SCC File No. 38540

IN THE SUPREME COURT OF CANADA

[ON APPEAL FROM THE COURT OF APPEAL OF BRITISH COLUMBIA]

B E T W E E N:

CHAYCEN MICHAEL ZORA

Appellant
(Appellant)

- and –

HER MAJESTY THE QUEEN

Respondent
(Respondent)

- and –

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PART I: OVERVIEW AND CONCISE STATEMENT OF FACTS

a) The question in which the intervener is intervening

1. The Attorney General for Ontario intervenes in the following question: is the *mens rea* for the offence of breach of recognizance, pursuant to s. 145 (3) of the *Criminal Code,* subjective or objective?

b) The relevant facts

2. The appellant was released on a recognizance arising out of drug trafficking charges. Two terms of his recognizance imposed a curfew and required him to present himself at the door of his residence within five minutes of any police officer or bail supervisor attending to determine his compliance with house arrest. On two occasions, when officers went to his home at approximately 10:30 pm (when he was required to be home in accordance with his curfew) the appellant failed to answer the door. The appellant was charged with four breaches of his recognizance, two counts for breaching his curfew and two counts for failing to present himself at the door as required.

3. The appellant testified that he was home on both occasions and admitted his failure to present himself at the door but argued he did not have the necessary *mens rea* as he did not hear the doorbell or the knocks and so did not intend to not attend at the door. He maintained he was asleep in his bedroom in the basement, having gone to bed earlier than usual due to the methadone he was taking for a heroin addiction, which caused him to be sleepy.

4. The trial judge neither accepted nor rejected the defence evidence but concluded by saying: "I believe that if a person wants the benefit of bail conditions and, in particular the continuation of bail conditions it behooves that person to arrange their life to comply with the terms of bail", which the appellant had done once he was charged with the breaches of recognizance, by setting up an audio-visual system to help alert him to future police checks. The trial judge appears to have accepted the Crown's argument that the appellant should be convicted unless he had a lawful excuse, which he bore the burden of proving. The appellant was acquitted of the breach of curfew charge because the failure to answer the door, together with the absence of any evidence that he was outside his residence at the time, was not sufficient to support a finding of guilt.[1]

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[1] Trial decision, March 29, 2017, Appellant's Record, Tab 1, para.16-18.

5. On summary conviction appeal the judge dismissed the appeal, concluding that he was bound by the British Columbia Court of Appeal in *Ludlow* and that the *mens rea* required for the offence of breach of recognizance is largely objective.[2]

6. The majority of the British Columbia Court of Appeal similarly dismissed a further appeal, concluding that the offence is duty-based and requires proof of an objective *mens rea,* and therefore requires proof that the accused had demonstrated a "marked departure" from the standard of care of a reasonable person in the circumstances. The majority held that the appellant had demonstrated such a marked departure because "a reasonably prudent person in the circumstances would have foreseen or appreciated the risk or could have done something to prevent the breach."[3]

7. Madam Justice Fenlon dissented on this question (concurring in the result) and held that the *mens rea* for the offence was subjective, but she would have dismissed the appeal on the basis that the appellant had been reckless by failing to ensure he could hear a knock at the door or the door bell.[4]

PART II: OVERVIEW OF POSITION

8. The Attorney General for Ontario intervenes to provide context to this Court about how breach of recognizance offences are prosecuted in an effective and fair manner in Ontario. The Attorney General for Ontario also intervenes to commend a rational and consistent approach for the interpretation of administration of justice offences generally. In particular, Ontario addresses the following three points:

a) In Ontario the *mens rea* for the offence of breach of recognizance is subjective. This has not undermined the functioning of the bail system and has not weakened the enforcement mechanism for the prosecution of a breach of a recognizance.

b) Ontario has implemented policies and provided directives to its prosecutors, which ensure that the human frailties and individual needs of an offender are addressed effectively and fairly when setting terms of judicial interim release and in the

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[2] Summary Conviction Appeal Decision, November 15, 2017, Appellant's Record, Tab 3, para.7; *R. v. Ludlow*, 1999 BCCA 365.
[3] British Columbia Court of Appeal decision, 2019 BCCA 9, Appellant's Record Tab 5, para. 53-55, 61, 66-68.
[4] British Columbia Court of Appeal decision, 2019 BCCA 9, Appellant's Record Tab 5, para. 70, 91 & 95-96.

prosecution of administration of justice offences. These policies and directives are consistent with a subjective *mens rea* and also with the new bail provisions in the *Criminal Code* (that will be effective December 18, 2019) which require a judge to give particular attention to the circumstances of (a) Aboriginal accused; and (b) accused who belong to a vulnerable population that is overrepresented in the criminal justice system and that is disadvantaged in obtaining release.

c) The *mens rea* for the offence of breach of recognizance logically must be compatible with other similar administration of justice offences in the *Code*.

PART III: ARGUMENT

a) The requirement in Ontario that the Crown prove a subjective *mens rea* for breach of recognizance has not undermined the functioning of the bail system

9. In Ontario, the *mens rea* for the offence of breach of recognizance is subjective, as held by the Court of Appeal for Ontario in *R. v. Legere* (1995), 95 C.C.C. (3d) 555 (Ont. CA).

10. Administration of justice offences, including charges relating to breaches of terms of release, are very common in Ontario, the most populous province in Canada.[5] The Attorney General of Ontario is responsible for all *Criminal Code* prosecutions in the Province of Ontario, save for a small number conducted under the authority of the Attorney General of Canada. Despite the majority of the British Columbia Court of Appeal's conclusion in *Zora* that an objective *mens rea* is necessary to "ensure proper functioning of the criminal justice system generally and the bail system specifically," [6] prosecutors in Ontario have been proving the offence of breach of recognizance on a subjective *mens rea* standard for many years without experiencing obstacles to ensuring compliance with orders designed to uphold the administration of justice and protect the public.

11. Justice Trotter, then sitting as an Ontario Superior Court trial judge, made the following comments in *Withworth* about what he described as "*in terrorem*" arguments about the collapse of our bail system if the Crown was required to prove a subjective *mens rea* and claims of

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[5] "*Set Up to Fail: Bail and the Revolving Door of Pre-trial Detention*", July 2014, the Canadian Civil Liberties Association and Education Trust, p. 64-65 (online at https://ccla.org/cclanewsite/wp-content/uploads/2015/02/Set-up-to-fail-FINAL.pdf)

[6] Majority decision of *R. v. Zora* 2019 BCCA 9, Appellant's Tab 5, para. 66.

forgetfulness were indulged. He was confident that "except in rare cases" the requisite subjective intent "will be easily inferred from the surrounding circumstances."

> **13** Due to the fact that s. 145(3) requires proof of subjective fault, an accused person who raises a reasonable doubt about an honest but mistaken belief of fact cannot be found liable. This sometimes gives rise to claims of forgotten court dates and misunderstood bail conditions. Depending on the circumstances, even a careless mistake may be tenable, as long as it falls short of the "deliberate" ignorance required to establish liability based on wilful blindness: see *R.* v. *Weishar* (2003), 13 C.R. (6th) 59 (Ont. S.C.J.), at pp. 67-70.

> **14** This state of affairs (*i.e.*, that claims of mere forgetfulness, perhaps based on carelessness, might result in an acquittal) stirs anxiety in some people. This leads to *in terrorem* arguments, complete with warnings that our bail system, as we know it, will collapse if courts were to indulge such doubtful claims. The Crown at trial made this submission. However, as Germain J. held in *R. v. Loutitt (2011), 284 C.C.C. (3d) 518* (Alta. Q.B.), at p. 525: "The sky will not fall if the Crown has to prove a mental element ... [F]ailing to appear in court has serious legal consequences." Judges will no doubt act sensibly in assessing the authenticity of claims of forgotten court dates and overlooked bail conditions. Effect need not be given to forgetfulness merely because it has been asserted. As the court in *Loutitt, supra,* held, except in rare cases, the requisite intent under s. 145(3) will be easily inferred from the surrounding circumstances.[7]

12. Being required to prove the offence of breach of recognizance on a subjective *mens rea* standard does not appear to have made it harder for Ontario prosecutors to secure convictions. According to a July 2014 report by the Canadian Civil Liberties Association and Education Trust, Ontario has maintained a relatively stable rate of convictions to charges, for offences relating to the failure to comply with bail, as compared to other jurisdictions. In fact, Ontario appears to have a higher conviction to charge rate than the rates in British Columbia for most of the period 2001 to 2009, a period during which courts in British Columbia would have been applying an objective standard. (By 2012 British Columbia was approaching a rate like Ontario's rate.[8]) Just as the Alberta Court of Queen's Bench predicted in *Loutitt*, the Ontario Superior Court observed in *Withworth*, and Justice Fenlon observed in her dissenting reasons in *Zora*, the "sky has not fallen" in Ontario by requiring a subjective *mens rea*.[9]

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[7] *R. v. Withworth* 2013 ONSC 7413, para. 14. See also: *R. v. English*, [2018] O.J. No. 1070 (OCJ); R. *v.* Syblis 2015 ONCJ 73; *R. v. John* 2015 ONSC 2040; *R. v. Jarrar* 2016 ONSC 5898.

[8] "*Set Up to Fail: Bail and the Revolving Door of Pre-trial Detention*", July 2014, the Canadian Civil Liberties Association and Education Trust, p. 64-65 (online: https://ccla.org/cclanewsite/wp-content/uploads/2015/02/Set-up-to-fail-FINAL.pdf)

[9] Reasons of Madam Justice Fenlon, *R. v. Zora* 2019 BCCA 9, Appellant's Tab 5, para.90; *R. v. Loutitt*, 2011 ABQB 545 para. 17.

b) Ontario has implemented policies consistent with a subjective *mens rea* standard.

13. The Attorney General for Ontario's current policies governing judicial interim release are consistent with and complimentary to a subjective *mens rea* for administration of justice offences and the recent amendments to the bail provisions of the *Criminal Code*.[10] These policies, directives and the *Criminal Code* provisions ensure that the needs and characteristics of an accused are considered, both when setting terms for judicial interim release, and when the Crown exercises its discretion whether to prosecute charges of breach of judicial interim release. The Attorney General for Ontario has recognized that the members of the population likely to face a charge of breach of recognizance often are vulnerable due to human frailties that include age, inexperience, addiction and mental disabilities. The Attorney General for Ontario also has recognized that administration of justice offences may significantly impact our indigenous communities.[11] In 2016 the Ontario government launched the following "Plan for Faster, Fairer Criminal Justice":

> Poverty, homelessness, mental illness and addictions lead many people into conflict with the law. In some cases where vulnerable individuals are charged with minor offences, community-based solutions can be an effective alternative to the criminal justice system. When individuals are connected with appropriate resources and supports, they are more likely to achieve stability in the community, and less likely to commit further criminal offences.[12]

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[10] Recent amendments to the bail provisions in the *Criminal Code* (see: Bill C-75, s. 210, royal assent June 21, 2019, effective December 18, 2019) create a new section (s. 493.2) which requires a judge to give "particular attention to the circumstances of (a) Aboriginal accused; and (b) accused who belong to a vulnerable population that is overrepresented in the criminal justice system and that is disadvantaged in obtaining release under this Part."

[11] "*Reasonable Bail*", September 27, 2013, The Centre of Research, Policy and Program Development, John Howard Society of Ontario; "*The justice system costs of administration of justice offences in Canada, 2009*," 2013, Department of Justice Canada, Research and Statistics Division; "*Administration of justice offences among aboriginal people: court officials' perspective*", 2013, Department of Justice Canada, Research and Statistics Division; Rankin, Micah B., "*Using Court Orders to Manage, Supervise and Control Mentally Disordered Offenders: A Rights-Based Approach*", 2018 C.L.Q. 280, p. 4; "*Set Up to Fail: Bail and the Revolving Door of Pre-trial Detention*", July 2014, the Canadian Civil Liberties Association and Education Trust, p. 72-79 (online: https://ccla.org/cclanewsite/wp-content/uploads/2015/02/Set-up-to-fail-FINAL.pdf)..

[12] "*About Ontario's Plan for Faster, Fairer Criminal Justice,*" News Release, December 1, 2016, 9:45 am.

14. Three Ontario communities (Toronto, London and Kenora) completed lengthy and detailed needs assessments, which, without exception, identified high rates of administration of justice offences in their communities.[13] In response to these needs assessments, the Ontario government has developed a Community Justice Centre model ("CJC") to more effectively address the personal circumstances of offenders, identify the root causes of crime, and reduce the risk of re-offending in those communities, which should in turn reduce the number of administration of justice offences. The CJC takes a holistic, community-centred approach, by delivering justice in a restorative framework, holding individuals accountable, and connecting them to supports that address their specific needs such as housing, education, job training, mental health or addiction.

15. The Attorney General of Ontario has issued a directive to his prosecutors on the subject of judicial interim release,[14] to ensure that prosecutors carefully consider the individual and personal characteristics of an accused, including the following:

> The Prosecutor must consider the unique circumstances of Indigenous Peoples when an accused self-identifies as Métis, Inuit or First Nation. The Prosecutor should also consider the distance and remoteness of many Indigenous communities and the barriers that this creates for access to bail hearings and forms of release. A significant disadvantage is created since the accused is unlikely to have established connections or supports in the community in which the bail hearing is taking place. In these circumstances, seeking the detention of an Indigenous accused should remain an exceptional measure unless the release of the accused would jeopardize the safety and security of the victim or the public. Although the Prosecutor should keep in mind the principles referred to by the Supreme Court in *Gladue,* a *Gladue* report should not be requested by the Prosecutor for a bail hearing. Reference should be made to the Indigenous Peoples Directive.
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> When determining a position on bail, Prosecutors should recognize the circumstances of vulnerable and disadvantaged accused, including racialized populations, the homeless, the poor or those suffering from mental illness or addictions. These accused may not have access to the type of accommodation, resources, networks or supports that commonly exist for other members of the community. Pre-trial detention should never be used as a substitute for mental health or other social measures.

16. The judicial interim release directive also expressly addresses the prosecution of breaches of judicial interim release, and directs prosecutors to:

> ….consider the extent of non-compliance, the seriousness of the alleged breach and any apparent reasons for the breach in determining her position on bail. The Prosecutor should

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[13] Needs Assessment Reports - for Toronto, London and Kenora available online: https://www.attorneygeneral.jus.gov.on.ca/english/justice-centres/

[14] "*Judicial Interim Release (Bail)*", Ontario Prosecution Directive, November 14, 2017.

> also consider the gravity of the administration of justice offence and the underlying facts in proportion to the consequences of proceeding with the criminal charge.
>
> Where an accused is arrested for breaching a condition of a release order and/or committing a new offence, the decision to cancel the previous release order should not be automatic but subject to consideration of the same factors set out above.

17. Similarly, when screening any charge to determine whether it is in the public interest to continue a prosecution, the Attorney General for Ontario has directed his prosecutors to consider a number of factors that include the particular circumstances and vulnerabilities of the accused, in the following excerpts of the policy:

> When deciding whether to prosecute or discontinue the prosecution a number of public interest factors should be considered. No one factor is determinative when assessing the public interest, but consideration should be given to:
>
> 1. the gravity or relative seriousness of the incident;
> 2. circumstances and views of the victim including any safety concerns;
> 3. the age, physical health, mental health or special vulnerability of an accused, victim or witness;
> 4. the prevalence of the type of offence and the actual or potential impact of the offence on the community and/or victim;
> 5. the criminal history of the accused;
> 6. whether the consequences of any resulting conviction would be unduly harsh or oppressive to the accused;
> 7. whether the accused is willing to co-operate or has already co-operated in the investigation or prosecution of others;
> 8. the degree of culpability of the accused, particularly in relation to other alleged parties to the offence;
> 9. the likely outcome in the event of a finding of guilt, having regard to the sentencing options;
> 10. the length and expense of a trial when considered in relation to the seriousness of the offence; and
> 11. the availability of any alternatives to prosecution such as diversion and civil remedies.
>
> …..

> In determining whether there is a public interest to proceed or discontinue the prosecution, the Prosecutor must remain objective and be aware of the negative impact of stereotypes. In particular, stereotypes relating to race or ethnic origin, colour, religion, sex, sexual orientation, gender identity, gender expression, political association or beliefs of the accused or any person involved in the case must be rejected.[15]

18. At the same time, the Attorney General for Ontario recognizes that his directives to prosecutors about the need for individualized approach to judicial interim release and the prosecution of breaches are not a substitute for a legal standard. (For example, this Court observed in *Nur* that the prosecutorial discretion to elect to proceed summarily cannot cure an unconstitutional provision governing mandatory minimum sentences for indictable offences.)[16]

c) The *mens rea* requirement for the offence of breach of recognizance logically must be compatible with other similar administration of justice offences

19. The British Columbia Court of Appeal in *Zora* recognized that the analysis in this case could impact other administration of justice offences (like breach of probation, fail to appear and fail to attend court) that exist in the *Criminal Code* as well as the *Youth Criminal Justice Act.* After reviewing over 20 decisions across Canada in relation to various *Code* provisions, that made different findings of subjective and objective *mens rea*, the Court observed that "ultimately the Supreme Court of Canada may have to settle the conflicting law across Canada although I note that some of the above-mentioned cases appear to conflate *mens rea* with lawful excuse."[17] Ontario observes that it is difficult to rationalise why the offence of breach of a recognizance would have a different *mens rea* than these other offences.

20. This Court has not considered the question of the *mens rea* for the offence of breach of probation, since the wording of s. 733.1 was changed and the term "wilfully" was removed. Under the old language, this Court held in *Docherty* that the offence of breach of probation required proof of a subjective intent.[18] Since the change in language of the section, most of the lower courts across the country have held that the offence of breach of probation requires proof of a subjective *mens rea*.[19]

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[15] "*Charge Screening*", Ontario Prosecution Directive, November 14, 2017.
[16] *R. v. Nur* 2015 SCC 15, para. 85-96; *R. v. Smith* [1987] 1 S.C.R. 1045, para. 68.
[17] "*The Justice System Costs of Administration of Justice Offences in Canada, 2009*", Research and Statistics Division Department of Justice Canada, January 2013, p. 4; *R. v. Zora*, 2019 BCCA 9, para. 41-43.
[18] *R. v. Docherty,* [1989] 2 S.C.R. 941 para. 13-15.
[19] **Breach of Probation Cases (s. 733.1)**: *R. v. John* 2015 ONSC 2040; *R. v. Crosswell*, [2007]

21. In respect of the *mens rea* for other administration of justice offences (*i.e.* breach of a s. 810 order (s. 811) or escape custody or fail to appear (s. 145)), the language in some of the lower court decisions is imprecise; some courts appear to be approaching *mens rea* on a sliding scale. Ontario, Quebec and Manitoba appear to require a subjective *mens rea* for all administration of justice offences, whereas Alberta has moved to an objective or modified objective *mens rea* for s. 145 offences and Newfoundland and Nova Scotia have applied both standards.[20]

22. Justice Code in *R. v. Porter* (a 2012 Ontario trial decision involving the offence of failing or refusing to comply with a breath demand without reasonable excuse) provides a helpful summary of the law on *mens rea* and how it has been treated in relation to various other offences. The *Porter* decision reminds us that this appeal has the potential to impact many other offences, including offences in the impaired driving area.[21]

O.J. No. 239 (OCJ) para. 5 & 6; *R. v. Palumbo* 2012 ONSC 3365; *R. v. Taylor,* [2013] O.J. No. 2397 (OCJ) para. 13; *R. v. Lempke* 2016 BCPC 344; *R. v. Ludlow* (1999), 136 C.C.C. (3d) 460 (BCCA); *R. v. Walkus* 2016 BCPC 370; *R. v. Bingley* [2008] B.C.J. No. 1680 (Prov.Ct.) para. 18; *R. v. Stanny* 2004 ABPC 149; *R. v. Mills,* [2007] A.J. No. 62 (Prov. Ct.) para. 21 & 22; *R. v. Eby* [2007] A.J. No. 306 (Prov. Ct.) para. 91-92; *R. v. Bolen* 2003 SKPC; *R. v. Crowe,* [2003] S.J. No. 846 (Q.B.) para. 11-12; *R. v. Bird,* [1999] S.J. No. 554 (Q.B.) para. 12; *R. v. Laferriere* 2013 QCCA 944, para. 83; *R. v. Mayo*, [1999] N.J. No. 109 (Prov. Ct.) para. 21 *R. v. C.D.C.,* [2004] N.J. 159 (Prov. Ct.) para. 20-29; *R. v. Stoddard* [2014] N.J. No. 183 (Prov. Ct.).

[20] **Escape Custody and Fail to Appear Cases (s. 145)**: *R. v. English*, [2018] O.J. No. 1070 (OCJ); *R. v. Syblis* 2015 ONCJ 73; *R. v. Withworth* 2013 ONSC 7413; *R. v. Brown* 2008 ABPC 128; *R. v. Stanny* 2004 ABPC 128; *R. v. Ritter* 2007 ABCA 395; *R. v. Qadir* 2016 ABPC 27; *R. v. Hammoud* 2012 ABQB 110; *R v. Potts* 2012 ABPC 78; *R. v. Lofstrom* 2016 ABPC 197; *R. v. Loutitt*, [2011] A.J. No. 1000 (Q.B.) para. 11-15; *R. v. Chen* 2006 MBQB 250; *R. v. Edgar* 2019 QCCQ 1328; *R. v. Y. (A.M.)* 2017 NSSC 99; *R. v. Al Khatib* 2014 NSPC 62; *R. v. Fitzgerald* 1990 CanLii 6481 (Nfld. C.A.); *R. v. L.T.W.* [2004] N.J. No. 260 (Prov. Ct.); *R. v. Nedlin* 2005 NWTTC 11.

Fail to Comply with s. 810 Recognizance Cases (s. 811): *R. v. Jarrar* 2016 ONSC 5898; *R. v. Kara* 2004 BCSC 1082; *R. v. Monrose,* 1998 CarswellQue 860 (Sup. Ct.); *R. v. Kirby* [2019] N.J. No. 80 (Prov. Ct.); *R. v. Basha* 2002 CarswellNfld 340 (Prov Ct.); *R. v. Marche*, [2019] N.J. No. 188 (Prov. Ct.); *R. v. Rodrigues*. [2016] N.J. No. 88 (Prov. Ct.); *R. v. Park* [2007 N.J. No. 304 (Prov. Ct.).

[21] *R. v. Porter*, 2012 ONSC 3504, para. 33-35; *R. v. Ye*, [2018] O.J. No. 71 (OCJ), para. 6; *R. v. Singh* 2013 ONSC 6324, para. 17-19.

PART IV: ORDER SOUGHT

23. The Intervener seeks no order.

ALL OF WHICH IS RESPECTULLY SUBMITTED

Susan Reid
Counsel for the Intervener, the Attorney General for Ontario
November 14, 2019

PART V: TIME FOR ORAL ARGUMENT

24. The intervener has been given 5 minutes for oral argument.

PART VI: SEALING ORDERS

25. The intervener makes no submissions about sealing orders or public access.

PART VII: TABLE OF AUTHORITIES

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Articles, Literature, and Prosecution Directives	Paragraph #
"*About Ontario's Plan for Faster, Fairer Criminal Justice,*" News Release, December 1, 2016, 9:45 am.	13
"*Administration of justice offences among aboriginal people: court officials' perspective*", 2013, Department of Justice Canada, Research and Statistics Division	13
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"*Set Up to Fail: Bail and the Revolving Door of Pre-trial Detention*", July 2014, the Canadian Civil Liberties Association and Education Trust (online: https://ccla.org/cclanewsite/wp-content/uploads/2015/02/Set-up-to-fail-FINAL.pdf)	10, 12