

ONTARIO COURT OF JUSTICE

CITATION: *York (Regional Municipality) v. Pellicci*, 2017 ONCJ 85

DATE: January 12, 2017

COURT FILE Nos.: 9423148Z, 9131152Z,
9342487Z, 5695986B

B E T W E E N :

REGIONAL MUNICIPALITY OF YORK

Appellant

— AND —

**ANTONIO PELLICCI, KARANDEEP SAHI,
ATTAULLAH MUHAMMAD, MAIA YAP**

Respondents

PROVINCIAL OFFENCE APPEALS

Before Justice J.F. Kenkel

Heard January 6, 2017

Reasons Released January 12, 2017

Ms. Volga Pankou counsel for the Appellant
Mr. Antonio Pellicci Respondent appearing on his own behalf
Mr. Karandeep Sahi Respondent appearing on his own behalf
No appearance by or on behalf of the Respondent Attaullah Muhammad
No appearance by or on behalf of the Respondent Maia Yap

KENKEL J.:

Introduction

[1] These four appeals involve the rejection of joint submissions as to sentence without reference to the appropriate legal test. In each case the court erred in law in rejecting the joint submission and the result was unfair to the prosecution. The issue is an ongoing one in this region and for that reason it's necessary to once again state the applicable legal framework and the importance of fair resolution in the provincial offences courts.

Plea Resolution and Joint Submissions

- [2] In *R v Anthony-Cook* 2016 SCC 43 paras 1-2, the Supreme Court described the importance of resolutions by joint submission:

Resolution discussions between Crown and defence counsel are not only commonplace in the criminal justice system, they are essential ... They occur every day in courtrooms across this country and they are vital to the efficient operation of the criminal justice system. As this Court said in *R v Nixon*, 2011 SCC 34, not only do joint submissions help to resolve the vast majority of criminal cases in Canada, but in doing so they contribute to a fair and efficient criminal justice system.

- [3] Those observations apply with stronger reason to the very busy provincial offences courts in this province. Their dockets have dozens of matters to be heard each day. Resolution without trial is essential to the efficient and fair operation of the system.

- [4] Prosecutors take into account numerous factors in arriving at resolution positions including:

- The circumstances of the offence
- Potential strengths or weaknesses in the prosecution case
- The presence or absence of a prior record of similar offences
- The personal circumstances of the accused

- [5] The resolutions in these appeals involved reductions in charges, reductions in fines or both. Some resolutions avoided administrative penalties such as driving demerit points. Others avoided conviction on offences which would trigger serious insurance consequences. Despite those benefits, the joint submissions as to sentence were rejected for other reasons:

- Insistence that where the accused pleads guilty to a reduced charge, the set fine for that offence must be imposed
- A concern that sentences imposed on a given day for a particular offence be the same regardless of the circumstances
- Concern about the accused's ability to pay not founded on the evidence
- A general sympathy for the accused
- An assertion of judicial independence, that the court must determine sentence regardless of the position of the parties

[6] Justices of the Peace may depart from joint submissions, but the ability to do so is prescribed by law. The appropriate test is a strict one – whether the proposed sentence would bring the administration of justice into disrepute or would otherwise be contrary to the public interest – *Anthony-Cook* at para 32. The phrase “otherwise contrary to the public interest” does not lower the standard. At para 34 of *Anthony-Cook* Justice Moldaver described the test in these terms:

...A joint submission should not be rejected lightly ...Rejection denotes a submission so unhinged from the circumstances of the offence and the offender that its acceptance would lead reasonable and informed persons, aware of all the relevant circumstances, including the importance of promoting certainty in resolution discussions, to believe that the proper functioning of the justice system had broken down. This is an undeniably high threshold – and for good reason ...

[7] Minor offences under Part I or Part II of the *Provincial Offences Act* RSO 1990 c P33 (POA) may be resolved out of court by paying the amount stated on the ticket – the “set fine” for the offence, with costs and the applicable victim surcharge. See: POA s.8. Set fines are established by the Chief Justice of this court pursuant to s.1 of the POA. Costs are established by Regulation – RRO 1990 Reg 945 as is the Victim Fine Surcharge – O Reg 161/00.

[8] Reference to the set fine as a sentencing limit is mistaken in law and ignores the purpose of the set fine, the fact that the accused pleaded guilty to a reduced charge and the fact that the proposed resolution also resulted in significant fine reduction from the original charge or charges. Other collateral benefits with respect to demerit points and insurance also apply in some cases.

[9] In one of these appeals it appears that the court rejected a joint submission simply to assert judicial independence. The presiding Justice of the Peace told the courtroom that there could be no agreements as to sentence. She rejected the joint submission, then lowered the fine by \$8.75 without explaining why the submitted fine was inappropriate or why the minor variance was necessary. Justices of the Peace do have the ultimate responsibility to impose a fit sentence, but that responsibility must be exercised according to the limits imposed by statute and following the framework provided by the appellate courts.

[10] Consistency in sentence for particular offences is one goal of sentencing, but it's an error in law to isolate that one factor and ignore the different circumstances of the offences and the personal circumstances of the offenders. Where an accused receives the benefit of resolution to a reduced charge and reduced fine and agrees they can pay that amount, a sentencing court should not further reduce the fine due to concerns about ability to pay not founded in the evidence. A general sympathy for an accused person is not a sufficient basis to interfere with a joint proposal.

[11] One might reasonably ask why the prosecution has bothered to pursue some of these appeals, where the fine reductions did not result in a significantly lower amounts. The appellant explained that these appeals are examples of regular arbitrary rejections of joint submissions in the provincial offences courts of this Region which have been unfair to the prosecution and which continue despite direction from this court. The appellant is correct that there have been numerous recent decisions on this point:

- *York Region v Sun* 2016 ONCJ 240
- *York Region v Newhook et al* 2015 ONSC 6587
- *York Region v Alakoozi* 2015 ONCJ 763
- *York Region v Chmiel* [2015] OJ No 5686 (CJ)
- *York Region v Mirza* [2015] OJ No 984 (CJ)
- *York Region v Wong* [2015] OJ No 983 (CJ)

[12] For resolution by charge and sentence reduction to continue in the provincial offences courts of this region, it's essential that joint submissions be respected. As Justice Moldaver explained at paragraphs 41 to 42 of *Anthony-Cook*:

... for joint submissions to be possible, the parties must have a high degree of confidence that they will be accepted. Too much doubt and the parties may choose instead to accept the risks of a trial or a contested sentencing hearing ... Hence, the importance of trial judges exhibiting restraint, rejecting joint submissions only where the proposed sentence would be viewed by reasonable and informed persons as a breakdown in the proper functioning of the justice system. A lower threshold than this would cast the efficacy of resolution agreements into too great a degree of uncertainty. The public interest test ensures that these resolution agreements are afforded a high degree of certainty.

[13] Even where the court undercuts a joint submission, this can have a negative effect on the administration of justice. In *R v DeSousa* 2012 ONCA 254 at para 24, quoted by Rose J. in *York Region v Sun* 2016 ONCJ 240, Justice Doherty observed:

... where a judge is considering "undercutting" a joint submission, he or she must have regard to the community's reasonable expectations that the court will impose a sentence in accordance with that agreed upon in the joint submission. Confidence in the operation of the justice system may suffer where an accused enjoys the benefits of a plea bargain, perhaps for example escaping prosecution on other more serious charges, but is not required to serve the sentence agreed upon as part of that bargain.

- [14] In each of these appeals the joint submission as to sentence was rejected without regard to the circumstances of the resolution, the accused's circumstances or the appropriate legal test. In each case the result was unfair to the prosecution. Had the courts applied the appropriate test the joint submission would have been accepted. The arbitrary rejection of joint submissions threatens to undermine public confidence in the provincial offences courts.

York Region v Pellicci

- [15] Mr. Pellicci was charged with speeding contrary to s.128 of the *Highway Traffic Act* RSO 1990 c H8 (HTA). The rate of speed alleged was 106km in a 60km/h zone. That offence carries a set fine of \$276. The respondent's legal agent negotiated a resolution with the prosecution that resulted in a plea to a lower charge – disobey sign (the speed limit sign) contrary to s.182(2) of the HTA. The parties jointly submitted a fine of \$200 which was higher than the typical fine for disobeying a sign, but retained some level of deterrence in relation to the actual offence committed. The court questioned why the submitted fine was higher than others imposed that day in similar resolutions. The prosecutor explained that the higher fine in this case related to the high speed which was 46km over the limit. The reduction in fine and removal of demerit points through the plea to the alternate offence still provided significant benefits to Mr. Pellicci. The prosecution submitted that the rejection of the joint submission would put the prosecution in a difficult position generally as they would be unable to offer resolutions as an alternative to trial in appropriate cases.

- [16] The Justice of the Peace focused on the charge that was pleaded to.

THE COURT A disobey sign is a disobey sign. The high rate of speed doesn't play a factor anymore because that charge is gone. So however this court likes to stay consistent. The first one was \$100, the second one was \$125. I can understand the variance between \$100 to \$125, I just can't understand \$200. So because this court likes to stay consistent you either go with \$100 or \$125.

- [17] Faced with that choice the prosecutor suggested the second option. The Justice of the Peace rejected the joint submission and imposed a fine of \$125. The Justice of the Peace also reminded the prosecutor, "We cannot forget that the rate of speed has never been proven."

- [18] The rate of speed was an admitted fact and part of the guilty plea. The respondent's agent advised the court that the accused pled guilty and agreed to the facts alleged by the prosecutor. Those facts were that the accused disobeyed a speed limit sign by travelling 46 km over the limit. The prosecution was not required to call further evidence of that admitted fact and the court erred in law by not treating that admitted fact as proven. The concern for consistency in result on a particular day without regard to the different facts underlying each resolution

was an error. The court further erred by rejecting the joint submission without regard to the applicable legal framework in circumstances where the sentence imposed was unfair.

York Region v. Sahi

[19] The respondent Sahi was initially charged with speeding contrary to s.128 of the *Highway Traffic Act*. His speed was measured at 108km in a 60km/h zone – 48 km over the limit. He was charged with the lesser offence of 85km in a 60km zone which has a set fine before trial of \$93.75. At trial this respondent agreed on a resolution with the prosecutor in which he entered a guilty plea to a further reduced charge of Disobey Sign s.182(2) HTA which does not carry the three demerit points which applied to even the reduced speeding offence. They agreed that the fine remain at \$93.75.

[20] The presiding Justice of the Peace refused to accept the joint submission and imposed a fine of \$85.00. The court stated,

THE COURT Okay. I want to make it very clear to everybody in the courtroom. There can be no deal with respect to the penalty. I'm the one who imposes the penalty. If you have arranged with the prosecutor for a certain amount of money that's fine, but nobody is obligated to agree to an amount of money. I have the ultimate authority over that ...

THE COURT All right, I'm not prepared to accede to the agreement of \$93.75. I don't think it's appropriate in the circumstances. I will impose the set fine of \$85.

[21] Had the accused proceeded with the trial that day he would have been prosecuted for the actual speed of 48km over the limit. The resolution he agreed upon resulted in a plea to an offence twice reduced which carried reduced demerit points. Neither party requested a reduction in the proposed fine, and there was no evidentiary basis for the court's conclusion that it wasn't appropriate. The fine of \$85 reflects the set fine for the offence the accused ultimately pleaded to, but imposing that fine ignored the substantial benefits the accused received in the proposed resolution. The court's rejection of the joint submission was arbitrary and an error in law.

York Region v. Muhammad

[22] Mr. Muhammad was charged with driving while holding a hand-held wireless communication device contrary to s.78.1 of the *Highway Traffic Act*, and with driving a motor vehicle without a permit contrary to s.7(1)(a) of the HTA. The penalty for driving with a hand-held device was then a minimum \$300 with 3 demerit points. Driving without a permit results in a fine of \$85. Mr. Muhammad agreed upon a resolution in which he pleaded guilty to the offence of driving without a permit only. That's not a moving violation and carries no demerit points.

The driving with a hand-held device charge was withdrawn. The parties jointly proposed a fine of \$300 which was more than the typical fine for driving without a permit, but was a reduction from the original combined fines.

- [23] The Justice of the Peace asked the accused whether he had the ability to pay the proposed fine,

THE COURT And do you have the ability to pay \$300?

MR. MUHAMMAD Yes.

THE COURT You do have that ability

- [24] The prosecutor advised the court that in resolution discussions, the accused's sole concern was not with the amount of the fine but with demerit points. When asked about his circumstances Mr. Muhammad told the court he had four children. Based on that response and the fact that the "set fine" for driving without a permit was lower, the court held,

THE COURT ... I do not believe that \$300 is appropriate in the circumstances based on this gentleman's financial circumstances, I'm going to lower the amount of the fine to \$200 which I think is going to be a little bit easier for this gentleman. It is still almost two hundred per cent over and above what is ordinarily the set fine but it does relate to what the prosecution was saying, namely that this was a global resolution.

- [25] The court lowered the fine to \$200 and suggested to Mr. Muhammad that he could have six months to pay.

THE COURT So \$200 fine imposed Sir, how long do you think it will take you to pay? Do you want six months, is that going to work?

MR. MUHAMMAD 30 Days

THE COURT Really?

MR. MUHAMMAD From today to 30 days, yes.

THE COURT You think so?

MR. MUHAMMAD That's good enough, yes.

- [26] While the court recognized that an elevated fine on the permit charge was appropriate given the benefits the accused had received from the global resolution, the court departed from the joint submission based on the accused's reference to having 4 children. There was direct evidence that he was able to pay the \$300 as jointly submitted and the later conversation about not needing extended

time to pay was consistent with that. There was no evidentiary basis for the rejection of the joint submission and the lowering of the fine. If the court had concerns about the accused's ability to pay despite his statement to the contrary, at the very least a further inquiry was required. Unfortunately, the discussion on that point didn't come until after the fine had been ordered reduced when the Justice of the Peace appears to have been taken by surprise by the fact that the accused did not need the extended time to pay she had offered. The rejection of the joint submission and the reduction of the fine in these circumstances was arbitrary and amounts to an error in law.

York Region v Yap

[27] VIVA transit operates on the honour system. Ms. Yap used VIVA bus transportation without paying and was charged with Failing to Comply with Conditions of Use contrary to s.24 of the Regional Municipality of York Bylaw #R-1415-2005-028 as amended. She reached agreement on an early resolution which involved a plea of guilty to the offence with a joint submission for a significant fine reduction from the set fine of \$125 to \$25. The joint submission was refused and the court ordered Ms. Yap to pay \$10. The further reduction to an amount closer to the unpaid fare removed any deterrent element in the penalty. The reduction was not requested by either party, was arbitrary and an error in law.

Conclusion

[28] The courts erred in all 4 of these cases so the sentences imposed are not entitled to deference. Applying the test set out in *R v Anthony Cook* to the circumstances of each case I find that none of the joint submissions should have been rejected. The appeals are allowed and the sentences are varied to reflect the original sentences proposed.

Ruling: January 6, 2017.

Reasons Released: January 12, 2017

Justice J.F. Kenkel