
CANADA / JUDGMENT

R. v. Dykman

2005 BCSC 18

COURT

Supreme Court of British Columbia

DECIDED

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Dykman,

2005 BCSC 18

Date: 20050106

Docket: 72621

Registry: Kamloops

Between:

Regina

Respondent

And

Otto Dykman

Appellant

Before: The Honourable Mr. Justice Powers

Reasons for Judgment

Counsel for the Crown

W.H.S. Burrows

Counsel for the Accused

G.J. Wool

Date and Place of Trial/Hearing:

December 16, 2004

Kamloops, B.C.

INTRODUCTION:

- [1] Mr. Dykman was convicted of speeding (Motor Vehicle Act, s. 146 (3)) in Provincial Court on June 2, 2004. The grounds of appeal are stated in his notice of appeal as follows:
- a) The trial judge misapprehended the evidence in fact and law, amounting to a miscarriage of justice, by failing to find an abuse of process or alternatively a reasonable apprehension of bias as the result of comments made by the Justice of the Peace (March 21st, 2003) and the police conduct in the court facilities at Ashcroft, B.C.
- [2] He asks that the conviction be set aside or quashed.

BACKGROUND:

- [3] Mr. Dykman received a traffic ticket for speeding on November 15, 2002. He disputed that ticket. His counsel appeared on his behalf in Provincial Court in Ashcroft on March 21, 2003. Mr. Dykman was not present, and a trial date was set in his absence. This appearance was before the sitting justice of the peace.
- [4] The trial commenced in Kamloops on October 23, 2003 before the same sitting justice of the peace. Mr. Dykman raised an issue of abuse of process, and sought a stay of proceedings. The issue related to evidence given by an RCMP constable about comments which may have been made on some occasions by RCMP officers to people attending court to dispute their tickets, and the comments made by the justice of the peace at the opening of court on March 21, 2003. In the circumstances, the justice of the peace concluded the only appropriate course for her to follow was to declare a mistrial, and have the matter rescheduled before a Provincial Court judge.
- [5] The trial, which leads to this appeal, was held on June 2, 2004. The trial took place before a judge of the Provincial Court. The transcript of the evidence given by the RCMP officer on October 23, 2003 was entered, by consent, and was the only evidence called. Counsel agreed that evidence was sufficient to support a conviction on the traffic ticket. The only issue was whether or not the Provincial Court judge should grant a stay of proceedings based on allegations of bias and abuse of process.
- [6] Constable Schellenberg was the officer who issued the traffic ticket. His evidence on October 23, 2003 was that traffic court is held in the River Inn conference room in Ashcroft. There may be up to 25 people who appear on court day for traffic violations, and several RCMP members who are prepared to testify; sometimes there are lots of people and sometimes there is nobody there. Constable Schellenberg said at p. 7:

Q. Okay, (indiscernible). Have you heard of a practice where the police will go out into the hallway and say to the defendants who have appeared that you won't ask for a suspension of your license if you just leave the court building. Have you heard of that practice?

A. I've heard of members, um, yeah, it's a - - it's a general practice to meet with people - -

[7] For the purposes of this appeal, the important words are at p. 8:

I've heard of members advising violators that they intended to seek a prohibition.

Q. All right, and if they leave the court building, then the prohibition will not be sought, is that right?

A. I think the way it's often put is if you - - if you leave, we'll leave it up to the Motor Vehicle Branch, but if we go to trial, I'm going to ask for a prohibition.

[8] He went on to indicate that he has heard of the practice within the two years that he has been stationed in Ashcroft, but it is not a practice that he follows.

[9] There was no evidence before the court as to what actually occurred on March 21, 2003 before court commenced.

[10] The sitting justice of the peace opened court with the following explanation:

THE COURT: What I'm going to do is determine if there's anyone for the afternoon list that's pleading guilty or asking for an adjournment, that'll be a shorter matter and I will deal with that first before we start with the remaining matters from the morning.

When I read the ticket to you, you can plead not guilty, we'll have a trial, and I'll explain the trial process before we begin.

Your second option is to plead guilty. To acknowledge the violation and simply make submissions with respect to penalty. It's important you understand that I'm not bound by the monetary amount on the ticket, that I will impose the penalty I think is appropriate and I'll have more say about that in a moment.

Your third option is to indicate you're not prepared to proceed today, to ask for an adjournment, and that may or may not be granted, depending on why you requested it and the history of the file in the system.

And lastly, you could simply leave and in that case, your ticket's treated as if you haven't filed a dispute. And that's what will happen to the persons who haven't attended today. I don't deal with someone who's not here until at least fifteen minutes has passed. They may be having difficulty finding the courthouse, which here is disguised as a hotel.

With respect to penalty, I consider the circumstances that led to the ticket being issued as I hear them from the officers from the Crown's perspective. Any previous driving record they wish me to consider, any suggestions they have as to what the appropriate penalty is.

I listen to the disputant, whatever that person has to say on those issues or anything else they think I need to know in order to come to the correct conclusion.

I look at the legislation. It gives me the range of penalties available for any charge, the minimum and the maximum. In some charges, there's a legislated minimum and I could not impose a penalty lower than that legislated minimum. In others, there's a possibility of a reduction in penalty if I felt that was appropriate.

I look at the plea. The courts have a long history of a considerational leniency where someone pleads guilty it's treated as an acknowledgement or responsibility and from my perspective hopefully the first step towards preventing the prohibited behaviour from being repeated in the future.

I look at something called the principles of sentencing, and that comes to me from hundreds of years of case law. One of the most applicable principles of sentencing that applies to traffic court is the principle of deterrence. The penalty should be sufficient to deter the prohibited behaviour.

Points are an insurance issue, that's I.C.B.C.'s scheme, that has nothing to do with the courts. I don't impose points, I can't change them.

And lastly, any monetary penalty is payable today unless I have extended the time to pay. So if, in fact, I impose a monetary penalty where someone pleads guilty or is found guilty, I'll follow by asking if that person wishes to request time to pay or if they're prepared to pay today.

[11] This explanation was correct at law. (R. v. Mordo 1977 BCCA, Vancouver Registry Docket #CA022640).

DECISION OF THE PROVINCIAL COURT JUDGE:

[12] In oral reasons for judgment, the Provincial Court judge stated it would be wrong for police officers to discourage people from proceeding with a dispute of a traffic ticket by suggesting that the officers might be asking the court to impose a suspension or additional penalty, rather than what would flow from a guilty plea or a simple finding of guilt by the court.

[13] With regard to the comments made by the sitting justice of the peace, the learned Provincial Court judge said that he did not think they were necessary (p. 5, ¶31), however, he recognized that a justice or a judge may:

make remarks along these lines to explain to unrepresented civilians that do not understand the process and how a trial proceeds to inform them and to give them some assistance and some understanding how things are going to unfold if they have a trial, and that may very well be perfectly proper depending upon how they are phrased and how they are put and in the manner in which they are put,

[14] However, the Provincial Court judge also found that these remarks were not for the purposes, nor would they dissuade somebody there, to dispute a ticket. He stated at p. 7, ¶33:

I, frankly, do not really think it is even borderline and, in my view, it would not be sufficient to raise a reasonable apprehension of bias in an informed observer looking at this dispassionately and objectively

- [15] The learned trial judge then considered whether the combined effect of what the police officers may have said and the comments of the justice of the peace would have the effect of dissuading somebody from proceeding with a trial.
- [16] The trial judge concluded that even if there was a reasonable apprehension of bias, based on the combined effect of remarks made by a police officer and the sitting justice of the peace, that was remedied by the declaration of the mistrial and the trial before the learned Provincial Court judge. (¶36).
- [17] The learned Provincial Court judge also considered the issue of stay of proceedings, and referred to a case *R. v. Power* 89 C.C.C. (3d) 1 (S.C.C.) for the proposition that it was only in the clearest cases that a stay of proceedings would be granted. The Provincial Court judge found that this was not such a case. (¶36).
- [18] In his argument, the appellant stated that this case was an abuse of process in common law, or alternatively, under the Charter of Rights and Freedoms, s. 7, s. 11(d) and s. 24.
7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof in accordance with the principles of fundamental justice.
11. Any person charged with an offence has the right
- (d) to be presumed innocent until proven guilty according to the law in a fair and public hearing by an independent and impartial tribunal;
- 24(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
- [19] The appellant argues that the trial judge misapprehended the evidence in fact and law, amounting to a miscarriage of justice by failing to find an abuse of process, or alternatively, reasonable apprehension of bias. The onus is on the appellant to demonstrate on the balance of probabilities that there has been an abuse of process. If an abuse has been established, then the court should determine what is a just and appropriate remedy pursuant to s. 24(1). (*R. v. O'Connor*, [1995] 4 S.C.R. 411 (S.C.C.)).

GROUND FOR APPEAL:

- [20] The grounds for appeal really are grounds of mixed fact and law. Regarding the claims of bias, it is whether there was any reasonable apprehension of bias, and whether that was resolved by the mistrial. The appellant referred to *R. v. R.D.S.*, [1997] 3 S.C.R. 484 which states the test for reasonable apprehension of bias at ¶31:

¶31 The test for reasonable apprehension of bias is that set out by de Grandpré J. in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369. Though he wrote dissenting reasons, de Grandpré J.'s articulation of the test for bias was adopted by the majority of the Court, and has been consistently endorsed by this Court in the intervening two decades: see, for example, *Valente v. The Queen*, [1985] 2 S.C.R. 673; *R. v. Lippé*, [1991] 2 S.C.R. 114; *Ruffo v. Conseil de la magistrature*, [1995] 4 S.C.R. 267. De Grandpré J. stated, at pp. 394-95:

the apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information [T]hat test is "what would an informed person, viewing the matter realistically and practically - - and having thought the matter through - - conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."

The grounds for this apprehension must, however, be substantial and I refus[e] to accept the suggestion that the test be related to the "very sensitive or scrupulous conscience".

[21] I would also refer to ¶32 and ¶33:

¶32 As Cory J. notes at para. 92, the scope and stringency of the duty of fairness articulated by de Grandpré depends largely on the role and function of the tribunal in question. Although judicial proceedings will generally be bound by the requirements of natural justice to a greater degree than will hearings before administrative tribunals, judicial decision-makers, by virtue of their positions, have nonetheless been granted considerable deference by appellate courts inquiring into the apprehension of bias. This is because judges "are assumed to be [people] of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances". *United States v. Morgan*, 313 U.S. 409 (1941), at p. 421. The presumption of impartiality carries considerable weight, for as Blackstone opined at p. 361 in *Commentaries on the Laws of England*, Book III, cited at footnote 49 in Richard F. Devlin, "We Can't Go On Together with Suspicious Minds: Judicial Bias and Racialized Perspective in *R. v. R.D.S.*" (1995), 18 *Dalhousie L.J.* 408, at p. 417, "the law will not suppose a possibility of bias or favour in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea". Thus, reviewing courts have been hesitant to make a finding of bias or to perceive a reasonable apprehension of bias on the part of a judge, in the absence of convincing evidence to that effect: *R. v. Smith & Whiteway Fisheries Ltd.* (1994), 133 N.S.R. (2d) 50 (C.A.), at pp. 60-61.

¶33 Notwithstanding the strong presumption of impartiality that applies to judges, they will nevertheless be held to certain stringent standards regarding bias - - "a reasonable apprehension that the judge might not act in an entirely impartial manner is ground for disqualification": *Blanchette v. C.I.S. Ltd.*, [1973] S.C.R. 833, at pp. 842-43.

[22] I find in this case that the comments of the justice of the peace would not create an apprehension of bias. Even if there were a reasonable apprehension of bias based on the comments made by the justice of the peace in the opening remarks on March 21, 2003, the justice of the peace declared a mistrial when the issue was raised. I agree that the

subsequent trial before the Provincial Court judge eliminated any possible concerns of bias. I should also say that it is not uncommon for a judge to make comments at the beginning of a trial to ensure that a self-represented litigant understands the process, and the potential consequences. I am satisfied that a reasonable and informed individual listening to the comments made by the justice of the peace would not determine that there was any intention or attempt to discourage people from proceeding with their trials. The justice of the peace's comments simply informed those who might not otherwise know what the potential outcomes were. It was also clear from the comments of the justice of the peace that her decision with regard to the appropriate penalty would be based on all of the circumstances, and the submissions made on behalf of Crown and the disputant.

ABUSE OF PROCESS:

[23] The appellant argues that the combined effect of comments made by police officers before traffic court and the comments made by the justice of the peace could lead a reasonably informed individual to conclude that somehow the justice of the peace and the RCMP, who were also prosecuting, may be in some fashion, working together. The appellant argues that the combined impact was to discourage people from proceeding with trials by the threat of greater penalty if they did proceed with the trial and were found guilty. The appellant argues that this tainted the entire process, creating an atmosphere of reasonable apprehension of bias and abuse, such that a stay of proceedings is the only appropriate remedy. The appellant argues that these combined circumstances are such that to continue with the proceeding would shock the conscience of the community to the detriment of the proper administration of justice.

[24] The appellant relied on the decision *R. v. Power*, supra. In dealing with the abuse of process, speaking for the majority, Madam Justice L'Heureux-Dube said at p. 6:

Although it is today undisputed that courts have an inherent and residual discretion to prevent an abuse of the court's process, this was not always the case.

[25] Further on p. 6 she states:

R. v. Jewitt (1985), 21 C.C.C. (3d) 7, 20 D.L.R. (4th) 651, [1985] 2 S.C.R. 128 (S.C.C.), put an end to the controversy by unanimously affirming the availability of the doctrine of abuse of process in criminal proceedings. The court, at p. 14, borrowed the comments of Dubin J.A. in *R. v. Young*, supra, that a stay of proceedings should be granted where "compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency" or where the proceedings are "oppressive or vexatious". The court also adopted, "the caveat added by the [Ontario] court [of Appeal] in *Young* that this is a power which can be exercised only in the "clearest of cases".

[26] Madam Justice L'Heureux-Dube concluded at p. 7:

I, therefore, conclude that, in criminal cases, courts have a residual discretion to remedy an abuse of the court's process but only in the "clearest of cases", which, in my view, amounts to conduct which shocks the conscience of the community and is so detrimental to the proper administration of justice that it warrants judicial intervention.

To conclude that the situation "is tainted to such a degree" and that it amounts to one of the "clearest of cases", as the abuse of process has been characterized by the jurisprudence, requires overwhelming evidence that the proceedings under scrutiny are unfair to the point that they are contrary to the interest of justice.

[27] A stay of proceedings is only appropriate when:

- (a) the prejudice caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome; and
- (b) no other remedy is reasonably capable of removing that prejudice.

R. v. O'Connor (1995), [1995] 4 S.C.R. 411, 44 C.R. (4th) 1, 103 C.C.C. (3d) 1.

A stay of proceedings is usually only granted if the accused cannot otherwise obtain a fair trial. It is the rare case where a prosecution will be stayed if a fair trial is possible. A judicial stay of proceedings is not to punish or pass harm, but to prevent harm to the judicial process, if the process continues.

R. v. Regan (1999), 28 C.R. (5th) 1, 137 C.C.C. (3d) 449, 179 N.S.R. (2d) 45.

[28] The evidence that was before the Provincial Court judge did not support the suggestion that any member of the RCMP did anything on March 21, 2003 to discourage any of the disputants from proceeding with their trial. The only evidence is that of Constable Schellenberg which indicates that he was aware that on some occasions some officers may have done that. He was clear in his evidence that it is not a practice that he has ever followed. The learned Provincial Court judge concluded that in this case the evidence did not satisfy him that there was any abuse of the process which would justify a stay of proceedings. I agree with that conclusion. The learned Provincial Court judge exercised his discretion in considering whether any abuse that may have occurred could be remedied other than by a stay of proceedings. He concluded that the declaration of the mistrial and a trial before a Provincial Court judge appropriately dealt with any allegations of abuse.

[29] The appellant has not satisfied me that exercise of discretion was wrong, or that I should interfere with it.

[30] In essence, the appellant is arguing that because on some occasion in Ashcroft, some police officer may have conducted himself improperly by discouraging disputants from contesting traffic tickets by the threat of greater punishment, that this prosecution should be stayed. This is the same as arguing that because an abuse of process may have occurred in one particular case, that all cases should be stayed, whether an abuse has occurred in all of the other cases or not.

[31] The appellant argues that the entire process was tainted from the beginning and, therefore, would be an abuse of process to continue with the prosecution. However, there is no evidence to support any abuse of process occurred at any stage of this prosecution.

[32] Therefore, the appeal is dismissed.

"R.E. Powers, J."

The Honourable Mr. Justice R.E. Powers

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