SUPREME COURT OF YUKON

Citation: *R. v. McDiarmid*, 2017 YKSC 20

Date: 20170310
S.C. No. 14-01511B
Registry: Whitehorse

BETWEEN

HER MAJESTY THE QUEEN

AND

MARK LEE MCDIARMID

Before Mr. Justice M. David Gates

Appearances:

David McWhinnie	Counsel for the Crown
Mark McDiarmid	Appearing on his own behalf

REASONS FOR DECISION

HISTORY OF THE PROCEEDINGS

[1] The Accused, Mark Lee McDiarmid, is charged with a number of offences alleged to have taken place on February 7, 2014, including threatening a justice system participant, attempted obstruction of justice, uttering threats, assault, assaulting a peace officer and resisting arrest.

[2] The matter was set to proceed to trial, with a jury, in Whitehorse on October 31, 2016. On the morning of October 31st, the jury panel was assembled and in attendance for jury selection. This was the only jury to be selected on this date.

[3] Mr. McDiarmid failed to appear at 10:00 a.m. The Crown advised the Court that he had spoken to Mr. McDiarmid the previous Friday and suggested that Mr. McDiarmid

attend at the courthouse at 9:30 a.m. on October 31st so that he would be available for any pre-trial meeting that the Court might wish to have in advance of jury selection. When Mr. McDiarmid did not appear by 11:00 a.m., the jury panel was asked to return at 1:00 p.m. Mr. McDiarmid was still not in attendance at that time and no information was received of any attempt by him to contact the court, the RCMP or the Crown's office. In light of his non-attendance, a warrant was issued for his arrest and the members of the jury panel were excused.

[4] Mr. McDiarmid was subsequently arrested on November 1, 2016, and remanded in custody. He is facing charges of failing to appear that are currently pending before the Territorial Court of Yukon. He was released by order of this Court on November 16, 2016, notwithstanding the strenuous objections of the Crown who sought the revocation of bail previously granted by this Court on August 11, 2015.

[5] A new trial date of February 20 - 23, 2017, was set. The determination of whether or not Mr. McDiarmid's pending criminal charges would proceed to trial with a jury was set to be heard on January 21, 2017. During a telephone conversation with the Trial Coordinator on Thursday, December 15, 2016, Mr. McDiarmid was advised that the matter would proceed at 10:00 a.m. on January 21, 2017, and that he was required to attend in person in order to be cross-examined by the Crown on his affidavit. He acknowledged to the Trial Coordinator that he understood that he was required to attend on January 21, 2017, in person. The Trial Coordinator also advised him that some of the materials attached to his affidavit, specifically portions of the hospital records, were very difficult to read. Finally, he was told that any additional materials that

he wished to rely on could be submitted via email. No further communication was initiated by Mr. McDiarmid thereafter.

[6] A confirming email was sent to the Crown and Mr. McDiarmid. In the email, he was advised that if he did not attend court on January 21, 2017, that the Court “may dismiss his application to retain his jury trial”. He was also told that he would be cross-examined by the Crown at the hearing and that he must be present on January 21st. He was also advised that the medical/hospital records attached to his affidavit are illegible and that he was asked to “look into this”. A follow-up email dated December 28, 2016, advised that the court appearance would commence at 9:30 a.m., rather than 10:00 a.m. A further email was sent on January 13, 2017, from the Trial Coordinator indicating that she had not received any material from Mr. McDiarmid and re-iterating that the hospital records filed as an attachment to his affidavit were difficult to read. He was also asked if there would be any further medical evidence from the Whitehorse hospital.

[7] Mr. McDiarmid failed to appear at 9:30 a.m., the time set for the hearing of the application. When court opened, Mr. McDiarmid was contacted via telephone at his home in Dawson City. He denied receiving any emails regarding the January 21, 2017 court appearance, though acknowledged that he was aware of today’s application as a result of telephone communication with the Trial Coordinator. He advised that be understood that the application would commence at 10:00 a.m. and that he was not required to attend in person. He also indicated that he was not prepared to proceed at that time and that he needed 20 minutes to obtain his materials and to heat up his house. He unilaterally terminated the telephone conversation at 10:00 a.m. at which point the matter was set over to 10:30 a.m. awaiting his return call.

[8] At 10:45 a.m., telephone communication was re-established and the matter proceeded. The Trial Coordinator gave evidence before the Court regarding the December 15, 2016 telephone call. She was questioned by the Crown and cross-examined by Mr. McDiarmid.

[9] Mr. McDiarmid advised the Court during the course of the January 21st appearance that he had not received any confirming emails from the Trial Coordinator. He did, however, acknowledge the December 15, 2016, telephone call.

[10] These proceedings arise by virtue of s. 598(1) of the *Criminal Code,* which deems that the accused's election to be tried by a judge and jury is waived when the accused fails "to appear or to remain in attendance for his trial".

[11] At the conclusion of the January 21, 2017 court appearance, I held that Mr. McDiarmid had failed to satisfy me that he had a legitimate excuse for his non-attendance on October 31, 2016, particularly in light of his failure to appear on that date for cross-examination on his affidavit. These are my reasons for decision.

BACKGROUND

[12] Mr. McDiarmid is a self-represented litigant who has appeared on numerous occasions before this Court and the Court of Appeal of Yukon. Based on my own extensive dealings with Mr. McDiarmid, I am satisfied that he is familiar, indeed well-versed, in court processes. He is articulate, intelligent and well-read as regards to criminal law and procedure.

[13] This is the fourth trial date that has been set to deal with these charges. The first trial was set to commence on August 10, 2015, but was adjourned on June 30, 2015, at

Mr. McDiarmid's request, to permit him to bring a number of pre-trial applications that could not be completed prior to the scheduled start date of the trial.

[14] These pre-trial applications, together with a s. 520 bail review, were then scheduled for the week of August 10, 2015. Filing deadlines were established for the various applications. By way of letter dated July 26, 2015, he advised the court that he was unable to meet the filing deadlines for his various applications. This was confirmed during a pre-trial conference held on August 3, 2015. In the result, the only application that was heard during the week of August 10, 2015, was Mr. McDiarmid's bail review. At the conclusion of the hearing, he was ordered released on conditions: see *R. v. McDiarmid*, 2015 YKSC 37. A new trial date was set for January 4, 2016.

[15] During the August 3, 2015 pre-trial application, Mr. McDiarmid expressed a desire to be represented by counsel. This was not the first time that he had raised this issue. He was provided with extensive information regarding the possibility of court appointed counsel via a *Rowbotham* application. He has never pursued the matter further. Given the number of times that this issue has been raised by Mr. McDiarmid, and extensively discussed during court proceedings, his failure to initiate a *Rowbotham* application leads me to conclude that he is quite content to continue to represent himself. This is, of course, his right.

[16] During the bail review held on August 10-11, 2015, Mr. McDiarmid confirmed his intention to bring several pre-trial applications, including a challenge to the order of Gower J. appointing an *amicus* over his objections. He also advised that he wished to have a preliminary inquiry and, as such, challenged the original committal for trial in the Territorial Court of Yukon on September 9, 2014. Finally, he made reference to various

additional pre-trial applications that he intended to bring, without providing the necessary particulars required to allow any of these matters to proceed.

[17] On October 30, 2015, he did, however, file an application seeking a preliminary inquiry relative to these charges. In *R. v. McDiarmid*, 2015 YKSC 54, I quashed Mr. McDiarmid's committal for trial and directed that the matter be returned to the Territorial Court of Yukon for the purposes of conducting a preliminary inquiry. I concluded that the learned Territorial Court Judge had committed jurisdictional error by failing to determine whether or not the accused wished to have a preliminary inquiry. One of the results of my decision was that the January 4, 2016 trial date was vacated. A preliminary inquiry was subsequently conducted and Mr. McDiarmid was committed to stand trial. On March 9, 2016, the Crown filed the indictment currently before the Court. A trial date was then set for the week of October 31, 2016.

[18] Pre-trial conferences were held on August 18 and 31, 2016, during which a deadline of September 30, 2016, was set for the filing of any pre-trial applications and supporting materials. No such applications were filed. The trial was, accordingly, set to proceed with a jury commencing October 31, 2016.

[19] Mr. McDiarmid filed an affidavit sworn on November 16, 2016, attaching various documents he obtained from the Whitehorse General Hospital. In his affidavit, Mr. McDiarmid describes the circumstances surrounding his non-attendance for his jury trial on October 31, 2016. As previously indicated, Mr. McDiarmid failed to attend a special sitting of the court on Saturday, January 21, 2017, convened specifically to permit the Crown to cross-examination Mr. McDiarmid on his affidavit, as well as to hear

oral argument on whether or not he had lost his right to a jury trial by virtue of s. 598(1) of the *Code*.

[20] I would summarize the content of Mr. McDiarmid's affidavit as follows:

- he arranged to travel to Whitehorse from Dawson City to attend his trial by obtaining a ride with his Mother. They departed Dawson City at 10:00 p.m. on October 30, 2016, arriving in Whitehorse at 3:00 a.m. on October 31, 2016. He ate some soup, tea and juice and went to sleep shortly thereafter;
- he awoke at approximately 7:30 a.m. At para. 9, he states: "shortly after waking up, I found my heart fluttering or beating erratically with uneven rhythm. In the next 45 minutes to 1 hour period I became progressively more confused, disoriented and dizzy as I tried to get the relevant legal materials picked out…"
- he called a taxi to take him to the hospital. He fell asleep several times while waiting in the emergency room to be seen by medical personnel. He fell asleep twice more after being taken to a treatment room.
- he deposes that exhaustion and falling asleep lasted for two days.
- he was seen by a Dr. Avery at some point after 11:00 a.m. An ECG, blood work and a medical examination followed. He was given an "Ativan" pill at one point and slept periodically thereafter for a period of time. He was discharged at some point and told to come back if the symptoms re-occurred.

- He sent a text to Maxine Lindsey asking her to advise his Mother that he was at the hospital with heart problems. His Mother had forgotten her cellphone at his sister's house that morning, but he expected that she would come back to retrieve it; receive the message from Maxine; and advise the Court of his situation.
- After seeing medical personnel, he left the Emergency room and attempted to call the Clerk's office at the Supreme Court of Yukon "but cannot recall what occurred with the call other than I was disconnected or the call went to message." He was not able to use his cell phone in the emergency room previously as it is against hospital policy. He was also unable to text anyone that he knew to relay a message to the Court regarding his medical condition as he did not have his contact list in his new phone.
- He then contacted the Sheriff's office and then the RCMP and learned that a warrant had already been issued for his arrest.
- Sometime after 3:00 p.m., he attempted to telephone Deputy Superintendent Petersen at the Whitehorse Correctional Centre ("WCC") to find out if WCC could send guards to the hospital to keep guard over him. He left a message for Ms. Petersen, asking her to call him back. While waiting for a return call, he went to another part of the hospital in search of a friend who he knew was a nurse at the hospital. Unable to locate his friend, he ran into a patient that he knew from Dawson City and

"offered to buy him lunch while I waited a return call or RCMP to arrest me."

- at 4:00 p.m. he called the RCMP again and was told that he could either turn himself in or attend court at 9:00 a.m. the following day. When he called the Supreme Court the following day, he was advised that there was no court for him that morning and a warrant was outstanding for his arrest.
- his Mother picked him up at the Whitehorse General Hospital during the afternoon of October 31st. He fell asleep in the car, but awoke when an aunt knocked on the car window while his Mother stopped to attend to an errand. Though "exhausted", he went to Starbucks with his aunt for coffee. His aunt later drove him to his sister's home. He awoke during the night as a result of heart palpitations.
- the following morning (November 1st) he returned to the hospital as he was feeling tired and his chest was sore. He waited 90 minutes before he was seen by medical personnel, at which time more blood work and a second ECG was completed. The attending doctor made an appointment for him for a halter on November 9, 2016. He was released shortly before noon, but was arrested upon leaving the hospital.

[21] Attached to Mr. McDiarmid's affidavit are copies of the ECG's and medical records from the Whitehorse General Hospital. Unfortunately, the records are difficult to read, in part due to the poor quality of the photocopying. Though specifically requested

to obtain better copies of the medical records, together with a medical report, no such material was ever provided to the court.

THE LAW

[22] Section 598(1) of the *Criminal Code* states:

> 598. Notwithstanding anything in this Act, where a person to whom subsection 597(1) applies has elected or is deemed to have elected to be tried by a court composed of a judge and jury and, at the time he failed to appear or to remain in attendance for his trial, he had not re-elected to be tried by a court composed of a judge without a jury or a provincial court judge without a jury, he shall not be tried by a court composed of a judge and jury unless
>
> a) he establishes to the satisfaction of a judge of the court in which he is indicted that there was a legitimate excuse for his failure to appear or remain in attendance for his trial;

[23] *R. v. Lee*, [1989] 2 S.C.R. 1384, is the leading case on the underlying purpose or rationale behind s. 598(1) of the *Criminal Code*. In *Lee*, the Supreme Court of Canada held that s. 589(1) violated s 11(f) of the *Charter*. However, the majority of the Supreme Court held that the provision was saved by s. 1 of the *Charter*. In determining the objective of s 589(1), the majority held that the purpose of the section went “beyond the punishment of those who fail to appear”, as “failure to appear at trial is already an offence under ... the Criminal Code”. Rather, the rationale for s 598(1) lies in the overall societal “cost” of the accused’s absence:

> [4] The rationale for the section lies in the “cost” to potential jurors and to the criminal justice system in terms of economic loss and of the disaffection created in the community for the system of criminal justice, especially through the first jury panel. The section was enacted ...“to protect the administration of justice from delay, inconvenience, expense and abuse, and to secure the respect of the public for the criminal trial process". ...The

> expense, it should be noted, is not only to the system. Persons summoned to serve on a jury panel have little choice but to obey the summons, and as such individuals who are selected as potential jurors often forgo for a substantial time their daily livelihood .... All of this leads to an erosion in public confidence and a frustration with the system when the accused fails to appear for his trial and the assembled jury panel has to be sent away. This is the mischief the section attempts to minimize. …

[24] In further discussing the notion of "cost" underlying s. 598, the majority stated that:

> [5] I do not believe that the importance of the objective can be measured solely by reference to the amount of money lost as a result of the non-appearance of accused persons, and the cost of empanelling a second jury. Rather the cost, and by implication the importance of the objective, must be measured in terms of the overall "cost", both in the sense of economic loss and disruption to lives, and in the sense of confidence and respect for the system, to the individuals selected for jury duty and to society as a whole. …

[25] Given the language of the provision, it is clear that the onus is on an accused to establish on a balance of probabilities that there was a legitimate excuse for his non-attendance: *R. v. Brown*, [2000] O.J. No. 2434 (ONCA). In *R. v. Harris*, [1991] O.J. No. 1509 (ONCA), the Ontario Court of Appeal set out what constitutes a legitimate excuse:

> … Nothing less than an intentional avoidance of appearing for trial for the purpose of impeding or frustrating the trial or with the intention of avoiding its consequences, or failure to appear because of a mistake resulting from wilful blindness, should deprive an accused of his constitutional right to trial by jury guaranteed by s. 11(f) of the *Charter.* …

[26] In *Brown*, the court held that it is open to a trial judge to reject an accused's explanation for his or her non-attendance. My review of the various decisions which have considered the issue of "legitimate excuse" suggests that they are largely fact-driven.

ANALYSIS

[27] This is not a situation where there is any suggestion that Mr. McDiarmid failed to attend court as a result of an honest mistake. Rather, he cites the ingestion of well-water acoli [sic] bacteria in drinking water he consumed at his sister's residence during the early morning hours of October 31, 2016, as "causing great illness", including an erratic heart beat and uneven heart rhythm. At paragraph 47 of his affidavit, he suggests:

> Due to my condition I would have either collapsed, been unable to continue and/or would have had an ambulance attend the Courthouse/room and Jury would have been dismissed, in event I went to Courthouse and not hospital. In either case there would have been no Jury trial.

[28] I do not accept Mr. McDiarmid's suggestion that the ingestion of well-water consumed at his sister's residence caused, as he suggests "great illness". Other than his own assertion regarding the presence of acoli [sic] bacteria in the water, there is no evidence that this is, or ever was, an issue relative to the water source at the residence of Mr. McDiarmid's sister.

[29] Based on his own account of what transpired at the Whitehorse General Hospital, both on October 31st and November 1st, Mr. McDiarmid was examined, tested and released on both occasions. The physician who attended on October 31st simply told him to return to the hospital if he suffered a re-occurrence of the same symptoms. On November 1st, he was also released following examination. In that instance, arrangements were made for him to receive a Holter monitor, but not until November 9, 2016. What I conclude from the medical examinations and assessments undertaken at

the Whitehorse General Hospital on both dates is that Mr. McDiarmid was not suffering from any serious heart condition.

[30] In my view, the fact that the physician attending Mr. McDiarmid on October 31st gave him an "Ativan" tablet is telling. Ativan is a drug prescribed for anxiety disorder. It is not a heart medication.

[31] It seems clear that Mr. McDiarmid was, indeed, suffering from fatigue at the time. His very late arrival in Whitehorse of October 31, 2016, just hours before he was scheduled to begin his jury trial, was doubtless a significant contributor to his feelings of exhaustion and led to him constantly falling asleep throughout the day on October 31st.

[32] While Mr. McDiarmid was able to place a telephone call to his Mother and to call the taxi company on the morning of October 31st, he offers no explanation for his failure to try and call someone associated with his trial. He states in his affidavit that he was able to call the court from the hospital, but was cut off, and then goes on to say that he was not permitted to use his cellphone in the hospital. He offers no explanation for his failure to enlist the assistance of anyone at the hospital to try and make contact with the court to explain his predicament. Mr. McDiarmid was at the Whitehorse Hospital for many hours without taking any steps to preserve his jury trial other than sending a text to Ms. Lindsey in the hope that she would somehow be able to communicate with his Mother. Unfortunately, by that point in time it was already too late as the jury panel had already been discharged and sent home.

[33] I find Mr. McDiarmid's going for lunch with a friend from Dawson City on October 31st, his failure to turn himself in immediately upon his release from hospital, and his going for coffee at Starbucks on his way home from the hospital, as indicative of a

rather casual attitude towards the judicial processes unfolding more or less simultaneously in his absence. His failure to attend for questioning on his affidavit reveals, in my view, a similar lack of respect for the processes of the Court.

[34] I do not accept his evidence that he attempted to call the courthouse but was cut off, or that anyone ever told him that he could simply show up for court at 9:00 a.m. on November 1st.

CONCLUSION

[35] Under all of the circumstances, I am not satisfied that Mr. McDiarmid has demonstrated that he had a legitimate excuse for his failure to appear for his jury trial on October 31, 2016. In accordance with s. 598 of the *Criminal Code*, I find that he has lost his right to a jury trial.

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GATES J.