

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Allahyar, 2017 ONCA 345

DATE: 20170501

DOCKET: C59110

Gillese, van Rensburg and Brown JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Mohammad Allahyar

Appellant

Gabriel Gross-Stein, for the appellant

Shawn Porter, for the respondent

Heard: April 3, 2017

On appeal from the judgment of Justice Gethin B. Edward of the Ontario Court of Justice, dated February 11, 2014, allowing an appeal from the order of Justice of the Peace Norman W. Mulloy, dated May 13, 2013.

van Rensburg J.A.:

A. OVERVIEW

[1] The appellant, Mohammad Allahyar, was charged with speeding, contrary to s. 128 of the *Highway Traffic Act*, R.S.O. 1990, c. H.8. After several attendances before a justice of the peace where Mr. Allahyar was assisted by his brother-in-law, Ethan Miazad, the charge was stayed for breach of the appellant's

rights under s. 7 of the *Charter*, as a result of the failure by the prosecutor, the City of Simcoe, to provide proper disclosure.

[2] The prosecutor appealed to the Ontario Court of Justice (“OCJ”). The appeal judge refused to permit Mr. Miazad to represent Mr. Allahyar, and ultimately set aside the stay.

[3] Mr. Allahyar, with leave, appeals to this court. The Attorney General elected to intervene in these proceedings under s. 168 of the *Provincial Offences Act*, R.S.O. 1990, c. P.33 (“*POA*”), and is therefore the respondent to the appeal to this court.

[4] The appellant asserts that the refusal to permit Mr. Miazad to represent him on his appeal to the OCJ occasioned a miscarriage of justice.

[5] I agree. The appeal judge did not turn his mind to the proper considerations and unreasonably refused to permit Mr. Miazad to assist the appellant. I would allow the appeal and, in accordance with the Attorney General’s proposed disposition, enter a stay of proceedings.

B. HISTORY OF THE PROCEEDINGS

[6] The appellant, who is not a native English speaker, was in court with an interpreter. There were several attendances before a justice of the peace in which the subject of disclosure was addressed. On each occasion the appellant

was assisted by Mr. Miazad, without objection by the prosecutor and with the agreement of the justice of the peace.

[7] The attendances occurred over several months. On April 2, 2012, the appellant requested an adjournment so that the prosecutor could provide disclosure of the operating manual for the radar device that captured his speed. On June 11, 2012, a second adjournment was granted to allow the appellant to attend at the Ontario Provincial Police (“OPP”) station and photocopy the relevant passages from the operating manual. Mr. Miazad went to the OPP station on September 26, 2012 to obtain photocopies of the pages from the operating manual, however, the officer at the station told Mr. Miazad that he could only look at the manual and was not allowed to photocopy it.

[8] On October 1, 2012, Mr. Miazad informed the court that he had not been permitted to make photocopies of the pages from the manual. The justice of the peace stated that the OPP should copy the relevant portions, and the matter was adjourned to allow the appellant to receive the relevant passages. On January 21, 2013, the matter was adjourned for a hearing of the appellant’s s. 7 and s. 11(b) motions. On May 13, 2015, the s. 11(b) motion was dismissed and the justice of the peace entered a stay of proceedings under s. 7 because the OPP had not photocopied the relevant portions of the manual.

[9] The prosecutor appealed to the OCJ. Both parties filed factums and were ready to argue the appeal. The prosecutor noted that Mr. Miazad had represented the appellant throughout and did not object to his continuing involvement. After questioning Mr. Miazad about his educational background and confirming that Mr. Miazad was not legally trained, the appeal judge stated:

I'm not going to hear the matter with Mr. Miazad as agent for the appellant. At an appeal level, one would hope that [at] a minimum there's an agent and that's not Miazad's situation. I'm becoming more and more concerned about individuals representing individuals in criminal or quasi-criminal or *Provincial Offences Act* matters that aren't properly trained. It's inappropriate, in my view, for the court to permit Mr. Miazad to represent the applicant on this appeal.

[10] The appeal judge adjourned the matter so that the appellant could have a lawyer or paralegal attend. On the return date, the appellant represented himself, relying on the factum Mr. Miazad had prepared. The appeal was allowed. The appeal judge ordered the matter to trial and also ordered the prosecutor to produce copies of the pertinent pages of the radar manual.

C. DISCUSSION

(1) The Relevant Principles

[11] As a general rule, a representative is permitted to represent a defendant in certain proceedings in the OCJ. Section 50 of the *POA* provides for a defendant to appear and act personally or by representative at trial in provincial offences

matters, while s. 118 provides for an appellant or respondent in appeals of Part III matters to appear and act personally or by representative. A “representative” is defined in s. 1(1) as “a person authorized under the *Law Society Act* to represent a person in that proceeding”.

The *POA* does not stipulate who may appear or act on behalf of an appellant in an appeal of a proceeding commenced (as here) under Part I of the *POA*. However, the combined effect of ss. 1 and 26.1 of the *Law Society Act*, R.S.O. 1990, c. L.8, s. 62; and ss. 6 and 30 of By-Law 4 of the By-Laws of the Law Society of Upper Canada, is that, in addition to a lawyer or paralegal holding a Class P1 license, a non-licensed family member or friend who does not expect or receive compensation for the provision of legal services, is authorized to represent a defendant in any proceedings under the *POA* before the OCJ.¹

The right of a representative to appear is subject to the court’s authority to control its own process.² The leading case is *R. v. Romanowicz* (1999), 45 O.R. (3d) 506 (C.A.). In *Romanowicz*, an accused was represented in summary conviction proceedings by an agent who was alleged to have provided ineffective assistance. The court considered whether and on what basis the court could

¹ All persons who provide legal services in Ontario require a license, except if and to the extent permitted by a by-law of the Law Society of Upper Canada: *Law Society Act*, s. 26.1. By-Law 4 of the Law Society of Upper Canada prescribes persons or classes of persons who are permitted to practise law or provide legal services in Ontario without a licence, the circumstances in which they may do so and the extent to which they may do so: *Law Society Act*, s. 62; By-Law 4. Certain non-licensees may provide the legal services that paralegals (licensees holding Class P1 licences) are authorized to provide, including representing a party before the OCJ in the case of a proceeding under the *POA*: By-Law 4, ss. 6, 30. Such persons include “related persons” (as defined in s. 251 of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.)) and friends or neighbours who provide legal services without expecting or receiving compensation. A representative who is a friend or neighbour is limited to providing the legal services in respect of not more than three matters per year: Bylaw 4, s. 30.

² The power is described as “inherent” in respect of superior courts and “implied” for statutory courts: *R. v. Cunningham*, 2010 SCC 10, [2010] 1 S.C.R. 331, at paras. 18-19.

preclude an agent who was not a lawyer from representing an accused person in a summary conviction proceeding.³

[12] In concluding that a trial judge has the authority to refuse to permit an agent who is not a lawyer to represent an accused person in summary conviction proceedings, the court in *Romanowicz* explained that “[s]everal provincial statutes that provide for representation by agents before various tribunals recognize the tribunal’s power to exclude agents” (at para. 54). As an example, this court referred to s. 50(3) of the *POA*, which, at the time, stated:

[13] 50(3) The court may bar any person from appearing as an agent who is not a barrister and solicitor entitled to practise in Ontario if the court finds that the person is not competent properly to represent or advise the person for whom he or she appears as agent or does not understand and comply with the duties and responsibilities of an agent.

[14] Section 50(3) continues to apply to proceedings commenced under the *POA* in the trial context. However, in 2006, with the coming into force of Bill 14, the *Access to Justice Act, 2006*, S.O. 2006, c. 21, Sched. C (which provided for,

³ The provisions at issue in *Romanowicz* were ss. 800(2) and 802(2) of the *Criminal Code*, which govern who can appear in summary conviction court. Section 800(2) provides that “a defendant may appear personally or by counsel or agent” and s. 802(2) provides “the defendant... may examine and cross-examine witnesses personally or by counsel or agent.” Section 802.1 provides that a defendant may not appear or examine or cross-examine witnesses by agent if the maximum summary conviction punishment is imprisonment for a term greater than six months, unless the defendant is a corporation or the agent is authorized under a provincial program approved by the lieutenant governor in council. There is no such program in Ontario.

among other things, the licensing of paralegals by the Law Society), the section was amended to read:

[15] 50(3) The court may bar any person, other than a person who is licensed under the Law Society Act, from appearing as a representative if the court finds that the person is not competent properly to represent or advise the person for whom he or she appears, or does not understand and comply with the duties and responsibilities of a representative.

[16] In *Romanowicz*, this court held that, although the *Criminal Code* does not expressly give the trial judge power to prohibit a specific agent (which it defined at para. 24 as meaning a “representative”) from appearing in a particular case, the court was “satisfied that the power to do so along the lines found in the provincial legislation exists by virtue of the court’s power to control its own process in order to maintain the integrity of that process” (at paras. 53, 58).

[17] The court set out the procedure to be followed when a party attends with an agent as representative. The court should first determine whether the defendant has made an informed choice to be represented by the agent (at paras. 41-44). In appropriate cases, the court may also inquire into the propriety of the representation. After providing examples of circumstances that could result in an order disqualifying an agent (questions of competence, discreditable

conduct, conflict of interest and a demonstrated intention not to be bound by the rules and procedures governing criminal trials), the court stated at para. 76:

[D]isqualification is justified only where representation would clearly be inconsistent with the proper administration of justice. It is not enough that the trial judge believes that the accused would be better off with other representation or that the process would operate more smoothly and effectively if the accused were represented by someone else. Disqualification of an accused's chosen representative is a serious matter and is warranted only where it is necessary to protect the proper administration of justice. [Emphasis added.]

[18] The court cautioned against adopting an arbitrary rule and emphasized the need to review the particular circumstances of the case, stating at para. 77:

The power to disqualify agents, like any other facet of the court's power to control its processes, must be exercised judicially on the basis of the circumstances present in a given case. Those circumstances may include the seriousness of the charge and the complexity of the issues raised in a particular case. A presumption, however, that all agents are incompetent to represent accused persons charged with certain summary conviction offences is not a proper basis on which to exercise that discretion.

[19] In *Romanowicz*, the agent in question was a paralegal who provided legal services at a time before paralegals could be licensed in Ontario. Questions respecting the standard of competence required of licensed paralegals have been addressed in recent cases such as *R. v. Khan*, 2015 ONCJ 221, [2015] O.J. No. 2096 and *R. v. Bilinski*, 2013 ONSC 2824, [2013] O.J. No. 2984.

Nothing in this decision is intended to address representation by licensed paralegals in provincial offence matters. The test in *Romanowicz*, however, is clearly applicable in cases where a person seeks to be represented in such matters by an unpaid family member or friend.

(2) Application of the Principles

[20] The appeal judge erred when he disqualified Mr. Miazad. He failed to approach the question of whether Mr. Miazad could continue to represent Mr. Allahyar in a manner consistent with this court's direction in *Romanowicz*. He did not consider whether disqualifying the appellant's choice of a representative was necessary to protect the proper administration of justice, or inquire into the particular circumstances of the case, but instead disqualified Mr. Miazad because of a general concern about persons without legal training representing individuals in quasi-criminal, criminal and *POA* proceedings.

[21] Questions of competence must be addressed having regard to the context. Specialized training is not necessarily required before an unpaid family member or friend can represent an accused or defendant in a provincial offence appeal before the OCJ. Attending court can be difficult and intimidating for an accused at any level of court. Having a friend or family member attend and assist can be invaluable and is consistent with ensuring access to justice.

[22] There was no question that Mr. Miazad was skilled and diligent in representing Mr. Allahyar. In the proceedings before the justice of the peace, Mr. Miazad identified case authority for his disclosure request, pursued the request in an appropriate manner, and brought motions under ss. 11(b) and 7 of the *Charter*, supported by an affidavit and factum, when such disclosure was not provided. He was successful in obtaining a stay of proceedings for the appellant. There was no basis for disqualifying Mr. Miazad out of concern for his competence in representing the appellant.

[23] The Attorney General acknowledges that the appeal judge did not consider the appropriate factors and ought not to have disqualified Mr. Miazad based on general concerns about persons without legal training appearing on *POA* matters. He submits, however, that the appeal judge did not err in disqualifying Mr. Miazad because Mr. Miazad had a conflict of interest that would have prevented him from acting on the appeal.

[24] The Attorney General contends that Mr. Miazad's conduct in respect of the disclosure request - the efforts taken to obtain photocopied pages of the manual - was at issue in the appeal to the OCJ. As such, he was a potential witness and would not have been able to represent the appellant. The Attorney General says that Mr. Miazad, and not the prosecution, was responsible for the fact that photocopies of the pages from the manual were not provided.

[25] There are two problems with this argument. First, the record shows that the prosecutor did not take the position that Mr. Miazad was a witness. Rather the appeal was argued on the transcripts of the attendances before the justice of the peace. The prosecutor never argued that Mr. Miazad had a conflict of interest, and did not object to Mr. Miazad's representation of Mr. Allahyar on the appeal for any reason.

[26] Second, the alleged misconduct by Mr. Miazad that might have led to him being a witness is simply not borne out on the record. Mr. Miazad was clear throughout the proceedings that he wanted copies of excerpts from the manual to be provided, and the matter was adjourned repeatedly so that this could occur. Although the prosecutor knew what was required, as the justice of the peace concluded on May 13, 2013, the disclosure did not happen. There is simply no merit to the argument that Mr. Miazad had a conflict of interest in continuing to represent Mr. Allahyar on the appeal.

[27] Finally, the appellant contends that this case raises broader concerns about access to justice, and invites the court to expand upon the *Romanowicz* decision. I find it unnecessary to do so.

[28] While *Romanowicz* was decided in the context of concern about representation by unlicensed paralegals in summary conviction proceedings, the principles it articulates are of broader application, and need not be reconsidered

or expanded upon in this appeal. The appeal judge failed to consider the proper factors under *Romanowicz* and the disqualification of the appellant's representative was not justified.

D. DISPOSITION

[29] For these reasons I would allow the appeal and, in accordance with the Attorney General's proposed disposition, enter a stay of proceedings.

Released: "KMvR" "MAY 01 2017"

"K. van Rensburg"
"I agree. E. E. Gillese"
"I agree. David Brown J.A."