Date: 20030114
Docket No.: S.C. 02-00321D
Registry: Whitehorse

IN THE SUPREME COURT OF THE YUKON TERRITORY

BETWEEN:

HER MAJESTY THE QUEEN

AND:

HARLAN LANCE NUKON

Ludovic Gouaillier — For the Crown

Barry Ernewein — For the Defence

MEMORANDUM OF RULING
DELIVERED FROM THE BENCH

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[1] FOISY J. (Oral): In this matter, first of all, I have already noted Mr. Justice Veale, did not resolve the matter when it was brought before him. He allowed the accused an opportunity to obtain a different counsel, since Mr. Coffin had made an application to withdraw. He then set it over to this date for argument. Accordingly, I have taken the position, and I think it is quite properly conceded by counsel, that I have jurisdiction to hear this matter.

[2] The history of this matter is not very complex. The accused took advice from his counsel, and his explanation before the court was that his counsel advised him that it was perhaps better that the plea should be one of guilty. At that point in time, the accused, seemed to have gone along with that suggestion. At this point, I want to make it clear that, I am not being critical of Mr. Coffin. The practice of criminal law

is not always as clear-cut and as neat as we would like it to be, and I am sure that Mr. Coffin thought that he had sufficient instructions. He entered a plea of guilty on behalf of the accused in the absence of the accused.

[3] The matter then came before Mr. Justice Veale a second time. At that time the accused was present in court, and then indicated to the court that his plea was that of not guilty. At that time his counsel had made an application to withdraw. Obviously, something occurred between the accused and his counsel which made it, in the mind of Mr. Coffin, difficult, if not impossible, to proceed with this matter on behalf of the accused. That leaves me in a state of wonderment as to what may have happened. There was an element of conflict and it appears that it had something to do with the plea that was entered. Consequently, we now have new counsel and the position of the accused is set forth, clearly, before me. He wants to plead not guilty.

[4] The accused ought not to be allowed to change his plea on a whim. Obviously, as was pointed out by Mr. Gouaillier, if this were to happen then the criminal system would fall into disarray. In this case, I am satisfied that the accused has made out a sufficient case, particularly, in view of the fact that when first confronted in court he made it clear that his plea was not guilty, and that he has, through counsel, made it clear he is not prepared to accept any of the evidence or facts which the Crown would present in order to prove the essential averments or the essential elements of this offence.

[5] That being the case, I am satisfied that the accused ought to be allowed to change his plea and accordingly I vacate the plea of guilty. Before we proceed to arraignment, as the accused was never arraigned, I would only add the following: I am not sure if the new section of the *Code*, s. 650.01(2)(c), applies. The section reads:

> A plea of guilty may be made, and a sentence may be

> pronounced, only if the accused is present, unless the court orders otherwise.

The section is in the conjunctive as opposed to disjunctive. In other words, if the word was "or" instead of "and," then it may well be that that section would have an application here. Since sentence has not been pronounced, then the second of the two requirements has not been met. Accordingly I doubt that the section applies.

[6] The other section, which was referred to me by counsel for the defence, s. 606 (1)(1.1), leaves me with the impression that Parliament, wanted to emphasize that it was important that a plea of guilty be accepted only if the court was satisfied that the plea was made voluntarily. I have a problem here, considering the history of this matter and how it evolved, as to whether or not the accused in his own mind was prepared to go along with the plea voluntarily. The accused must understand that the plea is an admission of the essential elements of the offence, and he must understand the nature and consequences of the plea. The court is not bound by any agreement between the accused and the prosecutor.

[7] The failure of the court to fully inquire whether the conditions set out in subsection 1.1 are met does not affect the validity of the plea. Here the court did make such an inquiry.

[8] Once the court embarks upon an inquiry as mentioned in s. 606(1.2) it must give meaning to the language in s. 606(1.1). To do so in this case lends support to the accused's position that the guilty plea ought to be vacated.

[9] THE COURT: All right. Are we prepared to proceed to an arraignment?

[10] MR. ERNEWEIN: Yes, sir.

[11] THE CLERK: Harlan Lance Nukon stands charged that he on or about the 16th day of August 2002, at or near Whitehorse, Yukon Territory, did unlawfully commit an offensive act. He did in committing a sexual assault on Penny Kaye cause bodily harm to her, contrary to s. 272(2)(c) of the *Criminal Code*. Having heard the charge read, how do you plead guilty or not guilty?

[12] MR. NUKON: Not guilty.

[13] THE CLERK: Harlon Nukon pleads not guilty, Your Worship.

[14] THE COURT: All right. The original election in this matter, was trial by judge alone, it was here in court?

[15] MR. ERNEWEIN: I believe so yes.

[16] THE COURT: There was no election for trial by judge and jury?

[17] THE CLERK: It was made Supreme Court Judge alone on November 12th, My Lord.

[18] THE COURT: All right. And I take it the accused is maintaining the election?

[19] MR. ERNEWEIN: That is correct.

[20] THE COURT: All right. So it is a matter of setting down a trial

date. Do we have dates?

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FOISY J.