

Her Majesty the Queen v. Blom

[Indexed as: R. v. Blom]

61 O.R. (3d) 51

[2002] O.J. No. 3199

Docket No. C36918

**Court of Appeal for Ontario,
O'Connor A.C.J.O., Abella and Sharpe JJ.A.**

August 21, 2002

Charter of Rights and Freedoms — Procedure on Charter application — Notice — Accused challenging admissibility of statement — Accused's Charter Notice skeletal and referring only to s. 10(b) of Charter — Trial judge erred in refusing to permit accused to argue that his rights under s. 7 of Charter would be violated if statement admitted — Failure of Notice to comply with rules 30.03 and 30.05 of Rules of the Ontario Court of Justice in Criminal Proceedings not fatal — Facts of case straightforward and accused's proposed Charter argument not legally novel — Crown could not have been prejudiced by defective Notice — Canadian [page 52] Charter of Rights and Freedoms, ss. 7, 10(b) — Rules of the Ontario Court of Justice in Criminal Proceedings, SI/97-133, rules 30.03, 30.05.

The accused was charged with impaired driving and driving "over 80". He gave notice of a Canadian Charter of Rights and Freedoms application to challenge the admissibility of a statement he made at the scene of the accident. The Notice was skeletal and mentioned only s. 10(b) of the Charter. Crown counsel argued that the Notice did not comply with rules 30.03 and 30.05 of the Rules of the Ontario Court of Justice in Criminal Proceedings as no affidavit was filed, and that the Crown was prejudiced as it did not have adequate time to prepare a legal argument in response to the accused. The trial judge agreed with the Crown. The accused was not permitted to argue that his rights under s. 7 of the Charter would be violated if the statement were admitted. The statement was admitted and the accused was convicted of driving "over 80". The summary conviction appeal court judge dismissed the appeal. The accused appealed.

Held, the appeal should be allowed.

The summary conviction appeal court judge erred by upholding the trial judge's refusal to consider the accused's Charter application on the ground of inadequate notice. Rule 30, requiring notice of Charter applications to exclude evidence, is a procedural rule. Its purpose is to facilitate the fair and expeditious determination of Charter issues by ensuring that neither party is taken by surprise at trial and that both parties have adequate notice of the factual and legal basis for the Charter application. Procedural rules are servants, not masters. They are not to be rigidly applied without regard to their underlying purpose. Where a procedural rule such as Rule 30 is invoked to foreclose consideration of a Charter issue, non-compliance with the rule is not necessarily fatal to the Charter application. Rather, the trial judge is required to consider and weigh a variety of factors to determine what course of action is required by the purpose of the rule. Where a party complains of inadequate notice, it is crucial for the trial judge to consider the issue of prejudice: does the failure to provide adequate notice put the opposite party at some unfair disadvantage in meeting the case that is being presented? If there is no real prejudice, inadequate notice should not prevent consideration of the Charter application. If the inadequate notice does put the opposing party at some unfair disadvantage, the court must consider whether something less drastic than refusing to consider the Charter argument can be done to alleviate the prejudice. The Notice in this case should be considered in the light of the charges the accused faced and the nature of the argument he sought to advance. The accused's Charter argument was not factually complex and was based on undisputed facts. It rested on precisely the same facts as the issue of the voluntariness of the statement. Nor was the Charter argument novel from a legal perspective. It did not require extensive legal research. It rested squarely on the application of a recent decision of the Supreme Court of Canada that would almost certainly be familiar to a prosecutor appearing before a court dealing with drinking and driving offences. It was difficult to see how the defective Notice caused any prejudice to the Crown. In the absence of any significant prejudice to the Crown, the trial judge erred in principle by foreclosing the accused's Charter application.

Cases referred to

R. v. Dumont (2000), 77 C.R.R. (2d) 373, 149 C.C.C. (3d) 568, 6 M.V.R. (4th) 167 (Ont. C.A.), affg (1999), 66 C.R.R. (2d) 184, 44 M.V.R. (3d) 211 (Ont. S.C.J.); R. v. Lavallata (1999), 47 M.V.R. (3d) 236 (Ont. C.J.); R. v. Loveman (1992), 8 O.R. (3d) 51, 8 C.R.R. (2d) 294, 71 C.C.C. (3d) 123, 12 C.R. (4th) 167 (C.A.); [page53] R. v. White, [1999] 2 S.C.R. 417, 174 D.L.R. (4th) 111, 240 N.R. 1, 63 C.R.R. (2d) 1, 135 C.C.C. (3d) 257, 42 M.V.R. (3d) 161, 24 C.R. (5th) 201

Statutes referred to

Canadian Charter of Rights and Freedoms, ss. 7, 10(b), 24(2)
Criminal Code, R.S.C. 1985, c. C-46, s. 253(a), (b), 686(1)(b) (iii)
Highway Traffic Act, R.S.O. 1990, c. H.8
Motor Vehicle Act, R.S.B.C. 1979, c. 288, s. 61(1)

Rules and regulations referred to

Rules of the Ontario Court of Justice in Criminal Proceedings, SI/97-133, rules 1.04, 2.01, 2.02, 30, 30.01, 30.03, 30.05

APPEAL from a judgment dismissing an appeal from a conviction for driving "over 80".

Timothy E. Breen, for appellant.

Shawn Porter, for respondent.

The judgment of the court was delivered by

[1] **SHARPE J.A.**: — The appellant was charged with impaired driving and with the "over 80" drinking and driving offence. He gave notice of a Canadian Charter of Rights and Freedoms application to challenge the admissibility of a statement he made at the scene of the accident. The Charter Notice was skeletal and mentioned only s. 10(b). The trial judge ruled that the Notice was insufficient to allow the appellant to argue that his s. 7 rights would be violated if the statement were admitted. The statement was admitted and the appellant was convicted. The appellant submits that the trial judge erred in precluding him from advancing his Charter argument and that the summary conviction appeal judge erred in dismissing his appeal.

Legislative Provisions

[2] The relevant provisions of the Rules of the Ontario Court of Justice in Criminal Proceedings, SI/97-133 (the "Rules") are the following:

1.04(1) These rules are intended to provide for the just determination of every criminal proceeding, and shall be liberally construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.

.....

2.01 A failure to comply with these rules is an irregularity and does not render a proceeding or a step, document or order in a proceeding a nullity, and the court, [page54]

- (a) may grant all necessary amendments or other relief in accordance with rule 2.02, on such terms as are just, to secure the just determination of the real matters in dispute; or
- (b) only where and as necessary in the interests of justice, may set aside the proceeding or a step, document or order in the proceeding in whole or in part.

2.02 The court may, only where and as necessary in the interests of justice, dispense with compliance with any rule at any time.

.....

30.01 This rule applies to applications under subsection 24(2) of the Charter for the exclusion of evidence.

....

30.03 The Notice of Application in Form 1 shall state

- (a) the place and date of hearing as determined in accordance with rules 30.02 and 30.04;
- (b) the nature of the application intended to be brought;
- (c) the anticipated evidence sought to be excluded, including any anticipated derivative evidence sought to be excluded;
- (d) the grounds to be argued, including a concise statement of the exclusionary issue under the Charter to be raised, a statement of the exclusionary principles under the Charter to be argued and a reference to any statutory provision or rule upon which reliance will be

- placed;
- (e) the documentary, affidavit or other evidence to be used at the hearing of the application;
- (f) the precise relief under the Charter sought upon the application; and
- (g) whether an order is required abridging or extending the time for service or filing of the Notice of Application or supporting materials required under rule 6.05.

30.05(1) In addition to any other materials that may be required in the proceedings in which the exclusionary issue under the Charter is raised, a Notice of Application under rule 30.03 shall be accompanied by

- (a) a copy of the information(s) to which the exclusionary issue raised in the Notice of Application relates;
- (b) a transcript of any proceedings earlier taken which are material to a determination of the exclusionary issue raised in the Notice of Application; and
- (c) where necessary to complete the record, an affidavit by or on behalf of the applicant deposing to the matters described in subrule (2); and **[page55]**
- (d) a copy of any other material in the court file that is necessary for the hearing and determination of the exclusionary issue raised in the Notice of Application.

(2) The affidavit filed by or on behalf of the applicant described in clause (1)(c) shall include

- (a) a description of the affiant's status and the basis of his or her knowledge of the matters deposed;
- (b) a statement of the particulars of the charge to which the application relates; and
- (c) a statement of the facts material to a just determination of the exclusionary issue which are not disclosed in any other materials filed in support of the application.

(3) Where the respondent seeks to rely on material that is not required to be filed under subrule (1) or (2), the respondent shall file documentary, affidavit or other evidence upon which reliance shall be placed no later than five days before the hearing of the application.

Facts

[3] The appellant was tried on a two-count information charging him with impaired driving contrary to s. 253(a) of the Criminal Code, R.S.C. 1985, c. C-46 and with operation of a motor vehicle with over 80 milligrams of alcohol per 100 millilitres of blood, contrary to s. 253(b).

[4] A civilian witness, George Jackson, encountered the appellant near the scene of a one-car accident in an unlit, rural area at approximately 1:25 a.m. Jackson lived nearby and had been awoken by a bang. He saw a car on fire in the ditch about 250 feet away from his property and went out to see what had happened. He had a brief discussion with the appellant, who was standing in the roadway near the vehicle. The appellant stated that no one else was in the car, that the car was two or three months old and that a tire had blown. Jackson observed no signs of impairment.

[5] Jackson called the police. P.C. Clayton, a uniformed officer driving a marked police cruiser, arrived at 1:39 a.m. The officer approached the appellant and asked him if he was the driver of the vehicle. The appellant said that he was the driver. The officer then asked the appellant for his driver's licence and the appellant complied. P.C. Clayton observed what he believed to be signs of impairment and arrested the appellant, advising him of his right to counsel at 1:45 a.m. The appellant was taken to the station, where he asked to speak to counsel. After consulting with counsel, he made no further statements, but he did give a breath sample, the result of which was a reading of .160.

[page56]

[6] Before trial, the appellant gave notice of his intention to bring a Charter challenge to the admissibility of certain evidence. The Notice was in the following terms:

TAKE NOTICE that an application will be brought at 9:30 a.m. on the 16th day of November, 2000, at Courtroom No. 1 at 491 Steeles Avenue East, Milton, for an order excluding the evidence of utterances made by the Applicant and any evidence derivative therefrom.

THE GROUNDS FOR THIS APPLICATION ARE:

1. That the Applicant's right to retain and instruct counsel as provided by section 10(b) of the Charter of Rights and Freedoms was infringed and/or denied.
2. Such further and other grounds as counsel may advise and this Honourable Court may permit.

IN SUPPORT OF THIS APPLICATION, THE APPLICANT RELIES UPON THE FOLLOWING:

1. On May 11, 2000 at approximately 1:33 a.m., the arresting police officer arrived at the scene of the arrest to find a motor vehicle on the east side of the road engulfed in flames and the Applicant standing on the west side of the road watching the fire.
2. The arresting police officer approached the Applicant and asked questions of the Applicant to which the Applicant replied.
3. At 1:45 a.m. the arresting police officer arrested the Applicant and then read to the Applicant his Rights to Counsel, caution and breath demand.

THE RELIEF SOUGHT IS:

1. An Order allowing the application and excluding the evidence of the Applicant's utterances and any evidence derived therefrom, including but not limited to the results of the Intoxilyzer tests.

[7] The Crown filed a response objecting to the sufficiency of the Notice based on the appellant's failure to state the grounds to be argued and to provide the documentary, affidavit or other evidence to be used in support of the Charter application.

Trial Proceedings

[8] At the opening of trial, Crown counsel indicated that a voir dire to determine the admissibility of the appellant's statement would be required, but he elected to call both Jackson's and P.C. Clayton's evidence first. After Jackson's evidence was heard, P.C. Clayton was called and examined by the Crown. When he got to the point where he was about [to] give evidence about the appellant's statement at the scene of the accident, a voir dire commenced. On the voir dire, Clayton described his encounter with the appellant at the scene, and testified that the appellant "told me he was the driver". Clayton described asking the appellant for his licence, observing signs of impairment, arresting the appellant and advising him of his right to counsel. [page57]

[9] At that point, Crown counsel indicated that as this appeared to be a combined voir dire, dealing with both voluntariness and admissibility under the Charter, he wished to object, arguing that the appellant had failed to give adequate notice to raise the Charter point. The appellant's trial counsel (not Mr. Breen) indicated that the Charter argument concerned only the admissibility of the statement, not the breath samples, and that he was relying on s. 7 as well as s. 10(b). The trial judge stated that he did not wish to embark on argument while Officer Clayton was on the stand and directed counsel to complete their examination and cross-examination before making any submissions.

[10] After P.C. Clayton completed his evidence, but before the appellant testified on the voir dire, the trial judge heard submissions on Crown counsel's objection to the sufficiency of the Notice. Crown counsel submitted that the Notice did not comply with rules 30.03(c) and (d) and 30.05. The Crown pointed to the appellant's failure to file an affidavit and his reliance on s. 7, despite the omission of any reference to it in the Notice. Crown counsel also submitted that he was prejudiced because he did not have adequate time to prepare a legal argument in response to the appellant.

[11] The appellant's trial counsel explained that the s. 7 argument was based on *R. v. White*, [1999] 2 S.C.R. 417, 174 D.L.R. (4th) 111, a decision of which he was unaware when he prepared the Notice. *White* dealt with the admissibility of a statement made by a driver after an accident because of his belief that he was required to make the statement pursuant to British Columbia's Motor Vehicle Act, R.S.B.C. 1979, c. 288, s. 61(1), which requires [a] driver to report an accident in certain circumstances. The Supreme Court of Canada held that while the statement satisfied the common law voluntariness test, its admission would violate the principle against self-incrimination protected by s. 7 of the Charter. The statement was excluded pursuant to s. 24(2).

[12] The appellant's trial counsel argued that an affidavit was unnecessary as the application was to be considered in the context of the trial and was not a stand-alone pre-trial application. He submitted that the factual basis for the argument was evident from the Crown disclosure as it rested upon the encounter between P.C. Clayton and the appellant. He submitted that if the Notice was found to be deficient, this procedural irregularity should not defeat the rights of an accused, and that the appropriate remedy would be to grant the Crown an adjournment.

[13] The trial judge ruled that the Notice was deficient and that the appellant was therefore precluded from advancing his s. 7 [page58] argument. The trial judge ruled that the notice did not meet the requirements of Rules 30.03 and 30.05, as an affidavit was required to complete the record and to allow the Crown to respond. The trial judge referred to this court's judgment on *R. v. Dumont* (2000), 149 C.C.C. (3d) 568, 6 M.V.R. (4th) 167 (Ont. C.A.), indicating that a trial judge has the discretion to permit a party to proceed despite non-compliance with Rule 30. The trial judge also referred to the objective stated in rule 1.04 that the rules "be liberally construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay". However, the trial judge refused to exercise his discretion in favour of the appellant. He noted the importance of notice to allow for proper preparation and observed that the Crown had warned the appellant that the Notice was inadequate. The matter had been before the court on a number of occasions, and set for trial some time ago. In these

circumstances the trial judge was unwilling to countenance any further delay. He refused to grant an adjournment and ruled that the appropriate remedy was to preclude the appellant from arguing his Charter application.

[14] Following this ruling on the Charter application, the voir dire continued to determine the voluntariness of the appellant's statement. The appellant testified that he knew from his driver's education course that it is an offence not to report an accident and not to remain at the scene. He testified that he admitted to the officer that he was the driver because he felt he was legally obliged to provide that information. He further stated that he knew that he had the right to counsel only after being advised of that right upon his arrest.

[15] The trial judge ruled that the appellant's statement was made voluntarily. The trial judge considered whether the statement was involuntary on account of the provisions of the Highway Traffic Act, R.S.O. 1990, c. H.8 requiring a driver to provide information, and distinguished the voluntariness test from the s. 7 test enunciated in *R. v. White*.

[16] The defence called no evidence on the trial proper. The trial judge acquitted the appellant of impaired driving, but convicted him of "driving over 80". The appellant was sentenced to 14 days' imprisonment, to be served intermittently, and 30 days' probation, and [was] prohibited from operating a vehicle for two years.

Summary Conviction Appeal

[17] The appellant appealed to the Superior Court of Justice on the ground that the trial judge had erred in refusing to consider **[page59]** his Charter application. The summary conviction appeal judge described this matter as "a close case" and reluctantly dismissed the appeal. He observed that he "may not have reached the same conclusion as the trial judge", but held he could not interfere with the trial judge's exercise of discretion:

In conclusion, while I have serious reservation about the refusal of the trial judge to grant the adjournment, it was a matter which was well within his discretion.

He applied the correct principles of law. He thoroughly appreciated the situation before him, including the accused[s] right to make full answer and defence. He took all the circumstances into account. He properly exercised his discretion.

Issues

[18] The appellant appeals to this court on the ground that the courts below erred in their interpretation of the Rules and in refusing to allow him to advance his Charter application. He asks that an acquittal be entered or, in the alternative, that a new trial be ordered. The respondent submits that the summary conviction appeal judge properly deferred to the discretion of the trial judge. In the alternative, if we find that the courts below erred, the respondent submits that on the evidence, there was no serious issue as to the identity of the appellant as the driver of the vehicle and that we should apply the proviso, s. 686(1)(b)(iii) [of the Criminal Code, R.S.C. 1985, c. C-46].

[19] Accordingly, the following issues arise on this appeal:

1. Did the summary conviction appeal judge err by upholding the trial judge's refusal to consider the appellant's Charter application on the ground of inadequate notice?
2. If error is found regarding Issue 1, should this court enter an acquittal, order a new trial or dismiss the appeal on the ground that the error did not result in any substantial wrong in the circumstances of the case?

Analysis

Issue 1: Did the summary conviction appeal judge err by upholding the trial judge's refusal to consider the appellant's Charter application on the ground of inadequate notice?

[20] I agree with the respondent that the trial judge's ruling was a discretionary one entitled to deference from this court. However, it is also well established that the discretionary decisions of [page60] trial judges on such issues are subject to appellate review where there is an error in principle: see *R. v. Loveman* (1992), 8 O.R. (3d) 51, 71 C.C.C. (3d) 123 (C.A.). In my view, the appellant has demonstrated such an error requiring the intervention of this court.

[21] Rule 30, requiring notice of Charter applications to exclude evidence, is a procedural rule. Its purpose is to facilitate the fair and expeditious determination of Charter issues by ensuring that neither party is taken by surprise at trial and that both parties have adequate notice of the factual and legal basis for the Charter application. As has been frequently observed, procedural rules are servants not masters. They are servants to the cause of the just and expeditious resolution of disputes. Procedural rules are important, but they are not to be rigidly applied without regard to their underlying purpose. This is made clear by the Rules themselves. Rule 1.04 requires that Rule 30 "be liberally construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay". Rule 2.01 provides that failure to comply with Rule 30 is a mere "irregularity" and that even where a rule has not been followed, to the extent possible, steps should be taken "to secure the just determination of the real matters in dispute".

[22] These provisions establish that where a procedural rule such as Rule 30 is invoked to foreclose consideration of a Charter issue, non-compliance with the rule is not necessarily fatal to the Charter application. Rather, the trial

judge is required to consider and weigh a variety of factors to determine what course of action is required by the purpose of the rule. See *R. v. Loveman*, supra; *R. v. Lavallata* (1999), 47 M.V.R. (3d) 236 (Ont. C.J.).

[23] Where a party complains of inadequate notice, it is crucial for the trial judge to consider the issue of prejudice: does the failure to provide adequate notice put the opposite party at some unfair disadvantage in meeting the case that is being presented? If there is no real prejudice, inadequate notice should not prevent consideration of the Charter application. If the inadequate notice does put the opposing party at a disadvantage, the court must consider whether something less drastic than refusing to consider the Charter argument, but still consistent with the goal of achieving "fairness in administration and the elimination of unjustifiable expense and delay", can be done to alleviate that prejudice. If so, that course should be followed in preference to an order refusing to entertain the Charter application.

[24] The appellant's Notice of Charter application was factually skeletal and it failed to indicate that the appellant would rely [page61] upon s. 7. However, the Notice should be considered in the light of the charges the appellant faced and the nature of the argument he sought to advance.

[25] This was a routine prosecution for a routine offence. The appellant's Charter argument was not factually complex. It was based on the undisputed facts of the encounter between the police officer and the appellant at the scene of the accident, and on the appellant's reason for admitting to the officer that he was the driver of the vehicle. The voir dire involved little evidence that would not be heard on the trial proper. It was conducted during the course of the trial, and quite apart from the Charter application, a voir dire was required to determine [the] voluntariness of the appellant's statement to the police officer in any event. The Charter argument rested on precisely the same facts as the voluntariness issue.

[26] Nor was the Charter argument novel from a legal perspective, and [it] did not require extensive legal research. The appellant's argument rested squarely on the application of a recent decision of the Supreme Court of Canada that would almost certainly be very familiar to a prosecutor appearing before a court dealing with drinking and driving offences.

[27] In view of the factual and legal issues raised by the Charter application, it is difficult to see how the appellant's defective Notice caused any prejudice to the Crown. There is no suggestion that the Crown would have called additional evidence on the Charter point. Nor is there any suggestion that Crown counsel would have conducted the examination of witnesses any differently had the notice been more complete. As already mentioned, the legal issue was routine and one Crown counsel could reasonably be expected to address without extensive preparation. At best, the Crown might have required a brief adjournment to review the White decision. The situation is similar to that presented in *R. v. Loveman*, supra, at p. 56 O.R., p. 127 C.C.C., where Doherty J.A. held:

In my opinion, the trial judge did not properly balance the various interests. His ruling sacrificed entirely the appellant's right to advance a Charter-based argument. The other interests engaged did not require the order made by the trial judge. As Crown counsel suggested, there were other alternatives. The trial judge could have heard the entire case except the Crown's legal argument in reply to the Charter argument, and then, if necessary (and it may well not have been necessary), allowed Crown counsel a brief adjournment to prepare his response to the legal issues flowing from the Charter argument.

[28] I am mindful of the difficult task confronting the judges of the very busy trial courts of this province. Trial judges are [page62] expected to run their courts efficiently and they are entitled to insist upon adherence to rules designed to ensure the proper administration of justice. I am also mindful of the discretionary latitude that should be accorded to trial judges, who are often required to balance competing factors and make difficult choices on the spot. Appellate courts should hesitate to interfere with these decisions. No doubt, the trial judge in the present case was only trying to apply the Rules fairly and to run an efficient court when he refused to consider the appellant's Charter application. However, in my respectful view, in the absence of any significant prejudice to the Crown arising from the defective notice, the trial judge erred in principle by foreclosing the appellant's Charter application. It follows that the summary conviction appeal judge also erred in his analysis of this issue.

Issue 2: If error is found regarding Issue 1, should this court enter an acquittal, order a new trial or dismiss the appeal on the ground that the error did not result in any substantial wrong in the circumstances of the case?

[29] In my view, the appropriate order is to allow the appeal, set aside the conviction and order a new trial.

[30] I do not agree with the appellant that we should attempt to decide the Charter issue on the record before us. The trial judge did not consider the issue and, despite the significant factual overlap with the voluntariness issue, we do not have the benefit of the trial judge's factual findings on the specific point raised by the Charter argument.

[31] Nor do I accept the respondent's submission that we should apply s. 686(1)(b)(iii) and dismiss the appeal. I agree that even without the appellant's admission that he was the driver, there is evidence from which a trier of fact

could infer guilt. However, I also agree with the appellant's submission that this was not the only available inference and, accordingly, a new trial is required.

Disposition

[32] For these reasons, I would allow the appeal, set aside the conviction and order a new trial.

Appeal allowed. *[page63]*