SUPREME COURT OF NOVA SCOTIA

Citation: R. v. Awad, 2014 NSSC 44

Date: 20140121
SYDJC: SN419992-SN419995; SN419988-SN419998
Registry: Sydney

Between:

Her Majesty the Queen

Appellant

v.

Karim Mossam Mohamed Awad et al

Respondents

Judge: The Honourable Justice Frank Edwards

Heard: January 21, 2014, Sydney, Nova Scotia

Written Decision: February 3, 2014

Counsel: Stephen Drake, for the Appellant
William Burchell, for the Respondents

By the Court:

Introduction:

[1] This is a Crown appeal of a decision dated September 6, 2013 by a Judge of the Provincial Court. The Learned Judge had declared eleven Informations nullities and quashed them. The Informant had sworn each of the Informations without having reasonable grounds to do so as required by section 504 of the Criminal Code. The Crown asks the Court to direct the Trial Judge to amend the Informations and hear the cases, or, in the alternative, for this Court to amend the Informations and return them to the Trial Judge for trial on the merits.

[2] Each case proceeded by way of summary proceedings. Section 786(2) of the Code requires such proceedings to be instituted within six months after the time when the subject - matter of the proceedings arose. That time has long since passed. The only potential curative amendment is therefore a re-swearing of the Informations.

[3] The Crown relied upon Section 601 of the Criminal Code and caselaw, in particular, **R.** v. **Moore** [1988] 1 SCR 1097 (S.C.C.). The Crown argued that

Informations sworn without reasonable and probable grounds were not nullities Further, a judge must not quash a charge unless she finds that any proposed amendment would cause injustice or irreparable prejudice to the Accused.

Background:

Defence Counsel called the Informant, Cst. Gibbons, to testify. Cst. Gibbons testified that she was not the investigating officer in any of these cases, nor did she speak to the investigating officer(s) about the files. Her assigned role was to swear Informations for the Cape Breton Regional Police. She testified that her assigned court duties resulted in the swearing of possibly hundreds of Informations, mainly between 2009 and June, 2012. Her procedure was to pick up the prepared Informations, read the Informations, sign them and take them to the Court before the Justice of the Peace. Cst. Gibbons would then swear to each Information before the Justice of the Peace. She did so without having reasonable and probable grounds.

[4] Cst. Gibbons testified that she had **since** reviewed each file and was prepared to re-swear the respective Informations in Court.

[5] The Trial Judge gave her oral decision on September 6, 2013. The written decision was released on September 20, 2013. The Judge held that each Information was valid on its face. She further held that the Informant had no personal knowledge, nor reasonable and probable grounds to believe an offence had been committed. The Informant swore a “false Information” and by doing so misled the Justice of the Peace. On that basis the Trial Judge declared the Informations to be nullities and quashed them.

[6] It was not disputed on this Appeal that the Crown made a motion to amend the Informations by having them re-sworn before any evidence on the merits was taken. The Trial Judge rejected the Crown motion to amend. (In **R**. v. **Kamperman** [1981] N.S.J. 494 (N.S.S.C.) There was no motion to amend. **Kamperman** is therefore distinguishable from this case. There must be a timely motion to amend. [**R** v. **Peavoy** (1974) 15 CCC(2d) 97 (Ont H.C.J.].

[7] The impugned procedure for swearing Informations was corrected by police as of November 2012.

Issues:

1) **Did the Learned Trial Judge err in declaring the Informations to be nullities?**

2) **If so, were the Informations amendable?**

Standard of Review

Whether or not the impugned Informations were nullities is a question of law. The standard of appellate review is therefore correctness. [See **Wilmot v. Ulnooweg Development Group Inc.,** (2007) N.S.C.A. 49].

Issue 1: Did the Learned Trial Judge err in declaring the Informations to be nullities?

[8] With the greatest respect, the answer is yes. In **Moore** supra, at para. 16, the Chief Justice in dissent described the criteria necessary to establish a nullity:

> ...**it is no longer possible to say that a defective information is automatically a nullity** disclosing no offence [page 1109] known to law. **If the document gives fair notice of the offence to the accused, it is not a nullity and can be amended under the broad powers of amendment s. 529 gives to the courts. Only if a charge is so badly drawn up as to fail even to give the accused notice of the charge will it fail the minimum test required by s. 510(2)(c).** A charge that is this defective would have to be quashed. **(Emphasis added)**

[9] The Majority accepted this statement by the Chief Justice:

> 58. Since the enactment of our Code in 1892 there has been through case law and punctual amendments to s. 529 and its predecessor sections, a gradual shift from requiring judges to quash to requiring them to amend in the stead; in fact, there remains little discretion to quash. Of course, **if the charge is an absolute nullity, an occurrence the conditions of which the Chief Justice has set out clearly in his reasons**, no cure is available as the matter goes to the very jurisdiction of the judge. In such a case, the doctrine of autrefois acquit is never a bar to the relaying of the charge because the accused was never in jeopardy and the disposition of the charge through quashing was for lack of jurisdiction. **(Emphasis added).**

> 59. My understanding of s.529, when read in its entirety, is that it commands the following to the trial judge: absent absolute nullity and subject to certain limits set out in subs. (9), the judge has very wide powers to cure any defect in a charge by amending it; if the mischief to be cured by amendment has misled or prejudiced the accused in his defence, the judge must then determine whether the misleading or prejudice may be removed by an adjournment. If so, he must amend, adjourn and thereafter proceed. **But, if the required amendment [page 1129] cannot be made without injustice being done, then and only then the judge is to quash. Therefore, a judge must not quash a charge, and it is reversible error of law if he does, unless he has come to that conclusion, namely that "the proposed amendment" cannot "be made without injustice being done". However, if having determined, as a matter of law (see subs. (6)), that an amendment cannot be made without causing irreparable prejudice, his quashing of the charge at the trial is then, in my view, tantamount to an acquittal.**
> **(Emphasis added).**

[10] In this case the Informations were all regular on their face and gave fair notice of the alleged offence to each of the Accused. They were therefore not nullities as described by **Moore.** The Trial Judge appears to have fallen into error by relying upon Black's Law Dictionary, rather than **Moore** for the definition of nullity.

[11] The governing Criminal Code Section is s. 601 (the successor of s. 529 discussed in **Moore**) which reads in part:

> S. 601 (3) Subject to this section, **a court shall, at any stage of the proceedings, amend the indictment or a count therein as may be necessary where it appears**
>
> a) that the indictment has been preferred under a particular Act of Parliament instead of another Act of Parliament;
>
> b) **that the indictment or a count thereof**
>
> (i) fails to state or states defectively anything that is requisite to constitute the offence;
>
> (ii) does not negative an exception that should be negatived,
>
> (iii) **is in any way defective in substance**,
>
> and the matters to be alleged in the proposed amendment are disclosed by the evidence taken on the preliminary inquiry or on the trial; or
>
> c) that the indictment or a count thereof is in any way defective in form.
>
> 4) **The court shall**, in considering whether or not an amendment should be made to the indictment or a count in it, **consider**
>
> a) the matters disclosed by the evidence taken on the preliminary inquiry;
>
> b) the evidence taken on the trial, if any;
>
> c) the circumstances of the case;

> d) **whether the accused has been misled or prejudiced in his defence** by any variance, error or omission mentioned in subsection (2) or (3); and
>
> (e) **whether,** having regard to the merits of the case, the **proposed amendment can be made without injustice being done**.
> **(Emphasis added)**
>
> 5) Where, in the opinion of the court, the accused has been misled or prejudiced in his defence by a variance, error or omission in an indictment or a count therein, the court may, if it is of the opinion that the misleading or prejudice may be removed by an adjournment, adjourn the proceedings to a specified day or sittings of the court and may make such an order with respect to the payment of costs resulting from the necessity for amendment as it considers desirable.
>
> 6) The question whether an order to amend an indictment or a count thereof should be granted or refused is a question of law.

[12] The combined effect of section 601 and the law set out in **Moore** is that the Trial Judge was obliged to allow the amendment of the Informations by having them re-sworn. There is no evidence that any of the Accused were prejudiced or misled by the impugned Informations. It is clear that amending the Informations would not have caused injustice or irreparable prejudice to any of the Accused. The Trial Judge would not have had any basis to make any such finding even if she had considered doing so. With respect, the Trial Judge made a reversible error of law when she quashed the charges.

Issue 2: **Were the Informations amendable?**

[13] This issue arises because the re-swearing of the Informations would take place after the expiration of the six month time limit [s.786(2)]. It is clear however that such an amendment would not constitute a new proceeding but rather the **continuation** of the proceeding under the original Information as amended. [See **Canadian Industries Ltd.** (1982), 69 C.C.C. (2d) 553 (N.B.C.A.) at para. 14]

[14] In **R** v. **Whitmore** (1987), 41 C.C.C. (3d) 555 (Ont. H.C.J.) aff'd 51 C.C.C. (3d) 294 (Ont. C.A.) Justice Ewaschuk found (bottom pg. 7 to top pg. 8 of the decision).

> **"Mr. Manning's point is that an information laid by an informant, who lacks reasonable and probable grounds is void ab initio. I disagree.** An information laid in such circumstances remains valid provided it is valid on its face. In fact, the failure of a justice to conduct a pre-inquiry prior to issuing process does not affect jurisdiction to proceed with the charges: **R** v. **Pottle** (1978), 49 C.C.C. (2d) 113 at 119 (Nfld.C.A.). Furthermore, the swearing to an information on personal knowledge when the informant has only hearsay knowledge is likewise not fatal to jurisdiction. **Such information may be amended even after a limitation period has passed: R** v. **Canadian Industries Ltd.** (1982), 69 C.C.C. (2d) 533 and **R** v. **Wildefong** (1970), 1 C.C.C. (2d) 45 (Sask. C.A.). **(Emphasis added)**

[15] **Conclusion**: I am therefore allowing the Appeal. I direct the Trial Judge to allow the Informations to be re-sworn and to hear the respective cases on their merits.

Order Accordingly,

J.

Sydney, Nova Scotia