R. v. Asselin, [2019] M.J. No. 245

Manitoba Judgments

Manitoba Court of Appeal

D.M. Cameron, C.J. Mainella and K.I. Simonsen JJ.A.

Heard: April 26, 2019.

Judgment: September 19, 2019.

Docket: AR18-30-09049

[2019] M.J. No. 245 | 2019 MBCA 94

Between Her Majesty the Queen, Respondent, and Naomi Shianne Ross (Accused), and Claude Joseph Bruno Raynald Asselin, Appellant

(60 paras.)

Case Summary

Criminal law — Contempt of court — Appeal by accused from conviction for common law contempt of court dismissed — Accused was subpoenaed as witness in second degree murder trial and refused to appear — Material witness warrant was not executed until trial had ended in acquittal — Sufficient evidence justified issuance of warrant given accused's statements to police and testimony at preliminary hearing — While process was imperfect, accused was properly detained and before court on contempt proceeding — Code's statutory contempt provisions did not oust court's jurisdiction to proceed with common law contempt — Criminal Code, ss. 9, 127(1), 708.

Appeal by the accused, Asselin, from a conviction for common law contempt of court. The accused was subpoenaed as a witness in a second degree murder trial occurring before a jury. The accused had previously given two statements to police and testified at the preliminary inquiry. Following the subpoena, the accused unequivocally indicated to the Crown that he would not meet with them, nor would he testify. The Crown obtained a material witness warrant, but was unable to execute it until after the murder trial ended in an acquittal. The accused took the position the warrant was wrongly issued, as the supporting affidavit contained insufficient information to demonstrate he was likely to give material evidence. The trial judge rejected the accused's position regarding the validity of the warrant and found no lawful excuse for not attending in response to the subpoena. The accused was convicted of common law contempt and sentenced to nine months' imprisonment, less credit. The accused appealed.

HELD: Appeal dismissed.

There was sufficient information before the Court to grant the material witness warrant, as there was evidence the accused gave two statements to police describing hearing an altercation, and leading them to the scene of the crime. Although a separate notice of motion or indictment was preferable, the accused was properly detained and before the Court on the contempt proceeding with written particulars of the charge. The jurisprudence clearly established that the statutory contempt provisions did not oust the common law jurisdiction of the superior court to deal with contempt pursuant to s. 9 of the Code. This conclusion applied equally to situations where a witness

failed to appear in answer to a subpoena as contemplated by s. 708. The sentence imposed was not unfit.

Statutes, Regulations and Rules Cited:

Criminal Code, R.S.C. 1985, c. C-46, s. 9, s. 127(1), s. 698(2), s. 708

Appeal From:

On appeal from 2018 MBQB 55.

Counsel

F.N. Coniglio, for the Appellant.

A.C. Bergen, for the Respondent.

The judgment of the Court was delivered by

D.M. CAMERON J.A.

Introduction

1 The appellant appeals his conviction for contempt of court at common law, applies for leave to appeal and, if successful, appeals his sentence of nine months' incarceration.

2 The appellant argues that the Court of Queen's Bench did not have jurisdiction over him as there was insufficient evidence before the judge who issued the material witness warrant for his arrest which ultimately resulted in him being brought before the Court for contempt. He maintains that his illegal arrest nullified his detention and the subsequent contempt proceeding. Next, he argues that the Court should have proceeded with the contempt hearing pursuant to section 708 of the *Criminal Code* (the *Code*) as opposed to its common law power preserved in section 9 of the *Code*. Finally, as noted above, he seeks leave to appeal and, if successful, appeals his sentence of nine months' incarceration.

3 For the reasons that follow, I would dismiss his appeal. There was sufficient information before the Court to grant the material witness warrant. In any event, the appellant was properly

detained and before the Court on the contempt proceeding. Section 708 did not prevent the trial judge from proceeding pursuant to his common law power of contempt.

4 The sentence imposed should be guided by sentences imposed on similarly situated individuals in similar situations. In this case, those situations include persons who refuse to be sworn or testify in murder trials or trials for serious violent offences. The trial judge imposed a sentence well within the range. He did not commit any error in law or principle and the sentence is not unfit.

Background and Proceedings

5 The appellant was subpoenaed as a witness in the jury trial of Naomi Ross (Ms Ross) for second degree murder. He had previously given two statements to the police and testified at Ms Ross's preliminary hearing. After receiving his subpoena, a series of emails between representatives of the Crown's office and the appellant were exchanged wherein the appellant indicated that he would not meet with the Crown assigned to prosecute the matter, nor would he attend court to testify at the murder trial. The trial judge described the appellant's responses to attempts by the Crown to speak with him as follows (at para 7):

* he first said he "was not available to go at all and not interested either... Sorry. Good luck with the trial";
* he next communicated that he would be on vacation that week and would not attend, stating, "... So if you have to put [out] a warrant for my arrest... Go for it. Nothing I can do, but if a warrant is issue[d] well I won't be helping you in court... That is a promise". I pause to reiterate that the trial was taking place over two weeks; and
* he last replied stating, "I told the truth the first [time] can't afford to [lose] wages anymore. You do what you have to [M]iss [the Crown]. Sorry but i ain't showing up." [sic]

6 In response to the apparent refusal of the appellant to attend court, the Crown filed a notice of motion requesting a warrant in Form 17 pursuant to section 698(2) of the *Code*. The Queen's Bench judge who granted the material witness warrant (the issuing judge) was not the trial judge. Despite efforts to execute the warrant, the appellant was not arrested until after the murder trial had been completed and Ms Ross had been acquitted.

7 As I will later explain, while the process that followed the appellant's arrest was not perfect, the appellant was advised at his first appearance in court that he was being detained as a result of contempt proceedings. At his next appearance, he was brought before the trial judge and the matter was adjourned for him to have his counsel appear. At the first appearance with counsel, the trial judge made it clear that the appellant was in custody based on the alleged contempt and that he anticipated that the matter would proceed by way of a summary process without any indictment or charges being laid. At that time, the Crown indicated that it was requesting that the Court exercise its common law power to impose punishment for contempt pursuant to section 9. By his next appearance, the appellant had filed an application requesting *habeas corpus* with *certiorari* in aid to quash the material witness warrant. The parties discussed whether the contempt proceedings should proceed pursuant to the common law, as found in section 9, or section 708, which specifically provides for contempt proceedings with an accompanying

maximum penalty in situations such as this. As there was to be a contested hearing regarding the issue, a date was set for an application for judicial interim release which was subsequently granted. The appellant's application to quash the warrant and for *habeas corpus* was not dealt with.

8 At his contempt hearing, the appellant argued that the material witness warrant was wrongly issued for his arrest because the affidavit filed by the Crown in support of its motion was insufficient in that it failed to demonstrate that he was likely to give material evidence as required by section 698(2). The trial judge summarily rejected the appellant's argument, describing it as a "mischaracterization of the evidence before the [issuing judge]" (at para 4). In his view, the issuing judge had an affidavit before him indicating that the appellant had given "two statements to police describing hearing a physical altercation at a location that led to police going to the scene" (*ibid*). He found that, while the affidavit did not state that the evidence was material, it was clear that it was. He further noted that the subpoena itself indicated that the charge was murder and stated "'it has been made to appear that you are likely to give material evidence for the prosecution'" (*ibid*). He rejected the testimony of the appellant regarding his proffered lawful excuses for not attending in response to the subpoena and convicted him of common law contempt.

9 In relation to the sentence, the issue was whether, as a superior court judge, the trial judge retained his common law authority to sentence the appellant for contempt, as preserved by section 9, or whether he was limited to sentencing the appellant pursuant to section 708. That section provides for a maximum penalty of 90 days of incarceration for failing to attend court when subpoenaed to do so. The trial judge found that his ability to deal with the matter pursuant to section 708 did not "oust or trump" his ability to deal with the contempt pursuant to section 9 (at para 17) and that "this court's inherent power to punish for contempt under s. 9 is available" (at para 21).

10 Not being bound by the limit prescribed by section 708, the trial judge sentenced the appellant to nine months' incarceration and credited him with one and one-half months of pre-sentence custody, leaving a go-forward sentence of seven and one-half months.

Grounds of Appeal

11 The appellant raises three grounds of appeal. First, he submits that the trial judge erred in finding that there was sufficient evidence to show that he was a person who was likely to give material evidence as required by section 698(2). In this regard, he argues that the trial judge erred in failing to quash the order and Form 17 warrant that resulted from those proceedings. Next, he argues that the trial judge erred in determining that section 708 did not apply to limit his ability to sentence the appellant. Finally, he submits that, should he be unsuccessful in his section 708 argument, his sentence of nine months is essentially unfit and that he should not receive a period of incarceration totalling more than 60 days.

Ground 1--Did the trial judge err in finding there was sufficient evidence to show that the appellant was a material witness at the time the warrant issued?

12 As indicated earlier, after being arrested, the appellant made an application for *habeas corpus* with *certiorari* in aid, requesting that the material witness warrant be quashed. He did not challenge the original subpoena that had been issued and served on him pursuant to section 698(1) of the *Code*, which formed the basis for the alleged contempt. The appellant contends

that, because the warrant was issued absent sufficient evidence, the entire process was flawed, including rendering his detention and the entire contempt proceeding a nullity. In support of his argument, he relies on the case of *R v Singh* (1990), 57 CCC (3d) 444. In that case, Medhurst J of the Alberta Court of Queens Bench quashed a Form 17 warrant on the basis that there was no evidence presented to the justice of the peace that *Singh* was a person likely to give material evidence. Having quashed the warrant, the Court declared all orders of detention made in relation to the warrant to be invalid.

13 The Crown argues that the trial judge did not err in finding that the information before the issuing judge disclosed that the appellant had material evidence to give at the trial. It also argues that the fact that the warrant had been executed and the trial judge had granted the appellant judicial interim release rendered moot his application for *habeas corpus* with *certiorari* in aid to quash the material witness warrant.

14 There is no allegation that the trial judge erred in his determination of the correct legal test to be applied in determining the validity of the warrant. The question for the reviewing judge (in this case the trial judge) was whether there was sufficient and credible evidence that could permit the issuing judge to authorise the material witness warrant (see *R v Morelli*, 2010 SCC 8 at para 40). The facts and inferences drawn by the issuing judge in reaching that determination are subject to review on the deferential standard of palpable or overriding error (see *Canadian Broadcasting Corp v Manitoba (Attorney General) et al*, 2009 MBCA 122 at para 22). In this case, the trial judge did not enunciate a standard of review. Nonetheless, his finding that the issuing judge "clearly . . . had evidence before him" (at para 4) of the materiality of the appellant's evidence demonstrates that he was aware that he was reviewing the decision of the issuing judge in light of the evidence that was before that judge and that he found that it could meet the required standard.

15 In this case, unlike in *Singh*, there was evidence from which the issuing judge could have concluded that the appellant was a material witness, including affidavit evidence that he had given two statements to the police regarding the murder, that he described hearing an altercation and that he ultimately led the police to the scene of the crime. It was open to the issuing judge to infer that the events were connected.

16 In addition, in my view, the appellant's argument conflates the issue of his arrest pursuant to the material witness warrant with the contempt proceedings. The warrant was not part of the contempt process. It was based on the appellant's anticipated failure to attend court to answer a subpoena that he never challenged. The warrant simply provided a means for the Crown to attempt to have him arrested and appear in court at the murder trial before the contempt occurred. In this case, the contempt occurred only after the appellant failed to attend the murder trial in accordance with the subpoena. It was always the position of the Crown and the Court that the appellant was being held separately on the contempt proceedings. As it turned out, the material witness warrant was the process by which the appellant was brought before the Court and provided the Crown with the opportunity to initiate the contempt proceedings.

17 At his first appearance in court, after briefly describing the circumstances and offering disclosure to the appellant, the Crown clearly indicated that it was asking for him to be detained in custody on the section 698(2) warrant, as well as on the contempt proceedings. At that point, the presiding superior court judge possessed the common law authority to order the appellant to be remanded in custody for contempt and adjourn the matter for him to obtain counsel (see *R v K (B)*, [1995] 4 SCR 186 at paras 10-11). Contrary to the position of the appellant, there was no

requirement for an additional warrant to have been issued when he failed to appear at the murder trial in order for him to have been lawfully detained for contempt.

18 Having stated the above, an alleged contemnor must be provided with proper notice. In my view, it would have been preferable if the Crown would have filed and served a notice of motion or indictment asking that the appellant be held in custody, specifying the basis on which it was intending to proceed and the nature of the relief that it sought.

19 In addition, written notice is preferable when, as was found by the trial judge in this case, the contempt is *ex facie* of the Court or was committed outside of the Court's knowledge, as opposed to one committed *in facie* where all the facts of the contempt are within the knowledge of the Court. (For a fuller explanation of *in facie* versus *ex facie* contempt, see Jeffrey Miller, *The Law of Contempt in Canada*, 2nd ed (Toronto: Carswell, 2016) at 25-26.) In my view, such notice would have also clarified that the Crown was initiating the proceedings, as opposed to the Court.

20 In its advisory paper, "Some Guidelines on the Use of Contempt Powers" (May 2001), online (pdf): *Canadian Judicial Council* [less than]www.cjc-ccm.gc.ca/cmslib/general/Contempt_Powers_2001_with_Header.pdf[gr eater than] (the CJC and the CJC Guidelines respectively), the CJC specifically approves of the use of such notice (see pp 13-14, 28; also see *Regina v Froese and BCTV Broadcasting System Ltd (No 3)* (1980), 54 CCC (2d) 315 at para 19 (BC CA)). In this case, formal notice could have avoided confusion regarding the procedure and penalty sought by the Crown.

21 On the other hand, the CJC Guidelines summarise that, in *Regina v Cohn* (1984), 15 CCC (3d) 150 (Ont CA), the Court addressed the issue of the right of a contemnor to know what is charged, stating (at p 28):

> It is important, however, that an alleged contemnor be informed precisely what is alleged against him or her, *i.e.* for refusing to be sworn or refusing to give evidence, or for disobeying a court order, *etc.*, and he or she should be given all reasonable particulars, especially when contempt out of the face of the court is alleged. <u>These particulars need not be in writing, for in most cases the issue can be stated orally with sufficient precision.</u>
>
> [emphasis added]

22 Thus, while advisable, the failure to file a formal notice of motion or indictment was not fatal. The notice of contempt, the intended procedure and the underlying facts were disclosed verbally. Written particulars were also provided.

23 In my view, the appellant was properly before the Court and detained on the contempt charge. While I have declined his invitation to find that the trial judge erred in refusing to quash the material witness warrant, to do so in the circumstances of this case would not have changed the fact that he was subject to the contempt proceedings.

<u>Contempt Pursuant to the Common Law and Section 9 Versus Section 708</u>

The Legislation

24 Section 9 provides:

> **Criminal offences to be under law of Canada**
>
> **9** Notwithstanding anything in this Act or any other Act, no person shall be convicted or discharged under section 730
>
> **(a)** of an offence at common law,
>
> **(b)** of an offence under an Act of the Parliament of England, or of Great Britain, or of the United Kingdom of Great Britain and Ireland, or
>
> **(c)** of an offence under an Act or ordinance in force in any province, territory or place before that province, territory or place became a province of Canada,
>
> but nothing in this section affects the power, jurisdiction or authority that a court, judge, justice or provincial court judge had, immediately before April 1, 1955, to impose punishment for contempt of court.

25 Willfully disobeying a court order such as a subpoena may constitute contempt of court at common law. In *United Nurses of Alberta v Alberta (Attorney General)*, [1992] 1 SCR 901, McLachlin J (as she then was), writing on behalf of a majority of the Court, stated (at p 933):

> To establish criminal contempt the Crown must prove that the accused defied or disobeyed a court order in a public way (the *actus reus*), with intent, knowledge or recklessness as to the fact that the public disobedience will tend to depreciate the authority of the court (the *mens rea*)

26 The "general rule" is that the state is entitled to every person's evidence (*R v S (RJ)*, [1995] 1 SCR 451 at paras 2, 277, 303; also see *Re Spencer and The Queen* (1983), 2 CCC (3d) 526 at 533 (Ont CA), aff'd [1985] 2 SCR 278).

27 In *R v Abdullah (G) et al*, 2010 MBCA 79 at paras 65-79, Hamilton JA held that service of a subpoena compels both attendance at court and the provision of testimony.

28 Section 708 provides:

> **Contempt**
>
> **708(1)** A person who, being required by law to attend or remain in attendance for the purpose of giving evidence, fails, without lawful excuse, to attend or remain in attendance accordingly is guilty of contempt of court.
>
> **Punishment**
>
> **708(2)** A court, judge, justice or provincial court judge may deal summarily with a person who is guilty of contempt of court under this section and that person is liable to a fine not exceeding one hundred dollars or to imprisonment for a term not exceeding ninety days or to both, and may be ordered to pay the costs that are incident to the service of any process under this Part and to his detention, if any.

The Positions of the Parties

29 The appellant argues that the common law power to punish for the offence of contempt of court has been circumscribed by section 708. In his view, the entire proceedings against him should have been taken pursuant to that section and the provision of authority to "[a] court, judge, justice or provincial court judge" to deal with a person to whom the section applies clearly indicates that it is applicable to a provincial superior court judge.

30 In support of his position, the appellant relies on the Alberta Supreme Court decision of *Regina v McKenzie* (1978), 41 CCC (2d) 394 (AD), wherein the Court overturned a conviction for contempt of a witness who refused to testify at a preliminary hearing. *In obiter*, Sinclair JA questioned whether the Crown could indict the accused for contempt as opposed to proceeding pursuant to section 472 of the *Code* (as it then was). In his view, that section prescribed the only way in which a recalcitrant witness at a preliminary hearing could be dealt with.

31 Next, relying on *R v Clement*, [1981] 2 SCR 468, the appellant argues that section 708 must be given meaning. In his view, to allow for common law contempt in a situation such as this renders section 708 meaningless and contrary to the interpretation of section 116(1) (now section 127(1)) provided in *Clement*. In support of his position, the appellant relies on *Abdullah*, which dealt with a charge of disobeying a court order pursuant to section 127(1) of the *Code*. Section 127(1) permits its use "unless a punishment or other mode of proceeding is expressly provided by law" (the proviso). In that case, Hamilton JA stated that, if the accused had failed to attend court instead of refusing to testify, it seemed the proviso would apply to prohibit a prosecution pursuant to section 127(1) in light of section 708 (see para 99).

32 The Crown argues that section 708 is an inclusive provision that does not exclude the power of a judge of the superior court to proceed. Rather, it conveys powers to a number of levels of court that might not otherwise have them. It distinguishes the cases that the appellant relies on in dealing with the exclusionary proviso found in section 127(1). It relies on *R v Vermette*, [1987] 1 SCR 577; *R v Publications Photo-Police Incorpore* (1988), 42 CCC (3d) 220 (Qc CA) (*Publications Photo-Police (CA)*); and *Quebec (Attorney General) v Publications Photo-Police Inc*, [1990] 1 SCR 851 (*Publications Photo-Police (SC)*), as authority for the proposition that the provisions of the *Code* that deal with contemptuous behaviours do not oust the inherent power of the superior court to deal with those behaviours pursuant to the common law offence of contempt.

33 As indicated earlier, the trial judge agreed with the Crown. He stated that section 708 "does not control these proceedings and that this court's inherent power to punish for contempt under s. 9 is available" (at para 21).

Analysis

Standard of Review

34 The parties agree, as do I, that the trial judge's decision is to be reviewed on a standard of correctness. In my view, it has not been shown that the trial judge erred in his interpretation of the common law power of a superior court to punish for contempt.

The Jurisprudence--The Common Law and the Code

35 The Supreme Court of Canada has had the opportunity to consider the interplay between

the common law offence of contempt and various provisions in the *Code* that address contemptuous behaviour. It has consistently found that those types of provisions do not oust the power of a superior court to deal with contempt pursuant to the common law.

36 For example, in *In Re Gerson/In Re Nightingale*, [1946] SCR 538, two witnesses refused to testify in a trial where they claimed that their testimony might incriminate them regarding charges on which they were awaiting trial. In that case, the superior court judge held them in contempt and sentenced them to a period of incarceration. In their application for *habeas corpus*, they argued that, rather than being held in contempt and subject to a summary proceeding, they should have been charged and tried under the applicable provisions of the *Code*, thereby entitling them to the right to make full defence. In summarily dismissing the argument, Rinfret CJC, in chambers, stated, "The power to punish for contempt is inherent in courts of superior original jurisdiction, quite independent of enactments in codes or statutes relating to their disciplinary powers" (at p 544).

37 In *Vermette*, the Court considered whether, in light of the abolishment of the common law offences found in section 8 of the *Code* (now section 9), the Crown could proceed by indictment where the accused threatened a witness outside of court, thereby committing an *ex facie* contempt. The Court held that the power to deal with contempt constituted "part of the inherent and essential jurisdiction of the courts" (at p 581). It further held that proceeding by indictment for contempt *ex facie* in the superior court had not been abolished by section 8 but, rather, was preserved by it (see paras 8-11). On the other hand, it found that proceeding by indictment pursuant to the common law power for contempt was not an offence created by the *Code*. Further, an accused could not elect to be tried before a provincial court as, unlike the superior court, that court only had jurisdiction over *in facie* contempt and not *ex facie* contempt. The Court concluded by quoting *In Re Gerson* and re-enforcing that the fact that the accused could have been charged with obstruction of justice under the *Code* did not preclude the Court from exercising its common law power of contempt.

38 The *McKenzie* case relied on by the appellant involved circumstances where the Crown filed an indictment alleging a criminal contempt against a witness for refusing to testify at a preliminary inquiry in the Provincial Court (an *in facie* contempt). In that case, the Alberta Supreme Court questioned whether the Crown had jurisdiction to do so but decided it need not determine the matter. Instead, it found that section 472(1) (now section 545) exclusively governed the situation. That section provides the circumstances under which a person may be imprisoned for refusing to testify at a preliminary hearing.

39 *McKenzie* was decided before *Vermette*. In *McKenzie*, the Court did not discuss the inherent and constitutional jurisdiction of a superior court to exercise its common law powers of contempt. Neither did it consider the inherent powers of the Provincial Court to deal with *in facie* contempt. Based on the above, in my view, *McKenzie* is of limited assistance and distinguishable on the facts of this case.

40 Next, in *MacMillan Bloedel Ltd v Simpson*, [1995] 4 SCR 725, the Court considered the constitutionality of section 47(2) of the *Young Offenders Act*, RSC 1985, c Y-1 (since repealed and replaced with the *Youth Criminal Justice Act*, SC 2002, c 1). That section purported to transfer exclusive jurisdiction to the youth court in respect of every *ex facie* contempt committed "against any other court" (at para 6). In characterising the nature of criminal contempt of court, Lamer CJC, writing for a majority of the Court, found that it had distinct characteristics from other crimes and could be "distinguished from other criminal offences" (at para 24). He said,

"While other crimes occur in society and the law merely defines or criminalizes them, contempt of court does not occur in the absence of a court" (*ibid*).

41 After considering that Parliament had the power to confer jurisdiction over *ex facie* contempt to the youth court, Lamer CJC then considered the constitutionality of the "exclusive" grant of power (at para 27) and whether it could remove the inherent jurisdiction of the superior court to exercise its power of contempt. He emphasised (at paras 37-38):

> In the constitutional arrangements passed on to us by the British and recognized by the preamble to the *Constitution Act, 1867*, the provincial superior courts are the foundation of the rule of law itself. Governance by rule of law requires a judicial system that can ensure its orders are enforced and its process respected. In Canada, the provincial superior court is the only court of general jurisdiction and as such is the centre of the judicial system. None of our statutory courts has the same core jurisdiction as the superior court and therefore none is as crucial to the rule of law. To remove the power to punish contempt *ex facie* by youths would maim the institution which is at the heart of our judicial system. Destroying part of the core jurisdiction would be tantamount to abolishing the superior courts of general jurisdiction, which is impermissible without constitutional amendment.
>
> The core jurisdiction of the provincial superior courts comprises those powers which are essential to the administration of justice and the maintenance of the rule of law. It is unnecessary in this case to enumerate the precise powers which compose inherent jurisdiction, as the power to punish for contempt *ex facie* is obviously within that jurisdiction. The power to punish for all forms of contempt is one of the defining features of superior courts. The *in facie* contempt power is not more vital to the court's authority than the *ex facie* contempt power. The superior court must not be put in a position of relying on either the provincial attorney general or an inferior court acting at its own instance to enforce its orders. Furthermore, *ex facie* contempt is not limited to the enforcement of orders. It can include activities such as threatening witnesses or refusing to attend a proceeding (see *R. v. Vermette*, [1987] 1 S.C.R. 577). In addition, the distinction between *in facie* and *ex facie* contempt is not always easily drawn (see *B.C.G.E.U.* [*v British Columbia (Attorney General)*, [1988] 2 SCR 214], *supra*), increasing the difficulty of saying one is more essential to the court's process than the other.
>
> [emphasis added]

42 Finally, as mentioned by the trial judge, the authors in The Hon EG Ewaschuk, *Criminal Pleadings & Practice in Canada*, 2nd ed (Toronto: Thomson Reuters, 2017) vol 4 (loose-leaf updated May 2017), ch 27 at paras 29:0180, 29:0272, note that the Supreme Court of Canada case of *Publications Photo-Police (SCC)* reinforced the notion that the fact that a contemptuous act may constitute a criminal offence does not prevent the Court from citing a person for contempt. In *Publications Photo-Police (CA)*, the Quebec Court of Appeal held that the fact that section 442 (now section 486) provided that a violation of a non-publication order of the identity of a complainant constituted a specific offence meant that the superior court did not have jurisdiction to hold the offender in contempt pursuant to its common law power to do so. In a one-line decision, relying on the reasons as stated in *Vermette*, the Supreme Court of Canada overturned the appellate court and restored the contempt convictions of the superior court.

43 In my view, the above jurisprudence clearly establishes that the provisions of the *Code*

dealing with various aspects of contempt do not oust the common law power of the superior court to deal with contempt pursuant to section 9. This conclusion applies equally to situations where a witness fails to appear in answer to a subpoena as contemplated in section 708. I agree with the Crown that that section should be read as inclusive, rather than exclusive. That is, it provides the powers contained therein to a number of levels of court as opposed to constituting an attempt to exclude the common law power of the superior court exercisable pursuant to section 9.

Disobey Court Order--Section 127(1)

44 The *Clement* decision relied on by the appellant dealt with the interpretation of section 116(1) (now section 127(1) of the *Code*). As stated earlier, that section provides that a person may be charged with disobeying a court order, subject to the proviso, which is "unless a punishment or other mode of proceeding is expressly provided by law". In that case, the Supreme Court of Canada held that the proviso did not operate to oust the common law jurisdiction to deal with contempt of court. In *Abdullah*, Hamilton JA summarised the findings in *Clement* as follows (at para 92):

> In *R. v. Clement*, [1981] 2 S.C.R. 468, the Supreme Court of Canada held that for the punishment or mode of proceeding to be "expressly provided by law," the punishment or other mode of proceeding must be enacted by statute law and it cannot originate from common law. Thus, a charge of common law contempt does not fall within the proviso. Section 127(1) will be "available as the basis for a charge for disobedience of a lawful court order whenever statute law (including regulation) does not expressly provide a punishment ... or other mode of proceeding, and not otherwise" (*Clement*, at p. 477). On the other hand, resort cannot be had to s. 127(1) where the *Code* expressly provides a punishment or other proceeding for the disobedience of a court order.

45 In *Clement*, when holding that the proviso in section 127(1) prohibits prosecution where other provisions of the *Code* exist that expressly provide for punishment, Estey J stated at (pp 478-79):

> It is an ancient rule of interpretation of all statutes, criminal and civil alike, that where possible a meaning should be assigned to words employed by the Legislature which will render the enactment useful or of some meaning in the practical workings of the state. In response to the submission of the respondent, it must be pointed out that there are other provisions in the *Criminal Code, supra,* which are indeed instances of other punishment or proceedings being "expressly provided" such as s. 472 which provides for punishment of persons refusing to give evidence at a preliminary enquiry. In such a circumstance, s. 116(1) would have no application as it would be excluded by its own parenthetical expression to which, in that circumstance, a meaning would be assigned.

46 Based on the above passage, the appellant argues that, in order to ascribe meaning to section 708, it must be read as excluding the common law power of a judge to proceed with contempt proceedings when a witness fails to answer a subpoena. In this regard, he also relies on *Abdullah*.

47 In *Abdullah*, the accused were charged with attempting to obstruct justice and disobeying a court order (subpoena) in circumstances where they attended court in response to a subpoena but refused to be sworn. Hamilton JA found that the proviso in section 127(1) did not operate to

prevent concurrent prosecutions for attempting to obstruct justice (see section 139(2) of the *Code*) and disobeying a court order. She observed that *Clement* and other jurisprudence that would apply the proviso did so where the "'other'" offences "refer or allude specifically to breaches of court orders" (at para 97). Unlike those "other" charges, she found that the offence of attempting to obstruct justice "contemplates many different types of conduct" (*ibid*).

48 In order to exemplify a situation where the proviso in section 127(1) might have applied, Hamilton JA stated, "I simply observe that if Abdullah or Amyotte had failed to attend court, rather than refused to testify, as required by the subpoena, it seems that the proviso would apply given s. 708" (at para 99).

49 In my view, the argument of the appellant must fail. The appellant conflates the jurisprudence regarding the proviso in section 127(1) with the inherent common law power of a superior court to punish for contempt. The proviso is a discrete provision in the *Code*. When Hamilton JA made the above statement, she was referring to the proviso and section 708 and not the ability to proceed by contempt under the common law. Indeed, in that case, the Court was careful to distinguish between contempt proceedings and a prosecution under the *Code* (see paras 86-89). There is nothing in the language of section 708 that purports to oust the common law jurisdiction of the court over contempt proceedings. I would therefore decline to interpret section 708 in the manner suggested by the appellant.

50 Based on all of the above, I would therefore dismiss this ground of appeal.

Sentence Appeal

51 The appellant's original argument was that the sentence of nine months' incarceration imposed by the trial judge was illegal as it exceeded the maximum 90-day period of incarceration provided for in section 708. Alternatively, in oral argument, he asked the Court to consider a period of incarceration totalling 90 days (including the time that he spent in pre-sentence custody). He submitted that he should have been sentenced to a period of incarceration guided by the maximum set in section 708. He referred to sentences imposed in *R v Skiline*, 1994 CarswellSask 364 (CA); and *R v Ticknovich*, 2003 ABQB 938. In *Ticknovich*, the accused was sentenced to 15 days' incarceration to be served intermittently, plus three months' probation for contempt of court for failing to appear in answer to a subpoena pursuant to the procedure set out in section 708. In *Skiline*, the accused was convicted of contempt pursuant to section 708 by a Provincial Court judge and sentenced to 10 days' incarceration. His conviction appeal was dismissed by the Saskatchewan Court of Appeal.

52 The Crown argues that the appellant did not appeal on the basis of fitness of sentence but that, in any event, the sentence was fit.

53 Burnett JA succinctly described the standard of review on a sentence appeal in *R v Rose*, 2019 MBCA 40, as "absent an error in law or in principle that had an impact on sentence or the imposition of a demonstrably unfit sentence, an appellate court must show deference" (at para 19).

54 First, I would decline to follow the *Ticknovich* and *Skiline* cases as suggested by the appellant. Each of those cases dealt with section 708 of the *Code* and neither contained an analysis of the significance of the offence or sentencing ranges. In my view, a sentence such as the ones imposed in those cases would not reflect the high level of moral blameworthiness of

the appellant in this case. In light of the facts of this case, including the planned and deliberate nature of the appellant's contempt, an appropriate sentencing range for this case should be similar to situations where contempt has been committed by a person who refuses to be sworn or provide testimony.

55 In the case of *Regina (City) v Cunningham*, 1994 CarswellSask 233, the Saskatchewan Court of Appeal described some of the factors to consider (albeit in the context of a different form of contempt) (at para 18):

> In imposing a sentence for criminal contempt the sentencing judge may properly take into consideration the extent of the wilful and deliberate defiance of the Court's order, the seriousness of the consequences of the appellant's contemptuous behaviour, the necessity of effectively terminating the appellant's defiance as required by the public interest as well as the importance of deterring such conduct in the future. Given these standards or criteria, an appellate court should respect the discretion of the sentencing judge unless error is demonstrated in balancing the various considerations. We find no such error in this case.

56 In *R v Jacob*, 2008 MBCA 7, Scott CJM, writing for the Court, stated (at paras 25-26):

> The purpose of criminal contempt is explained by Mr. Justice E.G. Ewaschuk *Criminal Pleadings & Practice in Canada*, 2nd ed., looseleaf (Aurora: Canada Law Book, 2007) as follows (at para. 29:0040):
>
> > Criminal contempt is aimed at *punishing* public acts which tend to bring the administration of justice into disrepute and interfere with the due administration of justice. It is directed at the protection of the integrity of the administration of justice. Its general purpose is to protect the fairness of the trial process.
>
> General deterrence is the principal factor to be considered when a witness refuses to testify. See *Neuburger* [*R v Neuburger*, 1995 CarswellBC 1682 (CA)]. The highest custodial sentences for contempt are imposed when a witness refuses to be sworn or to give evidence. See Clayton C. Ruby, *Sentencing*, 6th ed. (Markham: LexisNexis Canada Inc., 2004) at para. 23.445.

57 A brief review of sentences for similar offences demonstrates a range of 12 months to three years' incarceration for a first offence of contempt by persons who refuse to be sworn or testify in murder or serious violent-offence trials (see, for example, *Regina v Lamer* (1973), 17 CCC (2d) 411 (Qc CA) (one year--murder); *R v Neuburger*, 1995 CarswellBC 1682 (CA) (15 months--murder); *Jacob* (two years--murder); *R v Amyotte and Abdullah*, 2008 MBCA 48 (36 months--murder); *R v Yegin*, 2010 ONCA 238 (three years--murder); *R v McMillan*, 2011 BCSC 1537 (18 months--kidnapping and significant assault); and *R v Bidesi*, 2016 BCSC 171 (24 months--murder)).

58 In this case, the trial judge described the aggravating factors as including the fact that the trial was for a "grave personal violence offence" and the appellant's "brazen comments and attitude to prosecutors" (at para 26). He noted that the appellant effectively "dared" (*ibid*) the prosecutors to have him arrested. On the other hand, he recognised that the offence was committed out of foolish disregard for the appellant's legal and moral duty as opposed to loyalty to a gang or an individual (see para 27). In mitigation, he considered the appellant's personal history, finding him to be a contributing member of the community. He stated that he was not

considering the appellant's previous criminal record as a factor. He also did not consider the potential impact of the appellant's refusal to testify as he did not have evidence regarding that issue.

59 In light of all of the above, the trial judge did not err in principle or law and the sentence of nine months' incarceration is not unfit.

Decision

60 Based on all of the above, I would dismiss the appellant's conviction appeal. While I would allow leave to appeal sentence, I would dismiss the sentence appeal.

D.M. CAMERON J.A.
C.J. MAINELLA J.A.:— I agree.
K.I. SIMONSEN J.A.:— I agree.
