
CANADA / JUDGMENT

R. v. Carlson

2020 BCCA 360

COURT

British Columbia Court of Appeal

DECIDED

9 December 2020

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2020 BCCA 360 R. v. Carlson

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Carlson,

2020 BCCA 360

Date: 20201209

Docket: CA46274

Between:

Regina

Respondent

And

Robert Alan Carlson

Appellant

Before:

The Honourable Mr. Justice Groberman

The Honourable Madam Justice DeWitt-Van Oosten

The Honourable Mr. Justice Grauer

On appeal from: Orders of the Supreme Court of British Columbia, dated

September 18, 2019 (conviction) and November 14, 2019 (sentence)

(R. v. Carlson, 2019 BCSC 154; 2019 BCSC 1054; 2019 BCSC 1418; and

2019 BCSC 2083, Vancouver Docket 27423-2).

Oral Reasons for Judgment

The Appellant, appearing in person

(via teleconference):

R.A. Carlson

Counsel for the Respondent

(via teleconference):

M.A. Street

Place and Date of Hearing:

Vancouver, British Columbia

December 9, 2020

Place and Date of Judgment:

Vancouver, British Columbia

December 9, 2020

Summary:

Application to dismiss appeal for want of prosecution. The appellant had no realistic plans to furnish transcripts, and refused or neglected to apply for legal aid. Held: Appeal dismissed for want of prosecution.

[1] GROBERMAN J.A.: This is an application under Rule 13(3) of the British Columbia Court of Appeal Criminal Appeal Rules, 1986, B.C. Reg. 176/91 to dismiss the appeal for want of prosecution. The appeal is from conviction on one count of aggravated assault (Criminal Code, R.S.C. 1986, c. c-46, s. 268).

[2] The matter has a complicated history. The assault took place on June 29, 2017 when Mr. Carlson attacked his father with a hammer. His father suffered a wound to the back of his head (requiring stitches), as well as a fractured nose, a split lip, and two black eyes. Mr. Carlson was taken into custody and charged with aggravated assault and with assault on a police officer engaged in the execution of duties (Criminal Code, s. 270(1)(a)). He had his first appearance in Provincial Court on June 30, 2017. Thereafter, he remained in custody until January 2, 2018. Part of that time involved assessments of his fitness to stand trial, but for a large portion of the period, Mr. Carlson was eligible to be released on bail but remained in custody because he refused to sign the bail document.

- [3] Mr. Carlson elected trial by judge and jury. A preliminary inquiry proceeded in Provincial Court on January 8 and February 26, 2018 and Mr. Carlson was committed for trial on four counts: the two counts in the original information, plus assault with a weapon (Criminal Code, s. 267(a)), and resisting or wilfully obstructing a peace officer engaged in the execution of duties (Criminal Code, s. 129(a)). He applied to the Supreme Court to quash the committal. His application was heard on July 26, 2018, and dismissed on August 8, 2018 (2018 BCSC 1574). He then appealed the denial of certiorari to this Court, which heard and dismissed the appeal on December 4, 2018 (2018 BCCA 467).
- [4] A first trial commenced on April 3, 2019, but it ended in a mistrial two days later, prior to the conclusion of evidence. In reasons indexed as 2019 BCSC 1054, the judge declared a mistrial on the bases that the trial was likely to take much longer than anticipated, and that Mr. Carlson had been conducting his defence in a manner "detrimental to his interests". The judge doubted that it would be possible to give curative instructions to the jury that would result in a fair trial.
- [5] A different judge was appointed to case manage the matter, and to preside at a new trial. On May 28, 2019, jury selection was scheduled for September 3, 2019, with the trial to commence the following day.
- [6] On June 14, 2019, Mr. Carlson filed a pre-trial motion seeking to challenge the jury array. He filed further pre-trial motions on July 18, 2019. The trial judge heard the applications on July 24, 2019, dismissing them on that day.
- [7] On August 1, 2019, Mr. Carlson filed a notice of appeal, purporting to appeal the interlocutory rulings. He filed further material in the same appeal file on August 12, 2019, including a notice of application for leave to appeal. The matter was referred to a case management judge in this Court, who held a hearing on August 28, 2019. The judge gave oral reasons, stating that the Court had no jurisdiction to entertain the interlocutory appeals, and directing that the scheduled trial should not be interrupted to accommodate the purported appeal.
- [8] The second trial proceeded as scheduled. On September 12, during the trial, the Crown entered a stay of proceedings on the two counts involving police officers, so the jury was left with only the charges of aggravated assault and assault with a weapon. On September 18, 2019, it found Mr. Carlson guilty on both counts. On the following day, the judge entered a conditional stay on the assault with a weapon count, based on the principle in *Kienapple v. The Queen*, [1975] 1 S.C.R. 729.
- [9] On November 5, 2019, Mr. Carlson purported to amend his existing appeal (for which there was no jurisdiction) to make it a conviction appeal.
- [10] On November 14, 2019, Mr. Carlson was sentenced in the trial court to one day in prison, followed by a three-year period of probation. On November 22, Mr. Carlson filed additional materials in this Court, purporting to modify his appeal, and to include a sentence appeal.

- [11] At a case management hearing on December 4, 2019, the case management judge raised the issue of Mr. Carlson seeking legal aid and encouraged him to apply. Mr. Carlson indicated that he would not be doing so. The judge also discussed the irregular nature of the filings, and told him that he should file a new notice of appeal under a separate file number. Mr. Carlson reluctantly agreed to do so. The judge directed Mr. Carlson to file the new appeal by December 19, 2019, and scheduled a further case management hearing for December 20, 2019. At the conclusion of the case management hearing, the judge also raised concerns about transcripts, advising Mr. Carlson that he would need to arrange to file them.
- [12] Rather than complying with the judge's direction to file a new notice of appeal, Mr. Carlson attempted to file another amended notice of appeal within the existing file. The registry, not surprisingly, refused to accept that filing. At the case management hearing on December 20, the Crown advised that it would move to quash the existing irregular appeal, and that the matter could be scheduled for February 11, 2020. The judge directed that Mr. Carlson not file any further documents in the existing file prior to that date, apart from a response to the Crown's application. He did, again, encourage Mr. Carlson to file a new notice of appeal, and the Crown agreed it would consent to an extension of time to do that. Mr. Carlson said he would not do that prior to the hearing on February 11.
- [13] The Crown brought the application to quash the appeal on February 11, 2020. It took the position that the existing filings were irregular, and that a new notice of appeal should be filed. Counsel stated that the Crown would not object to Mr. Carlson filing a new notice of appeal, notwithstanding that it would technically be out of time. This Court decided, instead, to allow a new notice of appeal to be filed within the existing proceeding, to replace and consolidate the existing notices. The judges, themselves, drafted the notice of appeal for Mr. Carlson, and the new notice of appeal was filed on that day.
- [14] Following the filing of the new notice of appeal, the registry set a revised filing schedule, which required Mr. Carlson to provide proof that he had ordered transcripts by March 10, 2020. The transcripts and appeal book were to be filed by May 5, 2020.
- [15] Mr. Carlson had ordered a small selection of transcripts before the commencement of the second trial, and he filed proof of those orders on March 10, 2020. Those did not, of course, include any part of the trial at which he was convicted and sentenced. He subsequently provided very limited transcripts for a couple of days of the second trial.
- [16] A compliance hearing took place on September 1, 2020. Mr. Carlson attempted to file a further, rambling, notice of appeal on September 18, 2020, again purporting to expand the grounds.
- [17] Further case management conferences were held on September 23, November 2, and November 10, 2020. The case management judge impressed on Mr. Carlson that it was necessary to file transcripts and an appeal book. Recognizing that Mr. Carlson had no means to pay for the extensive transcripts that would be needed for his comprehensive appeal, the judge again advised him that he could apply for legal aid, and, if rejected, might make an

application for appointment of counsel under s. 684 of the Criminal Code. Mr. Carlson reiterated his position that he would not apply for legal aid. The judge told him that while he could make an application for appointment of counsel under s. 684 of the Criminal Code, such an application would probably not be granted if no attempt had been made to secure legal aid.

[18] Mr. Carlson did not apply for legal aid, nor did he formulate any realistic plan for proceeding with the appeal in a timely fashion. He made no proposal for securing transcripts nor was there any reasonable prospect of him being able to finance them.

[19] In the circumstances, the case management judge referred the appeal to a division of the Court, to consider a Crown motion to dismiss for want of prosecution.

[20] The application to dismiss the appeal was set for hearing today by teleconference. Mr. Carlson wrote to the registry on November 27, objecting to the hearing by telephone and "insisting" on an in-person hearing. This morning, he again expressed a strong preference for an in-person hearing.

[21] Section 3.4 of the Court's Updated Notice to the Public Regarding the Court of Appeal's Response to COVID-19 (most recently updated November 25, 2020) includes the direction of the Chief Justice that "[a]ll chambers applications will proceed by teleconference unless otherwise ordered". Section 683(2.1) of the Criminal Code specifically allows the Court to direct that proceedings take place by way of audioconference.

[22] Given the current situation with the COVID-19 pandemic, the orders and recommendations of the Provincial Health Officer, and the general directive given by the Chief Justice, we concluded that it was appropriate to hold this hearing by teleconference notwithstanding Mr. Carlson's desire to appear in person.

[23] Mr. Carlson referred to the following provision of the Criminal Code:

682(2) A copy or transcript of

- (a) the evidence taken at the trial,
- (b) any charge to the jury and any objections that were made to a charge to the jury,
- (c) the reasons for judgment, if any, and
- (d) the addresses of the prosecutor and the accused, if a ground for the appeal is based on either of the addresses,

shall be furnished to the court of appeal, except in so far as it is dispensed with by order of a judge of that court.

[24] His position is that the section requires the trial court, not the appellant, to make arrangements to ensure that the Court of Appeal is furnished with all of the required materials.

- [25] In fact, s. 682 is silent as to who has the responsibility to arrange for materials to be furnished to the Court of Appeal. I read the section as requiring the trial court to cooperate in ensuring that the materials can be made available, but I do not read it as placing an onus on the trial court to initiate steps to provide the material to the appeal court, nor do I read it as placing the financial burden on the trial court or on the public purse. Such an interpretation has been endorsed by the courts in previous cases: see, for example, *R. v. L'Espinay*, 2008 BCCA 20 at paras. 40-44. It is clear that the responsibility of ordering and furnishing transcripts lies with the appellant.
- [26] Mr. Carlson has filed a series of convoluted documents raising issues that he wishes to appeal, many of which appear, on their face, to be without merit. It is evident, however, that his appeal is a very broad one, and that the transcripts that Mr. Carlson has ordered are completely inadequate as a foundation for it.
- [27] I am satisfied that the appeal ought to be dismissed for want of prosecution. Mr. Carlson has had difficulty abiding by the rules governing criminal appeals, and appears unable to distinguish between frivolous legal issues and meritorious ones. He has neglected or refused to apply for legal aid. Without legal aid (or an appointment of counsel under s. 684, in the event that legal aid is denied) there is no realistic prospect for the appeal to proceed in an orderly or timely manner.
- [28] There has been a considerable expenditure of time and resources on this appeal, both by the Crown and by the Court. The time has come to bring it to an end. I would dismiss the conviction appeal for want of prosecution.
- [29] DEWITT-VAN OOSTEN J.A.: I agree.
- [30] GRAUER J.A.: I agree.
- [31] GROBERMAN J.A.: The conviction appeal is dismissed for want of prosecution.

"The Honourable Mr. Justice Groberman"

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