North Bay (City) v. Vaughan, [2018] O.J. No. 1809

Ontario Judgments

Ontario Court of Appeal

D.M. Brown J.A.

Heard: March 19, 2018.

Judgment: March 28, 2018.

Docket: M48246

[2018] O.J. No. 1809 | 2018 ONCA 319

Between The Corporation of the City of North Bay, Responding Party, and Joanne Vaughan, Moving Party

(29 paras.)

Case Summary

Criminal law — Regulatory offences — Application by defendant for leave to appeal dismissal of appeal from conviction and sentence for operating rental unit without a licence dismissed — Applicant did not attend trial, but was represented by counsel — Applicant pleaded not guilty, but did not contest facts — Applicant's first-level appeal, in which she alleged counsel did not follow her instructions to vigorously contest charge was dismissed and applicant now sought to appeal alleging her plea amounted to uninformed guilty plea, which should be set aside — Applicant clearly instructed counsel to proceed on basis of not guilty plea coupled with not contesting facts.

Criminal law — Appeals — Grounds — Misapprehension of or failure to consider evidence — Leave to — Application by defendant for leave to appeal dismissal of appeal from conviction and sentence for operating rental unit without a licence dismissed — Applicant did not attend trial, but was represented by counsel — Applicant pleaded not guilty, but did not contest facts — Applicant's first-level appeal, in which she alleged counsel did not follow her instructions to vigorously contest charge was dismissed and applicant now sought to appeal alleging her plea amounted to uninformed guilty plea, which should be set aside — Applicant clearly instructed counsel to proceed on basis of not guilty plea coupled with not contesting facts.

Application by the defendant for leave to appeal the dismissal of her appeal from the conviction and sentence of operating a rental unit without a licence. In November 2012, the applicant was charged with operating a rental unit without a licence contrary to the City's residential rental housing bylaw. The applicant obtained the required licence in February 2013 and she and her husband sold the property in April 2013. The applicant did not attend trial, but was represented by counsel. She did not contest the facts as read by the City's counsel. The applicant was convicted. Based on the joint recommendation, sentence was suspended and the applicant was prohibited from operating a rental unit without holding a valid licence for two years. The applicant appealed the conviction on the grounds that counsel had not followed her instructions to vigorously contest the charge. The appeal was dismissed. The applicant now sought leave to appeal on the grounds that she entered an uninformed guilty plea, which should be set aside. As part of her appeal, she wished to adduce fresh evidence consisting of an email to her trial counsel.

HELD: Application dismissed.

The purported fresh evidence was not fresh evidence as it existed at the time of the earlier appeal. Moreover, while the email itself was not entered as an exhibit, the gist of the email made it into the applicant's evidence. The appeal judge did not misapprehend the evidence. The applicant's instructions to counsel were sufficient and focused and she instructed counsel to proceed on the basis of a plea of not guilty coupled with not contesting the facts.

I. OVERVIEW

1 The applicant, Joanne Vaughan, applies under s. 131 of the *Provincial Offences Act*, R.S.O. 1990, c. P.33 (the "*POA*"), for leave to appeal the judgment of Justice Lalande of the Ontario Court of Justice made May 9, 2017 that dismissed her appeal from the conviction and sentence imposed by Justice of the Peace Scully on May 1, 2015.

II. PROCEDURAL HISTORY

2 In November 2012, the applicant was charged with operating a rental unit without holding a current valid licence contrary to the City of North Bay's residential rental housing bylaw.

3 The applicant obtained the required licence in February 2013. She and her husband sold the property in April 2013.

4 The applicant's trial before Justice of the Peace Scully was held in May 2015.

5 The applicant did not attend the trial but was quite aware it was taking place. She was represented by counsel.

6 At the trial, through her counsel, the applicant entered a plea of not guilty. However, she did not contest the facts read in by counsel for the City. A conviction was entered. Counsel made a joint submission on sentence, which the Justice of Peace accepted. The Justice of the Peace suspended the sentence and ordered the applicant not to operate a rental unit without holding a valid licence for two years.

7 The applicant appealed to the Ontario Court of Justice. She took the position that her counsel did not follow her instructions to vigorously contest the charge. Three witnesses testified before the appeal judge: the applicant and the two lawyers who acted for her immediately before and at the trial, Geoffrey LaPlante and Killian May. The appeal judge dismissed the appeal.

III. GROUNDS FOR LEAVE TO APPEAL

8 The applicant seeks leave to appeal on a single ground: at trial she entered what amounted to an uninformed guilty plea, which should be set aside. The applicant casts this as a question of law involving special circumstances for which it is essential in the public interest or for the due administration of justice that leave be granted. The applicant contends that hearing her appeal would enable this court to provide needed guidance on the law governing pleas entered in a defendant's absence. Her appeal would help clarify "this underdeveloped area of the law which affects the rights of so many people across the province."

9 If leave to appeal is granted, the applicant will seek to adduce fresh evidence. She submits that the admissibility of the fresh evidence also gives rise to a question of law that supports her application for leave.

IV. ANALYSIS

The standard for leave to appeal

10 The standard for leave to appeal under s. 131 of the *POA* was stated by this court in *Antorisa Investments Ltd. v. Vaughan (City)*, 2012 ONCA 586, 1 M.P.L.R. (5th) 240 (In Chambers), at para. 8:

The law on s. 131 is well-settled: see, for example, *R. v. Castonguay Blasting Ltd.*, 2011 ONCA 292 (in Chambers), at paras. 14-15. In order for the Applicants to obtain leave, they must establish: (i) special grounds; (ii) on a question of law alone; and (iii) that, in the particular circumstances of this case, it is essential in the public interest or for the due administration of justice that leave be granted. What constitutes "special grounds" in s. 131(1) is informed by the requirement in s. 131(2) that it is essential in the public interest or for the due administration of justice that leave be granted. The threshold for granting leave is very high.

The proposed fresh evidence

11 The applicant has filed an affidavit from Ms. Jessica Gagne, a lawyer in her appeal counsel's office, that attaches an email sent by the applicant and dated May 1, 2015 -- the date of the hearing before the Justice of the Peace -- to her then counsel, Killian May.

12 The previous day, April 30, 2015, the applicant had signed instructions to Mr. May that stated:

I wish to accept the [City's] offer.

I am voluntarily giving up my right to a contested trial and to assert full defences or indeed contest the facts that are being submitted by the Crown and are attached as EX 1.

I understand that despite the joint submission for no monetary penalty and not more than a two year order requiring compliance with the by-laws, by two experienced counsel, the Justice of the Peace can impose any sentence he or she sees fit.

13 Her May 1 email appears to have been sent before 8:30 a.m. on the day of trial. In it, the applicant wrote: "Premise of no contest, as I understand it, is to entry [*sic*] a not guilty plea with the understanding the facts read from the city will not be disputable but they have to be truthful." The applicant then proceeded to take issue with certain of the facts and tell her counsel how he could demonstrate they were untrue. She wrote: "Our offer is to stick to the facts alone - I will leave that other ridiculous thing in - Under Protest". She complimented her lawyer as "a most excellent and skilled lawyer". The applicant advised she would call her lawyer at 8:30 a.m. "to briefly go over the matter".

14 It appears from Ms. Gagne's affidavit that the paralegal who represented the applicant before the appeal judge possessed copies of the May 1, 2015 email. Although the paralegal cross-examined the applicant's trial counsel on his handling of the case, she did not refer to the May 1, 2015 email from the applicant to her trial counsel or mark it as an exhibit.

15 As I understand the applicant's argument, she submits that the May 1, 2015 email constitutes fresh evidence that is cogent, in the sense that it could have reasonably affected the decision of the appeal judge: *Palmer v. The Queen*, [1980] 1 S.C.R. 759, at p. 775; and *R. v. Hartman*, 2015 ONCA 498, 336 O.A.C. 329, at para. 20. It follows, the applicant contends, that it would be in the interests of justice to admit the fresh evidence and that evidence would result in this court setting aside her conviction based on not contesting the facts, thereby avoiding a miscarriage of justice. She argues that the availability of cogent fresh evidence that likely would result in setting aside the conviction amounts to a question of law within the meaning of s. 131 of the *POA*.

16 I am not persuaded by this submission. Putting to one side how the applicant attempts to cast the issue about the May 1, 2015 email as a question of law, I see no merit in her submission that the email amounts to cogent fresh evidence that was not available to place before the appeal judge.

17 The May 1, 2015 email obviously existed at the time of the 2017 appeal.

18 Moreover, although not entered as an exhibit, the gist of the email found its way into the applicant's evidence-in-chief. The applicant had drafted a factum dated December 16, 2015, which was marked on the appeal as her evidence-in-chief. In it, the applicant acknowledged that the day before the trial Mr. May reviewed with her the evidence the City proposed to submit at the hearing. The applicant recounted, in some detail, her position that certain of the statements by the City were "false and contestable". The factum/evidence-in-chief essentially set out the gist of the applicant's May 1, 2015 email to Mr. May. Accordingly, that evidence was before the appeal judge.

19 As well, the applicant did not refer to the May 1, 2015 in her factum/evidence-in-chief. Nor did she refer to the email in the wide-ranging evidence she gave during her cross-examination. Nor did the applicant's paralegal put the May 1, 2015 email to Mr. May during cross-examination.

20 This does not appear to have been an omission. Part way through her cross-examination of Mr. May the applicant's paralegal asked for a brief adjournment because "[m]y client would like to speak to me and she's writing profusely. I can't keep up with all the pieces of paper she's handing me." The appeal judge granted the adjournment. Notwithstanding that the applicant had ample opportunity to put to Mr. May the questions she desired, for whatever reason she chose not to question Mr. May on the May 1, 2015 email before the appeal judge.

21 Given those circumstances, I see no basis upon which the May 1, 2015 email gives rise to a question of law or somehow assists the applicant in meeting the high threshold for leave to appeal under s. 131 of the *POA*.

The question of law advanced by the applicant

22 Notwithstanding the applicant describes her appeal as raising a question of law, she submits in her factum that an appeal to this court would be her "first appeal from [Justice Lalande's] findings of fact." That more accurately captures the essence of her proposed appeal -- a challenge to the appeal judge's findings of fact.

23 The issue before the appeal judge was straight-forward: Did the applicant instruct trial counsel to enter a plea of not guilty, not dispute the City's facts, and then proceed with a joint submission on sentence? That called for a factual inquiry.

24 The appeal judge made clear findings of fact. He did not accept the applicant's evidence that she was confused by the offer the City made the day before trial or what would be involved in pleading not guilty, but not contesting the facts. The appeal judge held: "It is difficult in looking at all of this in these circumstances to conclude that [the applicant] was somehow caught off-guard when speaking with Mr. May and confused about what his instructions were to be."

25 The appeal judge noted that "this is not a case where a respondent did not speak to his or her agent." There was "no evidence that anything was lost in any interpretation by [the applicant] in her instructions."

26 He found that the applicant had provided her trial counsel with instructions that were "sufficient and focused". They were reduced to writing. The appeal judge found that trial counsel's instructions "were not boiler-plate. Instead he proceeded on the basis of a strategy which was well-balanced and reasonably crafted." He concluded: "There is no reason, when I look at the totality of the information before me, to conclude that a plea was entered on her behalf and against her wishes. This is not a case where [trial counsel] had unclear instructions. The joint submission on disposition was well thought out".

27 The appeal judge's reasons disclose that he understood the applicant was contending her plea of not guilty, coupled with not contesting the facts, was functionally equivalent to a guilty plea. However, he concluded the applicant had instructed trial counsel to proceed on that basis. The applicant cannot point to any misapprehension of the evidence by the appeal judge in this regard. Nor does she challenge any of his findings as demonstrating a

palpable and overriding error. That she disagrees with the appeal judge's findings does not transform questions of fact into a question of law.

28 The applicant's complaint is fact-based; it does not raise a question of law. The applicant has fallen far short of meeting the very high threshold for granting leave to appeal under s. 131 of the *POA*.

V. DISPOSITION

29 The applicant's application for leave to appeal is dismissed.

D.M. BROWN J.A.

Statutes, Regulations and Rules Cited:

Provincial Offences Act, R.S.O. 1990, c. P.33, s. 131

Counsel

Andrew Burgess, for the moving party.

Scott Lemke, for the responding party.

REASONS FOR DECISION