SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Deveau, 2010 NSSC 475

Date: 20101216
Docket: Hfx. No. 331818
Registry: Halifax

Between:

Her Majesty the Queen

Appellant

v.

Tina Marie Deveau

Respondent

D E C I S I O N

Judge:	The Honourable Justice Suzanne M. Hood
Heard:	December 16, 2010, in Halifax, Nova Scotia
Written Decision:	January 27, 2011 *(Written release of oral decision given December 16, 2010)*
Counsel:	Ron Lacey, Provincial Crown, for the appellant Wayne Bacchus, for the respondent

By the Court:

Introduction

[1] I have received briefs from both the appellant/Crown and the respondent/ defence. I have read the transcript of the hearing including Judge Williams' decision on the *voir dire*. I have also read his decision on the entire matter as well as the *Charter* motion. As counsel have pointed out, his ruling on the *voir dire* at pp. 176-179 is a succinct decision. In essence, he concludes (at p. 176):

> In my opinion, the Crown at this point, having failed to file a brief in response to the Applicant's brief concerning what his position is, so that the Applicant on its examination could be aware of what the Crown's official stand is on the application, be examined accordingly.

Before that he said (on p. 176):

> So, therefore, at this point in time, having heard the Defence's evidence, the Crown ought to be estopped from calling evidence, *viva voce* evidence, on the matter.

[2] This is the basis upon which he made his decision. He did not allow the Crown to call its evidence.

[3] The matter began with a discussion between counsel and the court about whether the matter was going to be done by way of a blended *voir dire.* The Crown, as it was entitled to do, said it would not be a blended *voir dire.* The Crown's position, with which Judge Williams agreed, was the one that would carry the day. So the matter was dealt with as a stand alone *voir dire* on the *Charter* issue. There was also some discussion about the manner in which that would be conducted. Ultimately, the defence, with whom no one disagrees, has the onus of establishing, on a balance of probabilities, that there was a *Charter* breach. He began first and called one witness. The following discussion about the manner in which it would be conducted is at page 17 of the transcript where the court said to Mr. Lacey:

> **THE COURT:** ...So the Crown is not agreeing to a blended *voir dire*. All right. Does the Crown have all its witnesses present?
>
> **MR. LACEY**: Yes.
>
> **THE COURT:** Then Mr. Bacchus, you can use those witnesses for your *voir dire.*

[4] There is a subsequent exchange which is referred to in the factums. In the transcript at p. 24, line 2, Mr. Bacchus said:

> **MR. BACCHUS**: Yes, Your Honour. I had that discussion with my friend. I was just going to state that, or ask, and you've answered my question. If I do proceed on the application, which I plan on today, and calling my client, I don't believe I'm under any obligation to call all the people that I've put xxx.

I guess the sentence was not concluded, but Mr. Bacchus said quite correctly:

> **MR. BACCHUS**: I don't believe I'm under any obligation to call all the people ... in the world ...

[5] This is what he was saying. Mr. Bacchus called his client and she was on the stand for parts of two days. She was cross-examined by Mr. Lacey and there was some re-direct and then the defence closed its evidence on the *Charter* application. The Crown then indicated it was going to call its witnesses at which time Mr. Bacchus objected (p. 163 of the transcript):

> **The Court:** Any other witness on the *voir dire,* Mr. Bacchus?
>
> **Mr. Bacchus:** No, Your Honour. I tender my evidence and close my case at this time.

> **The Court:** All right. Defence closes its case on the *voir dire*. Mr. Lacey, is the Crown going to do anything on the *voir dire*?
>
> **Mr. Lacey:** Yes, the Crown is going to call some evidence, Your Honour.
>
> **Mr. Bacchus:** Your Honour, I'm going to object.
>
> **The Court:** Why?

[6] Mr. Bacchus then made his submissions and, in his introductory remarks at p. 164, he said:

> I submit that the Crown is estopped from calling any witness. There was no notice ... was given whatsoever. Like I said, they have ample time. The Crown cannot rely on the disclosure for a criminal case, because that's another matter, obviously. We're not in here. We're in a *voir dire*, and if there's no consent that evidence is not going to go into trial ... and right now there was a tough line taken by the Crown. The Defence was taken equally tough with respect to procedure. There's not going to be any evidence going in the trial proper from the Defence point of view at this point in time.
>
> So I would submit that the Crown is estopped because they were ... they were ... they were want of prosecution with respect to giving notice for their can-say of their witnesses. They in turn have to say who they're relying on to rebut our assertion that there was a violation.

[7] Mr. Bacchus made an objection. The Crown, Mr. Lacey, responded and, as I have said, Judge Williams gave his ruling. The matter continued and this is an

appeal from an acquittal. Basically, the submission of the Crown is that there was an error in law by Judge Williams in refusing to allow the Crown to call its evidence.

[8] I will begin at the end. In my view, that was an error in law. It was a discretionary decision by Judge Williams, but that discretion has to be exercised judicially. There was no authority given for exercising the discretion in the way Judge Williams did. He simply said that he accepted Mr. Bacchus's submission that there was an estoppel. He referred, in the passages from his decision which I have already read, to the fact that the Crown did not file a brief and did not give notice of the witnesses they would be calling. He said that the Crown's position was that the defence ought to have been aware of who the probable witnesses were, but the Crown had failed to file a brief. Therefore, he agreed with the position of the defence counsel that there was an estoppel.

[9] In my view, that was an improper exercise of discretion because, in my view, there was no support on the record for the fact that there was prejudice to the defence in not knowing who the witnesses would be. The Crown disclosure has been referred to. There was a brief to Judge Williams filed by Mr. Bacchus (of which no copy is in the file). One could tell from the evidence of his witness what

the issues were that she was raising. I can only assume that those were pointed out in the brief that was filed. There was reference to a Section 8 breach and a Section 10 (a) and (b) breach. It seems to me to be expected, and not a surprise, that the Crown would be responding to that and that it should have been given an opportunity to do so. It left Judge Williams in the position, having made that ruling, that the only evidence he had about the *Charter* breach was from one side only. In essence, it was almost like an *ex parte* application, although obviously the witness for the defence was cross-examined. However, the Crown had no opportunity to bring forward its side of the story to rebut the allegations of the *Charter* breach.

[10] In my view, the exercise of the discretion was improper because only one party's witnesses were heard from when the witnesses were there. Granted, some of them were no doubt there for the trial. However, the two police officers who were most intimately involved with the alleged breaches of Section 8 and Section 10 (a) and (b) were there. It should not have been considered to be prejudicial or a surprise to the defence that these witnesses would be called or that the Crown would take a position and call witnesses on the *voir dire*.

[11] I conclude that the appeal should be allowed and the matter should be remitted back for a new trial. I take Mr. Lacey's point that it would be most unusual for it to be remitted back to the same trial judge as proposed by Mr. Bacchus. In my view, that is not where it should go.

[12] I realize there is some potential that, if the matter comes to trial, Ms. Deveau would be cross-examined with respect to the testimony she gave the first time. However, it seems to me to be inappropriate, if not virtually impossible, to have the matter continue on as if the first trial had never occurred.

[13] An acquittal was entered. There has been an appeal from that acquittal which has been granted. Therefore, the matter which Judge Williams had before him, in my view, is not ongoing at this time. A new trial is ordered and the usual practice, from which I see no reason to deviate, is to set it down before another trial judge.

Hood, J.