In the Court of Appeal of Alberta

Citation: R. v. Barton, 2016 ABCA 68

Date: 20160308
Docket: 1503-0091-A
Registry: Edmonton

Between:

Her Majesty the Queen

Respondent (Appellant)

- and -

Bradley Barton

Respondent (Respondent)

- and -

Women's Legal Education and Action Fund Inc. and Institute for the Advancement of Aboriginal Women

Applicants (Proposed Interveners)

Reasons for Decision of
The Honourable Mr. Justice Ronald Berger

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[1] Following a trial in the Court of Queen's Bench the respondent was found not guilty of causing the death of Cindy Gladue and thereby committing first-degree murder contrary to s. 235(1) of the ***Criminal Code***.

[2] The Crown has appealed. The grounds of appeal as framed by the appellant are the following:

1) The trial judge erred in law in his instruction to the jury with respect to manslaughter.

2) The trial judge erred in law in his instruction to the jury with respect to motive.

3) The trial judge erred in law in making a ruling under s. 276 of the ***Criminal Code*** after the close of evidence without any application having been brought by the defence and without a hearing on the issue.

4) The trial judge erred in law in instructing the jury that the complainant's consent on a previous occasion could be used to support a finding of honest but mistaken belief in consent on this occasion.

5) Such further and other good grounds as counsel may advise.

[3] The applicants seek leave to intervene in the appeal.

[4] I have reviewed the case law setting out the considerations that govern applications for intervener status in criminal cases. They include the following:

1) The nature of the case;

2) The issues which arise;

3) The likelihood of the applicant being able to make a useful contribution to the resolution of the appeal without causing injustice to the immediate parties;

4) Whether the appellant will provide a fresh, distinctive and useful perspective;

5) Whether the applicant's proposed submission links to an issue raised by the parties; New issues not argued in the Court below will generally not be entertained at the instance of an intervener;

6) The prejudice to either party if the intervention is granted;

7) Whether the intervention will transform the court into a political arena;

8) The applicant's particular expertise on the subject matter of the appeal;

9) Whether the presence of the intervener is necessary for the court to properly decide the matter;

10) Whether the arguments advanced by the intervener are repetitive of those of the appellant or the respondent;

11) The extent that the proposed intervener is a well-recognized group with a special expertise and a broadly identifiable membership base; and

12) Whether the proposed intervener has a real, substantial and identifiable interest in the subject matter of the proceedings.

[5] Some judges have opined that it is very unusual for the court to consider interventions in criminal appeals. By way of illustration, Watson J.A. in ***R. v. J.L.A.***, 2009 ABCA 324 (an important precedent-setting criminal law pronouncement heard by a designated five person panel reported as ***R. v. Arcand***, 2010 ABCA 363) explained that "the issue in such cases is between an individual and the state." He added, however, that in the case before him, "both the individual and the state are very ably represented." That comment was made in the context of a motion by the Criminal Trial Lawyers Association of Alberta for leave to intervene in the Crown appeal from the sentence imposed on ***Arcand***. The accused/respondent was represented by a lawyer who had been admitted to the Alberta bar a mere 2 years earlier in 2007.

[6] That is not the first time that judges of this Court have taken into account the relevant competence of counsel. In the ***Queen v. Neve***, 1996 ABCA 242, a panel of this Court observed, in connection with an application for intervention by the Alberta Civil Liberties Association, that "the appellant was represented by competent senior counsel at trial and is now represented by different but competent senior counsel on this application and for the appeal itself."

[7] I say, with great respect, that it is a mistake to purport to rely on an assessment of the relative experience, expertise or competence of counsel in adjudicating the merits of an application for intervener status. Indeed the spectre of inconsistency looms large. After all, the risk is that the inexperience of a Crown counsel (even if not expressly referred to) may be taken into account in allowing an intervention favourable to the Crown, while an intervention perceived as helpful to the accused may be rejected, simply on the basis, say, that a lawyer with 2 years experience is deemed competent to argue a complex appeal.

[8] At the end of the day, the relevant inquiry is whether the proposed intervener will advance different and valuable insights and perspectives that will actually further the court's determination of the matter (see: ***Canadian Doctors for Refugee Care v. Canada (Attorney General)***, 2015 FCA 34 at para. 15, citing with approval ***Canada (Attorney General) v. Pictou Landing First Nation***, 2014 FCA 21 at para. 11). Put another way, can the applicant add to the effective adjudication by ensuring that all the issues are presented in a full adversarial context? See: ***Reference re Workers' Compensation Act***, 1993 (Nfld.), 1989 2 SCR 335, at para. 13.

[9] Of course, in approaching the adjudication, the court must be mindful that the issue may be resolved otherwise than on the basis of an all or nothing proposition. The Court should ask itself whether there are issues in the appeal which warrant an intervention and, if so, what conditions should be imposed on that intervention.

[10] I say, with great respect, that judges are too quick to shun intervention by a third party in a criminal case. Watson J.A. has observed "all necessary voices with proper standing will necessarily be heard through the traditional binary process" – but not always. In fact, I have a real concern that the focus on the risk that "the hearing of other voices can distort an appeal," cited theoretically as a basis to reject the intervention of a party who is perceived to lend support to the Crown's position, is then invoked far too frequently to deny the appropriate intervention of a party who might assist the court but whose submissions may also be helpful to the defendant in the case. See, for example, ***R. v. J.L.A.***, *supra*.

[11] I acknowledge, as other judges have done, that the applicants have contributed helpful interventions in many cases, particularly those concerning gender discrimination.

[12] In the case at bar, the arguments which the proposed interveners intend to proffer, as counsel explained, will focus on the definition of "sexual activity" in s. 273.1(1) of the ***Criminal Code***. I am told that the proposed interveners intend to provide a substantive equality analysis of the meaning of consent and also observations on the procedure required by s. 276 of the ***Criminal Code***. The relief prayed for is that they be permitted to file one joint factum of 20 pages or less and to make oral submissions not exceeding 20 minutes.

[13] I have come to the conclusion upon a consideration of all of the factors set out earlier in these Reasons for Decision that the 3 judges of the Court of Appeal who will sit in judgment on the appeal will benefit from the unique perspectives of the interveners whose written submissions will assist the Court in a meaningful way. I see no prejudice to the respondent, provided that the submissions of the interveners are confined to the proposed joint factum. I grant leave to intervene to that extent only. The application to make oral submissions not exceeding 20 minutes in length is denied.

[14] The joint factum of the interveners shall be filed forthwith. The respondent shall be at liberty, if so inclined, to file a supplementary factum in response to the interveners' factum no later than 10 days prior to the scheduled date for oral argument.

Application heard on February 24, 2016

Reasons filed at Edmonton, Alberta
this 8th day of March, 2016

Berger J.A.

Appearances:

J.B. Dartana
for the Respondent (Appellant)

D. Bottos
for the Respondent (Respondent)

R. Khuller
K.A. McLeod, Q.C.
for the Applicants (Proposed Interveners)