Citation: *R.* v. *Martin*, 2006 YKTC 36 Date: 20060322
Docket: T.C. 05-00604
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: Her Honour Judge Ruddy

REGINA

v.
JASON RICHARD MARTIN

Appearances:
Ludovic Gouaillier Counsel for Crown
Gordon Coffin Counsel for Defence

REASONS FOR JUDGMENT

[1] RUDDY T.C.J. (Oral): Jason Richard Martin is before me for trial on a charge set out in the Information as follows:

> On or between the 1st day of November, 2005, and the 30th day of November, 2005, at or near Whitehorse, Yukon Territory, did unlawfully commit an offence in that he did wilfully attempt to obstruct the course of justice in a judicial proceeding by **obstructing** a witness to give a false statement to police, contrary to s. **139(1)** of the *Criminal Code*. (Emphasis added)

[2] There are two problems with the Information as worded. The use of the word obstructing is clearly nonsensical on its face and the wrong subsection has been referred to. Section 139(1) reads:

> (1) Every one who wilfully attempts in any manner to obstruct, pervert or defeat the course of justice in a judicial proceeding,
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> a) by indemnifying or agreeing to indemnify a surety, in any way and either in whole or in part, or
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> b) where he is a surety, by accepting or agreeing to accept a fee or any form of indemnity whether in whole or in part from or in respect of a person who is released or is to be released from custody,
>
> is guilty of
>
> c) an indictable offence and is liable to imprisonment for a term not exceeding two years, or
>
> d) an offence punishable on summary conviction.
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> (2) Every one who wilfully attempts in any manner other than a manner described in subsection (1) to obstruct, pervert or defeat the course of justice is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.
>
> (3) Without restricting the generality of subsection (2), every one shall be deemed wilfully to attempt to obstruct, pervert or defeat the course of justice who in a judicial proceeding, existing or proposed,
>
> a) dissuades or attempts to dissuade a person by threats, bribes or other corrupt means from giving evidence;
>
> b) influences or attempt to influence by threats, bribes or other corrupt means a person in his conduct is a juror; or
>
> c) accepts or obtains, agrees to accept or attempt to obtain a bribe or other corrupt consideration to abstain from giving evidence, or to do or refrain from doing anything as a juror.

[3] At trial, the Crown's main witness was Jeffrey Tashoots. The evidence of Mr. Tashoots suggested an attempt to persuade him to give a false statement to the police, presumably to support a false alibi. If believed, this would clearly constitute an

offence contrary to subsection (2) of s. 139, not subsection (1). In cross-examining Mr. Tashoots, defence counsel chose to ask few questions; all relating to the issue of sureties as contemplated by subsection (1). Crown closed its case and defence elected to call no evidence.

[4] In the course of submissions, defence counsel argued that the offence as charged had not been made out as the Crown had not proven an offence contrary to s. 139(1) as particularized in the Information. Crown argued that it is required to prove an offence, not the offence number.

[5] The preliminary issue to be decided is whether the offence section as particularized in an information is surplusage, and therefore need not be proven by the Crown.

[6] In *R.* v. *Vezina,* [1986] 1 S.C.R. 2, the Supreme Court of Canada defines surplusage as follows:

> The "surplusage rule", which has been developed by the courts over a great many years, is succinctly stated as follows in Ewaschuk, Criminal Pleadings and Practice in Canada (1983), pp. 222-3:
>
> > If the particular, whether as originally drafted or as subsequently supplied, is not essential to constitute the offence, it will be treated as surplusage, i.e., a non-necessary which need not be proved.
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> This common law rule is, in effect, the converse of s. 510(3) of the *Criminal Code,* which states:
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> > 510(3) A count shall contain sufficient detail of the circumstances of the alleged offence to give to the accused reasonable information with respect to the act or omission to be proved against him and to identify the transaction referred

> to, but otherwise the absence of insufficiency of details does not vitiate the count.

[7] Numerous cases have made it clear that reference to a section number is not required in an information, and further, that where a section number is included, it is mere surplusage, which need not be proven. In *R.* v. *Schafer*, [1989] S.J. No. 101 (QL) the Saskatchewan Court of Queen's Bench noted:

> The authorities indicate that the stating of the section number of a statute in an information is surplusage so long as the information sets out the essential ingredients of the offence so that the accused knows what charge he has to meet, that he is not taken by surprise and is not prejudiced.

[8] Having reviewed the authorities provided by the Crown as well as those referred to by Hrabinsky J. in the *R.* v. *Schafer* decision, *supra*, I am satisfied that reference to a section number in an information is indeed surplusage and need not be proven by the Crown. This does not, however, end the matter. The *R.* v. *Vezina* case, *supra*, makes it clear that the surplusage rule is "subject to the proviso that the accused not be prejudiced in his or her defence". Accordingly, the second issue to be decided is whether the accused was misled or prejudiced by the error in the subsection number.

[9] This is a somewhat more difficult question on the facts of this case. Given the manner in which defence counsel chose to conduct his cross-examination, one might argue that prejudice is readily apparent.

[10] Indeed, on the issue of prejudice, the defence has filed the Supreme Court of Canada decision in *R.* v. *Campbell* and *Kotler*, [1986] 2 S.C.R. 376, upholding a Court of Appeal decision not to interfere with the trial judge's finding of irreparable prejudice to the conduct of the defence where the Crown, having chosen to name the victims of the

offence in the indictment as sole proprietorships, which are not persons capable of being defrauded, sought later to amend.

[11] The application was denied on the basis of a finding of irreparable prejudice to the accused given that the defence may well have adopted an approach other than electing to call no evidence had the amendment been sought and granted at a more opportune time.

[12] One significant difference between *R.* v. *Campbell* and *Kotler*, *supra*, and the case at bar is that the court in *Campbell* and *Kotler* was clearly of the view that having chosen to particularize victims, the Crown was required to prove those victims, noting that "the Crown was undertaking to make its case within these narrow confines, and the defence was entitled to so assume and conduct its case accordingly". Clearly, the Court was not of the view that the particularization of victims in the indictment was mere surplusage.

[13] The same cannot be said in the case before me. Having found the section number to be surplusage, it does not then logically follow that the defence was entitled to rely solely on the section number in determining how to conduct its case, and having relied solely on the section number to its detriment is then able to claim irreparable prejudice. Rather, the proper question before me is whether the wording of the information as a whole identifies with reasonable precision the offence alleged such that the accused understands the case to be met.

[14] On a fair reading of the information, it is obvious, in my view, that the word “obstructing” and the reference to subsection (1) are typographical errors. I am satisfied

that the overall wording of the information does, notwithstanding these errors, sufficiently make clear the offence charged such that the accused ought not to have been surprised. I am not of the view that the accused has suffered irreparable harm as a result. I would also note that to find otherwise would, in my view, fly in the face of the development of the law in this area.

[15] An overall review of the case law on amending informations demonstrates a clear departure from dismissals based on mere technicalities in the wording of informations. This development is succinctly demonstrated in the *R.* v. *Vezina* case, *supra*, in which the Supreme Court of Canada stated:

> Both the "surplusage rule" and s. 510(3) (and its predecessors) are responses to the extreme formality of the 18th and 19th century law of criminal procedure. At that time, "at common law, every material fact, that is every fact which formed an ingredient in the offence, had to be alleged to be done at a particular place and time". Defects or omissions in the indictment were generally fatal, as "the slightest inexactitude in the wording was capable of invalidating the indictment".
>
> Although the rules concerning indictments came to be described as an "extraordinary and irrational set or rules", their purpose, it seems, was to alleviate the excessive harshness of the early criminal law. As Stephen has indicated:
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> > I do not think that anything has tended more strongly to bring the law into discredit than the importance attached to such technicalities as these….
> > …
>
> With the abrogation of the great majority of the capital statutes in the 19th century, however, much of the rationale for the formality and strict adherence to the wording of the indictment disappeared. Consequently, the legislators and the courts sought to relax a number of the rules concerning indictments and the courts were empowered to amend defective indictments.
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> The "surplusage rule," s. 510(3) of the Code, as well as s. 529, are thus designed to overcome the excessive technicalities of the former

> procedures and to require the accused to meet the intrinsic merits of the accusation.

[16] Having decided that the errors on the face of the information in this case are not fatal to the Crown's case, I am left with the remaining issue of whether the Crown has proven its case with respect to an offence contrary to s. 139(2) beyond a reasonable doubt. Notwithstanding my foregoing finding with respect to the section number, there are still a number of essential elements which the Crown must prove beyond a reasonable doubt; among these is the issue of identification.

[17] The offence is alleged to have been committed over the telephone. Mr. Tashoots, now 33 years of age, provided evidence that he and Mr. Martin had been good friends in high school. He further indicated that they had not had much contact since that time, though he still considered them to be friends. When asked how he knew it was Mr. Martin on the telephone, Mr. Tashoots' response was that the individual on the other end of the phone said he was Mr. Martin. Mr. Tashoots was not asked if he recognized the voice on the phone to be that of the defendant, nor was he asked to describe his more recent dealings with Mr. Martin, in particular, telephone exchanges such that I would be in a position to assess his ability to recognize Mr. Martin's voice on the telephone.

[18] In my view, this falls far short of a establishing the issue of identity beyond a reasonable doubt. I would also note that Mr. Tashoots proved himself to be an extremely difficult witness for the Crown. He had to be continually referred to his statement to refresh his memory. In addition, the Crown was required to resort to leading Mr. Tashoots to get even the barest bones of the offence before the Court.

While it is entirely proper to allow a witness to refresh his or her memory, it does impact the weight to be afforded to their evidence. In this case, Mr. Tashoots was virtually unable to demonstrate any present memory of the events alleged. As a result, his evidence is not particularly persuasive and I am of the view that it would be unsafe to convict on the basis of that evidence.

[19] On the whole of the evidence, I am not satisfied that the charge has been proven beyond a reasonable doubt and it is hereby dismissed.

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RUDDY T.C.J.