

Date: 20120605
Docket: 11/75
Citation: *R. v. Furlong*, 2012 NLCA 29

**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL**

BETWEEN:

HER MAJESTY THE QUEEN

APPELLANT

AND:

LISA FURLONG

RESPONDENT

Coram: Rowe, White and Hoegg JJ.A.

Court Appealed From: Supreme Court of Newfoundland & Labrador,
Trial Division (General), 201001G3152

Appeal Heard: April 11, 2012

Judgment Rendered: June 5, 2012

Reasons for Judgment by Hoegg J.A.

Concurred in by Rowe and White JJ.A.

Counsel for the Appellant: Stephen R. Dawson

Counsel for the Respondent: Randolph J. Piercey Q.C.

Hoegg J.A.:

INTRODUCTION

[1] This case concerns how an accused proves a breach of his or her *Charter* right under s. 10(b).

CASE HISTORY

Facts

[2] On October 21, 2009, Lisa Furlong was driving a motor vehicle in St. John's, N.L. She was stopped by police, and after detecting indicia of alcohol consumption, the officer administered a roadside breathalyzer and subsequently gave her a breathalyzer demand. Ms. Furlong provided breath samples, which registered over the legal limit. She was consequently charged with driving with over 80 mg of alcohol in 100 ml of her blood (failing the breathalyzer) and impaired driving. The matters were set for trial.

[3] Before trial, counsel for Ms. Furlong gave notice to the Crown that Ms. Furlong would be claiming a breach of her s. 9 *Charter* right not to be arbitrarily detained.

[4] Both counsel agreed that the *Charter* application and trial would proceed simultaneously in what is called a “blended *voir dire*”. As stated in the Crown's factum, this procedure “saves time by avoiding the duplication of evidence that would occur if the accused were obliged to lead evidence of the alleged *Charter* breach by way of a pre-trial application. It also gives the accused the advantage of being able to elicit all of the evidence in support of the *Charter* application through cross-examination, rather than having to lead it directly”.

[5] The trial proceeded at the Provincial Court of Newfoundland and Labrador in St. John's. Constable Patrick McDonald was the only witness. He testified that after he gave Ms. Furlong the breathalyzer demand, he informed her of her right to counsel. He said that she told him she understood it, and that she did not wish to speak to a lawyer. Constable McDonald was not cross-examined on any aspect of his evidence regarding the information he gave Ms. Furlong concerning her right to counsel.

[6] Upon conclusion of the evidence, Ms. Furlong's counsel advised the Crown that in addition to Ms. Furlong's argument that her s. 9 *Charter* right was breached, he would also be arguing that her right to counsel as guaranteed by s. 10(b) of the *Charter* was breached. Defence counsel indicated his willingness to have the matter postponed so that Crown counsel could consider her position on the issue. Crown counsel declined a postponement. Both counsel then made their closing submissions to the court. Defence counsel included the s. 10(b) argument in his closing submission.

The Parties' Positions at Trial

[7] Ms. Furlong maintained that her right to counsel was breached because Constable McDonald did not testify that he advised her she could contact Legal Aid or provide her with Legal Aid's telephone number. She argued that Constable McDonald's evidence about the information he gave her about her right to counsel showed that her right to counsel as provided was deficient, which made the right meaningless, thus resulting in a breach of s. 10(b) of the *Charter*.

[8] The Crown argued that Ms. Furlong had not proved that her *Charter* right to counsel had been breached. The Crown agreed that evidence respecting the availability of Legal Aid and the appropriate contact information had not been elicited from Constable McDonald. However, Crown counsel maintained that just because Constable McDonald did not testify to having told Ms. Furlong that she could contact Legal Aid and how to do it did not mean that he had not done so. The Crown maintained that because there was no evidence on this aspect of the right to counsel, there was no proof that the information had not been given to Ms. Furlong, and therefore there was no basis upon which the Court could find that the right to counsel as provided to her was deficient and that a breach of s. 10(b) ensued.

The Trial Judge's Decision

[9] The trial judge decided the case on the s. 10(b) argument. He observed that there was no evidence that Constable McDonald had given Ms. Furlong the Legal Aid information. Nevertheless, he concluded that the officer's failure to testify that he gave Ms. Furlong the Legal Aid information was fatal to the Crown's case, saying at pages 37 and 38 of the transcript:

.... so in my view there basically there has been an apparent violation of Section 10 because we don't have the information to suggest otherwise, and it appears from the evidence that we have that there has been a violation and I do so find.

[10] The trial judge went on to exclude the breathalyzer certificate evidence respecting the charge of failing the breathalyzer on the basis of *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353 and dismissed both charges due to lack of evidence.

The Summary Conviction Appeal Court's Decision

[11] The Crown appealed to the Supreme Court of Newfoundland and Labrador Trial Division sitting as the Summary Conviction Appeal Court, arguing that the trial judge had effectively reversed the burden of proving the breach of Ms. Furlong's *Charter* right from Ms. Furlong to the Crown. The Crown argued that the effect of the trial judge's ruling was to require the Crown to prove that Ms. Furlong's right to counsel was not breached.

[12] The Summary Conviction Appeal Court judge concluded that there was no trial evidence which supported "that the informational component of the s. 10(b) right was complied with." He stressed the importance of the informational component of the right, and referred to *R. v. Smith*, [1991] 1 S.C.R. 714 as support for the proposition that a detainee, as Ms. Furlong was in this case, must have sufficient information about her right to counsel so as to make a valid decision as to whether to waive it. (See also *R. v. Bartle*, [1994] 3 S.C.R. 173 at pp. 190 to 194.) The Summary Conviction Appeal Court judge agreed with the trial judge that the fact that there was no evidence from Constable McDonald respecting Legal Aid information meant that Ms. Furlong's *Charter* right to counsel as provided was deficient, and that she therefore suffered a breach. In the result, he dismissed the Crown's appeal. He also ordered costs against the Crown.

The Appeal to this Court

[13] The Crown appeals the decision of the Summary Conviction Appeal Court judge pursuant to s. 839(1)(b) of the *Criminal Code*. Section 839(1)(b) permits an appeal to this Court from a decision of a Summary Conviction Appeal Court on a question of law, with leave. The Crown also appeals the costs order under the provisions of s. 676.1 of the *Criminal Code*, which also requires leave.

ANALYSIS

Leave to Appeal

[14] The test for leave to appeal under s. 839(1) of the *Code* is set out in *R. v. Newfoundland Recycling Ltd.*, 2009 NLCA 28, 284 Nfld. & P.E.I.R. 153 at para. 9:

... to obtain leave to appeal pursuant to s. 839(1):

- (a) the appeal must “be taken on a ground that involves a question of law alone”, and
- (b) the ground(s) of appeal must be such that:
 - (i) either the ground of appeal has a “reasonable possibility of success”, or
 - (ii) “the proposed question of law [has significance] to the administration of justice”.

[15] Section 676.1 of the *Code* does not stipulate the circumstances governing the granting of leave to appeal a costs order.

[16] The s. 839(1)(b) appeal involves questions of law concerning who bears the burden of establishing the breach of a *Charter* right and how such a breach is to be proved. The s. 676.1 appeal involves consideration of circumstances which warrant a costs order against the Crown. Both of these grounds of appeal raise issues which are significant to the administration of criminal justice. Accordingly, leave is granted with respect to both grounds.

The Costs Appeal

[17] Costs against the Crown are rarely ordered in criminal cases. If they are, they are usually justified on the basis of reprehensible or unfair Crown conduct, or very unique circumstances. (See *Canadian Broadcasting Corp. v. Newfoundland and Labrador*, 2007 NLCA 62, 270 Nfld. & P.E.I.R. 117 per Cameron J.A., at paras. 48 to 50, *R. v. M.(C.A.)*, [1996] 1 S.C.R. 500 at paras. 97 and 98, and *R. v. Garcia* (2005), 194 C.C.C. (3d) 361 (Ont. C.A.).

[18] In this case, the Summary Convictions Appeal Court judge gave no reasons for his costs order, and there are no circumstances showing in the

record which would justify such an order. Moreover, Ms. Furlong agrees that this ground of the Crown appeal must succeed.

[19] Accordingly, the Crown appeal against the Summary Conviction Appeal Court judge's costs order is allowed.

The Section 10(b) Charter Breach Appeal

[20] The Crown appeal of the Summary Conviction Appeal Court judge's decision that Ms. Furlong's s. 10(b) *Charter* right was breached is also allowed. The Summary Conviction Appeal Court judge erred in concluding that the absence of evidence concerning information about Legal Aid allowed him to conclude that the information about the right to counsel as given to Ms. Furlong by Constable McDonald was deficient and that consequently, she proved that she suffered a breach of her s. 10(b) *Charter* right.

[21] Section 10 of the *Charter* accords positive rights. If an accused person claims a breach of a *Charter* right, he or she must assert the right, and prove its breach on the balance of probabilities. Chief Justice Lamer explained this in *R. v. Collins*, [1987] 1 S.C.R. 265 at 277:

... The appellant also bears the initial burden of presenting evidence. The standard of persuasion required is only the civil standard of the balance of probabilities and, because of this, the allocation of the burden of persuasion means only that, in a case where the evidence does not establish whether or not the appellant's rights were infringed, the court must conclude that they were not.

[22] Ms. Furlong does not dispute that she has the burden of proving that her right to counsel has been breached. However, she claims that she has discharged her burden by virtue of Constable McDonald failing to give evidence that the right to counsel he gave her was complete. This has the effect of shifting the burden of proof to the Crown to establish that there was no breach.

[23] Proof on the balance of probabilities requires evidence. If there is no evidence respecting whether an accused has been informed of his or her right to counsel, including whether he or she has been informed of the availability of Legal Aid and how to contact it, then there is no proof that the crucial aspect of the *Charter* right was provided or not. In the absence of such evidence, a court cannot conclude that the information provided to Ms. Furlong was deficient and that her s. 10(b) right was breached.

[24] Constable McDonald did not advert to the Legal Aid information at all in his evidence, and Ms. Furlong's counsel did not ask Constable McDonald any questions about it. If Constable McDonald had testified that he had not provided Ms. Furlong with the Legal Aid information, Ms. Furlong could then rely on his evidence to prove that the information regarding her right to counsel as provided was deficient and that a breach ensued. If Constable McDonald had testified that he had given her the Legal Aid information, and Ms. Furlong disagreed with his evidence, then she would have the right to adduce evidence in support of her position, either by cross-examination of Constable McDonald or by calling additional evidence, and the trial judge would have to decide the issue.

[25] It was open to Ms. Furlong to call evidence that the Legal Aid information had not been provided to her, but in order to do so, she would first have to have asked Constable McDonald about it while he was giving his evidence. This is fair play, as required by the rule in *Brown v. Dunn* (1893), 6 R. 67 (H.L.). Ms. Furlong could then have testified herself, unless she could prove her position by calling other witnesses. This is not to suggest that Ms. Furlong would be required to testify in her own defence, although it is an open question as to whether she waives her right to remain silent when she testifies at all on a blended *voir dire*. Rather, she could choose to testify to whether she was given her full right to counsel in support of her assertion that she suffered a breach if she could not prove the breach through other means.

[26] *Charter* rights are not like the elements of an offence. An offence is a charge of the Crown against an accused person. So, the Crown always has the burden to prove each element of the charge in order to prove the offence. The right to counsel is a *Charter* right accorded to an accused. An accused must assert the right and evidence must be adduced to prove its breach, in much the same way as a plaintiff prosecutes a civil claim against a defendant, ie. a plaintiff who claims that he or she has been wronged by a defendant must adduce evidence to prove the wrong in order for the claim to succeed.

[27] In this case, the trial judge acknowledged that there was no evidence on the Legal Aid aspect of the *Charter* right. However, he erred when he inferred from the absence of evidence on the point that the information about Legal Aid had not been given by Constable McDonald to Ms. Furlong. The Summary Conviction Appeal Court judge made the same error in upholding the trial court decision. Constable McDonald's lack of testimony on the

aspect of the right to counsel concerning Legal Aid does not prove that he did not provide the Legal Aid information to Ms. Furlong. It cannot be otherwise, for as Justice Lamer said in *Collins*, a court cannot assume that things happened or did not happen in the absence of evidence. Neither can a court infer that things happened or did not happen in the absence of facts from which a reasonable inference can be drawn. Accordingly, Ms. Furlong has not proved that the Legal Aid information included in her right to counsel was not given to her by Constable McDonald and that she consequently suffered a breach of her s. 10(b) *Charter* right.

Comment

[28] This decision should not be read as an admonition against the blended *voir dire*. Cooperation among counsel in the conduct of litigation, including cooperation on trial efficiencies like blended *voir dire*s, is to be encouraged. However, procedure cannot trump substantive rights, and parties must remain alert to their legal rights, roles and responsibilities.

DISPOSITION

[29] The Crown's appeal on both grounds is allowed. In the result, the costs order from the court below is vacated and the charge of failing the breathalyzer against Ms. Furlong is remitted to Provincial Court for a new trial.

L. R. Hoegg J.A.

I Concur: _____

M. H. Rowe J.A.

I Concur: _____

C. W. White J.A.