

COURT OF APPEAL OF YUKON

Citation: *R. v. Penner*,
2022 YKCA 4

Date: 20220517
Docket: 19-YU852

Between:

Regina

Respondent

And

Edward James Penner

Appellant

Before: The Honourable Chief Justice Bauman
The Honourable Mr. Justice Goepel
The Honourable Madam Justice Charlesworth

On appeal from: An order of the Supreme Court of Yukon,
dated September 19, 2019 (*R. v. Penner*, Whitehorse Docket 18-01502).

Oral Reasons for Judgment

No one appearing on behalf of the Appellant

Counsel for the Respondent:

N. Sinclair

Place and Date of Hearing:

Whitehorse, Yukon
May 16, 2022

Place and Date of Judgment:

Whitehorse, Yukon
May 17, 2022

Summary:

The appellant was convicted and sentenced for first-degree murder on 19 September 2019 and is currently in Kent Institution. The appellant filed an appeal from his conviction on 17 October 2019. He was appointed legal counsel from the Yukon Legal Services Society, who was able to file transcripts and an appeal book with the Court. The appellant has since dismissed that counsel and the appellant has not been attending case management proceedings. The Deputy Registrar referred this matter to the Court under Rule 13(3) of the Criminal Appeal Rules for potential dismissal for want of prosecution. Held: referral/application adjourned. It is not yet appropriate to dismiss this appeal for want of prosecution. The appellant has been convicted of a most serious offence and faces the most significant sentence known to our law. The Court appoints an amicus for the purpose of reviewing the merits of the appeal and making submissions thereon to this Court.

[1] **BAUMAN C.J.Y.C.A.:** This matter comes before the division on a referral from Deputy Registrar Outerbridge under Rule 13(3) of the *Yukon Territory Court of Appeal Criminal Appeal Rules, 1993*.

[2] Mr. Penner was convicted and sentenced for first-degree murder on 19 September 2019. He is serving a life sentence with eligibility for parole after 25 years in Kent Institution. The homicide was of a 25-year-old victim by a bullet wound to the head. Evidence in the case consisted of, among other items, DNA swabs and fingerprints from Pepsi cans at the scene, surveillance videos taken from a Whitehorse hotel, Facebook records, and forensic analysis of a cartridge and bullet.

[3] Mr. Penner filed an appeal from his conviction on 17 October 2019. Mr. Penner obtained counsel via the Yukon Legal Services Society (“LSS”), Mr. Larochelle appearing. Mr. Larochelle was able to obtain transcripts and prepare an appeal book. These have been filed with the court. However, Mr. Penner recently dismissed Mr. Larochelle as counsel. Mr. Penner has not been attending case management proceedings.

[4] At a case management hearing on 8 March 2022, which Mr. Penner did not attend, the circumstances were summarized as follows:

- (a) Deputy Registrar Outerbridge noted that the Court was unsuccessful in scheduling case management with Mr. Penner on 11 and 18 February 2022;
- (b) Mr. Larochelle is of the opinion that there is a “viable appeal”;
- (c) Mr. Larochelle had a factum prepared but could not file it without instructions from Mr. Penner;
- (d) Mr. Larochelle and LSS both told the Court that they were under the understanding that Mr. Penner was seeking his own counsel and not relying on legal aid;
- (e) Mr. Larochelle told the Court that the circumstances leading to Mr. Penner’s arrest in this matter raised mental health concerns and thought the Court should be aware of this;
- (f) Mr. Larochelle was of the opinion that this is “not a fanciful appeal” and that it contains “stronger grounds than [he] would’ve anticipated”;
- (g) Mr. Larochelle said that had he received instructions to file the appellant’s factum, the appeal was ready to be set for hearing, subject to the Crown submitting its responding factum;
- (h) The Crown was concerned that Mr. Penner was deliberately delaying the matter;
- (i) The Crown argued that, given the time delay if this matter were to be remitted for a second trial, its case would be prejudiced due to the degrading quality of witness evidence;

- (j) LSS told the Court that Mr. Penner was advised that he could apply for new counsel and that LSS would be open to this;
- (k) LSS told the Court that in response to that information, Mr. Penner indicated he was interested in getting his own lawyer; and
- (l) LSS told the Court that it continues to be open to a new application from Mr. Penner.

[5] After the 8 March 2020 case management hearing, Deputy Registrar Outerbridge wrote a letter to Mr. Penner explaining the process of appeal, the importance of attending case management hearings, and the risk that the appeal be referred to a division for dismissal.

[6] Mr. Penner has been notified by letter that he is required to appear by video before the division on Monday, May 16, 2022, at 10 a.m. An attendance order indicating the same has been sent to Kent Institution, however the division has been advised that Mr. Penner has chosen not to appear.

[7] Rule 13(3) of the Yukon Territory Court of Appeal Criminal Appeal Rules, 1993 says:

(3) Where the registrar considers that the appellant has failed to diligently pursue the appeal or has failed to comply with these Rules, he may refer the matter to the court or a justice.

[8] This is identical to Rule 13(3) from the British Columbia Court of Appeal Criminal Rules, 1986.

[9] In my view, it is not yet appropriate to dismiss this appeal for want of prosecution. Mr. Penner has been convicted of a most serious offence and faces the most significant sentence known to our law. In the circumstances I have outlined, at least one further accommodation must be afforded Mr. Penner. I would appoint an amicus for the specific purpose of reviewing the merits of this appeal and making submissions thereon to a division of this Court. That division may then be invited to hear the appeal on the merits with the assistance of amicus and whether Mr. Penner

actively participates or not. This latter determination, whether to proceed beyond the merits review I have directed, is of course a decision for the division hearing the matter. The application under Rule 13(3) is adjourned accordingly.

[Discussion with counsel]

[10] **BAUMAN C.J.Y.C.A.:** Looking at the proceedings, I presume Mr. Larochelle would recuse himself. Absolutely no reflection on Mr. Larochelle, of course.

[11] **GOEPEL J.A.:** I agree.

[12] **CHARLESWORTH J.A.:** I agree.

“The Honourable Chief Justice Bauman”