1996 CarswellOnt 5248
Ontario Court of Justice (Provincial Division)

R. v. G. (G.)

1996 CarswellOnt 5248, 34 W.C.B. (2d) 158

Her Majesty the Queen, Complainant and G.G., Accused

Bean Prov. J.

Oral reasons: November 12, 1996
Docket: Y-953006

Counsel: *Ms. K. Dalrymple* and *Ms. E. Penalagan*, for the Complainant.
Mr. D. Midanik, for the Accused.

Subject: Criminal

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Criminal law --- Constitutional issues in criminal law — Charter of Rights and Freedoms — Rights and freedoms — Arbitrary detention or imprisonment

Age of accused being in dispute due to conflicting evidence — Crown first proceeding against accused in youth court and then adult court — Accused later found to be young person and applying for stay of proceedings — Crown and police actions resulting in young person being detained as adult for five weeks — Actions warranting stay of all charges against accused — Young Offenders Act, R.S.C. 1985, c. Y-1 — Canadian Charter of Rights and Freedoms, ss. 7, 9, 11.

The accused, who was arrested on a number of serious charges, claimed to be a young person within the meaning of the *Young Offenders Act*. An information laid against the accused on previous charges contained a sworn statement by the informant that he had reasonable and probable grounds to believe that the accused was a young person, and the Crown proceeded against him in youth court. However, the Crown then obtained documentary evidence of the accused's birth date, submitted to immigration authorities by the accused's father, which showed the accused to be an adult. The Crown chose to rely on that evidence to proceed against the accused in adult court.

The accused was later found to be a young person within the meaning of the Act, and the charges against him in adult court were quashed. Defence counsel alleged that the Crown then breached an undertaking, given by both a police officer and Crown counsel, that in return for the accused surrendering on youth court charges, the Crown would not show cause for detention, and would recommend that the accused be released on recognizance. Crown counsel maintained that the undertaking was given only by the police officer and not by the Crown, and was therefore not binding on the Crown.

The accused applied for a stay of proceedings, alleging breaches of his rights under ss.7, 9 and 11 of the *Canadian Charter of Rights and Freedoms*.

Held: A stay of proceedings was granted.

The Crown proceeded against the accused as an adult when it should have proceeded against him as a young person. Youth court proceedings were already being taken against the accused as well as his co-accused, and there was a clear issue as to his age from the time of his arrest. The police were not acting in good faith, as they had disregarded the only sworn evidence available as to the age of the accused. The Crown never spoke to the accused's father with respect to the immigration information regarding the accused's age. The Crown should have withdrawn the adult information, as there was a real possibility that if it proceeded under the circumstances, the rights of the accused would be infringed. The Crown failed to exercise its discretion in a manner that would have prevented violation of the accused's *Charter* rights, and which in fact did violate his *Charter* rights by causing a young person to be detained as an adult for five weeks.

Defence counsel had 20 years' experience in criminal law matters, and had made notes indicating that he received the undertaking not to seek a detention order from both Crown counsel and the police officer. The officer's notes did not indicate whether Crown counsel was present at that meeting. The Crown failed to call the Crown counsel in question, and it could thus be inferred that her evidence would not assist the Crown. The evidence established that the accused was detained for two weeks because of a breach of undertaking by the Crown.

Nothing could be done to remedy the harm caused to the accused by his unlawful detention. This was one of the clearest of cases where the only appropriate remedy for the breach of the accused's rights was a stay of proceedings.

Table of Authorities

Cases considered by *Bean Prov. J.*:

R. v. O'Connor, [1996] 2 W.W.R. 153, [1995] 4 S.C.R. 411, 44 C.R. (4th) 1, 103 C.C.C. (3d) 1, 130 D.L.R. (4th) 235, 191 N.R. 1, 68 B.C.A.C. 1, 112 W.A.C. 1, 33 C.R.R. (2d) 1 (S.C.C.) — applied

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B of the Canada Act 1982 (U.K.), 1982, c. 11
s. 7 — considered

s. 9 — considered

s. 11 — considered

Criminal Code, R.S.C. 1985, c. C-46
Generally — referred to

Young Offenders Act, R.S.C. 1985, c. Y-1
Generally — considered

APPLICATION by accused young offender for stay of proceedings.

***Bean Prov. J.* (orally):**

1 I had hoped to be in a position to deliver extensive oral reasons this morning; but, due to a domestic emergency which occurred over the weekend, I am not. What I propose to do is deliver relatively brief reasons and then to deliver further written reasons. I do not propose to review the facts extensively this morning, nor to review the case law, but to simply give you in essence my conclusions and the factors which led to those conclusions and the result.

2 This is a motion by the young person, who is charged with five serious offences under the *Charter*, for remedies which he alleges ought to be provided for breaches of his rights under Sections 7, 9 and 11 of the *Charter*. They principally, in my view, relate to a deprivation of his liberty alleged to be not in accordance with the principles of fundamental justice, and to a detention alleged to be arbitrary.

3 The facts are essentially not in dispute, except for one crucial issue, an undertaking, which I will reach in a moment.

4 With regard to the undertaking, the Crown admits that an undertaking was in fact given, but alleges that it was not given by a Crown attorney but by a police officer. It is common ground that the undertaking can only be binding upon the Crown if it was in fact given by a Crown attorney.

5 The facts are that when the young person was arrested on these charges he communicated that he was of an age which would make him a young offender, and he has never said anything else. There was confusion as to his age, and eventually the Crown obtained a birth date which would have made him an adult. This birth date was shown on documents filed by the young person's father in an immigration matter. The Crown then proceeded on the basis that the young person was in fact an adult, and indeed the young person was charged with obstruction for giving a false birth date.

6 In my opinion, the Crown proceeded against the young person as an adult when it should have proceeded against him as a young person. It is common ground that at the time these charges were laid the Crown was already proceeding against the young person in youth court as a young offender. At the time these charges were pursued against the young person in the adult court, his co-defendants on these charges were all being proceeded against in the youth court. There was a clear issue as to the age of this young person from the time of the arrest on these charges, which resulted in the obstruction charge.

7 In my opinion, the police were not acting in good faith in prosecuting the young person in adult court, and not in youth court, because they disregarded the only sworn evidence as to his age which was available to them. This was contained in an information sworn on the previous charges, in which the informant swore that he had reasonable and probable grounds to believe that the young person was in fact a young person.

8 The only evidence upon which the Crown relied, in terms of documentary evidence, was the document supplied to them by Immigration. It is clear on the evidence that that information was given to the Immigration Department by the father, and it is clear that, since the mother was dead, that the only person who could give any information which would be at all reliable with regard to the birth date of the young person would be the father, and yet the Crown and the police made only one, abortive attempt to contact the father and thereafter never spoke to him with regard to the issue.

9 In addition, I am fortified in that opinion by the fact that both police officers involved in this matter stated under oath that they believe that the decision of Judge Cadsby, who found that the young person was in fact a young person within the meaning of the Act, was wrong, and that they still believe that the young person is in fact an adult.

10 In my opinion, when faced with these circumstances, the Crown should have withdrawn the adult information and proceeded to establish the age of the young person in a youth court, because there was no possibility of infringing the young person's rights if proceeded against in youth court, but there was a very real possibility and indeed a probability that if they proceeded in adult court the young person's rights would be infringed. This might result, as it did in this case, in his incarceration in an adult facility and the loss of the other procedural and substantive remedies granted to young persons in the *Young Offenders Act*, and in the present climate a very likely denial to him of legal aid. It would subject him to *Criminal Code* sentences, and would remove from him the possibility of alternative measures. In addition, in this case the balance of convenience indicated that the matter ought to have been proceeded with in youth court, because there were existing charges against the young person in youth court which would have had to have been dealt with there regardless of the outcome of any enquiry as to his age, and the co-defendants in this matter were all charged in youth court.

11 I cannot see, and none was given to me, either in submission or in the evidence, any real benefit to either the Crown or to the administration of justice in proceeding in the adult court as opposed to the youth court.

12 In my opinion, the police and the Crown had a discretion to exercise in these circumstances from the moment that they arrested and charged the young person until this matter appeared before me. In my opinion, when they have a discretion as to where to charge, that discretion must be exercised in a manner which will prevent the infringement rather than provide the possibility for the infringement or breach of the young person's *Charter* rights.

13 In addition, the young person alleges that the Crown sought a detention order in breach of an undertaking to the young person's counsel that the Crown would not do so. There is clearly a conflict on the evidence with regard to whether or not an undertaking was given to the Crown. As I indicated, it is common ground that the undertaking was given to the defence counsel, Mr. Winter, by the police officer, Constable Lambert.

14 Mr. Winter states that he spoke to the police constable and worked out an agreement that, since the young person had been released from adult detention because the adult charges had been quashed, he would surrender himself the next day on Y.O.A. charges which would replace the adult charges. As part of that bargain, the Crown undertook not to show cause for detention and to recommend that the young person be released on a recognizance, subject to conditions, some of which were agreed.

15 Constable Lambert agrees that this undertaking was reached with her, but denies that it was reached with the Crown attorney. She gave evidence that Ms. Borsanyi, who was the Crown attorney in question, could not have given an undertaking to Mr. Winter because they never met that day. There was therefore no possibility of Ms. Borsanyi giving such an undertaking.

16 I accept the evidence of Mr. Winter. He is an experienced criminal lawyer, with some twenty years experience. He testified, and I accept as a fact, that he knew that if he obtained an undertaking from the police only, it would not bind the Crown. He therefore deliberately sought out Ms. Borsanyi and obtained an undertaking from her. He made a note to that effect, that he had met with both Lambert and Borsanyi, and he noted in very short form the undertaking which had been given.

17 Constable Lambert's notes indicate that she met with Winter, but there is no indication at all in her notes as to whether or not she met with Ms. Borsanyi. One would have thought that if the position of the police and the Crown was that the undertaking given by the police was not binding, then Constable Lambert might have indicated circumstances under which that would not have been binding. In any event, she did not.

18 At the hearing before me, the Crown did not call Ms. Borsanyi. In my opinion, an onus to call her was placed upon the Crown when the young person raised a *prima facie* case that the undertaking existed and that it had been breached. There was no onus, in my opinion, on the young person to call Ms. Borsanyi, because he had established a *prima facie* case without Ms. Borsanyi's evidence, and because Ms. Borsanyi would undoubtedly be a hostile witness.

19 Ms. Borsanyi's evidence would, of course, have been the best evidence, aside from Mr. Winter's evidence, as to whether or not an undertaking had in fact been given. I will therefore draw the inference that the reason Ms. Borsanyi was not called by the Crown is that her evidence would not assist the Crown. In the result I find that there was in fact an undertaking given by Ms. Borsanyi to Mr. Winter that if the young person surrendered himself as agreed, which he did, that the Crown would recommend his release on a recognizance on certain conditions and, by inference at least, would not therefore proceed to show cause why he should be detained.

20 The Crown alleges that Mr. Mark, who was the Crown attorney at the detention hearing, upon which the young person was to be released in accordance with the undertaking, did not know of the undertaking. In my opinion, an undertaking given by one Crown attorney binds all Crown attorneys, and the Crown cannot rely on ignorance unless it establishes that the ignorance resulted from circumstances beyond its control. Inadvertence may excuse ignorance, but there is no evidence before me that the Crown did anything, let alone did anything inadvertently, that resulted in Mr. Mark not having knowledge of the undertaking. In any event, Mr. Mark was not called to establish that he did not in fact have knowledge of the undertaking.

21 When the young person was detained, at that point counsel appearing for the young person telephoned Constable Lane in order to ascertain why the Crown had failed to honour the undertaking, which apparently she understood was given by the police. At that point, of course, Constable Lane did not inform her that he had no knowledge of the undertaking that had been

given by Constable Lambert and not by him, but instructed her or advised her that as far as he was concerned the young person ought to be detained; and Ms. Schlesinger therefore viewed, as I understand it, the situation as one on which nothing more could be done. In any event, she did nothing further.

22 As a result of the Crown's failure to honour the undertaking, the young person was detained from November the 10th to November the 23rd, 1995.

23 When Mr. Winter realized what had been done, he chose to bring a bail review. The young person was eventually released on consent, on essentially the terms which had been given in the undertaking. In my opinion, Mr. Winter acted reasonably under the circumstances, because contacting the Crown, et cetera, would have essentially not advanced the young person's position, because a bail review could be brought on sooner than an appeal, and of course the justice of the peace was functus.

24 In my opinion, the evidence establishes that the young person was detained as an adult for five weeks because the Crown failed to exercise its discretion in a manner which could have prevented the violation of the young person's *Charter* rights, and which in fact did violate his *Charter* rights; and secondly, the young person was detained for a further two weeks because the Crown failed to honour its undertaking to counsel.

25 In my opinion, this is one of the third classes of cases referred to by Madam Justice L'Heureux-Dubé in *R. v. O'Connor* [(1995), 103 C.C.C. (3d) 1 (S.C.C.)], at page 39, where she states:

> In addition, there is a residual category of conduct caught by Section 7 of the Charter. This residual category does not relate to conduct affecting the fairness of the trial or impairing other procedural rights enumerated in the Charter, but instead addresses the panoply of diverse and sometimes unforeseeable circumstances in which a prosecution is conducted in such a manner as to connote unfairness or vexatiousness in such a degree that it contravenes fundamental notions of justice and thus undermines the integrity of the judicial process.

26 In my opinion, Parliament, by enacting the *Young Offenders Act* and providing therein for numerous instances where young persons are to be treated differently from adults in virtually every respect, and providing young persons with additional rights over and above those provided for adults, has clearly enunciated a public policy, the breach of which would contravene fundamental notions of justice and thus undermine the integrity of the judicial process. In my opinion, there is no need then to prove actual harm in any way, the young person having been treated and detained as an adult when he was in fact a young offender, and in circumstances where the Crown and the police by their own actions caused or at least could have prevented those breaches of his rights.

27 With regard to a remedy, in my view, this is one of the clearest of cases. There is nothing which can be done to remedy the harm caused to him, to give him now the rights which he ought to have had then or to compensate him for his unlawful detention. In my opinion, the only appropriate remedy for the breaches of the young person's rights is a stay, and I will therefore order that all charges against this young person be stayed.

28 As I indicated, I will deliver further, written reasons, expanding on these reasons and dealing with the cases and the facts in detail. I hope to have those out by the beginning of next week.

29 MR. MIDANIK: Thank you, Your Honour. I'm just wondering, there was also — I addressed one point during my submissions, the issue of costs.

30 THE COURT: The conduct of the hearing before me itself, while it may have been less than satisfactory, in my opinion, was not so outrageous as to attract an order of costs. There were obviously personality difficulties between counsel, which prolonged the matter, and there was not that collegial co-operation which judges usually expect and receive.

31 However, the issues were serious and, taking into account that they reflected on the conduct of the Crown as an institution as well as that of the police, the Crown therefore had an exceptional interest in the outcome of these proceedings. In my opinion, their conduct was not such as should attract costs. With regard to the violations of the rights of the young person, a satisfactory

remedy is a stay, rather than costs, because the young person must, in my opinion, receive some benefit from the relief ordered, or else it is simply a remedy in the air. In my opinion an order of costs in these circumstances would not benefit the young person. In those circumstances an order for costs is not appropriate.

Application granted.

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