

CANADA / JUDGMENT

R. v. Melnichuk

2004 BCCA 332

COURT

British Columbia Court of Appeal

DECIDED

4 June 2004

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2004 BCCA 332 R. v. Melnichuk COURT OF APPEAL FOR BRITISH COLUMBIA Citation: R. v. Melnichuk, 2004 BCCA 332 Date: 20040604 Docket: CA030780 Between: Regina Respondent And Roy Makar Melnichuk Appellant Before: The Honourable Madam Justice Newbury The Honourable Mr. Justice Oppal The Honourable Mr. Justice Lowry Oral Reasons for Judgment J.G. Hardwick Counsel for the Appellant V.C. Toselli Counsel for the Respondent Place and Date: Vancouver, British Columbia 4 June 2004

- [1] OPPAL, J.A.: The appellant, Roy Makar Melnichuk, was found guilty of one count of fraud under \$5,000, one count of theft under \$5,000, and one count of false pretences under \$5,000. Pursuant to the rule against multiple convictions as stated in R. v. Kienapple, [1975] 1 S.C.R. 729, a conviction was registered on only the fraud count. At the sentencing date the appellant made an application for a mistrial based on a reasonable apprehension of bias on the part of the trial judge on the grounds that she was a member of the Crown counsel office when that office had conduct of the appellant's file. The application was dismissed. He now appeals from that finding.
- [2] The background of this matter is as follows. The appellant was employed as a custodian for the school district in Kelowna. On September 23, 1999 he was charged with one count of fraud, one count of theft, and one count of false pretences in relation to monies that he was alleged to have wrongfully appropriated from his employer, the school board. The Information alleged that the offences took place between May 3, 1998 and January 24, 1999. The appellant made his first appearance in the Provincial Court on October 28, 1999. For reasons that are not entirely clear, there were a number of adjournments, remands and Informations before the trial finally proceeded on July 2 and 3, 2002.
- [3] The trial was held in the Provincial Court in Kelowna before the Honourable Judge Phillips. The particulars of the offences were as follows. Between May 1998 and January 1999 the appellant made claims for overtime pay for attendances at the school made after his regular hours of employment. The attendances were made in order to respond to call-outs from the alarm company. The Crown alleged that in submitting claims for overtime pay for attendances that were unnecessary the appellant acted dishonestly. The appellant admitted that he had made the claims that were not accurate although he said that he had no

fraudulent intent in submitting the claims. Judgment was reserved to August 21, 2002 when Judge Phillips found the accused guilty on all three counts but registered a conviction on the count of fraud under s. 380(1)(b) of the Code.

- [4] The case was adjourned for sentencing to October 25, 2002. On that date the appellant appeared with new counsel, Mr. Hardwick, who made an application for a mistrial based on the grounds of a reasonable apprehension of bias. The application was based on the fact that prior to her appointment to the Provincial Court in February 2001, Judge Phillips had been employed as a Crown counsel at the Kelowna office. The evidence was that Ms. Phillips (as she then was) served in the Kelowna Crown counsel office for approximately a 17-month period during which the office had conduct of the appellant's file.
- [5] In making his application for a mistrial Mr. Hardwick advanced four main arguments on the issue of apprehension of bias. They were:
1. that the length of time that the file was in the Kelowna Crown counsel office should give rise to a concern;
 2. that the Crown counsel office is relatively integrated and homogenous and accordingly, an inference ought to be drawn that counsel shared confidences;
 3. that Ms. Phillips' association with counsel with the Crown office was not fleeting; and
 4. that there was no "compelling practicality which dictated that she ought to have heard the trial as opposed to some other judge".
- [6] In dismissing the application, the trial judge reviewed the somewhat lengthy history of the proceedings which were characterized by the appellant applying for and being granted a number of adjournments in order to obtain counsel. She also made reference to the change in Informations as filed by the Crown. After a review of the evidence Judge Phillips raised a concern that the issue relating to bias was not raised until the convictions had been recorded. She went on to state that there was no evidence or anything to suggest that she had ever handled the appellant's file while she was at the Crown counsel office or that she was present for any discussion regarding his prosecution. She also said there was no evidence that reasonably suggested that she received any information regarding the appellant other than as a trial judge. Finally, she noted that there was no evidence or other basis to suggest that the Crown did anything which affected the assignment of Judge Phillips as a trial judge. In her reasons she made the following comments:
- [36] The question really comes down to whether or not a reasonable, well-informed, right-minded, practical and realistic person would perceive that there is a real likelihood of bias based upon the fact that I was one of many prosecutors in a relatively busy and large Crown Counsel office for a period of seventeen months while Mr. Melnichuk's file was being handled by that office.

- [37] This prior professional association should not be considered in a vacuum. The reasonable person would be informed that there is no suggestion that while I was at the Crown office I had anything to do with Mr. Melnichuk's file nor any discussions about Mr. Melnichuk's matter with other Crown counsel. The reasonable person would be informed that as a judge of this Court, I swore an oath to be impartial and have a duty to act on all matters in an impartial fashion. The reasonable person would be informed that both as Crown counsel and as a sitting judge, I would deal with literally hundreds of files in any given month. Finally, the reasonable person would be informed that Mr. Melnichuk was represented by experienced and local counsel throughout the time these matters were before the Court, and never raised the issue of apprehension of bias until Mr. Melnichuk attended at the date scheduled for sentencing.
- [7] I pause here to note as well that it is implicit in her reasons that she had no involvement in the matter. The argument that has been raised here by Mr. Hardwick is that Judge Phillips was not clear in her reasons as to her precise involvement in the conduct of the file and that she at no time unequivocally states that she had no discussions or any involvement at all in the conduct of the file while the file was in the Crown counsel office in Kelowna.
- [8] The appellant does not allege that there was actual bias on the part of the trial judge. Rather, it is argued that the trial judge's prior association with the Crown office created a reasonable apprehension of bias. The law is clear that the apprehension of bias must be reasonable and it must be based on cogent evidence. As well, there is a presumption of impartiality on the part of a judge who hears a case. The evidence of bias need not be direct. In fact, the apprehension of bias as such will invariably be based upon an inference that is drawn from cogent evidence. The test is an objective test.
- [9] In *Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R. 259, the Supreme Court of Canada revisited and redefined this issue. In that case a party sought to disqualify a judge based upon a reasonable apprehension of bias. The case involved an aboriginal land claim. The dispute was between two competing native bands. Prior to his appointment to the bench the judge had been an Associate Deputy Minister of Justice from 1982 to 1986 and in that capacity had received some information relating to the band's claim and in fact had attended a meeting where the claim was discussed. After his appointment to the bench he wrote reasons dismissing the band's appeals. Approximately a year after the decision the band made a motion to set aside the judgment alleging a reasonable apprehension of bias arising from the judge's involvement some 16 years prior to his written reasons. The judge filed a statement stating that he had no recollection of his personal involvement in the case. In dismissing the motion, the court reiterated the statement of policy that public confidence in our legal system is rooted in the fundamental belief that those who adjudicate in law must always do so without bias or prejudice and must be perceived to do so. At para. 60 the court stated: In Canadian law, one standard has now emerged as the criterion for disqualification. The criterion, as expressed by de Grandpré J. in *Committee for Justice and Liberty v. National Energy Board* [[1978] 1 S.C.R. 369], at p. 394, is the reasonable apprehension of

bias: ... 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. In the words of the Court of Appeal, that 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."

[10] In this case I cannot conclude that the judge erred in not disqualifying herself. The application is based on the fact that she worked as Crown counsel in the same office that prosecuted the appellant. The approximate overlap was 17 months. It should be noted that the Kelowna office is relatively large and deals with hundreds of files per month. There is no evidence that she had any dealings with the appellant's file. Moreover, there was a further lapse of 17 months from the date of her appointment to the bench to the date of trial. For these reasons, it cannot be said that there was a reasonable apprehension of bias. The presumption of impartiality has not been rebutted. I cannot conclude that the judge erred in law in not disqualifying herself.

[11] In these circumstances I would dismiss the appeal.

[12] NEWBURY, J.A.: I agree.

[13] LOWRY, J.A.: I agree.

[14] NEWBURY, J.A.: The appeal is dismissed. "The Honourable Mr. Justice Oppal"

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