

ONTARIO COURT OF JUSTICE

CITATION: *R. v. Leung*, 2015 ONCJ 413

DATE: 2015-07-23

COURT FILE No.: Central East - Newmarket 4911-999-00-5980987Z-00

IN THE MATTER OF an appeal under subsection 135.(1) of the
Provincial Offences Act, R.S.O. 1990, c. P.33, as amended;

B E T W E E N :

HER MAJESTY THE QUEEN
Respondent

— AND —

CHUNG-WAI WILSON LEUNG
Appellant

Before Justice David S. Rose
Heard on June 26, 2015
Reasons for Judgment released on July 23, 2015

V. Pankou counsel for the prosecution
D. Elia agent for the defendant Chung-Wai Wilson Leung

On appeal from conviction by Justice of the Peace R. Zito on February 2, 2015.

ROSE J.:

[1] This is an appeal against conviction on the basis that Justice of the Peace R. Zito erred in refusing the Appellant's adjournment request during the trial at the completion of the Crown case.

[2] The Appellant was charged with Failing to Yield to Traffic on a Highway under section 136(1)(b) of the *Highway Traffic Act*. At the commencement of the trial the Agent, Mr. Andrews, said "I anticipate the crown and then I'm guessing the video also. Is that correct? I'll be relying on the video" and then "Alright, so there'll be a crown witness and a video." The Crown then called the investigating officer, P.C.

Goodall, who testified about a driving incident he witnessed on East Beaver Creek while he was travelling southbound on that road. He gave evidence that the Appellant had pulled in front of him from East Pearce, causing him to slow down suddenly in order to avoid a collision. There were, in his words, snow banks in the area high enough that they obstructed the view of East Pearce from East Beaver Creek.

[3] The Appellant was represented by an Agent and not present personally on the day of trial. Cross-examination of the Officer focused on the lack of disclosure within the officer's notes about various portions of the officer's testimony in-chief. What followed was a series of interventions by the presiding Justice. Of the approximately 20 pages of evidence, there are approximately 14.5 pages of dialogue between His Worship and the Agent for the Appellant, little of which adds clarification to the trial issues. At times, this led to outright confusion. The Agent asked for an adjournment during his cross-examination of the officer because of the lack of disclosure on matters not covered by the officer's notes. The agent said,

Q: So, this can only be handled one way Your Worship, with respect. I'm asking for an adjournment today. I'll let – and I don't want to interfere with my friend's case; I want her to finish her case. I'll be asking for an adjournment after the Crown's case is in to notify my client of this further evidence that I was never given prior in disclosure; number one. Number two, I will wait until my friend's finished with her case and then see, and I may make a motion that – ask you to disallow the evidence that was never disclosed to the defence and I will go through that with you.

THE COURT: A number of things.

MR. ANDREWS: Yes.

THE COURT: First of all, what usefulness will have to go to your clients and tell, I heard evidence...

MR. ANDREWS: Uh hum.

THE COURT: Evidence we're talking about now.

MR. ANDREWS: Uh Hmm.

THE COURT: That will change our position what you wish to do, I imagine. We are in the middle of the trial.

MR. ANDREWS: I could give you an example.

THE COURT: One second Mr. Andrews.

MR. ANDREWS: I could give you...

THE COURT: You have the privilege having to have seen disclosure; the court has not. The court rely on past recollection recorded.

MR. ANDREWS: Correct.

THE COURT: Which is the notes that the officer used.

MR. ANDREWS: Correct.

THE COURT: Plus independent recollection that I cannot judge on it because I'm not in the brain of the officer, I don't know how many details he remember and...

MR. ANDREWS: I agree with you.

THE COURT: The concern of the court is to observe and be vigilant that the prosecution, based on the evidence before the court, will be able to establish a *prima facie* case.

MR. ANDREWS: And its...

THE COURT: From what I heard, we have a *prima facie* case. That is your problem Mr. Andrews, of which I'm not going to rule because I never seen the notes. They have not been introduced by the prosecution as an exhibit that will give me leave to review the notes and make the call based on your motion. *So even if you motion the court I'm going to deny the – your motion because I will never have had access to the notes of the officer Mr. Andrews.*

Emphasis added.

[4] From the above, the manner in which the adjournment was adjudicated up to that point was confusing at best, and probably amounted to a summary dismissal.

[5] Later, His Worship apparently again dismissed the adjournment Application saying,

THE COURT: This is the request of a motion. I'll tell you, I will deny your motion.

MR. ANDREWS: Thank you.

THE COURT: For a very simple reason. Your client had an obligation if he wished to....

MR. ANDREWS: I apologize.

THE COURT: To be part of this trial, to be in court. Maybe not to be even testifying and let you run the – agent – the trial but he had an expectation and I'll tell you why. You are an expert agent. You didn't start as of yesterday and you know by experience that you never know how a trial will turn and of course you must include the independent recollection. You have a great experience to know that an officer may write in his notes A-B-C-D, but it's a very blank mind and remember up to Z and that can come out in a trial and at that point you may realize that you need your defendant. This is the second time up in court, send an agent both times and today by his choice you ran his trial. My opinion is that he has a duty to be in court, he's not been excused with any particular reason from you other than you representing him. Today's the trial date, evidence are in *prima facie* case has been established. The motion is denied.

[6] So, for the second time the adjournment was denied. This time His Worship gave two reasons. The first was that Mr. Andrews was an expert agent and his experience should have caused him to anticipate the expanded nature of the officer's testimony, and that his disclosure would not be complete. The second reason for denial of the adjournment Application is that the accused had a duty to be in court and was not excused for any reason other than the agent's representation. I point out that the accused has no duty to be in court and may be represented by an agent per section 50 of the *Provincial Offences Act*, R.S.O. 1990 c. P.33.

[7] After denying the adjournment, His Worship convicted the Appellant. He correctly identified the offence as being one of strict liability.

Issue:

[8] This Appeal rests on the sole ground of whether the Justice of the Peace erred in failing to grant the Appellant's adjournment Application at the end of the Crown case.

Discussion:

[9] Section 49 of the *Provincial Offences Act* grants the trial court the power to adjourn a trial from time to time. It is silent on the test for granting such an adjournment. In *Darville v. The Queen* (1956) S.C.J. No. 82, the Court articulated the following principles: The power to grant an adjournment is a discretionary one, reviewable on appeal if that discretion was not exercised judicially. The conditions required for an adjournment because of absence of a witness are threefold:

- (a) That the absent witness is material to the case;
- (b) That the party asking for an adjournment is not guilty of laches or an omission;
- (c) That there is a reasonable expectation that the witness can attend at the future trial date.

[10] In *Mississauga (City) v. Malik* 2010 CarswellOnt 2357 (S.C.), Ricchetti J. articulated the following principles when scrutinizing an adjournment ruling of a Justice of the Peace sitting in Provincial Offences Court.

25 Where the request for an adjournment is made, the judicial officer is bound to demonstrate that the request was fairly listened to and the judicial officer considered all relevant factors in deciding whether to grant the adjournment. This would include such factors as:

- a. The length of time between the date of the offence(s) and the court date the adjournment is being sought. The longer the period of time, the greater the likelihood the adjournment should not be granted as the likelihood of prejudice to the defence increases.
- b. The amount of time before the matter can be scheduled. Again, the longer the period of time before a new return date, the greater the likelihood the adjournment should not be granted.
- c. Whether this is the first time the matter has come up. If the matter has come before the court on several or numerous occasions before, it is more likely an adjournment should not be granted because of the increasing delay by one party or the other.
- d. What is the reason for the adjournment request? Is it bona fide? Is it because of an administrative error? Is it an attempt to delay the matter? Bona fide requests or administrative errors may strongly favour granting the adjournment. On the other hand, if it appears the party seeking the adjournment is attempting to delay the matter or is due to a systemic problem within the administration, this

may strongly favour denying the adjournment.

- e. Will the party who has not sought the adjournment be prejudiced if the adjournment is granted? If so, are there any other ways in which the matter can be dealt with expeditiously or the prejudice lessened?
- f. What is the impact of not granting the adjournment? In this case, it was clear to the Justice of the Peace in both cases that the result would be the dismissal or stay of the charges. The impact on society's interest in having public safety charges heard on the merits is a factor to be considered as well.

26 This is not intended to be an exhaustive list. Each situation is unique. The end goal is to ensure justice and fairness is done to both sides.

[11] As can be seen from the above, what Justice of the Peace Zito did not consider in his adjournment application, whether it be the first ruling or the second ruling, was the following:

- Whether the adjournment was *bona fides*. His Worship's comments about the Agent Mr. Andrews being an expert and so presumptively to have known that his client's presence might be required is difficult to understand. His Worship appeared to have been impressed by Mr. Andrews experience. I am not sure that the role of "expert agent" exists in the Ontario Court, or the Law Society of Upper Canada. Nonetheless, the Court effectively went down the road of finding ineffective assistance of an agent which was visited on the Appellant.
- The fact that the Crown's case was closed and that no witnesses would be inconvenienced. There might well be some inconvenience to the Court, but that was never discussed in the ruling. The evidence portion of the trial was short, but there was no consideration of how long the defence portion would be.
- When the trial could have been completed, that is the length of the proposed adjournment.
- The impact of the failure to grant the adjournment. This was a strict liability offence which left the door open to a defence. Failure to allow a defence to be called guaranteed a conviction.
- Would the adjournment prejudice the Crown, who opposed the adjournment, especially given that the Crown case was completed?
- Whether the expanded testimony of the officer was properly something that required a rebuttal by the Appellant in order to make full answer and defence as he was entitled to under section 46(2) of the *Provincial Offences Act*.

[12] Having reviewed the transcript, I am also concerned that the request was not fairly listened to. The trial transcript reveals that when the adjournment came up for the second time, the prosecution believed, reasonably in my view, that the adjournment had already been denied:

THE COURT: Address the court that he wish to motion for an adjournment; correct Mr. Andrews?

MR. ANDREWS: That's correct.

THE COURT: Because...

MS. PANKOU: I'm sorry.

THE COURT: He receive outside of disclosure new evidence that in his opinion were not known to him and to his client and wished to convey that to the client so to decide is the case to put the client on the witness stand. This is the motion we're dealing with right now Madam Crown.

MS. PANKOU: It is my understanding Your Worship, I may be wrong,

THE COURT: It's a verbal motion that he made...

MS. PANKOU: But it is my understanding that before you called me to make submissions on the case Your Worship denied this motion.

THE COURT: No no. This is not conclude submissions; we're not there.

MS. PANKOU: It is my understanding that *I heard Your Worship deny this motion* because Mr. Andrews...

THE COURT: No, no, I said...

MS. PANKOU: Advise the Court before that she was not calling witnesses.

THE COURT: No, I denied – I never denied because there was never a motion. I said even if you file a motion with respect to discredit the evidence I will not grant the motion, I told Mr. Andrew, because I will never have access to the hard copy of the officer so, in – independent recollection not only is expected but is almost due because every officer has an independent recollection. So...

MS. PANKOU: I'm sorry Your Worship, I misunderstood the Court.

THE COURT: The motion that he made is for an adjournment.

MS. PANKOU: And as I said...

THE COURT: and I give you an opportunity to respond to this request, then I will rule on that motion.

Emphasis added

[13] The transcript thus supports a finding that His Worship dismissed the adjournment Application twice, the first time summarily and then a second time after more submissions. At best this is confusing, and at worst His Worship was predisposed to denial of the adjournment application. On either footing I find that the adjournment application was not properly adjudicated on.

[14] The Respondent argues that, even if I find that the discretion to grant the adjournment was not granted judicially, I should nonetheless dismiss the appeal because there was no miscarriage of justice. Under section 120(1)(a)(ii) of the *Provincial Offences Act* an appeal may be granted based on a wrong decision on a question of law. In my humble opinion, a failure to grant an adjournment is a question of law, see *Darville v. the Queen (supra)* at para. 7. Aside from that ground, the effect of denying the adjournment was to deny the Appellant the opportunity to call a defence, which is in my view a miscarriage of justice within section 120(1)(a)(iii) of the

Provincial Offences Act particularly where the offence is one of strict liability as it is here.

[15] Under the circumstances, the Appeal is allowed and a new trial ordered under a differently constituted court.

Released: July 23, 2015

Signed: “Justice David S. Rose”