COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Riesberry, 2014 ONCA 744
DATE: 20141028
DOCKET: C57616

Simmons, Rouleau and Tulloch JJ.A.

BETWEEN

Her Majesty the Queen

Appellant

and

Derek Riesberry

Respondent

Matthew Asma and Michael Kelly, for the appellant

Gregory Lafontaine, for the respondent

Heard: October 17, 2014

On appeal from the convictions entered by Justice Steven Rogin of the Superior Court of Justice, on August 15, 2013.

By the Court:

[1] The respondent is a licensed trainer of standardbred horses under the *Racing Commission Act, 2000*, S.O. 2000, c. 20. As such, he is subject to the Ontario Racing Commission's *Rules of Standardbred Racing*. On September 28, 2010, he was videotaped by a hidden camera injecting something into the

trachea of a horse at the Windsor Raceway. The horse raced about an hour later and finished sixth in that race. Subsequently, on November 7, 2010, the respondent was arrested as he entered the grounds of the race track. A search of the respondent and his truck following the arrest uncovered a syringe filled with performance-enhancing drugs.

[2] The syringe contained a combination of epinephrine and clenbuterol. Although epinephrine and clenbuterol have legitimate therapeutic applications, they can also be performance-enhancing drugs, depending on when and how they are administered. As a result, their use as performance-enhancing drugs on race day is prohibited.[1] Regardless of their contents, trainers are also prohibited from possessing loaded syringes at a race track.

[3] As a result of these events, the respondent was charged and tried for the following offences under the *Criminal Code*, R.S.C. 1985, c. C-46:

- defrauding the public of money wagered on the outcome of a horserace exceeding $5,000;
- cheating while playing a game with the intent to defraud members of the public engaged in wagering money on the outcome of a horserace;

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[1] The search also uncovered a second syringe containing a mixture of clotol and n-butyl alcohol. Clotol and n-butyl alcohol were not prohibited in 2010, and were not considered performance enhancing drugs. Accordingly, the contents of the second syringe are not relevant to this appeal.

- attempting to defraud the public of money to be wagered on the outcome of a horserace exceeding $5,000; and
- attempting to cheat while playing a game with the intent to defraud members of the public who would be engaged in the wagering of money on the outcome of a horserace.[2]

[4] The precise wording of the indictment in this case is important, because as the trial judge found, the references to "the public" foreclosed the Crown from relying on fraud or cheating directed at the other racers competing for the race's purse. Consequently, the issues at trial were argued entirely on fraud or cheating directed at the public at large.

[5] At trial, a veterinarian qualified to provide expert evidence testified that a tracheal injection of epinephrine was made so as to cause the drug to form a pool in the trachea of the horse and not be absorbed into the horse's blood vessels until the horse was stimulated by exercise, such as in a race. At that point, the drug would be inhaled and absorbed quickly, providing the horse with a potent stimulant.

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[2] The appellant was also charged with two other offences against regulations made under the authority of s. 204 of the *Criminal Code*. However, the Crown acknowledged at trial that it had not led evidence capable of proving those offences and acquittals were entered on those charges.

[6] The Crown's expert also testified that there was no legitimate medical reason for the injection that was recorded by the hidden camera. The trial judge accepted this evidence.

[7] In his reasons, the trial judge found that the respondent had injected a prohibited performance-enhancing drug into the horse on September 28, 2010, and that he had attempted to do the same on November 7, 2010.

[8] The trial judge found that the purpose of the injection was to enhance the performance of the horse, and not for any therapeutic purpose. The trial judge also found that the respondent was aware of the ban on loaded syringes at race tracks, and had nonetheless surreptitiously brought syringes containing banned substances onto the race track. In the trial judge's opinion, the injections were made "to create an unfair advantage" for the horse the respondent had entered in the race.

[9] Despite these findings, the trial judge acquitted the respondent on all charges.

[10] Concerning the fraud and attempted fraud charges, the trial judge was satisfied that the respondent had acted deceitfully. However, he found that the Crown had not proven deprivation beyond a reasonable doubt.

[11] The trial judge noted that the Crown argued that the betting public was deprived of its bet or was at least at risk of being deprived of its bet by the

respondent's deceit. However, he said that no evidence had been led that any member of the betting public placed a bet because they either knew or did not know about the injection. Moreover, the betting public did not participate in the race, they "only wagered on the outcome of it." In the trial judge's view, if anyone was deprived or at risk of deprivation, it was the other participants in the race who were all racing for the purses awarded to the winner. Yet that was not the fraud which the Crown had particularized in its indictment, since the indictment referred exclusively to "the public."

[12] For the same reasons, the trial judge found that there was no causal connection between the respondent's deceit and any deprivation the public would have suffered. Even if there was a causal connection, the trial judge relied on *R. v. Vézina*, [1986] 1 S.C.R. 2, to conclude that, assuming the betting public had suffered deprivation, the deprivation was too remote.

[13] Finally, the trial judge stated that the Crown had not led evidence of the amounts bet on the races at issue.

[14] Concerning the cheating while playing a game charges, the trial judge found that horseracing is not a game within the meaning of s. 197 of the *Criminal Code* because horseracing is a game of pure skill that does not include an element of chance.

[15] Further, the trial judge concluded that the "betting public … [was] too remote [from the respondent's] act of cheating." He observed that although the "betting public can win or lose their bet, the betting public is not really a participant in the race." Their bets are based on bettors' skill, or lack thereof, "acquire[d] by, among other things, reading the racing form and assessing the chances of winning by reference to the information listed in that form."

[16] Finally, in the trial judge's view, "the betting public was not deceived by [the respondent] cheating as they did not know about it." He said, "[t]here was no evidence that anybody placed any bet in reliance or non-reliance on the fact that the horse may have been injected with a performance enhancing drug." However, having said that, the trial judge went on to observe:

> I venture to say that in light of [the veterinarian's] evidence, that if the betting public had known of the injection, some might not have bet on the injected horse while others would, depending on their views of the efficiency of performance enhancing drugs. It would be but one of the various factors in addition to those enumerated in the racing form which bettors used to inform their wager.

[17] The Crown appeals from the acquittals and argues that the trial judge made several errors of law. The respondent submits that if the trial judge made

any errors, they were errors as to factual matters and therefore not subject to appeal by the Crown.[3]

A. THE FRAUD CHARGES

[18] Beginning with the fraud charges, it is undisputed on appeal that evidence was led at trial indicating that bets in excess of $5,000 were placed on both races. The trial judge's statement that no evidence was led on this matter constitutes an error in law because it indicates that he failed to consider the whole of the evidence: *R. v. J.M.H.*, 2011 SCC 45, [2011] 3 S.C.R. 197, at para. 31.

[19] The Crown also argues that the trial judge erred in law by concluding that the betting public was not put at risk of deprivation by the respondent's actions and that the risk of deprivation was too remote.

[20] Concerning the risk of deprivation issue, it was established at trial that horse racing is a highly regulated industry and that the regulatory scheme includes a ban on the presence of the performance-enhancing drugs utilized by the respondent in the body of a horse on race day. Given this regulatory scheme, bettors were entitled to bet on each race assuming that no horse in the race was affected by such drugs.

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[3] In oral argument, counsel for the respondent confirmed he was not relying on an argument raised in the respondent's factum that the trial judge erred in finding that, on September 28, 2010, the respondent injected a horse with a performance enhancing drug.

[21] In this regard, we agree with the Crown that the horseracing bettors are in a similar position to the investors in *R. v. Drabinsky*, 2011 ONCA 582. Just as investors were entitled to rely on the accuracy of the financial statements, bettors were entitled to assume compliance with the regulatory scheme. What occurred in this case was not a minor breach or minor non-compliance with the regulatory scheme. Where there is an attempt (successful or not) to affect the outcome of a race through the use of banned performance-enhancing substances, such a significant breach of the regulatory scheme necessarily places bettors at risk of being deprived of their bets. Indeed, as the trial judge found, the very purpose of the injection was to create "an unfair advantage" for the respondent's horse. It is obvious that a horse injected with performance-enhancing drugs could run differently than if it was not so injected; in fact, that appears to be at least part of the reason for the prohibition.[4]

[22] Further, as in *Drabinsky*, where there is a failure to disclose material non-compliance with the regulatory scheme, it is no answer to say bettors may have relied on other factors in making their bets. Bettors were entitled to assume compliance with the regulatory scheme when weighing those others factors and coming to a final decision. Non-compliance with the regulatory scheme in a manner so as to affect the outcome of a race necessarily puts the bettors'

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[4] See Ontario Racing Commission Rule 6.46.01 which bans the use of any substance on a horse that might "adversely affect the integrity of racing".

economic interests at risk. Bettors were deprived of information about the race that they were entitled to know; they were also deprived of an honest race run in accordance with the rules. In these circumstances, the trial judge erred in law because he failed to take account of the regulatory scheme in considering the risk of deprivation issue.

[23] Further, we agree with the Crown that the trial judge's reliance on *Vézina*, *supra* was misplaced. In *Vézina*, the Bank of Montreal was a mere conduit for bonds to be submitted to the Bank of Canada and had no money of its own at risk. Here, bettors had their bets at risk. The legal analysis in *Vézina* has no application to this case.

[24] Finally, in our view, the trial judge's closing comments that some bettors would have altered their betting behavior if they had known about the doping, and that the injections created "an unfair advantage" for the respondent's horse establish that but for his errors of law, he would have concluded that a risk of deprivation had been established.

[25] In our view, each of the errors committed by the trial judge could have affected his decision on the fraud and attempted fraud charges. In the result, we conclude that the trial judge erred in law in acquitting the respondent on the fraud and attempted fraud charges and we allow the appeal from the acquittals.

B. THE CHEATING WHILE PLAYING A GAME CHARGES

[26] As for the cheating while playing a game charges, in our view, the trial judge erred in his interpretation of a game as it is defined in ss. 197 and 209 of the *Criminal Code*.

[27] The respondent was charged with offences under s. 209 of the *Criminal Code*. That section provides in part:

> Everyone who, with intent to defraud any person, cheats while playing a game… is guilty of an indictable offence.

[28] Under s. 197 of the *Criminal Code*, a game for the purpose of s. 209 "means a game of chance or mixed chance and skill". However, the word "game" as it appears as part of the definition of a "game" is not further defined.

[29] In reaching the conclusion that there is no element of chance in horseracing, the trial judge relied on an American decision, *Harless and Addams v. The United States*, 1 Morris 169, 1843 Iowa Sup. LEXIS 15, in which the Iowa Supreme Court held that horseracing is a game of skill.

[30] However, in that case, the court said "[a]s generally understood games are of two kinds, games of chance and games of skill." The court did not take account of the possibility of a game of mixed chance and skill.

[31] As we have pointed out, the definition of game in s. 197 of the *Criminal Code* specifically refers to a game of mixed chance and skill. In relying on an

American decision that did not contemplate the possibility of a game of mixed chance and skill to support his conclusion that horseracing is a game of pure skill, the trial judge erred in law.

[32] As for the remoteness issue, in our view, the trial judge erred in law in his interpretation of s. 209. Under that section, a person who cheats while playing a game “with intent to defraud any person” is guilty of an offence. The words “any person” would clearly encompass any person betting on a race, and not just those participating in a race. Further, it is not incumbent on the Crown to prove that the respondent has profited from the deprivation or risk of deprivation.

[33] Concerning reliance, as explained above, bettors were entitled to rely on compliance with the regulatory scheme. It is no answer to say they also relied on other factors in making their bets. As the trial judge observed in this section of his reasons addressing cheating while playing a game, had they known about the doping, some bettors would likely have changed their behavior, while others would not. Thus, as a group, the betting public was deprived of information about the race that they were entitled to know; they were also deprived of an honest race run in accordance with the rules. As we said in the previous section of these reasons, in our view, the trial judge erred in law in failing to consider the regulatory scheme in relation to the issue of deprivation.

[34] In our view, each of these errors could have affected the result on the cheating while playing a game charges. In the result, we conclude that the trial judge erred in law in acquitting the respondent on these charges and we allow the appeal from the acquittals.

C. REMEDY

[35] Where this court allows a Crown appeal from an acquittal entered by a judge sitting alone, s. 686(4) of the *Criminal Code* authorizes this court to set aside the verdict and either order a new trial or enter a guilty verdict. The Crown asks that we enter guilty verdicts on all charges, or, in the alternative, order a new trial.

[36] To obtain an order setting aside an acquittal and directing a new trial, the Crown must demonstrate that the trial judge committed an error of law, and that the outcome of the trial might reasonably have been different if the error of law had not occurred (*R. v. Graveline*, 2006 SCC 16 at paras. 14-16).

[37] To obtain an order setting aside an acquittal and entering a guilty verdict on appeal, s. 686(4)(b)(ii) requires the Crown to go further and prove that “the accused should have been found guilty but for the error in law.” This is possible only where all the necessary findings of fact have been made for each element of the offence (either implicitly or explicitly), or if the facts are not in issue (*R. v. Cassidy*, [1989] 2 S.C.R. 345 at 354).

[38] Here, we conclude that but for the trial judge's legal errors, the respondent would have been found guilty of the fraud charges. The trial judge made a finding of deceitful and fraudulent conduct. However, he erred in failing to advert to the regulatory scheme and in his mistaken reliance on *Vézina*. But for these errors, his findings established a risk of deprivation caused by the appellant's deceitful conduct. Therefore, we set aside the acquittals and substitute guilty verdicts on the fraud and attempted fraud charges and remit these matters to the trial judge for sentencing.

[39] The situation is different with respect to the cheating while playing a game charges. As we have explained, the trial judge erred in law by applying the wrong legal test to determine whether horse-racing was a game of mixed chance and skill.

[40] The test for whether a game is one of mixed chance and skill was set out by the Supreme Court in *Ross, Banks & Dyson v. R.,* [1968] S.C.R. 786. A game of mixed chance and skill is one which in there is a "systematic resort to chance," to determine outcomes, and not merely "the unpredictables that may occasionally defeat skill."

[41] On appeal, the Crown submits that standardbred horse racing conducted according to the law in Ontario includes systemic resort to chance. The Crown relies on the Ontario *Rules of Standardbred Racing*, which require that starting

post positions be drawn by lot from among the entered horses that are eligible and selected to start: rule 17.09 and 17.10. At trial, the evidence showed that post position is determined by a computerized random post position generator and that certain post positions are more advantageous than others in that the advantageous positions provide shorter distances of travel. The Crown argues that these requirements and this evidence infuse horseracing with the necessary element of chance for the purposes of s. 193.

[42] The trial judge made no reference to this evidence, and the respondent argues that it establishes merely the unpredictables that may defeat skill, or at most a *de minimis* role of chance that does not meet the test in *Ross, supra*. In our opinion, this is a mixed question of fact and law which falls to the trier of fact to decide.

[43] As a result of his legal error, the trial judge never made the factual findings necessary to decide whether there is a "systematic resort to chance" to determine outcomes in horse-racing. Accordingly, while the respondent could reasonably have been convicted if the correct legal test were applied, the necessary findings of fact have not been made. We cannot substitute guilty verdicts on this ground.

[44] In addition, the Crown argued that even if horse racing was a game of pure skill, the appellant's deceitful conduct in this case transformed the horse-races at

issue into games of mixed chance and skill. For this argument, the Crown relied on the Supreme Court's judgment in *R. v. McGarey*, [1974] S.C.R. 278. There, the accused had secretly weighted some of the bottles in a game of bottle toss. The Supreme Court found that this type of cheating transformed the nature of the game in question from one of pure skill to one of mixed chance and skill.

[45] In our opinion, whether a particular form of cheating transforms a game of pure skill into a game of mixed chance and skill is a highly factual inquiry, for which the requisite factual findings have not been made in this case. We cannot substitute guilty verdicts on this ground.

[46] Accordingly, in relation to the cheating while playing a game charges, we set aside the acquittals and order a new trial.

Released:
"MT"
"OCT 28 2014"

"Janet Simmons J.A."
"Paul Rouleau J.A."
"M. Tulloch J.A."