R. v Schell, 2001 YKSC 547

Date: 20011211
Docket: S.C. No. 00-AP0005
Registry: Whitehorse

IN THE SUPREME COURT OF THE YUKON TERRITORY

BETWEEN:

HER MAJESTY THE QUEEN

APPELLANT

AND:

SCOTT EVAN SCHELL

RESPONDENT

REASONS FOR JUDGMENT OF
MR. JUSTICE VEALE

INTRODUCTION

[1] The Crown appeals the acquittal of Scott Evan Schell from a charge of failing to attend Territorial Court as required by a Promise to Appear, contrary to section 145(5) of the *Criminal Code*. The acquittal resulted from the decision of the trial judge not to admit the original Promise to Appear into evidence.

ISSUES

[2] The following issues arise:

1. What criteria governs the discretion of the trial judge to admit or refuse to admit evidence?

2. Did the trial judge err in refusing to admit the Promise to Appear into evidence?

THE TRIAL DECISION

[3] Mr. Schell was charged with failing to attend Territorial Court contrary to s. 145(5) of the *Criminal Code*. During the course of the Crown's case, the Crown requested the clerk to produce the original Promise to Appear to be tendered as an exhibit. The trial judge directed the clerk not to produce the Promise to Appear. Following a no evidence motion by the defence, the accused was acquitted.

[4] As I understand it from counsel on the appeal, the original file was for another offence and numbered 99-00622. It contained the original sworn Information and the Promise to Appear. As is the practice in the Territorial Court, an additional No. 99-00622A was created to identify the failure to appear charge. The new Information alleging the breach of s. 145(5) of the *Criminal Code* was filed in the same file which now has two court numbers. Therefore, when the Crown requested the clerk to produce the original Promise to Appear, it was from the same Territorial Court file which was in the control or possession of the clerk during the trial. To be perfectly clear, I understand that there was only one file with two numbers indicating related matters.

[5] The trial judge found that the proof of a court record or document by certificate under s.145(9) of the *Criminal Code* is permissive and does not preclude the common law method. At common law, court documents could be proved by production of either

the original record or an exemplification under seal of the court, neither of which required notice. (See *R. v. Tatomir* (1989), 51 C.C.C. (3d) 321 (Alta. C.A.).) An exemplification is a certified copy of the original document under the court seal.

[6] The trial judge refused to admit the Promise to Appear under what he described as his inherent jurisdiction to control the process in his courtroom. He cited the following reasons:

1. Allowing the Crown to take possession of the original document to be filed as an exhibit in another proceeding can result in that record being unavailable in its original location, misplaced or lost. (Para 10).

2. The integrity of the court files must be maintained to avoid potential loss, destruction or alteration.

3. The Crown should not be seen to receive special treatment. In other words, original public court records should not be turned over into the possession of the Crown, accused, or members of the public.

4. Certified copies or exemplification documents are easily obtainable in a matter of minutes and counsel should prepare his or her case sufficiently in advance in order to obtain the necessary documentation from the registry.

[7] The trial judge admitted the original Information, which was apparently in the possession of the Crown as there was no evidence as to how it came into the

possession of the Crown and no argument was made by the defence justifying its exclusion.

[8] The trial judge concluded that as there was no evidence before him as to what the Promise to Appear directed the accused to do, the Crown failed to prove an essential element of the offence. He granted the defence motion and dismissed the charge.

DISCUSSION

[9] The trial judge stated that he exercised his discretion pursuant to his inherent jurisdiction to preserve order in his courtroom. I will discuss his inherent jurisdiction later.

[10] The exercise of discretion by a trial judge is not to be interfered with lightly. As set out in *Canadian Pacific Ltd. v. Matsqui Indian Band*, (1995), 122 D.L.R. (4th) 129 (S.C.C.), at para. 39:

> This discretionary determination should not be taken lightly by reviewing courts. It was Joyal J.'s discretion to exercise, and unless he considered irrelevant factors, failed to consider relevant factors, or reached an unreasonable conclusion, then his decision should be respected. …an appellate court "must defer to the judge's exercise of his discretion and must not interfere with it merely on the ground that the members of the appellate court would have exercised the discretion differently".

[11] The trial judge was not provided with any of the authorities that are now before this court in appeal.

[12] The same issue was encountered in British Columbia in the case of *R. v. Sawchuk,* [1984] B.C.J. No 394 (Co. Ct.) (QL). In that case, the Crown tendered a court file number 41623 and requested the Provincial Court judge to exercise his discretion and examine specific contents of the file. The Provincial Court judge examined the file and found the accused guilty.

[13] On appeal, Wong Co. Ct. J., as he then was, found that at common law original court documents were receivable on their mere production as primary evidence of their contents. Original court documents were regarded as the best evidence.

[14] In reference to the difficulty that the original documents do not become exhibits, Wong Co. Ct. J. observed at para. 9:

> Another difficulty, mentioned earlier, which may arise when proof is to be made by inspection of the Court file is that the documents relied upon do not become exhibits. On appeal the file by necessity will have to be removed from the original Court and forwarded with appeal papers to the Appeal Court. Such removal will be inconvenient. The removal might be avoided if the Judge at the time of trial directs that whatever original Court records inspected at the trial be photocopied and the photocopy become exhibits for the trial. If this is not satisfactory for the purpose of any specific appeal, the Appeal Court can direct that the Court file be brought up.

[15] In the case at bar, the trial judge did not exercise his discretion to exclude evidence. Rather, he exercised his discretion to preserve the integrity of the administration of the court. However, there is no doubt that the effect of exercising his discretion was to exclude relevant and material evidence.

ISSUE 1. WHAT CRITERIA GOVERNS THE DISCRETION OF THE TRIAL JUDGE TO ADMIT OR REFUSE TO ADMIT EVIDENCE?

[16] It is well established that judges have the discretion to exclude relevant and material evidence where its probative value is outweighed by its prejudicial effect. The concept of prejudicial effect was expanded in *R. v. Mohan,* [1994], 2 S.C.R. 9 (S.C.C.), where Sopinka J., introduced the concept of cost benefit analysis. In certain circumstances, relevant and material evidence could be excluded if it involves an inordinate amount of time which is not commensurate with its value, or it is misleading in the sense that it is out of proportion to its reliability. The concept of prejudice has been further developed to include both the distorting impact discussed above, and the fairness in allowing the evidence to be presented. The latter could include unfair surprise depriving a party of the opportunity to respond.

[17] The trial judge did not exercise his discretion according to the rules of evidence. Rather, he relied upon his discretion to preserve the integrity of court administration. Although he referred to his inherent jurisdiction, the authority to “preserve order” is a statutory power in s. 78 of the *Territorial Court Act,* S.Y. 1998, c.26 which states:

> **Power to preserve order in court**
>
> 78. Every judge has the same power and authority to preserve order in a court over which he or she is presiding as may be exercised by a judge of the Supreme Court.

Alternatively, the trial judge could rely upon s. 484 of the *Criminal Code*:

> **PRESERVING ORDER IN THE COURT.**
>
> 484. Every judge or provincial court judge has the same power and authority to preserve order in a court over which he presides as may be exercised by the superior court of criminal jurisdiction of the province during the sittings thereof. R.S., c. C-34, s. 440.

[18] In my view the trial judge has a statutory jurisdiction to ensure the integrity of court documents. However, the question is whether this statutory power or discretion should be exercised where the result is to exclude relevant and material evidence.

ISSUE 2. DID THE TRIAL JUDGE ERR IN REFUSING TO ADMIT THE PROMISE TO APPEAR INTO EVIDENCE?

[19] I am not prepared to say that the integrity of court administration will never require the exercise of discretion to refuse to admit relevant and material evidence. At the same time, it is clearly an outcome to be avoided except in very exceptional circumstances. It is preferable to adopt the method in *R. v. Sawchuk, supra*, to admit relevant evidence than to exercise a statutory power or discretion to exclude such evidence.

[20] The question is whether the trial judge's reasons for the refusal to admit the Promise to Appear into evidence are reasonable and relevant to the situation before him. As I understand it, the Promise to Appear was in the possession of the court, or more precisely, the clerk in attendance at the trial. It is not a situation where the Promise to Appear was in a different location or in the registry, requiring an adjournment or inconvenience to the court to review it. It was readily available and simply required

that the original document be handed to the trial judge. I will comment on the enumerated reasons for the trial judge's exercise of discretion as follows:

1. As I read the *Sawchuk, supra,* there is no necessity to place an exhibit stamp on the original Promise to Appear. The original Promise to Appear could remain in its original 99-00622/99-00622A file with either the clerk's notation that it was reviewed as part of the trial in the 99-00622A matter or, the trial judge could direct that a photocopy be created and an exhibit stamp be put on the photocopy. Hence, there should be no risk of misplacing the original document.

2. I fail to see how the integrity of the court administration of its files and documents is threatened by this procedure. It is not a case of the file being removed from the registry and taken by the Crown to another location. The file 99-00622/99-00622A remains in the possession of the registry or a clerk thereof who has taken the file to court in the same manner as all files are taken to court.

3. I do not see this as giving a preference to the Crown. The contents of the court file should be available in court at the request of the Crown, defence counsel, or a self-represented litigant. There may be a legitimate concern about documents being removed from the court or the registry but that was not the factual situation before the trial judge.

4. The fact that the certified documents could be obtained from the registry in a matter of minutes does not affect the common law right to rely upon original documents from the courts' own files. While it may be lack of Crown

> preparation which is really at issue, and I can appreciate the trial judge's impatience on this point, it should not defeat the common law right to produce original documents from a court file.

[21] I have concluded that the trial judge erred in his exercise of discretion in refusing to admit the original Promise to Appear which was in the possession of the court clerk attending the trial. To do so defeated a long-standing common law right. It was not justified on the grounds of preserving order as the integrity of the court administration was never in doubt. Certainly, factual situations could arise where that would be the case. This was not one of them.

[22] I order that the appeal is allowed and the original Promise to Appear is admissible into evidence. The acquittal on the charge under s.145 (5) of the *Criminal Code* is set aside and the matter returned to the trial judge for a new trial.

_____
Veale J.

Counsel for Her Majesty the Queen	Narissa Somji
Counsel for the Respondent	Malcolm E.J. Campbell