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R. v. Dumont

Between
Her Majesty the Queen, applicant/appellant, and
Karen Dumont, respondent

[2000] O.J. No. 3413

136 O.A.C. 88

149 C.C.C. (3d) 568

77 C.R.R. (2d) 373

6 M.V.R. (4th) 167

47 W.C.B. (2d) 357

Docket No. C32620

Ontario Court of Appeal
Toronto, Ontario

Labrosse, Weiler and Sharpe JJ.A.

Heard: September 7, 2000.
Judgment: September 19, 2000.

(7 paras.)

On appeal from the order made by The Honourable Madam Justice Mary Anne Sanderson, sitting as a summary conviction appeal judge, dated July 5, 1999.

Counsel:

Tara Dier, for the applicant/appellant.
Anthony S. Rein, for the respondent.

The following judgment was delivered by

- 1 THE COURT:-- The Attorney General for Ontario applies for leave to appeal and, if leave be granted, appeals on a question of law from the order of Sanderson J., sitting as a summary conviction appeal judge, dismissing the Crown's appeal from the verdict of acquittal imposed by the provincial trial judge J.J. Douglas.
- 2 The sole issue is whether rule 30.05(3) of the Rules of the Ontario Court of Justice in Criminal Proceedings requires the Crown to give notice of its intention to call viva voce evidence in response to an application to exclude evidence under s. 24(2) of the Charter brought by the accused.
- 3 The rule provides:

Materials to be Filed

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
- (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.

Affidavit by or on Behalf of the Applicant

- (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.

Respondent's Documentary, Affidavit or Other Evidence

- (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.

Factum May be Required

- (4) A judge may require that factums complying with rules 6.06 to 6.08 be filed on applications under this rule.

4 In the Provincial Court, Douglas J., the trial judge, found the respondent not guilty of operating a motor vehicle while impaired and of driving over 80 contrary to ss. 253(a) and 253(b) of the Criminal Code. Before trial, Ms. Dumont's counsel filed an application seeking the exclusion of the "breath evidence" with a supporting affidavit of the accused. The Crown filed no material in response but, on the trial date, sought leave to call viva voce evidence from the arresting officer. Defence counsel opposed this application on the basis that rule 30.05(3) had not been complied with by the Crown. The trial judge agreed with defence counsel and the Crown was precluded from calling the officer. After a voir dire on the Charter application at which the defence evidence was the only evidence presented, the trial judge ruled the evidence of the breathalyser was inadmissible and acquitted the accused.

5 Sanderson J., the summary conviction appeal court judge, dismissed the Crown's appeal. She held that the provincial judge had properly recognized that she had a discretion to exercise. Sanderson J. dismissed the appeal on the basis that there had been no error on the part of the trial judge in the exercise of that discretion.

6 In our view, the routine disclosure provided by the Crown does not eliminate the need for compliance with the clear wording of rule 35.05(3). At the very least, the Crown could have given notice of the basis for its opposition to the Charter application. We agree with the summary conviction appeal court judge that the trial judge had a discretion, pursuant to rule 2, to permit the Crown to lead viva voce evidence despite non compliance with the rule. We also agree that, in the circumstances of this case, there was no error in the exercise of that discretion in refusing to waive compliance with rule 30.05(3).

7 Accordingly, while leave to appeal is granted, the appeal is dismissed.

LABROSSE J.A.

WEILER J.A.

SHARPE J.A.

---- End of Request ----

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