SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. A.M.Y.*, 2017 NSSC 99

Date: 20170419
Docket: Hfx. No. 455910
Registry: Halifax

Between:

A.M.Y.

Appellant

v.

Her Majesty the Queen

Respondent

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Restriction on Publication: Section 110, *Youth Criminal Justice Act*

Judge:	The Honourable Justice Peter Rosinski
Heard:	April 4, 2017, in Halifax, Nova Scotia
Written Decision:	April 19, 2017
Subject:	Summary conviction appeal – conviction for breach of non-association clause in recognizance – interpretation of interaction between s. 794(2) and "lawful excuse" in s. 145(3) Criminal Code
Summary:	A.M.Y. was prohibited from being in the company of another youth, N.Y., "unless in the presence of an adult approved by your parent or guardian". A.M.Y. was found in a car with N.Y., another youth and two adults. Youth Court judge concluded that the burden was upon the youth to establish the factual foundation for the "lawful excuse"/exception relying on s 794(2). Defence called no evidence – Youth Court

therefore had no evidence to establish that the adults in the car were "approved by your parent or guardian" and therefore, convicted A.M.Y. A.M.Y. maintains that the burden is on the Crown to establish beyond a reasonable doubt that the adults in the car were not approved by A.M.Y.'s parent or guardian.

Issues:

(i) Did the Youth Court judge err in law in her interpretation and application of s 794(2)? That is:

(a) Is s. 794(2) applicable to a charge of breach of recognizance pursuant to s. 145(3)?
(b) If so, what interpretive effect does s. 794(2) have in relation to the wording in s. 145(3)?
(c) What are the essential elements of the offence as alleged in the information in this case?

(ii) If so, was this a reversible error?

Result:

(i) The Youth Court judge committed a non-reversible error of law in placing reliance on s. 794(2) in the circumstances of this case

a) Generally, s. 794(2) could have application to charges of breach of recognizance – s. 145(3)- because it arguably provides more expansive wording than merely "lawful excuse", and in such cases places the burden to prove any of those s. 794(2) bases to avoid conviction on the accused;
b) However, in the case at bar, s. 794(2) was not applicable, because it was unnecessary: as with s. 794, generally the wording in s. 145(3)- "without lawful excuse, the proof of which lies on them," has been interpreted in the jurisprudence to place an evidentiary/persuasive burden on the balance of probabilities on an accused to establish the factual foundation underlying any exceptions to bail conditions;

c) the jurisprudence establishes that exceptions to bail conditions are not essential elements of the s. 145(3) offence generally, and the wording of the information in this case did not transform the "exception" into an essential element of the offence, but rather left the "exception" to be considered under the rubric of "lawful excuse".

(ii) The Youth Court judge did not commit a reversible error because whether the trial judge had used the approach under s. 794(2) or under "lawful excuse, the proof of which lies upon them", either one would have yielded the identical result, and no material prejudice to A.M.Y. was occasioned thereby.

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Heard:	April 4, 2017, in Halifax, Nova Scotia
Counsel:	Claire McNeil and Stephanie Smolensky, for the Appellant Erica Koresawa, for the Respondent

By the Court:

Introduction

[1] A.M.Y. was found guilty of having committed the following offence on May 22, 2016:

> Being at large on his recognizance entered into before a justice or judge on the 20th day of May 2016, and being bound to comply with the condition of that recognizance to wit, Do Not Associate with or Be in the Company of [N.Y.] Unless in the Presence of an Adult Approved by Your Parent or Guardian, without lawful excuse fail to comply with that condition, contrary to s. 145(3) of the Criminal Code.

[2] Her May 20, 2016 recognizance contained the following wording:

> The condition of this recognizance is that if the young person attends court on June 2, 2016 a 1:30 p.m.… and attends thereafter as required by the court in order to be dealt with according to law… and if the young person complies with the following conditions:
>
> > a) keep the peace and be of good behaviour
> >
> > (b) you shall attend court as and when directed
> >
> > (c) Reside at Phoenix Shelter, 1094 Tower Road, Halifax, Nova Scotia, unless permission to reside elsewhere is obtained from the court;
> >
> > (d) have no direct or indirect contact or communication with [J.Z.] except through a lawyer
> >
> > (e) do not associate with or be in the company of [N.Y. – her younger brother] unless in the presence of an adult approved by your parent or guardian;
> >
> > …
> >
> > (j) do not associate with or be in the company of any persons known to you to have a youth or criminal record except as may be incidental to school attendance or employment; except as may be incidental to participation in organized sporting, recreational, religious activities or counselling/treatment program; except family members and except as may be incidental to being in the Phoenix shelter.
> >
> > The recognizance is void, otherwise it stands in full force and effect.

[3] A.M.Y. appeals to this court requesting me to quash her conviction and enter an acquittal. She argues that the trial judge erred in her interpretation and application of s. 794(2) Criminal Code, when she relied upon s. 794(2) to effectively reverse the evidentiary burden of proof of an essential element of the offence, and placed the burden on the defendant to disprove the offence charged.

[4] Simply put, she argues that the Crown should have had the onus to prove beyond a reasonable doubt that the adults present in the car with her were *not* approved by her parent or guardian, rather than her being required to prove on a balance of probabilities that the adults present in the car with her *were* approved by her parent or guardian.

[5] For the reasons that follow I dismiss the appeal.

Background

[6] On May 22, 2016 at 7:30 p.m., A.M.Y. was found to be one of five passengers in a car stopped in Lower Sackville, Nova Scotia. Also present in the car was her brother, N.Y., and adults, Matthew Rideout and Michael Owen.

[7] The trial judge concluded in part:

> Both officers recognized A.M.Y. and N.Y. who were in the vehicle… The officers went through the motions of ensuring that there was no one in the car of whom the parents had approved. I accept their evidence on this point, and that Constable Brennan and Constable Edwards spoke to A.Y. (A.M.Y.'s mother). Constable Edwards contacted another individual as well. Based on those discussions, they were satisfied that there was no permission given to A.M.Y. to be in the company of N.Y.. They were satisfied that there had not been <u>any</u> approval given by a parent or guardian for A.M.Y. and N.Y. to be together in the presence of an adult.
>
> [Underlining in original]
>
> [After citing s. 794 Criminal Code] I have had an opportunity to review that section and the circumstances of this case and I am satisfied that the Crown has made out the charge beyond a reasonable doubt. This is not a complex matter and as far as I am concerned, the Crown can rely on that provision and is not required to prove that a parent had not given permission to allow A.M.Y. to be with her brother N.Y.
>
> In addition to relying on that section, I have considered the evidence of the officers who laid the charge once they felt confident, having spoken to A.Y., that there had been no approval given to A.M.Y. to be in the company of N.Y. There was no evidence called by the defence.

> Having regard to all the circumstances I find her guilty of the offence.

Grounds of appeal

[8] A.M.Y. states in her notice of appeal:

1. The trial judge erred in law in her interpretation and application of s. 794(2) of the Criminal Code to the charge against the appellant, in imposing a burden on the defendant to disprove the charge against her;
2. The trial judge erred in law in her interpretation and application of s. 794(2) of the Criminal Code in adopting an interpretation of s. 794(2) that is inconsistent with s. 11 (d) of the Canadian Charter of Rights and Freedoms with the effect that:
    a. The judge reversed the evidentiary burden of proof of an essential element of the offence with the effect that the onus of proof was placed upon the defendant rather than the Crown.

Standard of review

[9] Both counsel rely upon the extensive reasons of Justice Saunders in *R. v. Skinner*, 2016 NSCA 54, at paras. 15-27, to suggest that "correctness" is the proper standard of review of the trial judge's interpretation and application of s. 794(2). I agree.

Position of the parties

i) A.M.Y.

[10] A.M.Y. argued that this was "not a case where 'lawful excuse' was raised or argued. Thus, the principles of law under s. 145(3) and the reverse onus regarding 'lawful excuse' do not arise on the facts of this case". However, at the hearing both counsel conceded that whether seen through the lens of s. 145(3) or 794(2), neither section applies until the Crown has proved the *mens rea* and *actus reus*.

[11] Furthermore, A.M.Y. says that "in holding that s. 794(2) relieved the Crown from its onus of proof in relation to whether the adults were approved by a parent or guardian, the trial judge effectively reversed the onus of proof for an essential element of the offence from the Crown to the defence. This interpretation is inconsistent with principles of statutory construction, as well as the presumption of

innocence, a cornerstone of criminal justice, and as such is contrary to Charter values."

[12] She argues that persuasive reasoning from appeal courts concludes that s. 794(2) does not apply to proceedings under s 145(3) which has a "lawful excuse" provision: *R. v. Truong*, 2011 BCSC 1151 per Smart J.

[13] The narrow issue on that summary conviction appeal, was whether the Crown, having proved that the appellant was initially bound by the continuing condition in his recognizance of October 21, 2006 that he remain outside the 500 block of E. Hasting Street in Vancouver, could, without more, prove that he was still bound by it on January 1, 2007, or whether the onus is shifted to him to prove that he was not bound by it.

[14] Justice Smart concluded that, regarding both s 794(2) and 145(3), neither shifts the onus to an accused to provide a lawful excuse, exception or exemption, until the Crown has first proven each element of the offence -para 31; and that s. 794(2) has no application to a charge under s. 145(3): "I can think of no 'exception, exemption, proviso, excuse or qualification' that would provide a defence to a charge under s. 145(3). If there is, it would be captured by the words 'without lawful excuse'.

[15] Justice Smart at para. 30, relied on: the Ontario Court of Appeal decision in *R. v. Legere*, (1994) 95 CCC (3d) 555, where the court in relation to "the without lawful excuse portion of s. 145 (3)" adopted the following wording from an earlier Ontario Court of Appeal decision in relation to analogous wording ("without lawful justification or excuse, the proof of which lies on him"), in relation to possession, etc., of counterfeit money – s. 450 Criminal Code:

> (a) In my view, the inclusion of the words 'lawful justification or excuse' ought to be so construed; that is to say, construed as adding a defence that would not otherwise be available under the section and not as limiting the meaning of the section by eliminating what would otherwise be an element in the Crown's case and the defence that it had not been proved.

And on the reasoning in *R. v. PH*, (2000)143 CCC (3d) 223 (Ont CA) , where Justice Finlayson stated for the court:

> (b) Section 794(2) of the Code… applies in narrow circumstances, usually regulatory offences, where a status in law has been conferred upon the accused who otherwise would be culpable… [citing from *R. v. Lee's Poultry Ltd*,(1985) 17 CCC(3d) 539 (OCA)]:

> It is a fundamental rule of criminal law that the accused is presumed to be innocent until his or her guilt is proved beyond a reasonable doubt and, as such, the onus is on the Crown to prove each element of the offence to the degree required. At common law an exception developed to this fundamental rule for a class of offences created by regulatory legislation. Often such legislation created offences by banning specified activities but excepted persons who had authority of the regulatory body to do the acts banned…
>
> Section 794(2) speaks of exceptions, exemptions, provisos, excuses or qualifications. If it was intended to apply to defences, the word is not so arcane that he could not have been included in the list…

[16] To reiterate, the appellant says that the prohibited act, and an essential element of the s. 145(3) offence, is that "A.M.Y. violated her condition to 'not associate with or be in the company of N.Y. unless in the presence of an adult approved by your parent or guardian'."

[17] Not until the Crown has proved this essential element of the offence beyond a reasonable doubt, could s. 794(2) become relevant, and a defendant face an evidentiary burden on a balance of probabilities to demonstrate "a lawful excuse" as contained in s. 145(3).

(ii) Crown

[18] The Crown argues that "the prohibited act in this case was associating with or being in the company of NY. The exception – 'unless in the presence of an adult approved by your parent or guardian' – does not form part of the prohibited conduct. Rather [such evidence]… would provide the appellant with the lawful excuse."

[19] Counsel relies on the reasoning in *R. v. Zamora*, 2013 BCSC 473.

[20] Mr. Zamora was bound by a recognizance "not to be in the area bounded by [certain streets in Vancouver] except for the purpose of going directly to or directly from the courthouse at 222 Main Street,

[21] Vancouver, B.C., and/or the bail supervisor's office at 275 E. Cordova Street, Vancouver. Mr. Zamora was found within the prohibited area. He argued there was no evidence that he was not going directly to or from the courthouse or the bail supervisor's office, and the trial judge acquitted him, because she considered the exceptions to be an essential element of the Crown's case.

[22] Justice Kelleher set aside the acquittal and ordered a new trial. He concluded at para. 25:

> I am satisfied that the information in this case sets out the full text of the bail condition that was allegedly breached, including its exceptions. That does not require the Crown to disprove the exceptions. My conclusion that the exceptions to the conditions of the recognizance in the information constitutes surplusage is consistent with the case law and is grounded in good policy. The Crown, when it prepares an information, should not be discouraged from providing the accused with important information about the terms of a recognizance.

[23] More significantly, he agreed with Judge Dhillon's reasoning in *R. v. Dempster*, 2012 BCPC 275, and specifically the following statements in that case:

> 74 I conclude that if the conditions of a recognizance include an excuse or exception without which the alleged act or omission would be unlawful, there is no need for the prosecution to prove a *prima facie* case of lack of excuse. If all other essential elements of the charge have been proved, the accused has the burden of showing on a balance of probabilities that the excuse or exception applies as a bar to an otherwise successful prosecution.

[24] In *Dempster*, the defendant was subject to a recognizance with conditions:

> You shall obey a curfew… each day, except as follows (a) with the written consent of the bail supervisor. Such consent to be given only for compelling personal, family or employment reasons, or (b) when travelling directly to or returning directly from your place of employment or while in the court [sic] of your employment. You shall provide the bail supervisor with written details of employment if requested to do so, or (c) when travelling directly to or returning directly from an educational institution in which you are enrolled, or while in the course of classes or extracurricular (sic) activities approved in advance by the bail supervisor"; and
>
> You shall not possess any cell phone, pager or portable telecommunication device except for purposes directly and immediately related to your employment.

[25] Mr. Dempster was found guilty on both counts.

[26] Lastly, the Crown relies on the reasoning in *R. v. Ali*, 2015 BCCA 333. Mr. Ali was released on a recognizance, which contained 11 exceptions to a house arrest condition. He was permitted outside his home for the purpose of travelling directly to and from these activities:

> Reporting to a bail supervisor or immigration Canada; consulting with his lawyer; going to court appearances and immigration hearings; attending medical or dental

> appointments made in advance for himself or his children; shopping for groceries and other personal necessities, either for himself or his children, one time per week for no more than two hours; all of these activities had to be performed between 7:00 a.m. and 6:00 p.m.; attending his children's school or recreational activities [between 7:00 a.m. and 11:00 p.m.]; attending motor vehicle auctions to purchase motor vehicles one time per week; transporting vehicles which he had purchased from auction to his rented warehouse; going to auto wreckers and automotive parts outlets to buy parts needed for the repair of vehicles, one time per month.

[27] He was convicted of 19 of 21 counts of failing to comply with his recognizance of bail. He appealed 18 convictions relating to violations of his house arrest condition.

[28] The trial judge held that Mr. Ali was not required to establish on a balance of probabilities that his actions fell within an exception to the house- arrest condition. The Crown was required to prove the inapplicability of the 11 exceptions to the house arrest condition beyond a reasonable doubt. He was nevertheless convicted.

[29] On appeal, Madam Justice Stromberg-Stein stated for the court, at paras. 28-30:

> In my view, the judge's conclusion is inconsistent with *R. v. Holmes*, [1988] 1 S.C.R. 914 at 924 – 25, where, in the context of an analysis of the constitutionality of the offence of possession of break- in instruments, the majority held that “the opening words of s 309(1) , namely, 'without lawful excuse, the proof of which relies upon him', placed a persuasive burden on the accused to establish on a balance of probabilities an excuse in circumstances where he or she seeks to justify his or her actions despite an intention to use an instrument for housebreaking purposes." I agree with the Crown that where there are numerous exceptions to a condition, it would be impractical to require that the Crown negate each in establishing that a breach occurred, especially since evidence supporting the application of an exception would be in the exclusive purview of the accused.… *Goleski* [2015 SCC 6] establishes that s. 794(2) reflects common law principles that the burden falls on the accused to prove an exception or excuse on a balance of probabilities: para. 75. In my view, the same common law principles establish that a person charged with an offence under s. 145(3) of the Criminal Code, must prove an exception or an excuse on a balance of probabilities.

Why the trial judge did not commit a reversible error in law by her interpretation and application of s. 794(2) Criminal Code

[30] This involves consideration of several subsidiary questions.

i. Is s. 794(2) applicable to a charge of breach of recognizance pursuant to s. 145(3)? Generally, it is because: substantively it may provide further bases for avoiding criminal conviction, to the extent that its wording is more expansive than a merely "lawful excuse"; and procedurally because it places the evidentiary/persuasive burden to establish such other bases for avoiding criminal conviction under s 794(2) on the accused;

ii. If so, what interpretive effect does s. 794(2) have in relation to the wording in s. 145(3) "without lawful excuse, the proof of which lies on them"? In the case at bar, s. 794(2) reinforces that the evidentiary/persuasive burden in s. 145(3) on a balance of probabilities is on the accused, however the jurisprudence also establishes that an accused bears the burden of proof to prove "lawful excuse", therefore reliance on s. 794(2), was unnecessary.

iii. What are the essential elements of the offence as alleged in the information in this case (i.e. must the Crown prove beyond a reasonable doubt that the adults in the car with A.M.Y. were not "approved by your parent or guardian")? The accused must demonstrate on evidence to a balance of probabilities standard, that the adults in the car with A.M.Y. were approved by her parent or guardian.

(i) *Section 794(2) can be applicable to a charge of breach of recognizance pursuant to s. 145(3)*

[31] Courts of appeal in the past have found in *obiter dicta* comments, and otherwise, that: s. 794(2) "applies in narrow circumstances, usually regulatory offences, where a status in law has been conferred upon the accused who would otherwise be culpable" - *R. v. PH,* (2000) 143 CCC (3d) 223 (OCA), at para. 14,

where the court found that s. 794 (2) "simply has no application to the defence set out in s. 335(1.1) Criminal Code"; see also *R. v. Truong*, 2008 BCSC 1151, at para. 24, and para. 32 where we find: "it appears to me that this section has no application to a charge under s. 145(3)" –per Smart J. sitting as a SCAC; *R. v. DMH*, (1991) 109 NSR (2d) 322 (CA), where Hart J.A. stated for the court in relation to a charge that a youth did not have a burning permit contrary to s. 23(3) *Forests Act*: "in our opinion, s. 794(2) clearly relieves the Crown of the burden of negativing the exception herein, and is merely an extension of the common-law principle developed over the years in relation to regulatory offences prohibiting acts by persons other than those authorized by law… The failure to have a burning permit is not an element of the offence charged against the respondent, but an exception or exemption, which, if proven by the respondent, could justify his acquittal."; *R. v. TG*, (1998), 165 NSR (2d) 265 (CA), where Chipman J.A. stated in relation to a charge of unlawful possession of liquor under s. 78(2) *Liquor Control Act* at paras. *15-19*:

> The offence charge is unlawful possession under s. 78(2). All possession is thereby made unlawful, except as authorized by the Act or the regulations. Necessary to securing a conviction here, however, is reliance on the combined operation of s. 7 of the *Summary Proceedings Act*… and s. 794(2) of the Criminal Code… The effect of these provisions is that it was not necessary for the Crown to allege or prove that the appellant's possession was not otherwise authorized by the Act.

[32] For present purposes, this authority, and any uncertainty regarding the issue, was swept away when the Supreme Court of Canada released its decision in *R. v. Goleski*, 2015 SCC 6. It concluded that s. 794(2) was correctly applied to a refusal/failure to provide a breath sample contrary to s. 254(5) and the "without reasonable excuse" exception contained therein. However, I see a material distinguishing feature in the case of a s. 145(3) offence, which expressly sets out the burden to establish the exception: "without lawful excuse, the proof of which lies on them".

[33] In its short, oral, unanimous decision, the Supreme Court of Canada stated:

> In our view, the British Columbia Court of Appeal correctly concluded that s. 794(2) of the Criminal Code, properly interpreted, imposes a persuasive burden on the accused to prove an 'exception, exemption, proviso, excuse or qualification

> prescribed by law'. We do not think it appropriate to deal with the new issues raised by the intervenors. [1]

[34] Mr. Goleski was charged with failing or refusing to comply with a breathalyzer demand contrary to s. 254(5). As Justice Frankel stated for the Court of Appeal, at para. 1:

> This appeal concerns where the onus lies when an accused asserts that he or she had a reasonable excuse for failing or refusing to comply with a breathalyzer demand. Must the Crown prove the accused did not have a reasonable excuse beyond a reasonable doubt, or must the accused prove on a balance of probabilities the facts asserted as giving rise to a reasonable excuse? The answer to that question rests on the interpretation of s. 794(2) of the Criminal Code.

[35] The court's summary suggests – by virtue of s. 794(2) of the Criminal Code, an accused who asserts a "reasonable excuse" for failing or refusing to comply with a breathalyzer demand bears the burden of proving the factual foundation for that excuse on a balance of probabilities.

[36] Justice Frankel also noted at para. 28:

> The single question raised on this appeal concerns the allocation of the persuasive burden when an accused claims to have had a "reasonable excuse" for failing or refusing to provide a breath sample. Both the Crown and Mr. Goleski agree that s 794(2) of the Criminal Code applies to a charge under s. 254(5) i.e., that the "reasonable excuse" in s. 254(5) is an "excuse" under s. 794(2). They further agree that the disposition of this appeal turns on the interpretation of s. 794(2).

[37] Justice Frankel concludes at paras. 78 and 80:

> 78 In coming to the conclusion in *Lewko* that the words "except by way of rebuttal" did effect a change in the law, Bayda C.J.S. placed the "reasonable excuse" provided for in s. 254(3) of the *Criminal Code* in the same category as such common-law defences as necessity, duress, and self-defence: para. 18. As a result, he concluded that s. 794(2) does no more than require an accused to meet the "air of reality" test applicable to those defences. With respect, I cannot agree with this reasoning. As Dickson J. stated in *Perka* at 258-59, the statutory exceptions referred to in what was then s. 7(2) of the *Narcotic Control Act* (para. 43 above), are distinct from the common law defences. I note that *Perka* is not referred to in *Lewko*.
>
> 79 Section 794(2) applies not just to a "reasonable excuse" in the breathalyzer context, but to a broad range of statutory exceptions. By virtue of s. 34(2) of the

[1] The Attorney General of Alberta and Ontario both intervened. Their factums reveal that the "new issues" that the Supreme Court did not wish to address included: the *mens rea* that the Crown must prove prosecuting s. 254(5) offences, and what constitutes a "reasonable excuse" thereunder.

Interpretation Act, R.S.C. 1985, c. I-21, s. 794(2) applies to summary conviction offences under other federal enactments "except to the extent that the enactment otherwise provides". For example, it applies to offences under the *Excise Act*, R.S.C. 1985, c. E-14. Based on the interpretation of s. 794(2) in *Lewko*, a person charged under that *Act* by way of summary conviction with manufacturing tobacco without a licence (s. 226(a)) would not have to prove the existence of a licence, but only tender some evidence in that regard. Similarly, interpreting s. 48(2) of the *Controlled Drugs and Substances Act* (para. 47 above) in accordance with *Lewko* would mean that a person charged with importing a prohibited drug "except as authorized under the regulations" (s. 6(1)), would only have to tender some evidence that he or she was authorized to bring that drug into Canada. In my view, it would require much clearer language in a provision such as s. 794(2) to ascribe to Parliament an intention to require the prosecution to carry the burden of proving that an accused did not have authority to engage in activities that are generally prohibited.

80 With respect to the flaw in the reasoning in *Lewko*, the following from *Sheehan* is apposite:

> [13] ... The equating of a reasonable excuse within section 254(5) of the *Criminal Code* with other defences known to law (see paragraph 18 of *Lewko*) is in my view incorrect. Subsection 254(5) of the *Criminal Code* does not provide the accused with a "defence." What it does, is to provide the accused with the opportunity to escape liability by raising a reasonable excuse. It has been held for instance, to be "different" and "wider" than the defence of honest mistake (see *R. v. Mosher* (1992), 71 C.C.C. (3d) 165 (Ont. C.A.), at page 172). In my view, the error in *Lewko* involves a failure to appreciate the distinctive nature of the manner in which Parliament has drafted subsection 254(5). It provides the accused with an opportunity to escape liability in a manner particularized to that subsection. A subsection which it should be recalled, requires the accused to provide potentially incriminating evidence. Subsection 254(5) does not limit the application of defences which would otherwise be available to that offence or those "general defences" which are available to all offences. What it does, is that it allows the accused to raise as a reasonable excuse for refusing or failing to comply with a demand, issues that would never constitute a defence to any other charge. Interestingly, when an accused person raises the issue (or defence if you prefer) of reasonable excuse, he or she is conceding that the Crown has proven beyond a reasonable doubt the existence of the requisite *mens rea* and *actus reus* for the offence. Since the excuse must be objectively reasonable, since it only applies if the Crown has proven beyond a reasonable doubt that the accused has committed both the *actus reus* and *mens rea* of the offence and since it does not limit resort to other defences, then the onus of establishing the proffered excuse should rest with the accused.

[38] However, while I agree with the spirit of Justice Frankel's comments at para. 28, it must be remembered that s. 794(2) only applies to summary conviction offences as in *Goleski*; it does not apply to an indictably-elected s. 145(3) charge, but nevertheless, even without resort to s. 794(2), in such cases, in my view, the burden to establish the exception must still be on the accused, by virtue of the exception based on, the wording in s. 145(3) itself, and relevant persuasive jurisprudence.

[39] Thus, there remains no question that s. 794(2) can be applicable, to (summary conviction) Criminal Code offences, and specifically s. 145(3), i.e.: substantively (as providing bases to avoid conviction), and procedurally(to place the evidentiary/persuasive burden on the accused to establish any bases to avoid conviction outside of "lawful excuse") - see also *R. v. Ali*, 2015 BCCA 333, supra.

(ii) *How should s. 794(2) should be applied in the context of cases involving s. 145(3) Criminal Code? Substantively, it may provide bases beyond "lawful excuse" to avoid conviction, but procedurally it merely reinforces the wording "the proof of which lies upon them" in s. 145(3).*

[40] As noted above, once the Crown has proved beyond a reasonable doubt the existence of the required *mens rea* and *actus reus* for the offence, the manner in which Parliament has drafted s. 145(3) provides an accused with an opportunity to escape liability in a manner particularized to that subsection - i.e. upon proving the factual foundation for what an accused asserts is a "lawful excuse".

[41] While the court in *Goleski*, was clearly alive to the reality that s. 794(2) was more expansive wording than the wording in s. 254(5) "without reasonable excuse", it did not consider that redundancy to be problematic.[2]

[42] An obvious distinction exists between the wording of the s. 254(5) charge in *Goleski*, ["without reasonable excuse"] and 145(3) charge in this case ["without lawful excuse, the proof of which lies on them"]. Section 794(2) operates to provide an accused in cases of s. 254(5) offences, with bases to avoid conviction even after the *mens rea* and *actus reus* have been proved beyond reasonable doubt,

[2] This issue was raised in a somewhat similar case by Justice Mills in *R. v. Dumais*, 2009 SKQB 481at para. 11 in relation to s. 145(3). More importantly however, I agree with his conclusion that the essential element of the s. 145(3) offence in such cases is the prohibition on having contact with the identified class or specific individuals. If an exception is provided in a recognizance, that exception is not an essential element of the offence. In *Goleski*, the court was focused on the evidentiary/persuasive burden impact of s. 794(2), because s. 254(5) Criminal Code did not contain express words regarding the evidentiary/persuasive burden ("without reasonable excuse") as is expressly the case in s. 145(3) ("without lawful excuse, the proof of which lies on them").

but more importantly emphasizes that the burden to establish those bases of avoidance lies with the accused on a balance of probabilities, whether for "lawful excuse" or other bases to avoid conviction contained in s. 794(2).

[43] Thus, the application of s. 794(2), insofar as the evidentiary/persuasive burden is concerned, may be said to be redundant in relation to s. 145(3) charges in cases such as the one at bar.

(iii) *The evidentiary/persuasive burden that the adults in the car with A.M.Y. were "approved by your parent or guardian" is on A.M.Y., and that matter is not an essential element of the s. 145(3) offence, generally, or as specifically drafted in this case*

[44] While strictly speaking, A.M.Y. is correct that "lawful excuse" was not expressly raised or argued at trial, its operation was necessarily at play in this case because, whether characterized as a "s. 794(2)" issue, or as a "lawful excuse" issue, both approaches in essence involve the same consideration of whether there was a basis to avoid conviction upon the Crown having established the *actus reus* and *mens rea* of the offence, and therefore there is no material prejudice to A.M.Y. occasioned thereby.

[45] While the trial judge may have been in error in not examining the "lawful excuse" basis to avoid conviction specifically, having done so under the rubric of s. 794(2), she effectively did not make a reversible error in law - by combined operation of ss. 813 and 686(1)(b)(iii) Criminal Code, and *R. v. Sarrazin*, [2011] 3 SCR 505.

[46] Both counsel agree that the essential elements of the offence in s. 145(3) Criminal Code were properly summarized in *R. v. Custance*, 2005 MBCA 23 at para. 10:

1. The Crown must prove that the accused was bound by an undertaking or recognizance;
2. The accused committed an act which was prohibited by that undertaking or recognizance, or that the accused failed to perform an act required to be performed by that undertaking or recognizance; and
3. The accused had the appropriate *mens rea*, which is to say that the accused knowingly and voluntarily performed or failed to perform the act or omission which constitutes the *actus reus* of the offence.

[47] I note that the Court of Appeal in *Custance*, which is relied upon by the appellant A.M.Y., stated at para. 24:

> Once the Crown proves the elements of the offence beyond a reasonable doubt, the onus shifts to the accused to provide a lawful excuse on a balance of probabilities.

[48] The charge against A.M.Y. reads:

> … Being bound to comply with the condition of that recognizance, to wit, do not associate with or be in the company of [N.Y.] unless in the presence of an adult approved by your parent or guardian, without lawful excuse fail to comply with that condition, contrary to s. 145(3) of the Criminal Code.

[49] What is the prohibited act alleged in the charge?

[50] A.M.Y. insists that the prohibited act alleged is that the Crown must prove she "violated her condition to 'not associate with her be in the company of [N.Y.] unless in the presence of an adult approved by your parent or guardian'."

[51] She would argue that the Crown has drafted the allegation to include as an essential element, the "exception", and as a matter of fair notice of the charge to be answered, A.M.Y. was relying on this belief at trial, and it would be unlawful and unfair to allow a conviction to stand in those circumstances - see s. 581 Criminal Code.

[52] Firstly, in relation to a fair notice. A.M.Y. did not argue at trial that she did not have fair notice and was in any way prejudiced as she claims before this court. As I noted earlier, whether characterized under s. 794(2) or s. 145(3) "lawful excuse", there is no reasonable basis upon which to believe that the exercise of justice herein would not garner the same outcome using either approach.

[53] Moreover, I do not consider the Crown having drafted the information in a manner so as to include verbatim the entire clause of the recognizance, as thereby transforming the "exception" into an essential element of the offence.

[54] Clause (e) of the recognizance reads:

> Do not associate with her be in the company of [N.Y.] unless in the presence of an adult approved by your parent or guardian;

[55] As Justice Kelleher concluded in *R. v. Zamora*, 2013 BCSC 473, at para. 25:

> I am satisfied that the information in this case sets out the full text of the bail condition that was allegedly breached, including its exceptions. That does not

> require the Crown to disprove the exceptions. My conclusion that the exceptions to the conditions of the recognizance in the information constitutes surplusage is consistent with the case law and is grounded in good policy. The Crown, when it prepares an information, should not be discouraged from providing the accused with important information about the terms of a recognizance. [3]

[56] In *Custance*, the court identified the prohibited behavior as being either the commission of an act, which was prohibited; or failure to perform an act required to be performed. According to A.M.Y.'s argument, the Crown would have to prove as essential elements of the offence beyond a reasonable doubt that A.M.Y:

> i. Was in the company of N.Y. (the act); *and*
>
> ii. Had failed to obtain approval of her parent/guardian to have "approved" adults present (an omission). [4]

[57] This breakdown reinforces that the clause in issue contains two separate aspects: A.M.Y. shall not be in N.Y.'s company; unless an "approved" adult(s) is also present.

[58] In my opinion, the drafting of the "condition" clearly creates a prohibition; and leaves one specific basis for an exception to that prohibition. Only the prohibition is an element of the offence charged pursuant to s. 145(3).

Conclusion

[59] The trial judge committed no reversible error of law. A.M.Y. received a fair trial. The appeal is dismissed without costs.

Rosinski, J.

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[3] See to similar effect in *R. v. Dempster*, 2012 BCPC 275, Judge Dhillon's statement at para. 25.

[4] Whether she had received approval of her parent/guardian would be something, that A.M.Y. had a responsibility to ensure, and she therefore can be expected to have been aware of the lack of approval, and thus had "fair notice" - see Justice Wilson's comments in *R. v. Docherty* [1989] 2 S.C.R. 941, at para. 14: "In order to 'refuse' to comply with something, it is necessary to know what you are not complying with."