IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. Fitzgerald, 2010 NSPC 74

Date: 20101123
Docket: 2050132
Registry: Sydney

Between:

Her Majesty the Queen

Plaintiff

v.

Kenneth Fitzgerald

Defendant

DECISION

Judge:	The Honourable Jean M. Whalen, J.P.C.
Heard:	March 31, 2010 at Sydney, Nova Scotia
Charge:	Section 434 *Criminal Code* Section 7 *Charter* breach and Application for Stay
Counsel:	Kathryn Pentz, Crown Attorney Andy Melvin, Defence Counsel

Introduction

[1.] This is an application for a stay of proceedings by defence counsel, citing a Section 7 *Charter* breach.

Facts

[2.] As a result of a fire on March 10, 2009, at the home of Joe Hart, a police and fire investigation ensued. Mr. Fitzgerald was subsequently charged with three offences.

[3.] On the date set for trial the Crown called several witnesses, including the two home owners and Constable O'Donnell.

[4.] During Constable O'Donnell's testimony he made reference to an audio statement taken from Mr. Fitzgerald on March 20th. The Crown was not aware of this, nor had it been disclosed to Crown or defence.

[5.] After a short recess, the Crown undertook to provide the NICHE report to defence counsel, having determined, after speaking with the officer, there was no formal statement.

[6.] Defence counsel agreed to continue the trial given the Crown's undertaking and on the understanding that any motions or applications that may arise from this

or any cross-examination that is going to take place would be unaffected by the choice to proceed with the direct examination that particular day.

[7.] Shortly after Crown counsel began a *voir dire* on the two statements given by the defendant. In response to a question about the date Constable O'Donnell met with the defendant to make arrangements to come in to give a statement, the police officer attempted to refresh his memory and made reference to a NICHE report that the Crown did not have in its file.

[8.] At that point the trial was adjourned to enable the Crown to meet with the investigating officer and determine if there were any outstanding disclosure issues and to fulfill the Crown's obligation to disclose all relevant material to the defendant.

[9.] In the meantime, defence counsel filed a notice of *Charter* application on February 3, 2010 alleging a breach of Sections 7 and 11(d) and requesting a stay of proceedings pursuant to Section 24(1) of the *Charter*.

[10.] On February 4, 2010 the court received a written brief and supporting case law. An addendum was attached indicating defence had received additional disclosure between 4:15 and 4:30 that day, but did not elaborate.

[11.] On February 8th the Crown called Constable O'Donnell, the investigating officer, and Constable Murphy, the tech support.

[12.] Defence counsel did not call any witnesses in support of their application, choosing to cross-examine the Crown witnesses.

[13.] The Crown indicated that a complete copy of the NICHE report had been disclosed to defence counsel on February 4, 2010, and that a transcript of a statement dated March 20th was disclosed to defence on February 5, 2010.

Issue

[14.] The issues to be decided are: (1) whether there has been a breach of the defendant's Section 7 *Charter* rights. (2) has there been an abuse of process, and if so, is a stay of proceeding the appropriate remedy, or would some other remedy suffice.

Abuse of Process

[15.] Conducting a prosecution in a manner that contravenes the community's sense of decency and fair play, and thereby calling into question the integrity of the system, is also an affront of constitutional magnitude to the rights of the defendant.

[16.] The defendant must establish on the balance of probabilities that this prosecution is conducted in such a manner as to connote unfairness or

vexatiousness of such a degree that it contravenes fundamental notions of justice and undermines the integrity of the judicial process.

[17.] A stay of proceedings is given only in the clearest of cases. Was there any prejudice to the defendant's right to make full answer and defence to the extent that it cannot be remedied, or is there irreparable prejudice that would caused to the integrity of the judicial system if the prosecution were to continue.

[18.] If it appears that the state has conducted a prosecution in a way that renders the proceedings unfair, or is otherwise damaging to the integrity of the judicial system, two criteria must be satisfied for stay:

(i.) The prejudice caused by the abuse in question will be manifested, perpetuated, or aggravated through the conduct of the trial or its outcome;

(ii.) And or the remedy is reasonably capable of removing the prejudice.

[19.] Where the affront to fair play and decency is disproportionate to the societal interests in the effective prosecution of criminal cases, then administration of justice is best served by staying proceeding. Therefore one must ask:

(i.) Is this "one of those clearest of cases" where continuing prosecution would represent an inevitable affront to society's sense of fair play and decency?

(ii.) If so, does this affront outweigh society's justifiable and understandable interest in seeing cases such as these prosecuted effectively?

(iii.) If so, is there any relief, short of stay, that would tip the balance?

(iv.) And if not, then there must be a stay.

[20.] Defence counsel argues that the failure to disclose the defendant's June 2nd statement has affected the cross-examination already done by giving the witness an opportunity to adjust his testimony and insulate it against effective cross-examination.

[21.] With respect to Mr. Hart, defence counsel was putting questions to Mr. Hart about who he suspected set fire to his house.

[22.] The June 2nd statement given by the defendant is discussing a totally different fire and the defendant does not tell the officer anything about Mr. Hart.

[23.] I do not know how Mr. Hart could adjust or insulate his testimony when he is not aware of this statement or this application.

[24.] Mr. Hart appeared to me to get confused over the dates when certain events happened and the criticism that Hart is reinforcing his testimony could very well be, but has nothing to do with the failed disclosure of the June 2nd statement.

[25.] The defence counsel says that Constable O'Donnell has modified his testimony.

[26.] To be perfectly blunt, Constable O'Donnell returned prepared. He now knows the content of his file and thus could offer further testimony to questions asked.

[27.] The fact that the investigating officer had a conversation with the defendant on June 2nd and did not write it down is at the Crown's peril. This can be challenged by defence counsel on cross-examination. Besides, the defendant would have known he talked to the police officer about Hart, thus defence counsel's questions on cross-examination, and as well, that this was disclosed.

[28.] I do not agree with defence counsel's description that the witnesses are modifying and regrouping because first of all Mr. Hart has not been called in this disclosure application. Further, Constable Murphy was called to talk about the hard drive, which is not raised by defence on this application. And finally, the trial is in the middle of Constable O'Donnell's direct testimony.

[29.] Mr. Melvin argues that the defendant is a vulnerable member of society and Constable O'Donnell would have an advantage over him.

[30.] I read the statement and listened to the investigating officer. The defendant was not under arrest when he was talking to the investigating officer. He was asked about the June fire, not the March 10th fire. The defendant appears to understand the questions and he gives coherent answers.

[31.] Defence counsel says the Crown cannot explain failure to disclose as the police failed to disclose to the Crown. The Crown is not using this as an excuse. The Crown readily admits late disclosure. The Crown acknowledges their obligation under *Stinchcombe* and that it is a high standard, and on occasion some things get missed and the Crown says this is what happened here.

[32.] In fact there was a form in the Crown's file indicating there was a statement on March 20th which supports the investigating officer's testimony that it was sent to the Crown's office. However, Crown counsel missed it. This form was included in the defendant's disclosure, but nothing is mentioned in the correspondence sent to defence counsel.

[33.] The Crown argues this is a case of late disclosure, not non-disclosure and I would agree. I do not think a stay should be entered. This is not the clearest of cases. This is not a case where:

(1) charges were laid as a direct result of a Crown letter;

(2) this is not as a result of judge shopping or improper police involvement;

(3) where the Crown is trying to avoid an adverse judicial ruling;

(4) the criminal court or system is being used to collect a civil debt;

(5) nor has there been misleading testimony by a police officer.

[34.] There is no evidence that the prosecution has been conducted in an unfair or vexatious manner, and there is no evidence that this conduct is likely to continue. Constable O'Donnell has testified that all reports, forms and statements have now been disclosed.

[35.] These are serious charges. One neighbour was home and discovered the fire. It is necessary to balance the interests that society has in having a final decision on the merits. Given the nature and seriousness, I find that not reaching a final decision would bring the administration of justice into disrepute. I find that disclosure with an adjournment is sufficient to cure the defendant's ability to make full answer and defence. The Crown has readily agreed Mr. Hart can be recalled and Constable O'Donnell is still in direct examination.

[36.] Only in extreme circumstances should a mistrial be granted. I do not find on the evidence that the defendant took an irrevocable step in the trial that might have been handled differently with timely disclosure.

[37.] With respect to the lost evidence, the hard drive, it is not part of the defence application, and even if it was, I would reserve any decision until the end of the trial since a stay is not being granted.

The Honourable Judge Jean M. Whalen, J.P.C.