

CANADA / JUDGMENT

R. v. Catling

2018 BCSC 2330

COURT

Supreme Court of British Columbia

DECIDED

10 October 2018

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2018 BCSC 2330 R. v. Catling IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: R. v. Catling, 2018 BCSC 2330 Date: 20181010 Docket: 27554-3 Registry: Vancouver Regina v. Matthew Leonard Catling Date: 20181010 Docket: 27555-3 Registry: Vancouver Regina v. Matthew Leonard Catling Before: The Honourable Madam Justice Gropper (appearing by teleconference) On appeals from: Provincial Court of British Columbia, (R. v. Catling, Richmond File No. AH84344648 and Vancouver File No. AJ00878374) Oral Reasons for Judgment Counsel for the Crown (Respondent): J.L. Horneland (as agent for E.A. Wolfram) Counsel for the Accused (Appellant): M. Magaril Place and Date of Trial/Hearing: Vancouver, B.C. August 15, 2018 Place and Date of Judgment: Vancouver, B.C. October 10, 2018

Introduction

- [1] The Crown applies to summarily dismiss Mr. Catling's appeal by way of stated case, in accordance with Rule 18(2)(7)(b)(iv) of the Supreme Court Civil Rules, B.C. Reg. 168/2009. The Crown asserts that this is an interlocutory appeal and is, therefore, premature.

Background

- [2] Mr. Catling is charged with speeding in a municipality, contrary to s. 146(1) of the Motor Vehicle Act, Richmond File Number AH84344648; and use of an electronic device, contrary to s. 214.2(1) of the Motor Vehicle Act, Robson Square File Number AJ00878374. Mr. Catling filed separate Constitutional Question Act notices on both the Richmond and Robson Square prosecutions on November 2, 2017, and November 24, 2017, respectively. He asserted that s. 63.1 of the Offence Act violates Sections 7 and 11(d) of the Charter.
- [3] Section 63.1 provides: An enforcement officer may appear as, and may exercise the powers and perform the functions of, a prosecutor in relation to a violation ticket under this Act whether or not he or she is a member of the Law Society of British Columbia.

- [4] The files were joined solely for the purpose of determining the constitutional challenge to s. 63.1 of the Offence Act. On February 20, 2018, the Honourable Judge Lee held a Vukelich hearing, at the Crown's request, to determine whether an evidentiary hearing should be held in respect of Mr. Catling's Charter challenge. The Provincial Court Judge's decision
- [5] The decision is indexed at 2018 BCPC 186.
- [6] After reviewing the charges of s. 63.1 of the Offence Act, Lee P.C.J. describes Mr. Catling's Notice of Application for Constitutional Remedy seeking orders that s. 63.1 of the Offence Act be declared unconstitutional and of no force and effect or, alternatively, the enforcement officer in each case be disqualified from acting as a prosecutor, pursuant to s. 63.1 of the Offence Act, in these matters.
- [7] At paragraph 12, the court notes that: . . . the Provincial Court has no power to declare legislation to be unconstitutional and of no force and effect. A Provincial Court can only decline to apply the impugned section on a case by case basis [under] s. 52 of the Charter: *R. v. Lloyd*, 2014 BCCA 224.
- [8] Lee P.C.J. summarized the Crown's position in respect of the Vukelich procedure as follows:
1. the trial judge should assume the truth of the facts the applicant seeks to prove to establish his or her entitlement to the constitutional remedy.
 2. the trial judge should consider whether those facts disclose a basis in law for the constitutional remedy on the grounds set out in the applicant's notice of constitutional question, and
 3. if the trial judge concludes that the applicant would not be entitled to a constitutional remedy on those grounds, even if s/he proved the facts alleged, the trial judge can exercise his or her discretion and decline to embark on an evidentiary hearing.
- [9] In considering s. 11 of the Charter, at paragraphs 34 to 38 of the decision, the Lee, P.C.J. refers to "the issue of constitutionality of s. 63.1 of the Offence Act as it relates to s. 11(d) of the Charter" and the fact that that question "was answered in the decision of *R. v. Cooper*, 2002 BCSC 948, aff'd 2005 BCCA 256, leave to appeal ref'd [2005] S.C.C.A. No. 321".
- [10] Lee P.C.J. refers to both the Supreme Court and the Court of Appeal decisions in *Cooper* at paras. 35 and 36: In the Supreme Court decision in *R. v. Cooper*, Mr. Justice Metzger stated at para. 38:
- [38] I am satisfied that the impugned provisions of the Offence Act are constitutional pursuant to s. 1 of the Charter, and that complaints of actual prejudice to the fair trial right brought about by the dual role of prosecutor and witness should be left to be decided on a case-by-case basis at the hearing of the individual violation ticket. In the BC Court of Appeal decision in *R. v. Cooper*, the appeal of Mr. Justice Metzger's decision was dismissed. The Court stated:

- [12] There is high court authority for Mr. Nathanson's proposition in the context of criminal prosecutions of summary conviction offences. For example, in *R. v. White*, (1998), 41 C.C.C. (3d) 236 (Nfld. C.A.), Marshall J.A., in obiter, said at 245: . . . the practice of a prosecutor being permitted to give evidence in a case which he or she is prosecuting, has historically not only been considered inconsistent and incompatible with the due administration of justice but it violates the concept of fundamental justice as enshrined in s. 7 of the Charter and should no longer be tolerated. A prosecutor must act as a prosecutor and must not, in the same case, be received as a witness. In the BC Court of Appeal decision in *R. v. Cooper*, the appeal of Mr. Justice Metzger's decision was dismissed. The Court stated at para. 13:
- [13] Accepting for the purpose of discussion that this statement accurately states the law in British Columbia, the question is whether the same applies to proceedings such as these, which are regulatory or quasi-criminal in nature. Notwithstanding Mr. Nathanson's able submissions, I am not persuaded that the procedures adopted here are unconstitutional. The procedure in issue here is, in my view, justified within the meaning of s. 1 of the Charter, having consideration to the regulatory nature of the Motor Vehicle Act and the enforcement provision of the Offence Act, the nature of the offences charged, the volume of like cases to be handled, the geography and resources of the province, and significantly, both the procedural safeguards established in the Offence Act and the independent role of the Justice of the Peace.
- [11] Lee P.C.J. went on to consider whether he ought to reconsider the settled rulings expressed in *Cooper*. At paragraph 39, he referred to *Carter v. Canada (Attorney General)*, 2015 SCC 5, at paragraph 44:
- [44] . . . Trial courts may reconsider settled rulings of higher courts in two situations: (1) where a new legal issue is raised; and (2) where there is a change in the circumstances or evidence that "fundamentally shifts the parameters of the debate".
- [12] At paragraph 48, Lee P.C.J. determined that Mr. Catling did not satisfy either of those questions and he concluded that he must follow *Cooper*.
- [13] Lee P.C.J. summarized the decision at paragraph 49: Mr. Catling would not be entitled to a constitutional remedy based on s. 7 and s. 11(d) of the Charter even if the facts . . . alleged [were] proven [to be] true.
- [14] The court declined to permit an evidentiary hearing into the claim that s. 63.1 was unconstitutional and of no force and effect. Position of the Parties
- [15] As noted, the Crown says that this stated case should be summarily dismissed on the basis that they were interlocutory appeals and therefore premature.

- [16] Mr. Catling asserts that the trial judge declining to allow an evidentiary hearing into the constitutionality of s. 63.1 is a final determination of the constitutionality of the impugned provision is a separate proceeding. Alternatively, he argues that that is the principle of statutory interpretation, the Offence Act and the Criminal Code allow for interlocutory appeals by way of stated case. Analysis and Conclusion Applicable statute
- [17] As noted, Mr. Catling filed his application for a stated case under s. 115 of the Offence Act that provides:
- (1) A party to proceedings to which this Act applies or the Attorney General may appeal against a conviction, order, determination or other proceeding of a justice on the ground that it is
 - (a) erroneous in point of law, or
 - (b) in excess of jurisdiction by applying to the justice to state a case setting out the facts as found by the justice and the grounds on which the proceedings are questioned.
- [18] The Offence Act defines "order", in s. 1, as "including an order for the payment of money"; "proceedings" means
- (a) proceedings in respect of offences, and
 - (b) proceedings in which a justice is authorized by an enactment to make an order.
- [19] The word "determination" is not defined in the Offence Act.
- [20] In accordance with s. 115(2) of the Offence Act: An application to state [the] case must be made, and . . . must be stated within the period and in the manner directed by the Supreme Court Civil Rules, if any.
- [21] Section 18-2 of the Supreme Court Civil Rules sets out the procedural rules for an appeal by stated case, at sub-section (7), which provides: The court may
- (a) give directions for the proper hearing and determination of the stated case,
 - (b) without limiting paragraph (a), make one or more of the following orders: . . . (iv) that the stated case be disposed of summarily, . . .
- [22] Section 813 of the Criminal Code provides that, in summary conviction appeals, the accused may appeal from a conviction or order made against him or her, sentence, or verdict of unfit to stand trial or not criminally responsible due to a mental disorder. Appeals from Interlocutory Rulings
- [23] In *R. v. Sekhon*, 2016 BCSC 1697, Chief Justice Hinkson confirmed that appeals from interlocutory rulings are generally prohibited in criminal and quasi-criminal proceedings, at paragraphs 6 to 9 of that decision.

- [24] The policy reasons for such a limitation were described in *R. v. Watson*, 2007 BCSC 1707, paragraph 11: . . . [These] 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. Is this constitutional determination a separate proceeding?
- [25] The respondent points to the jurisprudence that provides the dual-proceeding approach, where the constitutionality of a law is at issue.
- [26] *R. v. Boutilier*, 2016 BCCA 24 directed this concept. The Crown obtained a designation that the respondent was a dangerous offender. In the course of that proceeding, the trial judge found that s. 753.1 of the Criminal Code was unconstitutional. Despite being successful in achieving the designation, the Crown filed a notice of appeal regarding the declaration of constitutional invalidity. The analysis of the court focused on the concept of dual proceedings, referring to *R. v. Laba*, [1994] 3 S.C.R. 965, and *R. v. Keegstra*, [1995] 2 S.C.R. 381, which held that when the constitutionality of a law is at issue, there are, effectively, two proceedings: the determination of culpability and the determination of constitutionality. Boutilier found that general prohibition against interlocutory appeals was not applicable where the determination of constitutionality was not an interlocutory order (at paras. 41-43).
- [27] In this case, Mr. Catling argues that the remedy that he is seeking is not specific to his case. He asserts that the decision rendered by Lee P.C.J. on the constitutional issue will stand and likely be used by the Crown for the basis of stare decisis toward any other defendant who wishes to make a similar constitutional challenge.
- [28] I am persuaded that this appeal is interlocutory and that the provisions of the Offence Act apply to it.
- [29] First, as Lee P.C.J. notes: . . . the Provincial Court has no power to declare legislation to be unconstitutional and of no force and effect. [The] Court can . . . decline to apply the impugned section on a case by case basis . . . The decision is not binding in terms of precedential value. The decision to decline to apply the impugned section only affects the accused in the particular case.
- [30] Second, if that is the case, this is not the sort of decision that requires a dual-purpose analysis as set out in Boutilier.
- [31] Third, the appeal in Boutilier was launched after the case was over. The court had declared the appellant to be a dangerous offender. There was no other route for the Crown to appeal the constitutional ruling but to pursue an appeal in accordance with s. 59(2) of the Criminal Code that provides that the Attorney General may appeal to the Court of Appeal from a decision made under that part on any ground of law.

[32] In this case, there has not been a ruling on the constitutional validity of s. 63.1 of the Offence Act, only whether the Charter remedy could be sought. I am satisfied, as I have stated, that this is an interlocutory appeal and I am bound by the decision in Sekhon, which applies in these circumstances.

Conclusion

[33] I dismiss Mr. Catling's appeal by way of stated case on the basis that it is premature. The matter is remitted to their respective trial courts to fix dates for appearances for hearing or trial on either or both of these matters. "Gropper J."

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