COURT OF APPEAL FOR YUKON

Citation: *R. v. Townsend*,
2014 YKCA 1

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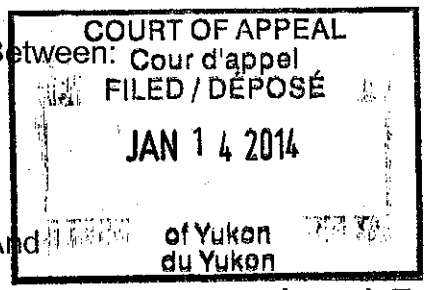
Docket: 11-YU698



Between:

Regina

Respondent

And

Joseph Townsend aka Joseph Desjarlais

Appellant

Restriction on Publication:
A publication ban has been mandatorily imposed under s. 486.4 of the *Criminal Code* restricting the publication, broadcasting or transmission in any way of evidence that could identify the complainant or witness.

Before: The Honourable Madam Justice Levine
The Honourable Madam Justice Neilson
The Honourable Madam Justice Garson

On Appeal from an Order of the Supreme Court of Yukon, pronounced November 23, 2011 (*R. v. Townsend*, Whitehorse Registry, Docket 10-01521).

Counsel for the Appellant:	K. Hawkins
Counsel for the Respondent:	L. Gouaillier
Place and Date of Hearing:	Whitehorse, Yukon November 13, 2013
Place and Date of Judgment:	Vancouver, British Columbia January 14, 2014

Written Reasons by:
The Honourable Madam Justice Levine

Concurred in by:
The Honourable Madam Justice Neilson
The Honourable Madam Justice Garson

Summary:

Appeal from conviction by a jury of sexual assault. The appellant claims there was a reasonable possibility that the jury was pressured to reach a verdict after they indicated to the trial judge that they were undecided. In his response, he told the jury that the "normal process is to keep going", and that if their deliberations continued overnight, they would be transported from Carmacks, where the trial took place, two hours away to Whitehorse, where there was available accommodation. The jury then requested further instructions, which the trial judge gave. The jury returned with a verdict after about half-an-hour.

Held: *appeal dismissed. If the jurors had been told earlier in the trial about the arrangements for sequestration, they would have been similarly inconvenienced. It is speculation, not a reasonable possibility, that the jurors would allow personal inconvenience to override their oath as jurors. The last thing the jurors heard from the trial judge was the further instructions in response to their questions. It is more likely that those instructions caused them to reach agreement than the information about travelling to Whitehorse.*

Reasons for Judgment of the Honourable Madam Justice Levine:

Introduction

[1] This appeal concerns the impact on a jury's deliberations of a trial judge's exhortation after the jury gave him a piece of paper with one word on it: "undecided". In response, the trial judge advised the jurors that if their deliberations continued overnight they would be transported from Carmacks, where the trial took place, to Whitehorse, where there was available accommodation. The appellant says this information made the exhortation improper and resulted in the jury making a decision not based on the evidence. He seeks a new trial.

[2] The test for whether an exhortation to a jury is improper is clear. It was stated in *R. v. G.(R.M.),* [1996] 3 S.C.R. 362 at para. 50:

> Not every improper reference in an exhortation will lead to a new trial. Instead, the exhortation must be viewed as a whole and in the context of the proceedings. The length of the deliberations, the nature of the question asked by the jury, and the length of the deliberations following the exhortation are all relevant. In considering all of these factors, an appellate court must determine whether there is a reasonable possibility that the impugned statements either coerced the jury or interfered with its right to deliberate in complete freedom from extraneous considerations or pressures, or caused a juror to concur with a view that he or she did not truly hold.

[3] In the context of these proceedings, the exhortation to the jury was not improper. I would dismiss the appeal.

Fresh Evidence

[4] The appellant applied to adduce fresh evidence on the appeal, consisting of a certified copy of the Supreme Court Criminal Clerks Notes (which recorded the timing of the key events at trial), and the affidavit of Melissa Atkinson, a lawyer at the Neighbourhood Law Centre in Whitehorse. In her affidavit, Ms. Atkinson provides information on driving distances between various communities in the Yukon Territory, as well as the temperature in Carmacks on November 23, 2011.

[5] Crown counsel did not dispute the admissibility of this evidence, noting that it was about matters of which the Court could take judicial notice. He questioned the applicability of the fresh evidence to the issue on the appeal. The Court ruled that the evidence was admissible and its applicability would be dealt with in our judgment.

[6] As will be seen from the reasons that follow, I have found the information contained in the appellant's fresh evidence application useful to provide context in considering the effect of the exhortation on the jury.

The Context of the Exhortation

[7] The appellant was tried from November 21-23, 2011 in Carmacks, Yukon Territory for a sexual assault that occurred the previous year in Pelly Crossing, Yukon Territory. According to the fresh evidence, Carmacks is located approximately 108 kilometres southeast of Pelly Crossing, and is approximately 177 kilometres northwest of Whitehorse. Some jury members came from Pelly Crossing.

[8] In his opening instructions, the trial judge gave the jury some information concerning court sitting hours. He also told them that at the end of the trial they would be sequestered and meals and overnight accommodation would be provided:

> So we're going to start each day at ten o'clock and sit until 12:30, break from 12:30 to two for lunch, and then break again at 4:30 or five o'clock depending on how we're doing. We'll have breaks, of course, in between times. Some days we may finish earlier or later, depending on the evidence. And, for example, if we want to complete an evidence to allow them to be excused from the court proceeding, we might go a little later. But we have three jurors from Pelly Crossing who have to go back home for dinner, so we'll be mindful of that.
>
> ...
>
> When all of the evidence has been presented, counsel have addressed you, and I have told you about the legal principles that apply to your discussions, you will go to the jury room to decide that case -- this case. At this point you will be sequestered, which means you will stay together until you reach your verdict. Meals and overnight accommodation, if required, will be arranged for you ...

[9] In his final instructions to the jury, the trial judge said the following about reaching a unanimous verdict:

> If you can't reach a unanimous verdict, you should notify the Jury Guard in writing, and he will bring me the message. I will discuss it with the Crown and defence and we will then return to the courtroom to see what we should do next.

[10] The jury began deliberations at 12:10 p.m. on November 23, 2013. At 2:39 p.m., they returned to hear a playback of part of the complainant's evidence. After hearing that evidence, they returned to their deliberations at 3:18 p.m.

[11] At 4:34 p.m., the jury returned, having provided the trial judge with a piece of paper on which was written the single word, "undecided". The trial judge and the jury had the following exchange:

> THE COURT: The piece of paper just had one word on it. It said undecided. Does that mean that you can't reach a unanimous verdict?
>
> A JUROR: We haven't, Your Honour.
>
> THE COURT: Well, there's no magic to doing that, and the normal process is that you keep working at it until you conclude it's an impossibility. Just to give you a heads up here, we're here in Carmacks. You're what they call sequestered, which means you have to be kept separate with the Jury Guard while you're deliberating. So that if the deliberations continue on overnight we're going to transport you to Whitehorse to remain in a hotel together, and we'll give you toothbrushes and that sort of thing. That's where we are. There's no room at the hotel here to sequester you here. So would you like to continue at it and we can set a time for supper and then you can go to supper, and then go to Whitehorse after that. What's your preference?
>
> A JUROR: I think we should carry on, but we would like possibly some clarification of the five points.
>
> THE COURT: You want clarification on some points?
>
> A JUROR: On the five points [indiscernible – speaker overlap].
>
> THE COURT: Oh, I see, okay. On the issues.
>
> A JUROR: Yes.
>
> THE COURT: Sure, we could do that. Counsel, what I propose to do is just go through my earlier comments that I made to them. So you can be seated, sir.

[12] After explaining the elements of the offence once again to the jury, the trial judge said:

> So I would suggest that you adjourn again, and maybe what we could do is have you sit for one more hour, deliberate for one more hour, then go to dinner at six o'clock and we'll see where things sit at that point. But we'll bring you back here before you go to dinner, say at quarter to 6:00. Okay. Thank you.

[13] The jury retired at 4:45 p.m. After discussions with counsel, the trial judge recalled them at 4:52 p.m. for further clarification of the elements of the offence. They retired again at 4:57 p.m.

[14] The jury returned at 5:17 p.m. and delivered a guilty verdict at 5:20 p.m.

The Appeal

[15] The appellant maintains the trial judge introduced extraneous considerations into the jury's deliberations when he informed the jurors that they would be sequestered overnight in Whitehorse, approximately two hours driving time away from Carmacks. This information came at a time when the jury had indicated to the trial judge that they were undecided and required clarification of a number of substantive issues. The appellant says the jurors were made aware that they faced significant inconvenience if they failed to reach a verdict that day. He points to the time of about half-an-hour, out of more than five hours of deliberations, between the exhortation and the guilty verdict, as reinforcing a conclusion that the information about where they would be sequestered introduced extraneous considerations and pressure into the jury's deliberations.

Discussion

[16] There is no dispute about the legal principles applicable to determining if an exhortation to a jury is improper. They were clearly set out by the Supreme Court of Canada in *G.(R.M.)*.

[17] In *G.(R.M.)*, after deliberating for an afternoon, that evening, and for 45 minutes the following morning, the jury indicated to the trial judge that they had reached an impasse. The trial judge urged them to consider the public expense involved in a new trial, the inconvenience a new trial would cause to all the participants, and the hardship to the accused and the complainant. He suggested that the minority might want to reconsider what the majority was saying. He also reminded them of their oath as jurors. After hearing the exhortation, the jury returned with a guilty verdict in 15 minutes. This Court dismissed the appeal ([1995] B.C.J. No. 560), finding the trial judge's disapproved-of references to public expense, hardship to the accused, and the suggestion that the minority reconsider their position, were remedied by his reminder to the jurors of their oath.

[18] On further appeal to the Supreme Court of Canada, Justice Cory for the majority considered the concerns that arise when an apparently deadlocked jury is pressured or coerced into reaching a verdict. He noted that the purpose of an exhortation after a jury states it is deadlocked is to encourage the jurors to endeavor to reach a verdict by reasoning together and to determine guilt or innocence based on the evidence they have heard. An exhortation should not introduce extraneous or irrelevant circumstances, urge a juror to change his or her mind for the sake of conformity, or impose a deadline for reaching a verdict (at paras. 16-17, 26). Where a short time has elapsed between the exhortation and the verdict, an appellate court might reasonably infer that something was said that induced one or more members of the jury to change his or her position (at para. 44). Justice Cory set out the "reasonable possibility" test for appellate review (at para. 50, quoted above at para. 2).

[19] There are a number of factors that distinguish this case from *G.(R.M.)* and other cases provided by counsel for both parties: *R. v. Palmer*, [1970] 3 C.C.C. 402 (B.C.C.A.) (exhortation not improper; appeal dismissed); *R. v. Alkerton* (1992), 72 C.C.C. (3d) 184 (O.C.A.) (exhortation improper; appeal allowed); *R. v. B.(D.D.)* (1995), 99 C.C.C. (3d) 232 (O.C.A.) (exhortation improper; appeal allowed); and

R. v. Reddick (1997), 117 C.C.C. (3d) 361 (N.S.C.A.) (the only case cited that was decided after *G.(R.M.)*) (exhortation improper; appeal allowed).

[20] The juries in *Palmer*, *B.(D.D.)*, and *Reddick* did not indicate they were deadlocked or undecided. Rather, in each case, the trial judge determined that the jury had deliberated for too long given the nature of the case, and exhorted the jurors to reach a verdict. In both *Palmer* and *Reddick*, as in *G.(R.M.)*, the trial judge suggested that the minority reconsider the views of the majority. In each of *Alkerton*, *B.(D.D.)*, and *Reddick*, as in *G.(R.M.)*, the trial judge referred to the inconvenience, including expense, to participants and the public, of a retrial. In *B.(D.D.)*, the jurors were given a deadline to reach a unanimous verdict.

[21] These cases are examples of exhortations that included references to extraneous matters such as the inconvenience to participants, expense to the public, and hardship to the accused of a retrial; pressured juries which had not indicated they were deadlocked or undecided; and suggested that jurors reconsider their views to conform with the majority.

[22] None of that occurred here.

[23] In this case, the jury indicated to the judge that they were "undecided". Thus, it was necessary for the trial judge to respond to their difficulty, which he did by saying that "the normal process is that you keep working at it until you conclude it's an impossibility". The jury agreed it would continue to deliberate. The appellant does not object to this part of the trial judge's response.

[24] Here, the appellant's objection is that the trial judge provided information to the jurors about the arrangements for their sequestration if it was required.

[25] The question is whether that information was "reasonably possible" of improperly influencing jurors to reach a verdict.

[26] The appellant says that the Court should infer from the short time between the exhortation and the verdict that the jury felt pressured to reach a verdict, as in

Alkerton, *Reddick* and *G.(R.M.)*. The nature of the pressure was receiving information, late in the day, that they would suffer the "significant" personal inconvenience of travelling for two hours in cold temperatures to be away from home overnight. He also argues that the nature of the questions asked by the jury, and the trial judge's further instructions following his exhortation, indicate that they required more time than they took to reach a considered verdict.

[27] In the rather unique circumstances of this case, there are a number of reasons why I do not agree with the appellant that the information about the sequestration arrangements gave rise to a "reasonable possibility" that the jury was improperly influenced into reaching a verdict.

[28] First, had the jurors been informed earlier in the trial of the sequestration arrangements, as the appellant suggests they should have, they would have suffered the same personal inconvenience. The fact that they were informed after they told the trial judge they were undecided adds nothing to the analysis of the "reasonably possible" effect.

[29] Second, in my opinion it amounts to speculation that a juror would allow a concern about his or her personal inconvenience to, in effect, violate the juror's oath to decide the case based on the evidence. Jurors take their role seriously, and it would be contrary to our expectations of the jury system to conclude that it is "reasonably possible" that a juror would allow his or her personal inconvenience to eclipse the importance of the juror's responsibility. The seriousness with which jurors take their responsibilities was described, albeit in a different context, by Justice Binnie for the Supreme Court of Canada in *R. v. Spence*, 2005 SCC 71 at para. 22, [2005] 3 S.C.R. 458:

> Our collective experience is that when men and women are given a role in determining the outcome of a criminal prosecution, they take the responsibility seriously; they are impressed by the jurors' oath and the solemnity of the proceedings; they feel a responsibility to each other and to the court to do the best job they can; and they listen to the judge's instructions because they want to decide the case properly on the facts and the law. Over the years, people accused of serious crimes have generally chosen trial by jury in the expectation of a fair result. This confidence in the

> jury system on the part of those with the most at risk speaks to its strength. The confidence is reflected in the *Charter* guarantee of a trial by jury for crimes (other than military offences) that carry a penalty of five years or more (s. 11(*f*)).

[30] Third, the trial judge's exhortation was followed by the jury's request for further instructions on the elements of the offence, which the trial judge provided, and then further clarification of his reference to the evidence. These were the last things the jury heard from the trial judge before reaching its verdict. There are many cases in which appellate courts have pointed to the importance of the trial judge's last instructions to the jury: see, for example, *R. v. Jack* (1994), 90 C.C.C. (3d) 353 at 359 (Man. C.A.), aff'd. [1994] 2 S.C.R. 310.

[31] In *Palmer* (at 415) this Court concluded that the short time between the exhortation and the verdict was not because the trial judge misled the jury, but because the recharge by the trial judge after the exhortation clarified the issues that had prevented agreement. I agree with the Court's conclusion that: "It is more likely that that portion of the charge (with respect to a matter about which the jury had expressed its difficulty) led to the agreement rather than the admonition."

Summary and Conclusion

[32] The information provided by the trial judge concerning the arrangements for sequestration of the jury was not an improper exhortation, and did not give rise to a "reasonable possibility" that the jurors were pressured to reach a verdict.

[33] I would dismiss the appeal.

R. E. Levine J.A.

The Honourable Madam Justice Levine

I Agree:

K. Neilson J.A.

The Honourable Madam Justice Neilson

I Agree:

D. Garson J.A.

The Honourable Madam Justice Garson