COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***R. v. Manuel,***
2007 BCCA 178

Date: 20070327

Docket: CA033173; CA033174

Between:

Regina

Respondent

And

Beverly Phylis Manuel and
Nicole Valencia Manuel

Appellants

Before: The Honourable Madam Justice Levine
(In Chambers)

C. Nowlin — Counsel for the Appellants

S. Brown — Counsel for the Respondent

Place and Date of Hearing: Vancouver, British Columbia
March 8, 2007

Place and Date of Judgment: Vancouver, British Columbia
March 27, 2007

Reasons for Judgment of the Honourable Madam Justice Levine:

[1] The issue raised by this application for leave to appeal is how considerations of First Nations law interact with Canadian law in determining the application of the colour of right defence to a charge under the ***Criminal Code***.

[2] The appellants, Nicole Valencia Manuel and Beverly Phylis Manuel, are members of the Secwepemc (Shuswap) First Nation and the Neskonlith Indian Band. They participated in a roadblock on Sun Peaks Road near Kamloops, British Columbia, in August 2001. They were convicted in Provincial Court on September 16, 2002, of unlawfully obstructing a highway and mischief, contrary to ss. 423(1) and 430(1)(c) of the ***Criminal Code***. The convictions were upheld on appeal to the Supreme Court of British Columbia on November 12, 2004 (2004 BCSC 1475).

[3] The appellants took the position at the trial and on the summary conviction appeal that they did not have the requisite *mens rea* for conviction because they honestly believed that, in accordance with aboriginal law, they had a legal right to block Sun Peaks Road. Nicole Manuel testified that her understanding of the laws of her people, which she described as “natural laws” and the “laws of the Creator”, imposed a duty on her and her people to take care of and preserve the land.

[4] The trial judge accepted the sincerity of Nicole Manuel’s beliefs about the ownership of the land in question, but concluded that “she was acting pursuant to a belief in a moral right under the law of the

Creator" (trial judge's reasons for judgment, paras. 27, 32). He took into account, in assessing the reasonableness of Nicole Manuel's belief, an 1862 agreement between Chief Neskonlith and British Governor James Douglas (the Neskonlith Reserve Agreement), and the rejection by the federal and provincial governments, on a "without prejudice" basis, of a claim made by the Secwepemc people in 1996 for recognition and re-establishment of the boundaries and territory set aside for the exclusive use of Indians under the Neskonlith Reserve Agreement.

[5] The summary conviction appeal judge held that the trial judge had correctly determined the facts and applied the law. He noted (at para. 13), "It is insufficient for an accused to show that she believed she had a moral right to act as she did", and held (at para.15) that the trial judge "merely determined that the appellants' belief was confined to moral rights".

[6] Both the trial judge and the summary conviction appeal judge relied on ***R. v. Pena*** (1997), 148 D.L.R. (4th) 372 (B.C.S.C.), for its articulation of the "colour of right" defence, and in particular, the distinction between a legal right and a moral right. The summary conviction appeal judge also referred to his decision in ***R. v. Billy***, 2004 BCSC 1474, released concurrently with his reasons for judgment in this case, in which he upheld another trial judge's decision convicting participants in a different road block on Sun Peaks Road on the ground that their belief in their right to act was moral, not legal. Both parties referred in their submission on this application to ***R. v. Pascal***, 2006 BCSC 1311, which followed ***Pena*** and ***Billy***.

[7] In ***R. v. Pena***, Josephson J. said (at paras. 17-18):

> When the accused acts on a mistake of law, the accused must believe that he has a legal as opposed to a moral right to act.
>
> In *R. v. Cinq-Mars* (1989), 51 C.C.C. (3d) 248 (Que. C.A.) [p.251] Vallerand J.A. quoted the following passage from Jacques Fortin and Louise Viau, *Traite de droit penal general* (Les Editions Themis Inc., 1982) at 128, which notes this distinction:
>
> > Colour of right consist of an erroneous belief on the part of the accused that he has a legal right to act as he did…Two fundamental conditions govern colour of right. First, the error must concern a conception of private law: the accused believes that the law recognizes his right to act as he did. Secondly, the right the accused believes he has must be a 'legal right' and not simply a moral right. A legal right, that is a right recognized at private law – for example, a right to possession…a right of retention. The accused acts under a colour of right if he erroneously thinks that he can rely on this right in the circumstances. The claim of a merely 'moral' right does not constitute colour of right. Belief in a 'moral' right is not based on a conception of law. It rather consists of the affirmation by the accused of his right to act as he does despite the law."
>
> [Underlining added.]

[8] The appellants' grounds of appeal are that the summary conviction appeal judge erred in applying the subjective test for the colour of right defence, and by importing an irrelevant consideration into the colour of right analysis.

[9] The appellants say that in ***Pena***, ***Billy***, ***Pascal***, and this case, the court erred by characterizing aboriginal perspectives on aboriginal legal rights and the aboriginal legal system as a belief in morality, not law. Their counsel argued that in ***R. v. Delgamuukw v. British Columbia***, [1997] 3 S.C.R. 1010 at para. 147, and ***R. v. Marshall*** (1999), 138 C.C.C. (3d) 97 at para. 19 (S.C.C.), the Supreme Court of Canada recognized the aboriginal perspective of land and aboriginal legal systems as substantive, not simply as an evidentiary consideration. Appellants' counsel also cites lower court decisions from other jurisdictions as examples of recognition of aboriginal perspectives on land ownership as law: see ***R. v. Ashini***, [1989] 2 C.N.L.R. 119 (Nfld. Prov. Ct.); ***R. v. Potts***, [1990] O.J. No. 2567 (Ont. Ct. Just. – Prov. Div.) (QL); ***R. v.***

Wawatie, 2002 CarswellQue 1042 (C.Q.).

[10] Section 839(1) of the ***Criminal Code*** provides for an appeal from a summary conviction appeal on "any ground that involves a question of law alone". An incorrect application of a legal test constitutes an error of law alone: ***R. v. Ewanchuck*** (1999), 131 C.C.C. (3d) 481 (S.C.C.) at paras. 21-22. The appellants also argue that the decision of the summary conviction appeal judge was unreasonable amounting to an error of law for the purpose of s. 686(1)(a) of the ***Criminal Code***: see ***R. v. Beaudry***, 2007 SCC 5 at para. 59.

[11] In ***R. v. Hunt***, [1998] B.C.J. No. 1347 (C.A.) (QL), Hall J.A. held that s. 839(1) requires that the legal issue raised be one of importance and that the matter has a reasonable chance of success. In ***R. v. Martin***, 2004 BCCA 548 at para. 15, Southin J.A. held that the power to grant or deny leave to appeal "must be exercised in the interests of justice".

[12] The Crown maintains that the application of the colour of right defence in this case is not an issue of law, but an issue of credibility and fact. Crown counsel says that the trial judge found that the appellants' belief in their right to block Sun Peaks Road was not honestly held, and the summary conviction appeal judge made no error in assessing the factual and legal reasoning of the trial judge.

[13] I am persuaded that the appellants have raised an issue of law of importance that has not previously been addressed by this Court.

[14] Appellants' counsel framed the question for consideration on appeal as follows:

> Can ancestral, traditional or customary First Nations beliefs about land entitlement or ownership amount to beliefs about private law for the purpose of colour of right analyses in Canadian law?

[15] This substantive question, in my opinion, subsumes the two errors of law raised on the application for leave to appeal: whether the trial judge erred in law by misapplying the subjective test for the colour of right defence, and by importing an irrelevant consideration into the colour of right analysis.

[16] I grant leave to appeal to both appellants on these two issues of law.

"The Honourable Madam Justice Levine"