

CANADA / JUDGMENT

R. v. Phelps

2020 BCSC 1750

COURT

Supreme Court of British Columbia

DECIDED

27 October 2020

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2020 BCSC 1750 R. v. Phelps

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Phelps,

2020 BCSC 1750

Date: 20201027

Docket: 109241-1, 109241-3

Registry: Kamloops

Regina

v.

Kyle Daniel Phelps

Before: The Honourable Mr. Justice Marchand

Oral Reasons for Judgment

Counsel for the Crown:

O.A. Potestio

Counsel for the Accused Phelps:

K.M. Walker, Q.C.

Place and Date of Trial/Hearing:

Kamloops, B.C.

October 27, 2020

Place and Date of Judgment:

Kamloops, B.C.

October 27, 2020

Introduction

- [1] Kyle Phelps and Darren Robinson were jointly charged with aggravated assault, robbery, and possessing a weapon for a dangerous purpose in relation to an incident that is alleged to have occurred on November 3, 2019 at Chase.
- [2] Mr. Phelps was arrested on February 26, 2020 and held for court. Mr. Phelps had a bail hearing on February 27, 2010 and was detained. Given his detention, on March 23, 2020, Mr. Phelps waived his right to a preliminary inquiry and elected to be tried by a Supreme Court judge without a jury. Mr. Phelps was subsequently released on conditions following a s. 525 detention review hearing.
- [3] In the meantime, Mr. Robinson was arrested on February 28, 2020 and was granted bail on March 2, 2020. On August 31, 2020, Mr. Robinson elected to be tried by a Supreme Court judge, sitting with a jury, and requested a preliminary inquiry.
- [4] As noted by the Crown, the history of proceedings has resulted in a de facto severance of Mr. Phelps and Mr. Robinson. To ensure consistent decisions and efficient proceedings, the Crown seeks to have Mr. Phelps and Mr. Robinson tried together. The Crown submits that the Supreme Court has the jurisdiction to "decline" Mr. Phelps' election and should exercise its discretion to do so.
- [5] For the reasons that follow, I do not agree that the court has the statutory jurisdiction to decline Mr. Phelps' election. I also do not agree that the court has the inherent jurisdiction to do so or, if it does, that the court should exercise its inherent jurisdiction in this case.

Analysis

Statutory Jurisdiction

- [6] The Crown relies on ss. 536(4.2), 565(1)(a), and 567 of the Criminal Code, as well as *R. v. Cornelio*, [1997] O.J. No. 3786 (C.J.); *Okell v. Saskatchewan (Minister of Justice)*, 2006 SKCA 34; *Toronto Star Newspapers Ltd. v. Canada*, [2006] O.J. No. 5781 (S.C.); *R. v. Ravandi and Henareh*, 2012 BCPC 432; *HMTQ v. Foster*, 2018 ONSC 897; and *R. v. Ryan*, 2019 NBPC 11.
- [7] Section 536(4.2) of the Code provides that:

If two or more persons are jointly charged in an information and one or more of them make a request for a preliminary inquiry. . . a preliminary inquiry must be held [for all accused].
- [8] Section 565(1)(a) provides that:

If an accused is ordered to stand trial for an offence that . . . may be tried by a judge without a jury, the accused shall . . . be deemed to have elected to be tried by . . . a judge and jury if

- (a) the justice of the peace, provincial court judge or judge, as the case may be, declined to record the election or re-election of the accused under section 567 . . .

[9] Finally, s. 567 provides that:

. . . if two or more persons are jointly charged in an information, unless all of them elect or re-elect or are deemed to have elected the same mode of trial, the justice, provincial court judge or judge may decline to record any election, re-election or deemed election for trial by a provincial court judge or a judge without a jury.

[10] I entirely agree with the Crown, as supported by the authorities cited, that these provisions are designed to avoid the current situation, where, by reason of their elections, the charges against Mr. Phelps and Mr. Robinson have been de facto severed. Given the discretion afforded by s. 567, severance may on occasion occur as the result of inconsistent elections, but generally severance is intended to be addressed by way of applications under s. 591 of the Code.

[11] The authorities make clear that, in an ideal world, jointly charged co-accused consult with each other before electing the single mode of trial that best suits them all and/or that the court note but not record any elections until the intended elections of all co-accused are known. In the latter case, if the co-accused elect or re-elect different modes of trial, the judicial officer taking the elections or re-elections can exercise their discretion to decline any intended election of trial by Provincial Court judge or Supreme Court judge without a jury, to ensure all co-accused are tried together (subject to any subsequent severance application).

[12] The flaw in the Crown's application is that Mr. Phelps is not before me for election or re-election. His election was recorded on March 23, 2020.

[13] On a plain reading of s. 567, I only have the jurisdiction to decline an election. I do not have the jurisdiction to set aside an election that has already been recorded.

[14] In the absence of a declined election, Mr. Phelps cannot be deemed to have elected trial by Supreme Court judge with a jury under s. 565(1)(a).

[15] For completeness, the mandatory requirement of a preliminary inquiry under s. 536(4.2) also does not arise. Mr. Phelps has been committed to stand trial in Supreme Court. Even though the Crown has not yet preferred an indictment against him, Mr. Phelps is no longer jointly charged with Mr. Robinson in an information. Further, in my respectful view, s. 536(4.2) is not intended to override the provisions in the Code that deal specifically with elections and re-elections.

[16] Before turning to the topic of inherent jurisdiction, I pause to note that none of the authorities relied on by the Crown relate to circumstances such as those that are before me. To be specific, none involve a Supreme Court judge "declining" or setting aside a previously recorded election.

Inherent jurisdiction

[17] In *R. v. Caron*, 2011 SCC 5, the Court reviewed the inherent jurisdiction of the Alberta Court of Queen's Bench in the context of making an interim costs order in respect of proceedings in the Provincial Court of Alberta. Though the context was quite different, a number of principles emerged from the court's decision, including the following:

1. The inherent jurisdiction of the provincial superior courts is broadly defined as "a residual source of powers which the court may draw upon as necessary whenever it is just or equitable to do so".
2. These powers are not derived from any statute or rule of law, but rather from the very nature of the court as a superior court of law.
3. Novelty is not a barrier to necessary action.
4. The inherent jurisdiction of the court is wide and may be invoked in an apparently inexhaustible variety of circumstances.
5. A categories approach is not appropriate.
6. The breadth of the court's inherent jurisdiction requires that it be exercised sparingly and with caution.

[18] One limit on the exercise of the court's inherent jurisdiction is that the court may not contravene an express statutory enactment. In his widely cited paper, *The Inherent Jurisdiction of the Court*, I.H. Jacob wrote:

The general jurisdiction of the High Court as a superior court of record is, broadly speaking, unrestricted and unlimited in all matters of substantive law, both civil and criminal, except in so far as that has been taken away in unequivocal terms by statutory enactment.

[19] Schultes J. considered the limits of the court's inherent jurisdiction in *R. v. Raczkowski*, 2013 BCSC 2528, and in *Re Further Detention of Things Seized*, 2018 BCSC 2506.

[20] In *Raczkowski*, Schultes J. concluded that he had the jurisdiction to fill an unforeseen gap in the Criminal Code to prevent an injustice by varying an intermittent sentence.

- [21] In *Re Further Detention of Things Seized*, Schultes J. concluded that he had the inherent jurisdiction to supplement the legislation to extend the detention of things seized in the course of a police investigation. Schultes J. concluded that to do otherwise would lead to an absurdity, in that either the investigation would be jeopardized or participants in the investigation would be endangered.
- [22] In the circumstances of this case, there is no unforeseen gap in the legislation. Rather, the Crown is seeking to undo an application of the legislation that, in retrospect, the Crown considers inappropriate.
- [23] While neither party cited any authority to help me understand the scope of the court's inherent jurisdiction, in my view, it cannot be used as a form of judicial review or appeal.
- [24] In all of the circumstances, I am compelled to conclude that I do not have the inherent jurisdiction to "decline" or set aside Mr. Phelps' previously recorded election.
- [25] If I am wrong about the scope of my inherent jurisdiction, the circumstances are not so compelling that I would exercise my inherent jurisdiction as proposed by the Crown.
- [26] I do not have a transcript of the proceedings before the experienced Provincial Court judge who accepted Mr. Phelps' election. I have to assume that the Provincial Court judge was aware of the usual and preferred practice of trying co-accused together and of her discretion to decline to record an intended election. If she appeared not to have been aware of or to have overlooked the usual practice and her discretion, the Crown ought to have raised the issue with her then.
- [27] In short, the time to deal with the Crown's current concerns was at the time Mr. Phelps made this election, not now. I am not prepared to exercise any inherent jurisdiction that I have to fix a "problem" that could have been, should have been, and, for all I know, was adequately addressed by the Provincial Court judge who recorded Mr. Phelps' election.

Conclusion

- [28] For all of these reasons, I must dismiss the Crown's application. In other words, Mr. Phelps' election of trial by Supreme Court judge sitting without a jury stands.

"L.S. Marchand J."

MARCHAND J.

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