SUPREME COURT OF YUKON

Citation: *R v Silverfox*, 2022 YKSC 22

Date: 20220506
S.C. No. 20-01513
Registry: Whitehorse

BETWEEN:

HER MAJESTY THE QUEEN

AND

CHARABELLE SILVERFOX and LYNZEE SILVERFOX

Before Justice E.M. Campbell

Counsel for the Crown	Leo Lane and William McDiarmid
Counsel for Charabelle Silverfox	Jennifer A. Cunningham
Counsel for Lynzee Silverfox	Jennifer Budgell

This decision was delivered in the form of Oral Reasons on May 6, 2022. The Reasons have since been edited for transcription without changing the substance.

REASONS FOR DECISION
(Change of Venue)

INTRODUCTION

[1] CAMPBELL J. (Oral): Charabelle and Lynzee Silverfox were jointly charged with murder and other serious offences in relation to the death of Derek Edwards on or about December 13, 2017, in Pelly Crossing, Yukon.

[2] Even though the events at issue in this matter took place in Pelly Crossing, a community located approximately 300 km north of Whitehorse, Crown and defence

agreed that the jury trial should proceed in Whitehorse. The jury trial was eventually scheduled to proceed in Whitehorse from March 28, 2022 to April 25, 2022.

[3] However, on the morning of jury selection, Charabelle Silverfox and Lynzee Silverfox stated that they no longer wished to proceed to trial and were prepared to enter guilty pleas with the Crown's consent. Charabelle Silverfox entered a guilty plea to the offence of second degree murder on the person of Derek Edwards. Lynzee Silverfox entered a guilty plea to one of the offences charged, a charge of offering an indignity to the human remains of Derek Edwards. I accepted the guilty pleas and entered a finding of guilt against both accused. The Crown stayed the proceedings on the remaining charges before the Court.

[4] The matter is presently set to proceed to sentencing on June 20, 2022. At this time, the matter is set to proceed in Whitehorse. At the time of fixing a date for sentencing, Crown counsel requested that the matter be returned to Pelly Crossing, its original venue. The defence opposed the Crown's request. As a result, I directed Crown counsel to file an application for a change of venue, which they did. In support of their position, Crown counsel filed the affidavits of:

- Marion Edwards, the sister of the deceased;
- April Baker, a close friend of the deceased's family;
- Joel Rogers, the Deputy Superintendent of Operations at the Whitehorse Correctional Centre ("WCC"); and
- Colin Kemp, a constable with the Major Crime Unit of the Yukon Division of the RCMP ("RCMP") and the lead investigator in this matter.

[5] They also filed:

- a letter from the acting Deputy Chief of the Selkirk First Nation; and
- admissions regarding information provided by the Sheriff, Andrew Hyde.

Positions of the parties

[6] The Crown submits that the COVID-19 restrictions in place at the time this matter was set for trial were the driving factor behind the change of venue. The Crown contends that now that the COVID-19 restrictions have been lifted, the matter should simply return to its original venue without the need for a formal application.

[7] In the alternative, the Crown submits that there are compelling reasons to move the sentencing hearing back to Pelly Crossing, and that those reasons meet the test set out at s. 599 of the *Criminal Code*, R.S.C. 1985, c. C-46 ("*Criminal Code*") for a change of venue.

[8] The Crown submits it is a well-established principle that criminal trials should be held in the community in which the alleged crime took place, and holding jury trials in the location where the crime allegedly occurred is the general rule in the Yukon, even for small communities. The Crown also submits that sentencing is part of the trial.

[9] The Crown submits that Mr. Edwards had many friends and family members who reside in Pelly Crossing and who want to attend the hearing but lack the means to travel and stay in Whitehorse. The Crown adds that the emotional support of the family of the deceased is in Pelly Crossing, not Whitehorse.

[10] In addition, the Crown submits that victim impact statements and a community impact statement will be filed and that the authors of those statements should be given the opportunity to read them in court in the presence of the accused and not by video.

[11] The Crown adds that the Selkirk First Nation supports holding the sentencing hearing in Pelly Crossing and has offered an appropriate venue for the hearing.

[12] The Crown submits that justice must be rooted in the community it serves. In addition, the Crown submits that it is essential for the Court to be present in Yukon communities whenever feasible and that the Court's presence in the community of Pelly Crossing for the sentencing in this matter furthers the important goal of reconciliation with Indigenous peoples.

[13] Finally, the Crown submits that it would be contrary to the interests of justice to hold the sentencing hearing in Whitehorse rather than in Pelly Crossing now that the circumstances that justified holding the trial in Whitehorse no longer exist.

[14] The defence opposes the application based on concerns for the safety of the accused and their respective families if the sentencing is held in Pelly Crossing as well as the lack of a risk assessment in that regard.

[15] Defence counsel dispute Crown counsel's assertion that the jury trial was moved to Whitehorse solely to conform with the health restrictions in place at the time due to the COVID-19 pandemic. Their recollection is that the parties agreed that the trial be held in Whitehorse as is usually the case for lengthy jury trials where the allegations originate in the communities.

[16] Defence counsel also submit that holding the sentencing hearing in Pelly Crossing does not promote the end of a fair and efficient trial considering the resources required to move the proceeding back to Pelly Crossing; and the fact that such a decision would likely result in the adjournment of the sentencing hearing due to the lack

of human resources available to hold the sentencing outside of Whitehorse on the date already scheduled for sentencing.

[17] Defence counsel submit that their clients have been in custody at the WCC for a long time, that they did not oppose the additional delay involved in allowing the community to provide a community impact statement, but that the interests of justice require they be sentenced without any further delay.

Analysis

[18] The parties disagree on the reasons that led to the initial change of venue from Pelly Crossing to Whitehorse. I do not intend to devote much time to addressing this issue other than to say that both Crown and defence agreed to the change of venue, that the Court relied, as it should be able to, on the agreement of experienced counsel on both sides, and that the jury trial was scheduled to proceed in Whitehorse accordingly. Had one of the parties objected, had reservations, or insisted on reasons being given for the change of venue that occurred, it should have stated so on the record when dates for the jury trial were canvassed and the jury trial scheduled to proceed in Whitehorse in this matter.

[19] In any event, the real question before the Court at this point is whether this matter, which was scheduled to proceed to trial before a jury in Whitehorse, should be returned to its original venue for sentencing after guilty pleas were entered.

[20] Section 599 of the *Criminal Code* provides that a court may, at any time before or after an indictment is found, on the application of the prosecution or the defence, order a change of venue where:

> (a) it appears expedient to the ends of justice, including

> (i) to promote a fair and efficient trial, and
>
> (ii) to ensure the safety and security of a victim or witness or to protect their interests and those of society; …

[21] I agree that sentencing is part of the trial process. In addition, I note that there is nothing in the wording of s. 599 of the *Criminal Code* that precludes the Court from ordering more than one change of venue in a proceeding or from ordering that a proceeding be moved back to its original venue.

[22] I also note that as a judge of the Supreme Court of Yukon, I have jurisdiction across the Yukon.

[23] The guiding principles for the exercise of the Court's discretion under s. 599 were set out in *R v Daunt*, 2005 YKSC 33 at para. 7, and confirmed in *R v Johnson*, 2014 YKSC 28 ("*Johnson*"):

> [7] The guiding principles … are:
>
> 1. a criminal trial should be held in the place in which the crime is alleged to have occurred;
>
> 2. the applicant must establish, on a balance of probabilities that a fair and impartial trial cannot be held in [the originating community];
>
> 3. the discretion to change the location must be exercised judicially, that is on a principled basis;
>
> 4. the applicant must be able to demonstrate that the partiality or prejudice established cannot be overcome by safeguards in jury selection which include peremptory challenges, challenges for cause and trial judge instructions to the jury.

[24] While the specific issues raised by an initial change of venue before the commencement of a trial, including the jury selection process, are no longer at play in

this case and different considerations apply to a sentencing hearing that proceeds before a judge, the overriding concern, as stated by Justice Veale (as he then was) in *Johnson*, at para. 23, remains trial fairness.

[25] I pause here to say that the Supreme Court of Canada has stated on more than one occasion that an accused's right to a fair hearing or a fair trial does not equate to an entitlement to the most favourable procedures that could possibly be imagined. Also, a fair trial must not be viewed only from the standpoint or perspective of the accused but also from the perspective of the community and, when applicable, the complainant (see comments of McLachlin J. and Iacobucci J., for the majority in *R v Mills*, [1999] 3 SCR 668 at 718; McLachlin J. in *R v O'Connor*, [1995] 4 SCR 411 at 517; and La Forest J. in *R v Harrer*, [1995] 3 SCR 562 at 573).

[26] In addition, the principle that a trial should be held in the place in which the crime is alleged to have occurred remains a valid consideration when an application is made to return a proceeding to the community where it originates after an initial change of venue.

[27] In *Johnson*, at para. 26, Justice Veale cited with approval Judge Lilles' comments in *R v SCB*, 2001 YKTC 506, reiterating:

> … [T]he importance of holding a trial in the community where the incident occurred in creating a sense of trust and ownership in the community as well as facilitating the appearance of the witnesses involved. …

[28] In that sense and considering the nature of the offences as well as the evidence before me on this application, it is clear that sentencing is an important step in this proceeding, and I agree with Crown's submission that moving back the sentencing to Pelly Crossing would further the goal of reconciliation with Indigenous peoples.

[29] Crown and defence have advised that they intend to proceed by way of joint submissions regarding the appropriate sentence to be imposed for both accused. Counsel have confirmed that they do not intend to call civilian or expert witnesses to testify at the sentencing hearing and they anticipate that the hearing should take a day. The parties have raised no technological issue or requirement that would militate in favour of keeping the proceeding in Whitehorse as opposed to moving it back to Pelly Crossing.

[30] While the parties do not intend to call witnesses at the sentencing hearing, it is expected that victim impact statements from members of Mr. Edwards' family as well as a community impact statement will be filed for the sentencing hearing. It is also expected that some of the authors of those statements (members of the Selkirk First Nation and residents of Pelly Crossing) will want to read them in court as provided by ss. 722 and 722.2 of the *Criminal Code*. The affidavits of Marion Edwards and April Baker reveal this proceeding is important for the family of the victim and other members of the community; and that they want to attend the hearing in person but that many of them, including elders, lack the means to attend Whitehorse for the hearing. The evidence also reveals that their support network is in Pelly Crossing, not Whitehorse.

[31] I note that a link can be set up between the courthouse in Whitehorse and Pelly Crossing to allow those who could not travel to Whitehorse to watch and participate in the sentencing proceeding by video. While not perfect, this is nonetheless a means by which this Court could make the proceedings in Whitehorse accessible to the citizens of the Selkirk First Nation and residents of Pelly Crossing.

[32] The letter of Dean Gill, the Acting Deputy Chief of the Selkirk First Nation, reveals that the First Nation government is supportive of the sentencing hearing proceeding in Pelly Crossing and has offered the Link Building as a venue for the hearing. While no specifics have been provided with respect to the capacity of that building, I am satisfied that the community building offered by the First Nation government should be large enough to accommodate the court proceeding and the implementation of the safety measures that have been put in place by the Supreme Court of Yukon as a result of the COVID-19 pandemic, such as social distancing.

[33] I note that the Territorial Court of Yukon holds regular court circuits in Pelly Crossing. It is clear that there is a facility in Pelly Crossing that would allow this Court to proceed to a sentencing hearing in the community. Whether such a venue would be available in a timely manner for sentencing is another consideration that I will address later in this decision.

[34] I am of the view that the above factual considerations militate in favour of moving the venue of the sentencing hearing back from Whitehorse to Pelly Crossing.

[35] However, from the outset, I have alerted counsel that:

(i) the Court's capacity to ensure a safe environment for all participants in this sentencing proceeding;

(ii) the ability of the authorities to ensure suitable transportation, meals, and housing for the accused who are detained at WCC; and

(iii) the Court's capacity to hold a sentencing hearing in a timely manner in Pelly Crossing;

were issues of concern for the Court that needed to be addressed.

[36] Based on the affidavit of Joel Rogers, the Deputy Superintendent of Operations at the WCC, I am satisfied that Corrections has the means and capacity to transport and attend to the needs of the two accused for a one-day hearing in Pelly Crossing.

[37] Considering the affidavit of Colin Kemp, a constable with the Major Crime Unit of the Yukon Division of the RCMP and the lead investigator in this matter, I am satisfied that the accused could be detained at the RCMP Detachment in Pelly Crossing during the day while the court is not in session. I am also satisfied that the RCMP is prepared to arrange for as many RCMP officers as necessary to assist with security measures whether inside or outside the courtroom in Pelly Crossing, as required.

[38] While I acknowledge that no risk assessment has been completed, it appears that sufficient resources are available to ensure the safety of all involved, including the safety of the accused and their respective families. In addition, while defence counsel explained that they expected to see a risk assessment prior to responding to this issue by filing evidence, if required, I note that the evidence before me does not disclose any specific risk or threat to the safety of the accused and their respective families that would warrant keeping the matter in Whitehorse.

[39] In addition, while the affidavits before me disclose some level of animosity towards the accused, the evidence does not reveal that the animosity is such that it would prevent holding a fair hearing in Pelly Crossing.

[40] Sentencing proceedings in serious criminal matters, and most specifically in matters involving the death of the victim, are highly charged and emotional, whether they are held at the courthouse in Whitehorse or in the communities.

[41] However, the evidence before me reveals that the Sheriff's office does not have the staffing capacity during the week of June 20th to provide security for the Court if the matter proceeds outside the courthouse. While I understand that members of the RCMP have stated their willingness to assist, security in the courtroom and coordination of what is required to ensure the safety of courtroom participants and the Court is the purview and responsibility of the Sheriff's office. As a result, the Court would not be able to travel and proceed with the sentencing hearing in Pelly Crossing, if the matter proceeds as scheduled on June 20th, despite the fact that there appears to be a venue available for the sentencing in Pelly Crossing on that date.

[42] In addition, I am informed by defence counsel that the joint submission involving Lynzee Silverfox will lead to a period of time served, if the proceeding takes place on or around July 6th. The Crown does not dispute that assertion. While I am not bound by a joint submission, I cannot depart or refuse a joint submission from Crown and defence on sentence unless the proposed sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest (see *R v Anthony-Cook*, 2016 SCC 43 at paras. 29 to 34). This is a high threshold.

[43] In addition, counsel for Charabelle Silverfox pointed out that her client is still detained at the WCC pending sentencing and is unable to access services comparable to what is available in the penitentiary system, where it is expected that she will be transferred upon being sentenced for the offence of second degree murder.

[44] Trial fairness encompasses the right to be tried and sentenced without unreasonable delays. Delay is therefore a valid consideration in a change of venue application (see *R v Etzel*, 2014 YKSC 64 at para. 25). Fairness therefore dictates that

the sentencing hearing be held, at the latest, on or before July 6 to ensure that delay does not result in the accused spending more time than warranted and necessary in custody at the WCC.

[45] Overall, I am of the view that the Crown has met its burden to demonstrate that it appears "expedient to the ends of justice" (*Etzel* at para. 26) to return this proceeding for sentencing to its original venue, Pelly Crossing, provided that:

(i) a risk analysis is conducted for or by the Sheriff's office prior to the sentencing hearing confirming that a hearing can safely be held in Pelly Crossing and would not require the presence of extensive police resources within the courtroom that would impact the fairness of the process; and

(ii) the sentencing hearing can be held in Pelly Crossing before July 6th.

[46] Otherwise, the sentencing will proceed as scheduled in Whitehorse on June 20th and a video link will be set up with Pelly Crossing for those who would want to attend the sentencing hearing and cannot travel to Whitehorse.

[47] I would add that a risk analysis does not need to be conducted every time it is requested that a matter be moved from Whitehorse to a community. However, I find it appropriate in this case.

[48] I understand that the authors of the community impact statement indicated at the end of March that it would take six to eight weeks to complete the community impact statement. Therefore, I am asking the Supreme Court Trial Coordinator to canvas, with all concerned, possible dates for sentencing in Pelly Crossing in May, June — except the week of June 20th — and the beginning of July, up to July 6th.

[49] I do not find, based on the evidence before me, that the alternate solution put forward by defence counsel (that the accused attend sentencing by videoconference from Whitehorse while the Court party travels to Pelly Crossing) is appropriate in the circumstances, and I do not find that it serves the ends of justice in this case.

[50] Considering the fact that my decision involves the further involvement of the Sheriff and the Supreme Court Trial Coordinator, I suggest that for now we keep the date of June 20th for sentencing in Whitehorse, and that the matter be brought before me, within the next two or three weeks, to confirm a date for the sentencing hearing because the Trial Coordinator will have to contact counsel. She will have to make inquiries. I am not asking the Sheriff's office to make or obtain a formal or a long risk analysis. I am simply asking the Sheriff's office to do what they usually do, which is assess the risks before the Court attends a venue for a hearing like this. I ask him to be in contact with counsel during that process.

[51] I suggest we adjourn this matter to a date within two or three weeks.

[52] MR. LANE: Just one point of clarification. I appreciate Your Honour's assessment in finding that holding the sentencing hearing in Pelly Crossing the week of June 20th on the evidence that is before the Court now is not feasible. If that situation changes and the Sheriff's office increases its staffing capacity or working with the RCMP determines that it is possible to do it that week, I just wanted to know the extent to which Your Honour's ruling today bars that possibility.

[53] THE COURT: I do not want to end up in a situation where so much pressure is put on the Sheriff's office that we have a hearing in Pelly Crossing that would affect their ability to maintain safety and security in this building. If, for some reasons, things

change —but that was not my understanding when the evidence was put before me when I heard this matter — then if, at the end of the day, the Sheriff can make the 20th work, that's fine. But with the evidence that I have right now, and what was agreed to by the parties, the Sheriff said they would not be able to make it work the week of June 20th.

[54] The safety of the court participants in this building is as important as the safety of the participants in Pelly Crossing. I certainly do not want to jeopardize that. That is why I said not the week of June 20th, but if that changes then that is fine.

[55] I certainly would not want to go past, as I said, July 6th — even a date before that I think would be preferable. That is why I included the months of May, June, and July as a possibility. I am prepared to start earlier in the day. I do not want to say too early because I know that people are going to have to depart from Whitehorse in the morning. I am prepared to say that the hearing could proceed from 10:00 a.m., 10:30 a.m. (instead of 11:00 a.m.) until 6:00 p.m. or so. I am prepared to accommodate that if that is possible.

[56] I am hoping, counsel, that as officers of the court, you will indicate your availability and cooperate with the Trial Coordinator.

[57] The risk analysis, I am going to ask that it be done as soon as feasible. Whether, as I said, the risk analysis is done by the Sheriff's office or done for them, that he contacts or his office contacts everyone concerned in order to gather the required information.

[58] I do not ask him to disclose confidential information or the content of his analysis or the analysis he receives with the parties, but I will certainly request that he

communicate the results and findings with the parties. Certainly, we can have a further discussion if there are concerns that arise from that risk analysis.

[59] MS. BUDGELL: Your Honour, just a comment on the issue of the risk analysis. I understood from our discussions with Sheriff Hyde, earlier this week, off the record, that it is not the Sheriff's office that will do any risk analysis, it is the RCMP. I understood that to be his position.

[60] THE COURT: And that is why I said "by or for the Sheriff's office" because, in the end, he is the one who is going to have to assess what is feasible and what is not feasible. Usually, even though I think those discussions are probably going to be more public in this case than they usually are, if there are concerns, they are raised with the judge. However, in this case, I am prepared to allow the Sheriff to, after sharing any concerns with me, sharing those concerns, if any, with Crown and defence. The goal is, at this point, as I said, as long as we can make sure that a fair and safe sentencing hearing can proceed in Pelly Crossing prior to July 6th, then it will proceed in Pelly Crossing. However, if there are concerns about safety and a fair process, then I will reconsider my decision.

[61] Mr. Lane, — Ms. Budgell, Ms. Cunningham, when do you think we should be back before the Court? Because if a date is chosen or found with the Trial Coordinator, she can set that date aside and save it until we get more information about the risk analysis.

[62] MS. BUDGELL: I would suggest either late next week or early the week after, Your Honour, just because if we are going to be looking at dates in May or prior to June 20th, it makes sense to get these answers sooner rather than later.

[63] MR. LANE: I think a week is not enough time. I do not know what is involved. I have never seen a formal risk assessment. I do not know if there is a protocol, but I would like to give — if the RCMP are going to be involved, I would like to give them more time than that. But certainly the week after next I think is reasonable.

[64] THE COURT: I only have Monday, May 16th to offer. Maybe we should contact the Trial Coordinator. Other than that, I would be the one appearing by video. It would have to be May 16th or the week of May 23rd.

[65] Counsel, there is nothing that prevents you from choosing a date with the Trial Coordinator. She will set that date aside — it would not be provided to anybody else — and then wait for the risk assessment.

[66] Mr. Lane, the longer the RCMP takes for that risk assessment, the smaller the window for a sentencing hearing proceeding in Pelly Crossing.

[67] MR. LANE: Understood.

[DISCUSSIONS]

[68] The matter will be brought back before me on May 24th at 9 a.m. for an update on the risk assessment, the risks involved in holding the hearing in Pelly Crossing as well as availability for a sentencing hearing in Pelly Crossing prior to or on July 6th.

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CAMPBELL J.