R. v. Currado

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COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Currado, 2023 ONCA 274
DATE: 20230425
DOCKET: C69172

Doherty, van Rensburg and Harvison Young JJ.A.

BETWEEN

His Majesty of the King

Respondent

and

Achille Currado

Appellant

Mark C. Halfyard and Colleen McKeown, for the appellant

Rebecca De Filippis, for the respondent

Heard: April 4, 2023

On appeal from the convictions entered by Justice Robert W. Rogerson of the Ontario Court of Justice on September 30, 2019, and from the order dismissing an application to stay the proceedings, dated February 3, 2021.

Doherty J.A.:

OVERVIEW

[1] The appellant submits that the charges against him should have been stayed as an abuse of process. The trial judge disagreed. I agree with the trial judge and would dismiss the appeal.

PROCEEDINGS AT TRIAL

A. The Merits of the Allegations

[2] The appellant, a police officer employed by the London Police Service ("LPS"), was charged with three offences:

- breach of trust;
- conspiracy to commit breach of trust; and
- attempt to obstruct justice.

[3] The Crown alleged that the appellant accessed and disseminated confidential police information to unauthorized sources over several months. The Crown further alleged that the appellant attempted to obstruct justice by using his position as a police officer to surreptitiously secure the release of a person in the custody of the LPS.

[4] At trial, the Crown presented its case largely by way of an Agreed Statement of Fact. Almost all of the conduct relied on by the Crown to establish the alleged offences was not disputed. The appellant testified and offered exculpatory explanations for his actions.

[5] The appellant testified that he came under the influence of a person named "Darko Jovanovich", who eventually convinced him to provide confidential police information to Darko and others identified by Darko, purportedly to assist in a secret ongoing corruption investigation being conducted by a well-known lawyer. The appellant indicated that he believed he was acting for a proper police purpose when he turned over at least some of the

confidential information to Darko and others at the direction of Darko. The appellant acknowledged that he subsequently learned that Darko was a "con man" and there was no investigation going on and no well-known criminal lawyer conducting that investigation. The trial judge disbelieved the appellant's testimony as to his state of mind.

[6] The appellant also advanced a duress defence for at least some of his actions. He claimed that at some point his relationship with Darko soured and Darko began to threaten him. According to the appellant's evidence, he continued to provide confidential information to Darko because he was afraid of him. The trial judge disbelieved this part of the appellant's evidence.

[7] The trial judge gave detailed reasons for judgment in which he reviewed the evidence at length. Nothing in his reasons is challenged on this appeal.

B. The Abuse of Process Claim

[8] Immediately before the trial was to commence, the appellant indicated that he proposed to bring an abuse of process application based on the prosecution's failure to make appropriate disclosure and the loss of certain material evidence. The appellant argued that the non-disclosure and loss of material evidence was deliberate and demonstrated the *mala fides* of the LPS. He contended that the actions of the LPS resulted in significant prejudice to him, and a breach of his rights under s. 7 of the *Canadian Charter of Rights and Freedoms*. The appellant argued that a stay of proceedings was the only appropriate remedy in light of the LPS's misconduct.

[9] In a ruling dated July 15, 2019, the trial judge declined to consider the merits of the abuse of process application, as it would have necessitated an adjournment of the trial. He advised the appellant that the application could be renewed post-conviction, if the appellant was convicted.

[10] After the trial judge convicted the appellant on all charges, the appellant did renew the abuse of process application. The appellant made two submissions. First, he renewed the

argument made prior to the commencement of the trial, that the LPS misconduct had rendered the trial unfair. Second, the appellant advanced a brand new abuse of process argument. He submitted that the LPS had assumed conflicting roles as investigator and victim in the same proceeding and, that by assuming those inherently conflicting roles, the LPS had tainted the proceedings, such that his trial was offensive to societal notions of fair play and decency and compromised the integrity of the justice system. The appellant maintained that the abuse of process flowing from the LPS conduct required a stay of proceedings, despite the absence of any unfairness to the appellant in the conduct of the trial.

[11] The trial judge rejected both arguments. He found that there was no non-disclosure of material information in the control of the LPS. He also found that there was no deliberate destruction of any material information, but only some carelessness in the handling of electronic devices seized by the LPS, which may have "theoretically" caused some loss of data. The trial judge observed that by the end of the abuse of process application, the defence had abandoned any claim that the conduct of the LPS had caused any unfairness in the trial, or compromised in any way the appellant's right to make full answer and defence.

[12] The trial judge understood the appellant's second argument as resting on the assertion that the investigation by the LPS of one of its own officers inevitably placed the LPS in a conflict of interest, requiring that the investigation be transferred to some other police force. The trial judge observed that the LPS had turned the matter over to the Ontario Provincial Police ("OPP") before charges were laid, but that the appellant took the position that the transfer should have occurred much earlier in the investigation and, in any event, that the LPS remained very involved in the investigation even after the OPP took over.

[13] The trial judge acknowledged that there could be situations in which it would be an abuse of process for a police service to investigate a criminal allegation against one of its own members. The trial judge held, however, that the determination of whether an abuse existed would "depend on the facts of the individual circumstances." He went on to find no

circumstances in this case to support the conclusion that the investigation by the LPS rendered the trial an abuse of process.

THE ARGUMENTS ON APPEAL

[14] The appellant does not renew the first abuse of process argument made at trial. He accepts the trial judge's finding that there was no deliberate non-disclosure or loss of material evidence. The appellant does not suggest his trial was in any way unfair.

[15] The appellant does, however, renew the second argument made at trial. He submits that the involvement of the LPS in the investigation through to the trial resulted in a breach of his rights under s. 7 of the *Charter* and places this case in what the jurisprudence refers to as the "residual" category of abuse of process. That category captures those unusual situations in which, although the state conduct created no actual unfairness to an accused, it did "risk undermining the integrity of the judicial process": *R. v. Babos*, 2014 SCC 16, [2014] 1 S.C.R. 309, at para. 31.

[16] In describing the second, or residual category, of abuse of process, Moldaver J., in *Babos*, said, at para. 35:

> [W]hen the residual category is invoked, the question is whether the state has engaged in conduct that is offensive to societal notions of fair play and decency and whether proceeding with a trial in the face of that conduct would be harmful to the integrity of the justice system. To put it in simpler terms, there are limits on the type of conduct society will tolerate in the prosecution of offences. At times, state conduct will be so troublesome that having a trial – even a fair one – will leave the impression that the justice system condones conduct that offends society's sense of fair play and decency. This harms the integrity of the justice system. [Emphasis added.]

[17] *Babos* uses strong language. That language tells me that resort to the residual category of abuse of process to stay an otherwise proper criminal trial will seldom be appropriate. There is a significant difference between state conduct which is unwise, unnecessary, inappropriate, or even improper, and state conduct that goes so far as to be properly characterized as "offensive to societal norms of fair play and decency".

[18] For example, in this case, a finding on the abuse of process application that it would have been better for the LPS to turn the investigation over to the OPP at a much earlier stage, or even a finding that the LPS was wrong in not turning the matter over to the OPP at an earlier stage, would not automatically place the LPS conduct within the residual category of the abuse of process doctrine. Not every state misstep or failure to comply with the various duties and obligations placed on the prosecution will be sufficiently serious or significant to justify a finding that the state conduct has so offended notions of fair play and decency as to undermine the integrity of the justice system.

[19] Counsel on appeal submits that the trial judge misconstrued the appellant's argument. Counsel contends that the abuse of process did not arise out of the appellant's status as a member of the LPS. Nor did it necessarily arise out of the particular offences alleged. Counsel submits, however, that when, as in this case, the offences targeted the misuse of LPS confidential sources and other key investigative assets, LPS became a victim of the crimes. LPS's dual status as an investigator and a victim created an inherent or institutional conflict that would inevitably compromise the integrity of the trial process.

[20] In her helpful submissions, counsel argued that a reasonable person, fully apprised of the circumstances, would conclude that members of the LPS could not maintain the objective even-handed approach to the investigation of crime which the Canadian public expects of police officers. On counsel's argument, the conduct of the appellant resulting in the charges cut too close to the bone to reasonably expect the LPS to remain objective and even-handed throughout the investigation.

[21] The appellant's submission rests on the characterization of LPS as a victim of the offences and on the contention that, as the victim, LPS would not be seen by the reasonable observer as capable of maintaining the objectivity and even-handedness expected of the police when investigating crimes. I do not accept either premise of the argument.

[22] The term "victim" is defined in s. 2 of the *Criminal Code*, R.S.C. 1985, c. C-46, as "a person against whom an offence has been committed". The offences for which the appellant

was convicted are not offences against the LPS. Rather, they are offences categorized under Part IV of the *Criminal Code* as "Offences Against the Administration of Law and Justice". The Crown is not required to prove that the LPS suffered any harm or other loss.

[23] The appellant places considerable emphasis on the "Victim Impact Statement" filed by the LPS at sentencing. Counsel maintains that the document demonstrates that LPS saw itself as the victim of the appellant's offences. The document sets out various ways in which the appellant's conduct potentially compromised the ability of the LPS to investigate criminal activity. The information in the document was relevant to sentencing, in that it spoke to the seriousness of the offences. The same information could have been put before the court by way of submissions from the Crown. The description of the document as a "Victim Impact Statement" is a harmless misnomer.

[24] The appellant also places reliance on the Supreme Court of Canada's judgment in *R. v. Lippé*, [1991] 2 S.C.R. 114. He submits that the institutional bias described in *Lippé* finds a counterpart in this case in the LPS's institutional conflict of interest arising out of its role as victim and investigator.

[25] Institutional bias, as described in *Lippé*, can have application in the context of an abuse of process claim based on the residual category. A conflict giving rise to an abuse of process within the residual category can arise where the conflict flows from generally applicable statutory mandates or structures, and not from any concerns particular to a specific fact situation. Section 19(2) of the *Special Investigations Unit Act, 2019*, S.O. 2019, c. 1, Sched. 5, which requires that police forces not investigate member police officers for certain serious offences, can be seen as a statutory recognition that the risk of institutional bias, either for or against a charged officer, is, in the circumstances addressed by the Act, so serious as to preclude a police force from investigating the matter.

[26] Beyond describing the concept of institutional bias, *Lippé* is of no assistance in this case. *Lippé* involved a challenge under s. 11(d) of the *Charter* to the independence and impartiality of municipal courts in Québec. Section 11(d) applies to courts who are adjudicating

charges against individuals. The concepts of impartiality and independence, as considered in *Lippé*, have no application to the LPS, an investigative arm of the administration of justice.

[27] The duties and obligations of police investigators to persons under investigation are found primarily in the law pertaining to the torts of malicious prosecution and negligent investigation. As an investigator, LPS owed a duty to the appellant to investigate the allegations as a reasonable police officer would do in all the circumstances, taking into account all of the available evidence, both inculpatory and exculpatory: *Hill v. Police Services of Hamilton-Wentworth*, 2007 SCC 41, [2007] 3 S.C.R. 129, at para. 73. There is no claim made on appeal that the LPS investigation was not full, objective and even-handed.

[28] In the context of an allegation that the continued investigation of the criminal allegation by the LPS constituted an abuse of process, even though it had no impact on the fairness of the process, the question becomes – would a reasonable person, fully informed of the particulars, and looking at the matter realistically and practically, come to the conclusion that the members of the LPS could not perform, or could not be seen to perform, their investigatory duties in a reasonable, objective, and even-handed manner: *Lippé*, at pp. 141-145.

[29] We were not referred to any case in which a court held that the failure of a police force to turn an investigation over to an outside police force on its own, and without regard to the actual fairness of the process, constituted an abuse of process.

[30] Perhaps *R. v. Grant*, 2020 ONSC 2423, provides the case closest on its facts to this case. In *Grant*, the trial judge found that the prosecution of a police officer, who was alleged to have committed an assault while on duty, amounted to an abuse of process. The trial judge gave many reasons for coming to that conclusion, including the failure of the police force to refer the investigation to an outside force. The other grounds relied on by the trial judge arose out of the specific circumstances of the case and the impact of the prosecution conduct on the fairness of the accused's trial.

[31] On appeal, the Summary Conviction Appeal Court ("SCAC") reversed and sent the matter back to the trial court. The SCAC found that the trial judge had made several errors. In respect of the failure to refer the matter to an outside police force, the SCAC said, at para. 54:

> There is no requirement for the [police force] to bring in an outside Police Service to conduct a criminal investigation of one of their own. That in itself does not demonstrate a bias. A review of the details of the investigation that was conducted is the most important consideration as to whether the [Police Service] conducted themselves in a manner that a reasonable person could conclude that their investigation was appropriate.

[32] I do not suggest that *Grant* provides a full analysis of the submission advanced by the appellant. It does, however, offer support for the approach taken by the trial judge in this case. Like the trial judge, the SCAC in *Grant* proceeded on a case-by-case basis in which "a review of the details of the investigation that was conducted, is the most important consideration".

[33] The other cases put before the court, while helpful, are not abuse of process cases. Some of them involve negligence or malicious prosecution allegations in which conflicts of interest particular to the circumstances, formed part of the evidentiary record relied on by the plaintiffs in support of their tort claims: see e.g. *Johnson v. Coppaway*, 238 D.L.R. (4th) 126 (Ont. S.C.) Those cases do not advance the appellant's argument.

[34] The appellant also referred to *Duff v. James*, 2016 ONSC 3737, aff'd 2017 ONCA 606, 416 D.L.R. (4th) 645. In *Duff*, the motion judge exercised a statutory power to direct that the OPP, rather than the local police force, enforce a family law order the judge made. The motion judge directed the OPP to enforce the order because the subject of the order was a member of the local police force and there had been difficulties enforcing earlier orders. A judge's exercise of a statutory power aimed at facilitating the effective enforcement of court orders does not engage any of the considerations relevant on the analysis of an abuse of process claim.

[35] The appellant submits that the actual conduct of the trial was irrelevant because the nature of his abuse of process claim did not depend in any way on the fairness of the trial. The

appellant is correct that the residual category of abuse of process does not look to the fairness of the process for demonstration of the abuse. I do not, however, agree that the conduct of the trial, especially in a case like this one, where the trial actually was completed before this abuse of process was alleged, is irrelevant.

[36] The Crown's case was introduced largely by way of an Agreed Statement of Fact. There was essentially no challenge to the facts as adduced by the Crown, and no claim that the facts were in any way unreliable. The appellant's defence was based on his state of mind. He testified that he honestly believed that what he was doing was in furtherance of legitimate police goals. I find it difficult to accept that the LPS was in an inherently untenable conflict of interest when, even on the appellant's evidence, the investigation produced an accurate picture of the relevant events. The rejection of the appellant's exculpatory explanation for those events cannot give rise to any concern about the fairness of the investigation.

[37] The absence of any suggestion at any point in the trial by experienced trial counsel that the LPS was in a conflict of interest also undercuts, at least to some degree, the suggestion that any reasonably informed person in the circumstances, looking at the matter realistically and practically, would have come to the conclusion that the trial of the appellant so offended societal notions of fair play and decency as to amount to an abuse of process. Presumably, trial counsel had the attributes ascribed to the reasonable person. He saw nothing inherently offensive or unfair about the participation of the LPS in the investigation. The inherent conflict in the roles played by the LPS and the consequential appearance of bias apparently only manifested itself when the appellant retained new counsel after he had been convicted.

CONCLUSION

[38] The appellant has failed to demonstrate any abuse of process. In so holding, I do not, however, diminish the care a police force must exercise in determining whether, in the circumstances of a particular case, the interests of justice would be better served by asking an outside police force to take over an investigation. Police services are alive to conflict concerns and most have written guidelines in place to structure their consideration if, and when, an

outside force should be brought in to an investigation. An example of the guidelines is found in *Grant*, at para. 21.

[39] The LPS was alive to the potential risks associated with its conduct of the investigation. It chose to turn carriage of the matter over to the OPP before any charges were laid. It may be that the LPS should have sought the assistance of the OPP earlier than it did, and it may be that members of the LPS should have played a less active role after the OPP became involved. However, even if one assumes an error in judgment by the LPS, that error is not sufficiently serious to render the criminal prosecution of the appellant an abuse of process.

[40] The appeal is dismissed.

Released: "April 25, 2023 DD"

"Doherty J.A."
"I agree. K. van Rensburg J.A."
"I agree. A. Harvison Young J.A."