



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

Citation: *R. v. Leonard*, 2022 NLCA 22

Date: April 8, 2022

Docket Number: 201901H0033

BETWEEN:

HER MAJESTY THE QUEEN

APPELLANT

AND:

SHANE LEONARD

RESPONDENT

Coram: Fry C.J.N.L., Welsh and Butler JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
General Division 201801G3194
(2019 NLSC 38)

Appeal Heard: March 16, 2022

Judgment Rendered: April 8, 2022

Reasons for Judgment by: Welsh J.A.

Concurred in by: Fry C.J.N.L. and Butler J.A.

Counsel for the Appellant: Andrew O. Brown Q.C.

Counsel for the Respondent: Bob Buckingham

Authorities Cited:

CASES CITED: *Molis v. R.*, [1980] 2 S.C.R. 356; *R. v. Burgess*, [1970] 2 O.R. 216 (Ont. C.A.); *R. v. Blondin*, [1971] 2 W.W.R. 1 (B.C. C.A.); *Sansregret v. R.*, [1985] 1 S.C.R. 570; *R. v. Zora*, 2020 SCC 14; *R. v. Briscoe*, 2010 SCC 13, [2010] 1 S.C.R. 411; *R. v. Morrison*, 2019 SCC 15, [2019] 2 S.C.R. 3; *R. v. Spencer*, 2014 SCC 43, [2014] 2 S.C.R. 212.

STATUTES CONSIDERED: *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, section 5(1); *Criminal Code*, sections 19, 676(1)(a), 686(4).

Welsh J.A.:

[1] Shane Leonard was acquitted on a charge of trafficking in oxycodone, contrary to section 5(1) of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19. The trial judge accepted Mr. Leonard's testimony that he was selling the prescription drug that is described by the brand name Percocet, but that he did not know that Percocet contained the ingredient oxycodone. On this basis, the judge concluded that the *mens rea* element of the offence had not been established. The Crown appeals.

BACKGROUND

[2] Mr. Leonard was prescribed Percocet following work-related and other injuries. He admitted that he sold some of the pills. He was charged that between May 13, 2015 and August 19, 2015 he trafficked in the controlled substance, oxycodone. In his decision, the trial judge considered Mr. Leonard's testimony (decision of the trial judge, 2019 NLSC 38):

[6] In his evidence, Mr. Leonard testified that he thought Percocet was the actual drug. He did not know its chemical composition. As well, he said that he never heard of anyone being charged for possession or the sale of Percocet.

[3] The judge was satisfied that Mr. Leonard:

[8] ... knew that selling any type of prescription drug to individuals not covered by a prescription would be a forbidden and dangerous practice.

[4] Nonetheless, that sale would not constitute a criminal offence unless the drug, or a component of the drug, was listed in a Schedule to the *Controlled Drugs and Substances Act*. In acquitting Mr. Leonard, the judge determined:

[21] In conclusion, while the evidence of Mr. Leonard is not free from difficulty, I am unable to conclude that it is false on the main issue before the court, knowing that the substance was controlled and listed in the *Act*. This is not a situation where he confused one drug under the *Act* with another under the legislation. It was his belief that Percocet was not a controlled substance. His evidence on this point was strongly maintained at trial and withstood cross-examination. While Mr. Leonard was aware that his involvement with prescriptions, and the distribution of prescription drugs was improper and wrong, this would be insufficient to sustain a conviction for the charge before the Court.

[22] Finally, I am unable to conclude that the accused was “wilfully blind” to the contents of Percocet. ...

[5] The judge found that the evidence was sufficient to raise a reasonable doubt about Mr. Leonard’s guilt, and acquitted him of the charge.

ISSUES

[6] At issue is whether the trial judge erred:

- (1) In failing to apply section 19 of the *Criminal Code*, that ignorance of the law is no excuse; or
- (2) In stating and applying the law regarding wilful blindness.

ANALYSIS

[7] This appeal by the Crown is governed by section 676(1)(a) of the *Criminal Code*:

The Attorney General or counsel instructed by him for the purpose may appeal to the court of appeal

(a) against a judgment or verdict of acquittal ... of a trial court in proceedings by indictment on any ground of appeal that involves a question of law alone;

...

(Emphasis added.)

[8] Section 686(4) of the *Code* addresses the remedy available on an appeal from an acquittal:

If an appeal is from an acquittal „, , the court of appeal may

(a) dismiss the appeal; or

(b) allow the appeal, set aside the verdict and

(i) order a new trial, or

(ii) ... enter a verdict of guilty with respect to the offence of which, in its opinion, the accused should have been found guilty but for the error in law, and pass a sentence that is warranted in law, or remit the matter to the trial court and direct the trial court to impose a sentence that is warranted in law.

[9] Section 5(1) of the *Controlled Drugs and Substances Act* provides:

No person shall traffic in a substance included in Schedule I ... or in any substance represented or held out by that person to be such a substance.

[10] Oxycodone is a listed drug under Schedule I. It is not contested for purposes of the appeal that Percocet contains oxycodone. Since Mr. Leonard admitted selling Percocet, the sole issue on appeal is whether he had the necessary knowledge to satisfy the *mens rea* element of the offence.

Ignorance of the Law

[11] Section 19 of the *Criminal Code* provides:

Ignorance of the law by a person who commits an offence is not an excuse for committing that offence.

[12] The Crown relies on this provision in submitting that it was not a defence for Mr. Leonard to say that he did not know that an ingredient in Percocet was a drug listed in a Schedule to the *Act*. In support of his position, Crown counsel relies on case law describing different scenarios. Each of these is distinguishable.

[13] First, in *Molis v. R.*, [1980] 2 S.C.R. 356, Mr. Molis had been producing a chemical substance, MDMA, prior to it being listed under the *Act*. After it was listed, Mr. Molis continued to produce MDMA. The Court rejected his defence that he was unaware of the change to the legislation. Section 19 of the *Criminal*

Code, ignorance of the law is no excuse, applied because Mr. Molis knew that he was producing MDMA; he just did not know that it was legally prohibited.

[14] By contrast in this appeal, the trial judge accepted that Mr. Leonard knew he was selling Percocet, but Percocet is not a drug listed under the *Act*. The circumstances that grounded the application of ignorance of the law in *Molis* would not apply here.

[15] Other scenarios offered by the Crown are also distinguishable. This is not a case where the accused thought he was trafficking in one prohibited drug, when, in fact, it was a different, but prohibited drug (*R. v. Burgess*, [1970] 2 O.R. 216 (Ont. C.A.)). Here, there is no evidence that Mr. Leonard knew he was trafficking in a prohibited drug. Rather, the evidence accepted by the trial judge was that Mr. Leonard did not believe that the drug he was selling was prohibited.

[16] Similarly, this is not a case where Mr. Leonard did not know what substance he was trafficking, but did know that, whatever the drug was, it was a prohibited substance (*R. v. Blondin*, [1971] 2 W.W.R. 1 (B.C. C.A.)). In fact, the opposite was the case; Mr. Leonard knew what he was trafficking, but not that it contained an ingredient that was prohibited.

[17] In summary, the trial judge did not err in concluding that ignorance of the law did not apply on the facts of Mr. Leonard's case. Mr. Leonard was not saying that he did not know that trafficking in oxycodone was an offence. Rather, he said that he did not know that Percocet contained oxycodone or any other prohibited ingredient. Mr. Leonard's mistake was a mistake of fact, not a mistake of law. This was not a case of ignorance of the law. It follows that section 19 of the *Code* has no application.

Wilful Blindness

[18] In the discussion on wilful blindness, the trial judge and counsel relied on *Sansregret v. R.*, [1985] 1 S.C.R. 570. In that case, which dealt with consent to sexual activity, the Court considered the effect of wilful blindness by an accused to negate a defence of mistake of fact. McIntyre J., for the Court, began with mistake of fact and honest belief, at pages 580 and 584:

The defence of mistake of fact has been said to rest on the proposition that the mistaken belief, honestly held, deprives the accused of the requisite *mens rea* for the offence. ...

... as held in *Pappajohn* [[1980] 2 S.C.R. 120], the mere honesty of the belief will support the ‘mistake of fact’ defence, even where it is unreasonable. On the other hand, a finding of wilful blindness as to the very facts about which the honest belief is now asserted would leave no room for the application of the defence because, where wilful blindness is shown, the law presumes knowledge on the part of the accused, ...

(Emphasis added.)

[19] And further, at page 584:

... wilful blindness arises where a person who has become aware of the need for some inquiry declines to make the inquiry because he does not wish to know the truth. He would prefer to remain ignorant.

[20] McIntyre J. then proceeded with a discussion of comments on the issue by textwriters such as Glanville Williams and Professor Stuart. With respect to negating the defence of mistake of fact by applying the doctrine of wilful blindness, McIntyre J. concluded, at pages 587 to 588:

This is not to be taken as a retreat from the position taken in *Pappajohn* that the honest belief need not be reasonable. It is not to be thought that any time an accused forms an honest though unreasonable belief he will be deprived of the defence of mistake of fact. This case rests on a different proposition. Having wilfully blinded himself to the facts before him, the fact that an accused may be enabled to preserve what could be called an honest belief, in the sense that he has no specific knowledge to the contrary, will not afford a defence because, where the accused becomes deliberately blind to the existing facts, he is fixed by law with actual knowledge and his belief in another state of facts is irrelevant.

(Emphasis added.)

[21] In this appeal, rather than applying the principles gleaned from the discussion in *Sansregret*, the trial judge relied on one sentence taken out of context from the summary of the law set out in Glanville Williams, *Criminal Law: The General Part*, 2nd ed., London, Stevens & Sons Ltd., 1961. The trial judge simply stated:

[22] Finally, I am unable to conclude that the accused was “wilfully blind” to the contents of Percocet. I refer again to *Sansregret*, wherein the Supreme Court of Canada said, “[a] court can properly find wilful blindness only where it can almost be said that the defendant actually knew.”

(Emphasis added.)

[22] The analytical approach adopted by the Court in *Sansregret* and subsequent cases is more nuanced, based on the particular facts, and focusing on a deliberate choice by the accused to remain ignorant in circumstances requiring a degree of inquiry. For example, in *R. v. Zora*, 2020 SCC 14, at paragraph 113, wilful blindness is described as “a substitute for the accused’s knowledge of the facts whenever knowledge is a component of *mens rea* and where the accused is deliberately ignorant” (emphasis added).

[23] In *R. v. Briscoe*, 2010 SCC 13, [2010] 1 S.C.R. 411, Charron J., for the Court, discussed the doctrine of wilful blindness in similar language:

[21] Wilful blindness does not define the *mens rea* required for particular offences. Rather, it can substitute for actual knowledge whenever knowledge is a component of the *mens rea*. The doctrine of wilful blindness imputes knowledge to an accused whose suspicion is aroused to the point where he or she sees the need for further inquiries, but *deliberately chooses* not to make those inquiries. See *Sansregret v. The Queen*, [1985] 1 S.C.R. 570, and *R. v. Jorgensen*, [1995] 4 S.C.R. 55. As Sopinka J. succinctly put it in *Jorgensen* (at para. 103), “[a] finding of wilful blindness involves an affirmative answer to the question: Did the accused shut his eyes because he knew or strongly suspected that looking would fix him with knowledge?”

(Italics in original.)

See also: *R. v. Morrison*, 2019 SCC 15, [2019] 2 S.C.R. 3, at paragraphs 98 to 100; *R. v. Spencer*, 2014 SCC 43, [2014] 2 S.C.R. 212, at paragraphs 84 to 86.

[24] I note in passing that the distinction between wilful blindness and recklessness is discussed in the above cases. However, the Crown did not rely on recklessness, so it is unnecessary to address it.

[25] Applying the above law to the evidence in this appeal, it follows that the doctrine of wilful blindness is a live issue necessarily engaged in determining whether Mr. Leonard had the necessary *mens rea* for the offence (*Spencer*, at paragraph 84). The trial judge erred in law by failing to apply to the facts of this case the principles underpinning the doctrine of wilful blindness as set out by the Supreme Court of Canada. The error was central to the assessment of the charge against Mr. Leonard and could reasonably be considered to have had a bearing on his decision to acquit (*Spencer*, at paragraph 86). In the result, I would allow the appeal and set aside the verdict of acquittal.

[26] The issue, then, is whether the matter should be remitted for a new trial, or whether this Court should substitute a verdict of guilty, as requested by the Crown. I am satisfied that the latter is the appropriate remedy.

[27] The trial judge found as facts that Mr. Leonard knew that he was trafficking a prescription drug, and the brand name of the drug. He knew that it was wrong to sell a prescription drug; that it was a forbidden and dangerous practice. His only defence was that he did not know the chemical composition of Percocet and had not heard of anyone being charged for the possession or sale of Percocet. These facts lead inexorably to the conclusion that Mr. Leonard was wilfully blind to whether trafficking in Percocet was a criminal offence. He claims that he did not know the ingredients contained in the drug. It was convenient not to know. He was deliberately ignorant; he deliberately chose not to make inquiries.

[28] As discussed above, wilful blindness imputes knowledge where knowledge is a component of the *mens rea* of an offence. In this case, as a result of Mr. Leonard's wilful blindness, knowledge that the drug he was trafficking contains a substance listed in Schedule I of the *Act* is imputed. Given that determination together with the facts found by the trial judge and Mr. Leonard's admissions, the elements of the offence have been proven. The appropriate remedy is to set aside the acquittal and enter a verdict of guilty.

SUMMARY AND DISPOSITION

[29] The trial judge erred in law in his analysis and conclusion regarding application of the doctrine of wilful blindness. Mr. Leonard's deliberate choice not to ascertain whether trafficking in Percocet would involve trafficking in a drug listed in Schedule I of the *Act* amounted to wilful blindness. With the resulting imputation of knowledge, the elements of the offence have been proven.

[30] Accordingly, I would allow the appeal, set aside the verdict of acquittal, and enter a verdict of guilty for the offence. I would remit the matter to the trial court for the imposition of a sentence that is warranted in law.

B. G. Welsh J.A.

I concur: _____
D. E. Fry C.J.N.L.

I concur: _____
G. D. Butler J.A.