

CANADA / JUDGMENT

Bessette v. British Columbia (Attorney General)

2016 BCSC 2416

COURT

Supreme Court of British Columbia

DECIDED

23 December 2016

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2016 BCSC 2416 Bessette v. British Columbia (Attorney General)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Bessette v. British Columbia (Attorney General),

2016 BCSC 2416

Date: 20161223

Docket: S178624

Registry: New Westminster

Between:

Joseph Roy Eric Bessette

Petitioner

And

Attorney General of British Columbia

Respondent

Before: The Honourable Mr. Justice Blok

Reasons for Judgment

Counsel for the Petitioner:

G. Garih

Counsel for the Crown:

T. Shaw

L. Chu

D. Havlovic

Place and Date of Hearing:

New Westminster, B.C.

December 16, 2016

Place and Date of Judgment:

New Westminster, B.C.

December 23, 2016

I. Background

- [1] On September 29, 2014, Joseph Bessette was charged with driving while prohibited, an offence under the Motor Vehicle Act, R.S.B.C. 1996, c. 318 [MVA]. Mr. Bessette disputes the charge.
- [2] Mr. Bessette, a francophone, seeks to have the trial of his MVA charge conducted in the French language. He asserts it is his right to have a trial in French by reason of the combined operation of s. 133 of the Offence Act, R.S.B.C. 1996, c. 338 and s. 530 of the Criminal Code. Section 133 of the Offence Act incorporates provisions of the Criminal Code where necessary and s. 530 of the Criminal Code provides for an accused to be tried in either of Canada's two official languages.
- [3] The respondent maintains that Mr. Bessette is not entitled to a trial in French as a matter of right because the charge concerns a provincial offence, not a Criminal Code or other federal offence, where different laws apply. The respondent says that provincial offences are to be tried in English by reason of the general adoption of English law in British Columbia as of November 19, 1858, a development in this province's legal history that is now reflected in s. 2 of the Law and Equity Act, R.S.B.C. 1996, c. 253. One of the English laws said to have been adopted in British Columbia is an Imperial statute of 1731 (4 Geo. 2, c. 26), which requires that all legal proceedings be in English only, a matter the respondent submits was confirmed by the Supreme Court of Canada in *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2013 SCC 42, [2013] 2 S.C.R. 774.
- [4] Mr. Bessette applied in Provincial Court for an order that his trial be conducted in French. In reasons given on July 13, 2015 and indexed as 2015 BCPC 230, Gulbransen, P.C.J. dismissed Mr. Bessette's application.

- [5] Mr. Bessette appealed that decision and set several successive dates for the hearing of that appeal before changing tack and filing a petition for judicial review. That petition was filed in its initial form on March 14, 2016 and in its amended form on April 12, 2016.
- [6] Accordingly, what is before this Court is a petition for judicial review of the order of the Provincial Court. It is not an appeal, as such.
- [7] In his petition Mr. Bessette seeks orders setting aside the dismissal of his application by the court below, as well as orders in the nature of certiorari and mandamus to compel the Provincial Court to conduct his trial in French.
- [8] There is, however, a threshold issue in this case. The respondent submits it is premature to review the decision below because it was an interlocutory ruling that will, if necessary, be reviewable by way of an appeal once the trial has concluded. The respondent says the extraordinary relief sought here is discretionary in nature and, as a result, superior courts have generally considered it inappropriate to intervene where there is an adequate remedy of an appeal.
- [9] The respondent also submits that, in prosecution proceedings, orders in the nature of certiorari and mandamus are limited to jurisdictional error and there is no jurisdictional error here because the judge in the court below unquestionably had the jurisdiction to decide the language application.
- [10] The petitioner does not dispute the proposition that superior courts generally do not intervene in prosecutions brought in provincial court, but notes that a superior court will intervene where special circumstances merit immediate intervention. The petitioner maintains that special circumstances are present in this case.

II. Discussion

- [11] I begin by addressing the threshold issue I have identified above.
- [12] Both parties cited *R. v. Duvivier* (1991), 64 C.C.C. (3d) 20 (Ont. C.A.), a case also called *R. v. Johnson* in some law reports, where a Ms. Johnson, the common law spouse of the accused Duvivier, challenged a subpoena served on her to compel her attendance at a preliminary inquiry. Doherty J.A., speaking for the court, said (at 23 - 25):

The jurisdiction to grant that relief, either by way of prerogative writ or under s. 24(1) of the Charter, is discretionary. It is now firmly established that a court should not routinely exercise that jurisdiction where the application is brought in the course of ongoing criminal proceedings. In such cases, it is incumbent upon the applicant to establish that the circumstances are such that the interests of justice necessitate the immediate granting of the prerogative or Charter remedy by the superior court

These cases dictate that issues, including those with a constitutional dimension, which arise in the context of a criminal prosecution should routinely be raised and resolved within the confines of the established criminal process which provides for a preliminary inquiry (in some cases), a trial, and a full appeal on the record after that trial.

Those same cases identify the policy concerns which underline the predilection against resort to the superior court for relief during criminal proceedings. Such applications can result in delay, the fragmentation of the criminal process, the determination of issues based on an inadequate record, and the expenditure of judicial time and effort on issues which may not have arisen had the process been left to run its normal course. The effective and efficient operation of our criminal justice system is not served by interlocutory challenges to rulings made during the process or by applications for rulings concerning issues which it is anticipated will arise at some point in the process. A similar policy is evident in those cases which hold that interlocutory appeals are not available in criminal matters

I stress, however, that this limitation on resort to Charter or extraordinary remedy relief during criminal proceedings has been judicially imposed and cannot be taken as the equivalent of an absolute privative clause barring all such applications. Where the circumstances are such that the interests of justice require immediate intervention by the superior court, that jurisdiction can and will be exercised.

[Citations omitted. Emphasis added.]

[13] The court in *Duvivier* (at 26) identified several situations where the courts have found, or might properly find, special circumstances sufficient to warrant the intervention of a superior court. The examples given are discussed in terms of Charter violations, a claim not advanced here, and so I have added the words "or other" in parentheses in order to include other types of alleged rights violations:

- a) where the superior court is the only court competent to grant the essential relief requested;
- b) where the applicant is suffering an ongoing significant Charter (or other) infringement;
- c) where refusing to consider the merits of the judicial review application will result in a substantial delay before the applicant may assert the Charter (or other) rights alleged;
- d) where the trial court is implicated in the alleged Charter (or other) violation; or
- e) where the Charter (or other) violation could be said to be "palpable" or "clearly threatened".

[14] Comments similar to those in *Duvivier* were made by our Court of Appeal in *R. v. M.P.S.*, 2014 BCCA 338. There, an accused sought to challenge a ruling by a preliminary inquiry judge concerning the applicability of s. 276(2) of the Criminal Code, a provision which prohibits the questioning of a complainant in a sexual offence prosecution about his or her sexual history unless the court determines the proposed evidence meets certain criteria. The court said:

[40] It seems to me that the law in this area is clear. A superior court has inherent supervisory jurisdiction, and there is no absolute requirement that it await the conclusion of an inferior tribunal's procedures before exercising that jurisdiction. That said, prerogative relief is discretionary, and a court will usually refuse such relief on the basis of prematurity if the tribunal has not completed its work. In *Vancouver (City) v. British Columbia (Assessment Appeal Board)* (1996), 135 D.L.R (4th) 48, this Court said:

26 The general rule seems clear in both criminal and civil proceedings: a tribunal should be permitted to complete its process and to render its final decision before judicial review is entertained.

[42] Concerns of judicial economy, efficiency, and deference will generally dictate that a superior court will adopt a "hands off" approach until the preliminary inquiry is complete. While there may be exceptional circumstances in which serious harm will occur without immediate intervention by the Supreme Court, such situations will be rare.

[Emphasis added.]

[15] The court added:

[44] Applications for certiorari in a criminal context are relatively rare in Canada. Certiorari is no longer used as an appeal mechanism in summary conviction matters (s. 833), and is not available where an appeal provision exists (s. 776). Given the broad rights of appeal in the Criminal Code, the Crown and the accused have very limited access to prerogative relief.

[45] In a civil law context, the development of the "pragmatic and functional approach" in *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048, and subsequent cases, and its gradual refinement into the "standard of review analysis" in *Dunsmuir v. New Brunswick*, 2008 SCC 9, have changed the language of judicial review. It is no longer common to speak of a "mere error of law" as opposed to an "error of jurisdiction". It is also not always necessary, in judicial review in a civil context, to explicitly demonstrate an error going to jurisdiction.

[46] These developments have not been mirrored in the law of prerogative relief in criminal matters.

[56] *Rao* [R. v. Rao, 2012 BCCA 275] illustrates the limits of certiorari in controlling the process at a preliminary inquiry. While a judge's refusal or neglect to follow a mandatory statutory provision will be characterized as a "jurisdictional error" and therefore be amenable to certiorari, an error of judgment in following a statutory provision will be characterized as a "mere error of law" and will not be amenable to prerogative relief.

[Emphasis added.]

[16] Although the present case does not involve Criminal Code charges but instead involves MVA charges with associated Offence Act procedures, the respondent says the same principles apply: *R. v. Sekhon*, 2016 BCSC 1697. The petitioner disputes that proposition.

- [17] In Sekhon the accused challenged a speeding ticket, and within those proceedings brought an application pursuant to s. 11(b) of the Charter, arguing that he had not been afforded a trial within a reasonable time. His application was dismissed. He appealed. Hinkson, C.J.S.C. dismissed the appeal, citing *R. v. Meltzer*, [1989] 1 S.C.R. 1764 and *R. v. Watson*, 2007 BCSC 1707, the latter which, in turn, quoted most of the same passages from *R. v. Duvivier* to which I have referred earlier. In short, Hinkson, C.J.S.C. said that the restrictive principles applicable to interlocutory relief in criminal proceedings are equally applicable to violation proceedings under the MVA. He concluded that the issue would have to be dealt with, if need be, after the matter was concluded in Provincial Court.
- [18] The respondent says that Sekhon is distinguishable because it is obvious that a trial delay argument ought not to be entertained until the actual trial. Although I agree that a delay argument is much more logically made at or after trial, there is nothing in the reasons of the court in Sekhon that indicates this was the basis for the decision. Instead, Hinkson, C.J.S.C. based his decision on the general rule that there are no interlocutory appeals in criminal matters, an approach he concluded applied equally to offences under the MVA.
- [19] Accordingly, I agree with the submission of the respondent that the principles applicable to extraordinary remedies and interlocutory relief in criminal proceedings, as set out in *R. v. Duvivier*, apply to offences under the MVA.
- [20] I return to Duvivier to discuss, under the sub-headings that follow, the situations identified in that case that might constitute special circumstances sufficient to warrant the intervention of a superior court.
- (a) Superior court the only court competent to grant the relief requested
- [21] The petitioner maintains the Supreme Court is the only court competent to grant the relief requested. The respondent says the Provincial Court was competent to rule on the issue and the petitioner may still appeal that ruling through an ordinary appeal should he be convicted of the offence following a trial.
- [22] I agree with the respondent's submission on this point. The fact that the ruling went against the petitioner in the court below does not mean this Court is the only court competent to grant the relief requested. The Provincial Court may have been right or it may have been wrong in its ruling – a matter on which I express no opinion – but it was competent to make the ruling it did.
- (b) Applicant suffering ongoing significant Charter (or other) infringement
- [23] The petitioner says the right he asserts in this case is related to the conduct of the trial and for that reason he does not have a meaningful remedy if he must wait until after trial to seek it. The respondent says the petitioner has a remedy, in part at least, of having French-English interpretation during the trial and has a remedy on the language rights point by way of an appeal (if he is convicted of the offence) and a re-trial, if ordered.

- [24] Although I do not agree that the availability of French-English interpretation at trial necessarily provides a remedy in the sense that "remedy" is used in the context of language or other statutory or Charter rights, I agree that it is not apparent that there is, in fact, an "ongoing significant" infringement of the petitioner's rights. This is a contested issue that is best left for argument on an appeal in its proper sense.
- (c) Refusing to consider the merits of the judicial review application will result in a substantial delay before the applicant may assert the Charter (or other) rights alleged
- [25] The petitioner submits that the alternate remedy of an appeal runs contrary to concerns about judicial economy. He says it is absurd to wait for such a remedy when the matter can be dealt with now and a possible second trial can be avoided.
- [26] The respondent says that judicial economy favours proceeding by way of a proper appeal (in the event of a conviction), where the issue can be dealt with as a clear, discrete and defined issue without the complicating overlay of the concepts of discretion and judicial restraint associated with the law of judicial review.
- [27] In my view, this case illustrates the point made in Duvivier about applications that "can result in delay, the fragmentation of the criminal process, the determination of issues based on an inadequate record, and the expenditure of judicial time and effort on issues which may not have arisen had the process been left to run its normal course". The incident giving rise to this case took place in June 2014 and the MVA charges were laid in September 2014. The decision on the language application was made in July 2015. Leaving aside the three dates set for the appeal (which, as noted earlier, did not proceed), since that ruling there have been seven court hearings to fix dates for trial and still the trial has not taken place.
- [28] To deal with this issue now, on judicial review, might result in further appeals and then, ultimately, the actual trial. Counsel agreed that the trial of this matter might conclude in an hour of trial time or even less, so it is not a case of potentially avoiding the cost and inconvenience of a lengthy trial.
- [29] The petitioner also indicated that one of the defences that may be raised at trial is his asserted right to have been given notice, in French, of the fact that he was prohibited from driving. Accordingly, the process urged upon me by the petitioner could result in two language-rights appeals, one via the current judicial review route (to deal with the language at trial) and the other by way of an ordinary appeal following the trial (to deal with the language issue concerning the notice of prohibition). This is a highly undesirable prospect.
- [30] For the reasons identified in Duvivier I conclude that judicial economy strongly favours the adjudication of the language issue or issues following an ordinary appeal and not by way of judicial review of the ruling from the court below.
- (d) Trial court is implicated in the alleged Charter (or other) violation

- [31] The petitioner says the trial judge is directly implicated in the violation of what he describes as his quasi-constitutional language rights. The respondent notes that the petitioner's submission on this point presumes that the petitioner will be successful on appeal or through judicial review, a point the respondent says is not at all apparent given the case authorities that go against the petitioner's argument.
- [32] In the case of this particular Duvivier scenario the authority relied upon by the Ontario Court of Appeal was *R. v. Rahey*, [1987] 1 S.C.R. 588, an income tax prosecution case. In *Rahey*, after the close of the Crown's case at trial there were a series of adjournments (19 in all), all of which were initiated by the trial judge. The accused sought relief for a breach of his s. 11(b) Charter right (trial within a reasonable time) by way of a petition to the superior court. The superior court granted that application and dismissed the charges. In the Supreme Court of Canada Lamer J. (as he then was) said the superior court judge "was obviously right in choosing to exercise her jurisdiction instead of leaving matters to the trial judge".
- [33] The situation in *Rahey* is obviously different from the one at bar. In *Rahey* the trial judge was the source of an ongoing problem. Here, the trial judge has merely made a ruling which the petitioner disagrees with, albeit relating to the conduct of the trial. In *Rahey* it was not appropriate to seek relief from the source of the problem; here, an application was made by the petitioner but the judge dismissed it. This is the stuff of ordinary appeals, not extraordinary remedies. As noted in *R. v. Corbeil* (1986), 27 C.C.C. (3d) 245 at 255 (Ont. C.A.):

When the question of infringement and the allegation of continuing infringement have been decided by a court of competent jurisdiction, the appropriate remedy is by way of appeal in due course.

(e) Charter (or other) violation is "palpable" or "clearly threatened"

- [34] The parties disagree about whether the alleged violation here is "palpable" or "clearly threatened". Both offer arguments in support of their positions and both make interesting points.
- [35] I find it unnecessary to address these submissions other than to say I am satisfied that the alleged violation is far from "palpable" or "clearly threatened". In other words, the decision of the learned judge below is not so obviously wrong (if indeed it is wrong at all) that it merits immediate intervention by this Court.
- [36] For the foregoing reasons I conclude the petitioner has failed to establish that the circumstances of this case are such that the interests of justice require the immediate granting of the prerogative remedies sought. His remedy is through an appeal, if necessary, after the trial of this matter has concluded.
- [37] In light of this conclusion it is unnecessary for me to consider the merits or substantive issue in this case. The petition fails on the threshold issue.

III. Conclusion

[38] The petition is dismissed.

"Blok J."

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