
CANADA / JUDGMENT

R. v. Lowther

2004 BCSC 1661

COURT

Supreme Court of British Columbia

DECIDED

14 December 2004

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2004 BCSC 1661 R. v. Lowther

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Lowther,

2004 BCSC 1661

Date: 20041214

Docket: S57837-1

Registry: Kelowna

Between:

Regina

Respondent

And

Cameron Barry Lowther

Appellant

Before: The Honourable Mr. Justice Barrow

Reasons for Judgment

Counsel for the Respondent:

B.S. Williamson

Counsel for the Appellant:

J.R. Gordon

Date and Place of Hearing:

November 29, 2004

Kelowna, B.C.

- [1] Mr. Lowther received 37 parking tickets over the course of some five months in 2003. He did not pay them and, as a result, the City of Kelowna (the "City") caused an Information to be sworn charging him with 37 violations of various sections of the City's parking by-law. A summons was issued and Mr. Lowther appeared in Provincial Court on February 3, 2004. He pled guilty to the offences. He was fined \$75 on each count for a total penalty in excess of \$2,500. On February 23, 2004, he filed an appeal from the sentence imposed.
- [2] Sometime after filing his appeal Mr. Lowther retained counsel, Mr. Gordon, who made a series of demands on the City for disclosure. The disclosure requests are voluminous. They include requests for copies of the appointment of a number of some city engineers; a list of the duties of a host of city engineers; copies of Traffic Orders for the 37 locations at which Mr. Lowther was alleged to have been parked; copies of the Police Act Oath of Allegiance; a narrative of the relationship between all relevant enforcement officers and the commissionaires; a copy of the by-law designating commissionaires as responsible for by-law enforcement; the name of the supervisor of the informant on the information charging Mr. Lowther; copies of the appointments as commissionaires of four of the by-law officers that issued violation notices to Mr. Lowther; copies of "updated" appointments for eight other commissionaires; the number of commissionaires appointed to enforce a now repealed city parking by-law; and the dates on which others have been appointed since the repeal. It is apparent that this disclosure is being sought in aid of a fresh evidence motion to be brought at the hearing of the appeal.
- [3] The City has taken the position that it was not obliged to make the disclosure sought and Mr. Gordon has brought the present application. By it he is seeking the requested disclosure and liberty to amend his notice of appeal to include an appeal of the convictions. During the hearing, the City indicated that it was not opposed to the appellant amending his notice of appeal and I, accordingly, granted him liberty to do so. All that remains to be dealt with is the application for disclosure.
- [4] At the hearing, the City took the position that the obligation to disclose is an adjunct of the right to make full answer and defence. It argues that the appellant has been convicted, indeed, has pled guilty to the offences and, in doing so, has waived his right to make full answer and defence. Given that state of affairs, the underlying interest that disclosure is intended to serve is no longer extant and the obligation is at an end.
- [5] The appellant's position is simply that he is entitled to disclosure.

- [6] I will assume, for purposes of what follows, that the obligation to disclose in relation to prosecutions under municipal by-laws for allegations of parking violations is generally the same as the obligation that rests on the Crown in criminal prosecutions.
- [7] In *Regina v. Trotta*, [2004] O.J. No. 2439, the Ontario Court of Appeal outlined the principles that govern disclosure in the context of appeals. Doherty J.A. noted that while disclosure jurisprudence has, for the most part, arisen in the context of the pre-verdict phase of criminal prosecutions, disclosure remains an obligation at the appellate stage of the process. He noted at para. 22 that one of the purposes of disclosure is to protect against the conviction of the innocent and "[t]he protection of the innocent is as important on appeal as it is prior to conviction".
- [8] The obligation to disclose at the pre-trial stage extends to all material that may be relevant to a defence of the offences charged. On appeal, as pointed out in *Trotta*, the analysis is somewhat different because the interests at play are different. The disclosure obligation consists of the following according to Doherty J.A. (see para. 25):

The Crown's disclosure obligation on appeal must extend to any information in the possession of the Crown that there is a reasonable possibility may assist the accused in the prosecution of his or her appeal. [See Note 3 below] In the present case, the applicant seeks disclosure in aid of a proposed fresh evidence motion. To obtain production, the applicant must first demonstrate a connection between the request for production and the fresh evidence he proposes to adduce. The applicant must show that there is a reasonable possibility that the material sought could assist on the motion to adduce fresh evidence. By assist, I mean yield material that will be admissible as fresh evidence, or assist the applicant in developing or obtaining material that will be admissible as fresh evidence. The applicant must next demonstrate that there is some reasonable possibility that the evidence to which the production request is linked may be received as fresh evidence on appeal.

(emphasis added)

- [9] The test for the admission of fresh evidence on appeal is set out in *R. v. Palmer*, [1980] 1 S.C.R. 759. Of importance to the matter at hand is the general rule that evidence will not be admitted on appeal if, by due diligence, it could have been adduced at trial. This principle is not an inviolate prohibition against the admission of such evidence. It is a factor to be considered in light of the "totality of the circumstances" (see *R. v. Warsing*, [1998] 3 S.C.R. 579 at para. 51). As with the other considerations set out in *Palmer*, it is to be applied having regard to the overriding principle set out in s. 683 of the Criminal Code, namely, "the interests of justice".
- [10] In determining whether evidence should be admitted even if the requirement of due diligence has not been met, regard can usefully be had to the purpose for the requirement. Doherty J.A. succinctly explained that purpose in *R. v. P.S.M.* (1992), 77 C.C.C. (3d) 402 (Ont. C.A.). There, at para. 411, he wrote:

The interests of justice referred to in s. 683 of the Criminal Code encompass not only an accused's interest in having his or her guilt determined upon all of the available evidence, but also the integrity of the criminal process. Finality and order are essential to that integrity. The criminal justice system is arranged so that the trial will provide the opportunity to the parties to present their respective cases and the appeal will provide the opportunity to challenge the correctness of what happened at the trial. Section 683(1)(d) of the Code recognizes that the appellate function can be expanded in exceptional cases, but it cannot be that the appellate process should be used routinely to augment the trial record. Were it otherwise, the finality of the trial process would be lost and cases would be retried on appeal whenever more evidence was secured by a party prior to the hearing of the appeal. For this reason, the exceptional nature of the admission of "fresh" evidence on appeal has been stressed...

- [11] Normally the obligation to disclose is triggered by a request from the accused. In the case of an unrepresented accused, the obligation exists independently of any request. In my view, the material sought on this application is not material that the Crown would have been obliged to disclose, absent a request, even though the accused was not represented. It is material by which the appellant seeks to investigate whether the parking by-laws were lawfully enacted and whether the by-law enforcement officers were lawfully designated to issue notices pursuant to them.
- [12] Although the appellant has filed a lengthy affidavit, most of which is nothing more than argument, there is no suggestion that he ever requested disclosure of this material prior to trial. He deposed that he was unemployed when he appeared before the Justice of the Peace and that he did not have legal counsel. He did not suggest, however, that he wanted to retain counsel and was unable to because of his financial situation, nor did he suggest that he had any intention of disputing his responsibility for the parking tickets. The transcript makes it clear that his intention was quite the contrary. He explained to the Justice of the Peace that he wanted to accept responsibility for the tickets and, as he put it, "pay them". He was fined substantially more than he anticipated and, as a result, he decided to appeal the penalty. No appeal from conviction was launched.
- [13] He thereafter retained counsel who has advised him that there may be defects in the parking rules that relate to certain streets in the City and in the designation of the commissionaires who issued the violation notices. The first requests for disclosure were made almost six months after Mr. Lowther pled guilty and was fined.
- [14] It is apparent that the evidence in question would have been available to the appellant at trial had he exercised due diligence. The principles that guide the exercise of the court's discretion to admit fresh evidence are intended to achieve a balance between the competing interests identified by Doherty J.A. in P.S.M. In the context of a system charged with administering a regime of parking by-laws, the interests of order and finality are of considerable importance. Because of that, it will be rare that the requirement of due diligence will be relaxed when considering the admissibility of fresh evidence on appeal. On the material before me, there is no basis to conclude that the due diligence requirement

should be relaxed or dispensed with. Indeed, to do so would be to cast into doubt the "finality" of any disposition in which an accused person appeared without counsel. There is, it follows, no possibility that the material the appellant seeks will be admitted as fresh evidence on appeal. The application for disclosure is, accordingly, dismissed.

"G.M. Barrow, J."

The Honourable Mr. Justice G.M. Barrow

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