IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***R. v. Lohse***,
2009 BCSC 1899

Date: 20090922
Docket: 26434-1
Registry: Cranbrook

Regina

v.

Achim Nolcken Lohse

Before: The Honourable Mr. Justice Melnick

On appeal from the Provincial Court of British Columbia on May 26, 2009

Oral Reasons for Judgment

Counsel for the Appellant:	L. Doerksen
Appearing on his own behalf:	A. Lohse
Place and Date of Hearing:	Cranbrook, B.C. September 22, 2009
Place and Date of Judgment:	Cranbrook, B.C. September 22, 2009

[1] **THE COURT:** This is an appeal by the Crown against the decision of a Provincial Court judge, in the context of a trial confirmation hearing, to stay two charges against the accused, Mr. Achim Lohse. The two charges in question were laid on March 7, 2008, and they apparently arise out of the death of a cat. Mr. Lohse was charged with offences under s. 446(1)(a) of the *Criminal Code* and 24(1) of the *Prevention of Cruelty to Animals Act*.

[2] I am not going to go into a lot of detail about the history of the proceedings that took place, apparently before two different Provincial Court judges as far as I can gather, in pre-trial procedures that took place in the Provincial Court. They stretched out over a period of time, culminating in the action of the Provincial Court judge here appealed against.

[3] The stay of proceedings was entered on 26 May 2009.

[4] The first appearance by Mr. Lohse was apparently in April of 2008. He was not in custody and was not under any release conditions. There were a number of adjournments. Mr. Lohse selected at some point to have a French language trial, and as one might expect, because the trial was to take place in Invermere, British Columbia, that resulted in a necessary change of prosecutors so that a French language-speaking prosecutor could be brought on board.

[5] Mr. Lohse, as the transcripts that I reviewed reveal, and as he was at pains to point out to me today, has throughout indicated that he is of the belief that he is being stonewalled by the prosecution and is being denied the disclosure necessary to prepare his proper defence. That being as it may, the circumstances surrounding the stay of proceedings in this case are such that, in the view of the Crown, it was either beyond the jurisdiction of the Provincial Court judge to come to the conclusion he did and to enter a stay of proceedings during the context of a trial confirmation hearing or that, in doing so, he did not provide an opportunity for the Crown to respond to any concerns that he had.

[6] Matters, as I indicated earlier, culminated in May of this year when, at the last trial confirmation hearing held, the Provincial Court judge had apparently anticipated that the prosecutor now engaged to prosecute what was set for a one-week Provincial Court trial in French (but which the Provincial Court judge apparently thought would probably take two weeks) was not present in person at the trial confirmation hearing.

[7] Now, the trial confirmation hearing was taking place in Invermere and the Crown counsel involved apparently works out of Port Coquitlam, a not inconsiderable distance away. The prosecutor had been directed by the Provincial Court judge to be available at 1:30 on that day to address the court by telephone. Unfortunately for the prosecutor, he was delayed because of a court commitment and returned to his office while the Provincial Court judge was on the line with a staff member.

[8] It is evident from reading through the transcript of that day's proceedings that the Provincial Court judge was annoyed with the prosecutor and probably annoyed that the matter of the trial confirmation hearing was dragging out to the extent that it was.

[9] There are differences in the views of the Crown and of Mr. Lohse as to whether full disclosure has been made. It is evident from the material that has been provided to me, both in terms of the transcripts and even copies of correspondence provided to me by Mr. Lohse this afternoon, that the Crown takes the view that it has made full disclosure, at least sufficient disclosure, for the matter to go to trial, and Mr. Lohse clearly takes quite the opposite view.

[10] In the ordinary course of events, that would be a matter to be dealt with at trial in the context, arguably, of an application brought by Mr. Lohse as to whether his *Charter* rights have been denied because of a failure to disclose so that he could not properly prepare for a hearing, or whatever other reason he might choose to advance at that time.

[11] I stress that in this case Mr. Lohse did not bring on any *Charter* application whatsoever. Rather, what he wanted was to have the prosecutor cited for contempt of court, an action which the Provincial Court judge apparently was not inclined to pursue.

[12] In this case, it would appear that the remedy of the stay of proceeding was something that was taken on the motion of the Provincial Court judge himself at the end of what appears to have been perhaps a frustrating hearing for him in that he could not contact the prosecutor at the time that he had directed the prosecutor to be present by telephone. What he did say when he spoke to the prosecutor was to inform him that he had stayed the two charges for what he said were a number of reasons. The Provincial Court judge said:

> I did that for a number of reasons. The first was, that there was to be a personal appearance, not a telephone one. The second was, you weren't at the end of the telephone, and the third is, there hasn't been compliance with my order made in February, in March, or the order I made in March, now. So, for all those reasons, I am directing a stay of proceedings. Mr. Lohse has been put through enough.

[13] There was no opportunity afforded to Crown counsel to provide any excuse or reason for any delay, if indeed there had been delay, or lack of providing information to the accused. There was no finding on the part of the Provincial Court judge that Mr. Lohse had been prejudiced by a failure to make disclosure. There was no discussion whatsoever in the three reasons that he gave concerning whether he regarded whatever had taken place to be a *Charter* violation and what sort of *Charter* violation that was and what injury that may have caused to Mr. Lohse's capacity to undertake a defence and whether a remedy under s. 24(1) of the *Charter* had been considered.

[14] Crown has referred to the decision of my brother Judge Parrett in *R. v. Whitehead*, 2009 BCSC 561, and I agree with the Crown that although the facts are not on all fours, that case is of great assistance to me in this case.

[15] The reasons advanced by the Crown for appealing the decision of the Provincial Court judge is that he was sitting at a pre-trial conference and therefore was not a court of competent jurisdiction to stay the proceedings; secondly, if he did have jurisdiction to consider a breach of the court's directions or the Rules of Court, he erred in law by granting a stay of proceedings without giving the Crown an opportunity to be heard with respect to the remedy for the breach; and thirdly, there was no basis in law to grant a stay of proceedings in any event.

[16] I do not believe that it is necessary for me to decide today whether a Provincial Court judge sitting at a pre-trial conference such as this is not a court of competent jurisdiction to stay proceedings. It would be unusual for a trial to be stayed at a trial confirmation hearing, in my view, as indeed the Supreme Court of Canada makes clear in *R. v. La*, [1997] S.C.J. No. 30, that is, that these matters are most commonly and most properly dealt with in the context of a trial.

[17] Having said that, however, the error that is most readily apparent is the action of the Provincial Court judge to have effectively come to the decision that he was going to stay the proceedings without input or explanation from Crown counsel. That he did so is evident from a reading of the transcript of May 26, 2009, as a whole and, as I said earlier, may have resulted from his frustration with the proceedings that had taken place both on that day and on previous days. But in my respectful view, he had an obligation to get the input of Crown counsel by way of explanation and, further, to have dealt with what was effectively a decision made in the context of the *Charter* by giving the Crown an opportunity to be heard with respect to, at the very least, the remedy for what he may have considered to be a *Charter* breach.

[18] The decision was an unfortunate one because this matter has dragged on for some time, as Mr. Lohse was at pains to point out, and I am now going to add to the amount of time that the process is taking by allowing the appeal and remitting the matter to the Provincial Court for trial.

[19] I note, however, that given the locale of where the trial is taking place, the fact that Mr. Lohse exercised his right to have the trial conducted in French in Invermere

necessarily has added to the length of time that the process must take. That is part of the reality of the price, if I can put it that way, one pays for the benefit the law provides.

[20] So having said that, as I said, the appeal is allowed. The matter is remitted to the Provincial Court.

"Melnick J."