Citation: *R. v. Amos*, 2014 YKTC 64

Date: 20140626
Docket: 14-00136A
13-00341C
13-00341B
13-00341A
Registry: Whitehorse

TERRITORIAL COURT OF YUKON
Before His Honour Judge Cozens

REGINA

v.

ALAN DOUGLAS AMOS

Appearances:

Ludovic Gouaillier	Counsel for the Crown
Alan Douglas Amos	Appearing on his own behalf
J. Robert Dick	Counsel appointed by the Court for cross-examination

RULING ON APPLICATION

[1] COZENS T.C.J. (Oral): I am going to reserve the right to issue written reasons should I wish to do so on this. I am not certain how practical that will or will not be, but I am going to briefly -- well, relatively briefly -- issue a decision today, but I am obviously not going to be in a position to do it as carefully as if it were written and, as such, I am going to reserve that right.

[2] Alan Amos is in Court today for a trial on two separate Informations. Information 13-00341B alleges that between May 22, 2013 and June 30, 2013 he committed the

offence of criminal harassment, contrary to s. 264(2)(b) against the complainant, Shannon Lee Knowles.

[3] He also is set to stand trial on Information 13-00341A that alleges two offences under s. 145(5.1) of the *Criminal Code* for breaching no contact conditions of his undertaking to an officer in charge between September 26, 2013 and September 29, 2013 and on or about October 1, 2013.

[4] He has two other Informations that arise from more recent dates, one of which he has entered a not guilty plea on, the other of which no pleas have been entered on. These do not relate to the same complainant.

[5] The Crown is seeking an adjournment of the trial.

[6] By way of history referring to the record of Court proceedings on the file, I note that the not guilty pleas were entered on January 22, 2014 and there was a fix date court on January 24th to set the matter over to May 14, 2014, with one day of trial set aside.

[7] Counsel for Mr. Amos withdrew on March 19, 2014, and on April 11th, the issue arose with respect to setting a pre-trial conference and also with respect to a disclosure application and affidavit. Mr. Amos indicated he would be self-represented at trial.

[8] On April 16th, there was a pre-trial conference that indicated the trial would not proceed on May 14th, which another pre-trial would be scheduled and applications would be made by the Crown to seek orders appointing counsel to cross-examine the complainant and for the complainant to testify outside of the courtroom.

[9] On May 14th, the notes indicate that the Crown application to appoint counsel for cross-examination was granted. The Crown application for the complainant to testify via video was granted, again with the consent of the accused (with respect to both applications).

[10] On May 30th, the matter was back in fix date court. Robert Dick was present in Court on that day as cross-examination counsel with his calendar to ensure a trial date could be set when he would be available. The trial date of June 10, 2014 was available, but Crown was not in a position to proceed on that date, so the matter was set over for trial to today's date, on June 26, 2014.

[11] As indicated, the Crown is here today seeking an adjournment of the trial.

[12] I note that the Crown seeking the adjournment was only assigned the trial late last week, as the earlier Crown who had brought the applications on May 14th is out of the office for medical reasons and the Crown that was subsequently assigned the file found herself in a situation of being double booked today. Therefore, the decision was made to transfer the file to the present Crown.

[13] With respect to the basis for the adjournment application, there are several reasons. One is the one I just mentioned with respect to two different matters being set for today.

[14] There is another issue that was raised by the Crown which is that the two files that are set for trial today really perhaps should have been the subject of two separate trials. If credibility is an issue on both, then perhaps the same judge should not hear

both. There were issues raised with respect to that being prejudicial, potentially, to the accused, and the Crown is concerned about fairness.

[15] The Crown also indicated that there are issues related to a potential *voir dire*.

[16] The Crown further, being quite fair and frank, indicated that, upon receiving the file, he had noted that there was still some significant disclosure that had not been made, and, again, expressed concern about the impact of this upon Mr. Amos being prepared to proceed.

[17] Noted also is that Mr. Dick has not been provided some of the evidence that he would require.

[18] With respect to that issue, Mr. Dick's information was that he had sent a letter by fax to the Crown requesting disclosure. No disclosure came, and he was informed by someone at the Crown's office that they had not received the fax.

[19] Mr. Gouaillier, the present Crown, having received the file, was proactive in contacting Mr. Dick, but it appeared that there would be some issues with respect to the trial and so, in the end, Mr. Dick does not yet have the disclosure, but he did indicate that had he been assured the trial was going to proceed today, he would have only needed a few hours to prepare and he would have been able to obtain what he needed from Mr. Amos.

[20] Mr. Amos is strongly opposed to the application. He wants to deal with this matter and he does not want it adjourned any further. From his point of view, it is disrupting his life, and he is prepared to proceed on the information that he has now.

[21] This is not a question of witness unavailability. The complainant was prepared to testify today by video conference. The Crown called this witness and the other witnesses off knowing that it was not going to be in a position to proceed in any event, in order to not inconvenience them. This was certainly not in anticipation that an adjournment would be granted, but simply recognized that the trial just cannot proceed regardless of any order I make today.

[22] So again, this is not a question of witness unavailability. I would say, really, at its core, leaving aside the issue, perhaps, of fairness based upon two trials proceeding on two Informations in the same day, it really comes down to an issue of the Crown not being in a position to proceed today because of issues that arose within their own office with respect to the availability of certain counsel and disclosure.

[23] And again, I note that the submissions of the Crown in this regard have been quite fair and candid with respect to why this adjournment application is sought.

[24] Crown has indicated if they are not granted the adjournment, they will not be in a position to proceed, which, of course, would result in the charges being dismissed.

[25] *R. v. Pittner*, 2008 ONCJ 136 provides a good outline of some of the issues surrounding an adjournment application. In that case, of course, it was the unavailability of a witness, which distinguishes it somewhat from the present case. The Court noted that in *Darville v. The Queen*, (1956), 116 CCC 113 (SCC), the Supreme Court of Canada set out the relevant factors on an adjournment application when the request is based on an unavailable witness.

[26] The three criteria are that the absent witness is a material witness in the case, that the party applying has been guilty of no laches or neglect in omitting to endeavour to procure the attendance of the witness, and that there is a reasonable expectation that the witness would be present at a future date if a postponement is granted.

[27] The Court goes on to note that, in the *R. v. Henry*, [1987] O.J. No. 947 (C.A.) case, the considerations were expanded somewhat to include ensuring that the witness' absence is not as a result of intimidation or fear of reprisal.

[28] And there are also issues with respect to the seriousness of the charge, which is a factor in certain cases -- that is noted in para. 5 of *Pittner* -- as well as the issue of prejudice. And prejudice, of course, involves not only prejudice to an accused, but prejudice to the public interest in ensuring that trials are heard on their merits.

[29] Again, this is not a case where it is an issue of an absent witness or a case where there is any concern about a reasonable expectation that the witness would be present if a postponement is granted.

[30] This is a case that really falls within the second point of *Darville*, which is the issue of laches, and I am satisfied that, although *Darville* speaks specifically to the issue of laches in procuring the attendance of the witness that, by analogy, the same issue of laches arise when it comes to the issue of disclosure or trial readiness on the part of the Crown.

[31] The bottom line is the issue of whether there has been an unreasonable delay in ensuring that the matter can proceed to trial, and one of the other cases I will refer to

briefly mentions this can take place in the context of different applications, including delay applications under the *Charter*.

[32] In the *Pittner* case, the Court was concerned with respect to the efforts of the RCMP to have made sufficient attempts in a timely fashion to procure the attendance of a significant witness and found that those attempts were insufficient to satisfy the second criteria.

[33] In *Pittner*, with respect to the seriousness of the offence, the Court states in para. 15:

> The more serious an allegation is, the more compelling the public interest in ensuring that it is heard on its merits. By the same token, the more serious the allegation, the higher the expectation the Crown has in expecting that all branches of the Crown will ensure that the case can be heard on its merits. In the case of serious allegations, steps must be taken earlier than what might be expected as reasonable in less serious cases to assure the attendance of all relevant witnesses. While the apparent seriousness of the allegations before me militates in favour of granting the adjournment requested the lack of priority which the Crown and the police have assigned to this prosecution does not favour an adjournment.

[34] With respect to the issue of prejudice, the Court in para. 17 notes that:

> The public interest in ensuring a case is heard on the merits would be prejudiced if I do not grant the adjournment. …

[35] In that case, prejudice to the accused was not extensively claimed.

[36] The Court stated in para. 18:

> I find this case troubling and I have given it careful consideration. However, in light of, in particular, the insufficient efforts to locate Ms. Szuca by the police system as a whole, the slim prospects in locating her if a postponement was granted and the priority with which this apparently serious case was treated, I am of the view that the Crown has not satisfied me that an adjournment is appropriate. It was reasonable for Mr. Pittner to expect that his matter would be heard yesterday and it ought to have been ready to proceed. ...

[37] The application for an adjournment was denied.

[38] The case of *R. v. Sabourin*, 2007 MBQB 153 was a case in which, due to some difficulties in the Crown's office, a preliminary hearing date was missed by the Crown. I will not go into those details any further for the purposes of what I am saying now.

[39] The Provincial Court judge did not grant the adjournment. *Sabourin* is therefore an application for a stay that was before a superior court following the Crown's decision to re-lay the charge after the adjournment was not granted. The Queen's Bench quoted the reasons of the Provincial Court judge at para. 24 and 25:

> ... while Crown counsel's cooperation and attempt to re-arrange the court date to accommodate defence counsel was commendable, "the systemic problems in the Crown office that have lead to this scheduling debacle clearly amount to laches on the part of the Crown as an institution". …

[40] And further:

> I have already acknowledged that this is a serious charge. However, that factor in and of itself cannot be determinative of the issue, as it cuts both ways. There is obviously a strong societal interest in having such matters adjudicated, but there is also a commensurately greater potential jeopardy for the accused facing such a charge.

> ...
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> Here the Crown as an institution seeks the discretionary remedy of an adjournment from the court to compensate for its own systemic problems and negligence in managing the trial scheduling in this matter. In my view, based on Darville considerations the Crown is disentitled to the discretionary remedy of an adjournment and the interests of justice mandate that this charge be dismissed.

[41] The Provincial Court judge found the Crown guilty of laches and dismissed its application to adjourn the matter to the November 8th, 2006 date.

[42] In considering the application before it, the Queen's Bench concluded that the Crown's conduct in re-laying the charge was tantamount to ignoring the Provincial Court judge's decision and was an attempt to circumvent the Court's ruling without appeal. They did not comment on the merits of the adjournment application.

[43] *R. v. Havens*, 2013 ABPC 298 is a case where there was an application by the accused to exclude evidence on the basis of an alleged contravention of his section 7 *Charter* rights. This was an issue of lack of timely disclosure of the intoxilyzer documentation. The Crown conceded that, but said that the appropriate remedy was the adjournment of the trial.

[44] The Court noted in *Havens* that, the case was not assigned to a prosecutor until just five days before trial, at which point the assigned prosecutor reviewed the file and noted that disclosure had not been mad. That is somewhat similar to the present case, although I note that this file before me was assigned to two separate prosecutors before

Mr. Gouaillier was assigned it just before trial, and he took steps immediately to ensure that the file was ready to go and found out that it was not.

[45] The Court considered three remedies in *Havens*: an adjournment, exclusion of the certificate, and a stay. The stay was not an appropriate remedy and defence counsel conceded this. Crown said an adjournment was appropriate, saying they were not applying for it, but the defence should be granted one. Defence said that was not appropriate, because it was really a Crown adjournment since they caused the situation where the trial could not proceed and they needed an adjournment to comply with the disclosure obligations.

[46] And then there was the issue of prejudice, which would have left the accused in a situation where he was not able to drive.

[47] The defence submission was that the situation was entirely caused by the Crown not performing their obligation and if it is a Crown adjournment to comply with their obligation, they must meet the test in *Darville*. In order to meet that test, they must not be guilty of laches. In having not performed their obligation, they were guilty of laches, and that was the sole reason for the necessity of an adjournment.

[48] Again, this is similar to the present case. In *Havens*, the *Darville* test was applied with respect to the issue of laches due to a lack of timely efforts to ensure disclosure, not with respect to the procuring of a witness.

[49] The Court, in *Havens*, did not find a flagrant disregard of the *Charter* rights of the accused, but the conduct was still reckless. In that case, defence had specifically requested disclosure, and that request was ignored on two occasions.

[50] The Court had a concern that this resulted in a loss of Court time, inconvenience to the witnesses and behaviour the Court wished to distance itself from. In *Havens*, the Court said:

> [17] Every criminal charge should be decided on its merits. Society expects this. If evidence is excluded, especially evidence that would prohibit the Crown from proceeding, the court must consider the impact of failing to admit the evidence on the repute of the administration of justice. In this case the impact would be equivalent to a stay. Without the certificate there can be no prosecution.

[51] The Court, in balancing these factors, stated that an adjournment was not an appropriate remedy. The Court stated that in looking at the fact that there would be prejudice to the accused, stated that in the Court's view:

> [19] ... it is the Crown that needs an adjournment to properly comply with their obligation so a fair trial can be conducted and that they are guilty of laches and therefore cannot comply with ***Darville***, I am satisfied that an adjournment is not the just and appropriate remedy. If this was an unusual error or slip up in the Crown's office that would be different, but when it appears there is a pattern of disregard of *Charter* rights, it cannot be condoned.

[52] I am going to say now that I am not prepared to find there is a pattern in the Crown's office of this taking place. I do not have the kind of information before me that would allow me to find that this is a pattern. It is not the first such application I have

heard recently, but again, I will not say that this establishes any pattern. I have not actually had these applications occur with any kind of frequency.

[53] It is common for this Court to hear that allegations that arise out of domestic relationship issues, whether they are assault or criminal harassment, are matters that need to be given priority and dealt with expeditiously and, as such, our trial coordinators make efforts to have these matters dealt with sooner rather than later.

[54] This file had been reviewed sufficiently by the Crown at the pre-trial to bring the applications to have counsel appointed and to have the complainant testify by video link.

[55] Mr. Amos consented to these applications in order to have the matter move forward quickly and expeditiously.

[56] No issues were raised at the pre-trial conferences with respect to concerns about both Informations proceeding on the same day.

[57] These files were assigned to particular prosecutors early enough to allow for the files to be properly reviewed and dealt with.

[58] I recognize that from the May 30th date to today's date is not a lot of time. The trial had been set originally for a trial date in May. This is not a case where there is a very, very quick turnaround that the Crown is really trying to facilitate with concerns about their ability to do so.

[59] With respect to the issue of disclosure, I appreciate that there is substantial disclosure, but I do not find that there is any reason that would justify disclosure not having been prepared and distributed, especially as the issue of disclosure had been raised at earlier pre-trial conferences by Mr. Amos. And I certainly am not of the impression that there was any particular difficulty in retrieving it. This is not a case where we are waiting for DNA from a lab or some third party.

[60] With respect to Mr. Dick's ability to proceed today, he obviously needs certain disclosure. It may well be that there was a technological problem and the fax never made it to the Crown's office, but it seems to me that if the Crown is bringing an application to have counsel appointed to cross-examine a complainant, which is a solution the Crown is seeking, with merit in such cases, then the Crown needs to be in a position to proactively provide disclosure to counsel that is appointed. And Crown knew that Mr. Dick had been appointed when the date was set on May 30th. Again, not the Crown that is before me.

[61] The Crown that is before me today, Mr. Gouaillier, upon being assigned the file, immediately contacted Mr. Dick to try to facilitate disclosure, which is completely appropriate on his part. But that, in and of itself, was not enough to deal with the issues and not the only reason why the Crown is here today, as Mr. Dick had indicated it would not have taken him much time at all to prepare for this matter had he not understood it was unlikely to be proceeding.

[62] There is certainly, in my opinion, prejudice to Mr. Amos simply by virtue of the fact that these charges have been going for a long time. He has been wanting to have

them dealt with. He is ready to go. He has done what he could to facilitate a speedy trial date.

[63] If this is adjourned further, he will remain in the position of having to face these charges.

[64] There is prejudice to society if the adjournment is not granted and these charges are not heard. I consider charges such as these to be serious charges.

[65] I note the Crown elected to proceed by summary election and not by indictment, but it is certainly a case which, in my opinion, requires care and attention in the Crown's office to ensure that it can be dealt with, and this is not a file that had kind of disappeared. The Crown was aware of some of the difficulties in this trial with respect to it proceeding and had brought applications in a timely fashion.

[66] I do not find that the issue of there being two separate Informations, given the nature of these Informations going to Court on the same day to be of such a concern that it would merit an adjournment.

[67] This is not a case where the trial Court would be dealing with charges against two separate complainants completely disconnected from each other. The no contact breach involves the same complainant that the harassment charge is against, and I do not find that to be so complicated that Mr. Amos representing himself would find himself in an unfair position.

[68] I think that is not a particular concern and it is not uncommon to find such charges put together on one Information, although I concede that had they all been on

one Information, if severance was sought there is a very good chance it would have been granted.

[69] I do not consider the fact that the Crown that was assigned this file after the original Crown no longer had it was scheduled to be in two separate courtrooms at 10 o'clock today.

[70] I find that there are clearly laches in this case, and again, I want to make it clear the laches have nothing to do with the actions of the present Crown. Mr. Gouaillier has done all that could be reasonably expected of him in the time he was assigned the file.

[71] But overall, there are laches, and I find these laches in the circumstances of this case are such that it would be improper for me to grant the adjournment, so the adjournment is not granted.

[72] MR. GOUAILLIER: And as indicated, Your Honour, Crown has no evidence to offer.

[73] THE COURT: Charges are dismissed.

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COZENS T.C.J.