Court of Queen's Bench of Alberta

Citation: R v PO, 2020 ABQB 543

Date: 20200916
Docket: 181424706Q1
Registry: Edmonton

Between:

Her Majesty the Queen

Crown

- and -

PO

Accused

Restriction on Publication

Identification Ban – See the *Criminal Code*, section 486.4.
By Court Order, information that may identify the complainant must not be published, broadcast, or transmitted in any way.
NOTE: This judgment is intended to comply with the identification ban.

Reasons for Decision
of the
Honourable Mr. Justice S.N. Mandziuk

Introduction

[1] The Accused is charged with a number of offences in a 14 count Indictment. At issue here are counts 2 through 4, which allege the Accused's guilt under ss 286.2(1), 286.3(1) and 286.4 of the *Criminal Code*. Broadly speaking, these offences relate to the commercial elements of sex trade work: receiving a material benefit from the sale of sexual services; procuring a person to provide sexual services; and advertising sexual services. The Accused is alleged to have been involved in the escorting business with the Complainant, and it is from that activity that the charges have arisen.

[2] The Defence intends to challenge the constitutionality of these *Code* provisions. The substantive basis for the challenge relates to the Supreme Court of Canada's decision in ***R v Bedford***, [2013] 3 SCR 1101. The Defence's position is that the impugned sections ultimately violate the right of an individual to engage safely in the sex trade.

[3] The only issue at present is whether the constitutional challenge should be decided before or after a verdict is rendered in the trial.

[4] At the time of this decision, approximately eight weeks of trial have been completed. Another four weeks are scheduled. The expected date of completion is in January, 2021. It goes without saying that this application was not brought prior to trial. The formal notice required under s 24 of the *Judicature Act*, RSA 2000, c J-2 has not been issued.

Positions of the Defence and the Crown

[5] The Defence takes the position that the constitutional challenge should be heard and decided after all of the evidence has been entered but before the verdict is rendered. The verdict on Counts 2 through 4 will be affected by the outcome of the constitutional challenge. In essence, the Defence argues that this issue "lies at the heart" of the Accused's guilt or innocence, and in order to make findings of fact properly, the constitutionality of ss 286.2(1), 286.3(1) and 286.4 of the *Criminal Code* must be determined.

[6] The Crown's position is that the constitutional challenge should be heard and decided at the end of trial, after the verdict is rendered. The Crown advances numerous precedential, policy and practical reasons in favour of this approach. The Crown's arguments are grounded in judicial restraint and economy, the need for trial judges to avoid fragmenting and lengthening proceedings, and efficient completion of the trial.

The Law

[7] The foundational case on this timing question is ***R v DeSousa***, [1992] 2 SCR 944.

[8] In ***DeSousa***, the trial judge heard an application by the Accused to have s 269 of the Code declared invalid on the basis that it contravened s 7 of the *Charter*. The trial judge heard the motion at the beginning of the trial, before hearing any evidence (***DeSousa*** at 950).

[9] In addition to dealing with the substantive issue (which included arguments around a s 11(d) violation in addition to the s 7 determination), Sopinka J considered "the correct procedure to be followed by a judge in considering a pre-trial motion contesting the constitutionality of the provision under which an accused is charged" (at 952). Justice Sopinka underscored both the broad discretion of the trial judge and the overarching principles that apply in these situations (at 954):

> With rare exceptions that do not apply here a trial judge is empowered to reserve on any application until the end of the case. He or she is not obliged, therefore, to rule on a motion to quash for invalidity of the indictment until the end of the case after the evidence has been heard. The decision whether to rule on the application or reserve until the end of the case is a discretionary one to be exercised having regard to two policy considerations. The first is that criminal proceedings should not be fragmented by interlocutory proceedings which take on a life of their own.

> This policy is the basis of the rule against interlocutory appeals in criminal matters. See *Mills v. The Queen*, 1986 CanLII 17 (SCC), [1986] 1 S.C.R. 863. The second, which relates to constitutional challenges, discourages adjudication of constitutional issues without a factual foundation. See, for instance, *Moysa v. Alberta (Labour Relations Board)*, 1989 CanLII 55 (SCC), [1989] 1 S.C.R. 1572, and *Danson v. Ontario (Attorney General)*, 1990 CanLII 93 (SCC), [1990] 2 S.C.R. 1086. Both these policies favour disposition of applications at the end of the case. In exercising the discretion to which I have referred the trial judge should not depart from these policies unless there is a strong reason for so doing. In some cases the interests of justice necessitate an immediate decision.

[10] In ***R v Levkovic***, 2010 ONCA 830, the Ontario Court of Appeal reiterated the principles in ***DeSousa***, stating that the law in the area is "well-settled" (at paras 33-34). This approach has also been taken in cases concerning mootness, with particular emphasis on the importance of judicial economy (see ***R v Lloyd***, 2016 SCC 13 at para 18; ***Borowski v Canada***, [1989] 1 SCR 342 at 353-56; ***Nascho Enterprises Ltd v Edmonton (City)***, 2014 ABQB 569 at paras 24-45; ***Philips v Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)***, [1995] 2 SCR 97 at paras 5-11) and in criminal jurisprudence that explicitly cautions courts against deciding issues which are unnecessary for resolving the matter before the court (see ***Lloyd*** at para 18; ***R v Alcantara***, 2012 ABQB 73 at paras 42, 45; ***R v Banks***, 2007 ONCA 19 at paras 23-25). Other criminal appellate cases as well as cases out of this Court have emphasized the importance of hearing and adjudicating constitutional issues after a verdict is rendered (***R v Dikah***, 1994 CanLII 8722 (ON CA) at para 33; ***R v Hall***, 1999 ABQB 231 (CanLII) at paras 79, 81).

[11] In short, it is a discretionary matter for the Trial Judge, and each case will turn on its own facts, context and efficiencies.

Analysis and Decision

[12] I can find no reason to exercise my discretion and hear this application prior to the completion of the evidentiary phase of this trial and the rendering of a verdict.

[13] I cannot find the immediacy referred to in ***DeSousa*** as a point of departure. It is not suggested that this court is implicated in a constitutional violation. Time will not be saved, and this trial's fact-findings *may or may not* impact the constitutional determination. It is not necessary to the verdict that the constitutionality of ss 286.2(1), 286.3(1) and 286.4 of the *Criminal Code* be determined prior to fact finding. The outcome of the *Charter* challenge will not, in my view, affect the fact-finding that will be required for the determination of the Accused's guilt or innocence on the counts in question.

[14] All relevant matters considered, it is most prudent, sensible and fair to hear and decide the application between verdict and sentencing for a number of reasons. First, a trial judge is *functus* after sentencing (***R v Vader***, 2019 ABCA 191 at para 59). Second, if there is a standing issue due to the acquittal of the Accused on one or more of the three counts, it would be sensible for all concerned if the standing argument is bundled with the substantive validity argument. Third, this is a fourteen-count indictment. There are other charges that are not going to be subject to a constitutional challenge, and there is no reason to delay the trial on those charges. This approach is most consistent with the principles from the applicable case law outlined above, given the circumstances of the case.

[15] I will now proceed to discuss some of the underpinnings of this decision.

Space to Build a Factual Foundation

[16] Following ***DeSousa*** and the principles outlined above, this Court needs to ensure that it has an adequate factual foundation for adjudicating the constitutional issue. This factor is less important when parties are unlikely to call evidence to support or contest the constitutional challenge. However, if ***Bedford*** – another criminal case involving a constitutional challenge to *Criminal Code* provisions regulating sex work – is any indication, a constitutional challenge to ss 286.2(1), 286.3(1) and 286.4 of the *Criminal Code* will likely require a significant amount of evidence to argue for and against the constitutionality of these provisions.

[17] In ***Bedford***, the Supreme Court of Canada found several *Criminal Code* provisions criminalizing certain aspects of prostitution unconstitutional. The impugned provisions were held to have violated s 7 of the *Charter* by depriving sex workers of security of the person, contrary to the principles of fundamental justice (see ***Bedford*** at paras 3-5, 93, 134, 145, 159). The violation was not justified under s 1 of the *Charter* (***Bedford*** at para 163). The evidentiary record in Bedford was gargantuan: the trial judge considered over 25,000 pages of evidence amassed over two and a half years (***Bedford v Canada***, 2010 ONSC 4264 at para 84). The number and variety of expert and lay witnesses was extensive, and the affidavit evidence from the witnesses was supplemented with many studies, reports, articles, legislation, Hansard excerpts, and so on.

[18] Given that the case at bar also involves provisions regulating sex work, the evidence required to establish a factual foundation for the constitutional issue is more likely than not to be extensive.

[19] The facts found in the case before me may be relevant to the *Charter* challenge, in whole, or in part, or may be of minimum relevance. It is too early to tell. Based on what I understand to have been the evidence in ***Bedford***, there will be much more required in the *Charter* challenge than the evidence in this case.

[20] As per ***DeSousa*** and ***Levkovic***, this need for a factual foundation that may include my fact-finding indicates that the challenge should be heard at the end of the trial, after a verdict is rendered.

Avoid Fragmenting and Lengthening the Proceedings

[21] If I hear the challenge before I render a verdict, then either party could appeal the decision on the constitutional challenge before I determine the Accused's guilt or innocence. The parties could then also appeal my decision on conviction or acquittal.

[22] In addition to the Supreme Court of Canada's direction in ***DeSousa***, the Ontario Court of Appeal has disapproved of this approach in both ***Levkovic*** (as mentioned above) and in an older case, ***R v Martin***, 1994 CanLII 225 (ON CA), where the court observed that "'[w]henever possible, the trial process should not be fragmented with appeals being launched at the conclusion of each stage.'" As the Court stated when the same issue was appealed for the second time, the "'trial record should be complete so that all grounds of appeal and not only those relating to *Charter* challenges may be completely and finally dealt with in one hearing'" (***Martin***).

[23] In this case, the proceedings would be further fragmented and prolonged by the fact that the constitutional challenge would introduce an entirely new set of issues, parties, evidence, and burdens. The evidentiary standard on the challenge is the civil standard – balance of probabilities – instead of the criminal standard. As mentioned above, the parties could foreseeably call a large amount of new evidence to adjudicate the constitutionality of the provisions.

[24] I also noted above the need for the Defence to provide 14 days' written and particularized notice of the intention to challenge the legislation to the Attorney General of Canada and the Minister of Justice and Solicitor General of Alberta under s 24(1) of the *Judicature Act*. The Attorney General of Canada and the provincial Minister of Justice may then become parties to the constitutional challenge (*Judicature Act*, s 24(4)). This is a significant difference in how the proceedings will and must unfold.

[25] Overall, this factor weighs strongly in favour of hearing the constitutional challenge at the end of trial, after verdict.

Exercise Judicial Economy

[26] Courts are limited in their functions by the amount of resources they have, and as a result, they must focus on proceedings that are necessary to resolving disputes between the parties before them so that the system can function efficiently for the benefit of all members of society who wish to have access to justice. In other words, "[j]udicial economy dictates that judges should not squander time and resources on matters they need not decide" (***Lloyd*** at para 18).

[27] As Topolniski J held in ***Nascho Enterprises Ltd v Edmonton (City)***, (2014 ABQB 569 at para 35):

> Judicial economy is about the use of scarce judicial resources. The Court must assess whether the special circumstances of the case make it worthwhile to apply those resources to resolve the moot issue. Examples of qualifying special circumstances are where the decision will have a practical effect on the rights of the parties and/or where the issue to be reviewed is a recurring but time limited issue tending to evade court review (*Borowski* at paras. 35-39). However, the simple fact that a case raising the same point is likely to recur even frequently, should not by itself be a reason for hearing an appeal that is moot. Then, the preferred approach is to wait and determine the point in a genuine adversarial context, unless the circumstances suggest that the dispute will have always disappeared before it is ultimately resolved (*Borowski*, at para 36).

[28] The constitutional issue should be adjudicated when and if it will contribute to deciding the controversy between the parties. If there is no controversy which requires adjudication of the constitutional issue, then the Court should not apply itself to that issue until it is necessary to do so.

[29] The Crown could fail to prove the elements of one or more of the impugned charges beyond a reasonable doubt, resulting in a whole or partial acquittal. This could happen for reasons that are unrelated to their constitutionality. The Crown could exercise its discretion and stay one or more charges. In those events, there may be no need to hear the constitutional issue because there is no longer a relevant controversy which requires a decision on that point.

End of Trial Means After Verdict

[30] Finally, the "end of trial" in ***DeSousa*** should be interpreted as "after a verdict is rendered" because this is the best way to ensure that the principles outlined in ***DeSousa*** and ***Levkovic*** are met in this case. The Ontario Court of Appeal has provided further guidance on this point: in ***Dikah***, the Court held that *Charter* motions should be heard and decided "after the trial is completed and a verdict rendered… in accordance with the principles discussed in *R v DeSousa*" (at para 33). The Court gave the following reasons for this position:

> This procedure preserves the accused's opportunity to be acquitted where the trier of fact is not prepared to rely on the evidence which is the product of the alleged misconduct while ensuring that all issues relevant to the trial stage of the proceedings are resolved before the case winds its way through the appellate process (***Dikah*** at para 33).

[31] This is aligned with considerations of judicial economy and the emphasis in ***DeSousa*** on avoiding fragmentation "by interlocutory proceedings which take on a life of their own" (at 954).

[32] I do not know how much time will be required for the *Charter* challenge. The parties will not only be the Crown and the Accused, but possibly the Attorney General of Canada and the Minister of Justice and Solicitor General of Alberta. There will be evidence required, quite possibly, that is beyond the evidence led at trial. It makes little sense from my perspective to further delay the evidentiary phase of this trial.

Defence's Arguments Regarding Tidlund

[33] The Defence has cited ***R v Tidlund***, 2010 ABPC 29 in support of the proposition that the Accused should be able to bring a constitutional challenge after the evidentiary portion of the trial has concluded but before the trial judge makes any findings of fact on the issues at trial and before a verdict is rendered.

[34] ***Tidlund*** is distinguishable in three important ways. First, unlike in the case at bar, in ***Tidlund*** the accused challenged the constitutionality of a statutory defence in the *Criminal Code* provision itself. The accused argued that the types of evidence he could use to rebut a statutory presumption of guilt were too restrictive and thus unconstitutional. Thus, a decision on the constitutional issue was necessary to the resolution of the overall case. Because the accused's ability to rebut the presumption was affected by the impugned legislation, the Court appropriately ruled on the constitutional issue before making its findings on whether the accused committed the offence, saving time, and maximizing judicial economy.

[35] However, in the case at bar, the Accused plans to challenge the constitutional validity of three of the offences in the indictment. The legislation is presumed valid unless a party successfully challenges it. The Accused is not challenging the constitutional validity of a statutory defence within the offences. Therefore, I do not need to and (based on the principles outlined in ***DeSousa*** and elsewhere) should not decide the constitutional questions before I decide whether the Crown has proved the elements of the impugned provisions beyond a reasonable doubt.

[36] A second way that ***Tidlund*** is distinguishable arises from the fact that the Court did not need to hear extra evidence to determine the constitutional issue. That issue could be a part of argument in the trial because "all that need[ed] to be before the Court before it hear[d] submissions and rule[d] on the constitutional question [was] already before the Court" (at para

12). Thus, Judge Fradsham's decision was consistent with ***DeSousa*** because it streamlined the proceedings instead of fragmenting them. The case at bar, with potential additional parties, may require additional evidence on the constitutional question.

[37] Finally, Judge Fradsham's interpretation of the "end of the case" in ***DeSousa*** and ***Martin***, while useful in supporting his position in ***Tidlund***, is less transferable to the case at bar because it ignores the context in which Sopinka J and Griffiths J, respectively, made their comments in those cases. While this context was irrelevant in ***Tidlund***, it is relevant in the current case. The "end of the case" needs to be interpreted in line with the two overarching policy principles in ***DeSousa***, the thrust of authoritative case law interpreting and applying ***DeSousa*** (keeping in mind that ***Tidlund*** is a Provincial Court decision and this Court is not bound by it), and Griffith J's comments in ***Martin*** that other defences at trial could have rendered the constitutional challenge "entirely moot" (at para 36). This jurisprudence suggests that, in a case like this one where all the above concerns apply, the constitutional challenge should be heard after the verdict is entered – so that, among other things, if a challenge is heard, it will not be moot.

[38] The Accused's right to make full answer and defence to these charges, and the fairness of the trial itself, are not, in my view, affected by my directed timing of the *Charter* challenge.

[39] The Defence asserts that the constitutional challenge is the only defence to these particular charges. That remains to be seen. I have not heard all the evidence. The Crown has the burden of proving the Accused's guilt on these charges. Guilt may or may not be the outcome based on the evidence. There may be defences available to the Accused that arise on the evidence that are outside of this constitutional question.

[40] The trial will continue to verdict. At that point, the Accused's application will be heard and decided. Proper notice will be given to all necessary parties, in particular the *Judicature Act* notice. Any standing issues can also be argued at that point.

[41] To be clear, the effect, if any, of this timing decision is without prejudice to the intended challenge to the constitutionality of the *Code* sections that the Accused intends to bring or to any other defences that might be advanced by the Accused.

Heard on the 21st day of August, 2020.
Dated at the City of Edmonton, Alberta this 16th day of September, 2020.

S.N. Mandziuk
J.C.Q.B.A.

Appearances:

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