

Federal Court of Appeal



Cour d'appel fédérale

Date: 20181026

Docket: A-136-17

Citation: 2018 FCA 196

**CORAM: WEBB J.A.
RENNIE J.A.
LASKIN J.A.**

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

ELENA KLEVTSOV

Respondent

Heard at Toronto, Ontario, on October 3, 2018.

Judgment delivered at Ottawa, Ontario, on October 26, 2018.

REASONS FOR JUDGMENT BY:

RENNIE J.A.

CONCURRED IN BY:

**WEBB J.A.
LASKIN J.A.**

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REASONS FOR JUDGMENT

RENNIE J.A.

[1] On October 9, 2015, the Canada Border Services Agency (CBSA) issued a Notice of Violation to the respondent imposing a penalty of \$800 for importing fruit into Canada, in this case, ten apples, without declaring them as required under section 39 of the *Plant Protection Regulations*, SOR/95-212 (Regulations). The Minister of Public Safety and Emergency Preparedness (Minister) reviewed the facts and upheld the Notice of Violation.

[2] Ms. Klevtsov appealed the Minister's decision upholding the Notice of Violation to the Canadian Agricultural Review Tribunal (Tribunal) pursuant to section 12 of the *Agriculture and Agri-Food Administrative Monetary Penalties Act* (S.C. 1995, c. 40) (AAAMPA).

[3] In reasons reported at 2017 CART 10 (*Klevtsov v. Canada (Minister of Public Safety and Emergency Preparedness)*), the Tribunal allowed Ms. Klevstov's application. Relying on the respondent's recounting of events, which included falling down a set of stairs prior to boarding a flight from Moscow to Toronto, together with medical evidence from physicians in Toronto that tended to show that the respondent had suffered a head injury, the Tribunal concluded that the common law defence of automatism was made out on a balance of probabilities and set aside the Minister's decision.

[4] The Attorney General of Canada applies to this Court to set aside the Tribunal's decision.

[5] A breach of section 39 of the Regulations is governed by the AAAMPA. Violations of the AAAMPA are absolute liability offences. A violation is established upon proof of the prohibited act, or the *actus reus*. Mistakes of fact and due diligence are not defences. Common law defences, including necessity, mental disorder and abuse of process however, are available: *Canada (Border Services Agency) v. Castillo*, 2013 FCA 271 at para. 21, 455 N.R. 50; *Doyon v. Canada (Attorney General)*, 2009 FCA 152, 312 D.L.R. (4th) 142. Subsections 18(1) and (2) of the AAAMPA makes this clear:

Certain defences not available

18 (1) A person named in a notice of violation does not have a defence by reason that the person

(a) exercised due diligence to prevent the violation; or

(b) reasonably and honestly believed in the existence of facts that, if true, would exonerate the person.

Common law principles

18 (2) Every rule and principle of the common law that renders any circumstance a justification or excuse in relation to a charge for an offence under an agri-food Act applies in respect of a violation to the extent that it is not inconsistent with this Act.

Exclusion de certains moyens de défense

18 (1) Le contrevenant ne peut invoquer en défense le fait qu'il a pris les mesures nécessaires pour empêcher la violation ou qu'il croyait raisonnablement et en toute honnêteté à l'existence de faits qui, avérés, l'exonéreraient.

Principes de la common law

18 (2) Les règles et principes de la common law qui font d'une circonstance une justification ou une excuse dans le cadre d'une poursuite pour infraction à une loi agroalimentaire s'appliquent à l'égard d'une violation sauf dans la mesure où ils sont incompatibles avec la présente loi.

[6] As a result, mental disorder, including automatism, is a potential defence.

[7] Whether the constituent elements of a defence have been identified by a judge is a question of law, reviewable on a correctness standard (*Vorobyov v. Canada (Minister of Agriculture and Agri-Food)*, 2014 FCA 102, at para. 28, 459 N.R. 134). In this case, the Tribunal did not address the evidentiary and legal elements necessary to establish the defence of automatism.

[8] The defence of automatism was described by the Supreme Court of Canada in *R. v. Stone*, [1999] 2 S.C.R. 290 (*Stone*), at paragraph 156 as “a state of impaired consciousness, rather than unconsciousness, in which an individual, though capable of action, has no voluntary control over that action.” Possible triggers for automatism include sleepwalking, blows to the head, and severe psychological blows.

[9] Two criteria must be met in order to establish the defence. First, there must be an assertion of involuntariness by the defence, and second, confirming psychiatric evidence. The Court is clear that the requirement of expert psychiatric evidence applies “in all cases” (*Stone* at paras.163, 187-188) and that genuine cases of automatism will be “extremely rare” (*Stone* at para. 180). Whether there exists a sufficient evidentiary foundation for the defence also takes into consideration relevant factors such as the severity of the triggering stimulus, corroborating evidence of bystanders, any medical history of dissociative states and evidence of motive. No one factor is determinative.

[10] Neither of the two requirements was met in this case.

[11] The respondent did not assert involuntariness, rather the evidence before the Tribunal was that she “forgot” about the apples (AB, Vol. 1, p. 224). Forgetfulness is simply a plea of mistake of fact, which is unavailable to her.

[12] Secondly, the medical records relied on by the Tribunal do not qualify as the psychiatric evidence required under *Stone*. The records are not from psychiatric specialists. There is no

indication that the evaluating physicians conducted psychiatric tests relevant to the state of automatism, nor do they make any conclusions as to the mental state of the respondent at the time of the offence. They make no observations of the relevant contextual factors. They simply do not engage the question whether the respondent was in an automatistic-type dissociative state at the relevant time.

[13] The requirement of psychiatric evidence is critical. It stems from the basic observation that courts, and most administrative bodies, are not comprised of medical experts. Without qualified expert testimony, they are unqualified to draw conclusions concerning an individual's physical or mental health, particularly in respect of complex dissociative conditions. In the absence of such evidence, the Tribunal's decision cannot stand.

[14] The respondent did not assert that she lacked voluntary control over her actions at the time of the alleged violation. Following her injury, she made the decision to board the plane rather than miss her flight. On arrival at Pearson International Airport she completed the customs declaration card, retrieved her luggage and had a discussion with a CBSA officer. The officer's notes of the conversation between her and the respondent do not indicate incoherence or disorientation. All of this evidence would be material and relevant to an expert qualified to express an opinion on whether the respondent was in an automatistic state.

[15] For the reasons above, the Tribunal did not properly apply the defence of automatism as set out in *Stone*, and in so doing erred in concluding that the defence was available in this instance.

[16] I would therefore grant the application and set aside the decision of the Tribunal. As there was only one possible conclusion open to the Tribunal on the record before it, I would not remit the matter but would reinstate the Minister's decision confirming the Notice of Violation of October 9, 2015.

[17] In the circumstances, I would not award costs.

“Donald J. Rennie”

J.A.

“I agree
Wyman W. Webb J.A.”

“I agree
J.B. Laskin J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

**APPLICATION FOR JUDICIAL REVIEW OF A DECISION OF THE
CANADIAN AGRICULTURAL REVIEW TRIBUNAL DATED MARCH 27, 2017,
DOCKET CART/CRAC-1907 (2017 CART 10)**

DOCKET: A-136-17

STYLE OF CAUSE: ATTORNEY GENERAL OF
CANADA V. ELENA KLEVTSOV

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: OCTOBER 3, 2018

REASONS FOR JUDGMENT BY: RENNIE J.A.

CONCURRED IN BY: WEBB J.A.
LASKIN J.A.

DATED: OCTOBER 26, 2018

APPEARANCES:

Jon Bricker FOR THE APPLICANT

Elena Klevtsov RESPONDENT

SOLICITORS OF RECORD:

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