Court File No. 38540

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

- between -

CHAYCEN MICHAEL ZORA

APPELLANT

- and -

HER MAJESTY THE QUEEN

RESPONDENT

- and -

ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF BRITISH COLUMBIA, CRIMINAL LAWYERS' ASSOCIATION OF ONTARIO, VANCOUVER AREA NETWORK OF DRUG USERS, BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION, CANADIAN CIVIL LIBERTIES ASSOCIATION, INDEPENDENT CRIMINAL DEFENCE ADVOCACY SOCIETY, PIVOT LEGAL SOCIETY and ASSOCIATION QUÉBÉCOISE DES AVOCATS ET AVOCATES DE LA DÉFENSE

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(Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW AND FACTS

A. Overview

1. This appeal deals with the applicable standard of *mens rea* to convict a person accused of violating a condition of their judicial interim release under s.145(3) of the *Criminal Code*, R.S.C., 1985 c. C-46. This appeal has general implications for administrative offences.

2. The Vancouver Area Network of Drug Users ("VANDU") is a non-profit society run by and for users of illicit drugs. VANDU supports a subjective standard of *mens rea* in respect of all administrative offences. In accordance with *Rizzo Shoes*, VANDU argues for an interpretation of s.145(3) emphasizing that the "scheme of the act" includes bail revocation provisions that deprive accused persons who breach conditions of interim release of liberty pending trial. Bail revocation protects public safety, preserves jurisdiction over the person, and tends to protect the reputation of the administration of justice. Given the work assigned by Parliament to the bail revocation process, the scheme of the act is compatible with a subjective *mens rea*, is consistent with judicial restraint in adjudicating offences (including s.145(3)) that aim at protecting the order-making function of the judiciary, and allows this Court to give full effect and meaning to the presumption of a subjective standard of *mens rea*.

3. VANDU submits that recklessness should not form part of a subjective standard for *mens rea* for administrative offences. Neither the language of s.145 nor any legal or interpretive principle supports a recklessness standard in this context. In the alternative, if recklessness is a part of the subjective *mens rea* for administrative offences, VANDU requests that this Court consider providing direction to lower courts to ensure that recklessness is properly and meaningfully differentiated from an objective *mens rea*. VANDU is concerned that inferences from *actus reus* to *mens rea* will rely on objective elements, such as assumptions about ordinary levels of prudence, that are inconsistent with subjective intent and are unfair to persons with partial capacity for choice and awareness.

B. Statement of Facts

4. VANDU does not take issue with the Appellant's characterization of the facts. Mr. Zora was charged under s.145(3) of the *Criminal Code* with two counts of breaching his curfew

and two counts of failing to comply with the condition that he present himself at the door. Mr. Zora gave evidence that he may have been sleeping during the two police checks and that it was difficult to hear the doorbell from where he slept. Mr. Zora also gave evidence that he was receiving methadone treatment and was in withdrawal from heroin use, which made him drowsy, so he often went to bed earlier than usual.

5. Mr. Zora was acquitted of the curfew violation charges but was convicted of breaching his condition to appear for compliance checks and sentenced to pay a fine of $400 for each breach. It is not entirely clear what standard of *mens rea* was applied by the Provincial Court Judge, except that the standard applied was almost certainly not subjective *mens rea*.

6. The convictions were upheld on appeal to the Supreme Court of British Columbia and the British Columbia Court of Appeal, which upheld an objective *mens rea* for the offence under s.145(3). Fenlon, J.A., dissenting, would have convicted the accused on a subjective recklessness standard, inferring Mr. Zora's subjective *mens rea* from his recklessness in not ensuring that he slept where the doorbell would have awoken him.

PART II – POSITION ON QUESTIONS IN ISSUE

7. What standard of *mens rea* applies to prosecutions of accused persons under s.145(3) of the *Criminal Code*? VANDU submits that Parliament's intent is that s.145(3) requires the prosecution to prove subjective *mens rea*.

PART III - ARGUMENT

The Scheme of the Act

8. *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21 sets out the condensed rule of statutory interpretation: "Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (emphasis added).

9. Section 145(3) of the *Code* applies only to persons who are subject to an undertaking or recognizance or are bound to comply with a direction under ss.515(12) or 522(2.1). No

analysis of s.145 that ignores the overall scheme of the *Criminal Code* for interim release pending trial is consistent with the analytic structure set out in *Rizzo Shoes*. The purpose of s.145(3) must be determined by reference to the purposes of s.515 and the bail regime as a whole.

10. Section 515 of the *Criminal Code* authorizes a Court to impose bail conditions that are necessary to further the statutory criteria for detention and to ensure that the accused can be released. Conditions must not be imposed to change an accused person's behaviour or to punish an accused person.

R. v. Antic, 2017 SCC 27 (CanLII) at para.67(j)

11. VANDU respectfully submits that the primary enforcement mechanism for actual and apprehended breaches of bail conditions is bail revocation pursuant to s.524 of the *Code*. Under s.524(1) of the *Code*, a judge may order the arrest of an accused where there are reasonable grounds to believe that the accused has contravened or is about to contravene any summons, appearance notice, promise to appear, undertaking or recognizance. Section 524(2) empowers a peace officer to arrest a person on reasonable grounds that the accused has contravened or is about to contravene a summons, appearance notice, promise to appear, undertaking or recognizance. Upon his or her arrest, s.524(3) of the *Code* prescribes that the accused be taken before a justice or a judge and s.524(4) prescribes the following process:

> (4) Where an accused described in paragraph (3)(a) is taken before a judge and the judge finds
>
> (a) That the accused has contravened or had been about to contravene his summons, appearance notice, promise to appear, undertaking or recognizance, or
>
> (b) That there are reasonable grounds to believe that the accused has committed and indicatable offence after any summons, appearance notice, promise to appear, undertaking or recognizance was issued or given to him or entered into by him,
>
> he shall cancel the summons, appearance notice, promise to appear, undertaking or recognizance and order that the accused be detained in custody unless the accused, having been given a reasonable opportunity to do so, shows cause why his detention in custody is not justified within the meaning of subsection 515(10). …

12. The two stage hearing process before a justice under s.524(8) is the same for the process before a judge under s.524(4). Proof of contravention of summons, appearance notice, promise to appear, undertaking or recognizance is on a balance of probabilities: *R. v. Parsons*, 1997 CanLII 14679 (NL CA) at para.21.

13. These bail revocation provisions enforce the specific terms of bail orders (and other administrative orders, including the summons, appearance notice, PTA, undertaking and recognizance) by means of mandatory hearings[1] on proof of actual or apprehended breach on a balance of probabilities and, if an actual or apprehended breach is established, cancellation of the release order is mandatory, and a reverse onus bail hearing follows that could well result in a loss of liberty pending trial. Under s.524, the Crown need not demonstrate subjective *mens rea* or even objective *mens rea* and proof beyond a reasonable doubt does not enter into the analysis.

14. The reputation of the administration of justice, the administrative interest in maintaining jurisdiction over the person and the public interest in suppression of crime are swiftly and surely preserved by the *Code*, *at least in part*, by revocation of the accused's liberty in the presence of an actual or anticipated breach of bail conditions. From the perspective of a reasonable member of the community, an accused's loss of liberty pending trial is a serious consequence flowing from the breach. Loss of liberty pending trial on the basis of a balance of probabilities for anticipated as well as actual breaches promote many of the interests referred to by the Crown before the BC Court of Appeal, including ensuring that those released from custody do not cause the dangers set out in s.515(10) and holding accused persons accountable and setting a minimum community standard for behaviour. In *R. v. Meads*[2] the Ontario Court of Appeal recognized that poor and socially isolated individuals who are alleged to have committed minor breaches of terms of release will often have difficulty

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[1] It would appear that a bail revocation hearing under *CCC* s.524 is not mandatory if the person arrested is charged under *CCC* s.145. If a charge under s.145 is approved, the Crown may proceed under s.515 or s.524 or both: *R. v. Yarema*, 1991 CanLII 7098 (ONCA). A person charged with a breach of bail under s.145 will proceed directly to a reverse onus bail hearing under s.515(6)(c). The Crown will in such cases is spared the trouble of a revocation hearing under s.524 but the Crown will need to maintain the breach charge to maintain jurisdiction for any detention order or release order.

[2] *R. v. Meads,* 2018 ONCA 146 (CanLII) at para.46

satisfying the reverse onus of proving that they are suitable for release because of poverty, mental illness or addiction problems.

15. Bail revocation is part of the "scheme of the act" in respect of which s.145 of the *Code* should be interpreted. The purpose of s.145 should be understood in light of the work done by bail revocation to preserve the administration of justice. Because bail revocation is a bulwark against erosion of the reputation of the administration of justice and preserves public safety, and because bail revocation is swift and sure and precedes any criminal trial on the offence under s.145(3), this Court need not rely exclusively or primarily on s.145 to preserve the administration of justice.

16. VANDU asserts that the Court of Appeal took an unjustifiably narrow perspective on the scheme of the *Code* when it described s.145 as engaged with the "risk-based" aspect of the bail provisions (paras.2 and 57). The revocation scheme, dealing as it does with both actual and apprehended breaches of bail on a balance of probabilities, is more centrally engaged with the "risk-based" aspect of bail provisions. Bail revocation and the threat of bail revocation are sufficient to address the risks to public safety and the risk that the Court's jurisdiction over the person will be lost, or the risk that the reputation of the administration of justice will suffer if bail conditions are breached. Ignoring the bail revocation scheme requires s.145(3) to carry more water than Parliament intended it to carry.

17. The decision on bail or interim release is informed by significant weight attached to depriving the accused of his or her liberty pending trial for an offence of which they are deemed innocent. On initial consideration of interim release, Judges and peace officers are not expected to take an unduly cynical or pessimistic approach to the capacity of the accused to abide by bail conditions. Conditions of interim release are intended to reduce the risk to the public and administration of justice to an acceptable level; if interim release were predicated on elimination of risk, bail would be unacceptably and unconstitutionally rare. The primary remedy intended by Parliament under s.524 of the *Code*, when an accused has breached his or her conditions of release, is for the Court to consider revocation of his or her bail and deprivation of his or her liberty pending trial. Consideration of criminal liability for the breach comes later, after the risk to safety and administrative interests have been at least partially addressed by revocation, and is a separate issue.

18. Similarly, the analysis by the BC Court of Appeal concluding that s.145 enacts a "duty-based" offence (paras.53-55) implicitly relies on s.145 being considered the only available judicial response to a real or apprehended breach of bail conditions. In light of the remedy of bail revocation, the Court of Appeal's concern that "a duty would be meaningless if every individual defined its content for him or herself according to his or her subjective beliefs and priorities" is misplaced. This erroneous perception, that s.145 is the only remedy within the bail scheme that can protect the administration of justice, is manifest in paragraph 66 of the reasons for judgment of the Court of Appeal.

19. Bail revocation does much of the work to ensure the proper functioning of the criminal justice system generally and the bail system specifically. Within the overall scheme for administrative offences under the *Code*, VANDU respectfully submits that the purpose of s.145(3) is to punish and deter breaches of administrative orders associated with residual risks to public safety and the administration of justice that are not adequately addressed by bail revocation.

20. An additional process to address administrative offences is created by Bill C-75, which will come into effect on December 10, 2019, after the hearing of this appeal[3]. Section 234 of Bill C-75 enacts s.523.1 of the *Code*, which creates a "judicial referral hearing" to deal with administrative offences that did not cause physical or emotional harm, property damage or economic loss. Judicial referral hearings can be initiated by an appearance notice issued by a peace officer (subject to the concurrence of the Crown) or at the Crown's discretion where a charge under s.145 has been approved, without resort to a s.521 bail review. Unlike a bail revocation hearing under s.524 and unlike a bail hearing under ss.515(6)(c), a judicial referral hearing does not impose a reverse onus on the accused to establish the basis for his or her release; the prosecutor must show cause under 523.1(3)(b)(ii) to justify detention on s.515(10) grounds.

21. The "judicial referral hearing" process reflects Parliament's intention to enhance Crown and judicial flexibility in dealing with administrative offences that cause no harm to persons or property. This enhanced range of responses to administrative offences strengthens the

[3] Bill C-75 received Royal Assent on June 21, 2019. Section 407 of Bill C-75 enacts the judicial referral hearing provisions into force 180 days after the Bill receives Royal Assent.

argument that it is unnecessary in many cases to prosecute criminal charges under s.145 to preserve the administration of justice and it is certainly unnecessary to have an objective standard for *mens rea* for such prosecutions in order to preserve the administration of justice.

The Rebuttable Presumption of Subjective *Mens Rea*

22. The common law presumes that Parliament intends crimes to have a subjective *mens rea*. The wording of s.145(3) does not express an objective fault standard, but support for an objective fault standard may be found in the scheme, object and purpose of the provision: *R. v. A.D.H.*, 2013 SCC 28.

23. The presence of a mandatory bail revocation hearing within the scheme of the *Code* to deal with breaches of release conditions shows that prosecution of s.145(3) offences is secondary to bail revocation; not only secondary in a temporal sense but also secondary in terms of the work done by s.145(3) to restore the normative order of the administration of justice. The judicial referral hearing scheme under s.523.1 enacted by Bill C-75 reinforces this argument.

24. VANDU is not saying that prosecutions under s.145(3) have no role in promoting public safety or supporting the administration of justice; the point is that charges under s.145(3) are not “indispensable”, “vital” or “key” to sustaining the administration of justice. There is no public policy basis and no administrative pressure internal to the scheme of the act that makes it necessary to make it easier to convict by lowering the *mens rea* requirement.

25. In determining the *mens rea* requirement for administrative offences, this Court should distinguish, as it does between civil and criminal contempt of court, between more pedestrian non-compliance with the terms and conditions of court orders and the more nefarious attitude or presence of defiance and disrespect and flagrant disregard for the orders of the Court. Just as contempt of court is not the first resort and “cannot be reduced to a mere means of enforcing judgments”, neither should s.145(3) be reduced to an administrative means. For criminal contempt, it must be proved beyond a reasonable doubt that “the accused defied or disobeyed a court order in a public way (the *actus reus*), with intent, knowledge or recklessness as to the fact that the public disobedience will tend to deprecate the authority of the court (the *mens rea*)”.

United Nurses of Alberta v. Alberta (Attorney General), 1992 CanLII 99 (SCC) at p.903; *Carey v. Laiken*, 2015 SCC 17 (CanLII) at para.36

26. VANDU submits that, in determining the *mens rea* for s.145, this Court should clearly identify the harm at which the provision is aimed. Release conditions often target an accused person's customs or habits with the intention of reducing the risk posed by the accused to persons or property. Accused persons often find it challenging, for example, to avoid attendance within a geographic area in which they are resident or that they ordinarily frequent. It is challenging to avoid social contact with specific friends or loved ones. It is challenging to avoid consumption of drugs or alcohol, particularly if withdrawal symptoms arise from abstention. Release conditions often pit the accused person directly against their habits. Rather than conceive release conditions as a "duty to the court", conditions of release are better understood as a serious practical challenge placed by the Court on an accused, for which the price of failure is bail revocation and the consequent loss of pre-trial liberty. If conditions of release are fashioned "to allow for release", occasional failure to meet those conditions can be reasonably anticipated: *R. v. Antic*, 2017 SCC 27 at para.67(j).

27. As opposed to the bail revocation context, where failure to meet the challenge of complying with bail conditions is relatively common, Parliament more likely intended s.145(3) and other administrative offences for situations where an accused defies, flouts or projects disrespect towards the release conditions and thereby affronts the order-making power of the Court. In this context, judicial restraint is appropriate because the judiciary acts in service of its own institutional interests. Judicial restraint is of particular importance in more remote Provincial Court judicial districts where the trial judge is likely to be the same judge who imposed the bail conditions. The requirement to prove subjective *mens rea* should be seen as a hallmark of judicial restraint and consistent with the dignity of the administration of justice.

Concern in Respect of the Recklessness Standard

28. VANDU submits the recklessness standard should not apply to s.145(3), at least not without significant cautionary guidance from this Court. Section 145(3) makes no express reference to recklessness and there is no principle of law to suggest that recklessness is a default standard for subjective *mens rea*. Because release conditions are intended to reduce

risk of commission of further offences and reduce risk of failures to appear, little but confusion is added by accreting a further layer of risk analysis entailed by a recklessness standard.[4]

29. Furthermore, the conceptual proximity of recklessness to negligence presents specific problems in its application to administrative offences. In *Sansregret v. The Queen*, [1985] 1 S.C.R. 570, Justice McIntyre, provides the following definition of recklessness at page 581:

> In accordance with well-established principles for the determination of criminal liability, recklessness, to form a part of the criminal *mens rea*, must have an element of the subjective. It is found in the attitude of one who, aware that there is danger that his conduct could bring about the result prohibited by the criminal law, nevertheless persists, despite the risk. It is, in other words, the conduct of one who sees the risk and who takes the chance. It is in this sense that the term 'recklessness' is used in the criminal law and it is clearly distinct from the concept of civil negligence.

30. Despite the Court's assertion in *Sansregret* that recklessness is "clearly distinct" from negligence, the difference between the two is 'found in the attitude of persistence despite awareness of danger or risk'. Since awareness of risk may be inferred from the prohibited conduct, VANDU is concerned that symptoms of addiction might be mistaken for recklessness. Addiction, as found by this Court in *PHS*, "is an illness characterized by a lack of control". Inferences of recklessness from prohibited conduct to fulfil the *mens rea* requirement are inexorably drawn from hidden assumptions about ordinary or normal levels of prudence, perception or understanding. It is tempting to reason that "anyone in the accused's position would have known", without having regard to the individual circumstances of the accused. Although inferring a reckless *mens rea* from prohibited conduct might be justifiable in the abstract, it requires rigour and intellectual discipline to avoid recourse to the "reasonable person" and confine the inference to the accused with all of his or her individual frailties, idiosyncrasies, eccentricities and limits.

> *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44 (CanLII) at paras.10, 12, 99-101

31. Even if this Court determines that recklessness should be included within the subjective *mens rea* for administrative offences, it may be of utility for this Court to offer

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[4] The risk-reduction aspect of release conditions is analogous to the risk-reduction purpose of the offence of counselling: see *R. v. Hamilton*, 2005 SCC 47 at paras.25-29

guidance to lower courts about how to apply the standard of reasonable doubt to the concept of recklessness in the context of addiction, where, as this Court found in *PHS*, the line between lack of control and choice is often ephemeral, and where preoccupation with substance use and ritualistic behaviour patterns may interfere with risk perception. In particular, VANDU asks this Court to caution lower courts about using objective standards for prudence and foresight when inferring what a accused person knew from what an accused person in fact did.

32. It is at least arguable that the dissenting opinion of the Court of Appeal at paragraph 95 of the reasons for judgment inadvertently relied on objective considerations in applying the recklessness *mens rea* standard to Mr. Zora's conduct.

33. There is an undesirable evanescence in the recklessness standard as it might apply to administrative offences. Articulating the recklessness standard in respect of administrative offences requires articulation of the risk of which the accused person must be found to be subjectively aware. If the risk of which the accused must be subjectively aware is the risk of breaching a release condition, then the *mens rea* effectively becomes objective. If, on the other hand, the risk of which the accused must be subjectively aware is risk of damage to the reputation of the administration of justice by flouting or flagrantly disrespecting court orders, then the Court might be taken to be imposing a more purposeful intent to Parliament than the actual wording of the provision could support. Because there is no support for a recklessness standard in the plain wording of the provision, and because of the intractable difficulties in applying the recklessness standard to administrative offences without improperly importing aspects of objective *mens rea*, it is open to this Court to conclude that Parliament did not intend the subjective *mens rea* for the offence under s.145(3) to include recklessness.

PART IV – SUBMISSIONS ON COSTS

34. VANDU makes no submission on costs of this appeal and will bear its own costs.

PART V – ORDER SOUGHT

35. VANDU makes no submission on the order to be issued in this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 15th day of November, 2019.

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PART VI – TABLE OF AUTHORITIES

CASE AUTHORITY	PARAGRAPHS
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Bill C-75, *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*, 1st Sess, 42nd Parl, 2019 (assented to 21 June 2019).	20, 23