SUPREME COURT OF YUKON

Citation: *R v Perez*
2024 YKSC 4

Date: 20240112
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 J. Ferguson
Counsel for the Defence	Sohana Chowdhury (by videoconference)

This decision was delivered in the form of Oral Reasons on January 12, 2024. The Reasons have since been edited for publication without changing the substance.

REASONS FOR DECISION

[1] WENCKEBACH J. (Oral): The accused, Karl Gerland Perez, is charged with sexual assault and forcible confinement. His trial was scheduled to commence on August 28, 2023, as a judge and jury trial. It did not start as scheduled, however, because Mr. Perez was not present, having missed his flight to Whitehorse the day before. Instead, a hearing was held pursuant to s. 598(1)(a) of the *Criminal Code*,

RSC 1985, c C-46 ("*Criminal Code*" or "*Code*") to determine if the trial should proceed as a judge and jury trial. I ruled that the trial should proceed as a judge alone trial.

[2] The following day, after the trial commenced but before any witnesses were called, Mr. Perez sought an adjournment because the Crown had given him new disclosure which had been created after a meeting the Crown had with the complainant the day before. He sought a three-to four-week adjournment to prepare for the complainant's cross-examination, to seek further disclosure from the Crown, and to determine if he should bring a s. 276 or a "*Stinchcombe*" application. I denied the request for a long adjournment but decided that, after the complainant testified, Mr. Perez could have a short overnight adjournment.

[3] Following further discussion, in which defence counsel, Ms. Chowdhury, sought to bring a s. 276 application, I directed that she provide the Crown with notice of the s. 276 application the following morning. The trial was then adjourned to resume the next day.

[4] The following day, Ms. Chowdhury sought to get off the record because Mr. Perez had lost confidence in her. The trial was therefore adjourned for Mr. Perez to get new counsel.

[5] At the next court date, Ms. Chowdhury appeared on behalf of Mr. Perez, having been retained once more by him.

[6] Defence counsel has now brought a recusal application on the basis of reasonable apprehension of bias. Mr. Perez alleges that there is a reasonable apprehension of bias arising from the manner in which I responded to the s. 598 application. He also submits that the s. 598 application in combination with my handling

of the adjournment application raise a reasonable apprehension of bias.

[7] In his notice of application, Mr. Perez also submitted that I should be removed from the trial because of violations of ss. 11(d) and 7 of the *Canadian Charter of Human Rights and Freedoms, Part 1 of the Constitution Act, 1982* (the "*Charter*"). Counsel did not make any *Charter* arguments, however. I will not therefore consider those grounds.

[8] The issues to be addressed here therefore are:

1. Is there a reasonable apprehension of bias because of the way I responded to the s. 598 application? and
2. Is there a reasonable apprehension of bias because of the way I responded to the adjournment application?

[9] The legal principles on reasonable apprehension of bias are uncontroversial. The test is: "what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. Would [they] think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly" (*Committee for Justice and Liberty v National Energy Board*, [1978] 1 SCR 369 at 394).

[10] There is a strong presumption of judicial impartiality. The threshold for finding bias, real or perceived, is high.

[11] I now turn to my analysis.

1. Is there a reasonable apprehension of bias because of the way I responded to the s. 598 application?

[12] Defence counsel's argument turns primarily on a comment I made at a pre-trial conference held on August 28, 2023. The conference had been set for 9 a.m. to iron out

any last-minute issues before the jury was impaneled. However, the news that Mr. Perez would not be attending was received the night before and, as a result, the discussions were about how to proceed in Mr. Perez' absence.

[13] During the conference, I stated:

> … Yes, I agree with Ms. Eldred. This is not a reasonable delay. Waiting 'til the day before a trial to travel even across Canada is taking a risk. Flying internationally, is, I agree with Ms. Eldred, is reckless.

[14] Defence counsel submits this comment raises a reasonable apprehension of bias. This is because, under s. 598, an accused that does not appear for the judge and jury trial is to be tried by judge alone unless they establish a legitimate excuse for their failure to appear. I made the comment before I decided the s. 598 application.

[15] According to defence counsel, a reasonable observer would, after hearing the statement, think it more likely than not that I had pre-judged whether Mr. Perez had a legitimate excuse for failing to attend his trial.

[16] I agree that, viewed in isolation, this comment might raise concerns. However, comments made by decision-makers are not to be assessed in isolation but must be viewed in context and in light of the whole proceeding (*Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General)*, 2015 SCC 25 at para. 26).

[17] The context here includes that, at the time I made my statement, the jury was beginning to gather for selection at 10 a.m. There was some pressure about how we could proceed in Mr. Perez' absence. Moreover, the comment is best understood in light of what was said both before and after I made the comment.

[18] At the beginning of the pre-trial conference, counsel raised various issues. Defence counsel proposed that the jury be selected in Mr. Perez' absence. Crown

counsel responded to defence counsel's proposal to select the jury. She also raised the issue that s. 598 applied and that a warrant should be issued for Mr. Perez' arrest, although stating that it may not need to be executed.

[19] After the Crown raised the s. 598 issue, and that an arrest warrant should be issued, defence replied. She explained a little bit more about Mr. Perez' situation. I will continue by reading from the transcript of the discussion in court.

[20] Defence counsel stated:

> So in the circumstances, that will be the defence submission, that he definitely has not absconded, and he has his reasons not to be able to present.
>
> And if Your Honour is still inclined to issue a warrant, as my friend indicated, he should have the time to appear voluntarily tomorrow without an immediate execution. Thank you.
>
> THE COURT: Did you share — and is there — did you share with your friend the ticket for today's date as well?
>
> MS. CHOWDHURY: Not the one for today's date, Your Honour. I just have the one that he had booked to get here, not the one that he's going to take today.
>
> THE COURT: So one of my concerns with that is that you said that he's going to be coming at 7, arriving at 7 p.m. today. As far as I'm aware — and I'm not sure if Ms. Eldred has done any research on this — we don't have any planes coming in at 7.
>
> MS. CHOWDHURY: Your Honour, I might be wrong to say that it will land here. Perhaps it's going to fly out, depart from Vancouver at 7. But I don't have the ticket to confirm that.
>
> SUBMISSIONS FOR CROWN:
>
> MS. ELDRED: Your Honour, I did look into this, and I assumed that the flight that my friend was referencing is an Air North flight that leaves Vancouver at 7:05 —
>
> THE COURT: Okay.
>
> MS. ELDRED: — this evening.
>
> I should note that it would be the position of the Crown that Mr. Perez took this risk upon himself. The flight that he was on from Manila flies every day, and it has a

> 25 per cent on-time statistic. So 75 per cent of the time, that plane is late. And he chose to wait until the day before his jury trial was to begin. And so he took, in the Crown's submission, the risk with — the flight that he would have come in on would have brought him in at 11:30 last night. That's basically 10 and a half hours before his trial is to begin, and so that in the Crown's position, he was reckless in making these travel arrangements, and that what was certainly foreseeable as a possibility has now occurred.
> THE COURT: All right. Yes, I agree with Ms. Eldred. This is not a reasonable delay. Waiting 'til the day before a trial to travel even across Canada is taking a risk. Flying internationally, is, I agree with Ms. Eldred, is reckless.
>
> In terms of proceeding with the jury selection, I not only have concerns about whether it's possible to waive Mr. Perez' right to be here for the jury selection, I think there has been some suggestion in the case law, though I haven't looked at it particularly well, is that there's an obligation for him to be there.
>
> But in the circumstances, I'm also concerned that he has not — that given his communications with you over Facebook in a busy airport, in what can only be a stressful time, that I have concerns that a waiver would not be sufficient. So we will not proceed with the jury selection today.
>
> And I do want to give some time for Ms. Eldred and for you, Ms. Chowdhury, to determine whether 598 is applicable. I'd like a little bit more — I'd like more … submissions on that.

[21] I then adjourned to give counsel time to prepare for the s. 598 application. One point that can be drawn from this exchange is that counsel and I intermingled discussion about s. 598 with discussion about whether an arrest warrant should issue. As the reasons why Mr. Perez did not appear in court are pertinent to both questions, it is not always clear when a statement was made about the arrest warrant and when it was made about s. 598.

[22] A reasonable observer would understand that when I asked about Mr. Perez' flight to Whitehorse it was about whether he would appear the next day and whether an arrest warrant should be issued. The impugned comment, which came next, is not so

clearly directed at whether an arrest warrant should issue. However, given that I had been focusing on the question of the arrest warrant, a reasonable observer would conclude that I was not solely, nor possibly principally, concerned about the s. 598 application in making my comment. Rather, they would conclude that my comment was also about whether to issue an arrest warrant. They would also reasonably conclude that I was frustrated that the proceedings had been complicated because of Mr. Perez' absence.

[23] That in itself is not sufficient to quell the concerns about that comment, but, in addition, what I said afterwards supports the conclusion that there is no reasonable apprehension of bias. Immediately after I made the comment, I indicated that the jury selection would not proceed that day as sought by defence counsel. I based this decision not on conclusions arising from s. 598 but because Mr. Perez should be present for jury selection. I then stated that I wanted to give counsel time to prepare arguments on s. 598 and that the application would proceed later.

[24] Viewing my statement in the context of the whole discussion, the reasonable observer would not be concerned about bias.

[25] As Crown has noted, other factors also weigh against the conclusion there is a reasonable apprehension of bias.

[26] First, I dismissed the jury for the day but asked them to return the following day.

[27] Second, at the start of the arguments on s. 598, I expressed concern that Mr. Perez was not present to give testimony. I stated that, given the contextual nature of the inquiry, it might be preferable for Mr. Perez to provide evidence. Defence counsel and Mr. Perez both confirmed that he wanted to proceed despite this.

[28] These factors would all suggest to the reasonable observer I had not decided the s. 598 question.

[29] Defence counsel submits that a reasonable apprehension of bias is raised not simply because of the comment but also because I adopted all of Crown's submissions in my decision.

[30] Agreeing with one party on all their submissions does not raise a reasonable apprehension of bias. Even incorporating substantial amounts of a party's submission in a decision does not, without more, lead to the conclusion that the Court is not impartial (*Cojocaru v British Columbia Women's Hospital and Health Centre*, 2013 SCC 30 at para. 1).

[31] In addition, I did not completely adopt Crown's submissions. I rejected Crown's submissions that Mr. Perez should have taken additional steps when he missed his flight to Whitehorse. The Crown also argued that a test developed in the case *R v Arreak*, [2000] NuJ No 12, should be applied. I declined, however, to determine whether that was the proper test.

[32] Taking the context of the proceedings into consideration, I conclude that my comment, neither by itself nor in combination with my adoption of many of Crown's submissions, raise a reasonable apprehension of bias.

2. Is there a reasonable apprehension of bias because of the way I responded to the adjournment application?

[33] Mr. Perez submits that a reasonable apprehension of bias arises because:

- I was unreasonable in granting the defence only a short adjournment;

- I was not critical of the Crown's position, accepted what the Crown submitted, and found the Crown to be faultless;
- I did not address some of Crown's arguments;
- I raised concerns that the defence was attempting to delay the proceedings;
- my demeanour; and
- because I have worked with the Crown in the past.

[34] I will address each argument separately and collectively.

[35] Defence counsel submits that my denial of an adjournment of three-to-four weeks to allow defence counsel to determine whether to bring further applications is unreasonable. She does not submit that this factor can be assessed on its own but states that, together with the other issues, there is a reasonable apprehension of bias.

[36] Defence counsel also submits that I should have been critical of the Crown's position. Before turning to this argument, however, I will address what the arguments were at the adjournment application as there was some disagreement at the recusal application about what defence argued when seeking an adjournment.

[37] First, there is agreement that Mr. Perez was seeking an adjournment in part to seek further disclosure from the Crown. There is also agreement the Crown's meeting with the complainant the day before and the disclosure Crown provided to Mr. Perez as a result of the meeting prompted the application. The disagreement is about why defence argued they were entitled to further disclosure.

[38] At the hearing of the recusal application, Crown's argument was implicitly based on the understanding that Mr. Perez sought further disclosure because of defence's

concerns that the Crown had acted improperly when she interviewed the complainant. Defence counsel submits that this was not the issue.

[39] At the recusal hearing, defence counsel submitted that Mr. Perez' position at the adjournment application was that the Crown did not provide full disclosure. The Crown is obligated to share the fruits of the investigation but did not do so. In the defence counsel's written argument, she further argues that the Crown provided an e-memo rather than an audio or video statement or verbatim notes from the Crown's meeting with the complainant the day before.

[40] It seems then that defence counsel's submission is that the Crown should have provided an audio or video statement or verbatim notes of the Crown's meeting with the complainant. The argument would then be that, because I was not critical of the Crown and did not require the Crown to provide this further disclosure, a reasonable apprehension of bias is raised.

[41] Contrary to defence counsel's submissions at the recusal application, however, her submissions at the adjournment application were not simply about whether all the notes created during the Crown's August 28th meeting with the complainant should be produced. Rather, she squarely based her submissions about Mr. Perez' entitlement to further disclosure on her concerns the Crown had behaved improperly.

[42] Throughout defence counsel submissions, she was focused on the Crown's alleged impropriety. For instance, when seeking a recess to prepare an adjournment application, defence counsel stated:

> … The defence has serious concerns with respect to the reason why the Crown had to meet the complainant after the multiple submissions and hearings and indications of evidence in the court yesterday and prepare the complainant

> again … (see *R v Karl Gerland Perez*, SC 21-01518, August 29, 2023, at p. 6, lines 2-5).

[43] At the adjournment application, the defence counsel stated again that she was concerned because the Crown had interviewed the complainant after the trial had started. She stated:

> … And I do not see any other reason other than an attempt on the Crown's part to get a better statement from the complainant in the circumstances, because technically, the trial had started yesterday. My client was not present. Because the trial started, he lost his jury for his absence. And there is no reason for the Crown to revisit the complainant and get another fulsome piece of disclosure.

[44] Later, defence counsel stated that she believed the Crown had been coaching the complainant. Ultimately, defence confirmed that the basis of the request for further disclosure would be because of Crown's impropriety and that she was concerned that Crown was holding information back.

[45] The nature of the disclosure sought was also not simply that of an audio or video statement or verbatim notes of the meeting. Instead, at the adjournment application, defence counsel stated she would be seeking all correspondence between the parties present at the interview, all emails and evidence of communication between the Crown and the police, between the police and the complainant, and between the Crown and the complainant.

[46] Thus, the defence's position at the adjournment application was that additional disclosure was needed because the Crown had behaved improperly by meeting with the complainant after the commencement of trial.

[47] My decision was responsive to this concern. It addressed whether the Crown had been improper in meeting with the complainant and whether Mr. Perez would be entitled

to further disclosure because of Crown's actions. I concluded that the Crown did not behave improperly. The defence can certainly take the position that I was wrong in my conclusion. However, while this may be a ground for appeal following a trial, it is not a ground for finding that there is a reasonable apprehension of bias.

[48] Mr. Perez also submits that there is a reasonable apprehension of bias because I did not address one of Crown's legal arguments. During the adjournment application, the Crown asserted litigation privilege over some of the disclosure defence counsel indicated she would be seeking. The Crown also stated that a s. 278 application would need to be brought for the notes of the Victim Services worker who attended the Crown's meeting with the complainant. The defence submits on this application that there is a reasonable apprehension of bias because I did not make a ruling about litigation privilege. She also takes issue with the fact that I did not order the Crown to disclose Victim Services notes to Mr. Perez.

[49] It is important to note that defence was not seeking disclosure at the adjournment application. At the adjournment application, defence counsel indicated that she would be seeking further disclosure from the Crown and that she required a three-to four-week adjournment to bring a *Stinchcombe* application.

[50] On the question of whether my failure to address litigation privilege raises a reasonable apprehension of bias, if Mr. Perez is dissatisfied with my decision not to address Crown's argument, he may appeal my ruling on the adjournment at the conclusion of the trial. It does not, however, raise a reasonable apprehension of bias.

[51] Defence counsel also submitted that a reasonable apprehension of bias is raised because I expressed concern that Mr. Perez may be attempting to delay proceedings.

The context in which I raised this concern is important. After I gave my ruling in the adjournment application, defence counsel indicated to the Court that she was not "in a position to represent [Mr. Perez]" — this is the August 29th transcript, p. 21, line 3 — and sought a recess to speak with him. The Court adjourned to permit Mr. Perez to speak with his counsel.

[52] Upon reopening of court, defence counsel did not address whether she would be able to continue to represent Mr. Perez. Rather, she sought to bring an application to re-elect to a judge and jury trial. Following discussion, counsel decided not to proceed with her application because she stated she misunderstood my ruling on the adjournment application.

[53] Defence counsel next stated that she wished to raise a s. 276 application. I directed that she provide a notice of application to the Crown by the next morning. Defence counsel did not indicate whether she would continue to represent Mr. Perez. It was only when I asked her specifically about it that she responded that she was prepared to continue "as of now". Again, this transcript is August 29, p. 24, line 37. Thus, defence counsel had stated that she would be getting off the record but then changed her mind, saying, after prompting, that she would remain on the record as of now.

[54] She next raised the possibility of bringing two applications. It was in this context that I had noted my concerns that Mr. Perez was attempting to delay the proceedings. I also stated, "I have not made any conclusions about whether or not you are delaying this, but I have serious concerns about that."

[55] The Court is entitled to provide their "tentative views to counsel and their clients"

(*R v Grant*, 2016 ONCA 639, at para. 129). I did not indicate a closed mind but I identified a concern about what I saw. This does not raise a reasonable apprehension of bias.

[56] In oral argument, defence counsel also submitted that my demeanour during the proceeding suggested a reasonable apprehension of bias. She stated that she and Mr. Perez had both noted it.

[57] An allegation about demeanour requires evidence. As no evidence was provided here, I will not consider the argument.

[58] Additionally, during oral argument, defence counsel submitted that, because it appeared Crown counsel and I had worked together in the past and defence counsel is from out-of-territory, there was a reasonable apprehension of bias.

[59] This submission is problematic in two ways.

[60] First, judges of the Supreme Court of Yukon do not sit on matters in which their former law firm or government office is involved in for two years after their appointment. This practice is consistent with the Canadian Judicial Council's recommendations for ethical practice. Given this, I fail to see how a reasonable person would believe that the scenario presented by defence counsel, without more, raises a reasonable apprehension of bias.

[61] Second, defence counsel's submission is factually wrong. As Crown counsel stated, she and I have not worked together. Crown counsel did not work in the Yukon while I was a practising lawyer. After she moved to the Yukon, Crown counsel may have appeared before me on Chambers days but nothing more. In addition, I have never worked at the federal Crown's office. Defence counsel's submissions are baseless.

[62] Recusals on the basis of a reasonable apprehension of bias are an important tool in the legal system. Impartiality is a fundamental part of the rule of law. Counsel should not hesitate to bring recusal applications where warranted. However, arguments about reasonable apprehension of bias should not be based on speculation.

[63] As well as assessing these arguments point by point, I have examined their cumulative effects. In my opinion, the arguments are largely concerned with the merits of the decision rather than whether they raise a reasonable apprehension of bias. To the extent they do touch on matters that concern reasonable apprehension of bias, a reasonable observer would not conclude that there is a reasonable apprehension of bias.

[64] I therefore dismiss Mr. Perez' application.

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WENCKEBACH J.