Citation: *R. v. Baglee*, 2020 YKTC 39

Date: 20201231
Docket: 19-00346A
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Cozens

REGINA

v.

JONATHAN WILLIAM BAGLEE

Appearances:
Benjamin Eberhard — Counsel for the Crown
Vincent Larochelle — Counsel for the Defence
Jonathan Gorton — Counsel for the Federal Department of Justice

RULING ON APPLICATION

[1] Crown counsel filed a Notice of Application (the "Application") on December 9, 2020, seeking an adjournment of a costs hearing that was scheduled to be heard on January 20, 2021.

[2] Counsel for Mr. Baglee is opposed to the adjournment request.

[3] Counsel for the Federal Department of Justice takes no position on the Application.

[4] The Application was heard on December 14, 2020, and judgment was reserved. The matter was adjourned back to the hearing date, and counsel was advised that I

would provide written reasons for my ruling in a timely fashion and without a further court appearance, so that the parties would be able to proceed with the costs application on January 20, 2021, if that were to be my decision. As I understand it, counsel for the Federal Department of Justice and Crown Counsel are required to file their materials for the costs hearing by January 8, 2021, and counsel for Mr. Baglee by January 15, 2021.

History

[5] Mr. Baglee has been charged on a 19-count Information, sworn August 2, 2019, alleging offences committed on or about July 30, 2019.

[6] On June 30, 2020, counsel for Mr. Baglee filed a Notice of Application for Disclosure (the "Disclosure Application"). The affidavit of Mercedes Henley, Mr. Baglee's common-law partner, was filed in support of the Disclosure Application on September 29, 2020. The Disclosure Application was withdrawn on October 9, 2020.

[7] On October 5, 2020, a Notice of Application for Costs was filed (the "Costs Application"), and on November 30, 2020, a Notice of *Charter* Application was filed by counsel for Mr. Baglee (the "*Charter* Application"). The Costs Application alleges a breach of Mr. Baglee's s. 7 *Charter* rights, and seeks a remedy under s. 24 of the *Charter*.

[8] On December 3, 2020, the Costs Application was set for hearing on January 20, 2021, and the *Charter* Application was set for June 1 and 2, 2021.

Submissions of Counsel

[9] Crown counsel submits that the Costs Application should not be heard until after the conclusion of the trial. Counsel states that some of the evidence to be heard at the Costs Application would require testimony from witnesses who would also be required to testify at trial. Counsel submits that there will therefore possibly be a duplication of evidence. Counsel submits that it should only be in exceptional circumstances that a costs hearing occurs before the trial of a matter is finished, and such circumstances do not exist in this case.

[10] Counsel for Mr. Baglee submits that the Costs Application is likely primarily to be paper-based, and will not necessarily require testimony from some of the same witnesses who would be required to testify at the trial. In any event, counsel submits that the trial should not be utilized to call evidence only relevant to the issue of costs, and not relevant to the trial matters.

Case Law

[11] In ***R.*** v. ***Clement*** (2002), 159 O.A.C. 323, the trial judge found that there was an abuse of process, but rather than issuing a stay of proceedings, ordered that certain evidence be excluded from the trial. Counsel for the accused then filed an application seeking costs be awarded for the stay of proceedings application. The trial judge made an order for costs against the Crown. The Court of Appeal overturned the decision of the trial judge, stating in paras. 9, 14 and 15:

> 9 The trial judge should not have determined the question of costs arising out of the stay application until the conclusion of trial. We reach that

> conclusion for three reasons. First, the benefit, if any, to the respondent's defence in the criminal proceedings achieved as a result of the application could best be measured at the completion of the trial. On the motion, the respondent sought only a stay. After a five week hearing, the trial judge refused to grant that relief. He did find an abuse and he did grant the respondent some relief. He excluded any evidence obtained directly or indirectly from the wiretap. The practical value of that remedy is, however, in doubt.
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> …
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> 14 The second reason for holding that the trial judge should not have determined the question of costs until the end of the trial arises from the jurisprudence concerning the nature of abuse of process applications brought in the context of a criminal trial. As the Supreme Court of Canada and this court, have repeatedly said, such applications should not be determined until the end of the trial except in unusual circumstances. The determination of whether conduct reaches the level of an abuse of process, and the further determination of the appropriate remedy in the event that the conduct does reach that level are best assessed in the light of the entire trial record and after a decision on the merits. …
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> 15 Thirdly, the trial judge's decision to award costs on the stay application prior to the completion of the trial and to direct those costs to be paid within thirty days effectively forced the Crown, if it wished to make any meaningful challenge to that order, to bring an appeal immediately and seek an order staying the trial judge's order. …The Crown's chances of recovering any money paid should the appeal be successful would be remote to say the least. …

[12] The Court of Appeal stated that the application for costs could be renewed at the end of the trial.

[13] In ***R.*** v. ***Daigle***, [1997] 162 N.S.R. (2d) 81 (N.S.S.C.), Hood J. quashed an order for costs made by the provincial court judge at the conclusion of the trial in which the accused was acquitted. Hood J. did so on the basis that the costs application was premised on a *Charter* application of which no notice had been provided to the Crown and, further, that the provincial court judge lost jurisdiction because the decision to award costs had been made with no evidentiary foundation.

[14] Of note, Hood J. stated in para. 92 that:

> It was also inappropriate for costs to be dealt with during the criminal trial. It would have been improper for the Crown to comment upon the testimony of the complainant or call evidence about its review of the case before the trial was concluded and a verdict rendered.

[15] During the trial, counsel for the accused had entered into a line of cross-examination for purposes not related directly to the issues to be decided at trial. Crown counsel had objected, unsuccessfully, to this line of questioning as not being relevant. It was the evidence that arose from this cross-examination that formed the basis for the trial judge's decision to award costs, as the trial judge did not allow the Crown to call any evidence on the costs application.

[16] In ***R.*** v. ***Versi***, [2000] 74 C.R.R. (2d) 359 (C.J.), the Court was dealing with a pre-trial motion for costs on the basis of the Crown failing to comply with its disclosure applications. The application for costs was premised on there having been a delay in disclosure being provided, and that what was provided was inadequate to allow the accused to make full answer and defence. Lane J. dismissed the application on the merits. Of note, however, is that the application was heard as a pre-trial motion with evidence adduced. It was not directed to be adjourned until after the conclusion of the trial.

[17] In ***R.*** v. ***Di Fruscia***, [1995] O.J. No. 3853 (C.J.), an order for costs against the Crown was made following a pre-trial application for disclosure and for costs to be awarded.

[18] Fairgrieve J. relied on the cases of ***R.*** v. ***Fletcher*** (Ont. Prov. Div., April 21, 1994 (unreported) and ***R.*** v. ***S.V.L.*** and ***H.V. L.*** (Ont. Prov. Div. July 21, 1995, unreported) in concluding that the accused was within his right to bring his application for disclosure prior to the trial. The disclosure application was heard three weeks prior to the trial date.

[19] The Crown (new to the file), was not opposed to an order for disclosure being made and, in fact, provided the requested disclosure in part on the morning of the day the application was heard and the remainder shortly after the order was made.

[20] The order for costs was made by Fairgrieve J. following the hearing of the disclosure application, after reserving judgment for further consideration. The order was based on the information provided to Fairgrieve J. at the hearing of the applications.

Conclusion

[21] In Mr. Baglee's case, the Disclosure Application was abandoned after the Crown provided the requested disclosure, as the Disclosure Application was no longer necessary.

[22] The question before me is whether the Costs Application should be heard prior to the conclusion of trial.

[23] I am not deciding on the merits of the Costs Application at this stage, as to whether costs should be awarded to Mr. Baglee.

[24] In my opinion, there is no reason why the Costs Application needs to wait until after the conclusion of the trial.

[25] These are not the same circumstances as in ***Clements***, which was dealing with an abuse of process issue, and related jurisprudence on when abuse of process applications should be heard.

[26] Disclosure applications, on the contrary, are generally brought as pre-trial applications in order to allow for an accused to make full answer and defence. That was the nature of the Disclosure Application in this case. The fact that disclosure was made, and the Disclosure Application abandoned in this case, does not mean that costs can no longer be awarded. That will depend upon the decision that is made at the hearing on the merits.

[27] I appreciate that at the hearing of the Costs Application it may be argued that the requested disclosure was not relevant to the issues to be resolved at trial, and was not necessarily required to be disclosed under the jurisprudence as it has developed since ***R.*** v. ***Stinchcombe***, [1991] 3 S.C.R. 326. There may, if warranted, be a submission made that only at the conclusion of the trial will there be an understanding of where the requested disclosure fits within the trial preparation and trial process. However, that possibility does not elevate a costs application on the basis of non-disclosure to the same status as an abuse of process application, with respect to the evidentiary foundation required for the application to be brought. In any event, should the judge hearing the Costs Application determine that there is an insufficient evidentiary foundation before him or her, the Costs Application could be adjourned to a later date.

[28] I agree with Hood J. when he states that the trial process should not be utilized to adduce evidence not relevant to the issues required to be resolved at trial. As such, if

viva voce evidence is required to be heard at the Costs Application, this evidence would possibly, perhaps even most likely, have to take place following the trial being concluded. In my opinion, it would be preferable to have this Costs Application proceed expeditiously on the January 20 date that is set, rather than delay it for what will likely be a substantial period of time.

[29] There is certainly jurisprudence before me where costs applications have been heard following pre-trial applications for disclosure, and in advance of the matter proceeding to trial.

[30] Counsel for Mr. Baglee does not anticipate there being any problem, from his point of view, in hearing the matter on the date currently set, and counsel for the Federal Department of Justice, while taking no position on the Application, is prepared to proceed on that date. It may well be that the Costs Application proceeds on the basis of the documentary evidence alone, without the requirement for *viva voce* evidence.

[31] There is also no requirement that there be an order that costs, if awarded, be made payable immediately, thus addressing the concerns set out in the third reason set out in ***Clements***.

[32] As such, the Application for an adjournment of the Costs Application is denied and the matter will proceed as scheduled on January 20, 2021.

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COZENS T.C.J