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R. v. Dumont

Between

**Her Majesty the Queen, appellant, and
Karen Dumont, respondent**

[1999] O.J. No. 2647

106 O.T.C. 395

66 C.R.R. (2d) 184

44 M.V.R. (3d) 211

43 W.C.B. (2d) 168

Court File No. 98-4405

Ontario Superior Court of Justice
Central East Region

Sanderson J.

July 5, 1999.

(8 pp.)

Criminal law -- Procedure -- Trial, special duties of Crown -- Duty to disclose evidence prior to trial -- Civil rights -- Canadian Charter of Rights and Freedoms -- Practice -- Criminal proceedings.

This was an appeal by the Crown from the dismissal of impaired driving charges against Dumont. Dumont brought an application under the Canadian Charter of Rights and Freedoms to exclude breath evidence and filed an affidavit in support. The Crown filed no materials in response, although the Rules of the Ontario Court of Justice in Criminal Proceedings required the Crown to provide its material to the defence not later than five days before the hearing. At the hearing of the Charter application, the Crown sought to call viva voce evidence in response to the allegations in Dumont's affidavit. The trial judge prohibited the Crown from calling this evidence because it had not filed responding materials. He determined that there had been a Charter violation and that the Crown's evidence relating to impairment should be excluded. He dismissed the charges against Dumont. The Crown argued that the trial judge erred in failing to hear its evidence. The Crown argued that, as it did not intend to rely on written evidence, it did not have to file affidavit material.

HELD: Appeal dismissed. The trial judge correctly interpreted the applicable rule, and the Crown was required to file affidavit material if it intended to call viva voce evidence on Dumont's Charter application. There was no reason to interfere with the trial judge's exercise of discretion in excluding the Crown's evidence.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, s. 24.

Criminal Code, s. 253(a), 253(b).

Rules of the Ontario Court of Justice in Criminal Proceedings, Rule 30.05(1), 30.05(2)(a), 30.05(2)(b), 30.05(2)(c), 30.05(3).

Counsel:

David Russell, for the appellant.

Anthony Rein, for the respondent.

SANDERSON J. (endorsement):--

Order Under Appeal

1 This is a summary conviction appeal from the order made by his Honour Judge J.J. Douglas of the Ontario Court (Provincial Division) at Barrie, Ontario, on February 8, 1999, dismissing criminal charges against the respondent under s. 253(a) and s. 253(b) of the Criminal Code of Canada.

Background

2 By Notice of Application dated December 29, 1998, counsel for the respondent gave notice of a Charter Application to exclude breath evidence, returnable on February 8, 1999.

3 Rule 30.05(1) of the Rules of the Ontario Court of Justice in Criminal Proceedings requires the applicant to file certain materials "where necessary to complete the record" including an affidavit of the applicant setting out the matters described in subrule (2).

4 Subrule 2 provides:

(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.

5 In support of the respondent's Charter Application, an affidavit of Karen Dumont was filed.

6 Rule 30.05 (3) Respondent's Documentary, Affidavit or Other Evidence provides as follows:

- (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.

7 The Crown filed no materials in response to the affidavit of Karen Dumont. On February 8, 1999, on the return of the Charter Application, the Crown sought to call viva voce evidence in response to the allegations made in the respondent's affidavit. Her counsel took the position that the learned Provincial Court Judge should exclude that evidence because the Crown had not complied with the requirements of Rule 30.05(3).

8 The learned Provincial Court Judge prohibited the Crown from calling evidence to respond to the allegations contained in the affidavit of Karen Dumont on the return of the accused's Charter application because it had not filed responding materials.

9 He held that there was a Charter violation and that the appropriate consequence thereof was the exclusion of the Crown's evidence relating to impairment and blood alcohol level. He dismissed the charges against the respondent.

10 Counsel for the Crown conceded in argument that if the ruling with respect to the exclusion of evidence was correct, then the result should stand.

11 However, he submitted that the learned Provincial Court Judge erred in law in failing to hear the evidence as it was necessary for him to hear it to come to a just and proper result.

12 The learned Provincial Court Judge commented in his ruling that the Rules were clearly intended to tighten up the practice of criminal law, particularly with respect to motions and applications to exclude evidence pursuant to section 24 of the Charter of Rights and Freedoms.

13 He noted that the Charter Application to exclude evidence was brought in compliance with the Rules. However, in his view, the Crown had failed to comply with the clear requirements of Rule 30.05(3).

14 He noted that His Honour Judge Cleary had earlier canvassed the same issue and had held in R. v. Kevin McGowan, released on October 13, 1998, that in the case before him, the Crown had failed to comply with Rule 30.05(3) and that it should and would be denied the opportunity to call certain evidence as a result. His Honour Judge Krelove had reached a similar result in R.v. Dusten Carney, on November 25, 1998.

15 The learned Provincial Court Judge agreed with Judge Cleary in McGowan that the Rules were put in place to focus the issues. They require the Crown to provide their material to the defence not later than 5 days before the hearing.

16 As the Crown had not complied with the Rules here, he held that it should be denied the opportunity to call further evidence on the Charter Application.

17 The learned Provincial Court Judge clearly recognized that in the circumstances, he had discretion to receive the viva voce evidence which the Crown proposed to call.

18 However, he decided not to do so in the particular circumstances of this case. He said:

It would not be in every case that I would deny the Crown the opportunity under section 30 to call evidence, but I would do so in a case when there has been no evidence proffered as to why compliance with the rules was not was not thought of or attempts were not made to comply with the rules.

A sloppy practice is, with respect, not an argument that supports the use of a court ordered discretion to a court-to allow a court to exercise its discretion against the clear language of the rules which says that you must provide notice of what you intend to call at the application.

19 Counsel for the Crown submitted that nothing in the Rules clearly provides that where it intends to call viva voce evidence it must file affidavit material setting out the evidence upon which it intends to rely.

20 He submitted that where it does not intend to rely upon paper, it is not necessary for the Crown to file affidavit material. The accused already has had disclosure and as a result, the respondent could not be surprised in the event that the Crown called certain evidence in respect of the Charter application.

21 Counsel for the respondent submitted that the wording of the Rule is clear. It clearly requires the Crown to file affidavit material if it intends to rely upon it to challenge the contents of the affidavit material filed by the applicant.

22 Counsel for the Crown candidly admitted that in the interval between the filing of the respondent's Charter Application and the date upon which that Application was returnable, there was an awareness within his office of the McGowan and Carey decisions, but that it was felt that the wording of the Rule was sufficiently unclear to justify the position that no affidavit need be provided.

ISSUE I - DOES RULE 30.05(3) REQUIRE THE CROWN TO PROVIDE AFFIDAVIT EVIDENCE IF IT INTENDS TO CALL VIVA VOCE EVIDENCE TO COUNTER THE CONTENTS OF THE AFFIDAVIT IN SUPPORT OF THE APPLICATION?

23 I find that the learned Provincial Court Judge correctly interpreted the applicable Rule and that the Crown was required to file affidavit material if it intended to call viva voce evidence on the Charter Application. It could not simply sit back and do nothing.

24 In my view, the wording of Rule 30.05(3) makes it clear that if the Crown intends to dispute assertions made in affidavit material filed in support of a Charter Application, it must file affidavit or other material. The Crown is simply being required to meet the same standard as is being required of the applicant under Rule 30.05(1) and (2).

ISSUE II - SHOULD THE TRIAL JUDGE HAVE AFFORDED THE CROWN THE OPPORTUNITY TO CALL THE EVIDENCE WHICH IT WISHED TO CALL?

25 Counsel for the Crown submitted that given the importance of the evidence, the learned Provincial Court Judge, nevertheless should have exercised his discretion to hear the evidence in the interest of justice.

26 While I agree that in many instances it would be appropriate to allow evidence to be called despite technical non compliance with the Rules, in my view, on the particular facts of this case, there is no good reason to interfere with the exercise of the learned Provincial Court Judge's discretion, or to allow this appeal. The learned Provincial Court Judge was clearly of the view that in this instance, the Crown either deliberately or sloppily chose to flout or to ignore its obligations under the Rules. This was not the first time that that

had happened. There was an awareness of the earlier decisions in which it had been held that the obligation of the Crown extended to the filing of material where viva voce evidence was contemplated in response to affidavit evidence in support of a Charter application to exclude evidence. It proffered no legitimate excuse for its failure to do so.

DISPOSITION

27 The appeal is dismissed.

28 Although the respondent seeks an order that the Crown pay her costs of the appeal, given all of the circumstances here, I am not satisfied that this is one of the rare cases where such an order would be appropriate.

SANDERSON J.