

CANADA / JUDGMENT

R. v. Sicotte

2020 BCSC 909

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 909 R. v. Sicotte

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Sicotte,

2020 BCSC 909

Date: 20200529

Docket: 25799-2

Registry: Nelson

Regina

v.

Bradley Robert Sicotte

Michelle Marie Tottenham

Before: The Honourable Madam Justice Fleming

Oral Ruling on Voir Dire #1

(via teleconference)

Counsel for the Crown:

D. Meagher

Counsel for the Accused, Bradley Sicotte:

B.F. Suffredine, Q.C.

Counsel for the Accused, Michelle Tottenham:

M.G. Goulden

Place and Date of Hearing:

Kamloops, B.C.

May 28, 2020

Place and Date of Judgment:

Kamloops, B.C.

May 29, 2020

- [1] THE COURT: I should say firstly, that yesterday's hearing was the first voir dire in this case. If a transcript of these reasons is ordered, I may edit them to clarify my meaning and expand upon my analysis.
- [2] Bradley Sicotte and Michelle Tottenham are charged in a seven-count indictment with committing six drug offences including possession of LSD, MDA, morphine, Oxycodone, and methamphetamine for the purpose of trafficking, all contrary to s. 5(2) of the Controlled Drugs and Substances Act, S.C. 1996, c. 19, and possession of a prohibited firearm contrary to s. 91(1) of the Criminal Code, R.S.C. 1985, c. C-46, on or about August 22, 2018 ("Indictment").
- [3] Both Mr. Sicotte and Ms. Tottenham apply for an order that the case is deemed to be dismissed pursuant to s. 485(3) of the Criminal Code.
- [4] Section 485 includes in relevant part:

PROCEDURAL IRREGULARITIES

485(1) Jurisdiction over an offence is not lost by reason of the failure of any court, judge, provincial court judge or justice to act in the exercise of that jurisdiction at any particular time, or by reason of a failure to comply with any of the provisions of this Act respecting adjournments or remands.

When accused not appearing personally

(1.1) Jurisdiction over an accused is not lost by reason of the failure of the accused to appear personally, so long as the provisions of this Act or a rule made under section 482 or 482.1 permitting the accused not to appear personally apply.

Summons or warrant

- (2) Where jurisdiction over an accused or a defendant is lost and has not been regained, a court, judge, provincial court judge or justice may, within three months after the loss of jurisdiction, issue a summons, or if it or he considers it necessary in the public interest, a warrant for the arrest of the accused or defendant.

Dismissal for want of prosecution

- (3) Where no summons or warrant is issued under subsection (2) within the period provided therein, the proceedings shall be deemed to be dismissed for want of prosecution and shall not be recommenced except in accordance with section 485.1.

Part XVI to apply

- (5) The provisions of Part XVI apply with such modifications as the circumstances require where a summons or warrant is issued under subsection (2).
- [5] Also relevant is s. 485.1:

RECOMMENCEMENT WHERE DISMISSAL FOR WANT OF PROSECUTION

485.1 Where an indictment in respect of a transaction is dismissed or deemed by any provision of this Act to be dismissed for want of prosecution a new information shall not be laid and a new indictment shall be preferred before any court in spect of the same transaction without

- (a) the personal consent in writing of the Attorney General ; or

Background

- [6] Mr. Sicotte and Ms. Tottenham rely upon agreed statements of fact, which I summarize as follows.
- [7] On August 22, 2018, Nelson Police executed a search warrant authorizing a search of the premises at 2409 Perrier Road in Nelson, B.C., between August 22, 2018, at 9:00 a.m. and August 24, 2018.
- [8] Mr. Sicotte and Ms. Tottenham were arrested that day and held overnight. On August 23, 2018, each was released on an undertaking given to a police officer containing a number of conditions restricting their behaviour and a promise to appear at the Nelson Provincial Court on December 4, 2018.
- [9] On September 17, 2018, Ms. Tottenham filed an application to a judge in Nelson Provincial Court seeking to replace her undertaking. On October 4, 2018, she signed an undertaking given to a justice or a judge, the content of which includes: "I understand I have a charge with the following offences." Appendix A to the undertaking lists the offences alleged by the police, but not charged at that stage.

- [10] Mr. Sicotte and Ms. Tottenham attended the Nelson Provincial Court as required by their promises to appear on December 4, 2018, but their names did not appear on the court list because no information had been sworn.
- [11] On January 31, 2019, Information 25799-2 was sworn containing the same charges as the Indictment. On that same day, the court issued summonses compelling Mr. Sicotte and Ms. Tottenham to attend on March 4, 2019. Neither summons was served. On March 5, 2019, further summonses were issued compelling their attendance on April 2, 2019. Both were served on March 14, 2019.

Positions of the Parties

- [12] The applicants take the position that when they appeared at the Nelson courthouse on December 4, 2019, and their names were not on the court list, the Provincial Court lost jurisdiction over them. Further pursuant to s. 485(3), the proceedings are deemed dismissed because although summonses were issued, they were not served until three months and one day later, one day beyond the three-month period identified in s. 485(2). Arguing more specifically that the release after arrest by the police on an undertaking and promise to appear is equivalent to release by a justice on bail, or police bail, the applicants assert the court thereby assumes jurisdiction over the person. Section 505 of the Criminal Code makes it mandatory for an information to be laid before a justice as soon as practicable and, in any event, by the time stated in the promise to appear. Because this did not occur and there was a failure to act, a loss of jurisdiction over them, not the offence, occurred as contemplated by s. 485(2). Ms. Tottenham submits the argument applies with greater force to her given her application to the Provincial Court and the consequent undertaking she gave to a justice.
- [13] The Crown takes the position that, for the purposes of s. 485, the court does not have jurisdiction over an accused person until an information is laid and the process is confirmed. Accordingly, because an information was not sworn before the appearance date of December 4, 2018, there was no jurisdiction for the Provincial Court to lose as contemplated by s. 485 and the provision simply does not apply. Alternatively, the Crown argues that the three-month time period prescribed by s. 485(2) relates to the issuance not service of a summons. Both the first and second summons were issued in less than three months.

Case Law

- [14] In support of their position, the Crown relies upon the decision of this Court in *R. v. Clark*, [1992] B.C.J. No. 2041 (B.C.S.C.). Mr. Clark was stopped by police who issued an appearance notice requiring him to attend Provincial Court about five weeks later. When he attended that day, there was no information before the court relating to the appearance notice. The information was sworn two weeks later before a justice of the peace charging him with the same offences alleged in the appearance notice. At the same time, the justice of the peace authorized the issuance of a summons requiring Mr. Clark to attend the court about three

weeks later which he did.

- [15] The Provincial Court dismissed the information for want of prosecution. The Crown appealed. The accused argued, much like here, that the court is required to act after an appearance notice has been issued, pursuant to ss. 505 and 508. The failure to act to confirm or cancel the appearance notice results in a loss of jurisdiction over the person as contemplated by s. 485(2). Section 485(3) then applies and the proceeding must be deemed to be dismissed.
- [16] After finding the law discussed in *R. v. Tremblay* (1982), 28 C.R. (3d) 262 and *R. v. Gagne* (1989), 53 C.C.C. (3d) 89 conclusive, Justice Houghton held that once the date on the appearance notice has passed, the information must be laid before a justice under s. 507, and s. 485 does not apply:

The court has not jurisdiction over the person of the accused until an information has been laid before the justice under 505 and the justice has endorsed the appearance notice pursuant to 508. Upon that happening, the section of the Criminal Code by which the court exercises its jurisdiction over the person of an accused comes into play. Up to that point, the court has not jurisdiction over the person of the accused and s. 485 is not applicable.

- [17] The applicants argue this last paragraph is obiter and wrong in law. They also argue Clark is distinguishable because Mr. Clark was released on an appearance notice, not an undertaking and a promise to appear, which as police bail, they emphasize places an accused in jeopardy, being bound by conditions which she may be charged with breaching even if no information is ever laid against her for the "original charges." Further, she remains on bail terms until the scheduled court appearance.
- [18] In support of their position, the applicants rely on *R. v. Qaunaq*, 2020 NUCJ 3, a very recent decision of the Nunavut Court of Justice. There, like here, the accused was arrested for a serious offence and released by a police officer on a promise to appear and an undertaking. When he appeared in court as required, there was no information before the court and none had been sworn. More than two years later, he was served with a summons requiring him to appear in court, the information before the court having been sworn about two months earlier.
- [19] The decision discusses Clark and considers *R. v. Oliveira*, 2009 ONCA 219. The issue in *Oliveira* was whether an undertaking is a nullity for non-compliance with s. 505 requiring an information to be laid as soon as practicable. The accused in that case was arrested for assaulting a police officer and refusing to provide a roadside breath sample. Police released him the same night on a promise to appear. He also entered into an undertaking that included a term he abstain from alcohol. Three days before the appearance date, the information was sworn alleging the offences for which the accused had been arrested. He attended on the appearance date and the matter was adjourned to a further date. The day before the court date, he was arrested and charged with breaching the term of his undertaking that required him to abstain from alcohol. At the trial of the breach charge, the

Crown accepted the information regarding the initial charges had not been laid as soon as practicable rendering the promise to appear of no force and effect.

- [20] Justice Doherty observed that promises to appear and undertakings serve very different purposes. While both are integral to police bail provisions, the purpose of a promise to appear is to secure the initial appearance of the accused. In contrast, the undertaking constitutes a promise by the accused to comply with certain conditions in exchange for their release pending the resolution of the charges (and subject to variation). Justice Doherty concluded the life of the undertaking is tied to the existence of the ongoing criminal proceeding in respect of the charges that give rise to the undertaking. He observed the charges were alive and well when the accused allegedly breached the undertaking.
- [21] In reviewing the history of the case, Justice Doherty commented the Ontario Court of Appeal's own jurisprudence made it clear that a failure to comply with the "as soon as practicable" requirement results in a loss of jurisdiction over the person only, citing *Regina v. Naylor* (1978), 42 C.C.C. 2d (Ont. C.A.). The majority judgment in *Naylor* included at para. 25:

Where the information has not been laid prior to the time set forth in the appearance notice, then, in my opinion, the information is invalid and no further process can be taken pursuant to it. In such circumstances, however, it is conceded that, subject to any limitation period, a new [limitation] could be laid under s. 455.

- [22] In *Qaunaq*, the court regarded it as significant that police officers did not have the authority to release accused persons on undertakings with conditions, until the Criminal Code was amended in 1994, essentially distinguishing *Clark* on this basis. The application judge observed that an accused is in jeopardy from the moment he is released on an undertaking with conditions, for the same reason as the applicants, because he can be charged and convicted of breaching these conditions even if the information never issues. She was also concerned that an accused subject to an undertaking has limited remedies available, concluding the case law and the Criminal Code did not provide for the lapse of an undertaking for failure to lay an information, a view I do not share. Similarly, she considered it unfair to expect an accused to bring an application to vacate an undertaking because of the prosecution's failure to lay an information.
- [23] The application judge held the court loses jurisdiction over the person where an accused is on both release documents and a recognizance or an undertaking with conditions, if an information has not been sworn by the time of the initial court appearance. The court may regain jurisdiction by following the procedure set out in s. 485(2), but failing to do so results in the proceeding being deemed dismissed for want of prosecution. Noting the information before the court was not laid with the consent of the Attorney General, the application judge found it to be a nullity.

[24] The applicants also rely on *R. v. Killaly*, 2010 BCPC 138, which also considered *Oliveira*. Jurisdiction over the person was discussed at para. 19:

if as of the first appearance date no criminal proceeding has been commenced, i.e. no information sworn or direct indictment preferred, then there are no charges before the Court. There is no offence over which the Court can have jurisdiction and its jurisdiction over the person lapses once the first appearance date has passed. The undertaking is no longer of any force or effect.

Statutory Interpretation

[25] Although the applicants make no separate submissions regarding the statutory interpretation of s. 485, the Crown's are quite extensive. Arguing the determinative issue is what is meant by the words "where jurisdiction over an accused or defendant is lost" as stated in s. 485(2), the Crown argues it is clear Parliament intended s. 485 to apply only once an information has been laid. In support of this assertion, the Crown observes that interpreting "loss of jurisdiction" as broad enough to encompass circumstances where no information has been sworn before the first appearance leads to absurd results, including:

1. Section 485(2) authorizes the court to issue a summons or a warrant where jurisdiction over an accused has been lost and not regained. Without an information having been sworn, neither would provide the court with jurisdiction. To the extent not swearing an information can be described as a procedural irregularity (as opposed to an exercise of prosecutorial discretion), a summons or warrant issued under s. 485(2), says the Crown, does not provide a cure: "Until there is a sworn information, the court cannot accept a plea, arraign the charge or pronounce sentence."
2. Section 485(3) contemplates the proceedings not being recommenced (as opposed to commenced), except in accordance with s. 485.1. It is well established that criminal proceedings are instituted or commenced by the laying or receipt of an information. In other words, it would be absurd to deem dismissed proceedings which do not yet exist.
3. Section 485.1 clearly pre-supposes an information has been laid, insofar as it contemplates a new information being laid, where jurisdiction has been lost and not regained within three months, with the permission of the Attorney General or the court.

[26] The Crown also submits the effect of the applicant's argument would be to create a de facto and seemingly arbitrary limitation period for the swearing of an information, based on the first appearance date, inconsistent with the limitation period for the laying of an information regarding summary proceeding offences found in s. 786(2), and the absence of a limitation period for laying an information regarding an indictable offence, subject to s. 505.

Discussion

- [27] I note that s. 485, enacted in its current form in 1985, was not at issue in either Oliveira or Killaly. In my view, the loss of jurisdiction over the person contemplated in the pre-charge context is different from the loss of jurisdiction over the accused contemplated by s. 485(2). In addition to the reality that s. 485 of the Criminal Code long predates the jeopardy arising from the police bail discussed by the applicants and in Qaunaq, a proper interpretation of the provision must recognize its location in Part XV "Special Powers and Procedures", whereas s. 505 and the provisions related to arrest and pretrial release are situated in Part XVI "Compelling Attendance of Accused Before a Justice and Interim Release". Justice Trotter's discussion of police bail in Chapter 2 of *The Law of Bail in Canada*, 3rd ed., and s. 504 of the Criminal Code reinforce my view. In the context of bail more broadly, loss of jurisdiction over the person simply means that a new information must be laid. I am also persuaded by the Crown's interpretative submissions outlined above.
- [28] Respectfully I disagree with Qaunaq, which conflates an understandable concern over the accused's pre-charge jeopardy based on the undertaking, with the loss of jurisdiction contemplated by s. 485. Further, I do not regard Clark as distinguishable. It therefore remains a binding authority. If I were persuaded its analysis of s. 485 was in obiter, which I am not, I would follow the reasoning because it is persuasive.
- [29] Without resolving the question of whether the Provincial Court had pre-charge jurisdiction over Mr. Sicotte up to the appearance date arising from the release documents and the application of Part XVI, and noting the broad definition of "accused" in s. 493 of Part XVI, I am satisfied that properly interpreted s. 485 is confined to addressing procedural irregularities that include the loss of jurisdiction over the accused by reason of a failure to appear once an information is before the court and the process has been confirmed.
- [30] In any event, assuming s. 485(2) did apply in this case, allowing as it does for the loss of jurisdiction over an accused to be cured by issuing a summons within three months, I firmly reject the applicants' suggestion that s. 485(2) requires a summons to be both issued and served within that time. This is entirely at odds with the plain language of the provision which makes no reference to service. Several other provisions of the Criminal Code do refer separately to issuance and service of a summons. It is clear to me, therefore, that had Parliament intended s. 485(2) to require service, it would have specified that requirement.
- [31] Accordingly, the application of Mr. Sicotte and Ms. Tottenham is dismissed.

"Fleming J."

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