SUPREME COURT OF YUKON

Citation: *R. v. Johnson*, 2014 YKSC 28

Date: 20140612
S.C. No. 13-01515
Registry: Whitehorse

Between:

HER MAJESTY THE QUEEN

And

DEREK GORDON JOHNSON

and

WILFRED SHELDON

Before: Mr. Justice R.S. Veale

Appearances:

Keith Parkkari — Counsel for the Crown
David C. Tarnow — Counsel for the Derek Johnson and Wilfred Sheldon

REASONS FOR JUDGMENT

INTRODUCTION

[1] Counsel for the accused applies for a change of venue from Burwash Landing to Whitehorse for a judge-alone trial that has been set for October 10 – 12, 2014. Burwash Landing is a small community consisting of 96 persons, located approximately 284 kilometres to the west of Whitehorse (Yukon Bureau of Statistics, *Population Report* (Whitehorse: YBS, September 2013)). It is the home of the Kluane First Nation.

[2] Section 599(1)(a) of the *Criminal Code* gives a court discretion to change the location of the trial "if it appears expedient to the ends of justice." The Crown opposes the application.

[3] This application is not about a lack of facilities or the ability to ensure security in or outside the courtroom in Burwash Landing. This Court, and the Territorial Court in particular, hold trials in small communities regularly without incident. The long-standing practice has been to bring justice to the community where the incident occurred.

[4] Rather, this application arises out of what may be described as a violent conflict between members of two local families. The issue in this case is whether the potential for violence and divisiveness in the community and its effect on the accused in this trial outweighs the important policy objective of bringing the justice system to the community where the incident arose.

BACKGROUND

[5] The two accused are charged with the offence of confining Colin Johnson without lawful authority in a house in Burwash Landing on August 8, 2013. It is not without significance that this young man tragically committed suicide five months after that date. Indeed, the Crown agreed that the family blames the two accused for his suicide.

[6] Counsel advised that one of the accused, Derek Johnson, was beaten up by Weldon Danroth shortly after these events. Mr. Danroth was charged, convicted and sentenced to 18 months for that offence (*R. v. Danroth*, 2014 YKTC 8). It is also relevant to this application that Randy Johnson, the elder brother of Colin Johnson, was charged regarding this beating of Derek Johnson but that case did not proceed for

undisclosed reasons. It was accepted by the sentencing judge that the beating was retaliatory.

[7] The preliminary hearing for this matter took place in Whitehorse, and the Crown presented one witness, who is presently in custody at the WCC on an unrelated matter.

EVIDENCE ON APPLICATION

[8] Defence counsel presented two witnesses. The first was Claudia Bob, the common-law wife of the accused Wilfred Sheldon. They have lived in Whitehorse since the charges arising out of the incident on August 8, 2013, at Burwash Landing.

[9] Ms. Bob presented as a credible witness with a genuine fear of returning to Burwash Landing. She testified that she and Mr. Sheldon had lived in Burwash Landing for four years before the incident. She described Burwash Landing as a community of “50 people” without RCMP (except sometimes in the summer) or a store to buy groceries. There is a summer resort that the Kluane First Nation recently purchased as well as a nursing station. It is not clear whether the resort will be open in October.

[10] Burwash Landing is quite isolated. The smaller community of Destruction Bay is a 20-minute drive away and it has a year-round motel and bar, but no grocery store or other amenities.

[11] The closest RCMP detachment is in Haines Junction, which is approximately 100 km away.

[12] Ms. Bob described the Burwash Landing community as very divided because of a long-standing division between two families, both with the surname Johnson, who dominate the community. The division is a violent one fuelled by alcohol. She described

the prevalent attitude as one of a “free for all” where partying and violence are common. She was afraid to go out at night while residing there.

[13] Ms. Bob was in Burwash Landing when Derek Johnson was assaulted and saw the injuries which were inflicted.

[14] Both accused in this case have been ordered to stay out of Burwash Landing. She and her husband are permitted by the terms of his recognizance to return to Burwash Landing with RCMP supervision to pick up personal effects and office documents for their business. However, she testified that as a result of threats and harassment, she is not comfortable returning to Burwash Landing, even with RCMP accompaniment. Defence counsel advises that Ms. Bob will be called as a defence witness, although she has not yet been subpoenaed.

[15] In cross-examination, Ms. Bob indicated that she does not trust the RCMP in Haines Junction based on a conversation that suggested that they are not sympathetic to her spouse’s case. Specifically, she recounted a phone call in which an officer told her that Derek Johnson “got what he deserved”, referring to his beating by Weldon Danroth. Ms. Bob was at the preliminary inquiry in this matter. She described a lot of tension between the family members in the gallery during that proceeding. She was uncomfortable. As well, since the charges were laid against her husband, she has been personally harassed. There has been no physical violence towards her.

[16] Defence counsel also called the Sheriff of the Yukon, Jordie Amos, to testify. Sheriff Amos described the security provided to the court party in the communities and the courtroom. In each case, the Sheriff’s office conducts a risk assessment to determine the level of security that may be required for a particular proceeding. Such

risk assessments generally involve discussion with counsel, court clerks, the trial judge, and the RCMP. In terms of the means at their disposal for maintaining order, the Sheriff and Deputy Sheriffs are not armed but have pepper spray and a baton for defensive purposes. Sheriff Amos testified that he has not used them in his four years in the Sheriff's office. Additionally, if there were a security risk, the Sheriff's office has a metal-detector wand that can be employed to screen people entering the courthouse or courtrooms, and in Whitehorse, a larger, more effective security screen unit can be employed. Sheriff Amos indicated that security was more complicated in the communities than in Whitehorse where the resources are more readily available and close at hand.

[17] The Sheriff said that his office can manage the courtroom security at Burwash Landing and would also be responsible for ensuring the safety of participants in and around the building the courtroom is situated in. However, the Sheriff and/or his deputies are only present during court proceedings.

[18] Sheriff Amos participated in the security for the preliminary hearing and confirmed that the gallery was full of people and the atmosphere was tense, but there were no incidents. In response to a leading question, he agreed that he was less comfortable providing security for this trial in Burwash Landing than in Whitehorse. He said that his office had more staff and resources in Whitehorse, so it is easier to alleviate any concerns.

[19] In cross-examination, Sheriff Amos acknowledged that there could be RCMP officers present and agreed any concerned witness could sit in the courtroom or in a vehicle outside before and after the trial. He said it was a daily part of his job to

experience discomfort. The Sheriff's office has provided security in Burwash Landing in the past, and he did not indicate that it would be unable to do so at this trial.

[20] The Crown did not present any evidence but indicated that the tension in this case was not one solely related to the August 8, 2013 incident but "part of a larger tapestry."

THE LAW

[21] This is not a case involving the question of whether a fair and impartial jury can be empanelled, which is the situation in most of the s. 599 caselaw. For example, in *R. v. Lafferty* (1977), 35 C.C.C. (2d) 183 (N.W.T.S.C.), the concern about conducting a trial in the small community of Fort Resolution was that potential jurors were related, one way or another, to either the accused or the complainant and would be unwilling to convict for fear of retaliation. In deciding that the jury trial should be held in the larger community of Hay River, Tallis J., stated at para. 21:

> The effective enforcement and administration of criminal law in this jurisdiction can only be achieved if the public has confidence in and respect for the law. In administering justice the Court should not sanction a course of action which will cause or aggravate divisiveness or hostility in a small settlement. …

[22] Holding jury trials in small communities is the general rule in the Yukon. The guiding principles were set out in *R. v. Daunt*, 2005 YKSC 33, at para. 7:

> 1. a criminal trial should be held in the place in which the crime is alleged to have occurred;
>
> 2. the applicant must establish, on a balance of probabilities that a fair and impartial trial cannot be held in [the presumptive community];
>
> 3. the discretion to change the location must be exercised judicially, that is on a principled basis;

> 4. the applicant must be able to demonstrate that the partiality or prejudice established cannot be overcome by safeguards in jury selection which include peremptory challenges, challenges for cause and trial judge instructions to the jury.

[23] Of course, there is no issue of jury selection arising here, and slightly different considerations apply, however the overriding concern remains trial fairness. Many factors are taken into consideration to ensure a fair trial:

> 1. the size of the community;
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> 2. prejudicial pre-trial publicity;
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> 3. widespread animosity that people may have towards the accused or the victim;
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> 4. widespread sympathy for the accused or the victim;
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> 5. fear or revulsion in the community;
>
> 6. the nature of the crime; and
>
> 7. the nature of the issues
>
> (*Daunt,* para. 8*)*

[24] This list of factors is not exhaustive.

[25] Concerns about the venue's effect on trial fairness in a judge-alone trial were addressed in *R. v. S.C.B.*, 2001 YKTC 506, by Lilles J. In that case, a 26-year-old female complainant was permitted to testify in Whitehorse for her 'emotional safety' and to ensure that she would testify. The complainant was a relative of the accused and also related to many of the inhabitants of Carmacks, a village of 450 people. The accused was charged with sexual assault and there was a stigma attached. The Court feared that the complainant's emotional safety was at risk, which would have affected her ability to testify and precluded a fair trial.

[26] Lilles J. followed the principles in *R. v. Lafferty* (cited above) and *R. v. Muckpa,* [1994] N.W.T.J. No. 68 (S.C.), in moving the trial. He confirmed the importance of holding a trial in the community where the incident occurred in creating a sense of trust and ownership in the community as well as facilitating the appearance of the witnesses involved. At para 9., he stated that the onus on the applicant to move a judge-alone trial was less than for a jury trial but still a substantial one. He summarized the principle at para. 10:

> For these reasons, as a matter of principle and long standing practice, the Territorial Court travels to all communities on a regular schedule and trials in the Yukon normally take place in the community where the offence is alleged to have occurred. There have been relatively few exceptions in the past. These exceptions result from balancing various factors in relation to the fairness of the trial, convenience, cost, as well as community interests and the exercise of discretion by the court to ensure that justice will be done. Every application must have a factual basis and each case has to be judged on its own facts.

[27] Lilles J. added that the fairness of a trial must be judged not only from the viewpoint of the accused but also from the broader perspective of the complainant and the community. He noted that a trial is not fair if a witness cannot testify because of concerns for his or her safety.

[28] As the reason for a change of venue was based on the emotional safety of the complainant, Lilles J. ordered the Crown to pay the reasonable expenses of the defence witnesses.

DECISION

[29] The case at bar is distinguishable from *S.C.B.* as the application is made not by the complainant but rather the accused who raise issues of personal safety. They and

their counsel are fearful of the potential for violence, based upon the already-realized reality of retaliation in respect of the incident underlying the charges.

[30] Trial fairness is an important principle for both the accused and the complainant in any trial. While there is no issue that this Court can provide the necessary security during a trial at Burwash Landing, I accept that there is a real risk of violence after court closes. There is clear evidence of past retaliation in this small community where violence has become common-place and is fuelled by alcohol and a long-standing family feud.

[31] The balance between the community interest and convenience of having a trial in Burwash Landing versus the emotional and physical safety of the accused and their witnesses is a close one in this case. It is not unheard of that threats and actual retaliation occur from time to time. But I am satisfied that the evidence of actual retaliation in this case and the small size of this violently divided community tip the balance in favour of holding this trial in Whitehorse, where the preliminary hearing was held. There may be some inconvenience to those family members who will be compelled to travel to Whitehorse but the Crown did not raise any specific issue of inconvenience for Crown witnesses or family members. The only evidence before me is that the key Crown witness is already in Whitehorse.

[32] I order that the location of this trial be moved to Whitehorse to ensure a fair trial for the accused.

VEALE J.