

COURT OF APPEAL OF YUKON

Citation: *R. v. S.C.C.*,
2021 YKCA 4

Date: 20210326
Docket: 19-YU854

Between:

Regina

Respondent

And

S.C.C.

Appellant

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Before: The Honourable Madam Justice Bennett
(In Chambers)

On appeal from: An order of the Territorial Court of Yukon, dated October 2, 2019 (*R. v. S.C.C.*, 2019 YKTC 36, Watson Lake Docket 18-10006).

Oral Reasons for Judgment

Counsel for the Appellant
(via teleconference):

V. Larochelle

Counsel for the Respondent
(via teleconference):

L. Whyte

Place and Date of Hearing:

Vancouver, British Columbia
March 25, 2021

Place and Date of Judgment:

Vancouver, British Columbia
March 26, 2021

Summary:

The appellant appeals his conviction for sexual assault on a number of grounds, including ineffective assistance of trial counsel. In the course of case management, the respondent Crown asked the case management judge to invoke section 11(f) of the Ineffective Assistance of Trial Counsel Practice Directive in order to review and, if necessary, compel production of the redacted portions of trial counsel's affidavit. Held: Section 11(f) of the Practice Directive does not apply. In these circumstances, it was not the role of the case management judge to be involved in preliminary matters prior to the filing of materials in accordance with the Practice Directive.

[1] **BENNETT J.A.:** This question arose at a case management conference regarding a ground of appeal relating to ineffective assistance of trial counsel. This case is from the Yukon, however, counsel have agreed that the Practice Directive for the British Columbia Court of Appeal (*Ineffective Assistance of Trial Counsel* (Criminal Practice Directive, 12 November 2013)) will apply. The question arises in the context of trial counsel's affidavit.

[2] Trial counsel (with, I believe with the assistance of counsel), provided appellate defence counsel with an affidavit. Appellate counsel was concerned about a paragraph in the affidavit going beyond the waiver of solicitor/client privilege, and asked trial counsel if she really needed to include it. She decided she did not and removed it. Appellate counsel forwarded the revised affidavit to the Crown, but advised her what had transpired. The Crown says this falls within the Practice Directive (set out below), and that she asks me to invoke s. 11(f) of the Practice Directive, and review the first affidavit to determine if she should receive it:

9. Upon receipt of trial counsel's affidavit, counsel for the appellant shall review it and where he or she is of the opinion that it divulges confidential information or instructions of the appellant exceeding what is necessary for trial counsel to respond to the allegations, edit the copy of the affidavit and redact any portions of the affidavit over which privilege is asserted. A redacted copy of the affidavits shall be sent to the Crown/respondent (with redactions showing as blackened lines) and trial counsel, unless otherwise directed by the case management judge.
10. Counsel for the appellant shall file with the Court, (a) the original copy of trial counsel's affidavit and (b) any edited or redacted version of the affidavit, both which shall be sealed by the registrar pending directions from the case management judge.

Stage Three: Case Management

11. At the case management hearing, the case management judge may make any directions necessary to ensure a timely and fair hearing of the appeal, and shall specifically consider whether, after receiving submissions from counsel for the appellant and the Crown/respondent, it is necessary to make directions concerning each of the following matters:

...

- f. If trial counsel's affidavit has been redacted by counsel for the appellant, the case management judge will, if required, review the original affidavit, the redacted affidavit and the appellant's affidavit, and after hearing from the parties, decide whether solicitor client privilege has been waived by the appellant with respect to some or all of the redacted portions. If so, the case management judge will release these redacted portions to the Crown/respondent.

[3] In my view, a case management judge should not be involved in what are essentially preliminary matters between defence counsel prior to the filing of trial counsel's affidavit. Section 11(f) of the Practice Directive does not apply at this stage, but only after a redacted affidavit has been filed in accordance with the Practice Directive.

[4] I make no observation on whether a division of the Court would have jurisdiction to make such an order pursuant to s. 683(1)(a) of the *Criminal Code*, R.S.C. 1985, c. C-46.

[5] We are at a stage now where the affidavit can be filed with the Court.

[6] The application by the Crown is dismissed.

"The Honourable Madam Justice Bennett"