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R. v. Oosterman

Between
Her Majesty the Queen, respondent, and
Gerry Oosterman, moving party (defendant)

[1998] O.J. No. 5785

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

Heard: July 22, 1998.
Oral judgment: July 29, 1998.
(12 pp.)

Criminal law — Procedure — Trial, special duties of Crown — Duty to disclose evidence prior to trial — Trial, motions — To dismiss charge.

Motion by the accused to dismiss a speeding charge. After the accused was charged, she appeared in court to request an adjournment to obtain disclosure from the Crown. The adjournment was granted with a deadline to comply with disclosure, but with no specification as to what was to be disclosed. The defence requested maintenance notes and the operating manual for the radar device. The Crown refused, claiming that the items could be obtained by way of subpoena or under the Freedom of Information Act, and that there was copyright protection for the manual.

HELD: Motion dismissed. The maintenance notes were not relevant as there was no evidence that the maintenance of the device was at issue. However, the police officer's notes revealed that the radar device was tested according to manufacturer's specifications, so it was reasonable for the defence to have access to those specifications. The defendant's right to make full answer and defence was paramount to whatever copyright interest there might have been in the manual. Although the Crown was found to have improperly failed to disclose the manual, the request for dismissal was premature. The failure to disclose was not an abuse of process. The matter was adjourned and the Crown was ordered disclose the manual in accordance with the defence request.

Cases Considered and Referred to:

R. v. Longmire, [1993] N.S.J. No. 15 (N.S.C.A.) (January 18, 1993) per Jones, Matthews and Roscoe JJ.A.
R. v. Reybroek, [1998] O.J. No. 2586 (March 4, 1998) (Ont. Prov. Div.) per Babcock Prov. J.
R. v. O'Connor [1995] S.C.J. No. 98 (S.C.C.).
R. v. Shannon, [1992] O.J. No. 2652 (December 11, 1992) (O.C.A.) per Houlden, Arbour and Weiler JJ.A
R. v. Stinchcombe (1991), 68 C.C.C. (3d) 1 (S.C.C.).

Statutes, Regulations and Rules Cited:

Freedom of Information Act.
Highway Traffic Act.

Provincial Offences Act, R.S.O. 1990, c. P.33, ss. 46(2), 60.

Counsel:

W. Ramroop, for the respondent.
D. Baker, for the defendant.

QUON J.P. (orally):—

INTRODUCTION

¶ 1 This is a motion brought by the defendant to have her charge dismissed as a result of her belief that the Prosecution has failed to provide her with full disclosure. The defendant had been charged under the Highway Traffic Act for speeding and sought disclosure of the radar manual and maintenance records pertaining to the radar device. The Prosecution did not disclose these documents to the defence, as they felt they were not obligated to, because of copyright over the manual, because of the Freedom of Information Act and because of the subpoena process that can be used to obtain these documents. If the manual and the maintenance notes are relevant, and the Prosecution is obliged to disclose these documents to the defendant, does the failure to do so, warrant the Court dismissing the charges?

¶ 2 The motion was argued before me on July 22, 1998. These are the written reasons of my ruling on the motion that was rendered orally on July 29, 1998.

FACTS

¶ 3 On June 6, 1997, the defendant was charged with speeding. The defendant filed a Notice of Intention to Appear on June 18, 1997. In August 1997, a clerk of the court issued a Notice of Trial for a March 9, 1998 trial date. On March 9, 1998, the trial was adjourned to May 12, 1998 at the defendant's request.

¶ 4 On May 12, 1998, the defendant and her legal counsel appeared before me and sought another adjournment in order to obtain disclosure from the prosecution. I granted the request for adjournment and set the trial for July 22, 1998 with a stipulation that the prosecutor's office satisfy its disclosure obligation by July 8, 1998. My stipulation did not specify that any particular document had to be disclosed. I was not sitting as the trial judge as the defendant had not entered a plea.

¶ 5 The defendant's counsel received disclosure from the police in June 1998 which consisted of the first three items from a five item list prepared and requested by the defendant's counsel. On June 11, 1998, Malcolm Murray, the Radar Coordinator for the Toronto Police Service, informed the defendant's counsel items #4 and #5 of the disclosure request would not be provided to the defence. However, the defendant's counsel was told that he could obtain the two non-disclosed items through the subpoena process, or by an application under the Freedom of Information Act.

¶ 6 The Defendant and her counsel appeared before me again on July 22, 1998. On this appearance, and after she had entered a not guilty plea, the Defendant made a motion to have her case dismissed on the grounds she had not received full disclosure. The defendant submitted that without this disclosure she would be unable to make "full answer and defence".

¶ 7 The two items not disclosed by the police or the prosecution to the defence were:

1. maintenance notes for the radar device used by the police officer on June 6, 1997.
2. radar manual or operating manual for the radar device used by the police officer on June 6, 1997.

Position of Parties

¶ 8 The defendant's counsel relies on R. v. Stinchcombe (1991), 68 C.C.C. (3d) 1 (S.C.C.) and submits the prosecution must disclose all relevant information in its possession to the defendant.

¶ 9 The prosecution relies on three factors for not disclosing the radar manual and the maintenance notes to the defendant: The undisclosed items could be obtained by way of subpoena or under the Freedom of Information Act. In addition, the radar manual could not be disclosed because there is copyright protection on the manual.

¶ 10 The defendant's counsel points out the author of the manual is Malcolm Murray, the Radar Coordinator for the Toronto Police Service (the same person who informed the defendant's counsel that the manual and the maintenance notes would not be disclosed), which the manufacturer provides with the radar devices.

ISSUES

¶ 11 Is the radar manual and are the maintenance notes sought by the defence relevant?

¶ 12 Should the prosecution disclose the radar manual or the maintenance notes to the defendant?

¶ 13 Does copyright protection over the radar manual preclude the prosecution from disclosing the manual to the defence?

¶ 14 What remedies are available to the defendant if the court finds the prosecution has failed in its obligation to disclose either the radar manual or the maintenance notes to the defence?

¶ 15 Should these proceedings be dismissed for the prosecution's failure to give full disclosure to the defence?

ANALYSIS OF FACT AND LAW

¶ 16 Subsection 46(2) of the Provincial Offences Act R.S.O. 1990, c. P.33, provides:

> The defendant is entitled to make full answer and defence.

¶ 17 In a recent speeding and disclosure of radar manual case, Babcock J. in R. v. Reybroek [1998] O.J. No. 2586 (Ont. Prov. Div.) (March 4, 1998) at paragraphs 8 and 9 of that judgment, found the defendant Reybroek was not entitled to disclosure simply by requesting it, and relied on a passage in R. v. Anutooshkin [not cited by Babcock J.] which stated:

> the accused was not entitled to disclosure merely upon demand. The right to have material disclosed is dependent upon whether it is relevant. The court must consider whether there is reasonable possibility that the material in question could assist the defence.

¶ 18 At paragraph 10 in Reybroek, Babcock J. adopted the reasoning in R. v. Longmire [1993] N.S.J. No. 15 (N.S.C.A.) (January 18, 1993) and stated "the defendant has not laid a rational basis or factual foundation for the disclosure requested". The Nova Scotia Court of Appeal in Longmire found the appellant had not been deprived of the rights to a fair trial and to make full answer and defence because of the Crown's refusal to provide him with a copy of the radar operation manual. The Court of Appeal did not find the trial judge had erred in declining to stay the charge, for the Crown's refusal to disclose the radar manual. The Court reasoned the appellant did not lay a rational basis or factual foundation for his request before the trial judge, and therefore was not entitled to the disclosure request.

¶ 19 Also in Reybroek, Babcock J. at paragraph 11 refers to the general principles of disclosure enunciated in R. v. Stinchcombe, supra:

> the Crown must disclose everything in its possession that's relevant to the charges; the Crown has no duty to disclose that which is clearly irrelevant; and that the Crown cannot disclose what it doesn't have.

¶ 20 At paragraph 15 of Reybroek, Babcock J. decided item #2 and item #7, as well as eight other items from a list of 12 items requested by the defendant for disclosure "to be frivolous, unreasonable and irrelevant" and "[n]one of these items are required to prepare a defence to this charge of speeding". Item #2 requested by the defendant was "a copy of radar manual and any amendments or addendum". Item #7 was "any and all service records or maintenance logs with respect to the radar device or any of its components".

¶ 21 In Reybroek, the defendant had failed to demonstrate why the requested documents were relevant to his defence. Since there was not a factual foundation established, the court determined the radar manual or maintenance notes were not relevant and therefore would not order these documents be released to the defence.

¶ 22 In determining relevance of the documents requested in the case before me, I used the following test for relevance: "Is the material being sought reasonably possible of being useful to the defendant in making full answer and defence".

Is Radar manual sought by the defence relevant?

¶ 23 The officer's notes as disclosed to the defendant revealed he tested the radar according to manufacturer's specifications. The officer's notes do not disclose what these specifications are. It would be reasonable then, for the defendant to have these specifications, in determining whether to challenge or cross-examine the officer's proposed testimony about the testing.

¶ 24 In R. v. Shannon [1992] O.J. No. 2652 (O.C.A.), rendered on December 11, 1992, the Court of Appeal affirmed the Crown's concession that it was necessary for the Crown to disclose a manual about the VG2 radar detecting device where the Crown intended to rely on evidence from the radar detecting device at trial. This finding in Shannon supports the defendant's position for disclosure of the radar manual to the defence.

¶ 25 In Stewart and Macey on Provincial Offences Procedure in Ontario, the authors at page 95 referred to R. v. McCracken (Ont. Prov. Div.), rendered on April 4, 1995 and concluded that:

> If the prosecutor intends to rely upon technical equipment for which there is an operator's manual or other technical specifications, the disclosure obligation may be fulfilled by providing an opportunity for the defence to examine or reproduce the material.

¶ 26 I regard the radar manual being sought by the defendant to be relevant in that it contains information relating to the specifications referred to in the officer's notes. On a balance of probabilities, I am satisfied that the defendant's ability to make full answer and defence to the charge of speeding may be adversely affected if the radar manual is not disclosed to the defendant. Accordingly, the manual must be disclosed to the defence.

Copyright on manual

¶ 27 Additionally, the prosecution argues that it cannot provide a copy of the radar manual to the defendant as there is copyright protection on the manual. I find the issue of copyright not to be a persuasive argument in not disclosing the manual. The prosecution has not convinced me that there is an important interest belonging to the author, publisher or owner of the copyright over the manual that ought to be protected.

¶ 28 Copyright is defined in Dukelow and Nuse's, The Dictionary of Canadian Law (2d), (Scarborough, Canada: The Carswell Company Limited, 1995), at page 259 as:

> The sole right to produce or reproduce the work or any substantial part thereof in any material form whatever ...
> ...
> [T]he exclusive right to make copies; and concomittant right to restrain others from making copies.
> ...

> It is, in effect, a right to prevent the appropriation of the expressed result of the labours of an author by other persons.

¶ 29 Copyright as intellectual property protects the interest of the creator or owner in the manual and to ensure the right of the copyright owner to capitalize or benefit exclusively in the use of the writing or document. I fail to see how the defendant will be able to make full answer and defence without a copy of the manual. If the defendant's only intention is to obtain a copy in order to prepare its defence the manual should not be kept from the defendant because of some copyright interest. The underlying principle is the defendant's right to make full answer and defence, and in this particular case, that right is paramount to any interest that the owner of the manual may have in the copyright over the manual. However, there may exist a situation when there may arise the need to protect the copyright interest. If the defendant made any use of the manual other than for its defence then I find the prosecution has a strong argument for protecting the copyright interest.

Are maintenance notes sought by the defence relevant?

¶ 30 There is no evidence before me that the officer carries out maintenance on the radar device or that the maintenance of the radar is at issue. Therefore, I will not order that the maintenance notes be disclosed to the defendant. However, if after the radar manual is disclosed to the defendant and maintenance of the radar device becomes an issue, then the defendant may seek an order for disclosure of the maintenance notes. Otherwise, as suggested by the prosecution, the defendant may seek the notes by way of an application under the Freedom of Information Act.

Request for Dismissal

¶ 31 In the most drastic cases concerning a lack of disclosure, I may, sitting as the trial judge, declare a mistrial, exclude the non-disclosed evidence, dismiss the case, or stay the proceedings as a remedy under section 24 of the Charter or as a common law remedy for an abuse of process. I must be satisfied that a particular case, concerning a lack of disclosure of relevant information, be one of the most drastic or exceptional cases of abuse before I would grant a stay of proceedings. Madam Justice L'Heureux-Dubé of the Supreme Court of Canada in R. v. O'Connor [1995] S.C.J. No. 98, referred to this principle at paragraphs 76 and 77 of the judgment:

> As I have stated, non-disclosure will generally violate s. 7 only if it impairs the accused's right to full answer and defence. Although it is not a precondition to a disclosure order that there be a Charter violation, a disclosure order can be a remedy under s. 24(1) of the Charter. Thus, where the adverse impact upon the accused's ability to make full answer and defence is curable by a disclosure order, then such a remedy, combined with an adjournment where necessary to enable defence counsel to review the disclosed information, will generally be appropriate.
> There may, however, be exceptional situations where, given the advanced state of the proceedings, it is simply not possible to remedy through reasonable means the prejudice to the accused's right to make full answer and defence. In such cases, the drastic remedy of a stay of proceedings may be necessary.

¶ 32 Other remedies available for inadequate disclosure for a Provincial Offences matter include: adjournment with or without an order for disclosure or an order for costs for defendant's witnesses pursuant to section 60 of the Provincial Offences Act, R.S.O. 1990, c. P.33.

¶ 33 The defendant's request in this matter, to have her case dismissed, is premature. I find the prosecution's failure to disclose at this stage, not to be an abuse of process. The prosecution exercised their discretion, and believed they had no obligation to disclose the manual or the maintenance notes. The defence is entitled to seek an order for disclosure from the trial judge, if the defence declines to disclose certain items. The Supreme Court of Canada in R. v. O'Connor [1995] S.C.J. No. 98, at paragraph 5 of the judgment affirmed the discretion of the prosecution in determining relevance of documents or items requested for disclosure:

> The Crown's duty to disclose information in its possession is triggered when a request for disclosure is made by the accused. When such a request is made, the Crown has a discretion to

> refuse to make disclosure on the grounds that the information sought is clearly irrelevant or privileged. Where the Crown chooses to exercise this discretion, the Crown bears the burden of satisfying the trial judge that withholding the information is justified on the grounds of privilege or irrelevance.

¶ 34 I do not find the action of the prosecution at this stage to be abusive. And to reiterate, I am bound by precedent not to grant a remedy of a stay, or to dismiss the case, except under the clearest of cases of prosecutorial abuse. In the situation before me, I do not find the evidence supports a finding that this case is one of the clearest of cases of abuse of process or avoidance of disclosure.

CONCLUSION

¶ 35 I have not found a ruling by a higher court, nor am aware of a higher court decision that has ruled the radar manual must be disclosed without a request from the defendant for the manual. That is, I have not found a ruling that the radar manual must be disclosed automatically to the defendant whether the defendant seeks it or not. However, when the defendant requests the manual from the prosecution, and the officers notes reveal that the officer had tested the radar according to manufacturer's specifications, then the manual should be disclosed to the defendant, as I have found in the instant case. Otherwise, how does the defendant know what those specifications were that the officer was guided by?

¶ 36 The obligation by the prosecution to disclose will be triggered by a request by or on behalf of the defendant for the manual, if supported by the officer's notes that tests were performed on the radar device according to manufacturer's specifications. In this instant case, the request for disclosure had been made by the defendant to the prosecution, and therefore, obligates the prosecution to disclose the requested radar manual.

¶ 37 Prosecutorial discretion over disclosure to the defendant is reviewable by the trial judge. On review, the prosecutor must justify its refusal to disclose or reasons why only certain items were disclosed. In the case before me, I have reviewed the reasons of refusal by the prosecution to disclose the radar manual, and I have determined that the prosecution's reasons are not a justification for not disclosing.

¶ 38 The Prosecution's explanations to the defendant, of having to seek the manual by subpoena (which does not disclose but only brings the document to court), or by applying under the Freedom of Information process, or that copyright over the manual prevents it from being disclosed, are not convincing or valid arguments in this case for non-disclosure.

¶ 39 In this present case, in which the police refused to disclose the radar manual and the maintenance notes, I find the defendant's case not to be one in which an order to dismiss the case or stay the proceeding is warranted. Instead of granting the most exceptional of remedies, I find the appropriate remedy is to grant a further adjournment and to order the radar manual disclosed to the defence. In this case, the defendant has established a rational basis or factual foundation of relevance for the radar manual to be disclosed, but not for the disclosure of the maintenance notes. As the officer's notes disclosed that he had tested the radar according to manufacturer's specifications, the defendant is entitled to the radar manual, if the defendant makes the proper request for disclosure.

ORDER

¶ 40 This matter will be adjourned to September 28, 1998 for trial and the Prosecution must disclose the radar manual by August 17, 1998 to the defence in order for the defendant to prepare its defence.

QUON J.P.

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