IN THE SUPREME COURT OF BRITISH COLUMBIA BETWEEN: REGINA APPELLANT AND: WENONA MARY LYN HALL RESPONDENT REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE COWAN

Counsel for the Appellant: G.P. Macdonald
Counsel for the Respondent: S. Sarsfield

Place and Date of Hearing: Duncan, B.C. October 16, 1996

[1] The Crown appeals the respondent's acquittal in Provincial Court on two counts charging offences contrary to the provisions of the *Tobacco Tax Act*, R.S.B.C. 1979 c. 404 (the Act).

[2] Count 1 charged the respondent that on or about October 14, 1993 at or near Duncan, B.C. she did have in her possession or keeping tobacco for an unlawful purpose contrary to s. 27 of the Act.

[3] Count 2 charged the respondent that on or about October 14, 1993 at or near Duncan, B.C. that she, not being a dealer or a common carrier under contract to a dealer, did transport in British Columbia tobacco in quantities in excess of 50 cartons of cigarettes contrary to s. 44 of the Act. With respect to Count 1 s. 27(2.4) of the Act makes it an offence for a person, unless that person is a dealer (as defined in the Act) to possess or keep tobacco for an unlawful purpose. Section 28 of the Act provides in part that in a prosecution under s. 27(2.4) the possession or keeping of tobacco in excess of 5 cartons of cigarettes by a person other than a dealer is in the absence of evidence to the contrary, prima facie evidence that the person unlawfully possesses or keeps tobacco for an unlawful purpose.

[4] Section 27(2.5) provides that for the purposes of subsection (2.4) if one or two or more persons with the knowledge and acquiescence of the rest, has tobacco in the person's possession, it is, in the absence of evidence to the contrary, considered to be in the possession of each and all of them. With respect to Count 2, s. 44(4) provides that no person shall transport in British Columbia tobacco in excess of 50 cartons of cigarettes.

[5] The facts are not in dispute. They are that on October 14, 1993 R.C.M.P. Constables Swustus and Wilton were on duty in Duncan when they observed a truck driven by the respondent, who is a Status Native Indian, stop at two outlets in Duncan for tax exempt cigarettes and observed the occupants of the vehicle, who were four in number, including the respondent, come out of each of the outlets carrying white shopping bags which the officers believed each contained 5 cartons of cigarettes. The vehicle was stopped and searched and 88 cartons of cigarettes were found in the rear of the vehicle. The cartons were seized by the officers.

[6] The respondent gave evidence at trial. She admitted that she was not a licensed retail dealer as defined in the Act. She testified that "as a Status Native Indian, I legally purchased twenty-two cartons of tax exempt cigarettes." She testified that "she simply went to buy tax-free tobacco".

[7] The reasons for judgment of the learned trial judge are brief. They are as follows:

> THE COURT: On count one I am not satisfied, despite the presumption section, that this tobacco was in Ms. Hall's possession for an unlawful purpose. The only evidence that I actually have on the point, other than the presumption, is the evidence that she felt it was legal to have, as long as you bought no more than five at the same store. That does not allow me to draw a further inference or it does not give any greater weight to the presumption that is contained in the legislation, in fact, in my view, allows me to draw an opposite inference, that it was for an innocent purpose, i.e. smoking it. Therefore, for that reason, I would not convict on count one. I would not convict on count one, as well, because I am not satisfied that the Crown has offered me proof beyond a reasonable that the substance prohibited, i.e. tobacco, has been established. There is no certificate of analysis. I am asked to draw an inference from the mere appearance of the cartons that the substance was tobacco. I am (sic) not prepared to do that. In my view, given the penalties associated with this particular crime, if I can call it that, as compared with other crimes such as possession of illicit drugs, these penalties for the most part seem more serious, and therefore I think the Crown should be held to the same standard that is expected in a charge under the *Narcotic Control Act* in terms of proving the identity of the substance. My ruling, therefore, will apply to count two, as well, because in that case it is essential for the Crown to prove that the substance was tobacco. I would also acquit on count two, on the grounds that the Crown has not satisfied me that the accused was not at the time a common carrier under contract to a dealer. There has been no argument on the point. It may be that it is not up to the Crown to negative these particular factors, but there is simply a total lack of

> evidence as to whether she is a common carrier and therefore entitled to carry this tobacco. So on both counts you are acquitted.

[8] The appellant submits that the learned trial judge erred: (1) in not applying the presumption set out in s. 28(3) of the Act; (2) in holding that the respondent was not in possession of tobacco; and (3) in not applying the provisions of s. 88 of the Act with respect to the first ground of appeal.

[9] I agree with the appellant's submission that the learned trial judge erred in not applying the presumption set out in s. 28(3) of the Act. In my opinion the respondent's statement that she felt she "legally purchased twenty-two cartons of cigarettes" is not evidence to the contrary which would rebut the presumption set out in s. 28(3) of the Act, as it is merely a statement that she was either ignorant of the law or of its meaning, scope, or application. Section 19 of the *Criminal Code*, which has application in these proceedings by virtue of s. 122 of the *Offence Act*, R.S.B.C. c. 305, provides that "ignorance of the law by a person who commits an offence is not an excuse for committing that offence."

[10] As to the second ground of appeal which alleges that the learned trial judge erred in finding that the accused was not in possession of tobacco, I am of the view that that ground of appeal must succeed as well. In my opinion, there was ample evidence before the learned trial judge that the respondent was in possession of tobacco, including specifically the respondent's own testimony that she "went to buy tax free tobacco".

[11] The third ground of appeal asserts that the learned trial judge erred in not applying the provisions of s. 88 of the *Offence Act*. Subsection (3) of that section provides that:

> ... "Where it appears that the defendant has done any or been guilty of any omission in respect of which, were he not licensed or registered or authorized by consent, permit, certificate or otherwise, he would be liable to a penalty, it is incumbent on the defendant to prove that he/she is licensed or registered or authorized by a consent, permit, certificate or otherwise, as the case may be."...

[12] I agree with the appellant that the effect of s. 88(3) of the *Offence Act* effectively shifts the burden to the respondent to prove that she was at the relevant time a common carrier under contract to a dealer. No evidence was given by the respondent in that regard.

[13] I would accordingly allow the appeal. As the respondent was unrepresented at trial and as there are, as set out in counsel for the respondent's brief of argument, other issues which were not advanced by the respondent at trial, such as, for example, the constitutionality of the several reverse onus provisions in the Act, I consider it appropriate to direct a new trial.

"J.C. Cowan, J."