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R. v. Sandoval

**Between
Her Majesty the Queen, and
Milagros Karen Rodriguez Sandoval**

[1998] O.J. No. 4436

**Ontario Court of Justice (Provincial Division)
Toronto, Ontario**

Hogan Prov. J.

Oral judgment: April 21, 1998.

(8 pp.)

Criminal law -- Summary conviction proceedings -- Informations -- Irregularities -- Objections, procedure -- Form and content -- Defects, effect of.

This was an application by Sandoval to quash an information. The appearance notice was not confirmed on the information. Sandoval was not represented by counsel at the time the objection to the information was made, but had been represented by counsel at earlier appearances.

HELD: The application was granted. Sandoval did not attorn to the jurisdiction as he was not represented by counsel. Sandoval attempted to raise the objection in a timely fashion. The defect in the information could not be remedied.

Counsel:

K. Doorly, for the Crown.

I. Isenstein, for the accused.

1 HOGAN PROV. J. (Orally):-- I have heard the submissions that have been made with regard to the failure to have the appearance notice confirmed on the information. I have had an opportunity to read the cases and, in fact, I gave crown counsel an opportunity to consider the matter and file other cases. That is why we adjourned until today.

2 I have read the cases that she has submitted. In my reading of the cases I find that something such as

this is a jurisdictional defect that could in fact be remedied by attorning to the jurisdiction. Then the issue does become what is attorning and what is attorning in a timely manner.

3 As I said earlier in my comments while you were making your submissions, it is not my view that an unrepresented accused by appearing attorns to the jurisdiction in any real way until they have had an opportunity to obtain legal advice. One, they would not even understand the term "attorn," nor would they know that there was anything wrong with the process, so I do not think there can be any form of attornment until they have been actually advised by counsel.

4 Then the issue becomes, once counsel has been retained, what is making a timely objection. I think I said a minute ago "timely attornment." I do not think that is really the appropriate phrase. Perhaps the best phrase is when does one attorn by not making a timely objection.

5 The case that seems to consider this is my brother Judge Blacklock's in the case of Rozanski where trial dates had been set on a number of occasions and adjournments granted and it was just on, I think, the last date when they were ready to proceed that in fact the objection was made. In this case on the first date for trial the objection was made, although prior to that there certainly would have been appearances where the accused had been represented by counsel and there was a pretrial held.

6 I think this case, quite frankly, is quite close to the line in the sense that I agree that if there is going to be this issue raised then it should not in fact be raised on the trial date, not just for the reason that I see Judge Blacklock raising as one concern -- and I am using that only as one concern -- the defect then cannot be remedied if it goes on for too long, but also that if this is an argument to be made then on the trial date, of course, the crown would have witnesses available on the merits of the charge itself and that might well not be the most efficient and best use of resources and court time to have that occur. So there are various reasons why the objection should be made at an earlier date.

7 I am told by defence counsel that he followed his standard practice, which was in fact to request a copy of the information so that he could check to make sure that everything had been done properly, and it did not come and that he did not in fact check it himself as a result of that, but checked on December 4th.

8 Now, as it turned out, the case could not proceed that day in any event and it still was within the time when something could have been done about it. So as I say, I think this is pretty close to the line because now, as Judge Blacklock has pointed out, in these days of disclosure, resolution discussions and pretrials there are more opportunities to raise these various issues. However in this case, as I say, the time in which it was raised, there was still time when it could have been dealt with -- it was on the first date set for trial and then Mr. Isenstein did request a copy of the information much earlier -- although, quite frankly he could have made some more diligent efforts to get it. But I do understand the difficulties at 111 Court and what happens there.

9 So having said all of that, as I say, this case is close to the line in terms of timely objection being made, but I am going to find that in the circumstances he did make some efforts. It was raised at a time when something could still have been done about it and it was the first time set for trial and the trial for other reasons could not proceed that day in any event.

10 So I am prepared to find that it was timely -- although just -- and therefore I find that there was not the attornment and the jurisdictional defect could not have been corrected by virtue of that. Therefore, by virtue of the case law, particularly Gougeon and the other cases that have followed it, I am going to find that the process was therefore not valid and it is appropriate that it be dismissed on that basis.

11 I am looking at you, Mr. Isenstein. You seem to be the expert on this. Is it as a result of the jurisdictional defect which I am finding has not been cured by attorning? I am just wondering what the proper ...

12 MR. ISENSTEIN: I don't know if it's quashed or void ab initio.

13 THE COURT: In fact, it should be quashed, I think, should it not?

14 MS. DOORLY: Well, if Your Honour has no jurisdiction -- is that -- I guess Your Honour is finding you have no jurisdiction.

15 THE COURT: That is right.

16 MR. ISENSTEIN: I think the information proper remains, but you are making an order you are declining to ...

17 THE COURT: To deal with it through lack of jurisdiction.

18 MR. ISENSTEIN: Yes.

19 THE COURT: So I think it has to be quashed rather than my making a finding that it is --

20 MR. ISENSTEIN: Or it's a nullity, maybe?

21 MS. DOORLY: That's discussed in that Silverstone case with Judge August.

22 THE COURT: I do not think that is void ab -- I cannot even speak today.

23 MR. ISENSTEIN: No, it's not void ab initio.

24 THE COURT: Thank you. No, I do not think that is appropriate.

25 MR. ISENSTEIN: I think His Honour Judge August in the Silverstone case, which was a case that I was -- the comment of Judge Fraser -- Mr. McGuire who was the crown asked that it be quash -- no. He asked for it to be quashed and His Honour said I don't have the jurisdiction. He wouldn't withdraw it.

26 THE COURT: But, you see, I do not think the information itself is a nullity. I think it has to be quashed.

27 MR. ISENSTEIN: He called it a nullity.

28 THE COURT: I am not sure that is correct.

29 MR. ISENSTEIN: It's an information defect reconfirmation information nullity.

30 THE COURT: But if it is a jurisdictional defect does that necessarily make ...

31 MR. ISENSTEIN: I think that's the whole issue -- whether the information is a nullity, whether the process is a nullity.

32 THE COURT: And I found it to be a lack of jurisdiction.

33 MR. ISENSTEIN: Right.

34 THE COURT: So I think it simply has to be quashed as a result of a jurisdictional defect.

35 MS. DOORLY: What do they say in Gougeon? What's the relief sought, I wonder, in those cases?

36 THE COURT: We could spend the next two hours deciding on the proper resolution.

37 MS. DOORLY: Yes. And adjourn again to make argument on this.

38 THE COURT: Yes, what did they do?

39 MR. ISENSTEIN: They didn't say. No, they didn't because Gougeon that was an obiter statement. I'm just trying to think. What did Judge Thomas do? I think he quashed the warrant in Koshino.

40 THE COURT: Yes.

41 MR. ISENSTEIN: That was at page ...

42 THE COURT: It is tab eight.

43 MR. ISENSTEIN: Tab eight. What did he do there?

44 THE COURT: Quashed the order.

45 MR. ISENSTEIN: Yes. The order requiring the applicant to appear was quashed. I think it's -- I guess Your Honour declines to exercise your jurisdiction to hear the case, so it's a nullity.

46 THE COURT: It is quashed.

47 MR. ISENSTEIN: It's quashed, perhaps, yes. The information is quashed.

48 THE COURT: Due to a jurisdictional defect.

49 MR. ISENSTEIN: Yes. I think that's what Judge August did.

50 THE COURT: Or I could say the information is found to be a nullity due to a jurisdictional defect. But it does not really nullify the information.

51 MS. DOORLY: No.

52 THE COURT: It is quashed. I am going to say it is quashed due to a jurisdictional defect.

53 MS. DOORLY: Okay.

54 THE COURT: And somebody can fight about that.

55 MR. ISENSTEIN: Thank you, Your Honour. That completes my matters. Good afternoon.

56 MS. DOORLY: Thank you, Your Honour.

57 THE COURT: Thank you. Thanks for your help.

qp/s/bbd