

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *R. v. Lohse*,
2010 BCCA 395

Date: 20100908
Docket: CA037568

Between:

Regina

Respondent

And

Achim Nolcken Lohse

Appellant

Before: The Honourable Madam Justice Saunders
(In Chambers)

On appeal from the Supreme Court of British Columbia, September 22, 2009
(*R. v. Lohse*, Cranbrook Registry, Docket 26434)

Appearing on His Own Behalf: A.N. Lohse

Counsel for the Respondent: W.J.S. Bell

Place and Date of Hearing: Vancouver, British Columbia
May 14, 2010

Place and Date of Judgment: Vancouver, British Columbia
September 8, 2010

Reasons for Judgment of the Honourable Madam Justice Saunders:

[1] Mr. Lohse seeks leave to appeal an order made September 22, 2009 by Mr. Justice Melnick of the Supreme Court of British Columbia vacating a stay of proceedings ordered by the British Columbia Provincial Court, and remitting the matter to that court for trial.

[2] The circumstances may be briefly stated. On March 7, 2008, Mr. Lohse was charged with one count of causing unnecessary pain, suffering, or injury to an animal (a cat) contrary to s. 446(1)(a) of the *Criminal Code*, and with one count of causing or permitting an animal to be or to continue to be in distress, contrary to s. 24(1) of the *Prevention of Cruelty to Animals Act*, R.S.B.C. 1996 c. 372.

[3] The matter was expected to be tried in Invermere, British Columbia. There were several adjournments of the proceedings, and hearings in which the issue of Crown disclosure arose. At some stage Mr. Lohse elected to have a French language trial. This resulted in a change of prosecutors. The prosecutor assigned to the case works out of Port Coquitlam, British Columbia, a considerable distance from Invermere.

[4] On May 26, 2009 the prosecutor had been directed by a judge of the provincial court to be available at 1:30 p.m. by telephone for a trial confirmation hearing. The prosecutor was delayed because of court commitments and was thus not available at 1:30 p.m. as required.

[5] The provincial court judge, on his own motion, stayed the proceedings, giving as his reasons that Crown counsel was not available by telephone at the specified time, and that there had been non-compliance by the Crown with two previous court orders. The judge did not give Crown Counsel an opportunity to explain his non-appearance or the Crown's perceived non-compliance with orders previously made.

[6] The Crown appealed the stay of proceedings to a summary conviction appeal judge. The summary conviction appeal judge, Mr. Justice Melnick, found that the

provincial court judge erred in staying the charges in the circumstances. He vacated the stay and remitted the charges to the provincial court for trial.

[7] Mr. Lohse's application in relation to the charge under the *Criminal Code* is governed by s. 839(1). Under that section, Mr. Lohse must establish:

- (a) the proposed ground of appeal involves a question of law alone;
- (b) the ground is of importance;
- (c) the ground has a reasonable likelihood of success; and
- (d) the interests of justice warrant the granting of leave to appeal:

see *R. v. Gaudaur*, 2010 BCCA 157.

[8] The application as it relates to the charge under the *Prevention of Cruelty to Animals Act* is governed by s. 124 of the *Offence Act*, R.S.B.C. 1996 c. 338, s. 124. That section also requires that the proposed appeal be on a question of law alone. The same criteria as applicable under s. 839 of the *Criminal Code* apply to the provincial charge .

[9] Mr. Lohse advances, as a ground for appeal, an error by the summary conviction appeal judge in concluding that the provincial court judge had not given the Crown an opportunity to provide any explanation or input prior to granting a stay of proceedings. He also seeks orders from this Court dealing with disclosure, the process in the provincial court, and orders relating to the conduct of the trial in the event that it proceeds. These latter matters are not before me on an application for leave to appeal.

[10] The basis of Mr. Justice Melnick's order was the absence of any opportunity afforded Crown Counsel to explain his unavailability at 1:30 p.m. on the telephone, and the lack of opportunity for the Crown to address its compliance with earlier orders of the provincial court.

[11] I tend to the view that the issue as framed by Mr. Lohse raises a mixed question of fact and law, and on that basis alone does not satisfy the criteria for leave to appeal. However, the Crown acknowledges that the issue of a party's right to participate in contested proceedings might be characterized as a question of law alone sufficient to satisfy the first criteria of the test. Accepting that this is so, and that the appeal could be framed so as to raise a question of law alone, are the other criteria satisfied? In my view, they are not.

[12] I am not satisfied that the appeal raises a sufficiently important issue of law, or that it has that degree of merit that warrants it being heard. A party's right to participate, and to answer criticisms directed to it, is well established. Thus the order of the summary conviction appeal judge does not depend upon a controversial proposition. I cannot conclude that either the second or third criteria are met.

[13] Last, I am satisfied that the interests of justice do not favour the appeal. It is well established that a stay of proceedings is a drastic remedy only to be granted in clear cases. In this case, in my view, the interests of justice favour the prosecution proceeding, providing to Mr. Lohse the opportunity to make full answer and defence to the charges, including raising at trial such procedural issues as he determines he should.

[14] In conclusion the application is dismissed.

"The Honourable Madam Justice Saunders"