CITATION: R. v. Hariraj, 2011 ONCA 739
DATE: 20111124
DOCKET: M40611

COURT OF APPEAL FOR ONTARIO

Cronk J.A. (In Chambers)

BETWEEN

Her Majesty the Queen
Ex Rel. City of Toronto

Applicant

and

Richard Hariraj

Respondent

George McQ. Bartlett, for the applicant

Adam Little, for the respondent

Heard: November 23, 2011

ENDORSEMENT

[1] The Crown moves for leave to appeal to this court under s. 139 of the *Provincial Offences Act* (the "POA") from the decision of E.N. Libman J. of the Ontario Court of Justice, dated September 15, 2011, dismissing a Crown appeal from the stay order of Justice of the Peace D. Begley, dated February 16, 2010, whereby a charge of speeding

against the respondent was stayed on the ground that the time to trial contravened s. 11(b) of the *Charter*. The Crown moves for similar relief in *R. v. Andrade*, court file number M40597, which also involves a stay order based on s. 11(b) of the *Charter* in respect of Part I POA offences.

[2] Both the Attorney General for Ontario and the Attorney General of Canada were served with notices of the respondents' s. 11(b) *Charter* applications and constitutional questions in this case and in *Andrade*. They were also served with notices of these motions for leave to appeal. Neither elected to intervene, either at trial or on these motions.

[3] As set out in its notices of motion, the Crown seeks to raise the same four issues on both appeals, should leave to appeal be granted. Counsel for the respondents (the same counsel on both motions) resists the leave motions primarily on the ground that the issues identified by the Crown are not questions of law and, in any event, on the basis that they have no general or province-wide significance since they concern only the trial scheduling procedures of the City of Toronto.

[4] I disagree. Stripped to their essence, the issues sought to be raised by the Crown on the two proposed appeals concern appropriate guidelines for reasonable intake and institutional delay in the prosecution of Part I POA offences, in light of s. 11(b) of the *Charter* and the principles articulated by the Supreme Court of Canada in *R. v. Morin*, [1992] S.C.R. 771 and by this court in *R. v. Omarzadah*, [2004] O.J. No. 2212. In my

view, these are questions of law. Contrary to the respondents' submission, that these questions arise in particular factual contexts, established by the evidence and the trial judges' findings in this case and in *Andrade*, does not compel a different conclusion or undermine the importance of the issues sought to be raised.

[5] The main questions sought to be raised by the Crown on appeal, described above, are identical to one of two key issues raised on appeal in *R. v. Vellone*, which was argued before a full panel of this court on November 21, 2011. At the conclusion of oral argument in *Vellone*, this court indicated its intention to allow the appeal based solely on an unrelated notice issue, with reasons to follow. Thus, the reasons of this court in *Vellone*, once released, will not be dispositive of the proposed grounds of appeal identified on these motions.

[6] On April 21, 2009, Gillese J.A. granted leave to appeal to this court in *Vellone*: [2009] O.J. No. 1607. She concluded that the proposed appeal in that case raised "very serious and important questions of law" and that it was "essential both for the public interest and due administration of justice that these questions be addressed". As pertinent to this case and *Andrade*, she described one of these important issues in part as follows, at para. 2:

> 2) How is s. 11(b) of the *Charter* to be interpreted in the context of a Part I prosecution under the [POA]? In particular, what are the guidelines for intake and institutional delay; does the presumption of prejudice apply to such a proceeding;

[7] These questions are also directly implicated in these two cases. I agree with Gillese J.A.'s conclusion in *Vellone* that these questions raise serious and important questions of law that should be addressed by this court in the public interest and to facilitate the due administration of justice. Thus, as in *Vellone*, I am satisfied that the test for leave to appeal under s. 139 of the POA has been satisfied in respect of this motion and motion number M40597 in *Andrade*.

[8] It is important that this court be positioned to determine the issues to be raised on appeal with the benefit of an appropriate evidentiary record. Crown counsel contends that the evidentiary record in this case and in *Andrade* are sufficient for this purpose and that no fresh evidence is required. Counsel for the respondents disagrees, emphasizing, as I have mentioned, that the records contain evidence concerning only the trial scheduling practices of the City of Toronto. In my view, it will be for the panel hearing the appeals to determine whether the available evidentiary records are in fact adequate for the issues raised to be fully addressed.

[9] I also note that Crown counsel has advised of his understanding that, if leave to appeal be granted, the Attorney General for Ontario intends to intervene in the appeals. As in *Vellone*, this court would certainly benefit from receiving the submissions of the Attorney General for Ontario. Of course, it is open to all parties to seek to adduce fresh evidence on appeal, if so advised and permitted by this court.

[10] Counsel for the respondents also seeks the appointment of *amicus* counsel for the purpose of the appeals. He advised that he appeared on these motions as a courtesy to a paralegal who apparently acted as agent for the respondents at trial. He is willing to serve as *amicus* if so appointed. Crown counsel supports the appointment of *amicus* in these matters.

[11] I agree that this court would benefit from the involvement of *amicus* counsel on the appeals. It is important that the court have the assistance of counsel who are prepared to argue both sides of the issues raised in order to properly determine those issues. There is no suggestion that a judge of this court lacks jurisdiction to appoint *amicus* counsel: see *R. v. Russel*, 2011 ONCA 303.

[12] For these reasons, the motions for leave to appeal in this matter and in *Andrade* (M40597) are hereby granted. I further direct that: (1) Crown counsel on these motions provide a copy of this endorsement to the Attorney General for Ontario; (2) the appeal in this matter and in *Andrade* be heard together; and (3) Adam Little, who appeared on these motions for the respondents, be appointed *amicus* counsel on both appeals.

"E.A. Cronk J.A."