

CITATION: R. v. Vellone, 2011 ONCA 785

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COURT OF APPEAL FOR ONTARIO

MacPherson, Simmons and Blair JJ.A.

BETWEEN

Her Majesty the Queen Ex Rel. The Regional Municipality of York

Appellant

and

Angelo Vellone

Respondent

Hans J. Saamen, for the appellant

Angelo Vellone, in person

Jordan Glick, *amicus curiae*

David Lepofsky, for the intervener, the Attorney General for Ontario

Heard: November 21, 2011

On appeal from the judgment of Justice Howard I. Chisvin of the Ontario Court of Justice dated February 20, 2009, with reasons reported at 2009 ONCJ 150, allowing an appeal from the conviction of the respondent by Justice of the Peace A. Malik of the Ontario Court of Justice dated August 25, 2008, with reasons reported at 2008 ONCJ 765, for speeding contrary to s. 128 of the *Highway Traffic Act*.

MacPherson J.A.:

A. INTRODUCTION

[1] The appellant, the Regional Municipality of York (“York Region”) appeals from the decision of Justice H.I Chisvin of the Ontario Court of Justice dated February 20, 2009. In that decision, Chisvin J. allowed an appeal from Justice of the Peace A. Malik’s August 25, 2008 conviction of the respondent Angelo Vellone for speeding.

[2] The appeal raises two issues: (1) did Mr. Vellone comply with the notice requirements of s. 109 of the *Courts of Justice Act*, R.S.O. 1990, c.C-43 (“CJA”), when he advanced his s. 11(b) *Charter* argument before the justice of the peace; and (2) was there a violation of Mr. Vellone’s s. 11(b) *Charter* right to be tried within a reasonable time?

[3] At the appeal hearing, this court heard oral submissions on the first issue from the appellant, the respondent in person, the *amicus curiae* appointed by the court, and the intervener Attorney General for Ontario. At the conclusion of these submissions, the court indicated that it would allow the appeal on the first issue without addressing the second issue. The court would order a new trial on the speeding charge, but would record the undertaking of counsel for York Region to withdraw the charge because of the passage of time and the volume of proceedings involving Mr. Vellone’s attendance, thus ending the matter.

[4] What follows are the reasons for this decision and disposition.

B. FACTS

(1) The parties and events

[5] On June 7, 2007, Mr. Vellone was pulled over for speeding on Highway 400 northbound. The police officer measured Mr. Vellone's speed at 120 kilometres per hour in a posted zone of 100 km/h. Mr. Vellone was charged with speeding contrary to s. 128 of the *Highway Traffic Act*, R.S.O. 1990, c. H-8 ("*HTA*").

[6] On June 20, 2007, Mr. Vellone filed a request for a trial. On September 24, 2007, a notice of trial was sent to him by mail providing a trial date of April 2, 2008.

[7] On April 2, 2008, Justice of the Peace Griffith decided to adjourn the trial because the temperature in the courtroom was 83.7 degrees. Mr. Vellone did not request this adjournment. He was asked if he had any difficulty with the trial being adjourned because of the temperature. He indicated that he wanted to get his trial over and done with, but would do whatever the court wanted. Crown counsel suggested a return date of August 25, 2008 at 1:30 p.m. Mr. Vellone asked if the trial could take place in the morning or at night court and was told that these were not possible. The trial was set for August 25, 2008.

(2) The trial

[8] On August 25, 2008, Mr. Vellone appeared before Justice of the Peace A. Malik. Mr. Vellone submitted that the matter should be dismissed for delay. Crown counsel

disagreed and the trial judge made an immediate ruling. The entire exchange on this issue was as follows:

THE COURT: Do you want to get some legal – legal advice or do you want to proceed today?

MR. VELLONE: If I may, I – under the *Charter of Rights*, I – I was under the belief that I – this thing took too long to come to trial and I was asking the Courts to be dismissed.

THE COURT: Sir, did you talk to the Prosecutor?

MR. AGOSTINHO: Your worship, I'd indicate first and foremost that to do a motion of that nature, it is not proper before you.

THE COURT: Yes.

MR. AGOSTINHO: Regulation 200 of the *Courts of Justice Act* clearly state that if you're going to make any type of a motion such as that, that it must be made it must be served on the Attorney General of Ontario, the Attorney General of Canada and the Prosecutor's Office fifteen days prior to the commencement of trial. And in this particular matter where an adjournment had been made previously before there's a case of Regina v. Franklin that also indicates and clearly states that transcripts have to be submitted to the Court to indicate as to why it was adjourned the last time. As a result I respectfully submit that a *viva voce* application such as Mr. Vellone is making is not acceptable and it is not proper before you at this time.

THE COURT: Yes – yes sir, your verbal motion for this *Charter* right is not acceptable because you should have done it fifteen days before in writing to the Ministry of the Attorney General with a copy to the Prosecutor and that motion is not properly before me, before this Court therefore I cannot accept your submission.

[9] The trial continued. The police officer who issued the ticket testified and was cross-examined by Mr. Vellone. Mr. Vellone testified. The trial judge convicted Mr. Vellone of speeding and imposed the statutory fine of \$90 plus \$5 for costs.

[10] Mr. Vellone appealed the conviction.

(2) The appeal

[11] On appeal to the provincial court, the Crown conceded that the trial Crown and trial judge were wrong to rely on Regulation 200 of the *CJA*, R.R.O. 1990, Reg. 200.

[12] Nevertheless, the Crown contended that there was a notice problem with Mr. Vellone's position before the trial judge. The Crown argued that Mr. Vellone had failed to comply with s. 109 of the *CJA*, which provides:

109(1) Notice of a constitutional question shall be served on the Attorney General of Canada and the Attorney General of Ontario in the following circumstances:

...

2. A remedy is claimed under s. 24(1) of the *Canadian Charter of Rights and Freedoms* in relation to an act or omission of the Government of Canada or the Government of Ontario.

(2) If a party fails to give notice in accordance with this section... the remedy shall not be granted....

[13] The appeal judge rejected the Crown's notice argument. The core of his reasoning is in these passages:

The Provincial Offences Act, s. 161.1 and following provides for agreements between municipalities and the Attorney

General to be put in place to allow the municipality the function of prosecuting offences, in this case, the offence of speeding.

Pursuant to these agreements the municipalities are required to provide not only the prosecutors but the court administrators and the court facilities. The only obligation the Attorney General has is that it is his responsibility to appoint Justices of the Peace to hear such trials. Beyond that, the prosecutions of these matters essentially would be a municipal concern. The Attorney General of course does maintain an overriding right to intervene and supervise the administration of the agreements. Once the municipality has taken on the prosecution of the matters, the Attorney General is no longer a party to the prosecution.

The Provincial Offences Act goes so far as to specifically note in s. 169 that a municipality acting under such agreement does not act as an agent for the Attorney General of Ontario.

Thus, by agreement, the Attorney General has delegated the prosecution of these matters to the municipality, and they are no longer prosecuted by the Attorney General.

...

In Mr. Vellone's matter the remedy being sought is not as a result of an act or admission of either the Government of Canada or Government of Ontario. Rather, the remedy is being sought as against the Region of York for not dealing with Mr. Vellone's matter and bringing it to trial within a reasonable period of time. As a result of the agreement that is in place under the provisions of the *Provincial Offences Act*, it is the municipality that is required to provide court resources and not the Government of Ontario. Thus, if there has been a violation of s. 11 (b) in this matter it is as a result of the conduct of the municipality and not that of the Government of Ontario. As such, it is clear that s. 109 of the *Courts of Justice Act* has no application to this proceeding.

Having reached this conclusion then, Mr. Vellone did not have to give notice pursuant to s. 109 of the *Courts of Justice Act* and thus should have been allowed to raise the argument

in the course of trial. The trial Justice of the Peace was in error in not allowing the motion to be dealt with in the absence of compliance with s. 109.

[14] The appeal judge then went on to consider the *Charter* s. 11(b) issue on the merits. He concluded that Mr. Vellone's right to be tried within a reasonable time had been violated. The appeal judge therefore allowed the appeal and stayed the speeding charge.

[15] York Region sought leave to appeal, which was granted by order of Gillese J.A. dated April 21, 2009. The Attorney General for Ontario intervened in support of York Region's position. By order of the Chief Justice of Ontario dated November 17, 2010, Darrel Hotz was appointed as *amicus curiae* to oppose the appeal. By order of the Deputy Registrar of the Court of Appeal dated May 3, 2011, and with the consent of the appellant and the intervener, Jordan Glick replaced Darrel Hotz as *amicus curiae*. In both his factum and oral submissions, Mr. Glick performed his role as *amicus curiae* admirably.

C. ISSUES

[16] The issues are, as stated by Gillese J.A. in her order granting leave to appeal:

- (1) Is notice required pursuant to s. 109 of the *Courts of Justice Act*, or otherwise, where an accused seeks a remedy for an alleged *Charter* violation, where the act of omission complained of is that of a municipality; and
- (2) How is s. 11(b) of the *Charter* to be interpreted in the context of a Part I prosecution under the *Provincial Offences Act*? In particular, what are the

guidelines for intake delay and institutional delay; does the presumption of prejudice apply to such a proceeding; and how is delay caused by an inability to proceed due to unexpected courtroom conditions to be treated?

D. ANALYSIS

(1) The notice issue

[17] The starting point on this issue is recognition that by virtue of s. 95(3) of the *CJA*, the s. 109 requirement that parties give prior notice of constitutional questions and remedies applies to proceedings under the *Provincial Offences Act*, R.S.O. 1990, c. P-33, (“*POA*”). The speeding infraction in this proceeding is a *POA* offence. Accordingly, there would appear to be a *prima facie* obligation to serve notice of the s. 11(b) *Charter* application on at least the Attorney General of Ontario.

[18] The appeal judge rejected this obligation because, in his view, Mr. Vellone’s application implicated acts or omissions of only York Region and, therefore, did not require notice to the Attorney General of Ontario pursuant to s. 109 of the *CJA*.

[19] With respect, I do not agree with this interpretation. It misconceives the constitutional relationship between provincial and municipal governments, misunderstands the contractual relationship between the Government of Ontario and York Region in the domain of the prosecution of *POA* offences, and ignores the actual interests of the Government of Ontario in the issue of alleged delay in this case. I reach this conclusion for several separate, but overlapping, reasons.

[20] First, the relationship between s. 109 and the *Charter* supports an interpretation of s. 109 requiring notice in this case. The wording of s. 109 of the *CJA* parallels the wording of s. 32(1) of the *Charter*. Section 109 of the *CJA* refers to the Government of Canada and the Government of Ontario. Section 32(1) of the *Charter* provides:

32(1) This Charter applies

- (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament...; and
- (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

[21] The Supreme Court of Canada has consistently held that municipal levels of government come within the meaning of “government” in s. 32(1) of the *Charter*: see e.g. *Ramsden v. Peterborough (City)*, [1993] 2 S.C.R. 1084; *Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62, [2005] 3 S.C.R. 141; and *Greater Vancouver Transportation Authority v. Canadian Federation of Students – British Columbia Component*, 2009 SCC 31, [2009] 2 S.C.R. 295 at paras. 18-19.

[22] Against this backdrop of statutory wording and case law, the term “Government of Ontario” in s. 109 of the *CJA* should be construed to parallel s. 32(1)(b) of the *Charter*. It would not make sense to say that *Charter* s. 32(1) includes municipal action as action of the Government of Ontario but s. 109 of the *CJA* does not.

[23] Second, interpreting s. 109 to require that *POA* Part I defendants notify the Attorney General of Ontario before seeking *Charter* remedies serves the purposes of s.

109. I accept the intervener Attorney General of Ontario's argument that there is a nexus between Mr. Vellone's speeding ticket and the interests of the Government of Ontario. Mr. Vellone was prosecuted for violating a provincial statute, the *HTA*, pursuant to procedures set out in another provincial statute, the *POA*. The *POA* gives the Government of Ontario presumptive authority to prosecute contraventions of provincial statutes like the *HTA* under Part I of the *POA*. In some parts of Ontario, such as York Region, the Government of Ontario has delegated this prosecutorial function to a municipality by a Memorandum of Understanding pursuant to Part X of the *POA*.

[24] In the Memorandum of Understanding relevant in this case, the Government of Ontario, with the consent of York Region, sets standards that apply to *POA* Part I prosecutions. The Government of Ontario maintains overall provincial oversight of the prosecutorial function. Section 162(3) of the *POA* requires municipal partners to maintain the performance standards set by the province. The Memorandum of Understanding requires municipal partners to maintain the same level of service delivery that was provided previously by the Province and to adhere to rigorous prosecutorial standards. The Government of Ontario retains the right at any time to take over a prosecution, pursuant to s. 168 of the *POA*.

[25] Within this legislative and contractual matrix, the component of s. 109 of the *CJA* requiring people in the position of Mr. Vellone to notify the Attorney General of Ontario of his s. 11(b) *Charter* challenge serves two important purposes. The notice requirement enables the Government of Ontario to decide whether to exercise its right to take over a

case under the *POA*. The notice requirement also furthers the Government of Ontario's important interest in monitoring the performance of municipalities under Memoranda of Understanding.

[26] Third, s. 11(b) cases may raise concerns about systemic problems that implicate provincial responsibilities. In this case, and indeed in most s. 11(b) cases, the decisions of court administrators (e.g. scheduling) and judges (e.g. adjournments) are often central to the claim and the analysis. The issues raised in a particular case might point to systemic issues of personnel and resources. Notice to the Attorney General of Ontario of a s. 11(b) challenge – or, perhaps, an avalanche of such notices – provides the Government of Ontario with important data about key components of the provincial justice system.

[27] For these reasons, I conclude that the appeal judge erred by holding that Mr. Vellone did not need to provide notice of his *Charter* s. 11(b) claim to the Attorney General of Ontario pursuant to s. 109 of the *CJA*.

[28] I briefly address one final matter. Both York Region and the Attorney General of Ontario submitted that Mr. Vellone was required to provide written notice of his s. 11(b) claim to the York Region prosecutor. The basis for this submission is either an expansive interpretation of s. 109 of the *CJA* (advanced by York Region) or a common law requirement that an accused provide the prosecutor with advance notice of a *Charter* claim (advanced by the Attorney General of Ontario).

[29] In light of the resolution of the appeal on the issue of notice to the Attorney General of Ontario, it is not necessary, strictly speaking, to consider the different issue of notice to the municipal prosecutor. I would decline to do so. However, I do observe that in its recent study *Modernizing the Provincial Offences Act: A New Framework and Other Reforms* (Interim Report) (Toronto: Law Commission of Ontario, 2011), the Law Commission of Ontario recommended, at p. 165, that:

38. The Attorney General table amendments to section 109(1) of the *Courts of Justice Act* that would:
 - a. Require service of a Notice of Constitutional Question on prosecutors in all *POA* matters;
 - b. Require that a Notice of Constitutional Question must be served on a municipal prosecutor when a party seeks relief under section 24(1) of the *Charter* relating to an act or omission of a municipality;

(2) **The delay issue**

[30] At the appeal hearing, the court announced that it would not address this issue in light of its decision on the first issue.

E. DISPOSITION

[31] The appeal is allowed and a new trial is ordered. Counsel for the appellant municipality has undertaken to withdraw the charge.

RELEASED: December 14, 2011 (“J.C.M.”)

“J.C. MacPherson J.A.”
“I agree Janet Simmons J.A.”
“I agree R.A. Blair J.A.”