

R. v. Hussein, [2019] O.J. No. 1532

Ontario Judgments

Ontario Court of Appeal

L.B. Roberts, G.T. Trotter and D. Paciocco JJ.A.

Heard: March 18, 2019.

Judgment: March 22, 2019.

Docket: C65954

[2019] O.J. No. 1532 | 2019 ONCA 230

Between Her Majesty the Queen, Respondent, and Ali Abdul Hussein, Appellant

(12 paras.)

Case Summary

Criminal law — Criminal Code offences — Offences against the administration of law and justice — Misleading justice — Obstruction of justice — Appeal by accused from conviction for obstruction of justice dismissed — Appellant fled Canada after being subpoenaed to testify at the murder trial as a Crown witness — Subpoena was issued improperly — Notwithstanding the non-compliance by the Registrar with the mandatory requirements for issuing a subpoena, the subpoena had to be obeyed unless set aside.

Appeal by the accused from conviction for obstruction of justice. The appellant fled Canada after being subpoenaed to testify at the murder trial as a Crown witness. The subpoena was issued improperly as the Registrar who issued the subpoena failed to make any inquiries of the requesting police officers into whether the appellant would have material evidence to give. The trial judge held that notwithstanding the non-compliance by the Registrar with the mandatory requirements for issuing a subpoena, the subpoena had to be obeyed unless set aside.

HELD: Appeal dismissed.

The appellant's wilful act of evading a subpoena and failing to appear as a witness at a murder trial where he had material evidence to give had a tendency to obstruct the course of justice. The actus reus of the offence was made out without the inquiry into the validity of the subpoena. Inquiry into the validity of the subpoena would violate the general rule that collateral attacks were impermissible. If the appellant had concerns about the validity of the subpoena, he had an effective means to challenge the court order by applying to quash the subpoena.

Statutes, Regulations and Rules Cited:

Criminal Code, R.S.C. 1985, c. C-46, s. 139(2), s. 260(1)(c), s. 505, s. 700(2)

Appeal From:

On appeal from the conviction entered by Justice Jacqueline Loignon of the Ontario Court of Justice on May 2, 2018.

Counsel

Ian Carter, for the appellant.

Katie Doherty, for the respondent.

REASONS FOR DECISION

The following judgment was delivered by

THE COURT

1 Mr. Ali Abdul-Hussein was a material witness to a killing. After being subpoenaed to testify at the murder trial as a Crown witness, he fled Canada in a deliberate attempt to avoid giving evidence. Although Mr. Abdul-Hussein was unaware of it when he fled, the subpoena was issued improperly: the Registrar of the Superior Court of Justice who issued the subpoena failed to make any inquiries of the requesting police officers into whether Mr. Abdul-Hussein would have material evidence to give.

2 After the murder trial was over, Mr. Abdul-Hussein was apprehended in England and returned to Canada. He was charged with obstructing justice "by failing to appear as a witness for a [m]urder [t]rial", contrary to *Criminal Code*, R.S.C. 1985, c. C-46, s. 139(2). At his trial, Mr. Abdul-Hussein admitted his conduct and conceded that he had the *mens rea* for the offence, but argued that the *actus reus* of the offence had not been proved since the subpoena was not issued legally.

3 The trial judge convicted Mr. Abdul-Hussein. She held that notwithstanding the non-compliance by the Registrar with the mandatory requirements for issuing a subpoena, the subpoena had to be obeyed unless set aside. Mr. Abdul-Hussein never applied to quash the subpoena. Given that he was a material witness in the murder trial, Mr. Abdul-Hussein's disobedience of that subpoena had a tendency to obstruct justice.

4 In coming to this conclusion, the trial judge reasoned by analogy from authority holding that a search warrant that is regular on its face "from the standpoint of form and jurisdiction" must be obeyed even if issued without sufficient grounds, unless it has been set aside: *R. v. Pastro*

(1988), 66 Sask. R. 241 (C.A.). This trial judge noted that this rule encourages the orderly conduct of trials, which would be disturbed if individuals could choose to disobey subpoenas instead of challenging their validity. She found that this approach is also consistent with the statutory direction in *Criminal Code*, s. 700(2), to persons served with subpoenas to attend and remain in attendance throughout the proceedings unless excused by the presiding judge.

5 Mr. Abdul-Hussein now appeals his obstruction of justice conviction. He argues that the trial judge was effectively relying on the prohibition against collateral attacks on judicial orders, which does not apply in this case because the validity of the subpoena is an element of the offence. Specifically, he urges that a failure to comply with an invalid subpoena does not have a tendency to obstruct the course of justice.

6 Alternatively, he urges that even if his attempt to rely on the improper subpoena is a collateral attack, his attack should be allowed as an exception to the general bar on collateral attacks, because the Registrar issued the subpoena without performing the required judicial function and the exception would be narrowly confined to obstruction of justice charges.

7 We do not agree with Mr. Abdul-Hussein. Mr. Abdul-Hussein's wilful act of evading a subpoena and failing to appear as a witness at a murder trial where he had material evidence to give had a tendency to obstruct the course of justice: *R. v. Houle*, 2016 MBCA 121 at para. 6. The *actus reus* of the offence is made out without the inquiry into the validity of the subpoena.

8 Such inquiry would violate the general rule that collateral attacks -- being attacks on an order "made in proceedings other than those whose specific object is the reversal, variation or nullification of the order" -- are impermissible: *R. v. Bird*, 2019 SCC 7, at para. 21. As Moldaver J. observed in *Bird*, at para. 22,

[T]he rule against collateral attacks on court orders has been consistently applied in criminal proceedings where the charge involves an alleged breach of a court order... The citizens' safeguard is in seeking to have illegal orders set aside through the legal process, not in disobeying them.

As Moldaver J. explained at para. 24, it violates the rule of law and the repute of the administration of justice to permit those presented with court orders to disobey them rather than to bring a challenge to their validity.

9 The decisions relied upon by Mr. Abdul-Hussein, *R. v. Oliveira*, 2009 ONCA 219, 243 C.C.C. (3d) 217, and *R. v. Molina*, 2008 ONCA 212, 231 C.C.C. (3d) 193, do not assist him. He asserts that those cases stand for the proposition that when the validity of a court order is an element of the offence, the collateral challenge bar does not apply. That is incorrect. Instead, those cases hold that it is not a collateral attack to defend against a charge of failing to comply with an order by relying on the failure of authorities to comply with statutory procedural protections associated with the order. *Oliveira* involved non-compliance with the requirement in *Criminal Code*, s. 505, that after issuing a promise to appear, authorities must lay the related information "as soon as practicable". *Molina* involved non-compliance with the requirement in *Criminal Code*, s. 260(1)(c), that an offender subject to a driving prohibition must be notified of the offence of failing to comply with that prohibition. Neither case involved challenges to the validity of the underlying orders themselves.

10 Nor, in our view, is this a case where an exception to the general rule should be recognized.

If Mr. Abdul-Hussein had concerns about the validity of the subpoena, he had an effective means to challenge the court order by applying to quash the subpoena.

11 Indeed, as the Crown pointed out, it is not contested that Mr. Abdul-Hussein had material evidence to give. Had he successfully challenged the subpoena before trial in this case, a new subpoena would have issued. In our view, it would turn the rationale for the rule against collateral attacks on its head to recognize an exception that would leave those who disobey orders in a better position than those who bring proper challenges.

12 The appeal is dismissed.

L.B. ROBERTS J.A.
G.T. TROTTER J.A.
D. PACIOCCO J.A.