

COURT OF APPEAL OF YUKON

Citation: *R. v. James*,
2022 YKCA 5

Date: 20220517
Docket: 20-YU870

Between:

Regina

Respondent

And

Alvin Dennis James

Appellant

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

On appeal from: Orders of the Supreme Court of Yukon, dated October 24, 2019, June 9, 2020 and June 12, 2020 (*R. v. James*, Whitehorse Docket 18-01509).

Oral Reasons for Judgment

The Appellant, appearing in person: A. James

Counsel for the Respondent: N. Sinclair

Place and Date of Hearing: Whitehorse, Yukon
May 17, 2022

Place and Date of Judgment: Whitehorse, Yukon
May 17, 2022

Summary:

The appellant was convicted of sexual assault on 24 October 2019 and was sentenced on 12 June 2020 for a 12-month custodial sentence followed by 18 months' probation. He filed a notice of appeal on 2 July 2020. The appellant has failed to advance his appeal. The Crown first brought a Rule 13 application on 17 May 2021, seeking dismissal of the appeal for want of prosecution. The Court declined to dismiss the appeal, giving the appellant a chance to confirm counsel and to advance the appeal. On 26 November 2021, the appellant was granted a limited appointment of counsel under s. 684 for the purpose of reviewing the merits of the appeal and determining whether to pursue a full s. 684 application. That counsel advised the Court on 16 February 2022 that her review was complete and that she did not intend to bring an application before the Court seeking a full s. 684 appointment. The appellant now tells the Court that he does not have the funds to obtain the trial transcripts, prepare an appeal book, or obtain counsel. The Crown has brought forward again its motion to dismiss the appeal for want of prosecution.

Held: application allowed; appeal dismissed. While the appellant has proposed a plan to set aside funds to pay for the transcripts and counsel, this plan would take another year to 18 months. The outcome of the limited s. 684 application, the potential impact on the complainant and other witnesses, and degrading quality of the evidence all weigh against allowing this appeal to continue. The time has come that these proceedings must be brought to an end.

[1] [9:30 A.M. – 9:31 A.M.]

[2] **MR. SINCLAIR:** Chief Justice and Honourable Justices, this matter emanates from a trial before a judge and jury in the Yukon Supreme Court. Mr. James was convicted on October 24, 2019, of a sexual assault and then ultimately sentenced on June 12, 2020, at which time he received a 12-month custodial sentence followed by 18 months of probation.

[3] Mr. James filed and served his notice of conviction and sentence appeal on July 2, 2020. He sought the assistance of the Yukon Legal Services Society for the prosecution of his appeal. Legal aid was denied to Mr. James on September 4, 2020. Since that time, he has done very little to advance his appeal.

[4] The Crown brought its Rule 13 application on May 17, 2021, for the first time before this Court. That would've been at the Court of Appeal assize last year. We appeared before you, Chief Justice, and Justices Frankel and Newbury. At that time, Mr. James appeared on his own behalf.

[5] Chief Justice, you granted what I've identified in my notes as a last chance adjournment of the Crown's application to confirm the appointment of counsel and for Mr. James to move forward with his appeal, including the filing of the trial transcript and the appeal book.

[6] The matter was in case management after that point a couple of times.

[7] On November 26, 2021, it was before another division of this Court. Justice Charlesworth, you were there together with Justices Bennett and DeWitt-Van Oosten. At that time, the Court made a limited s. 684 appointment of counsel order on the Court's own motion to provide Mr. James with counsel to assist him with the determination of the merits of the appeal and the possibility of a further application under s. 684 for the appointment of counsel or an application to the Yukon Legal Services Society Board of Directors to appeal the dismissal of his legal aid application.

[8] Since that time, we were back before Madam Justice Bennett in case management on February 16, 2022. At that time, Ms. Cunningham appeared. She had conducted her review of the merits. She advised the Court that she did not intend to bring an application before the Court seeking appointment of counsel and that she considered her services in assisting Mr. James to be concluded. She then, I suppose I could say, withdrew from the case.

[9] The continuation of the Crown's application was adjourned on February 16 to today's date. There was a letter sent to Mr. James providing him with all of this information and I think you will also find a copy of that February 24th letter on the court file. Justice Bennett provided directions to Mr. James that he was required to file the appeal book and transcript, or at least provide proof to the Court that he had ordered and paid for the transcript in advance of the hearing today and provide Crown counsel with that. He was given directions as to how to place that order and the matter was adjourned.

[10] I filed, in April, for the assistance of the Court, a copy of the charge to the jury, which was provided by the trial judge, Justice Campbell, to the jury, written instructions, as well as her reasons for judgment. I hope that the Court can glean from that some sense of the nature of the prosecution and the evidentiary issues that were considered by the jury.

[11] Since the last case management conference in February, I was contacted by Ms. Esther Armstrong on behalf of Mr. James. She indicated that Mr. James has been provided with a quote for the transcript of I think it's approximately \$12,000, and that Mr. James says that he can't afford to pay that all at once and that he wants more time to save up and be able to pay for the transcript.

[12] Ms. Armstrong also made an inquiry of me as to whether the entirety of the transcript would be required for the appeal, to which I responded that the notice of appeal doesn't really provide any particulars. I didn't know what the legal issues were and therefore couldn't concede that some of the evidence or other proceedings might not be necessary.

[13] **BAUMAN C.J.Y.C.A.:** Right. How many days was the trial?

[14] **MR. SINCLAIR:** The trial? Mr. James may have a better idea of that than I do. I think it was — was it a week?

[15] **BAUMAN C.J.Y.C.A.:** Okay.

[16] **MR. JAMES:** Yes.

[17] **BAUMAN C.J.Y.C.A.:** The status of the sentence, has it been served?

[18] **MR. SINCLAIR:** The sentence has been served. I may be mistaken about this. I have the sense that the sentence appeal is no longer before the Court or a live issue, but I don't have that in my notes. Anyway, Mr. James can speak to that, but he has served his sentence.

[19] Today, I expect that we will hear from Mr. James that he hasn't adhered to the direction provided by Justice Bennett and we don't have the appeal book and transcript, and that he wants more time to gather his resources.

[20] Crown counsel opposes the further adjournment of this matter, bearing in mind the very extensive length of time that has passed since Mr. James was sentenced in 2020; the corresponding impact of delay on future proceedings in terms of the degradation of witness memory; and, as well, with regard to the ongoing uncertainty and ongoing "harm", I will say, to the victim of the sexual assault who is waiting to find out whether it's going to be appealed, whether she is going to be exposed to the legal process again, which is I think a concern to her and perhaps the other witnesses to a lesser extent.

[21] **BAUMAN C.J.Y.C.A.:** Thanks, Mr. Sinclair.

[22] [9:41 A.M. – 9:49 A.M.]

[23] **BAUMAN C.J.Y.C.A.:** This is an application under Rule 13 of the *Yukon Territory Court of Appeal Criminal Appeal Rules, 1993*, to dismiss an appeal for want of prosecution. I refer to the chronology placed on the record by Mr. Sinclair and these brief reasons should be read together with that chronology.

[24] We find ourselves with a dilemma that the cost of the transcripts, the appeal book, and the lawyer amount to some \$20,000 if Mr. James is to prosecute this appeal. The appeal has been outstanding for a number of years. Many opportunities have been afforded to Mr. James to bring the appeal on. A lack of funds has prevented that. Importantly, however, legal aid has been denied and a merits review by a court-appointed lawyer has suggested that further applications with respect to the appeal would not be brought with the assistance of a s. 684 application, suggesting to us that at least counsel at that point did not believe the merits of the appeal justified proceeding further.

[25] As I say, the matter has been outstanding for some time and one must, as Mr. Sinclair stressed, also bear in mind the impact on the victim/complainant while

this matter has been outstanding and in limbo, if you like, with respect to the status of the prosecution, and that prejudice cannot be ignored.

[26] So, too, is the possibility of the evidence in any retrial ordered following appeal being degraded to the point where prosecution is not viable.

[27] Those weigh against granting further indulgences to Mr. James in the prosecution of the appeal.

[28] His proposal for the funding of the transcripts and legal counsel suggests that we would be looking at another year to 18 months if he was able to put aside a sizable sum each month into a fund to fund those matters. In our view, regrettably, it does not appear realistic and the more so Mr. James would be placing himself under a great stressor to finance an appeal that has very little chance of success according to those who have reviewed the matter in the past.

[29] While we sympathize with Mr. James' position and we admire the fact that he has come to court and has indicated a desire to continue the proceedings, nevertheless we think the time has come that they must be brought to an end for the reasons I have just tried to detail.

[30] Accordingly, I would allow the Crown's application to dismiss the appeal for want of prosecution.

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

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

[33] **BAUMAN C.J.Y.C.A.:** The appeal is dismissed.

“The Honourable Chief Justice Bauman”