

# SUPREME COURT OF YUKON

Citation: *R v Perez*,  
2023 YKSC 53

Date: 20230828  
S.C. No. 21-01518  
Registry: Whitehorse

BETWEEN:

HIS MAJESTY THE KING

AND

KARL GERLAND PEREZ

**Publication, broadcast or transmission of any information that could identify the complainant or a witness is prohibited pursuant to s. 486.4 of the *Criminal Code*.**

Before Justice K. Wenckebach

Counsel for the Crown

Kimberly Eldred and  
Arthur Ferguson

Counsel for the Defence

Sohana Chowdhury

**This decision was delivered in the form of Oral Reasons on August 28, 2023. The Reasons have since been edited for publication without changing the substance.**

## REASONS FOR DECISION

[1] WENCKEBACH J. (Oral): Mr. Karl Perez is charged with one count of sexual assault and one count of unlawful confinement against the complainant, B.C.-B. He chose to proceed by way of trial by judge and jury. The trial was to start today and was to commence with empanelling the jury. Mr. Perez did not come to court, however. He was in the Philippines until yesterday when he started his flight to Whitehorse. One of

his flights was delayed and he missed his connection to Whitehorse. He therefore did not arrive at Whitehorse last night as planned. The next available flight was today. He is supposed to take today's 7 p.m. flight and will appear in court tomorrow morning. Thus, this morning, the jury could not be empanelled and was dismissed until tomorrow.

[2] In accordance with s. 598 of the *Criminal Code*, RSC 1985, c C-46 ("*Criminal Code*"), because Mr. Perez did not appear for his trial, it is converted to a trial by judge alone. Mr. Perez, however, seeks to have the trial converted back to a trial by judge and jury. The Crown opposes the application.

[3] The sole issue here is whether Mr. Perez's failure to attend court because of his flight delay is a legitimate excuse, thus requiring the trial to proceed by way of judge and jury.

[4] I will first summarize the legal principles and then address the merits.

[5] An accused who is charged with an offence for which the maximum punishment is imprisonment for five years or a more severe punishment has a constitutional right to trial by judge and jury. The right is not unlimited, however. Section 598 of the *Criminal Code* provides that, where an accused does not appear or remain for their trial by judge and jury, the trial will proceed by judge alone unless the accused persuades the court that they had a legitimate excuse for their failure to attend or remain at court.

[6] The purpose of the section includes punishing accused who fail to attend court when required. This is not its only purpose, however. The Supreme Court of Canada has stated that the section addresses the cost to society when accused fail to attend a trial by judge and jury.

[7] In *R v Lee*, [1989] 2 SCR 1384, the Court described the costs as follows:

... The rationale for the section lies in the "cost" to potential jurors and to the criminal justice system in terms of economic loss and of the disaffection created in the community for the system of criminal justice, especially through the first jury panel. ... Persons summoned to serve on a jury panel have little choice but to obey the summons, and as such individuals who are selected as potential jurors often forgo for a substantial time their daily livelihood. In smaller and more remote communities this may have a severe disruptive effect on the jurors. Similarly, in these areas the cost of empanelling a jury the first time let alone a second time is very high. All of this leads to an erosion in public confidence and a frustration with the system when the accused fails to appear for his trial and the assembled jury panel has to be sent away. ... (at 1390-91).

[8] It went on to state:

... the cost, and by implication the importance of the objective, must be measured in terms of the overall "cost", both in the sense of economic loss and disruption to lives, and in the sense of confidence and respect for the system, to the individuals selected for jury duty and to society as a whole. ... (at 1391).

[9] The phrase "legitimate excuse" has also been examined by the courts. In considering what constitutes a legitimate excuse, the Ontario Court of Appeal has stated:

... nothing less than an intentional avoidance of appearing at trial for the purpose of impeding or frustrating the trial or with the intention of avoiding its consequences, or failure to appear because of a mistake resulting from wilful blindness, should deprive an accused of his constitutional right to trial by jury ... (*R v Harris* (1991), 66 CCC (3d) (Ont CA) at 539).

[10] In *R v Arreak*, [2000] NuJ No 12, the Court also considered what the phrase could mean. Justice Kilpatrick concluded that the test of reasonable diligence was appropriate. Thus, an accused must demonstrate that they exercised due diligence to attend their trial. To the extent that this test differed from that stated in *Harris*, Justice

Kilpatrick declined to follow it. Justice Kilpatrick also determined that the test was a mix of subjective and objective tests.

[11] In *R v Kingswell* (1996), 82 BCAC 266, the British Columbia Court of Appeal noted that in *Harris* the accused had an honest but mistaken belief about the facts. It concluded that the application of *Harris* may be limited where the context is different.

[12] Turning to the facts in this matter, Mr. Perez flew out of a community in the Philippines yesterday at about 10:30 a.m. (PHT). He arrived at Manila at 11:45 a.m. and was supposed to fly out of Manila at 7:20 p.m., arriving in Vancouver at 4:30 p.m. (PST). His next plane was scheduled to leave Vancouver at 9:05 p.m., arriving at Whitehorse at about 11:30 p.m. It was the last flight out of Vancouver to Whitehorse.

[13] His flight from Manila was delayed, however. It took off at about 10 p.m. He arrived in Vancouver at 7:30 p.m. The passengers were only able to deplane after 8 p.m. Although not specifically stated, I infer that Mr. Perez was unable to make his 9 p.m. flight because of the delay in deboarding as well as customs.

[14] Mr. Perez's counsel argues that Mr. Perez did not intend to delay or disrupt the proceedings. She essentially submits that it would have been better had Mr. Perez travelled before the day before his trial was to start. He had never experienced delays in his travels, however, and he did not anticipate any delays this time. While he did not make perfect arrangements, that is not expected of him. His inability to make the connection to Whitehorse is therefore a legitimate excuse.

[15] I do not find Mr. Perez's arguments persuasive. I accept that Mr. Perez did not intend to delay the proceedings. However, this is not sufficient to find that Mr. Perez's excuse is legitimate.

[16] Mr. Perez took unreasonable risks by trying to fly to Whitehorse in one day. There were many ways in which his travel could go wrong: he took three flights and travelled thousands of kilometres; he had to clear customs; Whitehorse is located in a remote area with few daily flights into it; and his flight to Whitehorse was the last of the night. He was facing many potential reasons for delay and gave himself no extra time to compensate for it.

[17] Mr. Perez told his counsel that he did not expect delays because he had never experienced them before. Counsel provided no information about how Mr. Perez has travelled, how much Mr. Perez has travelled, or when. He has certainly travelled to and from the Philippines, and he worked at Minto Mine so has at least some experience of travelling to remote communities. If he has not experienced delays, it is indeed fortunate. It is shortsighted in the extreme for him not to have considered the probability of some form of delay or difficulty in travel.

[18] Crown counsel submits that Mr. Perez should also have remediated the issues when they arose, for instance, by contacting counsel when he first learned that his flight was delayed in Manila, turning himself in to the police in Vancouver, or contacting counsel in British Columbia to try and appear in court by video.

[19] While I do not conclude that he should have taken the kind of steps Crown suggests, I do conclude that Mr. Perez was simply not prepared for the basics of travel. For reasons that are still unclear to me, Mr. Perez did not have a phone from which he

could contact his lawyer. He only contacted her through Facebook Messenger after his friend contacted her, asking her to check in on Facebook. This morning, he was not able to appear in court because he had no phone. It was only at 11 a.m. that he accessed a phone and appeared in court by telephone. While this failure did not have an impact on whether the trial jury could have proceeded today, it demonstrates how unprepared Mr. Perez was when problems arose.

[20] As Crown noted, the societal costs in this case are also significant. Unlike other jurisdictions, in the Yukon, we do not empanel multiple juries at one time. We empanel one jury on the first day of trial. Moreover, we have a small pool from which to draw jury members. It is not improbable that a person selected for the jury pool today may be selected for another jury pool at a later date. A negative experience in showing up only to be dismissed can have an important impact on that person's willingness to serve on a jury later on. Additionally, in this case, the jury pool will have taken two days out of their lives only to be dismissed.

[21] I agree with Crown that the principles laid out in *Harris* are not helpful in determining whether Mr. Perez's excuse is legitimate. I need not consider whether the *Arreak* reasonable diligence test is correct, however, as I conclude that Mr. Perez fell far below the reasonable diligence requirements.

[22] I conclude that Mr. Perez does not have a legitimate excuse for not appearing for his trial today. The trial will proceed as judge alone.