

Citation: *R. v. Krizan*, 2016 YKTC 3

Date: 20160229
Docket: 15-00506
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Cozens

REGINA

v.

PETER KRIZAN

Appearances:
Paul G. Battin
Vincent Laroche

Counsel for the Crown
Counsel for the Defence

RULING ON APPLICATION

[1] This is an application by Crown counsel to recall a defence witness, Warren Brian Warawa, in order to ask further questions in cross-examination.

[2] The trial commenced on December 15, 2015. Crown counsel called several witnesses and closed its case.

[3] Defence counsel called Mr. Krizan and Mr. Warawa, who was then in custody at the Whitehorse Correctional Center ("WCC"). Crown counsel completed his cross-examination of Mr. Warawa and the case was adjourned for defense counsel to consider whether he was going to call any further witnesses or whether we would be proceeding to closing submissions on the next court date. I note that Mr. Warawa

commenced his testimony at 5:02 p.m. and was cross-examined from 5:08 to 5:12. This was at the end of a full day of trial.

[4] Crown counsel subsequently reviewed a case in which Mr. Warawa had been the victim of an assault. (*R. v. Waugh*, 2001 YKSC 505). He noted that the presiding justice, Veale J., had stated in the Reasons for Decision that Mr. Warawa had suffered significant head injuries that had resulted in his incurring memory loss and that the impacts would be long-lasting (paras 2, 3).

[5] Counsel also points to the evidence in *Waugh* of Mr. Warawa's previous acts of violence that were before the Court, that counsel in that case had agreed could be used for proof of Mr. Warawa's propensity for violence (paras. 34, 35).

[6] Counsel wishes to further cross-examine Mr. Warawa on any possible memory issues insofar as they could potentially affect his recollection of the events that he testified to. This, counsel submits, may impact upon the reliability of Mr. Warawa's evidence.

[7] In addition, Crown counsel subsequently reviewed Mr. Warawa's criminal record and wishes to cross-examine him on this. Counsel submits that there are convictions for offences of dishonesty that could impact upon Mr. Warawa's credibility and thus the reliability of his evidence.

[8] Crown counsel filed the Affidavit of Legal Assistant Charlene Torgerson. This Affidavit (although erroneously referring to "Bruce Warawa" rather than "Warren Warawa"), indicates that diligent steps have been taken to ensure that Mr. Warawa has

been made aware of his potential required attendance at Court on the March 4, 2016 date set for continuance, and has been requested to provide his contact information. I am satisfied that, given the entirety of the Affidavit, that there is no confusion as to the fact that it was Warren Warawa who was being spoken of.

[9] Counsel for Mr. Krizan takes a somewhat neutral position on the application, although certainly not consenting to it. Counsel is primarily concerned that any further cross-examination be limited in scope.

Test for Recalling a Witness

[10] In *R. v. Clarke*, 2009 CarswellOnt 6281 (Sup. Ct. Jus.), Thorburn J. referred to *R. v. Hayward* (1993), 86 C.C.C. (3d) 193 (Ont. C.A.), in which the Court held that a trial judge sitting without a jury could permit either Crown or defence to reopen evidence before sentence is passed. In paragraph 17 he noted the following considerations:

- whether the evidence is relevant to a material issue in the case;
- the potential prejudice to the other party if reopening is permitted; and
- the effect of permitting reopening of the evidence on the orderly and expeditious conduct of the trial.

[11] I am satisfied that the questions that Crown counsel wishes to ask are relevant to a material issue in the case. They go to the credibility and reliability of Mr. Warawa's testimony, and this testimony is potentially probative in respect of some of the issues that will need to be decided.

[12] I am also satisfied that there is no prejudice in law to Mr. Krizan in allowing the Crown application. The questions sought to be asked are questions that would have

been appropriate had they been asked on the December 15. Defence counsel does not allege any legal prejudice, as long as the cross-examination is limited to the two areas Crown counsel has indicated he wishes to pursue, and I agree that there is none. I also note that defence counsel has not yet closed his case.

[13] The impact on the trial process is minimal. The requested cross-examination will occur on a date already set for continuation of the trial. The cross-examination will take very little time and not result in any further adjournment. Crown counsel has indicated that, should Mr. Warawa not appear, that it is very unlikely that an adjournment would be sought to procure his attendance.

[14] I agree with Crown counsel that, at the conclusion of court on December 15, it may have been more prudent to not complete the cross-examination in order to allow for some further investigation into Mr. Warawa's antecedents. Crown counsel is not in the same position as defence counsel in that Crown does not necessarily have advance knowledge of the witnesses defence counsel will be calling, and thus less time to prepare for the witness in advance of cross-examination. This said, it was at the end of a long day and I appreciate that Crown counsel was attempting to conduct the trial in as expeditious manner as possible.

[15] In all the circumstances, I find that it is appropriate to allow Crown counsel the opportunity to further cross-examine Mr. Warawa. The cross-examination will be limited to, firstly, any questions regarding Mr. Warawa's memory as of the date of his testimony in light of the head injury noted in the **Waugh** decision, and any subsequent head injuries. The questions will be in the "asked and answered" category in that Crown

counsel will not seek to be calling any evidence to rebut Mr. Warawa's testimony in this regard. Secondly, Crown counsel will be able to put Mr. Warawa's criminal record to him in the usual manner.

COZENS T.C.J.