SUPREME COURT OF YUKON

Citation: *HMTQ* v. *Ballantine*, 2011 YKSC 25

Date: 20110308
Docket: 10-AP019
Registry: Whitehorse

BETWEEN:

HER MAJESTY THE QUEEN

Respondent

v.

JAMES MCNAB BALLANTINE

Appellant

SUPREME COURT OF YUKON
COUR SUPRÊME DU YUKON
APR 2 6 2011
FILED / DÉPOSÉ

Before: Madam Justice M. C. Erb

Appearances:
Bonnie Macdonald — Counsel for the Respondent
Ann Pollak — Counsel for the Appellant

REASONS FOR JUDGMENT
DELIVERED FROM THE BENCH

[1] ERB J. (Oral): James McNab Ballantine was found guilty of impaired driving on October 14, 2010, by a judge of the Territorial Court of Yukon. He appeals from that decision. His grounds for appeal are: whether the trial judge denied the appellant his right to a fair trial and his right to make full answer and defence by refusing to adjourn the trial to permit him to retain and instruct new counsel. Secondly, whether the trial judge failed to explore potential defences for the appellant when the trial proceeded and he was, at that time, a self-represented litigant.

[2] The accused was charged on May 4, 2009, with impaired driving and refusing the breathalyzer, the latter charge of which he was acquitted. His first appearance was on

July 8, 2009. There were numerous court appearances prior to the entry of his plea on February the 17, 2010. This was explained by defence counsel by their efforts to acquire expert evidence. The trial was set for June 22, 2010. However, the day before the trial the Crown produced the last of its disclosure and, as a result, the accused's then counsel sought an adjournment to review it. Judge Faulkner set a new trial date for October 14, 2010.

[3] Nine days prior to the trial, the appellant's counsel, Mr. Horembala Q.C. appeared before Judge Ruddy and applied to withdraw as counsel after receiving a voicemail from the accused that he had retained a new lawyer. The accused was present when the adjournment application was made. Judge Ruddy asked the accused whether he had retained new counsel. The accused confirmed that he had, and provided the Court with the name of his new counsel and one of her colleagues. The new counsel he referenced is Ms. Pollak.

[4] The Court granted counsel's application to withdraw. Judge Ruddy went on to impress upon the accused that his trial would proceed on October 14th, and "You will need to make sure that your counsel are there and available for that trial." The accused replied that he would let her know. The accused appeared on his own on October 14th. However, new counsel was not available that day, which was nine days after the change in lawyers occurred. The accused asked for an adjournment to set a date when she would be available. Ms. Pollak's office is in Burnaby, BC. It was unfortunate that she did not arrange to attend by teleconference to explain the situation to the court. Crown counsel appearing at that time opposed the application.

[5] The Court did not grant the adjournment application because of the file's lengthy history. However, Court had the impression that the trial had been set previously several times. The accused attempted to explain the history, including the issue that caused the derailment of the first trial date and his issue with his former counsel. His explanation suggests that he had a philosophical difference with him. The accused told the Court:

> I kind of figured out that he didn't have my best interests at mind because he was trying to tell me stuff to do that I went no. So I had to dismiss him. I gave away a big bag of money, but I wasn't going to take what he suggested.

[6] The Court confirmed with the court clerk that previous counsel, Mr. Horembala, got off the record on October 5. The Court expressed concern that Ms. Pollak appeared not to be fully retained, rather ready to be retained. The Crown, represented by Ms. Nguyen, who appears to have been new to the file herself, then recounted the numerous appearances before the matter was originally set for trial because of defence counsel's pursuit of expert evidence. She went on to give the Court the impression that the problem with proceeding to trial was mainly caused by the defence, despite the fact that the only request for a trial adjournment previous to that date was made by the Crown. It is obvious that the Court had the misunderstanding that all of the adjournments were at "the behest of the [accused]" and that the trial had been set "several times." The Crown made no attempt to correct the court record. The trial judge then dismissed the adjournment application.

[7] On each of the key court dates here there was a different Crown appearing. There is no indication that the Crown had previously raised any issue about the length

of time it took to set the first trial date or whether or not it was prejudiced. There was some explanation about the expert evidence which was being sought and this would very easily have had an impact on the way that the matter would have proceeded. The Crown was obviously kept informed. If the trial judge had been given a more accurate picture of what had transpired, the decision on the adjournment may well have been different. What could have been included was information that there was an overlap in the period previous counsel was applying to get off the record and when new counsel would be fully engaged.

[8] There were only nine days between the date the previous counsel's application took place, at which time new counsel was then free to engage. It would be unusual for counsel to proceed to trial in such a short span of time. Further, it would appear that the accused worked at a camp outside the City of Whitehorse and that may have contributed, to some extent, with the ability of counsel to consult with him. The Crown suggests that the accused was simply trying to delay. There would be credence to this if the accused was self-represented throughout. However, he did have counsel early on and, when he sought new counsel, it was timely.

[9] This is not a situation where the accused dismissed his lawyer, then asked for an adjournment to accommodate a search for another one. The accused also advised the Court as best he could about what I took to be a philosophical difference in the way his original counsel was approaching his defence.

[10] The Court, in the end, based its decision on inaccurate information about what had taken place and the number of times the trial date had been set. The Crown had

some role in that misunderstanding. Had an accurate portrait of the events been before the trial judge, I have no doubt that his decision on the adjournment raised by the accused may well have been different.

[11] It has been a principle of our jurisprudence that "...justice should not only be done, but be manifestly and undoubtedly seen to be done." Here, the situation falls short of that standard in all of the circumstances. While no one wishes to increase the length of time it takes for matters to proceed to trial, or to encourage delay, there are occasions in which it cannot be avoided. Here, the file history was impacted by the evolution of the matter to the first trial date by the pursuit of expert evidence on one issue; the accused's employment at camp making him less available; the Crown's late delivery of full disclosure which derailed the June trial date; the philosophical difference between the appellant and his counsel which led to a breakdown in the solicitor-client relationship; the inability of new counsel to become engaged prior to original counsel being removed, leaving a very short time to the trial date. While the length of time to trial was somewhat inordinate, it was explained. There was no evidence that the Crown was prejudiced and, in fact, the Crown advised the Court that it had only one witness, a police officer.

[12] Since this matter can be resolved in the consideration of the adjournment issue, there is no need to address whether the trial judge assisted the appellant sufficiently with his defence. Accordingly, the appellant's appeal is granted. The matter will be returned to the Territorial Court for a new trial to be set at the earliest available and suitable date.

[13] MS. MACDONALD: My Lady, the Territorial Court fix dates are Friday at one o'clock. I wonder if this Friday at one o'clock would be acceptable to Ms. Pollak.

[14] THE COURT: Ms. Pollak.

[15] MS. POLLAK: Friday the 11th. Yes, it is. At one o'clock?

[16] MS. MACDONALD: Yes.

[17] THE COURT: All right. Now, I am going to expect, and I am sure the Territorial Court will too, that this trial proceed in a timely fashion here.

[18] MS. POLLAK: I do have early dates.

[19] THE COURT: Available.

[20] MS. POLLAK: Really, the month of May is out for me, but I have lots of dates in the summer.

[21] THE COURT: In the summer. Nothing before the summer? You might want to --

[22] MS. POLLAK: I might be able to find something in April, if the Court can find something in April.

[23] THE COURT: All right. Well, if the Court can find something in April, I hope that you will be prepared to accommodate it.

[24] MS. MACDONALD: Yes, the wait times for trial dates are quite a bit shorter than, I'm sure, Ms. Pollak is used to, practicing down in the Lower Mainland.

[25] THE COURT: Right, and as I am in Calgary too.

[26] MS. MACDONALD: Yes.

[27] THE COURT: All right. So we will leave that to Friday. Thank you.

ERB J.