

CANADA / JUDGMENT

R. v. Montgomery

2014 BCSC 934

COURT

Supreme Court of British Columbia

DECIDED

28 May 2014

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2014 BCSC 934 R. v. Montgomery IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: R. v. Montgomery, 2014 BCSC 934 Date: 20140528 Docket: 73426 Registry: Kelowna Regina v. Clifford Roger Montgomery, Tariq Mohammed Aslam and Salvador Ascencio-Chavez Before: The Honourable Madam Justice Beames Reasons for Judgment Re: Conduct Money Counsel for the Crown: C.W. Greenwood H. Magnin Counsel for the Accused, C.R. Montgomery: N.L. Cobb E. Lewis Counsel for the Accused, T.M. Aslam: J.W. Hogan, Q.C. J. Banks Counsel for the Accused, S. Ascencio-Chavez: K. Molle Counsel for the proposed witness, B. Ready: T.J. Russell Place and Date of Trial/Hearing: Kelowna, B.C. April 1, 2014 Place and Date of Judgment: Kelowna, B.C. May 28, 2014

- [1] These reasons address whether conduct money is payable to witnesses subpoenaed to testify in criminal trials.
- [2] Counsel for Mr. Montgomery obtained a subpoena requiring Barry Ready to attend at the trial to give evidence for the defence. Mr. Ready was, at one time, a co-accused in this matter. Mr. Ready's counsel applied to quash the subpoena, in part because his client, who was living and working in Manitoba, had not been paid conduct money.
- [3] Counsel for Mr. Montgomery took the position that conduct money is payable to witnesses in civil matters only and that the accused was not obliged to pay conduct money in order to compel Mr. Ready to attend court to give evidence. However, he undertook to pay Mr. Ready's reasonable conduct money if I ruled conduct money was payable, and Mr. Ready's counsel conceded that his client was not impecunious and could afford to travel to Kelowna to attend court. Consequently, I refused to quash the subpoena and Mr. Ready attended court in response to the subpoena. As events transpired, after speaking to Mr. Ready, the defence decided not to call him to testify and Mr. Ready was excused from the attendance.
- [4] Counsel for Mr. Ready relies on two decisions from the Provincial Court in which the then Associate Chief Judge Stansfield found conduct money was payable to defence witnesses served with subpoenas. In R. v. Dick, 2001 BCPC 245, he said: Lest there be any uncertainty, this is a defence witness being called by the defence, and the obligation to provide conduct money applies as it would in respect of any witness.

- [5] Counsel for Mr. Montgomery relies on the fact that there are no statutory, regulatory or even practice direction provisions which address the issue of conduct money in criminal matters, as distinct from clear provisions for the same in civil matters, to support his position that conduct money is not payable.
- [6] There is no question that "the involuntary participation of non-involved persons in litigation is a longstanding tradition of the legal system" (Fraser J. in *Northland Properties Ltd. v. Equitable Trust Co.* (1992), 10 C.P.C. (3d) 245 (B.C.S.C.) at 254-5) and that "everyone has a duty to testify to that which they have witnessed" (Cromwell J.A., as he then was, for the court in *D.W. Matheson & Son Contracting Ltd. v. Canada (Attorney General)*, 2000 NSCA 44 at para. 83).
- [7] There is also, in my view, no question that the court has the jurisdiction to control its own process, including by requiring that witnesses be paid reasonable conduct money by the party who causes them to be required, by subpoena, to attend court, whether in criminal or civil matters, and without the necessity for statutory or other provisions for the same.
- [8] In *R. v. Wilder* (29 April 1998), Vancouver CC901654 (B.C.S.C.) Scarth J. addressed the issue this way:
- [17] The Criminal Code is silent on the matter of who is responsible for paying a witness's expenses for attending a superior court of criminal jurisdiction to give evidence: *Re Wyshynski*, [1966] 2 C.C.C. 199 (Sask. Q.B.), at p. 204.
- [18] In civil proceedings the Court, by virtue of the Subpoena (Interprovincial) Act, R.S.B.C. 1996, c. 442, may impose the obligation on the party who obtained the subpoena to pay witness fees and travelling expenses to a witness who is required to attend before a court in British Columbia from another province in Canada. That Act does not, however, apply to a subpoena that is issued with respect to a criminal offence under an Act of Canada: s. 8.
- [19] Mr. Wilder states he will require Mr. Morriss to attend court for at least 2 weeks for the purpose of giving evidence. He says he is a lay litigant and has no funds with which to pay for Mr. Morriss's travel and accommodation expenses. As a citizen Mr. Morriss has an obligation to attend court and should pay his own expenses. Alternatively, Mr. Morriss was a person exercising an official function with the Government of Canada. It is said he had a contract with the government, that he reported to the government concerning Mr. Wilder's affairs from 1985 through 1995, that he involved himself in litigation with Mr. Wilder in order to provide information to Revenue Canada concerning Mr. Wilder, and that he conducted surveillance of Mr. Wilder for Revenue Canada. In short, it is said, he was an informant and government agent. Mr. Wilder submits the Crown should be held responsible for paying his expenses to attend.
- [20] Mr. Harper states the Crown is "neutral" about whether Mr. Morriss testifies or not. Without an order of the Court the Crown will not pay his expenses. At the present time, Mr. Harper submits, there is no basis for making an order requiring the Crown to pay those expenses.

- [21] I see no basis for requiring Mr. Morriss to pay the costs of his attendance before the Court here out of his own pocket.
- [22] It seems there is a power in the Court, including a District Court, to order the Crown to pay the fees and expenses of a necessary expert witness from the United States of America who, in the ordinary course, would be a witness for the defence but is instead called by the Court to assist the Court with a difficult issue: *Re Regina and P.R.S.* (1987), 38 C.C.C. (3d) 109 (Ont. H.C.), at pp. 113-14. The circumstances here do not indicate the Court should consider calling Mr. Morriss as its own witness.
- [23] In my judgment the ordinary rule of practice in both civil and criminal cases should prevail: the party who calls the witness should pay the reasonable costs involved in having him or her attend. It may be that evidence given in the voir dire, including that of Mr. Morriss, and evidence of the accused's financial inability to bear the costs, will justify reconsideration of the question of who, as between the Crown and defence, should ultimately be responsible for such costs. At this point, however, Mr. Wilder must bear such responsibility.
- [24] I am told Mr. Morriss would be satisfied if his travel and accommodation expenses are paid. It seems to me that this requirement would be met by applying Schedule A, Items 1, 2 and 3, of the Subpoena (Interprovincial) Act, *supra*.
- [9] While a duty exists for a fact witness to attend court and testify, potentially at some personal inconvenience, and without being paid a fee or being reimbursed for lost wages, for example, I am not convinced it is appropriate for that witness to be forced to attend (failing which the witness may be arrested and punished) at his or her own expense in terms of travel expenses.
- [10] Consequently, I find that Mr. Ready was entitled to be paid reasonable conduct money for his travel to and from Kelowna, plus a reasonable allowance for his associated accommodation and meals. "A.J. Beames J." The Honourable Madam Justice Beames

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