Citation: *R.* v. *Germaine*, 2011 YKTC 45

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Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: His Honour Chief Judge Cozens

REGINA

v.

WILLIAM NORMAN GERMAINE

Publication of information that could disclose the identity of the complainant or witness has been prohibited by court order pursuant to s. 486.4 of the *Criminal Code*.

Appearances:
Judy Bielefeld — Appearing for the Crown
Brook Land-Murphy — Appearing for the Defence

RULING ON APPLICATION FOR ADJOURNMENT

[1] COZENS C.J.T.C. (Oral): This is an adjournment application by the Crown of the trial of William Germaine, set for next week, July 19, 2011, in Carcross.

[2] When the application first came before me on July 12th, Mr. Germaine was to be tried on charges of assault against an unnamed complainant, unlawful entry, breach of probation, trespassing at night, mischief, and resisting arrest.

[3] These charges arose from an incident alleged to have occurred in Carcross on April 12, 2011. Mr. Germaine had three other charges before the Court: a breach of

probation times two, and failure to appear, that were set for plea.

[4] Mr. Germaine had been released on a promise to appear for the April 12th charges. He failed to appear in Whitehorse the next morning, and was subsequently arrested on June 14 for the breach charge, and failing to abstain from the possession and consumption of alcohol. The other breach of probation charge predates April 12th.

[5] Mr. Germaine was ordered detained in custody on June 17. On the June 29th appearance in a Wednesday docket court in Whitehorse, the matter was set for trial on the July 19th Carcross circuit. Crown was not consenting on June 29th to the July 19th trial date being set, due to the unavailability of information concerning witness availability for trial. The trial date was set regardless.

[6] When the Carcross pre-circuit took place on July 5th, counsel, or agent for counsel, were not in a position to address the issue of trial readiness. I note this also from the Clerk's notes from the pre-circuit. So, it seems that the pre-circuit conference served little purpose in regard to the trial of this matter.

[7] Crown counsel's position on this application was that one of the required officers was not available on July 19th, having filed a leave form on May 9th. Had the matter of fixing the trial date been set over to the regular Friday fix date docket, this information would have been available to Crown counsel. It was not available on June 29th.

[8] Crown counsel also indicated that a new charge of sexual assault was going to be laid against Mr. Germaine based upon the April 12th circumstances. Disclosure in the form of the complainant's statement had only been received by Crown counsel on

July 11th, and additional disclosure had been requested by defence counsel, and would be forthcoming.

[9] Crown counsel also stated that it was likely that defence counsel would be making a s. 276 application to adduce evidence of the complainant's prior sexual history.

[10] Defence counsel was opposed to the adjournment, indicating that the evidence of Constable Leggett would be admitted by defence counsel, thus making his unavailability a non-issue. Defence counsel stated that the s. 271 charge that was anticipated to be forthcoming was based on the same evidence available to the RCMP at the time the other charges were laid, and hence does not cause any further complications in the form of additional investigation or a need for more extensive disclosure. Defence counsel expressed concerns regarding the completeness or lack thereof of Crown disclosure to this point in time, however, defence counsel agreed that a s. 276 application may well be made before the trial judge. Counsel pointed out to the Court that the complainant was not in the Yukon, and to her knowledge, had not even been spoken to by Crown counsel for the purposes of preparation for trial.

[11] I adjourned the application over to today's date to allow an opportunity for a new Information to be filed, and for counsel to make further inquiries and submissions.

[12] On today's date, a new Information was filed alleging the same offences were committed with the exception that the s. 266 assault charge had been replaced by a s. 271 sexual assault charge. Crown counsel withdrew all charges on the initial Information, with the exception of a s. 733.1(1) charge, and a s. 129 charge.

[13] Crown counsel then withdrew the identical s. 733.1(1) and s. 129(a) charges on the new Information, indicating that it was the Crown's position that trial fairness required that Mr. Germaine be tried separately for these matters, notwithstanding that they appeared to be at least somewhat connected to the same set of circumstances.

[14] When I queried defence counsel on the issue of separate trials, counsel informed me that she was not in agreement that these matters should be tried separately. As such, and on the basis of her and Crown counsel submissions, I am treating the adjournment application as being with respect to all matters, and not as though one matter could proceed to trial prior to the other.

[15] Crown counsel confirmed that since July 12th, she has learned that the complainant is not in the Yukon, and has now spoken to her. The complainant has expressed her unhappiness about being required to testify at a trial, but has not indicated that she will not attend or will recant from her allegations against Mr. Germaine.

[16] Crown counsel has also indicated that the Crown will oppose any application under s. 276 that does not comply with the seven day notice requirement, set out in s. 276.1. I will address this position outside the merits of the adjournment application. I find it somewhat disingenuous for Crown to have a s. 271 charge sworn exactly seven days before a scheduled trial date, and then to oppose a s. 276 application on the basis of insufficient notice. Defence counsel cannot be expected to provide notice of a s. 276 application until there is the s. 271 charge before the Court. For the Crown to insist that the notice does not comply with the technical requirements of notice in such

circumstances is simply unfair.

[17] The test for an adjournment as set out in *Darville* v. *The Queen*, [1956] S.C.J. No. 82, is as follows:

> (a) that the absent witnesses are material witnesses in the case;
> (b) that the party applying has been guilty of no laches or neglect in omitting to endeavour to procure the attendance of these witnesses … and
> (c) that there is a reasonable expectation that the witnesses would be present at a future date if a postponement is granted.

[18] In the *R.* v. *Pittner*, 2008 ONCJ 136 case, two additional aspects of the test have been considered, and they have been referred to at times in this jurisdiction. The fourth one is the seriousness of the offence, and the fifth one is the prejudice. That includes the prejudice, of course, both to the accused, and to society in not having the matter heard on its merits.

[19] On the first issue, it is rather interesting with respect to the absence of a witness, as it appears that the only witness confirmed to be unavailable at this point in time, appears to no longer be required due to defence counsel's willingness to make admissions as to the evidence this officer would testify to. Therefore, it does not appear that there is, at this point in time, an absent witness.

[20] On the second point, there has not, strictly speaking, been *laches* on the part of the Crown, as I have no indication that there is an unavailable witness. Therefore, there cannot be *laches* with respect to the procuring of a witness. I strongly suspect that, should the matter come before me at trial in Carcross next Tuesday, Crown counsel will be seeking an adjournment on the basis that the complainant is not available, as it

appears to me that she has not been subpoenaed, and it is known to me that she is out of the jurisdiction.

[21] On the third point, with respect to the reasonable expectation that the witness would be present at a future date if a postponement is granted, again, it is premature for me to consider whether the complainant can be procured for a subsequent trial date, as I do not have before me reliable information that states that she is unable to be present for the current trial date.

[22] On the fourth point, this is a serious charge. I will note that Crown counsel has decided to proceed by way of summary election, rather than indictably. On the submissions before me, there do not appear to have been any physical injuries to the complainant, which should not be construed as ignoring the possibility of emotional or psychological injury the complainant may have suffered if, in fact, she was a victim of a sexual assault, which currently remains only an allegation.

[23] On the point of prejudice, there is clearly some prejudice to Mr. Germaine in that he is detained and, subject to a review of the detention order, will remain so until the September 20th circuit date, if that is when this matter were to be adjourned for the purposes of trial.

[24] While Crown counsel asserts that even if the charges set for trial are dealt with prior to that, such as on next Tuesday in Carcross, Mr. Germaine would continue in detention on the basis of the pre-existing s. 733.1(1) and the subsequent s. 145 and s. 733.1. I find it somewhat hard to accept that Crown counsel would seek detention, and a Court in position to consider the matter, would order it on the basis of these charges

alone. I also note that he has one month in remand to today's date for which he would receive credit in the event he pled guilty and was sentenced.

[25] There is the counterbalance, of course, of the societal expectation that serious matters be heard on their merits, and thus a potential prejudice to society if they are not. The problem, again, is that the information before me does not set out a foundation for the application that establishes that the matter cannot be heard on July 19th due to the unavailability of a Crown witness or necessary physical evidence.

[26] In sum, it really appears that at this point in time, the basis for the Crown application is that the Crown cannot be ready for trial in this matter by July 19th, and needs more time to prepare. This preparation includes more time to provide the disclosure that Crown counsel is, of course, obliged to provide defence counsel.

[27] This point poses some difficulty. I concur with the concerns of Crown counsel that this matter was set for trial from the Wednesday, July 19th docket court over the objections of, or at least with the reluctance of, Crown counsel. The Crown concern on June 29th, as I understand it, was expressed in terms of uncertainty as to witness availability, and not on the basis of an inability to be adequately prepared for trial. I can advise that a directive has now been issued to the presiding Justices of the Peace that trial dates for circuit matters which are before the Court in Whitehorse are to be set in Friday fix date courts, and not in Wednesday docket courts. Of course, if both Crown and defence counsel are in agreement that there are no witness availability issues or other potentially problematic issues, in such circumstances it may be that with the

consent of both Crown and defence counsel, the trial date can be set from a Wednesday or other docket court.

[28] This application for an adjournment is fraught with difficulties, the foremost being that the basis for the application is uncertain, as the unavailability of Constable Leggett does not appear to be an issue any more. It also appears that a s. 276 application, should one be made, and should short notice be granted, would not allow for the trial to be started and concluded on July 19th, because there are going to be materials that are going to need to be filed in respect of any such application.

[29] It has been a short time since the trial date was set, however, the charges arose from April 12th, which is not that close to the time that we are currently before the Court.

[30] In all of the circumstances, I conclude that given the willingness of defence counsel to consent to the admission at trial of the evidence of the only Crown witness known at this time to be unavailable, and the lack of any indication that other necessary evidence is unavailable, the application for an adjournment is denied. This said, Crown counsel is able to make further application for an adjournment at or prior to the trial date of July 19th if there is a change in the circumstances or additional information available that is not currently before me.

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COZENS C.J.T.C.