SUPREME COURT OF YUKON

Citation: *R v Tuel and Wuor*, 2021 YKSC 68

Date: 20210907
S.C. No. 21-01503
Registry: Whitehorse

BETWEEN:

HER MAJESTY THE QUEEN

AND

MALAKAL KWONY TUEL

and

JOSEPH WUOR

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Before Justice K. Wenckebach

Counsel for the Crown	Lauren Whyte
Counsel for Defendant Malakal Tuel	Jennifer Budgell (by telephone)
Counsel for Defendant Joseph Wuor	Lynn MacDiarmid

This decision was delivered in the form of Oral Reasons on September 7, 2021. The Reasons has since been edited for publication without changing the substance.

REASONS FOR DECISION

[1] WENCKEBACH J. (Oral): The applicant, Mr. Joseph Wuor, is accused, along with Mr. Malakal Tuel, of possessing cocaine for the purposes of trafficking, possessing

cash knowing that it was derived from the commission of an offence, being occupants in a vehicle while they knew there was a prohibited firearm, and possessing a loaded prohibited firearm without a licence, all stemming from events that took place on December 1, 2019, in Carcross, Yukon.

[2] Mr. Wuor is also solely charged on the same Indictment with possession of a firearm while prohibited.

[3] All of the charges against Mr. Wuor arise out of events that occurred on the afternoon of December 1 in Carcross, Yukon.

[4] In addition, Mr. Tuel is solely charged with other matters on the Indictment. Those charges arise out of an incident in the early hours of December 1, 2019, in Whitehorse, Yukon, in which the complainant, Mr. John Papequash, was shot. The charges Mr. Tuel face include attempted murder. Thus, Mr. Tuel is charged with the same drug and firearms offences out of Carcross as Mr. Wuor, and with additional offences out of Whitehorse.

[5] The trial on all charges is set to be heard before judge and jury. Mr. Wuor says that choice was made by Mr. Tuel. If Mr. Wuor were permitted to choose, he would elect trial in the Territorial Court of Yukon. Mr. Wuor seeks to sever the counts relating to Mr. Tuel from his charges or, in the alternative, to sever the counts relating to Carcross from those relating to Whitehorse.

[6] The issue here is: Should the charges be severed?

Analysis

[7] The authority of the Court to order that co-accused be tried separately is found at s. 591(3)(b) of the *Criminal Code*, RSC 1985, c. C-46 (the "*Criminal Code*"). It states:

> (3) The court may, where it is satisfied that the interests of justice so require, order
>
> …
>
> (b) where there is more than one accused or defendant, that one or more of them be tried separately on one or more of the counts.

[8] In considering severance applications, the Supreme Court of Canada has determined that the term "the interests of justice" encompass:

> [16] … the accused's right to be tried on the evidence admissible against him, as well as society's interest in seeing that justice is done in a reasonably efficient and cost-effective manner. … (*R v Last*, 2009 SCC 45, at para. 16).

[9] It also includes the interests of the prosecution (*R v Zvolensky*, 2017 ONCA 273 at para. 251).

[10] The factors used for determining whether severance should be granted, and which are applicable in this case are:

> [18] … the general prejudice to the accused; the legal and factual nexus between the counts; … the possibility of inconsistent verdicts; the desire to avoid a multiplicity of proceedings; … the length of the trial having regard to the evidence to be called; the potential prejudice to the accused with respect to the right to be tried within a reasonable time; [if the co-accused are alleged to have acted jointly]; and the existence of antagonistic defences as between co-accused persons. (*Last* at para. 18) [citations omitted]

[11] The Court's role is to "weigh cumulatively all the relevant factors to determine whether the interests of justice require severance" (*Last* at para. 44).

[12] In my analysis, I have further refined some of the factors listed above. I will therefore consider: how the length of the trial will affect Mr. Wuor; the impact of delay on him; the legal and factual nexus between the counts; the potential impermissible

inferences the jury could draw about Mr. Wuor; the allegation that the co-accused acted jointly; and the possibility of antagonistic defences as between Mr. Wuor and Mr. Tuel.

A. Length of Trial

[13] Mr. Wuor estimates that if all the charges proceed together, the trial will likely take two to three weeks. In contrast, if his charges are severed from those of Mr. Tuel then his trial would take two to three days. It stands to reason that the same argument applies if the Carcross charges are severed from the Whitehorse charges. Most, if not all, the same evidence applies to both co-accused. Even if there is additional evidence with regard to Mr. Tuel, thereby extending the trial, there will still be a significant decrease in trial time.

[14] In Mr. Wuor's case, the length of trial has an additional impact on him. Mr. Wuor lives in Alberta. If he is required to attend a trial lasting two to three weeks, he will be required to take time off work and to pay for accommodations while in Whitehorse.

B. Delay

[15] A trial before judge and jury would likely take place in the spring of 2022, possibly in April. Mr. Wuor and Mr. Tuel were charged December 5, 2019. The *Jordan* date (*R v Jordan*, 2016 SCC 27) for undue delay would be on June 5, 2025. Should the trial proceed as planned, therefore, s. 11(b) concerns do not arise.

[16] However, while it does not appear that the date of the trial will surpass the *Jordan* threshold, I conclude that Mr. Wuor will likely still suffer some prejudice through a delay. The Supreme Court of Canada has stated that delay can have a detrimental impact on the accused (*Jordan* at para. 20).

[17] In my opinion, the detrimental impact of delay can prejudice the accused even where it does not reach the point of violating the *Canadian Charter of Rights and Freedoms Part 1 of the Constitution Act*, *1982* (the "*Charter*"). In this case, Mr. Wuor is on strict bail conditions. The delay caused by having this matter proceed by way of trial before a judge and jury will extend the time that Mr. Wuor is on these strict bail conditions. The detrimental impact on Mr. Wuor in this case therefore causes him prejudice.

C. Legal and factual nexus

[18] Almost all the legal issues and many of the facts the Crown seeks to prove are the same in Mr. Wuor's and Mr. Tuel's charges out of Carcross. The accused are charged with mostly the same charges and the charges arise out of generally the same set of facts. There is therefore a clear, very strong factual and legal nexus between Mr. Wuor's and Mr. Tuel's Carcross charges.

[19] There is no legal nexus between the Carcross charges and those out of Whitehorse. There is, however, a strong factual nexus. Mr. Tuel is accused of shooting Mr. Papequash in front of the 202 Bar in the early morning of December 1, 2019, in Whitehorse. There are no witnesses who know Mr. Tuel to identify him and who can say that he was at the bar the night of November 30 and December 1, 2019. The Crown therefore anticipates relying on other evidence to establish that Mr. Tuel was at the 202. That other evidence is tied to both Mr. Wuor and the charges from Carcross. There is video evidence of two individuals at the 202 that match Mr. Tuel and Mr. Wuor. They were then seen together later that night and arrested together in Carcross.

[20] As well, clothing that the two individuals are seen wearing in the video matches clothing found by police in Mr. Tuel's car when they arrested Mr. Tuel and Mr. Wuor in Carcross.

[21] This same evidence, Crown says, will also be used to demonstrate that Mr. Wuor and Mr. Tuel were acting jointly in drug trafficking. The evidence of the clothing in the car helps to establish that the two were the individuals in the video. There is also video evidence from another bar, the Casa Loma, that shows individuals matching Mr. Tuel's and Mr. Wuor's descriptions.

[22] The Crown anticipates having witnesses testify that a man named Joseph, who fits Mr. Wuor's description, had two phones and one kept ringing. Together, this is intended to show that Mr. Tuel and Mr. Wuor were acting in concert in drug trafficking.

[23] The evidence about the shooting in Whitehorse does not arise solely out of Whitehorse and the evidence about the drug arrest in Carcross is not restricted to that which was found in Carcross. Rather, the Crown intends to use evidence from each location in proving the offences committed in the other location. There is therefore a factual nexus between the two sets of charges even where there is no legal nexus.

[24] As there is a factual overlap between the two sets of charges, the same witnesses would be called at two trials if the counts were severed. Police officers, drug, DNA, and firearm experts would be called twice and led through the same evidence in two different trials. If Mr. Wuor's charges are severed from Mr. Tuel's, then many of the same legal arguments will be made twice as well. There would be a multiplicity of trials and the factual nexus means that the trials would not be heard in a cost-effective and efficient manner.

D. Impermissible inferences

[25] Mr. Wuor submits that a jury may come to improper inferences because his co-accused is charged with the more serious offence of attempted murder while Mr. Wuor is charged with drugs and arms offences only. Mr. Wuor submits that there is a risk that the jury will link him to the charge of attempted murder and draw negative inferences about his guilt with regards to his actual charges.

[26] In my opinion, while there is a possibility that a jury could engage improper reasoning, this risk is remote and can be managed by an instruction to the jury. The risk that a jury would conclude that the accused is guilty through association to Mr. Tuel and his charges is lessened because the offences Mr. Wuor is charged with are dissimilar to the charges Mr. Tuel is facing with regards to the shooting.

[27] Mr. Wuor filed *R v Sher*, 2012 ONSC 1792, in which the Court determined that the risk of improper reasoning warranted severance.

[28] In *Sher*, the links between the offences were stronger than in the case at bar. There were other factors in *Sher* as well that convinced the judge to sever the charges. In *Sher*, the applicant and his co-accused were all charged with terrorism related offences and the co-accused also faced other terrorism related charges. In addition, the co-accused faced mountains of evidence against them. By contrast, the case against the applicant rested largely on an audio-probe recording of one conversation. Furthermore, the evidence against the co-accused showed “an arguably fanatical devotion to violent Islamist jihad (*Sher* at para. 11).

[29] The combination of factors led the judge to conclude that no instruction would be sufficient to ensure the jury would not improperly apply evidence about the co-accused to the applicant.

[30] Here, however, the circumstances do not create the same kind of risks as in *Sher*. There is a strong presumption that jurors are able to understand and follow instructions about what they can and cannot do with evidence (*R v Baranec*, 2020 BCCA 156 at para. 214). The risk that jurors will draw improper inferences about Mr. Wuor is not sufficient to overcome this presumption.

[31] I conclude that any risk that a jury will not apply the evidence properly can be mitigated with an instruction.

E. Acting in concert and antagonistic defences

[32] There is a strong presumption that co-accused alleged to have acted in concert will be tried jointly. In addition, if it is possible that co-accused will blame each other utilizing a cut-throat defence, the presumption of a joint trial may be even stronger. The reasons for this presumption was discussed in *Zvolensky*.

[33] In *Zvolensky*, Pardu J.A., at para. 29, cited the Supreme Court of Canada in *R v Crawford*, [1995] 1 SCR 858, at paras. 30-31, wherein the Court stated:

> 30 There exist, however, strong policy reasons for accused persons charged with offences arising out of the same event or series of events to be tried jointly. The policy reasons apply with equal or greater force when each accused blames the other or others, a situation which is graphically labelled a "cut-throat defence". Separate trials in these situations create a risk of inconsistent verdicts. The policy against separate trials is summarized by *Elliott*, *supra*, at p. 17, as follows:
>
> > There is a dilemma here which could only be avoided by separate trials. But separate trials will not be countenanced because, quite apart

> from the extra cost and delay involved, it is undeniable that the full truth about an incident is much more likely to emerge if every alleged participant gives his account on one occasion. If each alleged participant is tried separately, there are obvious and severe difficulties in arranging for this to happen without granting one of them immunity. In view of this, in all but exceptional cases, joint trial will be resorted to, despite the double bind inevitably involved.

[34] Here, Mr. Wuor and Mr. Tuel are charged with the same offences arising from the same evidence. It is most likely that full evidence and the truth about what occurred will emerge if they are tried together.

[35] Moreover, there is also the possibility Mr. Wuor will point the finger at Mr. Tuel with regard to the drug and gun charges. Mr. Wuor's lawyer candidly conceded that both Mr. Wuor and Mr. Tuel could engage in a cut-throat defence; and, in that case, if Mr. Wuor's charges are severed from those of Mr. Tuel, inconsistent verdicts are a possibility.

Conclusion

[36] It is fair to conclude that Mr. Wuor is likely to suffer some prejudice if the charges are not severed. Mr. Wuor will encounter delay, which, in turn, will extend the time he will be on strict bail conditions. He will be required to sit through a much longer trial than if he were tried alone or if the Whitehorse charges were severed. This will be costly for him, as he will not be able to work while attending court and will have to pay for accommodations.

[37] However, this prejudice must be weighed against the interest in seeing that justice is done in a reasonably efficient and cost-effective manner. Addressing, first, the option of severing Mr. Wuor's charges from those of Mr. Tuel, the legal and factual

nexus between their joint charges would result in the duplication of much of the evidence and legal arguments in two different trials. Two separate trials would be neither efficient nor cost-effective. As the Crown alleges that the two were acting jointly and there is the possibility that either one or both accused will use a cut-throat defence, there is a good chance that if separate trials are held justice will not be done.

[38] Severing the Carcross charges from the Whitehorse charges does not provide a much better option. Although there is no legal nexus, there is considerable overlap in the facts the Crown seeks to prove. There will therefore be duplication of evidence through the two trials. As a result, the problems with the multiplicity of trials and dealing with the same evidence continues to exist. The issues would be lessened if the charges from Carcross are severed from those of Whitehorse, but are not sufficiently diminished.

[39] Balancing the different factors and recognizing the prejudice to Mr. Wuor, I conclude that it is not in the interests of justice to sever the charges. Mr. Wuor's application is dismissed.

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WENCKEBACH J.