COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Cole, 2012 ONCA 347
DATE: 20120525
DOCKET: C54302

Laskin, Feldman and Watt JJ.A.

BETWEEN

Her Majesty the Queen

Applicant/Appellant

and

Anne-Marie Cole

Respondent

Jennifer Mannen, for the appellant

Richard Posner, for the respondent

Heard: April 27, 2012

On appeal from the decision of Justice L. B. Roberts of the Superior Court of Justice, sitting as a summary conviction appeal court, on August 16, 2011.

Watt J.A.:

[1] The Attorney General seeks leave to appeal from a decision of a judge of the Superior Court of Justice, sitting as a summary conviction appeal court (the appeal judge), setting aside the respondent's conviction of operating a motor vehicle with a prohibited concentration of alcohol in her blood.

THE BACKGROUND

[2] The circumstances in which the issues raised arise can be stated briefly.

The Trial Proceedings

[3] On the third date scheduled for her trial, the respondent did not appear because her counsel had apparently not reminded her of the trial date. Counsel was able to contact the respondent on the trial date, but the respondent failed to attend because of her employment obligations.

[4] The presiding judge was unimpressed with the respondent's failure to appear and her assignment of priority to her work obligations rather than to her appearance for trial. The judge noted that the offence was alleged to have occurred nearly two years earlier.

[5] The presiding judge, apprised that a s.650.01 designation had been filed by counsel shortly after the respondent's first appearance in answer to the charges, announced that he would "case manage" the prosecution. In order to do so, the presiding judge arraigned the respondent *in absentia* and entered a plea of not guilty when counsel, who appeared by designation, said she had no instructions on how the respondent wished to plead. Crown counsel elected to proceed by summary conviction.

[6] As a result of an outstanding disclosure request that had not been answered, the judge granted an adjournment request by counsel for the respondent and fixed a new trial date about three months later.

[7] The trial proceeded as scheduled after the judge dismissed an application by the respondent to recuse himself on the basis of a reasonable apprehension of bias. The trial judge convicted the respondent of operating a motor vehicle with a prohibited concentration of alcohol in her blood.

The Summary Conviction Appeal

[8] On her appeal to the Superior Court of Justice, the respondent challenged her conviction on two grounds:

i. that the trial judge erred in proceeding with the respondent's trial in the absence of the respondent, thus infringing her right to be present at trial and demonstrating a reasonable apprehension of bias against her; and

ii. that the trial judge erred in failing to exclude, on account of constitutional infringement the results of breath tests administered to the respondent.

The Decision of the Summary Conviction Appeal Judge

[9] The appeal judge concluded that the trial judge had erred in exercising his discretion under s. 803(2) of the *Criminal Code* to proceed in the absence of the respondent. The error, the appeal judge said, was the product of several factors:

i. a mischaracterization of the respondent's failure to attend as a "refusal" to appear, rather than as an inadvertent failure to appear for want of timely reminder;

ii. a failure to accord the proper weight to the reasons for non-attendance; and

iii. an invocation of s. 803(2)(a) for the purpose of administrative convenience.

[10] The appeal judge characterized the arraignment and entry of a plea as an infringement of the respondent's right to be present at her trial, allowed the appeal, quashed the conviction and ordered a new trial.

The Application for Leave to Appeal

[11] The Attorney General seeks leave to appeal from the decision of the appeal judge on three grounds involving questions of law alone. The grounds advanced allege errors by the appeal judge in her interpretation of some statutory provisions and her failure to consider the applicability of others.

ANALYSIS

Leave to Appeal

[12] It is well-settled that leave to appeal under s. 839(1)(a) of the *Criminal Code* should be granted sparingly. Two key variables inform the decision about whether leave to appeal should be granted:

i. the significance of the legal issues raised to the general administration of criminal justice; and

ii. the merits of the proposed ground of appeal.

Leave to appeal may be granted where the merits of the proposed questions of law are arguable and the proposed questions have significance beyond the four corners of the case. And leave to appeal may also be granted where there appears to be “clear” judicial error in the decision below, even if we cannot say that the error has significance to the administration of criminal justice beyond the specific case: *R. v. R. (R.)*, 2008 ONCA 497, 234 C.C.C. (3d) 463, at paras. 32 and 37.

[13] I am satisfied that this is a case in which we should grant leave to appeal. The grounds raised involve issues of statutory interpretation and the applicability of remedial provisions in summary conviction proceedings where no prejudice to the accused has occurred. The merits of the appeal are strong. The issues raised extend well beyond the circumstances of this case.

The Merits of the Appeal

[14] In my view, the reasons of the appeal judge reflect legal error and cannot stand.

The Designation of Counsel and its Effect

[15] In summary conviction proceedings, a defendant may appear personally, or by counsel, or by agent. Under s. 800(2) of the *Criminal Code*, a summary conviction court may order the defendant to appear personally and, if the court thinks fit, issue an arrest warrant to compel the defendant's attendance.

[16] On April 21, 2008, about 21 months prior to the appearance in issue, the respondent signed a designation under s. 650.01 of the *Criminal Code*. By that document, the respondent designated her counsel to appear on her behalf in any proceedings where her (the respondent's) attendance was not required by law or judicial order. That designation was in force on the date about which we are concerned.[1]

[17] Section 650.01(2) states the effect of filing a designation. Among other things, when a designation is filed, the appearance of designated counsel is equivalent to the presence of the accused, unless the presiding judge orders otherwise: s. 650.01(3)(b). It follows, in my view, that the appeal judge erred in

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[1] The form of designation used in this case is identical to Form 18 under the *Criminal Proceedings Rules* of the Superior Court of Justice. The *Rules of the Ontario Court of Justice in Criminal Proceedings* do not appear to provide a form for use under s. 650.01.

concluding that the physical absence of the respondent on the date of arraignment and entry of a plea of not guilty contravened her right of presence under s. 650 of the *Criminal Code*. The respondent, though physically absent herself, was "present" through the operation of s. 650.01(3)(b) of the *Criminal Code*.

The Procedural Proviso

[18] Even if the actual physical presence of the respondent were required to ensure compliance with s. 650(1) of the *Criminal Code*, which, in my view, it was not, what occurred plainly fell within the grasp of the curative proviso in s. 686(1)(b)(iv).

[19] Unfortunately, the appeal judge was not asked to consider and did not, on her own motion, consider the potential applicability of s. 686(1)(b)(iv) of the *Criminal Code* to the breach she found of s. 650(1) of the *Criminal Code*.

[20] The procedural proviso in s. 686(1)(b)(iv) permits an appellate court to dismiss an appeal from conviction where three conditions precedent are satisfied:

i. the error made at trial was a procedural irregularity;

ii. the trial court had jurisdiction over the class of offence of which the appellant was convicted; and

iii. the appellate court is satisfied that the appellant suffered no prejudice as a result of the error (procedural irregularity).

[21] The respondent's actual absence from arraignment was, at best, a procedural irregularity, as much as is the exclusion of an accused from part of his or her trial in proceedings by indictment: *R. v. F.E.E.*, 2011 ONCA 783, 108 O.R. (3d) 337, at para. 31; and *R. v. Simon*, 2010 ONCA 754, 104 O.R. (3d) 340, at para. 122.

[22] The presiding judge had jurisdiction over the class of offence with which the respondent was charged. Both offences could be prosecuted by indictment or by summary conviction. Once the trial Crown had elected to proceed by summary conviction, the judge had jurisdiction over the class of offence as a "summary conviction court" under s. 785(1) of the *Criminal Code*.

[23] The respondent suffered no prejudice by the arraignment and entry of the plea of not guilty in her physical absence from the courtroom. No evidence was adduced. The disclosure issue that remained outstanding required an adjournment. The adjournment was granted to a date about three months later when the trial proceeded in the respondent's actual presence.

[24] The presiding judge appears to have regarded the arraignment and entry of a plea (of not guilty) as essential for him to "case manage" what he considered a prosecution approaching vulnerability under s. 11(b) of the *Charter*. He was

wrong. Judicial case management is not dependant on arraignment or plea. Nor is it the exclusive preserve of the trial judge or a judge “seized” of a case.

[25] This case was a routine alcohol-driving prosecution: two prosecution witnesses and a couple of exhibits. The only “case management” required was selection of a trial date in consultation with counsel and the trial co-ordinator.

The Additional Grounds

[26] On the summary conviction appeal, the respondent sought to set aside her conviction on two other grounds. She argued that the conduct of the trial judge on the arraignment and entry of the plea, and later on a motion for recusal or mistrial, gave rise to a reasonable apprehension of bias. She also contended that the trial judge was wrong in failing to exclude evidence of the results of two breath tests administered shortly after the respondent’s arrest. The appeal judge rejected both arguments.

[27] On the hearing of this appeal, Mr. Posner relied upon his written submissions on these issues as a basis upon which we should dismiss the appeal, even if we considered the appeal judge was wrong in her decision about the breach of the respondent’s right of presence.

[28] I am satisfied that the appeal judge’s disposition of these additional grounds was correct.

CONCLUSION

[29] In the result, I would grant leave to appeal, allow the appeal, set aside the order of the appeal judge, and restore the conviction recorded and sentence imposed at trial.

Released: May 25, 2012 “JL”

“David Watt J.A.”

“I agree John Laskin J.A.”

“I agree K. Feldman J.A.”