

ONTARIO COURT OF JUSTICE

CITATION: *R. v. Cott*, 2019 ONCJ 587

DATE: 2019 08 21

COURT FILE No.: 4860-999-00-6563825Z-00

B E T W E E N :

HER MAJESTY THE QUEEN

Appellant

— AND —

KATHERINE R. COTT

Respondent

Before Justice Patrice F. Band
Reasons Dismissing Appeal
August 21, 2019

Mr. R. Raczkowski.....Municipal Prosecutor for the Appellant
Mr. T. BrownParalegal and agent for the Respondent

BAND J.:

I. INTRODUCTION

1. At the outset, it is important to note that even if this appeal by the Crown is successful, the Municipal Prosecutor has undertaken not to reprosecute Ms. Cott. Yet, according to both parties, the matter raises issues of importance to provincial offences prosecutions heard in the Ontario Court. As I understand it, the Prosecutor is concerned that the proceedings below might encourage defendants to seek to relitigate matters before different Justices of the Peace in the hopes of landing a more favourable decision. The Respondent is concerned that the Prosecutor's failure to respond to written disclosure requests is at the heart of the matter. This is why both parties have suggested that I use this opportunity to make some general comments.

2. A number of preliminary questions could be asked about the appropriateness of this very appeal: Is it moot? Has the Prosecutor sought to raise an issue on appeal that was not argued at first instance? Does it matter that the order being appealed from was not made by the justice before whom the Respondent was arraigned and declared not guilty? Because none of these potential issues were raised by the parties, I have decided to tackle the appeal on its apparent merits.

3. Ultimately, this matter can be resolved quite simply. For reasons that I will explain, the Respondent did not seek to relitigate the same issue or to launch a collateral attack on a prior Justice's order. The Appellant has failed to point to any reversible error and the appeal will be dismissed.

4. At the joint invitation of the parties, I will make additional comments in an effort to assist parties and justices who find themselves similarly situated in the future. I should note that I have chosen to refer to the many different Justices of the Peace and Prosecutors who have been involved in this proceeding by name. I have done so for the sake of clarity. As I make my comments, I am keenly aware of the fact that I sit in the position of "Monday morning quarterback."

II. PROCEDURAL BACKGROUND IN THE MATTER UNDER APPEAL

- **Confusion and lack of Continuity**

5. On July 28, 2017, Justice of the Peace L. Kirke, who made the order currently under appeal, had this to say about the proceedings:

...I think that ... there are a lot of things that happened that were confusing, frankly, and ... we find ourselves here today sort of going around and around a little bit.

She later added "this has been a tricky process to navigate."¹

6. Those two statements accurately reflect the matter as it developed before Her Worship. As I will explain further, much of the confusion arose because the contentious aspects of the matter were allowed to evolve in the hands of three different Prosecutors, two of whom made inconsistent submissions before one Justice of the Peace about the prior ruling of another Justice of the Peace. These difficulties were exacerbated by the fact that the transcript of those prior proceedings was not provided to the second Justice of the Peace.

¹ *Transcript of Proceedings*, pp. 50, 61.

7. It is necessary for me to present a certain amount of detail as to the history of this matter in order to put into context the arguments made on the appeal.

- **The Offence**

8. In August 2016, the Respondent was charged with failing to yield to a pedestrian, contrary to s. 144 of the *Highway Traffic Act*. It is my understanding Ms. Cott's car struck that pedestrian. As I have gleaned from the transcripts and oral submissions, the potential witnesses in this matter included that pedestrian, her daughter and an independent pedestrian.

- **Trial Date #1: January 30, 2017**

9. The first trial date was set for January 30, 2017. The Prosecutor sought an adjournment because of the unavailability of an officer. At that time, the Respondent was not represented. The adjournment was granted, and the next trial date was set for May 24, 2017.

- **The Disclosure Requests**

10. In April 2017, the Respondent retained Mr. Brown's services. In May 2017, Mr. Brown sent two written requests to the Prosecutor's office seeking additional disclosure.² Among the items sought were the addresses of the three civilian witnesses whose names appeared in the original disclosure. A number of times in oral argument on this appeal and indeed before different Justices of the Peace, Mr. Brown indicated that the independent pedestrian had evidence to give that was potentially helpful to the defence. That characterization was never challenged by any of the prosecutors – either before me or in the transcripts that were filed.

- **Defence Motion: May 23, 2017**

11. The Prosecutor's Office did not respond to Mr. Brown's written requests. As a result, with the trial date looming, Mr. Brown filed a Notice of Motion seeking an adjournment and took steps to have the motion heard on May 23, 2017 – the day before the trial date. The order sought in the Notice of Motion was as follows:

² On May 5 and 12, 2017.

That the matter be brought forward and adjourned as the defendant has not received all of the disclosure she requires to make full answer and defence to the allegation.

12. The motion was heard by Justice of the Peace Bubrin. Mr. Brown made his submissions regarding his unanswered requests for disclosure. At the close of his submissions, Mr. Brown formally requested an adjournment and then added the following request that His Worship:

... perhaps make a suggestion to the prosecutor that if you feel that the items I have asked for are reasonable, perhaps you could share that feeling with the prosecutor.

13. On behalf of the prosecution, after advising the Court that Mr. Brown had not articulated the reasons for his disclosure requests in his two letters, Ms. Benjamin handed *R. v. Mearow*, 2013 ONSC 1865³ (a.k.a. “*R. v. Mitchell*”) to Mr. Brown and to the Court for the first time during her responding submissions. Until that moment, Mr. Brown was unaware of the reasons for the prosecution’s opposition, much less of *Mearow* and the prosecution’s intention to rely on it.⁴

14. *Mearow* is a criminal case that discusses when the Crown should disclose contact information of witnesses to the defence. The Crown is under a general duty to disclose all relevant information. While it has discretion over that obligation, that discretion is reviewable by the trial judge. On such a review, the Crown bears the onus of bringing itself within an exception to the general rule.⁵

15. Bubrin J.P. gave Mr. Brown an opportunity to make reply submissions regarding *Mearow* and then took a brief recess. When His Worship returned, he denied the Respondent’s motion. A fair reading of his Reasons indicates that His Worship based his decision on the timeliness of the Respondent’s actions in retaining Mr. Brown, making her disclosure requests and filing her motion. He first noted that the motion was brought on the eve of trial rather than three clear days before. This, he later characterized as his “first concern.” He also indicated that the Respondent “needs to take responsibility for any delay in addressing matters, including hiring counsel.”⁶

16. Concerning the witnesses’ addresses, His Worship indicated that “safety concerns have not been specifically raised and even though there might be the right to

³ Hereinafter cited as *Mearow*.

⁴ *Transcript of Proceedings*, pp. 3, 14-15.

⁵ At paras. 10-16.

⁶ *Transcript of Proceedings*, pp. 19-21.

that information to defence counsel,” it was His Worship’s *opinion* that any hindrance of the defence’s ability to prepare “can be remedied by the obvious opportunity to cross-examine the civilian witnesses when they step forward to testify.”⁷

17. The adjournment request having been denied, the trial was expected to begin on the following day, May 24, 2017, before Justice of the Peace Kirke.

- **Trial Date #2 & Charter Application: May 24, 2017**

18. Mr. Brown filed a Notice of Application before Her Worship Kirke seeking a stay of proceedings pursuant to the *Charter of Rights and Freedoms*. The stated grounds for the Application included the non-disclosure of the witnesses’ contact information and the prosecution’s conduct before Bubrin J.P. It was Mr. Brown’s position that the prosecution misrepresented the holding in *Mearow*.

19. The Prosecutor that day was not Ms. Benjamin, but Ms. Jordan. Mr. Brown provided a fair summary of his disclosure requests and what had transpired to that point.⁸ He also provided copies of *Mearow*. Neither Her Worship nor Ms. Jordan were familiar with the *Mearow* decision.

20. It is clear that Ms. Jordan had not been completely informed by Ms. Benjamin of the prosecution’s position regarding the Respondent’s disclosure requests and applicable law. However, the transcript demonstrates that Ms. Jordan was willing to consider the issue and even *resolve* it if possible. At p. 24 of the *Transcript of Proceedings*, Ms. Jordan indicated that she had been “putting [her] mind to this to see how we can work around this” and that she was “trying to see if we can actually resolve this by getting Mr. Brown the information that he would like.”

21. It bears mentioning here that only the complainant pedestrian and her daughter were in attendance on this trial date. The independent pedestrian did not attend. Ms. Jordan sought the consent of the witnesses who were present to disclose their contact information. They declined.

22. Having perused *Mearow* during the hearing, Ms. Jordan came to a different interpretation of it than her colleague had the day before. Later, Ms. Jordan suggested that the matter be adjourned so that the case law could be properly argued. At p. 39, she acknowledged that she and Ms. Benjamin may have had different points of view and suggested that Ms. Benjamin attend on the next occasion.

⁷ Ibid, pp. 20-21.

⁸ *Transcript of Proceedings*, pp. 3-11

23. It is on that basis that the matter was adjourned to July 28, 2017 before Justice of the Peace Kirke.⁹ At p. 40, Her Worship stated her expectations as follows:

...obviously we'll all come prepared understanding the case law. I would ask for ... submissions and I should be able to render my decision.

- **Trial Date #3 & Charter Application: July 28, 2017**

24. On July 28, 2017, it was not Ms. Benjamin or even Ms. Jordan who attended on behalf of the Prosecution. It was a third Prosecutor: Mr. Raczkowski. Based on his understanding of what had transpired before Bubrin J.P. in May, Mr. Raczkowski announced his position that Mr. Brown's *Charter* Application was an attempt to relitigate the motion that Bubrin J.P. had dismissed. This, according to Mr. Raczkowski, meant that Her Worship Kirke had no jurisdiction to hear the Application. Rather, the Respondent was limited to one of two remedies: an application for an extraordinary (and interlocutory) remedy in the Superior Court or an appeal after trial. As a result, Mr. Raczkowski requested that the Application be dismissed.

25. Incidentally, it appears from the transcript that Mr. Raczkowski did not know whether or not the trial was expected to commence on July 28 in the event that the Application was dismissed.¹⁰ Also, it appears that no witnesses had been notified to attend. As a result, he submitted that if the Respondent's Application was denied, the Prosecution would seek an adjournment of the trial. In that event, Mr. Raczkowski indicated that he would consider the disclosure issue and potentially find a compromise.

26. After hearing extensive argument from both parties concerning the history of the matter, the Respondent's disclosure requests and their thoughts concerning jurisdiction, Her Worship Kirke denied the Respondent's Application for a stay of proceedings and ordered that the Prosecution disclose the witnesses' contact information. Mr. Raczkowski asked for two weeks to address Her Worship's order since, in his view, it represented a "serious policy change."¹¹

27. The matter was adjourned to September 11, 2017 to set a new date for trial. Her Worship Kirke decided that she was not seized of the matter because Ms. Cott had not been arraigned and the contents of the evidence had not been discussed.

⁹ Transcript of Proceedings, pp. 39-40, 45.

¹⁰ Transcript of Proceedings, at pp. 4-5, 10, 14, 22.

¹¹ Ibid, at p. 60.

28. Since Mr. Raczkowski was intending to seek an adjournment and remained open to trying to reach a compromise in that event, it is regrettable that the matter took the turn it did at this juncture. Assuming that it was in the public interest and that there was a reasonable prospect of success, this prosecution might otherwise have been salvaged.

- **The Dismissal of the Charge: September 11, 2017**

29. On September 11, 2017, the matter returned before Her Worship K. Dresher. Municipal Prosecutor Cox advised the Court that Mr. Raczkowski had come to the conclusion that the City could not comply with Kirke J.P.'s order and was electing not to proceed with the matter. At Mr. Cox's invitation, Dresher J.P. dismissed the charge.

III. THE APPEAL: MAY 1 AND JUNE 25, 2019

- **The Positions of the Parties**

30. As initially filed, Mr. Raczkowski's factum on appeal argued that the Respondent's Motion before Bubrin J.P., properly characterized, was an Application for Disclosure. According to him, the *Charter* Application filed before Kirke J.P. raised the same issue and was barred by the doctrine of issue estoppel. The Respondent disagreed, arguing that the motion before Bubrin J.P. was a request for an adjournment whereas the matter before Kirke J.P. was a *Charter* Application seeking a stay of proceedings for non-disclosure and concerns about the conduct of the Prosecutor.

31. On May 1, 2019, the appeal was scheduled to be argued before me. Two issues led to it being adjourned to June 25. First, I raised with the parties the following question:

if the May 23 motion was properly characterized as an Application for Disclosure, which is itself an application for relief pursuant to the Charter, did Bubrin J.P. have jurisdiction to address it even though he was not the Trial Justice?

Second, with some prompting from me based on the authorities cited in his own materials, Mr. Raczkowski came to the conclusion that issue estoppel did not lie in this context as Bubrin J.P.'s order was not final. However, Mr. Raczkowski was of the view that the issue, which he wished to redefine as "abuse of process by relitigation," had not been addressed by Kirke J.P. He sought more time to marshal his thoughts and to file additional written material. We adjourned to a suitable date and I set deadlines for the parties to exchange and file additional material in the interim.

32. On June 25, I heard Mr. Raczkowski's argument in full. Ultimately, it boils down to this: while Mr. Raczkowski acknowledged that Ms. Jordan may not have raised concerns about relitigation on behalf of the Prosecution on May 24, that does not matter. Mr. Raczkowski raised those concerns on July 28 and Kirke J.P. was bound to

address them because they went to her jurisdiction. According to him, Her Worship failed to do so and that constituted reversible error. I took Mr. Raczkowski to a number of passages in the *Transcript of Proceedings* of July 28 in which it appeared to me that Her Worship had been made aware of his concerns and accounted for them, but he maintained that she had not considered his argument. He left it to me to review the transcripts on my own time and I took the matter under reserve.

- **Reasons Dismissing the Appeal**

33. I would dismiss this appeal for two reasons. First, the Respondent did not seek to relitigate the same question before Kirke J.P. Second, if I am wrong about that, Kirke J.P. considered Mr. Raczkowski's arguments in that regard and dismissed them. It was open to Her Worship to do so on this record.

(a) The Respondent did not seek to relitigate

34. The Respondent's May 23 motion was, on its own very clear terms, a motion for an adjournment. It is true that non-disclosure was the stated ground. That fact alone should not easily lead one to conclude that it was a disclosure application in disguise. First, the reality is that adjournments are often caused by delays in disclosure that both parties agree must be made in order to allow the accused to make full answer and defence. Second, disclosure applications, properly made, are *Charter* applications. Such a step is seldom required when the issue is standard *Stinchcombe* disclosure and the parties are communicating. Of course there are times, as in this case, when the parties do not agree that the information sought constitutes *Stinchcombe* disclosure. Where that disagreement cannot be bridged, a disclosure application is the appropriate recourse.

35. In this case, where the Prosecutor's office did not provide the Respondent with a response indicating its position concerning her written requests, much less a reason for that position, the Prosecutor had no basis upon which to treat the adjournment motion as a *de facto* disclosure application. In any event, I am of the view that Bubrin J.P. did not do so. His Worship's decision, which I have described above, was nothing more than a denial of the adjournment request. The fact that he accepted Mr. Brown's invitation and stated his *opinion* about the Respondent's disclosure request does not convert His Worship's order that the trial proceed into an order dismissing a disclosure application.

36. In my view, since the May 23 Motion and the July 28 *Charter* Application were different in both form and substance, the Respondent cannot be said to have attempted to relitigate the same issue(s) before Kirke J.P. Therefore, Kirke J.P. was free to entertain the *Charter* Application.

37. Below, I will discuss what might have been done differently in the circumstances.

(b) Kirke J.P. considered the Prosecutor's argument

38. To understand whether or not Kirke J.P. failed to address Mr. Raczkowski's argument that the Respondent was seeking to relitigate issues that had been put to rest by Bubrin J.P., the context in which Her Worship was operating, and the facts that were available to her, must be considered. First, two Prosecutors from the same office took very different approaches on separate occasions. While Ms. Jordan understood that some of the issues overlapped, she was nonetheless willing to try to resolve them and, where that failed, to adjourn the matter so that the central point of law could be argued: whether *Mearow* compelled disclosure of the witnesses' contact information despite their opposition.

39. On the date set for that argument, a different Prosecutor (Mr. Raczkowski) took a new position: the Respondent's efforts constituted an effort to relitigate and raised a jurisdictional issue. Importantly, the transcript of Bubrin J.P.'s reasons and the submissions made to him were not placed before Kirke J.P. Neither Ms. Jordan nor Mr. Raczkowski had been present on May 23, and it was clear that neither of them had been fully briefed about what had transpired. In fact, Mr. Raczkowski engaged in speculation as to what Bubrin J.P. ordered and why, at p. 19 of the *Transcript of Proceedings*.¹² On the same page, Mr. Raczkowski states that "we should have the transcript of Mr. Justice Bubrin." I agree and, given Mr. Raczkowski's position, he ought to have obtained it before raising what, in the final analysis, became an allegation of abuse of process. In these circumstances, it was the Prosecution's argument to make, not the Respondent's to dispel. Had that step been taken, I have some hope that the transcript would have been interpreted as I have done. In any event, it would certainly have been of assistance to Kirke J.P., who had one hand tied behind her back.

40. Having said that, it is clear from the *Transcript of Proceedings* that Kirke J.P. understood Mr. Raczkowski's argument and that, having considered it, she simply disagreed with him and elected to resolve the issue on the merits.¹³ In light of the confusion sowed by the different prosecutorial stances and the absence of a transcript of the proceedings that took place before Bubrin J.P., one can hardly fault her for doing so in the manner that she did. It bears mentioning at this point that, at p. 55, Her Worship asked the following question of the parties:

Justice Bubrin, having ruled on an adjournment application, is not seized because it's an adjournment, correct? So he rules what happens with the adjournment, and then it moves on to the next jurist. Is that correct? Would both of you agree?

Mr. Raczkowski and Mr. Brown then registered their agreement. That, really, should have been the end of it.

41. I would also add that, unlike some other pre-trial motions, the merits of disclosure applications can vary over time. The issue is most often governed by relevance.

¹² At lines 12-15.

¹³ At pp. 30-31, 35, 42 and 56-57.

Relevance is a fluid concept that can evolve over the course of a proceeding such that the question can be revisited by a jurist who has denied a prior application. For this reason, and since they have their source in the *Charter*, disclosure applications ought to be addressed by a trial justice. I will discuss below what might have been done differently in that regard.

IV. SOME ADDITIONAL THOUGHTS

- **Better Communication yields Better Results**

42. It is unfortunate that the Prosecutor's office did not respond the Respondent's written disclosure requests. Had they communicated their position and the reasons for it in a timely way (including their intention to rely on *Mearow*), the Respondent would have been in a better position to plan the next steps. Those could have included further discussions with the Prosecutor and/or scheduling the appropriate motion.

43. At the very least, Ms. Benjamin should have discussed her position and its basis with Mr. Brown on the motion date before the start of argument. That would have enabled Mr. Brown to review *Mearow* and take such steps as appropriate, including seeking an adjournment.

44. To be sure, a motion or application made for one purpose can, during discussions between the parties or oral argument, evolve and change – sometimes dramatically. In fact, this can and should happen from time to time as issues come into greater focus. This can also lead to enhanced efficiencies. However, where this happens, it should be with the moving party's consent or, at the very least, only where that party is given adequate time to address the issues as reframed. In this case, I am of the view that by waiting until her responding submissions to provide her position and the reasons for it (including citing case-law that is neither notorious nor completely straight-forward) the Prosecutor attempted to unilaterally change the terms of the debate and convert a simple adjournment motion into something much more complex. It would strike me as unfair that, having done so, the Prosecutor could later argue that the issue was closed.

45. The *Transcript of Proceedings* makes it clear that Mr. Brown was at a disadvantage. Had he asked for time to review *Mearow* and to seek instructions from his client in these circumstances, I am sure that he would have been accommodated.

- **To arraign or not to arraign?**

46. The Respondent was not arraigned on either date before Kirke J.P. In my view, there are two reasons why that should have been done before the parties made their submissions: one technical and one practical. First, those dates were trial dates on which a *Charter* Application was before the Court. Such an application should be heard by the trial justice.¹⁴ Second, the failure to arraign the Respondent left everyone in a

¹⁴ See also: *R. v. Hawkshaw*, [2007] O.J. No. 3358 (Ont. C.J.).

state of confusion as to when and before whom the matter would be set for what would have been a *fourth trial date*. The question, with respect, is not whether trial evidence was heard during the *Charter* Application. If nothing else, this matter was in dire need of continuity. Even absent an arraignment, these circumstances called upon Her Worship to seize herself of the matter if at all possible.

- ***Jordan*, Efficiencies and Case Management**

47. The transcripts in this matter are replete with references to *Jordan*, timeliness and the need for efficiency in the Ontario Court. Of course, those values are important and all of us – parties and the Court alike – have a responsibility to promote them. However, as the old saying goes, *a stitch in time...* Sometimes an adjournment is required even at the risk of causing delay. Matters proceed most efficiently where all parties understand each other's positions and there are no surprises.

48. How and when to grant an adjournment is not simply a matter of counting past trial dates and assigning blame. Where there are legitimate concerns about delay, justices should not hesitate to case-manage matters. A short and well-managed adjournment can enhance efficiency.

49. This case illustrates the point. Of course, no one has a crystal ball. Yet, the fact that Ms. Cott was charged over three years ago cannot be overlooked.

50. An opportunity for case-management presented itself when it became clear that Mr. Brown was not equipped to respond to the Prosecutor's late-breaking position on May 23, 2017. The justice on that date could have granted an adjournment, offered to conduct a JPT and/or seize himself of the matter. In doing so, he could have case-managed the matter by imposing timelines and conditions in the hopes of resolving the issue or having it set down efficiently.

- **A Judicial Pre-Trial would have been appropriate**

51. In fairness, part of the confusion arose because Mr. Brown sought Justice of the Peace Bubrin's opinion about disclosure in the context of an adjournment motion on the record. It is not a justice's function to provide an opinion on a question of law - particularly in a contested hearing that was convened for a different purpose. However, it is certainly among our functions, indeed responsibilities, to assist parties in resolving contentious pre-trial issues in the hopes of moving matters forward efficiently and, where possible, eliminating time-consuming and costly procedural steps.

52. Where a party believes a justice's opinion could so assist, the best course is to schedule a judicial pre-trial conference ("JPT"). JPTs take place off the record where the justice is free to share his or her opinion as to the merits of the party's position. This might lead to a resolution of the issue and avoid the need for an unnecessary motion.

Where the justice's opinion does not have that effect, the parties are left with a clear sense of their options going forward. The justice can then assist them in setting the proceedings down efficiently.

53. In such a case, the moving party can then schedule a motion. Where the outcome of that motion, if successful, will necessarily cause an adjournment, it should be set as a pre-trial motion. In cases like this one, where the issue is about disclosure, such a motion should be scheduled to be heard by the trial justice a reasonable time prior to the trial proper. With direction from the JPT justice and the cooperation of the parties, the trial-coordinator/scheduling assistant can set the matter down accordingly.

- **The *Mearow* issue**

54. Neither of the jurists' treatment of *Mearow* is under appeal and the question was not fully argued before either of them. Therefore, I will leave the issues it raises for another day.

Released: August 21, 2019

Justice Patrice F. Band