

CANADA / JUDGMENT

British Columbia (Attorney General) v. Brooks

2024 BCSC 2478

COURT

Supreme Court of British Columbia

DECIDED

24 January 2024

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2024 BCSC 2478 British Columbia (Attorney General) v. Brooks

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

British Columbia (Attorney General) v. Brooks,

2024 BCSC 2478

Date: 20240124

Docket: 182612-1

Registry: Victoria

Between:

British Columbia (Attorney General)

Applicant

And:

The Honourable Judge Brooks

of the Provincial Court of British Columbia

Respondent

And:

Rachel Andrea Taylor

Respondent

Before: The Honourable Mr. Justice Gaul

Oral Reasons for Judgment

Counsel for the Applicant (Petitioner):

C. Jennings, K.C.

A. Pace

For the Respondents:

No appearance

Place and Date of Trial/Hearing:

Victoria, B.C.

November 7, December 21, 2023

January 8, 10, 2024

Place and Date of Judgment:

Victoria, B.C.

January 24, 2024

- [1] THE COURT: The Attorney General of British Columbia seeks an order of certiorari quashing an order of the Provincial Court of British Columbia that dismissed for want of prosecution a case that was before the court for sentencing. Additionally, the Attorney General seeks to have the matter remitted to the Provincial Court with the requirement that the court proceed with the sentencing hearing.
- [2] Quite understandably and consistent with its usual practice in situations like the present one, no response has been filed on behalf of the respondent Provincial Court Judge, nor were submissions made on their behalf at the hearing of the Attorney General's petition.
- [3] As for the respondent, Ms. Rachel Taylor, the accused in this matter, I have no response from her either and no one appeared on her behalf at the hearing of the petition. The Attorney General had difficulties contacting Ms. Taylor to notify her of its petition and to serve her with the relevant materials. Eventually, the Attorney General sought and obtained an order permitting it to serve Ms. Taylor substitutionally. I am satisfied that the Attorney General has complied with the terms of that substitutional service order.

Background Facts

- [4] The relevant facts of this matter are reasonably straightforward and with some minor modifications I will simply rely on what is contained in the Attorney General's written statement of argument.

- [5] On 6 August 2021, Ms. Taylor was charged with four property-related offences alleged to have taken place on 25 and 26 February 2021. Specifically, she was charged on Information 182612-1 with:
- a) theft of blank cheques, contrary to s. 334(b) of the Criminal Code;
 - b) using forged cheques, contrary to s. 368(1)(a) of the Code;
 - c) fraud, contrary to s. 380(1)(b) of the Code; and
 - d) fraudulent impersonation, contrary to s. 403(1)(a) of the Code.
- [6] The Crown chose to prosecute Ms. Taylor summarily.
- [7] On 8 December 2021, Ms. Taylor attended with her legal counsel in Provincial Court and entered guilty pleas to Counts 2 and 3 on the Information. At the request of defence counsel, the court ordered the preparation of a presentence report and a psychiatric report. The court then adjourned the matter to 14 February 2022 to confirm the receipt of the reports and to fix a date for a sentencing hearing.
- [8] Ms. Taylor or her counsel, and Crown counsel appeared in Provincial Court on 11 further occasions, after the initial appearance in December 2021. These consisted of:
- a) appearances to seek an extension of time for the completion of the reports;
 - b) appearances to determine whether the reports had been completed;
 - c) an appearance for Ms. Taylor's then counsel to withdraw as counsel of record;
 - d) an appearance to confirm Ms. Taylor had retained new counsel and that counsel was now counsel of record;
 - e) further appearances to determine whether the reports had been completed, and
 - f) scheduling appearances.
- [9] Ms. Taylor's sentencing hearing was eventually scheduled for 28 February 2023. Regrettably, the series of misunderstandings and mistakes that led to the order dismissing the charges against Ms. Taylor, began the day before her sentencing date.
- [10] On the afternoon of 27 February 2023, Ms. Taylor's counsel's legal assistant sent Crown counsel the following message:

Further to your email below I advise that our office has not received the scheduling notice for tomorrow.

Unfortunately this matter is not in Ms. Allouche's calendar as a result.

It is my understanding that we have not been able to make contact with Ms. Taylor for some time and that I anticipate Ms. Allouche would be making an application to get off the record.

Given the circumstances that you are coming into court for this matter only, perhaps it would be prudent to adjourn?

- [11] Unfortunately, the deadline for adjourning hearings via the judicial case manager's office had passed and consequently Crown counsel replied to defence counsel's legal assistant advising that the adjournment would need to be obtained in court the next day on the 28th.
- [12] Ms. Taylor's case came before His Honour Judge Brooks on 28 February 2023. Again, in an unfortunate turn of events, the Crown prosecutor who had conduct of Ms. Taylor's case was absent. Unbeknownst to everyone present, they had been sick overnight and inadvertently slept through their wakeup alarm.
- [13] At the outset of the hearing Ms. Taylor's counsel specifically informed the court that Ms. Taylor was...

content to enter a guilty plea but that she's -- she has COVID and isn't well, and is asking for the sentencing to be adjourned for a short period of time.

Counsel added:

However, I'm not certain that Crown is aware that this is going to proceed, and really just ask for your direction as to whether we should be entering a guilty plea this morning, and asking for an adjournment?

- [14] I will pause here to note parenthetically that obviously Ms. Taylor's counsel misspoke, for Ms. Taylor had already entered guilty pleas in December of 2021.
- [15] Counsel for Ms. Taylor advised the court of the identity of the Crown counsel with whom she and her office had been communicating. Judge Brooks asked that a broadcast be made, paging the prosecutor to attend his courtroom. That step yielded no results. Counsel for Ms. Taylor and court staff also attempted to reach the prosecutor in question; however, they were unable to do so. I understand they only placed calls to the prosecutor's personal phone number.
- [16] I again note parenthetically that it is somewhat surprising that no attempt was made to call or contact the local Crown counsel office to determine the whereabouts of the missing prosecutor. If that had been done one could reasonably assume that another Crown counsel could have and would have promptly appeared in court to address Ms. Taylor's case. Be that as it may, this was not done and after waiting approximately 20 minutes Judge Brooks stated the following:

All right. So the matter of Ms. Taylor is on the list today on Information 182612. It is a four-count information. The scheduling notice indicates it is here for indicated guilty plea and Ms. Taylor is here and her counsel is here, but no Crown counsel has shown up.

I have a scheduling notice in front of me for this date and time and this courtroom for an indicated guilty plea of 45 minutes. Time estimates with regard to guilty pleas are usually arrived at by discussion with both Crown and defence, so I am satisfied that there was discussion with Crown counsel about how much time was going to be set aside for this.

The matter was set to today, and I have just been told by Madam Clerk that the Crown was notified specifically about documentation for today's appearance.

It is now 9:48. We have paged Crown counsel. We have done everything that we can in order to have this matter heard, and Crown counsel simply has not bothered to show up.

In those circumstances this matter is dismissed for want of prosecution. Thank you. That is the conclusion of the matter.

The Petition

- [17] Within an hour of the order in question, the prosecutor who had missed the hearing earlier that morning, contacted the judicial case manager in an effort to have Ms. Taylor's matter recalled in court so that they could explain the situation and address it appropriately. That Crown request was denied, resulting in the current petition and the Attorney General's request that the order dismissing the case against Ms. Taylor be quashed and the proceedings against Ms. Taylor reinstated.
- [18] In *R. v. Awashish*, 2018 SCC 45, Mr. Justice Rowe writing for a unanimous court addressed the legal principles relating to certiorari and explained:
- [11] ... The use of certiorari is therefore tightly limited by the Criminal Code and the common law so as to ensure that it is not used to do an "end-run" around the rule against interlocutory appeals (*R. v. Robertson* (1988), 41 C.C.C. (3d) 478 (Alta. C.A.), at p. 480). For example, in preliminary inquiries, jurisdictional error must be shown for certiorari to be granted. This includes where the preliminary inquiry judge commits an accused to stand trial in the absence of any evidence on an essential element of the offence (*Skogman v. The Queen*, [1984] 2 S.C.R. 93, at p. 104), or acts contrary to the rules of natural justice (*Patterson v. The Queen*, [1970] S.C.R. 409, at p. 414, per Hall J.; *Forsythe v. The Queen*, [1980] 2 S.C.R. 268, at p. 272; *Dubois v. The Queen*, [1986] 1 S.C.R. 366, at p. 377, *R. v. Deschamplain*, 2004 SCC 76, [2004] 3 S.C.R. 601, at para. 17).
- [23] ... In the criminal context, jurisdictional errors occur where the court fails to observe a mandatory provision of a statute or where a court acts in breach of the principles of natural justice...

Position of the Attorney General

- [19] The Attorney General contends that an order for certiorari is available and appropriate in the current situation because the presiding Provincial Court judge committed a jurisdictional error when he proceeded to terminate the prosecution of Ms. Taylor without

giving the Crown the opportunity to address the merits of its case or, for that matter, the immediate issue that had arisen on the 28th, that being the unexplained absence of the Crown prosecutor. Moreover, the Attorney General maintains that the presiding judge exceeded his jurisdiction and thus fell into error by dismissing the charges against Ms. Taylor when, as a matter of law, he had no legal capacity to do so.

Breach of the Principles of Natural Justice

- [20] Affording the parties to a litigation a fair and reasonable opportunity to be heard is one of the fundamental principles of natural justice.
- [21] In my opinion, the unfortunate cascade of circumstances that I have listed earlier in these reasons induced Judge Brooks to adopt a course of action that amounted to a breach of natural justice. That is, he did not give the Crown sufficient opportunity to address the case before the court.
- [22] It is clear from the record of proceedings that the Crown had every intention of proceeding with and prosecuting the case against Ms. Taylor. There had been more than 15 appearances in Provincial Court over the course of nearly two years. Most if not all of those appearances were adjourned at the behest of Ms. Taylor, meaning the consequential delay in getting the matter concluded was attributable principally to Ms. Taylor.
- [23] It also must not be forgotten that Ms. Taylor's counsel never referred to or sought a dismissal of the charges when she appeared in court on 28 February 2023. All she requested was another adjournment. Judge Brooks did not address that request. Instead, on his own motion, he dismissed the charges against Ms. Taylor.
- [24] In my respectful opinion, before taking the drastic step of ordering the dismissal of Ms. Taylor's case, greater efforts ought to have been made to contact the local Crown counsel office so that it could be advised of the developing situation and the fact that the court was considering dismissing the charges. Moreover, Judge Brooks should have been advised of the true factual foundation of the case before him. By this I mean, Judge Brooks should have been advised that the matter was not before him for guilty plea, as Ms. Taylor had already entered guilty pleas.
- [25] In *R. v. Helmka*, [1993] B.C.J. No. 3044 (S.C.) Mr. Justice Esson, as he then was, granted an application for an order of certiorari quashing the order of a Provincial Court judge who had dismissed a charge for want of prosecution. When the case was called 15 minutes after the start of court, the accused, Mr. Helmka, and his counsel appeared but no one was present for the Crown. The judge asked if the prosecutor responsible for the case was present in the courtroom. They were not. The judge observed, "There does not appear to be anybody here," following which he invited defence to make an application. Counsel for the accused accepted the invitation and said simply, "Dismiss it for want of prosecution." The judge replied, "So ordered." In granting the prerogative relief sought by the Crown, Justice Esson concluded:

- [6] In my view, to dismiss for want of prosecution on a first appearance without a factual basis for concluding that the Crown did not intend to proceed is to fail to exercise the discretion judicially. To justify such a result, there must be more than some minor tardiness or lack of courtesy on the part of Crown counsel.
- [26] In my opinion, these observations of Justice Esson are apposite to the case before me. Like the provincial court judge in Helmka, I find Judge Brooks did not have a factual foundation, let alone an accurate one, for concluding that the Crown did not intend to proceed with the prosecution of Ms. Taylor and that the circumstances before the court warranted the exceptional order of dismissing the case against Ms. Taylor.
- [27] It bears repeating that Judge Brooks was under the significant misapprehension that Ms. Taylor was present before him for the purpose of entering a plea to the charges against her, when in fact she had already entered guilty pleas. In my opinion, had Judge Brooks been aware of the true history of the case before him, including the fact that Ms. Taylor had already entered guilty pleas, he would very likely have acted differently and not ordered the case dismissed for want of prosecution.
- [28] In my opinion, in proceeding in the manner that he did, Judge Brooks denied the Crown the fundamental right to be heard and this resulted in a jurisdictional error.

Jurisdiction to Dismiss for Want of Prosecution

- [29] The Crown also contends that Judge Brooks did not have the statutory jurisdiction to make the order that he did. Given my conclusion that there was a breach of natural justice resulting in a jurisdictional error, it is not specifically necessary for me to address this second aspect of the Attorney General's argument. I will do so, however, in case I am wrong in having concluded there was a breach of natural justice in this case.
- [30] The Provincial Court of British Columbia is a statutory court established by the Provincial Legislature. Its jurisdiction in criminal matters is conferred expressly or by necessary implication by the Criminal Code of Canada or other relevant legislation. In this regard, Mr. Justice Bouck observed in *R. v. Topping*, 2000 BCSC 689:
- [13] *R. v. Doyle* (1976), 29 C.C.C. (2d) 177 at 181 (S.C.C.) is authority for the proposition that a Provincial Court Judge has no jurisdiction in criminal matters except those that are conferred expressly, or by necessary implication, on the Judge by the Criminal Code or other relevant statute:

Whatever inherent powers may be possessed by a superior court judge in controlling the process of his own Court, it is my opinion that the powers and functions of a magistrate [Provincial Court Judge] acting under the Criminal Code are circumscribed by the provisions of that statute and must be found to have been thereby conferred either expressly or by necessary implication.

[31] Sections 485, 799 and 803(4) of the Code confer upon a Provincial Court judge the ability to dismiss a case for want of prosecution in specific instances. These provisions of the Code read in part:

485 (1) Jurisdiction over an offence is not lost by reason of the failure of any court, judge, provincial court judge or justice to act in the exercise of that jurisdiction at any particular time, or by reason of a failure to comply with any of the provisions of this Act respecting adjournments or remands.

...

(3) Where no summons or warrant is issued under subsection (2) within the period provided therein, the proceedings shall be deemed to be dismissed for want of prosecution and shall not be recommenced except in accordance with section 485.1.

...

799 Where, in proceedings to which this Part applies, the defendant appears for the trial and the prosecutor, having had due notice, does not appear, the summary conviction court may dismiss the information or may adjourn the trial to some other time on such terms as it considers proper.

...

803(4) Where the prosecutor does not appear at the time and place appointed for the resumption of an adjourned trial, the summary conviction court may dismiss the information with or without costs.

[32] Section 485 of the Code only applies to situations where jurisdiction over the accused has been lost and consequently, in my view, this provision has no applicability to the present case.

[33] Additionally, in my opinion sections 799 and 803(4) of the Code only apply in circumstances involving an accused's trial. In *R. v. Sauve*, 2016 SKCA 85, Justice Ottenbreit of the Saskatchewan Court of Appeal explained:

[17] The purpose of the adjourned date is the governing factor. Whether ss. 799 and 803(4) apply requires a determination of whether the purpose of the adjourned date was for the trial to proceed on that date. Where a matter has been adjourned to a docket courtroom to be spoken to, it is not adjourned to a trial date. There is therefore no jurisdiction in the summary conviction court on such a return date to dismiss the information for want of prosecution.

[34] At the hearing on 28 February 2023, the court never called upon the accused, Ms. Taylor, to enter pleas to the charges against her. In other words, neither the court nor the defence treated the appearance on 28 February 2023 as a trial date. As a matter of law, Judge Brooks could not have called on Ms. Taylor to enter pleas or proceeded with a trial, for she had already entered guilty pleas in December 2021 and those pleas had not been withdrawn.

- [35] In light of all this, I find neither section 799 nor section 803(4) empowered Judge Brooks to dismiss the case against Ms. Taylor for the reason that he did. Given that there was no other source of authority, I find that by making the order in question, Judge Brooks exceeded his jurisdiction and thereby committed a jurisdictional error.
- [36] I find support for my conclusion in *Topping*, where Justice Bouck explained:
- [27] Here, the Judge did not call upon the accused to plead guilty or not guilty. Therefore, the Judge could not rely on s. 799 to dismiss the information. Because there was no express Criminal Code section allowing the Judge to dismiss the information before plea, and no implicit right for the Judge to do so, the Judge acted without jurisdiction.
- [37] I note in passing that in *R. v. Ahrens*, 2000 BCSC 995, Madam Justice Smith, when she was a member of this court, endorsed and adopted Justice Bouck's reasoning in *Topping*.
- [38] In *R. v. Norn*, 2021 NWTSC 35, the presiding justice declined to follow the reasoning and decision in *Sauve*, finding it was based on dated jurisprudence which favoured a very narrow and outdated interpretation of the power of statutory courts. In the justice's view, a more modern perspective of provincial and territorial courts was justified and called for; one that recognized that territorial court judges and their provincial counterparts have the authority to dismiss charges for want of prosecution as part of their power to control the process.
- [39] In *R. v. Fabian*, 2021 NWTCA 9, the Court of Appeal found that the decisions of a territorial judge to dismiss various cases for want of prosecution were unreasonable. In addressing whether a statutory court has the authority to dismiss cases for want of prosecution as part of its general power to control its process, the court observed:
- [10] The Criminal Code contains some specific provisions about dismissal for want of prosecution: s. 485, 799, and 803(4). The failure of the Crown prosecutor to attend on indictable matters, or at pre-trial proceedings in summary conviction matters, is not included: compare *R. v. Sauve*, [citation omitted]. It is not necessary to decide whether the court has a necessary incidental statutory jurisdiction to dismiss for want of prosecution in the circumstances, but it is clear that, even if so, this would be a remedy reserved for serious abuses of process related to the particular case.
- [11] There were also procedural problems with the approach taken. The Crown prosecutor was never given an opportunity to explain why she was late. The record does not disclose whether she knew that some of her colleagues had recently run into the same problem. If she had been allowed to make submissions by telephone, she could have explained the circumstances, and the trial judge could have expressed his displeasure on the record, in open court.

- [40] I respectfully do not share the opinions expressed in Norn regarding the powers of statutory courts, and in particular the conclusion that judges of such courts are able to dismiss a case for want of prosecution as part of their general power to control the court's process.
- [41] The provisions of the Code clearly articulate in what circumstances a statutory court can dismiss a case for want of prosecution, and in my respectful opinion that is determinative of the scope of a Provincial Court judge's power and authority on this issue.
- [42] In my view, the legal principles relating to the power of a Provincial Court judge to dismiss a case for want of prosecution continue to be those expressed by Justice Bouck in Topping.

Conclusion

- [43] In Topping, Justice Bouck astutely noted:
- [23] On a judicial review, it is easy to criticize busy trial judges when they err. In many instances, it is impractical for trial judges to adjourn questionable matters to do legal research. This was one of them. Here, the Judge did not have the assistance of Crown counsel when he made his ruling. On this application, I had the benefit of oral and written submissions from both sides, plus the added luxury of reserving my decision so I could examine the relevant authorities.
- [44] I too recognize the busy and challenging environment that Provincial Court judges face on a regular basis and find the observations of Justice Bouck apply in the case before me. While I did not have submissions from Ms. Taylor, I did have helpful and as expected, fair and balanced submissions from the Attorney General's counsel.
- [45] In my opinion, the judge presiding on 28 February 2023 committed jurisdictional errors when he dismissed the charges against Ms. Taylor for want of prosecution. He did so by breaching the principles of natural justice and by exceeding the jurisdiction granted to him under the Criminal Code.
- [46] The Attorney General had the option of appealing from the presiding judge's order. They could also have laid a new Information charging Ms. Taylor with the same offences. The Attorney General chose neither of those options, preferring instead to proceed by way of the present petition and its request for an order of certiorari and mandamus. Generally, the court will be hesitant to grant such relief when other remedies are available.
- [47] In the present circumstances, I find it was appropriate and made practical sense for the Attorney General to proceed as they did. Ms. Taylor had entered guilty pleas. A presentence report had been prepared. I agree with counsel for the Attorney General that laying a new Information would not remedy the injustice in this case because it would place Ms. Taylor in a position of effectively having her guilty plea withdrawn without any evidentiary basis or justification for doing so.

- [48] In my opinion, the reasonable and appropriate avenue to address the jurisdictional errors committed by the presiding judge was the one adopted by the Attorney General.
- [49] For all of these reasons, I am granting the relief sought in the Attorney General's petition. That is, I will grant an order in the nature of certiorari with mandamus in aid quashing Judge Brooks' order of 28 February 2023 and remit the matter to him or another judge of the Provincial Court of British Columbia so that Ms. Taylor's sentencing hearing can proceed.

"G. R. J. Gaul, J."

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