In the Court of Appeal of Alberta

Citation: R v Vader, 2018 ABCA 389

Date: 20181122
Docket: 1603-0100-A
Registry: Edmonton

Between:

Her Majesty the Queen

Appellant

- and -

Travis Edward Vader

Respondent

- and -

Legal Aid Alberta

Intervenor

- and -

The Canadian Broadcasting Corporation and CTV, a division of Bell Media Inc.

Intervenors

The Court:

The Honourable Madam Justice Patricia Rowbotham
The Honourable Madam Justice Barbara Lea Veldhuis
The Honourable Madam Justice Frederica Schutz

Memorandum of Judgment

Appeal from the Judgment by
The Honourable Mr. Justice D.R.G. Thomas
Dated the 11th day of March, 2016
(Docket: 130781800Q1)

Memorandum of Judgment

The Court:

[1] This is an appeal of an order (the Order) made in the course of proceedings in *R v Vader*. Her Majesty the Queen appeals the grant of a *Rowbotham* order (*R v Rowbotham* (1988), 41 CCC (3d) 1 (ONCA)), which directed the Crown to pay legal fees for work previously completed. The Order also directed a publication ban, an *in camera* hearing and sealed the file in relation to the *Rowbotham* application.

[2] The facts in relation to the application are unique. In 2012, Mr Vader was charged with two counts of first-degree murder. Mr Beresh was retained as counsel pursuant to a Legal Aid Certificate. The certificate also approved a fixed number of hours for a student, Ms Purser. In March 2014, the Crown stayed the charges and the certificate was cancelled.

[3] When the Crown reactivated the charges in December 2014, Legal Aid issued a new certificate to Mr Beresh who then applied to stay the charges based on abuse of process and delay. Mr Whitling, who did not have a Legal Aid Certificate, assisted Mr Beresh with the application. Ms Purser also assisted, but exceeded the hours preapproved by Legal Aid. On March 4, 2016, when the trial was scheduled to begin, Mr Vader brought an application "For Conditional Stay of Proceedings Pending Provision of Continued Funding for Legal Counsel". The application included a request for payment for the work which Mr Whitling and Ms Purser had already completed. The application sought other relief, including that Legal Aid fund Mr Beresh's representation of Mr Vader at trial. By the time the application was heard on March 11, 2016, there was a new Legal Aid Certificate for Mr Beresh's representation of Mr Vader at trial. Accordingly, the application heard by the trial judge, which is the subject of this appeal, dealt only with the work done prior to trial without a Legal Aid Certificate.

[4] The trial judge granted the Order. He directed that Her Majesty the Queen pay the fees for work completed by Mr Whitling and Ms Purser in the total amount of approximately $21,000. The Order further directed that the application be heard *in camera*, was subject to a publication ban and that all materials filed and transcripts of the application were sealed.

The Rowbotham Order

[5] The application was brought as a *Rowbotham* application and must be analyzed within the *Rowbotham* framework. In order to obtain a *Rowbotham* order, an accused must establish that there is a substantial likelihood that his right to a fair trial under sections 7 and 11 of the *Charter* will be breached if he is without the assistance of a lawyer. The accused must also establish that he cannot afford a lawyer and that he has exhausted all possible routes to obtain counsel, including Legal Aid.

[6] The trial judge failed to consider and apply the test. It can be assumed that Mr Vader could not afford a lawyer. What was lacking here was any examination of whether there was a substantial likelihood that Mr Vader's right to a fair trial would be breached if he did not have counsel. It is important to consider the context in which this application arose. Legal Aid had granted a Certificate to Mr Beresh to represent Mr Vader at the trial. The case had a long history. Mr Beresh had represented Mr Vader throughout. The application was argued on March 11, 2016 three days after the trial had commenced. Mr Beresh submitted:

> This is our application, and it has been narrowed substantially, and it's now down to two issues only that require your attention, and you are probably aware from the material file[d] with you and copied to my friend in your absence that [the] issue of funding arose and the issue of being in a position to proceed with the trial. In the interim, we've negotiated some of the issues and, as I say, only reduced to two, and our position is that this is not affected at all by the fact that we agreed to start the trial. So if there is any [s]uggestion today that somehow our position here is prejudice[d] because we've agreed to start the trial, with the greatest of respect, I suggest that that should find no footing with the Court.

[7] There was no application to withdraw as counsel. Rather, counsel employed a pressure tactic designed to skirt any proper consideration of the *Rowbotham* test. The trial judge was placed in the difficult position of either resolving a fee dispute between Mr Beresh and Legal Aid over past fees (which is not the role of the court), or facing a potential application by Mr Beresh to withdraw. A proper consideration of the *Rowbotham* test would have resulted in the definitive answer that the accused's right to a fair trial was not compromised because he had counsel.

[8] The appellant also submitted that the trial judge erred in directly ordering the Crown to pay the disputed fees. A *Rowbotham* order is not, strictly speaking, a direct order to the Crown to simply pay the accused's legal fees. A *Rowbotham* order provides for a conditional stay of the accused's proceedings pending the Crown determining whether it will pay for the defence. Here, although the application sought a conditional stay, the Order does not grant a conditional stay. However, when this was pointed out to the trial judge after he had given his order, he directed that the Crown be given seven days to pay the fees. No harm resulted from the improper form of the Order.

[9] Finally, if a *Rowbotham* application is contested, the Crown must be given the opportunity to respond, including leading evidence, cross-examining witnesses and making submissions: *R v Rain*, 1994 ABCA 373, at paras 27 to 33 157 AR 385. Here, the trial judge did not permit the Crown to call three witnesses from Legal Aid who were in the courtroom and ready to testify. In our view, this was procedurally unfair to the Crown, and it is not a sufficient answer to say that one affidavit, tendered by Mr Vader, from a retired Legal Aid employee, rendered the process fair.

In Camera Proceeding, Publication Ban and Sealing Order.

[10] Rule 6.28 of the *Alberta Rules of Court*, AR 124/2010 and Court of Queen's Bench Criminal Practice Note #4 deal with orders that ban publication and restrict public access to criminal proceedings.

> 6.28 Unless an enactment otherwise provides or the Court otherwise orders, this Division applies to an application for an order
>
> (a) to ban publication of court proceedings,
>
> (b) to seal or partially seal a court file,
>
> (c) permitting a person to give evidence in a way that prevents that person or another person from being identified,
>
> (d) for a hearing from which the public is excluded, or
>
> (e) for use of a pseudonym.

The Practice Note directs the applicant must file a Notice of Application prescribed in Form A and otherwise comply with the directions of the Clerk of the Court for providing notice to the media. The obvious purpose of the provisions is to ensure that where a party seeks to exclude the media, the media have notice of the proceeding. When freedom of expression is at stake, the media is entitled to an opportunity to be heard and notice is fundamental to that process: *Dagenais v Canadian Broadcasting Corp* [1994] 3 SCR 835, 20 OR (3d) 816 and *R v Mentuck*, 2001 SCC 76, [2001] 3 SCR 442, (*Dagenais/Mentuck* framework).

[11] The procedure was not followed here. The Notice of Application was not in form A. Indeed, it appears that the application was never filed. We can only assume that counsel handed it to the trial judge on March 4, 2016. In the result, there was no notice to the media, and despite the Crown's repeated submissions to the trial judge that notice should be given to the media, the trial judge refused to do so. In our view, he erred in refusing. The media was entitled to notice of the application, and it was the trial judge's responsibility to see that notice was given. Once notice had been given, the trial judge, upon hearing submissions from the media, could have weighed the advantages and disadvantages of granting the various confidentiality protections sought by the respondent.

Conclusion and Remedy

[12] The appeal is allowed. The trial judge erred in granting the *Rowbotham* order and also in granting the publication ban, sealing order and *in camera* hearing in the absence of notice to the

media. With respect to the *Rowbotham* order, there is little practical effect to our decision as the Crown does not seek repayment of the fees paid to Mr Whitling and Ms Purser.

[13] As regards the various confidentiality provisions, the media was entitled to notice. This Court is not in a position to determine whether the sealing orders and bans should have been ordered in the absence of evidence about the effect of allowing public access to the file material and the proceedings. Mr Whitling's affidavit contains information protected by solicitor client privilege and Mr Vader has not waived the privilege. Counsel for the intervenors advised the court that there was no information in her factum that would require a continuation of the sealing order in relation to the factum. We have reviewed the factum and agree. With respect to the remaining file materials, including the affidavits and facta of the other parties, we are simply not in a position to lift the sealing order or the publication ban. If there is any utility in pursuing this now that the media has notice, the parties must return to the Court of Queen's Bench.

Appeal heard on November 1, 2018

Memorandum filed at Edmonton, Alberta
this 22nd day of November, 2018

Rowbotham J.A.

Veldhuis J.A.

Schutz J.A.

Appearances:

L. Friesenhan
for the Appellant

W. Raponi
for the Respondent

M.T. Duckett, Q.C.
Agent for K.A. Quinlan, for the Intervenor Legal Aid Alberta

T.C. Layton
for the Intervenors The Canadian Broadcasting Corporation and CTV, a division of Bell Media Inc.