SUPREME COURT OF YUKON

Citation: *R v Vachon*,
2021 YKSC 39

Date: 20210802
S.C. No. 20-AP012
Registry: Whitehorse

REGINA

RESPONDENT

YOLANDE VACHON

APPELLANT

Before Justice K. Wenckebach

Counsel for the respondent — Sarah Bailey

Appearing on her own behalf — Yolande Vachon

REASONS FOR DECISION

INTRODUCTION

[1] The appellant, Yolande Vachon, appeals her conviction and sentence for breaching a no-contact provision of a peace bond, issued pursuant to s. 810 of the *Criminal Code* (the "*Code*"). The issues on her conviction appeal are whether the trial judge misapprehended the evidence, and whether the fresh evidence Ms. Vachon presented on appeal requires that a new trial be conducted. The question with regard to the sentence appeal was whether the sentence is demonstrably unfit.

[2] Ms. Vachon also brought a preliminary motion that I recuse myself from hearing the appeal on the basis of reasonable apprehension of bias.

BACKGROUND

[3] Ms. Vachon has been subject to several peace bonds in relation to Mr. Samson Hartland, his wife, Lindsey Hartland, and their children, Sabrina Hartland, Cadence Hartland, and Alexander Hartland, including one imposed on June 5, 2019. It included a provision that Ms. Vachon have no contact, directly or indirectly, and not communicate verbally or non-verbally in any way with Sabrina Hartland, Cadence Hartland or Alexander Hartland.

[4] Ms. Vachon was charged with breaching that provision of her peace bond on October 8, 2019.

Trial Decision

[5] At trial, Sabrina Hartland, who was the complainant, Samson Hartland, and Ms. Vachon testified. Ms. Hartland testified that she attended an election forum hosted at a hotel with her father on October 8, 2019. She went into the bathroom, where she saw Ms. Vachon. Ms. Vachon said “Hi” to her, and “is your father here?” Sabrina went immediately to a stall and waited for Ms. Vachon to leave. Only once Ms. Vachon left did Sabrina leave the bathroom.

[6] Mr. Hartland testified that he saw Ms. Vachon enter the ballroom where the forum was taking place. He confirmed with his wife via text that the peace bond was still in place. He believed that one of the conditions was that Ms. Vachon was required to maintain a minimum distance from all members of the Hartland family, though the evidence ultimately showed that there was no such condition. Mr. Hartland approached Ms. Vachon, and reminded her that she should not be there. Ms. Vachon refused to leave.

[7] When Sabrina returned to the ballroom, Mr. Hartland told her he was contacting the police. He did so, and ultimately the two decided to leave.

[8] Ms. Vachon testified that she was in the bathroom doing her make up, and, while there, a girl entered. She may have said “hi” as a reflex, but did not remember. She then recognized that the girl was Sabrina. Ms. Vachon denied saying anything else to Sabrina. Sabrina went into the stall, Ms. Vachon quickly finished doing her make up, and left.

[9] The decision at trial was focused on Ms. Vachon and Sabrina’s interactions in the washroom. The trial judge determined that the issue rested on credibility. If Ms. Vachon were to be believed, then the fact that she said “hi” out of habit would raise a reasonable doubt as to whether she had the requisite intent to violate the peace bond.

[10] On the other hand, if the court believed Ms. Hartland’s testimony that Ms. Vachon had asked whether her father was also there, then that was sufficient to establish the necessary intent to breach the peace bond.

[11] The court had difficulty with Ms. Vachon’s testimony. The trial judge acknowledged that Ms. Vachon was firm in her testimony about what happened in the bathroom. At the same time, she also found that Ms. Vachon had “…what appeared to be a somewhat distorted perception of reality” (unpublished, para. 14). The court went through some examples of Ms. Vachon’s evidence, and conclude that she did not believe Ms. Vachon’s evidence, nor did it leave her with a reasonable doubt.

[12] The court also had some concerns about Mr. Hartland’s testimony, noting that the history of the involvement of the parties could have coloured his perception of the events of October 8.

[13] The court did not have these concerns about Ms. Hartland. She stated:

> [22] However, I do not find this to be the case for Sabrina's evidence. She was aware of the history and this caused her to have some fear of Ms. Vachon, but that history did not appear to colour her perceptions in any way. In fact, in many ways, I found her to be the most credible and reliable of the three civilian witnesses that I heard today. I found Sabrina's recollection to be clear, detailed, and yet not so perfect as to be suspect. She was entirely unshaken in any way in cross-examination and did not vary at all in terms of what had been said to her in the bathroom.
>
> [23] Based on everything that I saw and heard, I have absolutely no difficulty accepting Sabrina's evidence in relation to the events in the bathroom on October 8, 2019.

[14] As the trial judge accepted Ms. Hartland's evidence and did not believe Ms. Vachon's evidence, she convicted Ms. Vachon.

ISSUES

1. Does my presiding over the appeal raise a reasonable apprehension of bias?
2. Did the trial judge err in her assessment of the evidence?
3. Did Ms. Vachon receive ineffective assistance from her lawyer at trial?
4. Was the sentence imposed unfit?

ANALYSIS

1. *Does my presiding over the appeal raise a reasonable apprehension of bias?*

[15] At the beginning of the hearing, Ms. Vachon sought that I recuse myself. She stated that as I had provided legal advice to her before, I would be biased and should not preside over the appeal. After hearing from Ms. Vachon and Crown counsel I adjourned to consider the matter. Upon my return Ms. Vachon stated that she was

satisfied that I would not be biased and could hear the appeal. I had also determined that there was no reasonable apprehension of bias.

[16] In *Committee for Justice and Liberty v National Energy Board*, [1978] 1 SCR 369 ("*Committee for Justice and Liberty*") at 394, the Supreme Court of Canada set out the criterion for finding that a reasonable apprehension of bias exists. The question to be asked is: "what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."?

[17] The determination of whether a reasonable apprehension of bias exists is fact specific (*Wewaykum Indian Band v Canada*, 2003 SCC 45 at para. 86). With regard to former clients, judges should refrain from sitting on cases involving former clients until "…a reasonable period of time has passed" (*Committee for Justice and Liberty*, at 388).

[18] Here, Ms. Vachon and I agreed that we had met once or twice, in 2009 or earlier, when I worked as a staff lawyer at Yukon Legal Services Society, which provides legal aid assistance. I do not recall much about the meetings, except that Ms. Vachon's issues involved her daughter, and that I could not assist her as I did not practice in the area of law with which she needed help. Given that I only met with Ms. Vachon once or twice, at least ten years ago, given my lack of recollection, and my limited involvement with Ms. Vachon, I find that the circumstances do not give rise to a reasonable apprehension of bias.

2. *Did the trial judge err in her assessment of the evidence?*

[19] A court sitting on appeal on a question of fact cannot overturn the decision of the trial judge simply because the appeal court would have made a different decision than the trial judge. Instead, the trial judge's decision can only be overturned if the judge made a "palpable and overriding error" (*R v Shepherd*, 2009 SCC 35 at para. 18). A palpable and overriding error is an error which can be identified without a lot of effort, and without going through the evidence piece by piece (*Salomon v Matte-Thompson*, 2019 SCC 14 at para. 112).

[20] In her argument, Ms. Vachon stated that she had not been stalking the Hartland family, but that she had been simply doing her own work. I take from this that Ms. Vachon is saying that the judge erred in determining that she engaged in stalking behaviour.

[21] In this case, the judge did not make a determination that Ms. Vachon was stalking the Hartland family. In her reasons for judgment, the judge referenced the relationship between Ms. Vachon and the Hartland family, and stated only that they had had a "…very troubled history" (para. 15).

[22] In the sentencing decision (unpublished), furthermore, the court spoke directly to Ms. Vachon and said at para. 8: "The really important thing is that you have done much, much better since this charge was laid. That is what they are telling me. You have stayed away from the family, and things have been going well. You need to keep doing that." Again, this is not a finding that Ms. Vachon had been stalking the family. Rather, the trial judge simply noted that Ms. Vachon had not complied with the peace bond before the charge was laid, but did afterwards.

[23] If I understand Ms. Vachon's submissions correctly, she is also asking that I review the decision to issue the peace bond against her. Her argument is that she has not stalked the Hartland family, and therefore no peace bond should ever have been put in place.

[24] I do not have the ability to review the decision to issue the peace bond against Ms. Vachon. This is an appeal of Ms. Vachon's conviction for breaching the peace bond. It is not an appeal of the issuance of the peace bond itself. Therefore, I can only determine if there was an error in the decision to convict Ms. Vachon of the breach, and not whether the peace bond should have been issued to begin with.

[25] The judge's decision more generally was also well-reasoned. She considered the evidence of the three witnesses with care, and provided sound reasons for accepting Ms. Hartland's evidence and rejecting that of Ms. Vachon. The judge's decision was not unreasonable.

3. *Did Ms. Vachon receive ineffective assistance from her lawyer at trial?*

[26] Ms. Vachon filed extensive documentary evidence and provided evidence during the course of the hearing. She also called a witness, Mr. Richard Graham, to give evidence. He was examined on the stand by her during the hearing of the appeal. The documentary evidence and the statements Ms. Vachon provided at trial should have been provided through an affidavit. Ms. Vachon did not provide an affidavit on the fresh evidence, but the Crown did not raise this as an issue. In my opinion, given Ms. Vachon's presentation at the hearing, it is likely that Ms. Vachon would have great difficulty filing an appropriate affidavit. Given the circumstances, I will proceed as though the evidence was presented through affidavit.

[27] During the hearing and in written materials, Ms. Vachon provided information about the history between her and the Hartland family, and why the relationship deteriorated. At the hearing, Ms. Vachon indicated that she had expected her lawyer to present this historical evidence at trial, and was surprised when he did not.

[28] In addition, Ms. Vachon stated that the girl about whom the peace bond had been put in place was not the same girl Ms. Vachon met at the washroom. She advised that she informed her lawyer about this, but he did not raise it at trial.

[29] The evidence that she sought to introduce through Mr. Graham was about a City Council meeting, which was what prompted the Hartland family to seek the June 5, 2019 peace bond against Ms. Vachon. Mr. Graham had no recollection of a discussion with Ms. Vachon at the City Council meeting. His evidence did not provide any additional information regarding the issues in this appeal.

[30] Ms. Vachon was represented by counsel during her criminal proceedings, so the crux of the issue here is whether counsel's decision not to lead the additional evidence constituted incompetence and requires that a new trial be held. This, in turn, requires consideration of whether the fresh evidence should be admitted.

[31] In order to establish that counsel was ineffective, an appellant must prove: "…first, that counsel's acts or omissions constituted incompetence and second, that a miscarriage of justice resulted" (*R v GDB*, 2000 SCC 22 ("*GDB*") at para. 26). Where it is clear that the appellant has not been prejudiced at trial, then the appellate court should not consider the question of competence (*GDB*, at para. 29).

[32] Under s. 683(1) of the *Code,* a court sitting on appeal has the ability to accept fresh evidence. The test for determining admissibility of fresh evidence was outlined in

R v Palmer, [1980] 1 SCR 759 ("*Palmer*"). It is, however, modified when the fresh evidence goes to the integrity of the trial process, as, for instance, when there are allegations of ineffective counsel (*R v Dunbar*, 2003 BCCA 667 ("*Dunbar*") at para. 34).

[33] Most significantly, the requirement of due diligence is relaxed where the question of the integrity of the trial process is at issue (*Dunbar*, at para. 35). Other branches of the *Palmer* test still apply however. In particular, the court must consider the relevance of the fresh evidence, its credibility, and whether it is otherwise admissible (*Dunbar*, at para. 37).

[34] In this case, I have determined that my task in assessing the fresh evidence about Ms. Vachon's relationship with the Hartland family is to determine whether the evidence could have affected the outcome of the trial. Put another way, if the evidence about Ms. Vachon and the Hartland family had been admitted at trial, could she have been acquitted?

[35] I conclude that the evidence would have had no impact on the outcome of the case.

[36] There are three purposes for which Ms. Vachon seeks to introduce new evidence. First, the evidence of the history between her and the Hartland family would provide context to the trial. Second, the same evidence would demonstrate that a peace bond should not have been issued against her. Third, Ms. Vachon seeks to introduce evidence that the girl she saw in the bathroom was not Sabrina Hartland.

[37] At trial, the judge could not decide whether the peace bond should or should not have been made against Ms. Vachon. Ms. Vachon had been charged with breach of the peace bond issued against her, and that was all that the trial judge could hear about

and decide on. The only thing the trial judge could decide was whether Ms. Vachon had had contact with Sabrina Hartland on October 8, 2019. This means that the evidence that Ms. Vachon wanted to introduce with regards to the history between her and the Hartlands, including why the relationship developed as it did, when problems came up between Ms. Vachon and Mr. Hartland, or what occurred during the Council meeting that led to the peace bond being made was not important at the trial.

[38] In saying this, I am not saying that the information is not important in itself. Ms. Vachon's experiences are clearly important for her life. The trial of the breach charge was, however, about one situation – when Ms. Vachon saw and spoke with Sabrina Hartland at the candidate's meeting on October 8, 2019 – it was not about anything else.

[39] Therefore, the evidence Ms. Vachon hoped to admit at her trial could not have made a difference to the outcome of her case.

[40] The evidence about whether the girl that Ms. Vachon saw in the bathroom was Sabrina Hartland is different. It is evidence that is central to the charge against Ms. Vachon. As such, it is relevant. Here, however, Ms. Vachon's lawyer did introduce evidence about what occurred in the bathroom, through Ms. Vachon. Ms. Vachon testified at the trial and provided evidence about her interactions with Ms. Hartland. When asked by her lawyer what occurred in the bathroom she said:

> So I went to the High Country Inn. And as soon as I got there I went to the washroom – because I walk in the building and I – I stopped at the washroom – and I started refreshing my face and I put my makeup on. I was done half my face and a little girl walked in the washroom. So I just looked and I don't recall saying "Hi", but it's a normal thing for me to say "Hi" to children because I used to be a cross guard at all the events. So I just looked and I think – when we saw that – I saw that it

> was her and she saw it was me, we were both like “uh-oh”, and then I – I think I just – when I noticed it was her, I just went “Oh my God,” and I just finished putting my makeup and I washed my hands and I left.
> (Transcript of proceedings at trial, at 30-31, ll. 46-47, 1-8).

[41] Ms. Vachon’s statement at the appeal hearing that the girl in the bathroom was not Sabrina contradicts the testimony she gave at trial. This is not evidence that her lawyer could have presented at trial but chose not to. It is simply different evidence than she herself testified to at trial.

[42] As a result, I do not admit Ms. Vachon’s additional evidence. The evidence about her history with the Hartlands was not relevant to the trial. The evidence about what occurred in the bathroom was not new evidence; Ms. Vachon testified to it at trial, but said something different at the time. I dismiss this ground of Ms. Vachon’s appeal.

4. *Was the sentence imposed unfit?*

[43] The trial judge sentenced Ms. Vachon to probation for one year, with a conditional discharge. The most important condition of the probation order is that Ms. Vachon not have contact with the Hartland family, and that she not be within 8 metres of them. (At trial, the condition was that Ms. Vachon not be within 20 metres of the Hartland family. This was later varied to 8 metres at a sentencing review). The only other conditions of the probation order are those required by law.

[44] Ms. Vachon says that she should not have received this sentence. She says that she is not at fault, and she should not have been placed on the peace bond to begin with. Ms. Vachon also says that the probation order is making her life very difficult. As an example, she used to attend many City Council meetings, and meetings involving political parties. However, she cannot do so anymore because the Hartlands also attend

many political meetings. When she does attend, she must leave when she sees a member of the Hartland family.

[45] A court sitting on appeal can only change the sentence imposed by the trial judge in limited circumstances. This is because trial judges hear all the evidence, make assessments about the witnesses and have a good understanding of the case before them. They are in the best position to decide a sentence (*R v Lacasse*, 2015 SCC 64 at paras. 11 and 42).

[46] In this case, part of Ms. Vachon's submission is based on her belief that she should not have been convicted. As I have found that there were no errors at trial, Ms. Vachon cannot succeed on this basis.

[47] The other submission Ms. Vachon makes is that the sentence is unreasonable, because it places an unfair burden on her. However, Ms. Vachon discussed this condition with her lawyer, and the court, and agreed to it. During the sentencing hearing, the following exchange took place between the trial judge, Ms. Vachon and Mr. Mark Chandler, Ms. Vachon's lawyer:

> Ms. Vachon: I'm sorry, Your Honour. When I reach this kind of disagreement with a person that I work with or whatever, I reach to a point where I go, "Okay, you know what, this is way too much problems [as written]. I don't need it." I like to be able to breathe and be able to feel like I'm myself, not have a cloud over my shoulders carrying around, and I – and I reach a point where go, [as written] "Okay, you know what, if we're like this, there's no need for the problem. The problem needs not happen. Don't talk to me and I will not talk to you. Do not bother me and I will not bother you." That's a guarantee.
>
> The Court: Okay.
>
> Mr. Chandler: I understand from a previous – from a previous discussion before Ms. Vachon made the statement that she's okay with all members of

> Mr. Hartland's family, so that's himself, his wife, and his three children.
> The Court: Okay. Just not with the reporting to a probation officer or perhaps some assessment or programming.
>
> …
>
> Ms. Vachon: - it that's the case. If he doesn't want me talking to them, I happily say "Go your way." I'm fine with that. And I can be civil with them in any public situation because I do not-
> The Court: Okay.
> Ms. Vachon: – wish to involve a problem.
> The Court: Okay. Well, if I put you on no contacts, you can't have any contact with them even in a public situation.
> Ms. Vachon: Absolutely.
> The Court: That's how we got here today.
> The Accused: I have no wishes to do so –
> The Court: All right. So what's –
> Ms. Vachon: – for my own well-being.
> (transcript of proceedings at trial, pp. 48-49, ll. 40-47, 1-7, 11-24)

[48] During the sentencing hearing, Ms. Vachon stated that she agreed to the condition that she have no contact with Samson Hartland, his wife, and his three children. She had thought about it, and it appears she discussed it with her lawyer before consenting to it. Given this, I am not prepared at this point to find that the sentence was unreasonable.

[49] In analysing the sentence imposed, moreover, I conclude that it is an appropriate sentence. Ms. Vachon was convicted of breaching a no-contact provision of a peace bond. The requirement that Ms. Vachon not have contact with the Hartland family is therefore aimed at addressing the very problem that brought Ms. Vachon to court to begin with. The length of the probation order, 12 months, is fair.

[50] Moreover, the trial judge ordered that Ms. Vachon be placed on a conditional discharge order. That means that if Ms. Vachon complies with the probation order, she

will not have a criminal record. In doing this, the judge recognized that, if Ms. Vachon could comply with the probation order, then she should not be saddled with a criminal record.

[51] In court, Ms. Vachon described the impact that the probation order has had on her life. I accept that the no-contact condition has been difficult for her; especially given Ms. Vachon is interested in political events while Mr. Hartland is actively involved in politics. This means that Ms. Vachon cannot attend meetings and events that she would normally go to. This does not make the sentence unreasonable. The sentence was crafted to fit Ms. Vachon's circumstances and the circumstances of the offence for which she was convicted.

[52] Despite being dissatisfied with the conviction and the sentence, during the appeal hearing Ms. Vachon recognized that she was still bound by the probation order and said she would abide by it unless it was overturned. As I am not overturning the decision or sentence, I urge Ms. Vachon to continue to abide by the probation order. I echo the trial judge when she said that staying away from Mr. Hartland, his wife, and his three children will be better for the Hartlands, and better for Ms. Vachon.

CONCLUSION

[53] I therefore dismiss Ms. Vachon's conviction and sentence appeal.

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WENCKEBACH J.