In the Court of Appeal of Alberta

Citation: R v Tibu, 2016 ABCA 97

Date: 20160407
Docket: 1503-0324-A
Registry: Edmonton

Between:

Her Majesty the Queen

Applicant
(Appellant)

- and -

Simona Gabriela Tibu

Respondent
(Respondent)

Reasons for Decision of
The Honourable Madam Justice Frederica Schutz

Application for Leave to Appeal

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Introduction

[1] The Crown seeks leave to appeal from the decision of a summary conviction appeal judge, which overturned the respondent Ms. Tibu's convictions for assaulting a peace officer and resisting arrest after she was stopped for speeding.

Background

[2] The facts are summarized in the trial judge's reasons for decision: ***R v Tibu***, 2015 ABPC 88. The facts are also briefly reviewed in the summary conviction appeal judge's oral reasons for decision, the transcript of which reasons are before this court.

[3] It is not necessary to review all of the factual details because the crucial finding of the summary conviction appeal judge, which finding is impugned by the Crown, is as follows:

> Thus, according to Sergeant Behiels, there were 10 to 12 demands for the documents in a 44 second time frame; not in the 1 minute 14 second time frame as found by the trial judge.
>
> The requirement under Section 169(b)(ii) that the person has provided inadequate or questionable information about her identification, presupposes a request for such information and an opportunity to provide it. Where the peace officer has articulated the demand in such a rapid fire fashion that it would be impossible to respond, ask a question, or take steps to seek out the document, as would be the case if he made the demand 10 to 12 times in 44 seconds, there would be no opportunity for the subject of the demands to comply.
>
> . . .
>
> True, Sergeant Behiels was dealing with an irrational driver, but on his own description of events, there was no opportunity for the Appellant to comply with the request to produce the documents since within seconds the situation escalated with his rapid fire demands, while the driver expressed irrational worries about her car.
>
> When Sergeant Behiels opened the door and directed the Appellant to exit the car, the arrest was initiated. At that point, given what had transpired over the 44 seconds, and even the 77 seconds, the Appellant was not given a real opportunity to respond to the demand for her documents. Therefore, the evidence does not prove, in my view, that the Appellant provided the peace officer with inadequate or

> questionable information as to her identification, a required pillar of proof necessary to establish reasonable grounds for arrest.
>
> . . .
>
> In my view, the trial judge misapprehended the facts as to what occurred in the seconds leading up to the initiation of the arrest. With respect, he ignored the actual evidence of Sergeant Behiels as to how the crucial seconds of the demand for documents unfolded. He failed to give proper effect to Sergeant Behiels' evidence. When it is considered in light of the statutory preconditions to the right of arrest, that evidence fails to meet the test to establish reasonable grounds for arrest without warrant. Since reasonable grounds for arrest did not exist before the arrest was initiated when Sergeant Behiels opened the car door, the arrest was not lawful [transcript at 18/35-20/2].

Proposed Grounds of Appeal

[4] The applicant Crown submits that leave should be granted on the following grounds:

1. the summary conviction appeal judge erred in law in entering an acquittal to the offence of assaulting a peace officer, without considering the lesser and included offence of assault *simpliciter*;

2. the summary conviction appeal judge erred in law in improperly interfering with the findings of fact of the trial judge, without evidential support for her findings of fact. In doing so, she improperly substituted her view of the evidence and applied an improper standard of appellate review;

3. the summary conviction appeal judge erred in law in applying an incorrect legal standard to the findings of fact of the trial judge, by failing to determine if any misapprehension of evidence was essential to the reasoning process of the trial judge leading to conviction. This error in law was compounded by entering acquittals as an appropriate remedy; and

4. the summary conviction appeal judge erred in law in entering acquittals rather than ordering a new trial.

Test for Leave to Appeal

[5] Leave to appeal from a summary conviction appeal decision is governed by s 839 of the *Criminal Code,* RSC 1985, c C-46, which limits leave to questions of law alone:

> **839.(1)** Subject to subsection (1.1), an appeal to the court of appeal, as defined in section 673 may, with leave of that court or a judge thereof, be taken on any ground that involves a question of law alone, against

(a) a decision of a court in respect of an appeal under section 822; or

(b) a decision of an appeal court under section 834, except where that court is the court of appeal.

[6] Decisions of this court have established that the question of law must also have importance beyond the confines of the particular case, and it must be reasonably arguable: ***R v Bennett***, 2004 ABCA 116 at paras 9-10, 354 AR 6; ***R v Edmonton***, 2013 ABCA 318 at para 31, 561 AR 25; ***R v Dufault***, 2014 ABCA 271 at para 13, 68 MVR (6th) 219.

[7] The criteria to be met before leave to appeal is granted is therefore whether:

(a) the proposed ground of appeal involves a question of law alone;

(b) the matter raises a reasonably arguable case of substance; and

(c) the question is of sufficient importance to merit the attention of the full court.

[8] The function of this court in considering the Crown's leave to appeal application is only to determine whether the summary conviction appeal judge's decision is such that the Crown has met its burden to satisfy the three-branch test set out above.

[9] Applications for leave should be granted sparingly under s 839, and for good reason. The case has already been reviewed by one level of appellate court, namely the Court of Queen's Bench of Alberta, which is the primary appellate court of review. Thus, the granting of leave would bring about a second level appeal which is to be discouraged in the absence of some compelling reason to conclude otherwise: ***Dufault*** at para 14.

Analysis

[10] The grounds proposed by the Crown do not, in my view, raise a question of law alone and even if it could be said that a question of law alone has been raised, I would not grant leave because leave ought only to be granted if the matter raises a reasonably arguable case of substance and it must be of sufficient importance to merit the attention of the full court, and it is not of such sufficient importance.

[11] The Crown submits that the "broader administration of justice" in this case includes the fact that negative media coverage arose against the officer who made the arrest because the respondent Ms. Tibu made negative comments in the media. The Crown submits that the summary conviction appeal judge's allowing of the appeal in favor of the respondent had the effect of diluting the trial judge's findings about this unfortunate collateral issue.

[12] I disagree. In fact, the summary conviction appeal judge expressly agreed with the trial judge that the arresting officer was dealing with an irrational driver.

[13] The second aspect of the Crown's argument is that the summary conviction appeal judge failed to consider the lesser and included offence of assault *simpliciter*. The Crown argues that the result is that in any case where a peace officer, for whatever reason, is found to be acting outside the course of his or her duty, a citizen can assault that officer with impunity.

[14] First, I am not persuaded that the summary conviction appeal judge did not have in mind the lesser and included offence of assault. Second, the summary conviction appeal judge expressly found that the assault conviction under s 270(1)(b) of the *Criminal Code*, and the resisting arrest conviction under s 129(a) of the *Criminal Code*, "both rest on proof of the essential element that the peace officer be engaged in the lawful execution of his duty. Where the arrest is unlawful, Sergeant Behiels was not engaged in the lawful execution of his duty." [transcript at 20/4-7].

[15] The summary conviction appeal judge then turned her mind to the appropriate relief where there is a misapprehension of evidence and cited ***R v Morrissey*** (1995), 22 OR (3d) 514 at para 83, 97 CCC (3d) 193 (CA), which states that a misapprehension of evidence may refer to a failure to consider evidence relevant to a material issue, a mistake as to the substance of the evidence, or a failure to give proper effect to the evidence, each of which errors the summary conviction appeal judge found in the trial decision.

[16] Where there is a misapprehension of evidence, as found by the summary conviction appeal judge, ***Morrissey*** says at para 88:

> . . . on appeals from convictions in indictable proceedings where misapprehension of the evidence is alleged, this court should first consider the reasonableness of the verdict . . . If the appellant succeeds on this ground an acquittal will be entered. If the verdict is not unreasonable, then the court should determine whether the misapprehension of evidence occasioned a miscarriage of justice . . . If the appellant is able to show that the error resulted in a miscarriage of justice, then the conviction must be quashed and, in most cases, a new trial ordered.

[17] Applying ***Morrissey***, the summary conviction appeal judge found that the misapprehension of the evidence in this case yielded an unreasonable verdict and an acquittal must be entered with respect to the convictions under ss 270(1)(b) and 129(a) of the *Criminal Code*, since, "on the evidence, the Crown has not proved the existence of reasonable grounds for arrest without warrant." I find no fault with this conclusion.

[18] And, no purpose would be served by ordering a new trial since the question turns on the evidence of Sergeant Behiels which, properly construed, shows absence of proof of reasonable grounds for arrest.

[19] Moreover, as the respondent points out, in the absence of proof of reasonable grounds for arrest, the actions of the respondent could fairly be construed as defensive and sufficient to satisfy the self-defence provisions of s 34(1) of the *Criminal Code*. In particular, the respondent points to the trial judge's findings at para 267 which are as follows:

> From approximately 8:26:42 a.m. until approximately 8:34:50 a.m. the defendant:
>
> (a) almost continually struggled aggressively against Sgt. Behiels;
>
> (b) yelled at traffic on Highway 21 that she was being assaulted and raped;
>
> (c) tried at least twelve times to move toward Highway 21, while there was fairly heavy traffic on that highway;
>
> (e) at approximately 8:27:01 a.m. intentionally attempted to bite one of Sgt. Behiels' hands, and in that attempt her mouth contacted and did not break the skin on one of his hands, but did leave her saliva on the skin of one of his hands; and
>
> (f) at approximately 8:27:55 a.m. intentionally grabbed at Sgt. Behiels' groin, and contacted it at least once with one of her hands, or with one or more of her fingers.

[20] In short, these findings would have to support assaultive actions by the respondent that were not defensible.

[21] The summary conviction appeal judge had the entire record before her. Even if I was persuaded that she did not consider assault *simpliciter*, and I am not, the evidence against the respondent though perhaps arguable, is weak. This is a ground to deny leave: ***R v Edmonton***, 2013 ABCA 318 at para 31.

[22] Turning specifically to the impugned passage from the summary appeal court's decision, on the standard of review imposed upon me, I am not satisfied that the summary conviction appeal judge made any error in finding that the trial judge had misapprehended crucial evidence about what occurred during the 44 seconds or the 77 seconds in which Sergeant Behiels was engaged with the respondent prior to arrest.

[23] The trial judge made a finding of fact that Sergeant Behiels in a very short period of time made at least 10 demands that the respondent produce her documents, and that finding of fact was not altered by the summary conviction appeal judge. Rather, the summary conviction appeal judge said that the trial judge erroneously ascribed 77 seconds as the material time, when in fact the material time for consideration as to whether the respondent was given a reasonable opportunity to produce documents was 44 seconds. The summary conviction appeal judge then went on to decide

that in the face of "rapid fire" and numerous demands (not less than 10), in this extremely short time period, it would not be reasonable to infer that the respondent had a reasonable opportunity to produce documents. The summary conviction appeal judge specifically said that when Sergeant Behiels opened the door and directed the respondent to exit the car, the arrest was initiated:

> At that point, given what had transpired over the 44 seconds, and even the 77 seconds, the appellant was not given a real opportunity to respond to the demand for her documents. Therefore, the evidence does not prove, in my view, that the appellant provided the peace officer with inadequate or questionable information as to her identification, a required pillar of proof necessary to establish reasonable grounds for arrest [transcript at 19/19-24].

[24] Indeed, as the respondent points out, the trial judge did not make any finding whatsoever that the respondent refused to produce documents. Rather, the trial judge finds as a fact that in the material time before arrest Sergeant Behiels was continually asking for documents.

[25] Therefore, the misapprehension of the evidence by the trial judge was not with respect to the number of times Sergeant Behiels asked for the respondent's documents but, rather, the relevance of the number of times Sergeant Behiels asked for the documents in relation to assessing whether a lawful arrest was made.

[26] The summary conviction appeal judge determined that insufficient weight had been given by the trial judge to the number of "rapid fire" demands made and the relevance of that number of "rapid fire" demands in assessing whether a lawful arrest was conducted.

[27] Simply put, the trial judge did not assess the evidence in terms of relevance to lawful arrest and to the elements of proof that the Crown would be required to establish in order to establish reasonable grounds for arrest.

[28] It is important to review what s 169(1)(a) and (b) of the *Traffic Safety Act*, RSA 2000, c T-6 actually says, which wording was specifically in the contemplation of the summary conviction appeal judge:

> 169(1) A peace officer may arrest a person without warrant if the peace officer, on reasonable grounds, believes that:
>
> > (a) the person has committed an offence in respect of any of the provisions set out in subsection (2), and
> >
> > (b) the person
> >
> > > (i) will continue or repeat that offence if not arrested,

> or
>
> (ii) has provided the peace officer with inadequate or questionable information as to the person's identification.

[29] The summary conviction appeal judge determined that the trial judge had failed to ask the question whether the respondent had provided the peace officer with "inadequate or questionable information as to the person's identification." In the absence of the trial judge finding that the respondent would "continue or repeat the offence, if not arrested", then the first question is the only relevant question.

[30] In finding that the trial judge did not ask the question as to whether the accepted evidence proved that the respondent had provided the peace officer with inadequate or questionable information as to her identification, it is reasonable for the summary conviction appeal judge to conclude that the failure or omission of the trial judge to ask this crucial question rendered the verdict unreasonable.

[31] Assuming that the errors alleged by the applicant rise to the level of questions of law alone, and I am not convinced they do, the summary conviction appeal judge was correct in determining that the misapprehension of evidence amounted to an unreasonable verdict. Such unreasonable verdict would be answered by the entry of an acquittal.

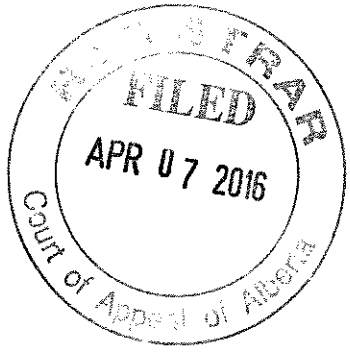
[32] The function of this court is only to determine whether the summary conviction appeal judge's decision discloses an error of law, whether the issues in play are important to the broader administration of justice, and whether the issues raised by the Crown are arguable.

[33] I find that even if there is a question of law that is arguable, I see no basis upon which the issues raised on this application would impact the broader administration of justice, whether for the factors mentioned or otherwise, and there is no compelling reason to allow this second level of appeal.

[34] Accordingly, the application is dismissed.

Application heard on March 17, 2016

Reasons filed at Edmonton, Alberta
this 7th day of April, 2016



Schutz J.A.

Appearances:

C.J. Sharpe
for the Applicant (Appellant)

E.A. Maynes
for the Respondent (Respondent)