25/10; [2010] VSCA 100

SUPREME COURT OF VICTORIA — COURT OF APPEAL

WELLS v THE QUEEN

Ashley, Redlich and Weinberg JJA

30 April 2010

CRIMINAL LAW – APPLICATION FOR PERMANENT STAY OF PROCEEDING – INTERLOCUTORY DECISION – APPLICATION FOR REVIEW OF DECISION UNDER S295(3)(b) *CRIMINAL PROCEDURE ACT* 2009 – REFUSAL TO CERTIFY THAT INTERLOCUTORY DECISION WAS OF SUFFICIENT IMPORTANCE TO TRIAL TO JUSTIFY IT BEING DETERMINED ON AN INTERLOCUTORY APPEAL – APPLICANT CLAIMED LOSS OF MEMORY FOLLOWING COLLISION – MOTOR VEHICLES INSPECTED BY POLICE OFFICER AFTER COLLISION – NO FAULT FOUND BY POLICE OFFICER WITH EITHER VEHICLE – BOTH VEHICLES SUBSEQUENTLY DESTROYED – DEFENDANT NOT GIVEN AN OPPORTUNITY TO HAVE THE VEHICLES INDEPENDENTLY EXAMINED – WHETHER DESTRUCTION OF EVIDENCE WARRANTED A PERMANENT STAY OF THE CHARGES – NATURE OF REVIEW UNDER S296 – WHETHER APPLICATION FOR A CERTIFICATE SHOULD BE DISMISSED: *CRIMINAL PROCEDURE ACT* 2009, S295(3)(b).

W. was involved in a motor vehicle collision which resulted in the death of a person in one of the vehicles involved. W. claimed that he had no memory of the circumstances leading up to the collision. Both motor vehicles were examined by a police officer who found no fault with either vehicle. Accordingly, the vehicles were released to their owners and subsequently destroyed. Neither vehicle was able to be examined by an expert engaged by W. At the trial for culpable driving, W. applied to the Judge for a permanent stay of the presentment and unsuccessfuly sought a certificate from the Judge to certify that the matter was of such importance as to justify it being determined on an interlocutory appeal. Upon appeal—

HELD: Application for review of the decision to certify dismissed.

1. The gist of the stay application made to the Judge was that W.'s inability to have the vehicles independently examined and his own want of recollection of the incident, singly and in combination, made it imperative that a stay be granted. W. relied upon what he claimed was the administration of justice having been brought into disrepute by the police having done nothing to prevent the destruction of the vehicles before he was charged.

2. A permanent stay is an extreme step. In the present case, the destruction of the vehicles, most particularly the utility, did not constitute circumstances which would justify grant of a stay. Whilst W. was deprived of the opportunity of having his expert examine the vehicles, the examiner's conclusions, based upon his inspection of them, are not challenged. Further, it appears to be quite improbable, as matters stood at the end of the evidence of the examiner and hearing the expert on the *voire dire*, that examination by the latter could have provided evidence of a defect which could explain the collision. W. is by no means deprived of a forensic answer to the examiner's evidence and the trial judge could no doubt seek to redress any disadvantage faced by W. by an appropriate observation.

***R v Edwards*, [2009] HCA 20; (2009) 255 ALR 399, applied.**

3. Whilst, in the particular case, it would have been better had the police retained the vehicle. it was pertinent that—

(1) the owner of the utility was someone other than W.;

(2) the police were apparently on notice, before the vehicle's release, that W. was asserting that he had no recollection of the incident; and

(3) the circumstances of the incident were, on their face, unusual. But to say that a different course would have been the preferable course is not to say that the course which was followed required grant of a permanent stay. The conduct of the police was not such as to bring justice into disrepute.

4. The present case falls into the category of memory loss resulting from the act constituting the alleged offence. That, of itself, did not constitute a circumstance justifying grant of a stay.

***Ross v Tran*, MC3/1997; (1996) 87 A Crim R 144, distinguished.**

5. In all, W. has not shown that, by reason of the destruction of the vehicles, he would suffer prejudice of such a degree as would significantly and irremediably impair his right to a fair trial.

ASHLEY JA:

1. Rodney Wells faced trial on a count of culpable driving. He unsuccessfully applied to a County Court judge for the permanent stay of the presentment. He then unsuccessfully sought a certificate from the learned judge under s295(3)(b) of the *Criminal Procedure Act* 2009 (Vic) ('the Act'). Now he applies under s296 of the Act for a review of the refusal to certify; and, if the review succeeds and he is granted leave to appeal, then he seeks that the appeal be allowed.

2. The applicant was driving a utility vehicle along the Hume Highway on the afternoon of 13 April 2007. Having diverged to pass another vehicle, his utility, it seems, did not straighten, but instead travelled wholly or partly into the emergency lane and collided, generally nose to tail, with a stationary Ford sedan. The impact was very forceful. Both vehicles were extensively damaged. An occupant of the stationary vehicle was killed.

3. There was no evidence that the utility's brakes had been applied before the collision. Nothing indicated that the applicant had swerved in an attempt to avoid the collision.

4. The applicant was injured in the collision. On his account, not conceded by the Crown, he has no recollection of the collision, and so can cast no light on how it came about.

5. The vehicles were removed for police inspection. On 23 April 2007, each of them was examined by Robert Le Guier, a police mechanical investigator of very long experience. With respect to the utility, a 2006 model, he found no evidence of damage which could account for it having followed the course which it did, and for not having braked. Specifically, he found no evidence of pre-collision damage to the steering or brake mechanisms.

6. Subsequent to his examination of the vehicles, Senior Sergeant Le Guier (conveniently, 'the examiner') advised the informant that he had found no fault with either vehicle, and that they could be released. They were. The utility was released to its owner, Thrifty Car Hire. It was subsequently destroyed. So was the sedan.

7. About a year after the incident, the applicant was charged. The vehicles had been destroyed by that time.

8. Neither vehicle was able to be examined by an expert engaged by the applicant, a Mr John Marshall.

9. The gist of the stay application made below was that the applicant's inability to have the vehicles independently examined and his own want of recollection of the incident, singly and in combination, made it imperative that a stay be granted.

10. In this Court, if not below, counsel for the applicant also relied upon what he claimed was the administration of justice having been brought into disrepute by the police having done nothing to prevent the destruction of the vehicles before the applicant was charged.

11. For the purposes of considering the application, the learned judge below heard evidence on a *voire dire* from the examiner, the informant, and Mr Marshall.

12. There was no challenge to the examiner's competency or impartiality. Neither did Mr Marshall challenge the conclusion that, upon the examination which had been conducted, no pre-collision defect was evident in the braking or steering system of the utility.

13. Applicant's counsel, however, sought to show that some tests had not been performed which might have revealed defects in one or other system. It was not in debate, as I understand it, that additional tests might have been performed. But the gist of the examiner's evidence was that the tests which had been performed implicitly excluded the prospect that other tests might have revealed a defect in one or other system; and that, in respect of one test not performed, it would have been an irrelevance.

14. Be that as may, the applicant can rightly say that he has been deprived, by the destruction of the vehicles, from having them examined by the expert of his choice.

15. Section 296(4) of the Act obliges this Court, if it is to grant leave to appeal, to 'consider the matters referred to in s295(3)' and be 'satisfied as required by section 297'.

16. In this case, s295(3)(b) was in point. So, for the purposes of s296(4), the question arises whether the decision was 'otherwise of such importance as to justify it being determined on an interlocutory appeal'? That is a matter for this Court to consider afresh, ordinarily on the material adduced below, and not ignoring the conclusion reached by the judge below.

17. In *McDonald v DPP*[1] I said this:

> It is, I think, correct to say that if the judge concludes that the decision meets the statutory description in paragraph (b) – that is, 'that the decision is ... of sufficient importance to the trial to justify it being determined on an interlocutory appeal' – then the judge must certify. At that point, no question of the exercise of a discretion arises. But in determining whether the circumstances fit the description in paragraph (b), the judge is required, as I see it, to make what may be called a value judgment.
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> In this case, the judge was rightly of the opinion that an appeal would be quite hopeless. In those circumstances, it could not have been concluded, and should not have been concluded by his Honour that the decision was of sufficient importance to the trial to justify it being determined on an interlocutory appeal. An argument, if accepted, may be such as would render a trial unnecessary. But if the argument is without any merit, it cannot be said that it possesses the quality of 'sufficient importance to the trial' which is required by paragraph (b).
> I should finally make this observation. Nothing that I have said should be taken to mean that, if a judge considers an unsuccessful argument to have been something better than absolutely hopeless, the statutory description will necessarily be satisfied. Nor should it be taken to imply that the value judgment must necessarily be confined to consideration of prospects of success. Simply, there should not have been certification in the present case because, as the learned judge rightly concluded, the point raised lacked any legal merit.

18. In the same case, Redlich JA added the following:

> As this case indicates, where the trial judge is of the view that the interlocutory decision is so plainly correct that the argument to the contrary is hopeless or foredoomed to fail, it is not an appropriate case in which to grant a certificate. In other circumstances, the trial judge is required to assess the relative merit of his or her conclusion and the degree to which it could be said that his or her decision is attended by doubt. I would not wish it to be understood that because a trial judge concludes that their decision may be attended by some doubt, that it necessarily follows that a certificate should be granted.

19. What Redlich JA and I said in *McDonald* is relevant to this Court's consideration whether the interlocutory decision in the present case was of the character described in s295(3)(b). If it was not, the case will not be one in which it is, for the purposes of s297(1) 'in the interests of justice to grant leave to appeal'. So much was decided in *McDonald*.

20. There are cases, decided either way, in which the destruction of evidence has been relied upon as the basis for an application for a permanent stay. Compare *Holmden v Bitar*,[2] *R v Reeves*,[3] *Police v Sherlock*[4] and *R v Edwards*.[5]

21. A permanent stay is an extreme step. In *Edwards*, referring to *Walton v Gardiner*,[6] the High Court said this:

> A majority of the court approved each of the formulations of the test applied by members of the Court of Appeal; 'whether, in all the circumstances, the continuation of the proceedings *would* involve unacceptable injustice or unfairness', or whether the 'continuation of the proceedings *would* be 'so unfairly and unjustifiably oppressive' as to constitute an abuse of process'. Their Honours observed that it had been made plain by the Court of Appeal that the court would only be satisfied that continuation of the proceedings constituted an abuse in an exceptional or extreme case.

22. In the present case, I am not at all persuaded, as matters presently stand, that the destruction of the vehicles, most particularly the utility, constituted circumstances which would justify grant of a stay. Whilst the applicant was deprived of the opportunity of having his expert examine the vehicles, the examiner's conclusions, based upon his inspection of them, are not challenged. Further, it appears to me to be quite improbable, as matters stood at the end of the

evidence of the examiner and Mr Marshall on the *voire dire*, that examination by the latter could have provided evidence of a defect which could explain the collision. I consider also that the applicant is by no means deprived of a forensic answer to the examiner's evidence. Again, the trial judge could no doubt seek to redress any disadvantage faced by the applicant by an appropriate observation.

23. I should add this: The police did no more than release the utility to its owner. It was not the police who destroyed it, or gave instructions for its destruction. Indeed, it was common ground that the police followed ordinary practice in returning the vehicle, after inspection, to its owner.

24. Counsel for the Crown nonetheless accepted that, in the particular case, it would have been better had the police retained the vehicle. I agree. It was pertinent that – (1) the owner of the utility was someone other than the applicant; (2) the police were apparently on notice, before the vehicle's release, that the applicant was asserting that he had no recollection of the incident; and (3) the circumstances of the incident were, on their face, unusual. But to say that a different course would have been the preferable course is not to say that the course which was followed requires grant of a permanent stay. I do not accept the submission that the conduct of the police was such as to bring justice into disrepute.

25. In all, the applicant has not shown that, by reason of the destruction of the vehicles, he would suffer prejudice of such a degree as would significantly and irremediably impair his right to a fair trial.

26. A little earlier, I used the phrase 'as matters presently stand'. I did so because it might appear, as the trial proceeds, that the circumstances are otherwise than I presently apprehend them. If that turned out to be the case, the applicant would not be precluded from making a further application for a stay.

27. Thus far I have focussed upon the destruction of the vehicles. But then there is the question of the applicant's alleged memory loss.

28. Let it be assumed that the memory loss is real and that the applicant is deprived of the opportunity of explaining how the collision occurred.

29. In *Ross v Tran and anor*,[7] a magistrate held that long delay and memory loss (the latter implicitly) in combination justified an order for a permanent stay on the ground of abuse of process. That order was not disturbed on a judicial review proceeding in the Supreme Court.

30. But *Tran* was a case in which memory loss did not arise out of the alleged offence. It was attributable to another event which occurred within the period of delay. The loss deprived the accused man of the prospect, which could not be excluded, of providing an innocent explanation for a particular piece of incriminating evidence.

31. *Tran* was thus unlike this case. For here the memory loss was a consequence of the act which constituted the alleged offence.

32. I do not exclude the possibility that total memory loss resulting from the act constituting the alleged offence might justify the grant of a stay in a rare case. But it must be a rare case. For instance, it could hardly be doubted that a charge of causing serious injury would not be stayed on the footing that the person charged had himself suffered brain injury in the course of the alleged assault and was unable to give evidence as to the circumstances of it. In a different context, it is not to be supposed that a drunken person charged with rape could obtain a stay on the basis that he had no recollection of the alleged offence and thus was deprived of the ability to raise possible defences.

33. The present case falls into the category, as I have said, of memory loss resulting from the act constituting the alleged offence. I do not accept that, of itself, it constituted a circumstance justifying grant of a stay.

34. Neither, I consider, do the applicant's memory loss and the inability of the applicant's expert

to examine the utility in combination constituted circumstances justifying a grant of stay. Zero plus zero does not equal one. The position might have been different if there had been no examination of the utility. But so to say is simply to admit the possibility that different circumstances might yield a different outcome.

35. In all, and contrary to the submission of counsel for the applicant, I do not accept that his client is reduced to fighting his trial with one arm tied behind his back. As I see it, there are many forensic possibilities open to him at trial. Indeed some of them might not have been open to him had the vehicles been examined by his expert.

36. So, in my opinion, the circumstances of this matter do not satisfy the language of s295(3)(b) of the Act. In those circumstances they could not satisfy s297(1). It follows that the application for review of the decision refusing to certify under s295(3)(b) should be dismissed.

REDLICH JA:
37. I agree, for the reasons given by Ashley JA, that it has not been demonstrated that the claim that the proceedings should be permanently stayed as an abuse of process was sufficiently important to the trial within the meaning of s295(3)(b) of the Act. The learned trial judge was in my view correct to refuse the grant of a certificate as her decision was not attended by sufficient doubt.

WEINBERG JA:
38. I also agree.

ASHLEY JA:
39. The Court orders that the application for review be dismissed and that the notice of application for leave to appeal against an interlocutory decision be struck out.

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[1] [2010] VSCA 45.
[2] (1987) 47 SASR 509; (1987) 75 ALR 522; (1987) 27 A Crim R 255. Emphasis in original.
[3] (1994) 122 ACTR 1; (1994) 121 FLR 393 (Gallop J).
[4] [2009] SASC 64; (2009) 103 SASR 147; (2009) 194 A Crim R 30.
[5] [2009] HCA 20; (2009) 255 ALR 399; (2009) 83 ALJR 717.
[6] [1993] HCA 77; (1993) 177 CLR 378; (1993) 112 ALR 289; (1993) 67 ALJR 485; (1993) 112 A Crim R 289.
[7] (1996) 87 A Crim R 144.

APPEARANCES: For the applicant Wells: Mr JR Sutton, counsel. Rainer Martini & Associates, solicitors. For the Crown: Ms C Lee, counsel. Mr C Hyland, Solicitor for Public Prosecutions.
