IN THE SUPREME COURT OF YUKON

Citation: *Bergeron v. Vaneltsi,* 2012 YKSC 19 Date: 20120314
Docket No.: S.C. No. 11-AP012
Registry: Whitehorse

Between:

STEVE BERGERON

Respondent

And

MARTHA MARY VANELTSI

Appellant

Before: Mr. Justice R.S. Veale

Appearances:

Martha Mary Vaneltsi Appellant
Steve Bergeron Respondent

REASONS FOR JUDGMENT

[1] This is an appeal from a s. 810 peace bond imposed on Martha Vaneltsi by Justice of the Peace Cameron. There is no question that the conduct of the proceedings was deeply flawed. The order imposing the recognizance must be quashed, and I did so on February 21, 2012, with reasons to follow. These are my reasons.

BACKGROUND

[2] On September 15, 2011, Steve Bergeron swore an Information swearing that he had reasonable grounds to fear that Martha Vaneltsi would cause him personal injury. The Information was sworn on the basis of an alleged assault that took place "between the 01st day of July, 2011 and the 01st day of August, 2011". After a first appearance on

September 22, 2011, the hearing of the application was set for October 6, 2011, and on that day Mr. Bergeron and Ms. Vaneltsi appeared before JP Cameron.

[3] As will be elaborated on below, the proceedings that took place on October 6 denied the appellant any semblance of procedural fairness. Neither the appellant nor the respondent was put under oath. There was no structure, no cross-examination, and no consideration of the 'evidence' in making the order. Indeed, the peace bond was seemingly issued on the basis that since one was already in place against Mr. Bergeron, there would be no harm in imposing a reciprocal bond against Ms. Vaneltsi.

[4] The hearing went off the rails within minutes of starting. Both Mr. Bergeron and Ms. Vaneltsi were self-represented. The Justice began by asking whether Ms. Vaneltsi had spoken with a lawyer. She said she wasn't able to get one. The following exchange then took place:

> THE COURT: Okay. You understand what it is that brings you here today?
>
> THE RESPONDENT: Yeah.
>
> THE COURT: The application by Mr. Bergeron is for a peace bond. The findings of the Court do not have to be that there was any particular crime or anything committed. All that the Court is concerned with is whether or not, first, Mr. Bergeron fears you and, secondly, whether or not that fear is reasonable in the circumstances.

[5] The Justice set out the correct legal test to be followed but gave no explanation about the process that would be followed. Ms. Vaneltsi responded to the Justice by denying that Mr. Bergeron had reason to fear her, and asserted that both she and her

children had been assaulted by him in the past. She said that he drinks and ‘suffers from FASD’. She alleged that he was with a violent and unpredictable woman who also ‘had FASD’. She claimed he had broken into her property and has a ‘record of assaulting multiple people in this community … [h]e’s been busy all summer assaulting people’. The Justice asked about the nature of her relationship with Mr. Bergeron, and she indicated that she had been in a violent domestic relationship with him.

[6] After this opening, the Justice asked Mr. Bergeron what caused him to fear Ms. Vaneltsi. Although this question could be expected to elicit the evidence critical to his judicial determination of Mr. Bergeron’s application, there was no attempt to put Mr. Bergeron under oath. In response, Mr. Bergeron indicated he was “fed up” with Ms. Vaneltsi. He acknowledged that he had been verbally but not physically abusive towards her in the past. He said that in the summer she had “grabbed [him] by the throat” leaving him with a bruise and scratches. He said that “she threw strawberries” at him. He told the Court that he was on a court order through the Community Wellness Court and accused Ms. Vaneltsi of phoning the police to advise them of falsified breaches of his conditions. He indicated that the difficulty he was having with Ms. Vaneltsi began when she discovered he was in a new relationship.

[7] At this point, rather than allowing either of the parties to elaborate on their allegations or challenge what had been said by the other, the Justice proceeded to make his own free-ranging inquiries. Mr. Bergeron told the Court about the peace bond that Ms. Vaneltsi had in place against him and said he “[wants] just both ways”.

[8] Ms. Vaneltsi acknowledged that she had a peace bond against Mr. Bergeron. The Justice advised her that he “[failed] to understand why [she] would be opposed to

having a peace bond to have no contact with him". She said that she was opposed because he drinks and would continue to lie about her being violent. In response to Mr. Bergeron's substantive allegations, she acknowledged "[smearing] a strawberry into his white shirt" and said it was because he didn't use a condom with his new girlfriend and she was worried about sexually transmitted diseases.

[9] After inquiring about whether she had, in fact, been tested for sexually transmitted diseases, the Justice of the Peace concluded by ordering her into a recognizance on the basis that Mr. Bergeron and Ms. Vaneltsi:

> "… clearly … have an unhealthy relationship as far as communication goes. And with a peace bond already in place, in regards for him not to have contact with you, it is not unreasonable, in my view, in this circumstance, to also place you on a peace bond that you are not to have contact with him".

[10] The recognizance imposed is for a 12-month term and it contains a no-contact term.

THE GROUNDS OF APPEAL

[11] In her thorough written material, Ms. Vaneltsi put forward twelve grounds of appeal arguing jurisdictional errors and errors in law. I am paraphrasing the list, and combining some of the grounds that are more easily dealt with together:

1) she was not arraigned and not given an opportunity to enter a 'plea' to the allegations, and therefore the Justice committed an error in law and/or lacked jurisdiction to hear and consider evidence;
2) that she had no disclosure of Mr. Bergeron's potential evidence prior to the hearing;
3) that the evidence taken at the hearing was not under oath;

4) that the evidence given did not make out the allegation in the Information;

5) that the Justice erred in law by failing to advise Ms. Vaneltsi of her right to cross-examine Mr. Bergeron and erred in refusing to allow her to cross-examine him. This latter error amounts to a deprivation of her ability to make full answer and defence;

6) that the Justice erred by failing to advise Ms. Vaneltsi of her ability to make submissions prior to his decision, and erred in refusing to allow her to make submissions;

7) that the Justice erred in law and fact by failing to properly adjudicate the matter and by not applying the s. 810 test to the evidence prior to issuing the peace bond.

ANALYSIS

[12] Peace bonds are governed by Part XXVII ("Summary Convictions") of the *Criminal Code*. An appeal from a peace bond lies to this court pursuant to s. 813(a) of the *Criminal Code*. Section 822 imports the bulk of the procedures and powers set out in ss. 683 through 689 to summary conviction appeals.

[13] The relevant part of s. 810 reads:

> **Sureties to Keep the Peace**
>
> *Where injury or damage feared*
> 810. (1) An information may be laid before a justice by or on behalf of any person who fears on reasonable grounds that another person will cause personal injury to him or her or to his or her spouse or common-law partner or child or will damage his or her property.
>
> *Duty of justice*
> (2) A justice who receives an information under subsection (1) shall cause the parties to appear before him or before a

> summary conviction court having jurisdiction in the same territorial division.
>
> *Adjudication*
> (3) The justice or the summary conviction court before which the parties appear may, if satisfied by the evidence adduced that the person on whose behalf the information was laid has reasonable grounds for his or her fears,
>
> > (a) order that the defendant enter into a recognizance, with or without sureties, to keep the peace and be of good behaviour for any period that does not exceed twelve months, and comply with such other reasonable conditions prescribed in the recognizance, including the conditions set out in subsections (3.1) and (3.2), as the court considers desirable for securing the good conduct of the defendant; or
> >
> > (b) commit the defendant to prison for a term not exceeding twelve months if he or she fails or refuses to enter into the recognizance.
>
> …
>
> *Procedure*
> (5) The provisions of this Part apply, with such modifications as the circumstances require, to proceedings under this section.

[14] The imposition of a peace bond or recognizance requires the exercise of the court's preventative justice power (*J.H. v. W.B.*, 2001 YKTC 502, *R. v. Budreo* (2000), 46 O.R. (3d) 481 (C.A.)). Although s. 810 does not create an offence and it may be invoked on the civil standard on a balance of probabilities, there are nonetheless serious implications for a defendant brought before a justice under this section. A s. 810 peace bond can lead to significant restrictions on someone's liberty. As well, where a justice determines that a peace bond is warranted, a defendant who refuses to enter into one can face a prison term of up to 12 months (s. 810(3)(b)). A breach of a term of a recognizance leads to a criminal prosecution under s. 811, and the potential for

imprisonment of a term up to two years. Accordingly, while a peace bond hearing allows for some relaxation of the legal formalities required in a punitive offence-driven process (*J.H. v. W.B.),* basic procedural safeguards remain critical.

(1) FAILURE TO ARRAIGN

[15] Section 801 of the *Code* requires arraignment of the defendant:

> *Arraignment*
> 801. (1) Where the defendant appears for the trial, the substance of the information laid against him shall be stated to him, and he shall be asked,
>
> *…*
>
> (b) whether he has cause to show why an order should not be made against him, in proceedings where a justice is authorized by law to make an order.

[16] The defendant can then indicate whether or not he has cause to show why an order should not be made against him.

[17] Although Ms. Vaneltsi's written submission referred to caselaw suggesting that a failure to arraign an accused necessarily results in a loss of jurisdiction by the Court (*R. v. Franiek*, [1971] 1 WWR 104 (BCSC)), I prefer the more recent reasoning of the Ontario Court of Appeal in *R. v. Mitchell* (1997), 36 O.R. (3d) 643:

> 25 … The failure to properly arraign the appellant was a procedural error. Section 686(1)(b)(iv) of the Criminal Code provides that the court may dismiss an appeal where: notwithstanding any procedural irregularity at trial, the trial court had jurisdiction over the class of offence of which the appellant was convicted and the court of appeal is of the opinion that the appellant suffered no prejudice thereby.
>
> 26 It has been authoritatively established that the failure to arraign an accused is a "procedural irregularity" which can be cured by s. 686(1)(b)(iv) in the appropriate circumstances: R. v. C.N., [1992] 3 S.C.R. 471, reversing (1991), 144 N.R. 294 (Que. C.A.); R. v. St. Pierre (1994), 97

> C.C.C. (3d) 93 (Que. C.A.). The application of s. 686(1)(b)(iv) in these cases is consistent with the careful analysis of the scope of that section provided by Goodman J.A. in R. v. Cloutier (1988), 43 C.C.C. (3d) 35 at 46-51 (Ont. C.A.) in which he held that serious procedural errors going to jurisdiction are within the curative reach of s. 686(1)(b)(iv) as long as those errors do not go to the court's jurisdiction over the type of offence charged. Section 686(1)(b)(iv) can be applied in this case if the failure to read the charges to the appellant did not cause him any prejudice.
>
> 27 Arraignment is intended to ensure that an accused is aware of the exact charges when he or she elects and pleads. Arraignment also ensures that all parties to the proceeding have a common understanding of the charges which are to be the subject matter of the proceedings which follow. …

[18] While it is clear that the appellant was contesting the peace bond application, it is not clear what she knew about the allegation of an assault before she arrived at court on October 6, 2011. There had been one prior appearance on September 22, but I do not have a transcript from that date. A formal arraignment ensures that the defendant in a proceeding is aware of the circumstances that bring her before the court. In criminal proceedings, repeated appearances and the disclosure obligations of the Crown provide an accused with information about the substance of the allegations, and a failure to arraign is less likely to cause prejudice. In these circumstances, I am not at all satisfied that the appellant knew the case she had to meet. I cannot say that she was not prejudiced by the Justice’s failure to formally arraign her. This is not an appropriate circumstance in which to apply the curative proviso contained in s. 686(1)(b)(iv), and I find that the failure to arraign Ms. Vaneltsi was an error sufficient to justify a quashing of his order.

(2) NO DISCLOSURE

[19] Ms. Vaneltsi argues that she was entitled to disclosure about the grounds for the s. 810 Information, and that the failure to provide it deprived her of her right to make full answer and defence.

[20] A defendant's right to disclosure in a s. 810 proceeding has been affirmed by Lilles J. in *M.D. v. R.L.*, [1998] YJ No. 122 (TC). However, I understand that the past Territorial Court practice on s. 810 proceedings is not to require the informant to provide anything specific until it is requested and, on the record before me, it does not appear that Ms. Vaneltsi made any request for disclosure. While the right to disclosure does impose an obligation on the informant to provide material relevant to the allegations made, there is also an obligation on the defendant to be diligent in pursuing the material she wants (*R.* v. *Dixon*, [1998] 1 S.C.R. 244). Indeed, in criminal appeals, the defendant's diligence is a factor that an appellate court will look to in determining whether the overall fairness of the trial process was adversely impacted.

[21] While I recognize that the scope of a defendant's right to disclosure may be narrower in the context of a peace bond than in a criminal charge, in my view, Ms. Vaneltsi was, at a minimum, entitled to receive a summary of the allegations underlying the Information laid against her. Although she did not specifically request this information prior to the hearing, given the lack of detail in the Information (which essentially alleged Mr. Bergeron feared personal injury because of an 'assault' sometime between July 1 and August 1, 2011), she would have had no understanding of the case she had to meet. I cannot say that the lack of disclosure here did not affect

the fairness of the trial process. I would also add that a self-represented person must be advised of her right to disclosure before proceeding.

[22] In my view, it would add to the fairness and efficiency to peace bond proceedings if the Territorial Court required that an informant provide a written summary of the allegations that form the basis of their reasonable grounds to fear personal injury or property damage at the time that they lay the s. 810 Information. Given that many defendants are self-represented, they may not always know that they are entitled to ask for specifics of the allegation on the Information. If a short written summary could be provided to a defendant either with the summons or at a first appearance, it would help ensure a fairer and more efficient peace bond process.

(3) EVIDENCE NOT UNDER OATH

[23] As noted above, neither Mr. Bergeron nor Ms. Vaneltsi were placed under oath at the hearing, although they were both providing substantive context to the allegation.

[24] As Ms. Vaneltsi points out, the *Code* provisions make it mandatory that evidence from witnesses be given under oath (s. 802). But the requirement is more fundamental than this. The right of an accused person to be tried upon evidence qualified by oath, affirmation or s. 16 of the *Canada Evidence Act* is fundamental to our system of justice (see e.g. *R. v. Wilson* (1995), 139 NSR (2d) 61 (CA)). This is no less true in the peace bond context. Without an oath or affirmation, there is a danger that a witness will not be aware of their moral obligation to tell the truth and will not feel conscience bound to do so. The failure here to impress the witnesses with the solemn context in which their evidence was given created a real risk that the peace bond was imposed on flawed factual underpinnings. Indeed, the transcript of this highly emotional proceeding

indicates that the ‘evidence’ given by both parties contained inflammatory allegations which may well have been tempered by the Justice’s impression on the parties of the importance of telling the truth.

[25] I find that the failure to elicit evidence under oath or affirmation is also an error that justifies a quashing of the peace bond.

(4) EVIDENCE GIVEN DID NOT MAKE OUT THE ALLEGATION

[26] Given my determination that the “evidence” at the hearing was tangibly unreliable because it was unsworn, it cannot have proven the allegation in the Information. It is not an appropriate process for a peace bond hearing to have what amounts to a conversation with the complainant and defendant.

(5) FAILURE TO ALLOW CROSS-EXAMINATION

[27] As noted by Ms. Vaneltsi, there is a clear and codified right of cross-examination in s. 802(2). This goes to her ability to make full answer and defence, a right which is also codified in s. 802(1) and, given the potential for an infringement on her liberty, further guaranteed by s. 7 of the *Charter* (see *Budreo, supra*). While again I recognize that the procedural safeguards required of a criminal trial can be relaxed in the context of a peace bond proceeding, the right to cross-examination must be afforded. This error also necessitates a quashing of the peace bond imposed by Justice of the Peace Cameron. This is not to say the justice cannot assist in the proceeding where there are self-represented complainants and defendants but it must follow the codified procedure.

(6) FAILURE TO ALLOW SUBMISSIONS

[28] The right of an individual to be heard in a proceeding in which their interests may be affected is a fundamental component of natural justice, and has long been

recognized as such (see *R. v. Dodson* (2000), 128 O.A.C. 290, *R. v. J.V.* (2002) 163 C.C.C. (3d) 507 (SC)).

[29] Here, it can not strictly be said that Ms. Vaneltsi was not heard. She was given notice, attended the hearing, and was given the chance to speak her part. Although the lack of structure to the proceeding made it challenging to deliver focused submissions, Ms. Vaneltsi was nonetheless able to tell her side of the story to the presiding justice.

(7) IMPROPER PEACE BOND TEST

[30] The appellant also succeeds in quashing the order on this ground. The peace bond was granted on the most spurious of bases, namely that it was “not unreasonable” to place Ms. Vaneltsi on a peace bond because of the parties’ “unhealthy relationship as far as communications go” and because of the fact that there was already a peace bond in place against Mr. Bergeron. This is obviously not the applicable test nor the one set out by the Justice at the commencement.

[31] Pursuant to s. 810(3), and given the substance of the Information, the Justice presiding over the hearing was required to satisfy himself on a balance of probabilities that the informant had reasonable grounds, subjectively and objectively, to fear that Ms. Vaneltsi will cause personal injury to him before he could order the recognizance. Nowhere does he indicate that he was so satisfied, and his reasons demonstrate a disregard of this test.

CONCLUSION

[32] The appellant’s proceedings before the Justice were profoundly flawed. The principles of procedural fairness and fundamental justice and the mandated *Criminal Code* process were almost wholly disregarded.

[33] As noted, I have already quashed the recognizance imposed on Ms. Vaneltsi. At those proceedings, Mr. Bergeron indicated that he wished to abandon his application and move on with his life, and he has signed an order withdrawing the Information filed with the Territorial Court. Accordingly, I do not need to direct a rehearing of this matter.

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VEALE J.