

CANADA / JUDGMENT

R. v. Melrose

2014 BCCA 148

COURT

British Columbia Court of Appeal

DECIDED

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2014 BCCA 148 R. v. Melrose COURT OF APPEAL FOR BRITISH COLUMBIA Citation: R. v. Melrose, 2014 BCCA 148 Date: 20140415 Docket: CA040836 Between: Regina Respondent And James Richard Melrose Appellant Corrected Judgment: The text of the judgment was corrected at paragraph 10 on April 16, 2014. Before: The Honourable Madam Justice Bennett (In Chambers) On appeal from: An order of the Supreme Court of British Columbia, dated March 27, 2013 (R. v. Melrose, 2013 BCSC 526, Vancouver Docket 26086). The Appellant: In Person Counsel for the Respondent: J.R.W. Caldwell Place and Date of Hearing: Vancouver, British Columbia December 9, 2013 Place and Date of Judgment: Vancouver, British Columbia April 15, 2014 Summary: After successfully appealing a conviction for speeding in the Supreme Court of British Columbia, the appellant's application for costs was denied. He applied for leave to appeal the denial of costs. Held: leave to appeal granted. Reasons for Judgment of the Honourable Madam Justice Bennett:

- [1] Mr. Melrose applies for leave to appeal a refusal of costs order made in the Supreme Court, after he successfully appealed a conviction for speeding.
- [2] In the unusual circumstances of this case, I would grant leave to appeal on the basis outlined below. I. BACKGROUND
- [3] Our usual practice when leave to appeal is granted is not to give reasons for this decision. Mr. Melrose is self-represented, and I think it will assist him if he understands why I have granted leave to appeal.
- [4] Mr. Melrose was charged on October 11, 2010 with speeding. He filed a dispute notice on November 8, 2010, within the appropriate time. Mr. Melrose received a notice that his hearing date was scheduled for August 11, 2011. On July 11, 2011, he sent a request for disclosure by registered mail to the police officer who issued the ticket. Although this was received at the police station, the request did not find its way to the officer and Mr. Melrose did not receive any disclosure pursuant to his request.
- [5] He appeared in court on August 11 and advised the judicial justice that he wished to make an application for a stay of proceedings on the basis of non-disclosure and unreasonable delay contrary to s. 11(b) of the Charter of Rights and Freedoms. His case was adjourned and a hearing set before a provincial court judge.

- [6] Judge Senniwi heard Mr. Melrose's application for a stay of proceedings on October 20, 2011. She did not stay the proceedings, and concluded that Mr. Melrose would have to make an application for disclosure before the judicial justice who was hearing the case. I am not certain why she believed she did not have the jurisdiction to make the order, but that question is not before me. Judge Senniwi held that Mr. Melrose's first hearing date was well within the normal time, so there was no infringement of his s. 11(b) rights and therefore no basis for a stay. She did not appear to consider the delay associated with the non-disclosure or the time that it would take for further resolution. This is not before me either, so I will not comment further. The matter was remitted to the judicial justice for trial.
- [7] In the meantime, Mr. Melrose had not received the disclosure he requested in July. He sent another registered letter to the police officer, and it was received at the police station on December 13, 2011. On January 9, 2012, Mr. Melrose called the police officer and left a message. The officer returned his call on January 17, the day before his next hearing, and left a message. Mr. Melrose did not receive it until the evening as he was at work.
- [8] The next hearing took place on January 18, 2012. The officer was ordered to provide copies of documents to Mr. Melrose at that time. This included a copy of the officer's notes of the alleged speeding infraction and a letter explaining the shorthand notations. The judicial justice did not order much of the disclosure requested by Mr. Melrose, but ordered the officer to produce a curriculum vitae.
- [9] On March 13, 2012, Mr. Melrose went to the police department to seek further disclosure and it was recommended he complete a request pursuant to the Freedom of Information and Protection of Privacy Act, R.S.B.C. 1996, c. 165. He did this, but never received a response.
- [10] Mr. Melrose had further communication with the officer, but did not receive sufficient disclosure to his satisfaction. His next hearing was on April 23, 2012, before Judicial Justice Makhdoom. By that time Mr. Melrose had received the officer's curriculum vitae and her notes of the alleged speeding infraction. Judicial Justice Makhdoom was satisfied that the rest of the disclosure sought by Mr. Melrose was either not relevant or not in the Crown's possession. Mr. Melrose's trial went ahead and he was convicted. He filed a notice of appeal on May 22, 2012.
- [11] Mr. Melrose's summary conviction appeal was heard on October 15, 2012 before Mr. Justice Tindale. He argued lack of disclosure, improper restriction of his cross-examination, and delay contrary to s. 11(b). Justice Tindale allowed his appeal on the disclosure and cross-examination issues and ordered a new trial. He did not consider the delay issue because he had already ordered a new trial and concluded that "there was no useful purpose in addressing this ground of appeal". This was, respectfully, clearly an error in law because a successful s. 11(b) argument would result in a stay of proceedings, and not a new trial. Justice Tindale also denied Mr. Melrose an order for costs. I will refer to Tindale J.'s reasons in more detail below.

- [12] Mr. Melrose applied for leave to appeal the order for a new trial, the failure to address the s. 11(b) delay issue, and the denial of costs. On December 4, 2013, after he filed his application and motion book, the Crown entered a stay of proceedings on the speeding charge rendering his appeal on the s. 11(b) issue moot. He wishes to pursue his application for leave to appeal the denial of costs.
- [13] Mr. Melrose filed his motion book on October 28, 2013. The Crown did not file its response until December 6, 2013, and handed it to Mr. Melrose just before court on Monday, December 9, 2013, although some materials were e-mailed to him on December 6. Mr. Melrose had taken yet another day off work (this was day 8) and did not want an adjournment, although he was not prepared to proceed. I heard both Mr. Melrose and the Crown, and gave both an opportunity to file written submissions. II. DISCUSSION
- [14] In his reasons for dismissing the summary conviction appeal, Tindale J. said this about the application for costs:
- [39] The appellant is seeking the costs of this appeal. The respondent is opposed to that order being made.
- [40] In *R. v. Neustaedter*, 2003 BCSC 39, Madam Justice Stromberg-Stein stated at para. 7: In *R. v. King* (1986), 26 C.C.C. (3d) 349 (B.C.C.A.), the Court recognized three classes of cases where costs might properly be awarded against the Crown:
1. Where the prosecution by the Crown has been frivolous;
 2. Where the prosecution has been conducted for an oblique motive; or
 3. Where the case has been taken by the Crown as a test case.
- [41] The case also recognizes that there may be other classes of cases where costs may be awarded. Certainly, pursuant to s. 826 of the Criminal Code there is discretion in this court to award costs.
- [42] In my view this case does not fall in any category which would attract an award for costs. The appellant's application for costs is denied.
- [15] As is apparent from Tindale J.'s reasons, he considered the Criminal Code provisions dealing with costs, when in fact he should have applied the costs provisions in the Offence Act, R.S.B.C. 1996, c. 338 (set out below): Costs 79 (1) The justice may, in his or her discretion, award and order costs the justice considers reasonable and not inconsistent with the fees established by section 80 to be paid
- (a) to the informant by the defendant, if the justice convicts or makes an order against the defendant, or
 - (b) to the defendant by the informant, if the justice dismisses an information.
- (2) An order under subsection (1) must be set out in the conviction, order, or order of dismissal.

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- (3) Costs awarded and ordered to be paid by a person under this section are deemed to be all or part, as the case may be, of a fine imposed against the person. Fees and allowances 80 The fees and allowances mentioned in the tariff to this Act, and no others, are the fees and allowances that may be taken or allowed in proceedings before justices under this Act. Costs 112 (1) If an appeal is heard and determined, or is abandoned or is dismissed for want of prosecution, the appeal court may make any order with respect to costs that it considers just and reasonable.
- (2) Section 79 (3) applies to an order under subsection (1). Powers of court hearing appeal 121 (1) If a case is stated under this Act, the Supreme Court must hear and determine the grounds of appeal, and may
- (a) affirm, reverse or modify the conviction, order or determination,
 - (b) send the case back to the justice for amendment and deliver judgment after it has been amended, or
 - (c) remit the matter to the justice with the opinion of the Supreme Court, and may make
 - (d) any other order in relation to the matter that it considers proper, and
 - (e) any order with respect to costs that it considers proper and that could be made by a justice.
- (2) Except as provided in section 119 (2), an order for the payment of costs must not be made against the justice who states a case.
- [16] The jurisdiction to appeal a summary conviction appeal under the Offence Act, is set out below: Appeal to Court of Appeal on question of law 124 (1) An appeal to the Court of Appeal may, with leave of a justice of that court, be taken on any ground that involves a question of law alone against a decision of
- (a) a court in respect of an appeal under section 102, or
 - (b) the Supreme Court in respect of a stated case under section 121.
- (2) Sections 673 to 689 of the Criminal Code apply, with the necessary changes and so far as applicable, to an appeal under this section, and the Court of Appeal may grant a new trial.
- (3) Despite subsection (2), the Court of Appeal may make any order with respect to costs that it considers proper in relation to an appeal under this section.
- (4) The decision of the Court of Appeal may be enforced in the same manner as if it had been made by the justice before whom the proceedings were originally heard and determined.
- (5) The Rules of Court made by the Court of Appeal under section 482 of the Criminal Code apply, with the necessary changes and so far as applicable, to an appeal to the Court of Appeal under this Act.
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- [17] There are generally two bases on which to order costs in summary conviction matters: when there is "oppressive or improper conduct" by the Crown or where the case is "remarkable" (for example, a test case for the Crown): *R. v. C.A.M.*, [1996] 1 S.C.R. 500 at paras. 97-98; *R. v. Taylor*, 2007 BCCA 250 at para. 24.
- [18] The nature of an appeal to the Court of Appeal on a summary conviction "is not a second appeal from the trial court. Rather, it is an appeal from the decision of the summary conviction appeal court. Accordingly, the focus of a leave application, and the appeal if leave is granted, is on whether any error of law was committed by the summary conviction appeal judge": *R. v. Winfield*, 2009 YKCA 9 at para. 12.
- [19] The test for leave was stated succinctly in *Winfield*, at para. 13: To obtain leave to appeal from the decision of a summary conviction appeal court, the applicant must establish that (a) the ground of appeal involves a question of law alone, (b) the issue is one of importance, and (c) there is sufficient merit in the proposed appeal that it has a reasonable possibility of success. The overriding consideration in the exercise of the discretion to grant or refuse leave is the interests of justice: *R. v. Cai*, 2008 BCCA 332, 258 B.C.A.C. 235 at para. 26 (Chambers); *R. v. Gill*, 2008 BCCA 259 at para. 3 (Chambers).
- [20] The first question is whether the appeal involves a question of law alone. In my view, the questions of law are i) the misapplication of the legislation by Tindale J. and ii) the failure to properly consider the effect of a possible s. 11(b) delay, not dealt with by Tindale J., and caused, in part by the conduct of the Crown (including the police) leading up to the ultimate disposition, on the question of costs.
- [21] Costs are seldom awarded in criminal or, as here, quasi-criminal cases. However, in this case, Mr. Melrose was obliged to make many appearances in court because of the police officer's failure to provide the disclosure that the Supreme Court ultimately concluded he was entitled to in order to properly defend himself. The failure to make timely disclosure is the primary cause of the delay in the hearing of the case. In my opinion, this raises important questions about the ability of a citizen to access justice, and the potential entitlement to a costs order when the Crown fails to comply with its obligations in a timely way, or at all. The issues advanced by Mr. Melrose were not addressed by the summary conviction appeal judge and they have sufficient merit to be heard on appeal.
- [22] Finally, I conclude that the interests of justice require that leave be granted on the following bases:
- i) whether the summary conviction appeal judge erred in failing to consider the effect of the delay to trial in his decision to deny costs; and ii) whether the summary conviction appeal judge erred in applying the wrong legislation to the costs issue.
- [23] As noted at the outset, I would grant leave to appeal the denial of costs.

[24] Additional copies of the motion book and material filed on the leave application will suffice as transcripts and appeal books. Factums will be filed in accordance with the Rules. "The Honourable Madam Justice Bennett"

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