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R. v. Hung

Between
Her Majesty the Queen, and
Edward Hung, moving party (defendant)

[1997] O.J. No. 6017

Ontario Court of Justice (Provincial Division)
Toronto, Ontario
Quon J.P.

Heard: May 13, 1997.
Judgment: July 23, 1997.
(14 pp.)

Criminal law — Jurisdiction — Objection to jurisdiction — Loss or suspension of jurisdiction — Failure of court to proceed on date in appearance notice — Over the offence — Over the accused — Regaining of jurisdiction.

Motion by the accused for an order that the Provincial Offences Court had lost jurisdiction over his offence. The accused was charged under the Highway Traffic Act for failing to drive in a marked lane. The trial was scheduled for December 17, 1996. The accused and his lawyer appeared in court on that date, but his name was not listed on the docket and his certificate of offence was not available. The accused later learned that a sum of money was erroneously credited to his name for payment of a fine, and his matter was administratively deleted from the December 17 docket. In January 1997, the clerk of the court sent a notice of trial to the accused informing him of a May 13 trial date. The accused appeared on May 13, not as an appearance to the notice of trial, but to challenge the jurisdiction of the court. He claimed that because the Provincial Offences Court failed to do anything on December 17 when he appeared for trial, the Court lost jurisdiction over the offence.

HELD: Motion dismissed. The accused's argument would have succeeded if the charge had been under the Criminal Code. However, it was a provincial offence and the Provincial Offences Act applied to prevent a loss of jurisdiction over the offence resulting from a failure to act. However, The Act did not prevent the Court from losing jurisdiction over the person of the accused. Jurisdiction could only be regained by the Court re-issuing a summons to appear. Court Administration had no authority to set a trial date after jurisdiction over the person was lost, so the notice of trial was invalid and improper. The accused's attendance on May 13 was not an attornment to the Court's jurisdiction. Therefore, the Court had no jurisdiction to hear the matter. It was open to the Crown to apply for a new summons.

Cases Considered and Referred to

Doyle v. The Queen, [1977] 1 S.C.R. 597 (S.C.C.).
R. v. General Motors of Canada Ltd. (July 5, 1990) Court File No. 506/90 (O.S.C.).
R. v. Gougeon et al (1981), 55 C.C.C. (2d) 218 (Ont. C.A.)
R. v. Krannenburg, [1980] 1 S.C.R. 1053 (S.C.C.)
R. v. Stelco [1996] O.J. No. 3648 (Ont. Ct.(Gen. Div.)) per Fedak. J. at Hamilton.
R. v. Southwick, ex parte Gilbert Steel, [1968] 1 C.C.C. 356 (Ont. C. A.)
R. v. Veltri Stamping [1986] O.J. No. 894 (Ont. C.A.).

Authorities Referred to:

Drinkwalter and Ewart, Ontario Provincial Offences Procedure (Toronto, Canada: The Carswell Company Limited, 1980), p. 136.

Statutes, Regulations and Rules Cited:

Criminal Code, R.S.C. 1985, c. C-46, s. 440.1. Highway Traffic Act, R.S.O. 1990, c. H.8, s. 154(1)(a). Provincial Offences Act, R.S.O. 1990, c. P.33, ss. 31, 32.

Counsel:

P. Brauti, provincial prosecutor.
E. Hung, defendant.

QUON J.P.: —

1. INTRODUCTION

¶ 1 This is a motion brought by the defendant for a declaration that the Provincial Offences Court has loss jurisdiction over the defendant's offence. The defendant Edward Hung personally appeared to dispute the Court's jurisdiction to proceed with his trial. Mr. Hung contends the Court has loss jurisdiction over the offence because the court failed to do anything at the previous court date in which he had appeared. He relies on R. v. Krannenburg [1980] 1 S.C.R. 1053 to support his motion. Has the Court lost jurisdiction? And if it has, did the Court regain jurisdiction by the defendant coming to court to contest jurisdiction?

¶ 2 The motion was argued on May 13, 1997. I made my ruling on the motion orally on July 23, 1998. These are the written reasons of that ruling.

2. FACTS

¶ 3 The defendant was charged on August 25, 1996 for "failing to drive in marked lane" contrary to paragraph 154(1)(a) of the Highway Traffic Act. [See Note 1 below] A Notice of Intention to Appear was filed with the court on August 30, 1996. On October 2, 1996, the clerk of the court issued a Notice of Trial scheduling the trial for February 18, 1997.

Note 1: R.S.O. 1990, c. H.8.

¶ 4 On October 23, 1996, S. Tsoi, an agent for the defendant, sought to adjourn the February 18 trial date. The motion was granted by His Worship Lewin and the trial was adjourned to December 17, 1996 at 7:00 p.m. in courtroom "B" at 60 Queen Street West, Toronto. The Court also made the date peremptory on the defendant.

¶ 5 On December 17, 1996 the defendant and his lawyer appeared at the courthouse at 7:00 p.m. However, his name was not listed that night on any of the lists of defendants for any courtroom. They made an appearance in courtroom "B" before His Worship Downes. The Court informed the defendant his name did not appear on the docket nor was his Certificate of Offence in the courtroom. His Worship made an endorsement that there was no information before the Court. The defendant was not able to obtain an explanation as to why his matter would not proceed that night.

¶ 6 The defendant made some inquires subsequent to December 17 and learned a sum of money was erroneously credited to his name as an out-of-court payment of the fine. An Icon Inquiry printout was submitted by the defendant, and from this document I have ascertained that on December 9, 1997 the defendant's matter was administratively deleted from the 7:00 p.m. docket of December 17, 1996.

¶ 7 On January 9, 1997 the clerk of the court sent out a Notice of Trial to the defendant notifying him of a May 13, 1997 trial date. On May 13, the defendant appeared before me and brought this present motion. The defendant stated to the Court he was only appearing for the purpose of challenging the jurisdiction of the court and not as an appearance to the Notice of Trial on the charge.

3. ISSUES

¶ 8 Whether the Provincial Offences Court's failure to do anything on December 17, 1996 when the defendant appeared for trial has caused the Court to lose jurisdiction over the offence.

¶ 9 Whether the defendant's appearance on May 13, 1997 restores any loss of jurisdiction by the Provincial Offences Court over the offence or over the person.

¶ 10 Whether the clerk of the court has authority to set a subsequent trial date by a Notice of Trial after the Court failed to do anything with the defendant's charge on December 17, 1996.

4. ANALYSIS OF LAW AND FACTS

LOSS OF JURISDICTION

¶ 11 The defendant submits the Supreme Court of Canada's decision in R. v. Krannenburg [1980] 1 S.C.R. 1053 governs the defendant's situation and that the Provincial Offences Court has lost jurisdiction over the offence because nothing was done by the court on December 17, 1996.

¶ 12 The facts in the case at bar are not that dissimilar to the R. v. Krannenburg case. Krannenburg is a Criminal Code case, unlike the matter before me, which is a Provincial Offence matter.

¶ 13 Krannenburg's criminal trial had been set for 2:00 p.m. in courtroom No. 5. Due to a mix-up, the case was called that morning in courtroom No. 1. Since Krannenburg was not present, the judge issued a warrant for Krannenburg's arrest. Unaware of the situation, Krannenburg and her counsel appeared in courtroom No. 5 at 2:00 p.m. as scheduled. Krannenburg's name did not appear on the list of cases scheduled to be heard that afternoon. Crown counsel informed Krannenburg's counsel that he knew nothing about the charge. Krannenburg and her counsel departed the courthouse.

¶ 14 The issue for the Supreme Court of Canada in Krannenburg was whether section 440.1, a curative provision of the Criminal Code, [See Note 2 below] remedied a loss of jurisdiction resulting from the failure of a court to proceed with a trial at the appointed time and place. The Supreme Court decided that section 440.1 was not broad enough to cover the situation where the accused appears at the time and place scheduled, but the court fails to appear, and nothing is done. The Court found that section 440.1 is directed to cure situations where there has been a procedural defect or irregularity in respect of adjournments or remands. In Krannenburg there was no breach of the procedural requirements of the Criminal Code dealing with adjournments. Thus, section 440.1 did not save jurisdiction over the offence when the court had not acted. The result was a finding of loss of jurisdiction over the offence.

Note 2: R.S.C. 1985, c. C-46.

¶ 15 Dickson J. in Krannenburg, at page 1055 stated what the law was before section 440.1 was enacted:

> It has long been recognized in our law that an inferior Court may suffer loss of jurisdiction by reason of some procedural irregularity, as for example, when the date to which an accused is remanded or to which a case is adjourned for trial comes and goes without any hearing or appearance, "with nothing done".

¶ 16 And at p. 1056 Dickson J. also noted what a loss of jurisdiction meant:

> Loss of jurisdiction over the offence occurred when the date of adjournment or remand passed and "nothing was done". Such procedural defect destroyed the jurisdiction of the Court. The indictment or warrant became invalid and of no effect.

¶ 17 Dickson J. at pages 1057-1058 commented on the distinction between the loss of jurisdiction over the offence and loss of jurisdiction over the person:

> Prior to the decision in Doyle [See Note 3 below], there was a respectable body of authority which drew a distinction between loss of jurisdiction over the person and loss of jurisdiction over the offence, i.e. the indictment or information. Loss of jurisdiction over the person was considered to arise when the court failed to follow the prescriptions of the Criminal Code pertaining to adjournments and remands. Although jurisdiction over the person was said to be lost, it could be regained when the accused appeared before the court voluntarily or in response to a summons or warrant. Proceedings then continued on the original information or indictment. ...
> The judgment in Doyle cast doubt upon the validity of a distinction between jurisdiction over the person and jurisdiction over the offence.

Note 3: Doyle v. The Queen, [1977] 1 S.C.R. 597.

¶ 18 In R. v. Veltri Stamping [1986] O.J. No. 894, an Ontario Court of Appeal decision, the principal issue was whether the court lost jurisdiction over an information. The appellants were originally convicted of tax evasion under the Income Tax Act, and on appeal a new trial was directed. A summons for the new trial was issued to the appellants for September 10, 1985, returnable before a Justice of the Peace who was to set a date for trial. The appellant, Frank Veltri, and his counsel attended on September 10, but the presiding Justice of the Peace decided, since she lacked jurisdiction to try the appellants on the information, she also lacked the jurisdiction to set a trial date. The matter was then adjourned to September 17, 1985.

¶ 19 On September 17, Veltri and his counsel again attended before the Justice of the Peace, but this time the information was not physically present in the courtroom. The Justice of the Peace then ruled she had no jurisdiction to deal with the matter since there was no information before her.

¶ 20 In response to a new summons to attend for the purpose of setting a date for trial, counsel for the appellants argued that the Provincial Court had lost jurisdiction over the information. An application for prohibition was then commenced to prevent any further proceedings being taken on the information. Counsel for the appellants contended that "nothing was done by the Justice of the Peace on September 17, 1985" and thus the jurisdiction over the information was lost and could not be revived.

¶ 21 The Court of Appeal held that Veltri's case was clearly distinguishable from Krannenburg and cases which have held that there had been a loss of jurisdiction over the information, when the date to which an accused is remanded, or to which a case is adjourned for trial comes and goes, with nothing being done by the court when the accused appears.

¶ 22 First, where the Justice of the Peace declared she had no jurisdiction because of the absence of the information, the appellant in Veltri Stamping conceded the Justice of the Peace erred in law. The appellant confirmed it is well established the Court's jurisdiction does not depend on the information being physically present in the courtroom, provided there is an information in existence. Such an error in law by the Justice of the Peace resulting in her declining jurisdiction does not result in the Provincial Court losing jurisdiction over the information.

¶ 23 Secondly, where the Justice of the Peace held that she lacked jurisdiction to set a trial date because she lacked jurisdiction to try the matter, the Court of Appeal found the Provincial Court did not lose jurisdiction over the information. The Court of Appeal found it to be an error in law for the Justice to hold she had no jurisdiction to set a trial date although she did.

¶ 24 For a loss of jurisdiction situation decided under a Provincial Offences prosecution, I considered R. v. Stelco [1996] O.J. No. 3648 (Ont. Ct. (Gen. Div.)). In that case, Stelco had argued that the Provincial Offences Court lost jurisdiction over the person of Stelco but not over the offence or the information. Stelco asserted there were two situations whereby the court lost jurisdiction. First, Stelco said there had been an improper adjournment made on January 11, 1996, as the return date was not set for an appearance in "open court". The return date had instead been set for an appearance "in chambers". Secondly, on August 20, 1996, the court failed to act in any way, in respect to the charges against Stelco.

¶ 25 Stelco further argued, jurisdiction over the person could be regained by the Court, if Stelco voluntarily appeared, but Stelco had no intention of appearing voluntarily. Stelco also submitted there was an alternative method of re-establishing jurisdiction by issuing a second summons. However, Stelco argued this option was not available to the Court, as the Provincial Offences Act did not specifically allow for the re-issue of a summons, when the court has already gained and lost jurisdiction over the defendant. Stelco submitted the limitation period to lay a new information for the same charge had expired, and therefore the time to re-issue a summons had passed.

¶ 26 However, Fedak J. in Stelco did not agree with Stelco's contention that there had been a loss or jurisdiction over the person for an improper adjournment. He held the informal process of adjourning the matter, on consent, for a pre-trial conference "in chambers", instead of "open court" was not improper nor a defective adjournment.

¶ 27 Fedak J. further held, even if the Provincial Offences Court did lose jurisdiction over the person of Stelco on either January 11 or August 20, jurisdiction was simply re-established by Stelco's consent to appear for trial on October 28, 1996. Stelco had agreed to a nine-day trial block starting October 28, during a pre-trial conference held on February 13, 1996. Also, Fedak J. felt that jurisdiction was re-established when a summons was issued by the Provincial Offences Court requiring Stelco to appear before the Court on October 4, 1996.

¶ 28 In regards to Stelco's argument that the Provincial Offences Court had no authority to re-issue the summons for a October 4, 1996 court date, because the limitation period had expired for laying a new information, Fedak J. held at paragraph 39:

> The limitation period applies only to the Provincial Offences Court's jurisdiction over the offence, not the person of the defendant.

¶ 29 And at paragraph 36 he held:

> There is no provision in the POA limiting the number of Summonses a defendant may be issued pursuant to the same valid and subsisting information.

¶ 30 He then concluded that the re-issued summons for October 4, 1996 was valid and enforceable since the information was still valid.

¶ 31 Fedak J. also distinguished Krannenburg from Stelco as there had been an irregularity in the procedural handling of adjournments in the Stelco case whereas in Krannenburg there had been no irregularity in procedure.

¶ 32 At paragraph 43, Fedak J. states:

> If ... the jurisdiction over the person had been merely lost, the Court could regain it under certain circumstances. This is in contrast to loss of jurisdiction over the offence where the information lapses. In such a case, jurisdiction is totally lost, absent a fresh information. As

> counsel for Stelco concedes jurisdiction of the Provincial Offences Court over the offence has not been lost and only jurisdiction over the person has, that jurisdiction may be regained in certain circumstances.

¶ 33 At paragraph 39, Fedak J. alludes to the operation of section 31 of the Provincial Offences Act [See Note 4 below] and states:

> Perhaps because of section 31 of the POA, Counsel for Stelco has conceded that the Provincial Offences Court never lost jurisdiction over the Information or over the offence.

Note 4: R.S.O. 1990, c. P.33,

¶ 34 The defendant Edward Hung in the case at bar was charged under the Highway Traffic Act, provincial legislation governed procedurally by the Provincial Offences Act. Section 31 of the Provincial Offences Act [See Note 5 below] is the Criminal Code's version of section 440.1.

Note 5: R.S.O. 1990, c. P.33.

¶ 35 Section 31 of the Provincial Offences Act R.S.O. 1990, c. P.33 states:

> s. 31 The court retains jurisdiction over the information or certificate even if the court fails to exercise its jurisdiction at any particular time or the provisions of this Act respecting adjournments are not complied with.

¶ 36 In Drinkwalter and Ewart's treatise, Ontario Provincial Offences Procedure, at page 136, the authors relate the decision in R. v. Krannenburg to section 31 of the Provincial Offences Act. They state [emphasis below is mine]:

> In one very important area, s. 32 [now s. 31] [See Note 6 below] is much broader than s. 440.1. The latter provision cures only those jurisdictional defects which relate to improper adjournments and remands. The Supreme Court of Canada has recently made this explicit in R. v. Krannenburg. In that case it was held that a failure to do anything in relation to a criminal case on a date on which action was scheduled to be taken in court ends that court's jurisdiction over the information. It was held that s. 440.1 was of no avail in those circumstances.
> However, s. 32 [now s. 31] requires precisely the opposite interpretation, since it explicitly states that a court does not lose jurisdiction if it fails to exercise jurisdiction at any particular time. Accordingly, if circumstances such as those in R. v. Krannenburg occurred in relation to a provincial offence proceeding, s. 32 [now s. 31] would provide a basis for re-issuing a summons to the defendant and continuing as though there had been no break in the proceedings.

Note 6: The language in the present section 31 is simplified from the language used in section 32: "even if the court fails to exercise its jurisdiction" of section 31 replaced "notwithstanding the failure of the court to exercise its jurisdiction" found in section 32.

¶ 37 In R. v. Southwick, ex parte Gilbert Steel [1968] 1 C.C.C. 356 (Ont. C.A.), the Court of Appeal held that provided the information was laid within the limitation period, a summons or an arrest warrant can be issued, served, or executed outside the limitation period.

¶ 38 In the case at bar, the Court failed to do anything on December 17, 1996 when the defendant appeared in court. This would have been considered a loss of jurisdiction under the Krannenburg analysis if this had been a Criminal Code offence and section 440.1 would not have cured the loss of jurisdiction as it was not caused by a

defective adjournment procedure. However, since Mr. Hung's case fails under the Provincial Offences Act regime, section 31 of the Act applies, and as in the Stelco case above, there is no loss of jurisdiction over the offence because of the Court's failure to act. And, in the same way as the Stelco case, the Court has only lost jurisdiction over the person, which can be regained by the Court re-issuing a summons or by the defendant voluntarily appearing in court.

RESTORATION OF JURISDICTION BY DEFENDANT'S APPEARANCE

¶ 39 The defendant on May 13, 1997 stated he was only before me to challenge the jurisdiction of the Court and was not making an appearance to answer to the Notice of Trial. The issue left for me to consider is whether the defendant's attendance in court to challenge jurisdiction, is an appearance which allows the Court to regain jurisdiction over the defendant's person.

¶ 40 In R. v. Gougeon et al, (1981), 55 C.C.C. (2d) 218 (Ont. C.A.), the Court of Appeal held that there was no such thing as a conditional appearance, and counsel could not appear in court on behalf of a client to object to a defect in the process which brought the accused before the Court, unless the defect was one that went to the Court's jurisdiction to proceed with the matter.

¶ 41 In the instant case, a summons was not re-issued by a judicial officer after the Court had failed to do anything on December 17, 1996, and jurisdiction over the person had been lost. Instead, a Notice of Trial was sent by Court administration to the defendant informing him of a trial date for May 13, 1997.

¶ 42 A parallel situation occurred in the unreported decision of R. v. General Motors of Canada Ltd. (July 5, 1990) Court File No. 506/90 (O.S.C.). Court Administration, in that case, had sent out a notice to the defendant changing the court location for a trial that had been earlier set by a Provincial Court judge. A Court Administrator wrote the parties and advised them the trials would be still held on the same date but at a different court location. Counsel for the defendants argued the Court had no jurisdiction to proceed on the charges on that date. Counsel for the Ministry of Labour argued that s. 32 (now s. 31) of the Provincial Offences Act applied and the defect in the adjournment did not deprived the Court of the jurisdiction to proceed. The trial Justice held that he did not have jurisdiction to proceed with the case against General Motors. The Ontario Supreme Court upheld the decision and agreed that Court Administration did not have the authority to change the court location for the trial -- only a judge or justice of the peace had that authority. The Court in upholding the trial Justice's decision made the following endorsement:

> In my view the procedure adopted whereby a Court Administrator purported to advise these respondents of the change in location of the sitting of the Court was inappropriate and without authority - only the Court could do that.
> In my view in these circumstances there was no attornment to the jurisdiction of the Court by the respondents. The Justice of the Peace was, in my view, correct in proceeding as he did and in the result he achieved.
> In result therefore the application is dismissed.

[The Court did not assign paragraph numbers 43 and 44 to the judgment.]

¶ 45 The Court in General Motors also held that the defendants did not attorn to the jurisdiction of the Court as the Court was not dealing with defects in process which went to the jurisdiction of the Court to hear the charges.

¶ 46 The similarity of the instant case and the General Motors case is evident. Court Administration in both cases acted without authority. Like the determination made in General Motors, I also find Court Administration in the instant case acted improperly and without authority in issuing a Notice of Trial to the defendant to attend on May 13, 1997, after the Court had lost jurisdiction over the person on December 17, 1996. The Provincial Offences Court, however, did not lose jurisdiction over the offence on December 17, 1998 by the Court's failure to do anything with the defendant's charge. Section 31 of the Provincial Offences Act provides the override and prevents a loss of jurisdiction over the offence for the Court's failure to act.

¶ 47 In order for the present defendant to be properly brought back to court after the Court's failure to act on December 17, 1996, a new summons would have to be issued by a judicial officer. A Notice of Trial sent by Court Administration is not a valid process to make the defendant re-attend after the Court has lost jurisdiction over the person. A re-issued summons from a judicial officer is required in order for the Court to regain jurisdiction over the person. Since a summons was not re-issued requiring the defendant to appear on May 13, 1997, the defendant was not obligated to attend on May 13, the date on the invalid Notice of Trial.

¶ 48 I am also adopting the finding in the General Motors case which held there was no attornment to the Court's jurisdiction, for the instant case. I find the defendant in this case did not attorn to the Court's jurisdiction, as the Notice of Trial for May 13, 1997 was invalid and went to the jurisdiction of the Court to hear the matter. Further, the invalid Notice of Trial was not a defect that was related to a procedure on adjournments. Therefore, the defendant Hung's appearance to challenge the jurisdiction of the Court does not restore the Court's lost jurisdiction over his person. The invalid Notice of Trial is not the type of procedural defect that can be cured by the appearance of the defendant before the Court.

5. CONCLUSION

¶ 49 Section 31 of the Provincial Offences Act preserves the Court's jurisdiction over an offence, if the Court fails to do anything on a date when the defendant appears for trial. In this case, the defendant's information was not before the Court when the defendant appeared for trial which had been previously set by a judicial order. The Provincial Offences Court did not lose jurisdiction over the offence on December 17, 1996 when it failed to do anything. Also, the reason for the Court's failure to act does not pertain to any procedural defect regarding adjournments under the Provincial Offences Act.

¶ 50 However, section 31 did not prevent the Court from losing jurisdiction over the person of the defendant on December 17, 1996. In which case, jurisdiction over the person could only be regained by the Court re-issuing a summons to the defendant to appear. The Notice of Trial sent by Court Administration to the defendant for the May 13, 1997 trial date was invalid and improper. Court Administration had no authority to set a trial date after the Court had lost jurisdiction over the person of the defendant. As the Court did not issue a summons for the May 13 date, the defendant was not legally required to appear on that date.

¶ 51 I find the defendant's attendance on May 13, 1997 to contest jurisdiction, not to be an attornment to the Court's jurisdiction. The Court of Appeal in R. v. Gougeon held there was no such thing as a conditional appearance and that counsel could not appear in Court on behalf of a client to make an objection to a defect in the process which brought the accused before the Court, unless the defect was one that went to the Court's jurisdiction to proceed with the matter. Since the defect complained about by the defendant went to jurisdiction over his person, I find that the defendant's appearance did not rectify the loss of jurisdiction. Since jurisdiction can alternatively be regained by the Court over the person by the defendant voluntarily appearing, I find that the defendant has not voluntarily appeared and therefore no jurisdiction has been regained.

¶ 52 Therefore, I lack the jurisdiction to entertain this matter. I find the defendant was not legally bound to appear on May 13, 1997 in courtroom "B". I find that Court Administration did not have the authority to set the defendant's matter into courtroom "B" on May 13 without prior judicial authorization. It was necessary for a judicial officer to issue a new summons to the defendant for him to appear again on the charge. Lastly, the Crown may apply for a new summons from a judicial officer if it wishes to continue with this charge against the defendant.

QUON J.P.

* * * * *

¶ 53 Appendix A

Cases Considered and Referred to

Doyle v. The Queen, [1977] 1 S.C.R. 597 (S.C.C.).

R. v. General Motors of Canada Ltd. (July 5, 1990) Court File No. 506/90 (O.S.C.).
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