

IN THE SUPREME COURT OF THE YUKON TERRITORY

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

AND:

DARYL F. NOVAKOWSKI

Respondent

Zeb Brown

For the Appellant

Daryl Novakowski

Acting on his own behalf

**MEMORANDUM OF JUDGMENT
DELIVERED FROM THE BENCH**

[1] VERTES J. (Oral): In this case, the accused was charged with the offence of speeding. The evidence at the trial was, from the arresting police officer, that he stopped what he thought was a speeding vehicle. The driver produced a driver's licence, and the police officer testified that the driver identified himself as Daryl Novakowski. Whether in fact he identified himself or not is not essential in this analysis.

[2] The trial proceeded and, at the close of the Crown's examination in chief of the investigating police officer, the respondent rose to cross-examine and at that point

the presiding Justice of the Peace interjected and advised the respondent that he would be better off not cross-examining since the Crown had failed to identify him as the individual that was named in the charge.

[3] I do not know if the Crown had any further witnesses to call. I do not know if the defence was planning on presenting evidence. It seems clear that, with the Justice of the Peace's intervention at that stage and dismissal of the charge on the basis of lack of identification, what occurred can be rightly characterized as what we call in criminal law a non-suit. The test for a non-suit is not proof beyond a reasonable doubt or lack thereof, the test is whether there is any evidence by which a properly instructed trier of fact, acting reasonably, could enter a conviction.

[4] In my respectful opinion, the error of law made by the Justice of the Peace in this case was the assumption that an in-dock identification was absolutely necessary in every case. In my opinion, that is not the law, as stated by other courts, some of them being the cases provided by the appellant's counsel on this hearing. The onus is upon the Crown to prove that the crime has been committed and that the accused is the person who did it. That last point, and like any fact in issue, can be proved in many different ways.

[5] In this particular case, in my respectful opinion, the Justice of the Peace failed to draw the distinction between the need to make sure that the person in court is the person named in the charge and the need to prove that the person charged committed the offence.

[6] As for the former, I think there were a number of circumstances by which the Justice of the Peace could be assured that the individual who was there was Mr.

Novakowski, named in the charge. As for the latter, well, as I indicated, the question of whether the person charged committed the offence can be proven in many ways. Certainly, in this particular case, the fact that the police officer testified as he did, there was some evidence at least upon which a reasonably instructed trier of fact could conclude that the individual named Daryl Novakowski committed the offence of speeding. That is not to say that it was proven beyond a reasonable doubt in this case, because the trial never got to that point. The trial was cut off short by the trial judge's intervention.

[7] The appellant did not put the argument on the basis that the trial judge improperly intervened. I think the Justice of the Peace in this case was quite properly looking out for the interests of an unrepresented accused. There is, however, a difference between making sure that an accused's rights are protected and advising an accused on trial strategy and trial tactics, and that is what happened here. In my respectful opinion, I think the Justice of the Peace went a step too far and predetermined the issue without hearing from Crown counsel in this case.

[8] So the error of law, in my opinion, is that the Justice of the Peace was of the view that it was necessary to have an in-dock identification of the defendant, who was present in court, as the person who allegedly committed the crime. That is not necessary; it is not an absolute necessity in every case. The Justice of the Peace, in my respectful opinion, acted precipitously in cutting the trial short. If the trial had proceeded to a conclusion, it may be that the Justice of the Peace would have concluded that there was a reasonable doubt.

[9] THE RESPONDENT: Is today also to determine, sorry to interrupt you, whether or not it goes back to trial?

[10] THE COURT: Well, if I allow the appeal, that is the only thing that will happen.

[11] THE RESPONDENT: It will go. Oh, okay.

[12] THE COURT: It will go back to a trial in the Justice of the Peace court.

[13] THE RESPONDENT: Yes, I see. I feel kind of misled, if you don't mind, Your Honour, because I have already divulged -- I had a full case to proceed with that day. And after several months and several hours of investigation plus other people I paid to investigate certain things to proceed to trial that day, unfortunately we didn't get there. I have divulged all my information to the Crown and to the R.C.M.P., which came to me right after that day and asked me, "What was your case?" So I kind of feel cheated by the law, in some sense, here too. And if that does go --

[14] THE COURT: Well, I do not know what your defence is going to be, whether it is the way the police used this radar gun?

[15] THE RESPONDENT: Well, it was a combination of several things, let alone missing records and so on. I have divulged everything to them.

[16] THE COURT: Okay. I take it one of your defences was not going to be that you are not the man named in this charge?

[17] THE RESPONDENT: No, that was an unexpected occurrence,

Your Honour, that day.

[18] THE COURT: Yes.

[19] THE RESPONDENT: Definitely.

[20] THE COURT: In many ways, while there is no requirement on a defendant to disclose his case to the Crown ahead of time, in many ways this may assist everybody. The Crown is obligated to disclose its case ahead of time, that is a requirement. By the fact that there has been a mutual disclosure now, it may only assist in coming to a proper resolution of this case.

[21] I will give you a bit of gratuitous advice, Mr. Novakowski, if you feel that you have been prejudiced by the fact that you have disclosed things to the Crown.

[22] THE RESPONDENT: That I normally wouldn't have, yes.

[23] THE COURT: If you feel that you have been prejudiced, then your recourse is to raise that right off the bat with the presiding judge when this trial is set to be reheard, and argue that the case should be tossed out because of extreme prejudice to you. Then you would have to establish how you are prejudiced, not just because you have lost the element of surprise. That is not prejudice. Prejudice is being treated unfairly.

[24] In this particular case, the only remedy I can grant, if I allow the appeal, is to send it back for a new trial because the trial was cut off.

[25] THE RESPONDENT: Definitely.

[26] THE COURT: It was aborted. In my respectful opinion, it was aborted on the basis of an error of law by the trial judge in this case.

[27] THE RESPONDENT: That's fine if it was error of law. I don't have a problem with that.

[28] THE COURT: All right.

[29] THE RESPONDENT: Thank you.

[30] THE COURT: The appeal is allowed. The matter is remitted to Justice of the Peace court for trial.

[31] I take it, Mr. Brown, there is provision, is there not, if there is a new trial, in terms of moving it into Territorial Court?

[32] MR. BROWN: Oh, yes, that is no problem.

[33] THE COURT: I mean these sort of things can be moved to Territorial Court; can they not?

[34] MR. BROWN: They can be, and they routinely are, whenever there is a legal issue of any nature.

[35] THE COURT: Yes. I do not know if there will be legal

issue during the trial. If Mr. Novakowski is going to be represented by legal counsel at the new trial, then you may want to consider moving it into Territorial Court where the proceedings are a little more formal, and where certain remedies can be given that cannot be given in a Justice of the Peace court. That is just for your consideration, obviously.

[36] MR. BROWN: I was just going to suggest, My Lord, that we put it to the Tuesday morning docket at that time. We could fix a date.

[37] THE COURT: What Tuesday morning docket? It is not for me to fix a date; is it? It is going back to another court, either Justice of the Peace court or Territorial Court. You will have to speak to them about getting a trial date.

[38] MR. BROWN: Yes, of course.

[39] THE COURT: All right. Mr. Novakowski, you should consult with your lawyer and have him consult with Mr. Brown and arrange for a new trial date and any other matters that need to be addressed. Thank you.

VERTES J.