COURT OF APPEAL OF YUKON

Citation: *R. v. Rutley*,
2014 YKCA 6

Date: 20140602
Docket: YU716

Between:

Regina

Respondent

And

Darren Troy Rutley

Appellant

Before: The Honourable Mr. Justice Frankel
(In Chambers)

On appeal from: An order of the Yukon Territorial Court, dated January 25, 2013
(*R. v. Rutley*, 2013 YKTC 7, Dawson City Docket 11-11015).

Acting on his own behalf:	D.T. Rutley
Counsel for the Respondent (via teleconference):	D.A. McWhinnie
Appearing on behalf of the Correctional Service of Canada:	L. Seaweed
Place and Date of Hearing:	Vancouver, British Columbia May 23, 2014
Place and Date of Decision:	Vancouver, British Columbia May 23, 20014
Place and Date of Reasons:	Vancouver, British Columbia June 2, 2014

Summary:

Conviction appeal referred to a division of the Court as further efforts at case-management would be an exercise in futility.

Reasons for Decision of the Honourable Mr. Justice Frankel:

[1] This matter involves an appeal by Darren Troy Rutley from his conviction by Judge Ruddy of the Yukon Territorial Court, on a charge of breaking and entering, and committing an aggravated assault, contrary to s. 348(1)(b) of the *Criminal Code*, R.S.C. 1985, c. C-46. I am the case-management judge. At the conclusion of a case-management hearing on May 23, 2014, I referred this matter to a division of the Court to consider several applications brought by Mr. Rutley and whether his appeal should be dismissed for want of prosecution. These are my reasons for doing so. They are written, in part, to inform the members of the division before whom this matter comes as to why it is before them.

[2] The offence occurred on August 2, 2011. A three-count information was sworn on August 3, 2011. Mr. Rutley appeared, in custody, before a justice of the peace that day. On August 19, 2011, a justice of the peace denied Mr. Rutley's application for bail and ordered him detained. Those reasons are indexed as 2011 YKTC 32.

[3] There were numerous pre-trial appearances in the Territorial Court. The matter eventually came on for trial in Dawson City on April 17, 2012. Mr. Rutley acted on his own behalf. After three days, the trial was adjourned. Thereafter, it continued in both Whitehorse and Dawson City, concluding in Whitehorse. On January 25, 2013, for reasons indexed as 2013 YKTC 7, the trial judge convicted Mr. Rutley on the breaking and entering charge and acquitted him on the other two charges. At the outset of her reasons she states:

> [2] Trial of this matter has had a lengthy and convoluted history. An exorbitant number of applications filed by Mr. Rutley, along with his fixated belief that there is a conspiracy afoot to ensure his conviction, often distracted from the central issue in this case; whether the evidence is sufficient to establish, beyond a reasonable doubt, that Mr. Rutley committed the offences as charged. This decision is focused on the central issue.

[4] On February 14, 2013, the trial judge sentenced Mr. Rutley to 900 days' imprisonment.

[5] On March 1, 2013, Mr. Rutley filed a notice of appeal from conviction. Attached to that notice are seven pages setting out numerous grounds of appeal under the following major headings: (a) The right to adequate representation; (b) Right to make full answer and defence/Right to a fair trial; (c) Charter application/ 10(a) and 10(b); (d) Right to a fair hearing/Right to make full answer and defence; (e) The admissibility of evidence; and (f) Transcript evidence. Reference is made to seeking relief under ss. 7, 11(d), and 24(1) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

[6] On April 19, 2012, Mr. Rutley filed a notice of application seeking: (a) an extension of time within which to file his appeal book and transcript; and (b) the appointment of counsel to represent him on the appeal.

[7] By letter dated June 10, 2013, the Executive Director of Yukon Legal Services Society advised Mr. Rutley that the Society would not fund his conviction appeal. The following appears in that letter:

> After said review, we confirm that YLSS will not be providing you with counsel for your appeal due to your continued and strongly expressed lack of confidence in the administration of YLSS as well as your ongoing concern about YLSS' inability to provide you with acceptable counsel. It is YLSS' view that the chances of this strongly held position changing is extremely remote going forward.

The letter advised Mr. Rutley that he had a right to appeal the refusal to the Society's board of directors, which he did. By letter dated July 2, 2013, the board of directors advised Mr. Rutley that it agreed with the decision not to provide funding.

[8] Mr. Rutley's application for the appointment of counsel was spoken to before a judge of this Court on July 4 and 18, 2013. On the latter date it was adjourned to August 6, 2013.

[9] On August 6, 2013, a judge of this Court granted Mr. Rutley's application to the extent of making an interim order for the appointment of counsel to assist him in bringing forward an application under s. 684(1) of the *Criminal Code*. By virtue of s. 684(2), such an appointment provides funding for both the fees and disbursements of counsel: *R. v. Pedersen; R. v. Serrano-Hernandez*, 2014 BCCA 16 at paras. 2, 22 (Chambers), 348 B.C.A.C. 274. The operative term of the formal order entered with respect to that appointment reads:

> IT IS ORDERED THAT:
>
> Counsel be appointed to assist the Appellant, Darren Rutley, in making a s. 684 Application under the Criminal Code to appoint a lawyer for the Hearing of his Appeal.

By virtue of that order, Jennifer A. Cunningham came to represent Mr. Rutley.

[10] My first involvement as case-management judge occurred on December 16, 2013. That hearing was conducted using both teleconferencing (for Ms. Cunningham and Crown counsel, David A. McWhinnie, who were at the courthouse in Whitehorse) and videoconferencing (for Mr. Rutley, who was then incarcerated at Mountain Institution). At that time Ms. Cunningham indicated she had experienced difficulties in communicating with Mr. Rutley. Mr. Rutley expressed concern because he had not spoken to Ms. Cunningham and had not received any documentation with respect to that day's proceedings. I adjourned the matter generally to allow Mr. Rutley and Ms. Cunningham to communicate. I indicated I was not seized of the s. 684 application (i.e., it could be brought on in regular chambers), but would, if it became necessary, conduct any future case-management hearings.

[11] On January 17, 2014, Mr. Rutley filed what is styled "Application, Part IV". The Court file contains another document styled "Notice of III Part Application". That document does not bear a court registry stamp but appears to have been signed by Mr. Rutley on November 5, 2013. Mr. Rutley has, at various times, referred to these two documents as his "four-part application". In them, he seeks the following orders:

Part I

- The production of a certified true copy of the transcript of the proceedings before a judge of this Court on May 30, 2013. (This Court's records do not indicate that any proceedings took place that day.)
- The production of certified true copies of orders made by the trial judge for the production of trial transcripts.
- Production of a certified true copy of the interim s. 684 order.
- The transfer of all documents in the Territorial Court file to this Court together with an affidavit by the Court Registrar as to the contents of that file; Mr. Rutley to be provided with certified true copies of all the documents in the file.
- Production of a certified true copy of the contents of this Court's file

Part II

- Removal of the order for the appointment of counsel.

Part III

- Application for an extension of time.

Part IV

- That Mountain Institution return to Mr. Rutley all seized legal material (privileged correspondence, unfiled evidence in support of pending court applications).
- That Mountain Institution provide Mr. Rutley with a laptop computer with certain software.
- That Mountain Institution provide Mr. Rutley with a minimum of four hours per working day in an area where privileged information can be saved and stored.

- That Mountain Institution provide Mr. Rutley with a printer for use with the abovementioned computer.
- That Mountain Institution facilitate Mr. Rutley's access to the LexisNexis Quicklaw legal research website.
- That Mountain Institution permit Mr. Rutley to purchase printer ink, paper, and memory sticks and/or U.S.B. drives.
- That the Attorney General of Canada and/or the Attorney General of Yukon provide Mr. Rutley with funding for a Quicklaw subscription along with funding for the purchase of the abovementioned supplies.
- That Mountain Institution provide Mr. Rutley with "unfettered access to the Access to Information Act" through the "Inmate Telephone System".
- That Mountain Institution provide Mr. Rutley with adequate storage for the safety and security of his legal materials.

[12] The next case-management hearing took place on February 11, 2014. Mr. McWhinnie and Ms. Cunningham appeared by teleconference, Mr. Rutley by videoconference. When Mr. Rutley indicated he did not want Ms. Cunningham to represent him, I excused her. Mr. Rutley said he would not be seeking an order for the appointment of counsel and intended to proceed on his own. He asked that a date be set for his four-part application.

[13] I advised Mr. Rutley that in light of the fact his appeal had been filed in time, there was no immediate need to deal with an extension of time for filing the appeal book and transcripts. With respect to the orders being sought against Mountain Institution, I said those were, in effect, orders against the Correctional Service of Canada, and expressed doubt as to my jurisdiction to make them. In any event, I was not prepared to make any orders until the Correction Service had been served and had been given an opportunity to respond to it. I also expressed doubt as to my jurisdiction to make a "free-standing" order requiring an Attorney General to pay for

the appeal book and transcripts. Again, I said I would not entertain such an application unless the potentially-affected Attorney General was represented.

[14] Mr. McWhinnie had similar doubts with respect to my jurisdiction, stating that the power to make orders affecting the Correctional Service of Canada may well lie exclusively with the Federal Court. Mr. Rutley stated he intended to file an application in the Federal Court. When I suggested to Mr. Rutley that counsel would be of assistance to him, he said he wished to proceed on his own, stating that he had the right to be free of state interference in the pursuit of his appeal.

[15] Mr. Rutley said he would take steps to serve the Correctional Service. Mr. McWhinnie agreed to assist to the extent of forwarding what material he had to the British Columbia Regional Office of the Department of Justice, as it was likely that counsel with that office would be acting for the Correctional Service. Mr. McWhinnie said he would assist Mr. Rutley by providing him with information with respect to where and on whom his application materials should be served. I indicated that once all the necessary parties had been serviced, I would hold a pre-hearing conference to discuss how to organize the hearing of Mr. Rutley's application.

[16] During the hearing, I pointed out to Mr. Rutley that the interim s. 684 order was still in effect and suggested that he reconsider proceeding without the assistance of counsel.

[17] At the end of the hearing, I directed Lucretia Flemming, Acting Senior Court Clerk (who was in the courtroom in Whitehorse) to prepare a list of the transcripts that had already been produced and provide it to me, Mr. Rutley, and Mr. McWhinnie. I indicated that after seeing the list, I might ask that Mr. Rutley's file be transferred to the registry in Vancouver, so that I could review its contents. I then adjourned the case-management hearing generally.

[18] On February 12, 2014, Ms. Flemming provided me with a list of the contents of Mr. Rutley's file. After reviewing that list, I asked her to send me copies of the

transcripts that had already been produced. I received transcripts with respect to the proceedings on 45 days in the Territorial Court and two days in the Supreme Court of Yukon. The Territorial Court transcripts start with Mr. Rutley's first post-arrest appearance before a justice of the peace (on August 3, 2011), and includes 13 days of trial proceedings. The Supreme Court transcripts concern applications brought by Mr. Rutley during the course of the trial.

[19] As I was of the view that having access to the trial transcripts that had already been produced might be of assistance to Mr. Rutley, I directed the registry in Vancouver to provide copies of those to him, together with the trial judge's reasons for conviction and reasons for sentence. I also asked the registry to arrange another case-management hearing. The transcripts and reasons were sent to Mr. Rutley at Mountain Institution on March 18, 2014; a copy of the covering letter was sent to Mr. McWhinnie.

[20] The next case-management hearing took place on April 9, 2014. Mr. McWhinnie appeared by teleconference. There was difficulty conducting the hearing due to considerable feed-back noise emanating from the videoconferencing facility being used by Mr. Rutley, who was then incarcerated in Mission Institution.

[21] Mr. Rutley indicated he had received the transcripts and reasons I had directed be sent to him. He stated he would not be filing any application in the Federal Court.

[22] Mr. Rutley expressed dissatisfaction with the fact that I had not provided him with all available transcripts. He claimed a right to the production of a complete record of the proceedings relating to his trial at state expense. He complained the transcripts he had received were inaccurate as thousands of pieces of information were missing and they were "riddled with inconsistencies". He claimed that the state had a right to alter the contents of a transcript after it had been prepared.

[23] I again reminded Mr. Rutley of the interim s. 684 order. He adamantly stated he was "going to go this alone".

[24] Mr. Rutley asserted he had been subjected to unlawful searches and seizures and that legal materials had been taken from him and evidence had been destroyed.

[25] Mr. Rutley repeated his view that as a self-represented litigant he had the right to the production of the complete trial court record. He asserted that the trial judge had made an order for the production of all of the transcripts. I advised Mr. Rutley I did not agree that as a self-represented litigant he was entitled to production of a transcript of all the proceedings in the Territorial Court. In response to a question by Mr. Rutley as to how he could obtain the transcripts, I advised him that he could order them. I also pointed out, again, that by virtue of the interim s. 684 order he could obtain the services of counsel to meet with him and explore what grounds of appeal might be available. Mr. Rutley said he refused to have the state dictate his grounds of appeal. He then launched into a litany of complaints with respect to his treatment in custody, including an allegation that he had been unlawfully assaulted at the hands of the state at Mountain Institution. He referred to having been given a “brain beating”.

[26] When I told Mr. Rutley I was prepared to give him, perhaps, one more month to look into what he could do to move his appeal forward, he responded by asking me to recuse myself. I dismissed that application summarily. I then told Mr. Rutley that if he did not wish further time, then I would refer the matter to a division of the Court which could consider whether to dismiss his appeal for want of prosecution. Mr. Rutley responded by saying he was tired of being “kangarooed” by both the state and this Court. He referred to the alterations to the transcripts as “the state’s dirty little secret”.

[27] Mr. Rutley said he would try to obtain funding with which to advance his appeal. To give him an opportunity to do so, I set another case-management hearing for May 20, 2014.

[28] On May 16, 2014, Mr. Rutley sent a letter to me in which he asserted that Ms. Flemming had agreed to provide him with the transcripts that had already been produced and to order and provide to him with all remaining transcripts. In that letter,

he stated the transcripts sent to him had been unlawfully seized. Also on May 16, 2014, Mr. Rutley sent a letter to the Ms. Flemming stating:

> Your continued refusal to provide the court ordered copy of transcripts has left me no choice but to request costs for production of copies forthwith. Refusal or undue delay will warrant future litigation against you, address yourself accordingly.

[29] On May 18, 2014, Mr. Rutley sent me a letter to the effect that he is a beneficiary of his grandfather's estate and that the executors hold monies in trust for him that could be used to pay for the appeal book and transcripts.

[30] The May 20, 2014 case-management hearing was plagued by sound problems, making meaningful participation by Mr. Rutley impossible. Anticipating that this might reoccur, I had already made arrangements for another hearing on May 23, 2014. In light of Mr. Rutley's complaints with respect to legal materials being taken from him, I asked Mr. McWhinnie to arrange for someone representing the Correctional Service to attend the next hearing.

[31] I advised Mr. Rutley that based on the November 7, 2012 transcript, it appeared that what the trial judge had ordered were transcripts of earlier appearances to be used in connection with an unreasonable delay argument Mr. Rutley wished to raise under s. 11(b) of the *Charter*. I indicated that while I had been able to find several rulings by the trial judge, none concerned unreasonable delay. I adjourned the hearing, indicating that if the sound problems could not be fixed, then I would look into having Mr. Rutley present in the courtroom.

(Note: I found the following rulings: 2012 YKTC 117 (*Rowbotham* Application); 2012 YKTC 81 (Ruling on Application for Disclosure); 2012 YKTC 82 (Ruling on Application for Abuse of Process); and 2012 YKTC 91 (Ruling on Application [*Charter* ss. 10(a) and 10(b)].)

[32] On May 21, 2014, the executors of the estate sent a letter to the registry advising that a specified sum of money was being held in trust for Mr. Rutley. Also on May 21, 2014, Mr. Rutley filed an application seeking to have me recuse myself.

In addition, he filed two applications in the Supreme Court. One is entitled, “Writ of Habeas Corpus, Application for Sentence Re-Calculation”. The other is entitled, “Writ of Habeas Corpus, Application for Unlawful Search and Seizure”.

[33] Upon being advised that the sound problems had not been fixed, I directed that Mr. Rutley attend in the courtroom on May 23, 2014. Les Seaweed, a Correctional Manager at Mission Institution attended as a representative of the Correctional Service. Mr. McWhinnie appeared by teleconference.

[34] I first dealt with Mr. Rutley’s recusal application. He stated that it was based on the fact that the steps I had taken to obtain the transcripts from Whitehorse had not been taken in open court. Because of this, he believed I had some oblique motive to which he was not privy. He said he did not believe I had authority to hear the recusal application and that it should be heard by a division of the Court. I dismissed the application summarily.

[35] I asked Mr. Seaweed to provide me with information concerning what, if anything, had affected Mr. Rutley’s access to the transcripts and his other legal materials. Mr. Seaweed said that over the past few months Mr. Rutley was transferred between Mountain Institution and Mission Institution on several occasions and, at times, had been placed in administrative segregation, i.e., removed from the general population. In April, Mr. Rutley was assaulted in his cell at Mission Institution, which resulted in it being sealed until it was examined by the police and later cleaned. Following the assault, Mr. Rutley was transferred to Mountain Institution. On May 20, 2014, Mr. Rutley was given his belongings and personal effects from his Mission Institution cell.

[36] Mr. Rutley agreed that the legal materials from his Mission Institution cell had been returned to him. However, he claimed some things were missing. In particular, he said he did not have the material relating to his four-part application and 4000 to 5000 pages of “legal documentation”, including pre-trial transcripts and evidence to be used in future litigation. He maintained that the trial transcripts I had provided to him were inaccurate.

[37] With respect to the issue of unreasonable delay, Mr. Rutley said he did not advance such an application at trial because he believed it was too late to do so at the end of the trial. Mr. McWhinnie advised me that in August 2012, Mr. Rutley had filed an "omnibus application" in the Territorial Court, which included a request for relief under s. 11(b) of the *Charter*. He said notes made by counsel who appeared for the Crown at the trial indicate that on January 16, 2013, Mr. Rutley told the trial judge he did not intend to pursue an unreasonable delay application.

[38] Mr. Rutley agreed that while it could be said that he had "abandoned" his unreasonable delay argument he intends to advance it on this appeal. As well, he intends to advance his four-part application on the appeal.

[39] Mr. Rutley could not provide me with any reasonable assurance that he would be taking any of the steps necessary to prosecute his appeal. He again asserted that the trial judge had ordered that he be provided with a transcript of every appearance in his case. He stated he has a right to justice and the law, and a right to have his four-part application heard by this Court. He said he recently mailed a "Part V" to his application to the registry in Whitehorse.

[40] Given my limited jurisdiction as a single judge, Mr. Rutley's desire to have his four-part (soon to be five-part) application heard, and the fact no progress had been made, or was likely to be made, in moving this appeal forward, it appeared to me that the only course of action open was for me to refer this matter to a division of the Court. Mr. Rutley and Mr. McWhinnie indicated they were of the same view.

[41] Mr. Rutley then asked me to issue a subpoena directing Ms. Flemming to appear before a division of the Court and to bring the trial court file with her. I dismissed that application summarily.

[42] Given the events described above, I concluded that further efforts at case-management would be an exercise in futility. Accordingly, I referred this matter to a division. I advised Mr. Rutley and Mr. McWhinnie that the registry would make arrangements for that hearing.

"The Honourable Mr. Justice Frankel"