NR-CRIMADVISOR 2016-10
Criminal Law Newsletters
October, 2016

— Milligan's Criminal Law Advisor—*By Jeffrey Milligan* (Formerly The David Rose Criminal Law Advisor, and Neuberger Rose Criminal Law Advisor)

Table of Contents

1. — The Yukon Court of Appeal holds that in a drug case the Crown must prove the date and locale of the offence as alleged in the indictment

The Crown does not always have to prove the particulars that it alleges in the information or indictment. Whether it must prove the particulars alleged depends upon whether those particulars are material and, very often, unproven particulars are regarded as "surplusage" that do not need to be proved. Generally, the time when the offence was alleged to have occurred and the location where it is said to have occurred are not material. See, for example, s. 601(4.1) of the *Criminal Code*.

But sometimes the date of the offence and the locale where it was said to have been committed *are* material and must be proven by the Crown. A recent decision of the Yukon Court of Appeal sheds light on when particulars as to the date and locale of the offence must be proven.

The Yukon Court of Appeal recently heard an appeal from the an acquittal entered by Chief Judge Ruddy on a single count of possessing cocaine for the purpose of trafficking "on or about August 30 2013 at or near Whitehorse, Yukon Territory". Ruddy J. held that the Crown failed to prove the date and locale of the offence as particularized in the indictment. Those, she found, were essential elements the Crown was obliged to prove because they were necessary to the accused's understanding of the case against him.

Mr McMillan was arrested and charged as part of a wider drug trafficking enterprise between the Lower Mainland of British Columbia and the Yukon.

The Crown's case against him was entirely circumstantial. The centre piece of the case rested on two finger prints

of his found on material used to package a brick of cocaine that was retrieved on 30 August 2013 by a police agent from a residence in Whitehorse. The agent turned over the brick to his handlers and it was duly tested forensically.

That agent, a former drug trafficker, testified that, although he had met Mr McMillan in early August in Whitehorse, he was not aware of his involvement in the transaction that took place on August 30. He did not say identify Mr McMillan as someone who delivered drugs to the house in Whitehorse and did not say that Mr McMillan was even present at the residence when he retrieved the brick of cocaine. Surveillance evidence suggested that the brick of cocaine was delivered to Whitehorse some time in early August.

Mr McMillan did not testify or call evidence at his trial.

At the outset of the trial, defence counsel identified the time of the offence as an issue at the trial. In the closing submissions, defence counsel argued that there was no evidence that Mr McMillan was in Whitehorse on August 30. Counsel also argued that the evidence was more consistent with his having the package in British Columbia rather than in Whitehorse.

The trial judge held that sometimes particulars are essential to the charge and sometimes they are not. Referring to the leading case from the Supreme Court of Canada on the issue — *R. v. Saunders*, [1990] 1 S.C.R. 1020 — Ruddy J. noted that each count must contain enough information for the defendant to understand the allegations against him or her.

The date alleged in the averment, "on or about August 30, 2013", was, she held, an essential element of the charge because the accused relied on it in mounting his defence. There was no direct evidence that he was in Whitehorse on 30 August and the trial judge found the evidence of the agent that he met Mr McMillan in early August to be unreliable. Because there was no cogent evidence that Mr McMillan had been in Whitehorse at a time proximate to the date alleged, she dismissed the charge against the appellant.

At the appeal, the Crown argued that the time and date of the offence were not material and relied upon *R. v. B. (G.)*, [1990] 2 S.C.R. 30, in which Wilson J., writing for the court, held that the date of the offence is generally not an essential element of the offence of sexual assault.

The Crown also relied on s. 47(2) of the *Controlled Drugs and Substances Act* which permits the Crown to prosecute drug offences anywhere in Canada where the offence took place, the subject-matter of the proceedings arose, or the accused is apprehended or located.

The Yukon Court of Appeal held that this argument conflated jurisdiction with the sufficiency of pleadings. Clearly, Yukon had jurisdiction to try the case but that was not the issue. As Madam Justice Dickson, who wrote for the court, put it, at para. 20, the issue is "whether the time and place alleged were material *in the circumstances* and had to be proven". The fact that the Crown had territorial jurisdiction to try the case did not relieve it of the obligation to comply with the pleadings sufficiency rule.

The Crown must prove the particulars it sets out in the averment of the information or indictment if they are either

(a) an essential element of the offence; or

(b) critical to the defence.

See *R. v. B. (G.)*, *supra*, at 52.

Time and locale are not ordinarily essential elements but they will be when they are necessary for the accused to

identify the transaction that gives rise to the charge. The "golden rule" is that the accused "must be reasonably informed of the transaction alleged against him, thus giving him the possibility of a full defence and fair trial": *R. v. Brodie*, [1936] S.C.R. 188 at pp. 193-194.

The Yukon Court of Appeal held that the particulars were crucial to the defence when they were relied upon to defend the charge as particularized. Thus, the trial judge committed no error when she found that the Crown was obliged to prove that the appellant possessed cocaine for the purpose of trafficking at a time proximate to August 30 in Whitehorse, as the Crown alleged. The defence relied on those particulars in preparing and advancing his defence. Mr McMillan's lawyer focused much of the cross-examination to suggest the poor quality of the evidence placing Mr McMillan in the Yukon at the time and place alleged. The appeal was dismissed and the acquittal was affirmed.

R. v. McMillan, 2016 YKCA 10, 2016 CarswellYukon 95

2. — A judge of the Ontario Court of Justice acquits a man of uttering death threats

Justice Konyers of the Ontario Court of Justice recently acquitted a man of two count of uttering threats to cause death.

It was alleged that, in the course of a telephone call the defendant Mr Platts had when traveling by train between Ottawa and Toronto, he threatened to kill ten female MPs and the wife of the Prime Minister.

The main witness against Mr Platts was Mary Sutherland. She was a fellow passenger on the train and overheard snippets of a one-sided telephone conversation that the defendant had on the train. The longer she listened in, the more disturbing the telephone call became.

Sometimes Mr Platts got up and paced around and sometimes he sat as he spoke on the phone.

At first, Mr Platts discussed finances but the conversation turned to one in which he used jargon that someone who worked in law enforcement or security might use. Ms Sutherland began to take notes of what she was able to hear.

The tenor of what Mr Platts was saying became increasingly alarming. She noted that Mr Platts said the following things: "kill 10 female MPs", "and the PM's wife", "anthrax", "manufacturing controlled substances". He also said he was a member of the secret service and, while she did not make a note of this, she recalled that Mr Platts said something about a bomb.

Mary Sutherland admitted in cross-examination that Mr Platts never said that he intended to kill or kill anyone nor did he instruct the other party to do so. Nevertheless, the conversation she overheard was disturbing and the witness became concerned that Mr Platts was suffering from a mental illness or was involved in a plot to kill someone, particularly the ten MPs or the wife of the prime minister. As Justice Konyers put it, at para. 13, "any reasonable person would have been concerned standing in her shoes". She decided to tell a railway employee of her concerns and that employee caused the police to be called.

After they arrested the defendant, the police searched him and seized his cell phone, six paper notebooks filled with handwritten notes and hundreds of scraps of paper. The notebooks contained draft letters to government officials, including the prime minister, imploring them to increase airport security by establishing patrol units at major Canadian airports. Some of these letters identified himself as "Head of the Canadian Secret Service".

Justice Konyers accepted the witness's evidence as accurate but noted, at para. 9, that it was "challenging to place the words uttered by Mr Platts in the proper context" because she could only hear part of what he said and

did not know whom he was speaking with or what he or she had said. Justice Konyers also observed that it appeared that Mr Platts genuinely thought he was engaged in a role in law enforcement or security, as evinced by his utterance in the telephone conversation and his notebooks.

The *actus reus* of uttering threats was enunciated in *R. v. Clemente*, [1994] 2 S.C.R. 758 at para. 9. One must examine the words that were spoken and the context to decide whether they a conveyed a threat to a reasonable person.

Having regard to what the witness heard and the surrounding circumstances, Justice Konyers held that the Crown did not satisfactorily rove the *actus reus*. He wrote, at para. 16:

> An objectively reasonable person fully apprised of all of the circumstances would, in my view, likely have been left in a similar state of uncertainty as was Ms Sutherland as to whether the words she heard were actual threats or the ramblings of a mentally unstable individual.

The evidence also fell short in establishing the *mens rea* of the offence.

The *mens rea* of uttering threats requires proof that the words were intended to intimidate or to be taken seriously. Justice Konyers had a reasonable doubt that Mr Platts had an intent to intimidate anyone. He seemed, as he put it at para. 17, "utterly disinterested in his audience on the train". Moreover, a reasonable inference available on the evidence was that Mr Platts, to quote Justice Konyers also at para. 17, was "earnestly involved in a conversation about how to stop threats that he believed existed towards public officials".

For these reasons, Justice Konyers dismissed the charges against the defendant.

R. v. Platts, 2016 ONCJ 504, 2016 CarswellOnt 13166

3. — A judge of the Ontario Court of Justice acquits a defendant because he had a reasonable doubt that the Crown rebutted the possibility of "bolus" drinking

Justice Borenstein of the Ontario Court of Justice recently acquitted a defendant in an "over 80 mgs" case in which the breath tests at the police station were at least 350 mgs of alcohol per 100 mL of blood. The Crown could not establish that the first breath test was taken within two hours of the time she last drove her vehicle and had to tender expert evidence from a toxicologist to "read back" her readings to the time frame when the accident occurred. In very well written reasons for judgment, Justice Borenstein dismissed the charge against the defendant because he had a doubt that the Crown rebutted the possibility that she had engaged in "bolus" drinking (i.e., drunk a large amount of alcohol which could have raised her blood-alcohol concentration from below the legal limit to well above it) either just before or just after the accident.

The defendant was involved in a single-motor vehicle accident one afternoon in Toronto. The precise time was not known. A civilian who saw the accident flagged down an officer who reported the accident. The police dispatch then sent another officer, Cst McCue, to investigate. (Neither the civilian nor the officer he or she spoke to were called as witnesses by the prosecution.)

When Cst McCue arrived, he saw the defendant's vehicle had struck a pole and a tire was on the curb. The defendant was sitting in the passenger seat of another car around the corner from her vehicle.

Cst McCue spoke to her briefly but did not notice any indicia of impairment, even the odour of alcohol on her breath. Another officer arrived and she was turned over to him. He noticed some signs of impairment — the odour of alcohol on her breath, bloodshot and glassy eyes, she moved sluggishly when she left the vehicle she was in and she had an "unfocused look" — but he did not believe he had reasonable grounds for a breath demand under

s. 254(3) of the *Criminal Code* because some of what he observed could have been attributable to the accident. He made an approved screening device demand and she failed the test.

She was taken to the station and provided two samples of her breath for analysis. The lowest of the two readings was 350 mgs of alcohol per 100 mL of blood.

As Justice Borenstein put it at para. 2 of his reasons for judgment:

> The case against the accused is overwhelming subjelikely have been left in a similarct to one issue, namely, is there a reasonable doubt that Ms Gallant consumed the majority of the alcohol consumed either shortly before she drove or after she drove.

After the "fail" on the screening device, the police searched the defendant's car and found her purse there. She objected to her purse being searched, but the police found in it a 26 oz bottle of vodka and between 1/4 to 1/2 of the vodka was missing.

The toxicologist's opinion was that the defendant's blood-alcohol concentration greatly exceeded the legal limit whenever the accident might have occurred but it was premised on an assumption — what the Ontario Court of Appeal called, in *R. v. Grosse* (1996), 29 O.R. (3d) 785, a "pivotal assumption" — that the defendant did not drink large amounts of alcohol either shortly before or shortly after the accident.

The toxicologist opined that a 100 lb woman would have to have drunk 7 1/2 oz of vodka shortly before or after the accident to cause her blood-alcohol concentration to riser from just below the legal limit to the level ascertained by the breath tests at the police station. As noted above, some 6 1/2 to 13 oz of vodka were missing from the bottle.

Justice Borenstein asked himself if it were reasonably possible that she could have drunk at least 7 1/2 oz of vodka just before or after the accident.

According to the leading case in Ontario on the issue, *R. v. Paszczenko*, 2010 ONCA 615, the Crown "need do very little" to establish that the accused did not engage in bolus drinking "in the absence of *something* on the record to suggest the contrary". The recent appellate cases, as Justice Borenstein observed, permit trial judges to draw a "common sense inference" that "normal people" do not consume large amounts of alcohol shortly before, when or shortly after they drive a motor vehicle.

In *Paszczenko*, *supra*, Mr Lima exhibited signs of intoxication while driving and immediately after being pulled over. The Ontario Court of Appeal held that, "while not conclusive", this provided some circumstantial evidence that he did not engage in "bolus" drinking. Constancy of indicia of impairment suggests a lack of "bolus" drinking and, by contrast, an increase in the level of indicia of impairment might suggest the possibility of "bolus" drinking. (See, for example, *R. v. Constable*, 2016 ONCJ 423 at para. 19, which was summarized in last month's issue.)

Justice Borenstein thought it "unlikely" that the defendant drank 7 1/2 oz of vodka either just before the accident or just after it but he had a reasonable doubt that she might have.

The first officer noticed no signs of impairment (yet the second officer, apparently, did) and the defendant was in possession of a bottle of vodka, from which some 6 1/2 to 13 oz were gone. She had the "time and access" to drink it. While the Court of Appeal has said that "normal" people do not drink large amounts of alcohol just before, when, or just after driving, as Justice Borenstein aptly put it, at para. 16, "an open bottle of vodka in her car is a potential indication of abnormal drinking". The accident, he noted, was consistent with being impaired by alcohol but the defendant told police that she swerved to miss a cat on the road; thus, it cannot be given all that much weight.

To quote Justice Borenstein, at para. 18:

> At the end of the day, there is a realistic possibility that Ms Gallant drank a significant amount of alcohol after the accident or just before. The open vodka in her purse raises that issue. And I do not know how much she drank or that she drank less than 7 1/2 oz. While I think she likely did not drink that much, I am not convinced beyond a reasonable doubt that she did not.

Accordingly, the defendant was found not guilty.

R. v. Gallant, 2016 ONCJ 540, 2016 CarswellOnt 13910

4. — A judge of the Ontario Court of Justice acquits a defendant charged with "over 80 mgs" because the approved screening device demand was not made until at least 9 minutes after the officer formed a suspicion that the defendant had alcohol in his body

Justice Doody of the Ontario Court of Justice recently acquitted a defendant charged with "over 80 mgs" owing to a breach of the defendant's rights under ss. 8 and 9 of the *Charter*.

The defendant Mr Olive was involved in an accident with another motor vehicle in the late afternoon. Police were dispatched.

Cst Xiao, the investigating officer, arrived at the scene of the accident at 17:57. According to his evidence, paramedics were already on scene when he arrived. He said that once he arrived, he spoke to the other driver who was involved in the collision to ascertain if he needed medical attention (but this was not in his notes). He began to look for the other driver and someone directed him to the ambulance where Cst Xiao saw the defendant, Mr Olive, being attended to by a paramedic or paramedics.

Some 30 seconds to a minute later, when there was a pause in their conversation, Cst Xiao spoke to Mr Olive. He said that he immediately smelled alcohol on his breath but did not make a demand for an approved screening device test at that time, however. He asked Mr Mitchell some questions about the accident he was involved in and, eventually, made the approved screening device demand at 18:10.

Cst Xiao, in cross-examination, said that he spoke to Mr Olive "within a few moments"of his arrival at the scene of the accident.

Mr Olive failed the test and was arrested, searched, handcuffed and taken to a police station where his blood-alcohol concentration was found to be in excess of the legal limit.

Section 254(2) of the *Criminal Code* provides that where a police officer has reasonable grounds to suspect that a person has alcohol in his or her body and has driven in the preceding three hours, he or she may require that person to "provide forthwith a sample of breath" into an approved screening device. This provision not only requires that the test be administered "forthwith" after the demand is made but also that the demand be made "forthwith" after the peace officer forms the requisite reasonable suspicion. See, for example, *R. v. Quansah*, 2012 ONCA 123 at paras. 25-26. In *R. v. Woods*, [2005] 2 S.C.R. 205, Justice Fish, writing for the Supreme Court of Canada, held that "forthwith" meant "immediately" or "without delay". The appellate case law suggests that in unusual circumstances the word "forthwith" should be given a flexible interpretation.

Justice Doody did not believe that Cst Xiao spoke with the other driver (because, in large part, there was no entry in his notes to this effect) and found that Cst Xiao arrived at the ambulance no later than 18:00 and perhaps a minute or two earlier. He also found that the officer formed a reasonable suspicion by no later than 18:01 that Mr Olive had been driving within the last three hours and had alcohol in his body. The trial judge found that the

questions the officer posed to Mr Olive after smelling alcohol on his breath were for a purpose other than gaining grounds for the screening device demand.

Thus, the demand was made at least 9 minutes after forming the requisite reasonable suspicion.

Justice Doody held that the demand was not made "immediately" and there were no unusual circumstances to justify the delay. Thus, there was a breach of Mr Olive's rights under s. 8 and, perforce, under s. 9 because the arrest was the result of an unconstitutional seizure of his breath.

In his s. 24(2) analysis, Justice Doody duly considered the three factors enunciated by the Supreme Court of Canada in *R. v. Grant*, [2009] 2 S.C.R. 353.

The first factor — the seriousness of the *Charter*-infringing conduct — favoured exclusion because it was well settled that the approved screening device demand had to be made "immediately" following the formation of the reasonable suspicion. As Justice Doody observed, at para. 38, Cst Xiao "knew or ought to have known that delaying the demand in order to conduct an investigation into the collision was not *Charter*-compliant".

The impact of the breach, he held, at para. 50, "strongly" favoured exclusion. While the taking of the breath samples at the police station, as the Supreme Court of Canada said in *Grant*, *supra*, is "relatively non-intrusive", the effect of the breach upon Mr Olive was much more intrusive. He was arrested, handcuffed, placed in a cruiser and taken to a police station and held in custody before he was made to provide samples of his breath. This was also recognized by Ducharme J., sitting as a judge in the summary conviction appeal court in *R. v. Au-Yeung*, 2010 ONSC 2292.

To quote from para. 51 of the reasons for judgment:

> Furthermore, if delays in the range of what occurred in this case, together with the serious impacts on a defendant's rights, are held to be not sufficiently serious to justify exclusion, the result will be that police will be given a zone of delay in which they will be free to be lax about the necessity for a forthwith demand and accused persons will be left without an effective remedy. This would result in a situation similar to the "fifteen minute grace period" decried in *Quansah*.

Justice Doody excluded the readings and acquitted Mr Olive.

He also found that the breath tests at the police station were not taken "as soon as practicable" as required by s. 258(1)(c) of the *Criminal Code*.

The first test was taken at 19:27, about an hour and forty minutes after Cst Xiao was notified by dispatch about the accident.

Cst Xiao's evidence was to this effect:

> 18:10 he made approved screening device demand
>
> 18:13 he arrested Mr Olive
>
> 18:15 he made the intoxilyzer demand (under s. 254(3) of the *Criminal Code*)
>
> 18:15-18:22 paramedics dealt with Mr Olive
>
> 18:22 he gave the right to counsel and caution to Mr Olive

18:24 Mr Olive placed in cruiser

18:37 they depart the scene of the arrest for the police station

The defence conceded that there was no unjustified period of delay after 18:37 when Cst Xiao left the scene of the arrest for the police station.

Justice Doody found that there were two periods of delay that were not satisfactorily explained: the delay of at least 9 minutes after Cst Xiao formed his reasonable suspicion until he made the approved screening device demand; and the period of some 13 minutes from the time Cst Xiao put Mr Olive in his cruiser until his departure from the scene of the arrest.

Cst Olive testified that after he put Mr Olive in his cruiser and before he left the scene, he spoke to other officers and he said that "he took his time". Justice Doody held that what he did during this period was unnecessary. The officer did not know that there was an obligation imposed by statute to take the tests "as soon as practicable" and believed that the police had three hours to take the breath tests.

The aggregate period of unexplained or unsatisfactorily explained delay was at least 22 minutes and Justice Doody held that he could not conclude that the Crown had established that the tests were taken "as soon as practicable". Thus, he would have held that the presumption of identity did not apply and there was no evidence of Mr Olive's blood-alcohol concentration at the time of the offence.

R. v. Olive, 2016 ONCJ 558, 2016 CarswellOnt 14290