SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Pike*, 2018 NSSC 38

Date: 20180214
Docket: CRPH. No. 470108
Registry: Port Hawkesbury

Between:

Jeremy Pike

Applicant

v.

Her Majesty the Queen

Respondent

Judge:	The Honourable Justice Patrick J. Duncan
Heard:	February 14, 2018, in Port Hawkesbury, Nova Scotia
Written decision:	February 27, 2018
Counsel:	Jeremy Pike, Self-represented Applicant Mark Guthro, for the Respondent

By the Court:

Introduction

[1] On October 13, 2017, Jeremy Pike affirmed three Informations before a Justice of the Peace which alleged:

1. That between April 2016 and March 2017 Crown Attorney Herman Felderhof committed acts, specified in the Information, that constituted an offence contrary to section 139(2) of the **Criminal Code of Canada**-obstruction of justice;
2. That between March 24, 2015 and December 16, 2015, Terry Doyle, committed the offence of fraud contrary to section 380(1)(b) of the **Criminal Code**, and breach of trust by a public officer contrary to section 122 of the **Criminal Code**. Details of the manner in which these offences are alleged to have occurred are set out in the Information;
3. That between December 1, 2013 and October 6, 2015 Patrick MacLean committed the offence of breach of trust by a public officer contrary to section 122 of the **Criminal Code**. Details of the manner in which this is alleged to have occurred are set out in the Information.

[2] Pursuant to section 507.1 of the **Criminal Code** the Justice of the Peace referred the three Informations to Provincial Court Judge Alain Bégin, for determination as to whether process would issue in relation to any or all of these allegations. A pre-enquête hearing was held *in camera* on October 16, 2017 to consider the matter under section 507.1 At the conclusion of that Hearing Judge Bégin declared all three Informations to be invalid, relying on section 581 of the **Criminal Code** as his authority to so order.

[3] On November 6, 2017, Mr. Pike filed a Notice for Judicial Review in which he seeks a writ of *mandamus*. The applicant submits that the Provincial Court Judge failed to act judicially in the conduct and determination of the pre-enquête hearing.

[4] In addition, he has presented an argument that in refusing to hear evidence from him, before making a determination in the hearing, the judge violated the applicant's constitutional right to freedom of expression as guaranteed by section 2 of the **Canadian Charter of Rights and Freedoms**.

Analysis

[5] Section 507.1(2) requires that the Hearing Judge consider whether or not a case for issuance of process has been "made out". The onus rests with the applicant to satisfy that test. Section 507.1(3) sets out the pre-conditions for issuance of process. Subsection 503.1(8) incorporates provisions of subsections 507(2) to (8). Those subsections, in turn, incorporate the procedure set out in section 507(3) which, in my opinion, ultimately incorporates the procedure under section 507(1)(a) which states:

> … The justice… shall…
>
> (a) hear and consider, *ex parte*,
>
> (i) the allegations of the informant, and
>
> (ii) the evidence of witnesses, where he considers it desirable or necessary to do so;…

[6] The Hearing Judge, acting pursuant to 507.1, has a duty to hear and consider "the allegations of the informant" and has a discretion to hear the evidence of witnesses where the judge considers it to be "desirable or necessary to do so". In exercising this discretion, the judge must be seen to act judicially. In my view, to "hear and consider", being the language in subsection (a), the allegations means more than simply reading the Informations. There must be some form of a hearing, in which both parties should be provided with a fair opportunity to state their positions.

[7] Whether the judge acted judicially in this matter is to be assessed as against this standard.

[8] The "Doyle matter" was the first addressed by the judge. As I look at the transcript he began by speaking with the Crown Attorney and asked what their position was in relation to the matter. The Crown Attorney replied that he was seeking a hearing in relation to that Information. The judge then opines that:

> You're trying to deal with a civil matter in criminal court. The venue for this, if you are having problems with regards to school bus, schooling, all that stuff that's Supreme Court. If you want to sue the School Board and try to force them to do something that's fine, but if you read section 122 of the **Criminal Code** this doesn't even come close to covering the test required under section 122.

[9] At that point there was some confusion as to whether the intended charge against Mr. Doyle had been the subject of an earlier proceeding that had been stayed. Mr. Pike interjected as follows:

> Mr. Pike: Your Honor, may I address the court?
>
> The Court: yeah
>
> Mr. Pike: There has never been a charge laid against Mr. Doyle. This is the first charge laid against Mr. Doyle.

[10] Over the next several minutes there was a discussion as between the judge and the Crown Attorney, all without the participation of Mr. Pike. At page 9 of the transcript the judge states:

> And the concern I have is why are we spending time in Provincial Court on what is clearly a civil matter? Why is the Crown not using its discretion, and it's your discretion, to… to enter a stay? Why are we setting this over for a potential hearing and there's three different matters here and we're going to be chewing up better part of a day or two on matters that are civil?…

[11] Following a further discussion with the Crown, the court concluded that there was "inherent jurisdiction" to declare the Information invalid pursuant to the provisions of section 581 of the **Criminal Code**. The Crown responded to this by saying:

> I would leave that to Your Honor to exercise your discretion if you wish but it seems to be more directed towards form than substance. In this case, the complaint is substance.

[12] Notwithstanding this representation of the Crown the Provincial Court Judge concluded that his authority under section 581 did permit him to make a declaration that the Information charging Terry Doyle was invalid, closing with the following words: "This is a civil matter and that is dismissed."

[13] A review of the transcript makes it clear that both parties were seeking a hearing on the so-called "Doyle Matter". Neither party were afforded that opportunity. More importantly, the judge did not permit Mr. Pike to speak to the

basis upon which the case could be made. In fact, Mr. Pike's only comments are the ones I just quoted.

[14] At a minimum, in my view, the combined effects of the provisions in sections 507 and 507.1 require the judge to provide that opportunity to Mr. Pike. In failing to do so the Hearing Judge failed to act judicially and in compliance with his statutorily imposed obligation.

[15] My comments should not be interpreted as suggesting that a Hearing Judge lacks discretion to refuse to hear evidence, however before making that determination the private Informant must be given some opportunity to make their case, that is what is contemplated by section 507.1(2) of the **Code**. In my view, that wasn't provided in the "Doyle Matter".

[16] In relation to the "Patrick MacLean" Information, beginning at page 13 of the transcript, the court addressed Mr. Pike and said:

> …explain to me, sir, why that would be any different than what I just said with regards to Mr. Doyle. Again, I… My position is this is a civil matter, not a criminal matter. You're complaining about where a school bus is going or is not going in my view is that this is a matter… You should be suing the School Board in Supreme Court amd trying to get some sort of jurisdiction or order… Trying to get an order from the Supreme Court to try to direct someone to do something. I don't have that power, alright, and again, to me this would be an abuse of process to be using the **Criminal Code**, a very blunt instrument, and the power of the **Criminal Code** to try to get some school bus driver to change his route or the School Board to change its school bus route. So why would that be any different than what I … the comments I just said about Mr. Doyle?

[17] In reply, Mr. Pike began to explain what he believed constituted the basis upon which the Information could be sustained. As he has argued today, a matter can have both civil and criminal consequences, they are not mutually exclusive. He offered to provide, that is Mr. Pike offered to provide, evidence to support the issuance of process, however, the court interjected at that point, referring to the requirements of section 122 of the **Criminal Code** in concluding that it was a "totally civil matter that should be done in Supreme Court, not Provincial Court". The Hearing Judge again exercised his discretion, as he understood it, to rely on section 581 of the **Criminal Code** to declare the Information invalid.

[18] The "Felderhof" Information was next. In this instance, the court asked Mr. Pike to explain the background. He made it clear that his complaint was that Mr.

Felderhof had acted outside the scope of his authority by directing the police to stop an investigation of his complaint that was then underway. At pages 19 to 21 of the transcript, there is a discussion in which Mr. Pike tries to clarify that he is not challenging the right of a Crown Attorney to enter a stay of prosecution. Instead, he is suggesting that his complaint against Mr. Felderhof was that Mr. Felderhof had intervened in the police investigation precipitously and in excess of the authority provided to him in his role as a Crown Attorney and, thus, his conduct constituted an obstruction of justice.

[19] The court stated, at page 22:

> If you have difficulties with a lawyer, i.e. Mr. Felderhof who is a lawyer, you can… if you think he's acting inappropriately then you can complain to the Bar Society. To, again, use the blunt force and power of the **Criminal Code** …
>
> …to use the blunt force of the **Criminal Code** to think that somehow or other you want me in a sense, or any other judge here, you want… you're almost looking for us to review his stay. So you want the Court to review the discretion he applied…

[20] In the remainder of his comments, it becomes apparent that the judge interpreted this charge as seeking a review by the Court of a Crown Attorney's conduct in the exercise of their prosecutorial discretion. He concludes, at page 25:

> That's how I view your charges against Mr. Felderhof. All right? This is… it's an abuse of process for you to want to proceed against Mr. Felderhof. who exercised his discretion, trying to get this court to review the discretion, which we can't. I'm again exercising my discretion under section 581, my exclusive jurisdiction and declaring that Information invalid as well.

[21] With respect, the issue before the Hearing Judge was whether the conduct complained of could form the basis of a criminal case. Implicit in the Hearing Judge's conclusion was a determination that Mr. Felderhof was acting in the exercise of his duty and the exercise of discretion within that duty, that is afforded to him. That was not part of the function of the Hearing Judge in a pre-enquête hearing. Whether Mr. Felderhof was operating within the exercise of his prosecutorial authority is an element to be decided by a trial court. It would be a defence for Mr. Felderhof, if the other elements of the offence are made out, to say that he was acting within the scope of his authority.

[22] In fact, that is precisely the issue that Mr. Pike wants examined, because if the evidence ultimately demonstrated that Mr. Felderhof had blocked a criminal

investigation and in doing so exceeded his prosecutorial authority, then it would be a live issue as to whether criminal liability could attach. To put it another way, it is possible for a public official to make a decision and take steps that are clearly within their statutory authority or are otherwise acting lawfully. It is also possible that an official can overstep that authority. Then the issue becomes, once that authority has been exceeded, whether the conduct amounts to something attracting civil or criminal liability or, as the judge pointed out, potential disciplinary liability. It is not appropriate, in a pre-enquête hearing, to assume that it could not.

[23] In this third matter, while there is a slightly more substantial exchange as between Mr. Pike and the Hearing Judge, the Hearing Judge, as he had from the outset, showed a predisposition to dismiss Mr. Pike's Informations. This was reflected in his opening comments and those same comments permeated the remainder of the hearing and ultimately informed the judge's conclusions.

[24] It is entirely permissible for a judge to express opinions during the course of submissions. In fact it is a common means by which the court is able to better inform itself on issues that stand out as needing to be answered before the court can reach its conclusion, acting judicially. Unfortunately, in this case, Mr. Pike was rarely given the necessary opportunity to make his case. It is, in my view, difficult to conclude that he was provided with a fair hearing and given a fulsome opportunity to meet the statutorily imposed burden that rested with him.

[25] With respect to the judge's reliance on section 581 - assuming for the moment that there was a discretion to dismiss the Informations on that basis, Judge Bégin failed to tie the flaws, as he saw them, in the Informations, to the language in section 581. In effect, the Hearing Judge concluded that he should quash the Informations for defects in the formulation of the charges. Section 581 is intended to ensure that the charges are set out in a manner that adequately describes the substance of the offence in terms that put the accused on his or her notice as to what events he or she must answer to.

[26] In these Informations, the **Criminal Code** sections were identified (in accordance with section 581(5)); and the details of the circumstances are included (as required under section 581(3)). The informality of the language in the Information is specifically indicated as not a basis upon which to find an Information to be insufficient. *See*, section 581(2).

[27] In my view, the Hearing Judge was incorrect in relying on section 581 to declare these Informations invalid, moreover his path of reasoning was not

apparent or indicated in his decision. So to the extent that he had considered factors which would have tied the circumstances to that section, it was not apparent in the transcript.

Conclusion

[28] In conclusion, it is well understood that the trial courts, especially the Provincial Court, are very busy and struggling with the additional burdens created by the Supreme Court of Canada decision in *R. v. Jordan* 2016 SCC 27. It requires all judges to ensure that the time of criminal courts is used efficiently and to the greatest good of society. Murder cases, sexual assaults, other significant acts of violence, large scale frauds and drug matters, for example, occupy significant time in the courts. There is a requirement that courts manage their process, and to ensure that time is used efficiently.

[29] Unreasonable delay in bringing a matter to conclusion can result in the termination of a prosecution. Courts are already operating with limited resources. There are cases in this country where charges, laid by the police, serious matters, have been discontinued because the prosecution in those provinces have concluded that it is better to use court resources to prosecute the most serious of cases. Cases that many people would consider serious are sometimes being discontinued or stayed by the Crown even where they have been investigated fully and charges laid by the police. So the challenge for the courts to manage the process is there.

[30] Having said that, the **Criminal Code** does provide for private prosecutions. They do, as Mr. Pike has pointed out in his materials again today, have a role to play in the administration of justice in this country and the provision is there to ensure that an Informant has an opportunity to make their case. In doing so, they must follow the provisions of the **Criminal Code** and so too must the court respond, relying on the provisions of the **Criminal Code** to consider and determine whether process should issue in any individual case. In my view, the process that is called for under section 507.1 and the parts of section 507 relevant to this case were not followed by the Hearing Judge. I conclude therefore that the application for *mandamus* should be granted and the matter returned to a different judge of the Provincial Court for the conduct of a new pre-enquête hearing, in accordance with the provisions of section 507.1 and in relation to all three of the Informations.

[31] I will turn briefly to the section 2 **Charter** argument because it was briefed. I have some comments to offer but the decision I have made is based on the first issue.

[32] The applicant submits that in refusing to permit him or other witnesses to testify in a pre-enquête hearing, the Hearing Judge denied a **Charter** protected right of freedom of expression.

[33] A courtroom is not a forum for the unfettered expression of an individual's observations and opinions. There are well established rules of evidence, some founded in the common law, some found in statutes such as the **Canada Evidence Act** R.S.C. 1985, c. C-5, as amended which determine whether certain evidence is permitted.

[34] The **Provincial Court Act** R.S.N.S. 1989, c. 258, as amended, both empowers and obligates Provincial Court Judges to apply their judgement to ensuring that the evidence adduced in a proceeding is limited to that which is relevant and admissible and necessary. A person's right to freedom of expression, as guaranteed in section 2 of the **Charter of Rights and Freedoms**, is not engaged when a judge is carrying out that statutorily imposed responsibility, which in some situations, is to refuse to permit certain testimony or other forms of evidence to be introduced in a hearing, providing that the decision is made in accordance with the law, whether it be statutory or common law.

[35] When a judge commits an error in deciding whether to admit or refuse to hear testimony, the remedy is an appeal, or as has been put forward in this case, a judicial review. I would not have been prepared to conclude that the decision not to permit evidence to be called in this case would have generated a reviewable error under the **Charter**.

[36] Order accordingly.

Duncan, J.