IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *R.* v. *Papequash*, 2006 YKSC 13 Date: 20060210
Docket: S.C. No. 05-01502
Registry: Whitehorse

BETWEEN:

HER MAJESTY THE QUEEN

AND:

CHRISTIAN TROY PAPEQUASH

Before: Mr. Justice L.F. Gower

Appearances:
Noel Sinclair For the Crown
Gordon Coffin For the Defence

MEMORANDUM OF RULING
DELIVERED FROM THE BENCH

[1] GOWER J. (Oral): This is an application by the accused, Christian Troy Papequash, for an adjournment of his trial, which is scheduled to take place before a judge and jury, commencing February 20, 2006, which is just a little over a week away.

[2] Mr. Papequash is charged with a sexual assault, contrary to s. 271, on one S.W., which is alleged to have occurred between June 15 and July 8, 1997, in Whitehorse. I am advised that the Information on that charge was sworn November 9, 2004. The preliminary inquiry proceeded on April 19, 2005.

[3] The initial trial date was set at a fix-date hearing on April 26, 2005, and was scheduled to take place in September 2005. The trial could not take place in September for reasons of court scheduling. The court, on its own motion, brought the matter forward and the trial was rescheduled to take place in December 2005. Then the Crown brought an application to adjourn those dates because the complainant had just given birth to, I believe it was twins, and was unable to testify. So the matter was rescheduled from December 2005 to February 20, 2006.

[4] I am told that this is a case which involves between two and four Crown witnesses, depending on what admissions the accused is able to provide, and it is expected to last about three days.

[5] The other complicating factor in this application is that the accused has been represented to date by counsel appointed through the Yukon Legal Services Society (Legal Aid). That counsel was Mr. Gordon Coffin, who applied by notice of application filed February 6th, which was heard February 7th, to be relieved as counsel of record. In support of that application, he filed an affidavit of his legal assistant which indicated that the legal assistant had emailed the accused on October 7, 2005, advising him of the then trial date, which was in December, and asked him to contact their office.

[6] At some point prior to October 14, 2005, the accused attended at the Legal Aid office, that is, Mr. Coffin's office, and indicated in passing that he may wish to retain another lawyer. At that point, Mr. Coffin's office had three postal addresses for the accused and on October 14th, the legal assistant forwarded correspondence to the

accused at each of those addresses, giving him further information about the trial dates and asking that he get in contact with them if he wished to change counsel.

[7] Shortly after the mailing of those letters, Mr. Coffin had a passing conversation with the accused at the courthouse and confirmed that he was aware of his trial dates. On January 12, 2006, the legal assistant, again, emailed the accused and asked him to contact their office to arrange an appointment with Mr. Coffin. Not having heard from the accused in response to any of those emails or correspondence, the legal assistant emailed him on January 31, 2006, indicating that if he failed to contact their office by the following Friday at 4:00 p.m., then Mr. Coffin would make his application to this Court to be removed as his lawyer. She indicated that none of the emails that she sent to the accused were returned as undeliverable, nor was the correspondence forwarded to him returned by Canada Post.

[8] I heard Mr. Coffin's application on February 7th, but because of the nature of this case and because of the fact that the charge is old and that it had been adjourned a couple of times already, I declined to grant Mr. Coffin's application and I made an order directing that the accused appear before this Court today. That order was served on the accused and he has responded by appearing.

[9] At the outset of the hearing today, Mr. Coffin renewed his application to withdraw, giving the same reasons that he gave on February 7th, which are that he has had insufficient time to prepare for this trial because of the fact that the accused did not stay in touch with him and provide him with timely instructions. He also confirmed that he found out this morning from speaking with the accused that he still wishes to retain new

counsel. I granted Mr. Coffin's application, and he has been relieved as counsel of record for Mr. Papequash.

[10] The accused then addressed me directly and indicated that he has been working for the last two weeks in the Fort Nelson, British Columbia area on a slashing and line-cutting job and that he is expecting to receive a cheque in the amount of approximately $2,800 for 10 days of that work. He returned to Whitehorse about a week and a half ago, but has made no efforts at all to find a new lawyer since he has been back in the city. He tells me that he would like to return to the Fort Nelson area today in anticipation of another four to six weeks of slashing work and says that, as a result, he expects to be able to earn and save enough money to retain a private defence lawyer. That is the reason for his application for a further adjournment.

[11] The accused has no explanation at all for his lack of diligence in failing to maintain contact with his lawyer last fall, notwithstanding that he apparently received at least some of the correspondence I referred to. He says that he was drinking and partying about that time and was not really paying attention to this charge. That, of course, is inexcusable conduct and in general terms, if there were no other reasons, I would be very much disinclined to grant the accused his adjournment at this late stage, given the nature of the charge, given its age and given the fact that the accused has not acted with reasonable care and diligence in trying to retain a new lawyer or, at the very least, in dealing with Legal Aid in attempting to get another lawyer besides the one that he was assigned.

[12] However, that is not the only consideration here. I also have a complainant who is gearing up for a sexual assault trial, which is, no doubt, going to be taxing on her emotional state. I also have to consider that this is a jury trial and, as far as I am aware, the jury panel has already been summonsed to attend on February 20th.

[13] Further, I have to consider that the Crown has indicated to me that they, in all likelihood, will be making an application, either before trial or at trial, under s. 486.3(2) of the *Criminal Code*. This is a new provision which came into force in January of this year, which authorizes the Court, when an accused is unrepresented in a sexual offence of this nature, to appoint a lawyer for the accused solely for the purpose of cross-examining the complainant. Now, s. 486.3(2) is not very detailed on the mechanics of how that is done.

[14] In previous applications under s. 486(2.3), which I believe has now been renumbered to 486.3(1), and deals with witnesses under the age of 18, what has happened is that the Crown will contact a prospective defence lawyer to see if they are interested and available in acting in this capacity and whether they are prepared to accept the Crown's rate of pay. If so, then they appear on the application and the judge appoints them.

[15] If that is done in this case, or even if some other procedure is invoked, it is likely that the cross-examination will have to be rescheduled in order to accommodate the defence counsel's schedule. It is very unlikely that that kind of an application, if it was granted, would result in a defence counsel being appointed and then immediately being able to attend during the trial the week of February 20th to complete the cross-

examination. Therefore, it is highly likely, in my view, that the trial would be adjourned in any event, even if it was commenced on February 20th.

[16] Further, if the trial was started and then adjourned to another date, that would lead to even greater inconvenience. It is no secret that this is a matter which is going to involve a deputy judge of this Court presiding, so we would also have to deal with that judge's schedule, and, following the adjournment, we would have to bring the jury back at a much later date for a continuation of evidence. That would make it difficult for them, no doubt, to remember all of the evidence when they retire to deliberate on the verdict, which is a much less than satisfactory prospect.

[17] For those reasons, I am inclined to grant the accused's application for an adjournment and I make that order.

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GOWER J.