Indexed as:

R. v. Pucci

Between
Her Majesty the Queen, and
Tony Pucci, accused

[1998] A.J. No. 49

1998 ABQB 18

211 A.R. 396

37 W.C.B. (2d) 124

Action No. 9703-1977-C3

Alberta Court of Queen's Bench
Judicial District of Edmonton

Bielby J.

January 16, 1998.

(6 pp.)

Criminal law -- Procedure -- Conduct of trial -- Witnesses -- Failure to appear, adjournment.

Application for adjournment. The accused Pucci was charged with trafficking in cocaine. On the date of the trial a critical Crown witness failed to appear because he was not served with a subpoena. The circumstances were explained to the court by a detective who was responsible for the error. The subpoena had been left with the detective for him to serve on the witness, but was misplaced due to the volume of material which the detective handled in his work. The detective stated that in every other case the witness had shown up in court and was not trying to evade his responsibilities.

HELD: Application denied and charge dismissed. The Crown did not meet the test for granting an adjournment. The failure to serve the witness was the product of neglect, however sympathetic the

circumstances.

Counsel:

Ben A. Guido, for the Attorney General of Canada.
Brij Mohan, for the accused.

REASONS FOR JUDGMENT

1 **BIELBY J.**:-- The accused resisted an application for adjournment of his trial on a charge of trafficking in cocaine due to the non-appearance of a critical Crown witness. He argued that the requirements of R. v. Darville (1956) 25 C.R. 1 (S.C.C.) had not been met by the Crown in regard to the adjournment request.

2 The issue was adjourned for written argument, now received from both Counsel.

3 The material witness, a civilian agent who allegedly made a cocaine "buy" from the accused, did not appear at trial because he was never served with a subpoena to appear. The Crown had delivered a subpoena for him to the office of Detective MacDonald of the Edmonton City Police with a request that he serve the witness. He did not do so and the Crown did not follow up the service prior to the date set for trial.

4 The circumstances were verbally explained by Detective MacDonald in Court on the hearing of the adjournment application. While he made the statement from the body of the Courtroom and was therefore not under oath, and while his evidence was not contained in a sworn affidavit as is often the case in this type of application, the Court accepted his information as it was not challenged by the Defence. Indeed, the Defence now relies on the transcript of the Detective's statement in support of its position.

5 Detective MacDonald stated:

> Due to the volume - there are really no legitimate excuse other than the volume of material that I deal with. The subpoena got tucked in a stack of expert reports that I have about that thick. Usually the agent phones me the day of Court and tells me to meet him in the coffee shop. Today he didn't. I went through my stuff and I found that I had not served the subpoena. I would like to mention that in every case that this agent has been subpoenaed he has shown up in Court each and every time. It's not a matter of him trying to evade his responsibilities here, and I take responsibility for not serving the subpoena on him.

6 The Supreme Court of Canada outlined three conditions in the Darville decision which must be met before an adjournment should be granted because of the failure of a witness to appear. They are:

> (a) that the absent witnesses are material witnesses in the case;
> (b) that the party applying has been guilty of no laches or neglect in omitting to endeavour to procure the attendance of these witnesses; and,
> (c) that there is a reasonable expectation that the witnesses can be procured at the future time to which it is sought to put off the trial.

7 The accused argues that the Crown has not met the second condition, that there was neglect in omitting to endeavour to procure the attendance of this witness.

8 The Crown has been unable to locate any case authority which interprets neglect in any manner which limits its meaning to circumstances of intentional or reckless neglect, or excludes innocent inadvertence. While the Crown argued that the limited authority on this issue supports a widening of the tests in Darville to include the type of analysis Courts conduct to determine if a stay of execution is appropriate, as suggested in R. v. P.M. [1994] O.J. No. 1795, Ont. Prov. Ct., the actual decision in that case was to decline to grant the adjournment request. The police had made one attempt to serve the complainant at her mother's home and when that failed made no other attempts as her whereabouts were unknown; the Court found neglect.

9 In R. v. Blanchard [1993] Y.J. No. 47, Judge Stuart of the Yukon Territorial Court catalogues the social policy considerations behind the need for an administrative system designed to ensure the adequate service of subpoenas. He describes the need to secure and retain public respect for the administration of justice by avoiding unnecessary trials, promoting fair trials, fostering respect for lay witnesses, protecting the victim, protecting the interests of the accused, and avoiding wasteful public expenditure. I note with interest the very administrative procedure for the service of subpoenas condemned in that decision is the one that was apparently used in this case, i.e. the Crown asked the police to serve the witness and then made no further contact with the witness until the trial date. In Blanchard the police asked to serve the subpoena made no effort to do so until four days before the trial; when that failed they substitutionally served a person living at the same residence as the witness. The trial judge refused the adjournment request.

10 In another literate judgment on this topic, Madam Justice Fruman of this Court, in R. v. Fauteux, [1997] A.J. No. 929 refused to grant judicial review of a decision of a Provincial Court Judge to grant an adjournment request at a preliminary inquiry necessitated by the failure of a police witness to appear. The witness had been mailed the subpoena at work but her mail had not been forwarded to her at her home where she was on maternity leave; when called to attend Court at the last moment she was unable to do so because of child care responsibilities.

11 Madam Justice Fruman found she had no jurisdiction to grant judicial review because the decision below was not patently unreasonable, i.e. it was within the proper exercise of discretion of

the Provincial Court Judge hearing the matter. The test to be applied by her was, therefore, different than in this case where the determination of neglect is fresh for me to make, not a review of the reasonableness of an earlier decision by another judge.

12 Detective MacDonald's candour is commendable and was appreciated. It is easy to imagine how this type of oversight could arise in the everyday management of a busy police practice. However, I cannot conclude the failure to serve the witness was not the product of neglect, however sympathetic the circumstances.

13 It is not necessary, therefore, for me to consider whether the Crown has also met the first requirement of the Darville case, proof that the missing witness had material evidence to offer. Apparently the witness did not properly identify the accused at the preliminary which gives rise to the argument that he is not material at trial.

14 In the result, I decline to grant the adjournment. The Crown has indicated it will call no evidence at the trial which is to be resumed February 2, 1998. If that is the case the charge will then be dismissed against the accused.

BIELBY J.

cp/d/mop/DRS/DRS