



**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL**

Citation: *R. v. Jerrett*, 2017 NLCA 65

Date: November 9, 2017

Docket: 201601H0110

BETWEEN:

HER MAJESTY THE QUEEN

APPELLANT

AND:

JENNIFER JERRETT

RESPONDENT

Coram: White, Harrington and Hoegg JJ.A.

Application Heard: September 19, 2017

Judgment Rendered: November 9, 2017

Court Appealed From: Supreme Court of Newfoundland and Labrador
Trial Division 201601G2589

Reasons for Judgment: Hoegg J.A.

Concurred in by: White and Harrington JJ.A.

Counsel for the Appellant: Vikas Khaladkar

Counsel for the Respondent: Self Represented

Hoegg J.A.:

INTRODUCTION

[1] This appeal concerns whether a person charged with breaching a provincial regulatory offence can be convicted for failing to attend court as required under section 145(2)(b) of the *Criminal Code* (*Code*).

BACKGROUND

[2] Jennifer Jerrett was charged with three violations of the *Highway Traffic Act*, RSNL 1990, c. H-3 (*HTA*) in relation to her operation of a motor vehicle without a valid driver's license and insurance. She was issued an appearance notice to appear in Provincial Court on June 19, 2015 to respond to the charges. On June 19, 2015 the Court set the charges over to November 4, 2015 so Ms. Jerrett could seek legal advice, and ordered her to appear on that date to enter pleas. Ms. Jerrett did not appear on November 4, 2015. Accordingly, the Court issued a warrant for her arrest.

[3] On December 12, 2015 Ms. Jerrett was arrested after turning herself in to the police. She was subsequently charged with a breach of section 145(2)(b) of the *Code* for failing to appear in court as required on November 4, 2015. On March 28, 2016, Ms. Jerrett appeared and pleaded guilty to two of the three *HTA* offences and the *Code* offence of failing to appear in court as required. (The Crown withdrew the third *HTA* offence.) The Provincial Court Judge (Judge) convicted her of the two *HTA* offences, but declined to accept her guilty plea in relation to the *Code* offence of failing to appear as required on November 4, 2015 and dismissed the charge. He explained his reason for doing so at paragraph 20 of his decision:

In this case, while the accused has failed to attend court in so doing she has not committed a criminal offence. The information is worded "At or near St. John's in the province of Newfoundland and Labrador having appeared before a Judge did fail, without lawful excuse, to attend court as required on Wednesday, the 4th day of November AD 2015 at 9:45 A.M. thereby committing an offence contrary to section 145(2)(b) of the *Criminal Code*." The *Provincial Offences Act* provides a process to deal with non-attendance of an accused. The court can proceed *ex parte* and impose sentence or issue a warrant of arrest. In this case, there is no underlying or predicate criminal conduct to ground the section 145(2)(b) charge. The *Act* does not create a separate offence of failure to attend court and I cannot, as a result, accept the accused's guilty plea. The section 145(2)(b) charge is dismissed.

[4] The Crown appealed the Judge's decision to the Summary Conviction Appeal Court (SCAC), where a Justice of that Court agreed with the Judge's reasoning and upheld his decision, saying at page 36 of the transcript of the SCAC proceedings:

... I disagree with the Appellant's submissions and I agree with Judge Orr's decision that an underlying or predicate criminal conduct is required to ground a section 145(2)(b) charge. More specifically, the failure to appear charge under section 145 must, in my view, be in relation to a failure to appear to answer to a criminal offence not a regulatory offence as is the case here.

To elaborate, section 6(1) of the *Provincial Offences Act* merely adopts a proceeding relating to an offence. Adopting the proceeding does not mean a charge under section 145 of the *Code* may apply to non-attendance in court under an appearance notice issued in conjunction with charges under the *Highway Traffic Act*. To do so, in my view, indeed has the effect of attempting to create a criminal offence by adopting portions of the *Criminal Code*. Rather, I accept and endorse Judge Orr's analysis and reliance on the *Boggs* and the *Wholesale* cases as being applicable to this matter...

ISSUE

[5] The issue is whether the SCAC Justice erred in holding that section 145(2) of the *Code* does not apply to the failure to attend court as required where the offence in respect of which attendance is required is a provincial or regulatory offence.

LEAVE TO APPEAL

[6] Section 839(1) of the *Code* stipulates that leave is required to appeal a SCAC decision. In *R. v. Newfoundland Recycling Ltd.*, 2009 NLCA 28, 284 Nfld. & P.E.I.R. 153 at para. 9, this Court stated that such an appeal must "be taken on a ground that involves a question of law alone" and that the ground(s) must be such that either:

- (i) there is a "reasonable possibility of success", or
- (ii) the "proposed question of law has significance to the administration of justice".

[7] The applicability of a legal standard to the facts of a case is a question of law (*R. v. Shephard*, 2009 SCC 35, [2009] 2 S.C.R. 527 at para. 20). Whether the facts of Ms. Jerrett's case establish, at law, a breach of section 145(2)(b), is a question of law. Given the prevalence of provincial

regulatory offences in our courts, the issue is significant to the administration of justice. Leave to appeal was accordingly granted at the hearing.

LEGISLATION

[8] Section 145(2)(b) of the *Code* reads:

(2) Everyone who,

...

(b) having appeared before a court, justice or judge, fails, without lawful excuse, the proof of which lies on him, to attend court as thereafter required by the court, justice or judge,

... is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years or is guilty of an offence punishable on summary conviction.

[9] The *Provincial Offences Act*, SNL1995, c. P-31.1 (the *Act*) governs proceedings respecting offences under the *HTA*. Section 6 of the *Act* provides that the provisions of the *Code* respecting summary conviction offence proceedings apply to provincial regulatory offences:

- (1) Except where and to the extent that it is otherwise specifically enacted, the provisions of the *Criminal Code* respecting summary convictions and the proceedings relating to them apply, with the necessary changes, in respect of offences and orders and proceedings relating to the offences and orders made or to be made under this Act.
- (2) Without restricting the generality of subsection (1), the provisions of sections 21 and 22 and Parts XVI, XVIII, XXII, XXIII, XXVI and XXVII and sections 463 to 465, 484 to 490, 492.1 and 492.2, 770 to 773 and 783 of the *Criminal Code* apply, with the necessary changes, to matters to which this Act [applies].

...

[10] Section 803 of the *Code* addresses adjournments of summary conviction proceedings and the consequences for a defendant who does not appear on an adjourned date:

- (1) The summary conviction court may, in its discretion, before or during the trial, adjourn the trial to a time and place to be appointed and stated in the presence of the parties or their counsel or agents.

- (2) If a defendant who is tried alone or together with others does not appear at the time and place appointed for the trial after having been notified of that time and place, or does not appear for the resumption of a trial that has been adjourned in accordance with subsection (1), the summary conviction court
- (a) may proceed *ex parte* to hear and determine the proceedings in the absence of that defendant as if they had appeared; or
 - (b) may, if it thinks fit, issue a warrant in Form 7 for the arrest of that defendant and adjourn the trial to await their appearance under the warrant.
- (3) If the summary conviction court proceeds in the manner described in paragraph (2)(a), no proceedings under section 145 arising out of the defendant's failure to appear at the time and place appointed for the trial or for the resumption of the trial shall, without the consent of the Attorney General, be instituted or be proceeded with.

[11] In summary, the province has adopted the provisions of the *Code* relating to adjournments of summary conviction offence proceedings and has stipulated that they apply to proceedings respecting provincial regulatory offences unless otherwise specifically stated. The adoption and application of the proceedings respecting summary conviction offences to proceedings respecting provincial regulatory offences is a well-established practice of Canadian provincial legislatures. Such a practice is an efficient way for provinces to legislate practice and procedure while enabling those charged with breaching provincial offences to avail of the principles of Canadian criminal law as they develop. The practice is also helpful in fostering consistency in the application of law across the country.

ANALYSIS

[12] For the reasons that follow, it is my view that the SCAC Justice erred in upholding the Judge's decision that Ms. Jerrett could not be found guilty under section 145(2)(b) of the *Code* for failing to appear in court on November 4, 2015.

[13] Both the Judge and the SCAC Justice reasoned that the provincial statute under which Ms. Jerrett was charged (the *HTA*) provided a "specifically stated process" to occur on the non-appearance of a defendant, and also that there was no separate offence for failing to appear in respect of a charge under the *HTA*. They reasoned that there had to be related

underlying criminal conduct involved in the breaches of the *HTA* in order to ground the charge of failing to appear, and because the *HTA* charges did not involve criminal conduct, Ms. Jerrett could not be convicted under s. 145(2)(b) of the *Code*.

[14] With respect, I must disagree. The conduct underlying the charge of failing to appear as required under section 145(2)(b) is the failure of a defendant to appear after he or she has made an initial appearance in court and was ordered by the court to return for continuation of the proceedings. The predicate or underlying conduct is not the failure to appear to initially answer a *HTA* charge. Whether the defendant to a section 145(2)(b) charge is charged with mischief or assault punishable on summary conviction, any other summary conviction offence, or a regulatory offence under a provincial statute is irrelevant to a charge under section 145(2)(b). A section 145(2)(b) offence involves a failure to appear in court after being required by the court to do so. Why and in respect of what charge a defendant is required to appear are immaterial.

[15] In this case, Ms. Jerrett was charged and given a notice to appear in court on June 19, 2005. On that date she appeared and requested time to seek legal advice in relation to the charges against her. The Judge acceded to her request and set the matter over to November 4, 2015, and ordered her to appear on that date. Ms. Jerrett was present in court on June 19, 2015 when the proceedings were adjourned, for her benefit, and by virtue of the Judge's adjournment of the matter to November 4, 2015, knew she had to appear on that date for continuation of the proceedings. She did not do so.

[16] The Judge relied on section 25 of the *Act* to support his view that the statute had provided a specific process to occur when a defendant charged with the offences Ms. Jerrett was facing failed to appear. The *Act* does provide for a specific process to obtain when a person fails to appear in relation to a provincial regulatory charge under the *HTA*. However, that specific process does not apply to Ms. Jerrett's case. If Ms. Jerrett had not appeared in court to answer the charge having been noticed to appear, I would agree with the Judges below that a charge under section 145(2)(b) would not be supportable. But this is not what happened.

[17] There was an intervening event – Ms. Jerrett's initial appearance in court on June 19, 2015 and a court order for her to return on November 4, 2015. Her failure to appear when directed to do so by the Court - her contravention of the Court's order – is the underlying or predicate conduct

of the section 145(2)(b) charge against her – not her failure to appear initially.

[18] The purpose of section 145(2)(b) is to enable courts to control their own process. Failing to give effect to a judge's order to a defendant to return for continuation of proceedings against him or her would undermine the judge's authority to control the process of the court and render judges' procedural orders ineffective and unenforceable, thereby impugning the integrity of the justice system.

[19] Both the Judge and SCAC Justice relied on the decisions in *R. v. Boggs*, [1981] 1 S.C.R. 49, 120 D.L.R. (3d) 718 and *R. v. Clarke*, 2000 ABCA 246, 84 Alta. L.R. (3d) 321 to support their reasoning. These cases are distinguishable from Ms. Jerrett's situation.

[20] In *Boggs*, the defendant had been disqualified from driving under a provincial statute. He was charged with two *Code* offences of driving while disqualified. The Supreme Court held that the sections of the *Code* under which he was charged were *ultra vires* Parliament because they added criminal consequences to provincial license suspension. The Court stated that federal penal consequences could not attach to the breach of a provincial statute without the necessary relationship to the conduct that led to such an order. A similar situation presented in *Clark* where the offence of driving while disqualified was held not to apply to persons disqualified from driving under provincial legislation. The Alberta Court of Appeal stated that absent a connection between the underlying criminal conduct and the license suspension there could not be a criminal conviction.

[21] The *Boggs* and *Clark* cases differ materially from that of Ms. Jerrett's case as her case does not involve a question of a criminal consequence attaching to a breach of a provincial statute (the *HTA*). The *Code* offence, or criminal consequence, in this case is for failing to appear as ordered by the Court. The criminal conduct in question is disobeying a court order, which is a stand-alone offence separate from the charges under the *HTA* offences. Again the underlying or predicate conduct which relates to the section 145(2)(b) charge against Ms. Jerrett was her failure to appear in court in contravention of a judge's order. The relationship between her conduct and the charge is clear. Accordingly, her guilty plea ought to have been accepted by the Judge and the SCAC Justice ought to have allowed the Crown's appeal to the SCAC.

DISPOSITION

[22] In the result, I would allow the Crown's appeal, enter a finding of guilt in respect of the section 145(2)(b) charge and grant an absolute discharge to Ms. Jerrett as requested by the Crown.

L. R. Hoegg J.A.

I concur: _____

M. F. Harrington J.A.

I concur: _____

C. W. White J.A.