

CITATION: R. v. Klundert, 2008 ONCA 767
Date: 20081114
Docket: C45694

COURT OF APPEAL FOR ONTARIO

MacFarland, Rouleau and Epstein JJ.A.

BETWEEN

Her Majesty the Queen

Appellant

and

Jack Klundert

Respondent

Croft Michaelson and Xenia Proestos for the appellant

Douglas H. Christie for the respondent

Heard: March 20, 2008

On appeal from the acquittal entered by Justice Joseph Quinn of the Superior Court of Justice, dated June 26, 2006.

MacFarland J.A.:

[1] The Crown appeals the acquittal of the respondent after his re-trial on a charge of income tax evasion, pursuant to s. 239(1)(d) of the *Income Tax Act*, R.S.C. 1985, (5th Supp.), c. 1 (the “Act”).

OVERVIEW

[2] By indictment dated July 5, 2001 it was alleged that the respondent did wilfully evade or attempt to evade the payment of \$348,231.15 in taxes imposed upon him by the Act, by failing to report income in the amounts of \$241,625, \$270,403, \$434,931, \$254,520 and \$272,910 for the taxation years 1993, 1994, 1995, 1996, and 1997 respectively.

[3] By verdict handed down March 14, 2002 the respondent was acquitted on the charge of income tax evasion. Following a Crown appeal to this court that acquittal was set aside and a new trial ordered: *R. v. Klundert* (2004), 187 C.C.C. (3d) 417 (*Klundert No. 1*), leave to appeal to S.C.C. refused, [2004] S.C.C.A. No. 463.

[4] The second trial proceeded in June 2006, once again before a court composed of judge and jury. Once again the respondent was acquitted on the charge of income tax evasion. The Crown now appeals the second acquittal.

FACTS

[5] The respondent is an optometrist who carries on a successful business in Windsor, Ontario. It was admitted that during the relevant period the total income not declared by the respondent, including some interest and RRSP income, was \$1,474,389. Federal taxes on that income have been assessed in the amount of \$348,231.

[6] Prior to 1993, the respondent filed tax returns and paid tax as required under the Act. By 1993 however, he had formed the opinion that the federal government did not have the legislative power to impose or collect income tax. Accordingly, as of 1993, the respondent stopped completing his returns and paying taxes.

[7] The respondent acknowledged that he neither reported his income nor paid the taxes owing during the relevant time period. Thus, the conduct constituting the crime of tax evasion was not in issue. However, the respondent argued that the fault requirement was not made out.

[8] The respondent's position at his first trial was that his refusal to pay taxes did not constitute tax evasion, but was instead an honest protest against what he believed to be unlawful governmental action. The respondent knew there was an obligation to pay taxes, but did not believe that obligation was lawfully imposed.

[9] This court concluded that at his first trial, the trial judge erred in law in instructing the jury that an honest belief that the Act was beyond the legislative power of the federal government was relevant to culpability on a charge of tax evasion. As Doherty J.A. writing for the court, explained at paragraphs 58 – 60:

Can Dr. Klundert's belief that the Act is beyond the powers of the federal government and, therefore invalid, constitute a mistake of law negating the fault component of the crime of tax evasion? The answer must be "no". Section 239(1)(d) refers to the "payment of tax imposed by the Act." Dr. Klundert knew full well that he owed tax imposed by the Act. His mistake did not go to knowledge of his obligation to pay taxes owing under the Act but rather to the government's right to impose that obligation on him. *He did not assert that he was doing his best to comply with the law but, through ignorance or mistake, failed to do so. To the contrary, he acknowledged the obligation to pay under the Act and made a considered decision to refuse to pay because of a belief that the law requiring him to pay was invalid.* [Emphasis added.]

A person's mistaken belief that a statute is invalid or is otherwise not applicable to that person's conduct is a mistake of law. It is, however, a mistake of law that is irrelevant to the existence of the fault requirement in s. 239(1)(d). Nor can that kind of mistake of law provide a freestanding excuse for the commission of a crime: *Criminal Code*, s. 19 [Citations omitted].

There are solid policy reasons for drawing a distinction between an accused who mistakenly believes that he or she is complying with the Act and an accused who knowingly violates the Act, but mistakenly believes the Act is invalid. The former is trying to comply with the law. Particularly where the law is complex, a mistake concerning the applicable laws can logically negate the blameworthiness of the person's conduct. The latter is not trying to obey the law, but is instead deciding which laws should be obeyed. An acquittal based on a mistaken belief as to the validity of a law would undermine the rule of law. [Emphasis added.]

[10] The respondent knew he was obliged to pay taxes, but did not do so. His belief that the obligation was not lawfully imposed was not a defence to the charge of tax evasion because it spoke only to his motive for failing to pay tax, not his intention in filing tax returns that listed his income as zero.

[11] At his second trial, despite this court's ruling, the respondent again took the position that the Act was beyond the powers of the federal government. However, he did not argue that he failed to pay taxes that he knew were owed because he believed the Act to be unlawful and so inapplicable. Rather, he explained his failure to pay taxes as arising from his belief that he was not obligated to pay taxes. Klundert took the position that he was not obligated to pay income tax because he believed the Act does not apply to him. Klundert testified that he is neither a "person" nor a "taxpayer" as defined in the Act.

[12] The "defence" offered by the respondent at his second trial was merely a nuanced version of the defence offered at his first trial, a defence this court held was unavailable to him.

[13] I would allow the appeal, set aside the acquittal and order a new trial.

ANAYLSIS

Application of the Act

[14] The respondent's explanation of his understanding of the Act and why it does not apply to him is convoluted to the point of being incomprehensible. He distinguishes between a "person" as described in the Act and a "natural person" as he understands that term to be used in the *Magna Carta* and the *Bill of Rights*, S.C. 1960, c. 44, reprinted in R.S.C. 1985, App. III. In the following excerpt from his evidence in chief, the respondent explains why he is not obligated to pay income tax:

Q. Dr. Klundert, what was your knowledge in respect to your obligation to pay taxes?

A. I knew that I needed to file an income tax return.

Q. For who?

A. For, uh, the taxpayer.

Q. In what capacity?

A. And from my understanding, um, I needed as a natural person to file – as legal representative of the taxpayer.

Q. And where did you get that understanding?

A. That understanding came to me as a result of, um, learning about my – my, uh, position as a natural person and from studying some of the definitions of the Income Tax Act.

Q. What definitions?

A. The definition of a taxpayer, the definition of a person.

Q. Alright.

A. And the definitions of a legal representative of a person.

Q. Um-hmm.

A. Of a – legal representative of a taxpayer. Excuse me.

Q. Well, what was your obligation, as you understood it, to pay taxes?

A. I believed that I – I didn't owe any taxes, and so I was not obliged to pay taxes.

Q. That is in what capacity?

A. As a natural person.

Q. Alright. And why not?

A. Because I believe that the – as a result of my studies, that the Income Tax Act applied to the taxpayer, but as a natural person I was a legal representative of the taxpayer and I had the, uh, option of, un, acting as a natural person or willingly representing the – the natural – the – the – the taxpayer, and then submitting, uh, as a taxpayer.

Q. Submitting what?

- A. Filling out the income tax form as a taxpayer.
- Q. What were you trying to do in regard to this law?
- A. I was trying to fulfill the law because I knew that I needed to fill out an income tax form. And so I filled out the income tax form as a natural person, as the legal representative of the taxpayer. And I believed that the taxpayer, uh, didn't owe anything. He owed zero.
- Q. Did you – when did you – well, I guess the first question is did you read the definition of person in the Income Tax Act?
- A. Yes, I did.
- Q. When did you first read it?
- A. I read that early in '94, again before I – I filed that 1993 return.
- Q. Did you then or have you ever since acknowledged your obligation to pay in your capacity as a natural person?
- A. No. At that point as a result of understanding who I was as a natural person, I then began working in my individual capacity for myself as a natural person and not for the taxpayer.

[15] In essence, Klundert's evidence was that as a natural person he had no obligation to pay taxes because he didn't owe any. The respondent did not consider himself to meet the definition of "person" as that term is defined in the Act. According to the respondent, he had the option to act as a natural person – to whom the Act does not, in his view, apply, *or* to submit to the Act as a taxpayer. Because the respondent considered himself to be earning income in his individual capacity for himself as a natural person and not as a taxpayer, he did not believe he was under any obligation to pay income tax.

[16] Mr. Christie on behalf of the respondent, explained the defence in the following terms:

I maintain, of course, that the Court of Appeal made certain findings of fact that – about Dr. Klundert that were not in a jury verdict and were not what he said, but I am not arguing that. But I’ve covered what the Court of Appeal said, that his mistake did not go to – if – if you’ll notice in the third line of paragraph 58, his mistake did not go to knowledge of his obligation to pay. Well he just testified to that. He said it did go to – if there is a mistake, his – *his knowledge was that he was not obliged to pay*. That’s what he said. Now, I then ask him, “What were you trying to do?” And his answer was “To comply with the law.” [Emphasis added.]

The Court of Appeal said he did not assert that he was doing his best to comply with the law. He said he was. He’s also explained that he understood he had certain obligations under the law to file a return on behalf of the taxpayer, with the taxpayer, he said, having earned no money. That’s an interpretation of the Act. It’s not saying there is no jurisdiction over me, a natural person. Its not saying there’s no jurisdiction over anybody in Canada because of the Act because I’m on an Indian reserve. Its not saying that there’s no jurisdiction to the *Income Tax Act* because I’m beyond the 200 mile limit, which was Mr. Watson’s argument in the – the other case. Those are jurisdictional arguments. So is the constitutional argument a jurisdictional argument. These are not jurisdictional arguments, and every single explanation of what was not allowed refers to a jurisdictional argument. Not one refers to where a person might have a mistaken belief as to the knowledge of their obligation to pay, which is what he specifically said. Whether you believe him is up to the jury, and he has said he was doing his best to comply with the law as he understood it.

[17] Mr. Christie says if the respondent is wrong, he has made a mistake of law based on his misinterpretation of the Act. According to Mr. Christie, the respondent is not saying the Act does not apply to him. Rather, the respondent is saying that according to his interpretation of the Act, he was not under any obligation to pay.

[18] It is rather transparent that what the respondent has attempted to do is to articulate his defence in a way that complies with this court's ruling in his first appeal. It is an effort on the part of the respondent to transform his belief as to the validity of a law into an assertion of a mistake in his understanding of the law which could negate the requisite culpable state of mind – being now aware that a mistake of law as to the applicability of the Act is not a defence. In this sense, the respondent attempts to place himself within the realm of mistake of law identified by Doherty J.A. in *Klundert No. 1* – those who are attempting to obey the law, but are mistaken in their belief.

[19] Unfortunately for the respondent, the Act does not distinguish between persons and natural persons. The definition of “person” in the Act includes human beings of which specie the respondent belongs.

[20] More important, the essence of his argument is that ‘the Act does not apply to me because I choose to have it not apply to me’. Contrary to what Mr. Christie says, this is a jurisdictional argument (and one which is void of merit) that leads to a mistake of law which does not afford a defence. This court has already said in *Klundert No. 1* – this kind of mistake of law is irrelevant to the fault requirement of the charge of tax evasion.

[21] The distinction between the defence offered at the first trial and that offered at the second trial is one without a difference. The fact that he could both argue that because he is a “natural person” he owes nothing under the Act and advance a protestor defence demonstrates that the former is simply a variation of the latter and in substance this defence is no different than his defence raised in *Klundert No. 1* and is therefore unavailable.

[22] As the defence is not one available in law it ought not to have been put to the jury. While the trial judge clearly told the jury in his charge:

Jack Klundert's evidence that he was a tax protestor or that he mistakenly or honestly believed the *Income Tax Act* did not apply to him is not a defence or an excuse.

He nevertheless put the defence's position on both of these points to the jury, and in so doing erred in law.

Tax Protestor Defence

[23] As he did at his first trial, the respondent on the second trial said that he “wanted to protest income tax ... uh, and I simply wanted to protest the entire process ” by filing tax returns as he did during the period in question by filling in the blanks with zeros where income and the calculation of taxes owing were to be reported. When asked if he had any purpose other than to protest, he replied that he did not.

[24] In his charge, the trial judge correctly told the jury that the respondent's evidence that he was a tax protestor did not provide a defence to the charge of tax evasion and did not go to the issue of Klundert's intent to evade the payment of taxes. However, when he put the position of the defence to the jury, he stated that it was the position of the defence that:

[A]ny rational person could not have intended to evade by acting in the manner of the accused. They should acquit unless they are satisfied beyond a reasonable doubt that his stated intention to solely protest was not his honest intent.

[25] In so doing the trial judge erred in law. Where as a matter of law a defence is not available to an accused, it must not be put to the jury. Where defence counsel argue such a defence before a jury, the trial judge's obligation is to clearly and unequivocally tell the jury that defence counsel was in error and that arguments to that effect cannot be relied upon in coming to a verdict.

Mistake of Law Defence

[26] In reviewing the essential elements of the charge of tax evasion the trial judge correctly instructed the jury:

... I would caution you that any belief that Jack Klundert may have held that the *Income Tax Act* did not apply to him is not a defence

[27] Later in reviewing the theory of the defence he stated:

... the accused testified he did not owe any tax, and never expected it was possible to evade any tax owing by filing as he did. If they believe him or have a reasonable doubt about it they must acquit.

[28] As summarized earlier in these reasons the respondent's defence in its essence, is that he does not owe any tax either because the *Income Tax Act* does not apply to him as a "natural person" who has chosen to file his return as a "legal representative of the taxpayer" or because the *Income Tax Act* does not apply to income where the "natural person" has earned the income but has chosen to file the return as "the legal representative of the taxpayer". That defence was not available in law. It is, in effect, simply a variation of the mistaken belief that Doherty J.A. addressed in *Klundert No. 1* when he explained that:

... a person's mistaken belief that a statute is invalid *or is otherwise not applicable to that person's conduct* ...

is a mistake of law that is irrelevant to the existence of the fault requirement in s. 239(1)(d). As stated in paragraph 25 above, where as a matter of law a defence is not available to an accused, it must not be put to the jury and the jury must be clearly instructed that the defence is unavailable.

[29] Despite the initial correct instruction, it was an error to repeat, as part of the theory of the defence – a defence that was not available to the respondent. The initial instruction and the defence position are contradictory and there is a real risk of confusing the jury.

[30] If, nonetheless, the trial judge was of the view that the respondent had raised a lawful defence because of his alleged belief that he was a “natural person” as opposed to a “person”, then in such circumstances the trial judge would be obliged to charge the jury in relation to this defence in terms the jury would understand by explaining the defence went to *mens rea*, the nature of the belief and that the belief must be honestly held and by reviewing the evidence.

[31] Although, as set out earlier we do not think this defence ought to have been left with the jury, it in fact was. It is apparent that the jury, by their questions, had difficulty with it and that the charge was inadequate.

Tax Avoidance

[32] The jury asked the trial judge for the legal definition of tax avoidance and tax evasion. The only issue for the jury in this case was the intention of the respondent in failing to pay any taxes. Tax avoidance was not raised as a defence and the jury ought to have been told in clear terms that the tax avoidance was not a matter which should be of any concern to them. The trial judge should have instructed the jury that the only issue with which they should concern themselves was whether the respondent was guilty or not guilty of tax evasion. In such circumstances, it would have been appropriate for the trial judge to repeat the three essential elements of the charge, both in response to the question, and to refresh their memories of what Crown counsel was required to prove beyond a reasonable doubt.

CONCLUSION

[33] For these reasons, the verdict of acquittal cannot stand. The acquittal having been entered by a court composed of a judge and jury and having concluded the Crown appeal must be allowed, this court's only option is to once again order a new trial: *Criminal Code*, s. 686(4)(b)(ii).

RELEASED: November 14, 2008 "JMacF"

"J. MacFarland J.A."

"I agree Paul Rouleau J.A."

"I agree Gloria Epstein J.A."