

CANADA / JUDGMENT

Poisson v. Canada (Attorney General)

2002 BCSC 753

COURT

Supreme Court of British Columbia

DECIDED

15 May 2002

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

Source record

2002BCSC0753

Citation: Poisson v. Canada (Attorney General)

Date: 20020515
2002 BCSC 753

Docket: CC991288
Registry: Vancouver
IN THE SUPREME COURT OF BRITISH COLUMBIA
IN THE MATTER OF AN APPLICATION BY A PERSON
CLAIMING RELIEF FROM FORFEITURE PURSUANT TO S. 462.42
OF THE CRIMINAL CODE OF CANADA
AND
IN THE MATTER OF CHRISTOPHER BELL
AND
IN THE MATTER OF FORFEITURES MADE UNDER S. 462.37(1)
OF THE CRIMINAL CODE AS PART OF THE SENTENCING OF CHRISTOPHER BELL
AT THE PROVINCIAL COURT OF REVELSTOKE, BRITISH COLUMBIA, HOLDEN AT
VANCOUVER, BRITISH COLUMBIA, ON SEPTEMBER 29, 1999

BETWEEN: DENNIS POISSON
APPLICANTAND: ATTORNEY GENERAL OF CANADA
RESPONDENT

REASONS FOR JUDGMENT**OF THE****HONOURABLE MADAM JUSTICE BEAMES****Counsel for the Applicant:**

Adrian F.P. Brooks

Counsel for the Respondent:

Lisa J. Pindera

Date and Place of Hearing:

March 26, 2002

Vancouver, BC

INTRODUCTION:

- [1] The applicant has applied, pursuant to s. 462.42 and related provisions of the Criminal Code, R.S.C. 1985, c. C-46, for the return of money ordered forfeited by His Honour Judge Overend on September 29, 1999. The hearing of the application is scheduled for August 2002. The applicant has made an application for a preliminary ruling as to what needs to be proved by the applicant in order to secure the return of the money forfeited.

BACKGROUND:

- [2] In the early morning hours of March 28, 1999, the RCMP stopped a van that was travelling on the Trans Canada Highway near Revelstoke. The driver of the van was Christopher Patrick Bell. The van was registered to a company named Absolut Holdings Incorporated. Upon being asked by the police officer, Mr. Bell admitted to having some marijuana in his possession. He was arrested, and incidental to his arrest, the van was searched. The police found \$120,000 in Canadian currency in the van. Mr. Bell was released later on March 28th, having first signed a relinquishment of claim, releasing any claim to the \$120,000.
- [3] On June 29, 1999, a two-count Information was sworn against Mr. Bell. The second count was as follows:

Count # 2

Christopher Patrick BELL, at or near the City of Revelstoke, in the Province of British Columbia, and in other places both in an[d] out of Canada, on or about the 28th day of March, 1999 unlawfully did have in his possession property or proceeds of property, to wit: \$120,000.00 Canadian funds, knowing that all or part of the said property or of those proceeds was obtained

by or derived directly or indirectly from the commission in Canada of offences under Sections 5 and 6 of the Controlled Drugs and Substances Act, contrary to Section 8 of the Controlled Drugs and Substances Act.

[4] On September 29, 1999, the matter came before His Honour Judge Overend in Provincial Court in Revelstoke. A transcript from the attendance indicates that Christopher Johnston appeared for the Federal Crown and Robert Blakely appeared for and with Mr. Bell. The entirety of the transcript, up to the point that counsel commenced making submissions with respect to sentence, reads as follows:

[Lines 1-15 p. 1]

MR. JOHNSTON: Christopher Patrick Bell, that's a matter for disposition. We'll deal with that first.

THE COURT: Mr. Blakely, are you on that matter?

MR. JOHNSTON: He is, Your Honour. If he could be paged, Madam Clerk.

THE CLERK: Christopher Bell to the courtroom please.

MR. BLAKELY: This is Mr. Bell, Your Honour. There should be a two-Count C Information --

THE COURT: Yes.

MR. BLAKELY: -- and I have instructions from Mr. Bell to enter a guilty plea to Count 2.

THE COURT: All right. Are you ready to deal with disposition at this time.

MR. BLAKELY: We are.

THE COURT: Thank you. Circumstances?

[5] Sentencing submissions were then made, which included reference to the \$120,000 which had been seized. At page 5 of the transcript, the court imposed sentence. In the course of sentencing, the court made reference on two occasions to the seriousness of the offence. On page 6 of the transcript, immediately after sentence was imposed, the following appears:

[Lines 1-4 p. 6]

MR. JOHNSTON: Your Honour, although there has been a relinquishment signed, I'd also be requesting an order of forfeiture of the money seized.

THE COURT: Yes. There is an order of forfeiture.

[6] That order was formalized, and the filed copy of the order, signed by the judge, counsel for the Federal Crown and counsel for the accused, reads as follows:

UPON the conviction of the accused Christopher Patrick Bell, before me at Revelstoke, British Columbia, on the 29th day of September, 1999, of an offence contrary to Section 8 of the Controlled Drugs And Substances Act and upon hearing Christopher H. Johnston, Esq., Agent for the Attorney General of Canada, and Robert V. Blakely, Esq., on behalf of the accused;

THIS COURT ORDERS that the \$120,000 in Canadian funds seized from the accused, Christopher Patrick Bell, be forfeited to Her Majesty The Queen in Right Of Canada.

- [7] The record of proceedings, page 2, notes that on September 29, 1999, Count 1 was stayed and there was a guilty plea to Count 2. The details of the sentence imposed on Count 2 are recorded. The record also indicates that the forfeiture order was granted. Although there are places on the record for making notations with respect to elections, no entry was made with respect to how the Crown proceeded, or what the accused's election was.
- [8] On October 29, 1999, the applicant filed his notice of application pursuant to s. 462.42 of the Criminal Code, declaring that he has an interest in the property forfeited pursuant to the order of His Honour Judge Overend.

THE APPLICANT'S POSITION:

- [9] The applicant raises, as the subject for a preliminary ruling, the issue of the proper characterization of the proceedings before the Provincial Court judge on September 29, 1999. It is the applicant's position that a proper characterization of the proceedings is that the matter proceeded summarily, rather than by indictment.
- [10] The argument of the applicant is essentially that as a matter of law, the proper characterization of the proceedings before His Honour Judge Overend is that they were summary proceedings. If they were summary proceedings, they must necessarily have been pursuant to s. 8(2)(b)(ii) of the Controlled Drugs and Substances Act, R.S.C. 1996, c. 19, ("CDSA"), which subsection creates a hybrid offence and applies only where the value of the property or the proceeds does not exceed \$1,000. If the applicant's position is correct, the forfeiture order should and could only have been for \$1,000 and the applicant says s. 462.42 applies only to that \$1,000. On the applicant's analysis, the return of the balance of the amount seized, namely \$119,000, should be decided pursuant to s. 462.43 of the Criminal Code, which would require only that the applicant prove an interest in the property or the proceeds.

RELEVANT STATUTORY PROVISIONS:

- [11] Section 8 of the CDSA provides as follows:
8. (1) No person shall possess any property or any proceeds of any property knowing that all or part of the property or proceeds was obtained or derived directly or indirectly as a result of
- (a) the commission in Canada of an offence under this Part except subsection 4(1) and this subsection;
- (b) an act or omission anywhere that, if it had occurred in Canada, would have constituted an offence referred to in paragraph (a); or

(c) a conspiracy or an attempt to commit, being an accessory after the fact in relation to, or any counselling in relation to, an offence referred to in paragraph (a) or an act or omission referred to in paragraph (b).

(2) Every person who contravenes subsection (1)

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years, where the value of the property or the proceeds exceeds one thousand dollars; or

(b) is guilty

(i) of an indictable offence and liable to imprisonment for a term not exceeding two years, or

(ii) of an offence punishable on summary conviction and liable to a fine not exceeding two thousand dollars or to imprisonment for a term not exceeding six months, or to both,

where the value of the property or the proceeds does not exceed one thousand dollars.

[12] Section 462.42 of the Criminal Code provides as follows:

462.42 (1) Where any property is forfeited to Her Majesty under subsection 462.37(1) or 462.38(2), any person who claims an interest in the property, other than

(a) a person who is charged with, or was convicted of, an enterprise crime offence or a designated substance offence that was committed in relation to the property forfeited, or

(b) a person who acquired title to or a right of possession of that property from a person referred to in paragraph (a) under circumstances that give rise to a reasonable inference that the title or right was transferred from that person for the purpose of avoiding the forfeiture of the property,

may, within thirty days after that forfeiture, apply by notice in writing to a judge for an order under subsection (4).

...

(4) Where, on the hearing of an application made under subsection (1), the judge is satisfied that the applicant is not a person referred to in paragraph (1)(a) or (b) and appears innocent of any complicity in any enterprise crime offence or designated substance offence that resulted in the forfeiture or of any collusion in relation to any such offence, the judge may make an order declaring that the interest of the applicant is not affected by the forfeiture and declaring the nature and extent of the interest.

...

(6) The Attorney General shall, on application made to the Attorney General by any person who has obtained an order under subsection (4) and where the periods with respect to the taking of appeals from that order have expired and any appeal from that order taken under subsection (5) has been determined,

- (a) direct that the property or the part thereof to which the interest of the applicant relates be returned to the applicant; or
- (b) direct that an amount equal to the value of the interest of the applicant, as declared in the order, be paid to the applicant.

462.43 Where property has been seized under a warrant issued pursuant to section 462.32, a restraint order has been made under section 462.33 in relation to any property or a recognizance has been entered into pursuant to paragraph 462.34(4)(a) in relation to any property and a judge, on application made to the judge by the Attorney General or any person having an interest in the property or on the judge's own motion, after notice given to the Attorney General and any other person having an interest in the property, is satisfied that the property will no longer be required for the purpose of section 462.37, 462.38 or any other provision of this or any other Act of Parliament respecting forfeiture or for the purpose of any investigation or as evidence in any proceeding, the judge

- (a) in the case of a restraint order, shall revoke the order;
- (b) in the case of a recognizance, shall cancel the recognizance; and
- (c) in the case of property seized under a warrant issued pursuant to section 462.32 or property under the control of a person appointed pursuant to subparagraph 462.33(3)(b)(i),
 - (i) if possession of it by the person from whom it was taken is lawful, shall order that it be returned to that person,
 - (ii) if possession of it by the person from whom it was taken is unlawful and the lawful owner or person who is lawfully entitled to its possession is known, shall order that it be returned to the lawful owner or the person who is lawfully entitled to its possession, or
 - (iii) if possession of it by the person from whom it was taken is unlawful and the lawful owner or person who is lawfully entitled to its possession is not known, may order that it be forfeited to Her Majesty, to be disposed of as the Attorney General directs, or otherwise dealt with in accordance with the law.

536(2) Where an accused is before a justice charged with an offence, other than an offence listed in section 469, and the offence is not one over which a provincial court judge has absolute jurisdiction under section 553, the justice shall, after the information has been read to the accused, put the accused to his election in the following words:

You have the option to elect to be tried by a provincial court judge without a jury and without having had a preliminary inquiry; or you may elect to have a preliminary inquiry and to be tried by a judge without a jury; or you may elect to have a preliminary inquiry and to be tried by a court composed of a judge and jury. If you do not elect now, you shall be deemed to have elected to have a preliminary inquiry and to be tried by a court composed of a judge and jury. How do you elect to be tried?

DISCUSSION:

- [13] Acceptance of the applicant's argument requires a finding that the offence charged in Count 2, to which Mr. Bell plead guilty, was a hybrid offence or alternatively, if the offence was not a hybrid offence but rather an indictable offence, that the Provincial Court lacked the jurisdiction to deal with the matter by way of indictment, as a result of the failure to put to the accused his election pursuant to s. 536(2).
- [14] Where an accused person appears before a Provincial Court judge charged with a hybrid offence, sometimes referred to as a dual procedure offence, the Crown must elect whether to proceed by summary conviction or by indictment. If the Crown does not elect whether to proceed summarily or by indictment, the Crown is presumed to have chosen to proceed summarily in the absence of an indication to the contrary: *R. v. Mitchell* (1997), 121 C.C.C. (3d) 139 (Ont.C.A.). If the offence is a hybrid offence, it is the responsibility of the Crown to indicate its election, and if it fails to do so, the Crown is taken to be proceeding summarily. Where it is not possible to determine whether or not the election has been made or there is a waiver, the presumption is that the proceeding was a summary one: *R. v. Dosangh* (1977), 35 C.C.C. (2d) 309 (B.C.C.A.); *R. v. Ferguson*, [1992] B.C.J. No. 1672 (B.C.C.A.).
- [15] If the offence charged was an indictable offence, the Provincial Court judge did not have absolute jurisdiction to hear the matter. Pursuant to s. 536(2), where an accused person appears before a Provincial Court judge on an indictable offence, the judge shall, after the Information has been read, put the accused to his election as to mode of trial. If an election was not put to the accused, and there was no waiver by the accused, the Provincial Court judge loses jurisdiction over the proceedings: *R. v. Watts*, 1999 BCCA 268; *R. v. Dosangh*, *supra*.
- [16] The applicant submits that the first step in determining whether the proceedings were summary or indictable is to examine the transcript of the attendance in Provincial Court, and characterize what occurred. I cannot accept that submission. The foundation for the Crown's case against Mr. Bell necessarily comes from the Information and from the Criminal Code sections. To look at the proceedings before the Information and the Code is, in my view, to put the cart before the horse. The Information alleged that Mr. Bell unlawfully had in his possession "property or proceeds of property, to wit: \$120,000 Canadian funds, knowing that all or part of the said property or of those proceeds was obtained by or derived directly or indirectly from the commission of offences under Sections 5 and 6 of the Controlled Drugs and Substances Act, contrary to Section 8...". Section 8 creates two categories of offences, one involving property or proceeds with a value over \$1,000 and one involving property or proceeds of \$1,000 or less. The offence is only a hybrid offence where the value of the property or proceeds does not exceed \$1,000. If the value of the property or proceeds exceeds \$1,000, the offence is an indictable one.

- [17] The applicant submits that the value which determines whether the count is pursuant to s. 8(2)(a), indictable, or s. 8(2)(b), hybrid, is not the amount of \$120,000, as specified in the Information, but the portion of that amount the accused knew was obtained or derived from the commission of an offence under the CDSA. In other words, the applicant submits that I can find that the offence Mr. Bell plead guilty to was a hybrid offence because of the language in the Information, namely "knowing that all or part", so that it is possible to conclude that the amount which was the true subject of the offence may not have exceeded \$1,000. That submission, in my view, ignores the fact that the language in the Information precisely mirrors that in s. 8 of the CDSA. The language in s. 8 makes it an offence to have either possession of property or proceeds of property knowing all or part came from the commission of a CDSA offence. One of the essential elements alleged by the Crown in the Information was the possession of \$120,000. The sentencing submissions made reference to the sum of \$120,000. Mr. Bell signed a relinquishment on the night of his arrest with respect to \$120,000. As I said earlier, the presiding judge commented on the seriousness of the offence, and said that it was Mr. Bell's lack of a criminal background that saved Mr. Bell from a significant period in custody.
- [18] Taking all of the circumstances into account, I conclude that the offence Mr. Bell was charged with, and plead guilty to, was an indictable offence, pursuant to s. 8(2)(a) of the CDSA.
- [19] Having found that the offence was not a hybrid offence, but rather was an indictable offence, I will deal with the applicant's alternate submission, with respect to the Provincial Court's jurisdiction. The only alleged flaw in the proceedings in Provincial Court was the failure to put to the accused his election, as required by s. 536(2). With respect to that flaw or procedural error, the law is clear that a failure to put to an accused his election pursuant to s. 536(2) will not necessarily be fatal to the proceedings, in the sense that the Provincial Court will lack jurisdiction to deal with the matter.
- [20] In *R. v. Watts*, *supra*, the accused was acquitted in Provincial Court of two counts, both of which charged the commission of indictable offences. The record disclosed that the required election had not been put to the accused, although "all parties seem to have proceeded on the basis that this case could be heard in the Provincial Court" (para. 5). The Crown appealed the acquittals, and counsel for the accused took the position that the Court of Appeal did not have jurisdiction to hear the Crown's appeal. It was submitted that the failure to put the election to the accused rendered the proceedings in Provincial Court void, or at least voidable, and that the Provincial Court judge was not acting under Part XIX of the Criminal Code. The Court of Appeal dealt with the latter submission at paras. 15-17:
- [15] I have not overlooked Mr. Tessmer's argument that the trial judge in this case was not acting under Part 19 of the Code, at least that was his submission. With respect, I think the trial judge was acting as a judge under the Code and was a trial court, because these charges did not allege offences that the trial judge could never hear. Rather, they were charges that the trial judge could hear in some circumstances and I do not think that in the circumstances

that came before the trial judge that it could be said that he was not acting and sitting as a trial court.

- [16] I am comforted in this conclusion by the obvious trend of the law to avoid narrow technical approaches to the occasional accidents that happen from time to time in legal proceedings.
- [17] This is especially so in cases where the jurisdiction of this court to hear an appeal from a conviction or acquittal is questioned, particularly where there has been absolutely no prejudice to any party.

(emphasis added)

- [21] In *R. v. Mitchell*, supra, the accused was not properly put to his election in Provincial Court and was convicted of five charges. He appealed and one of the issues the Ontario Court of Appeal had to determine was whether the proceedings were rendered a nullity by the failure to properly comply with the Criminal Code provisions relating to election, which the court concluded amounted to a procedural error. The Court, at para. 23, adopted a three-step format for analyzing the error: was there a failure to comply with a statutory procedural requirement; if there was non-compliance, was it rendered harmless by s. 686(1)(b)(iv) of the Criminal Code; if there was non-compliance and s. 686(1)(b)(iv) cannot be applied, did the appellant waive compliance with the procedural requirement?
- [22] After concluding that there had been non-compliance and that s. 686(1)(b)(iv) could not cure the error, the court considered whether there had been an effective waiver of the procedural requirements of s. 536(2). It was guided by the Supreme Court of Canada decision in *R. v. Korponey* (1982), 65 C.C.C. (2d) 65, which considered waiver of procedural rights concerning a re-election. Lamer J., for the court in *Korponey*, supra, said, at p. 73:

Generally speaking, the right to waive that type of procedural requirement has been recognized by all the Courts, including this Court...

And further, at p. 74:

...the validity of such a waiver, and I should add that that is so of any waiver, is dependent upon it being clear and unequivocal that the person is waiving the procedural safeguard and is doing so with full knowledge of the rights the procedure was enacted to protect and of the effect the waiver will have on those rights in the process...The Judge's duties concerning any waiver are no different than those on a plea of guilty. The factors he will take into account in determining whether the accused has clearly and unequivocally made an informed decision to waive his rights will vary depending on the nature of the procedural requirement being waived and the importance of the right it was enacted to protect. However, always relevant will be the fact that the accused is or is not represented by counsel, counsel's experience, and, in my view of great importance in a country so varied as ours, the particular practice that has developed in the jurisdiction where the events are taking place.

(emphasis in original)

In both Mitchell, supra, and Korponey, supra, valid waiver was found.

- [23] Finally, on this issue, is R. v. Fry, 2000 BCCA 221. Mr. Fry was charged with an indictable offence under the CDSA. He first elected trial by judge and jury. In a subsequent attendance in Provincial Court, he elected to be tried by Provincial Court judge alone and entered a guilty plea to one count and a second count was stayed. The re-election procedures did not accord with those required by s. 561 of the Criminal Code. On an appeal from sentence, it was argued that the sentence should be set aside because the sentencing judge lacked jurisdiction as a result of the procedural error. Crown relied upon Korponey, supra, and argued that there had been waiver of the formal procedure set out in s. 561. Although the proceedings were "perhaps excessively informal", the Court of Appeal concluded that counsel for Mr. Fry, with Mr. Fry in attendance, entered a plea of guilty for Mr. Fry and made sentencing submissions, which amounted to Mr. Fry participating in the sentencing proceeding. In these circumstances, the court concluded that the reasoning in Korponey, supra, applied and Mr. Fry could not successfully challenge the jurisdiction of the Provincial Court.
- [24] In this case, Mr. Bell was represented by counsel from Vernon. His counsel was called to the bar in 1983. The proceedings were in Revelstoke, and the presiding Provincial Court judge, who is very experienced in criminal matters, is resident in Vernon. Although the proceedings were informal, Mr. Bell was in attendance, his counsel and Crown advised the presiding judge that the case was ready for disposition, his counsel advised the court that he had his client's instructions to enter a guilty plea to count 2, and he indicated, when asked by the judge, that he and his client were ready to deal with disposition. I am satisfied that there was a clear and unequivocal waiver of Mr. Bell's right to have his election put to him, and that the court had jurisdiction to deal with the indictable offence with which Mr. Bell was charged, and to which he plead guilty. It follows that the court also had jurisdiction to make the forfeiture order in the amount of \$120,000.

CONCLUSION:

- [25] I am satisfied that the provisions of s. 462.42 apply to the applicant's application for the return of the entire sum forfeited, namely \$120,000, and I so order.

"A.J. Beames, J."

The Honourable Madam Justice A.J. Beames

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/02/07/2002bcsc0753.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/poisson-v-canada-attorney-general-2002>

Prepared on 29 October 2026 · Esheria