IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *R.* v. *John*, 2005 YKSC 15

Date: 20050228
Docket: S.C. No. 04-01542
S.C. No. 04-1542A
S.C. No. 04-01543
T.C. No. 01-00628C
T.C. No. 04-00426
Registry: Whitehorse

BETWEEN:

HER MAJESTY THE QUEEN

AND:

ERIC LOGAN JOHN

Before: Mr. Justice L.F. Gower

Appearances:
Melissa Atkinson — For the Crown
Malcolm Campbell — For the Defence

MEMORANDUM OF RULING
DELIVERED FROM THE BENCH

[1] GOWER J. (Oral): This was an interesting and somewhat difficult point for me to resolve. This is the matter of Eric Logan John, who is set for a sentencing hearing today in Whitehorse. Ms. Atkinson, for the Crown, has made a preliminary application for an adjournment of this sentencing hearing. The reason she has done that is because she anticipates that a number of facts which the Crown expects to allege, specifically aggravating facts, will not be admitted by the defence. She will, therefore, be required to call two RCMP witnesses and one civilian witness to

attempt to prove those facts beyond a reasonable doubt, as required by *R.* v. *Gardiner*, [1982] 2 S.C.R. 368.

[2] The charges before the Court are two breaches of probation, one count of escaping lawful custody and one count of resisting arrest. Guilty pleas were entered on January 18, 2005.

[3] Mr. Campbell, for the defence, advised the Court today that he began discussions with Crown counsel in a fairly informal way, around the middle of December, about the possibility of resolving these matters. He expected to receive a draft statement of agreed facts from Crown counsel. However, that was not forthcoming. The counsel he had been dealing with at that time was Mr. Phelps.

[4] Mr. Campbell then wrote to Crown counsel on February 3rd, and I understand the letter was delivered the same day, with a proposed draft agreed statement of facts. Mr. Campbell informed the Court today that he had subsequent conversations with Mr. Phelps at different times throughout the month of February, inquiring as to the Crown's response to the defence draft proposal.

[5] Nothing was forthcoming, either verbally or in writing, from the Crown's office until this past Friday, February 25th, when Mr. Phelps, as I understand it, responded to Mr. Campbell's proposal. He indicated that there were a number of contentious facts still at issue. It is important to note that February 25th, in this jurisdiction, was a statutory holiday, and Mr. Campbell was not in his office on that day and was not aware of Mr. Phelps' reply until the weekend. He attempted to contact Mr. Phelps by fax and by e-mail on Sunday afternoon, February 27th, indicating that he was not prepared to

agree to the Crown's counter proposal and that the Crown should be prepared to call witnesses to prove the disputed facts beyond a reasonable doubt.

[6] I understand that there was some further discussion between counsel this morning, trying to resolve this matter, but to no avail. Mr. Campbell says that the adjournment should not be granted because the Crown has been guilty of laches or neglect in failing to respond in a timely manner to his letter of February 3rd. Further, when the response did come, it was far too late for Mr. Campbell to address the issues in a full and effective manner.

[7] In raising this point, Mr. Campbell implicitly relies on the Supreme Court of Canada decision of *R.* v. *Darville,* [1956] O.J. 104 (QL). That case stands for the general proposition that in order for a party to be entitled to an adjournment of a trial on the grounds of the absence of witnesses, they must be able to establish (and I paraphrase):

> (a) that the absent witnesses are material in the case;
>
> (b) that the party applying has not been guilty of laches or neglect in arranging for the attendance of the witnesses; and
>
> (c) that there is a reasonable expectation that the witnesses will attend court on the date sought by the party applying for the adjournment.

Of course, those principles also apply to a sentencing hearing where evidence is called.

[8] There is no issue, as I understand it, with respect to the first and third points. Rather, it is the second point regarding laches or neglect on the part of the Crown which Mr. Campbell relies upon.

[9] I have heard nothing from the Crown in response to Mr. Campbell's submissions to the Court that he made follow-up attempts to communicate with Mr. Phelps, seeking the Crown's position, throughout the month of February. A response to those submissions would have been helpful to the Court. In the future, if this type of issue arises, if it is not possible to put that information in the form of an affidavit, it would be preferable for the lawyers involved in the discussions to attend Court to make submissions, so that the Court has more than just one side of the story.

[10] I have to confess that I am very sympathetic to Mr. Campbell's position. One of the reasons is that I am told Mr. John has been in custody since September 2nd of last year, which is, to date, approximately six months of pre-sentence custody. That is a very significant amount of remand time. I have no information whether there was any attempt to resolve this matter prior to the middle of December, as Mr. Campbell submitted. But in any event, six months is a considerable period of pre-sentence custody.

[11] I have looked at the case law filed by Mr. Campbell, which he will be relying on at the sentencing hearing for the range of sentence for these types of matters, particularly escaping lawful custody. Indeed, the range in those cases is relatively low - in the two to five month range. If that is eventually accepted by the Court as the appropriate range, then Mr. Campbell is correct that his client will have already served more than the appropriate amount of time for these charges by way of his pre-sentence custody. So any lengthy adjournment from this day on would certainly work to the prejudice of Mr. John.

[12] I am told that the earliest date that is available for this matter to be heard in Whitehorse, which suits the schedules of both lawyers, would be March 31, 2005. In my view, that date is too far down the road. That would result in an additional month of pre-sentence custody.

[13] On the other hand, there is the prospect of having this matter dealt with in four day's time in Ross River in the afternoon. If that can be done, then Mr. John would suffer minimal prejudice by that additional time in pre-sentence custody.

[14] Although I am sympathetic to Mr. Campbell's position, I am still troubled that I have no explanation from the Crown as to what was going on in February, while they were in possession of Mr. Campbell's proposal and prior to the response of February 25th. I do not know if there were institutional reasons for the delay in the response. I simply do not know what the reasons for the delay were. I emphasize that, because I know this Court would expect to receive such information in the future. If it were not for the fact that a court date is available in four day's time, I would be inclined to refuse the Crown's request for an adjournment for the reasons argued by Mr. Campbell.

[15] However, I suppose it is at least conceivable that the Crown may have thought that they could have resolved this matter as late as last Friday, or over the weekend, and therefore decided that it was not necessary to attempt to procure the attendance of the three witnesses. On the other hand, it certainly would have been prudent for the Crown to anticipate that there would not be an agreement, and have the witnesses available in reserve, especially if there is such an apparently large divergence on the facts that are contentious.

[16] In the circumstances, I am prepared to exercise my discretion judicially, as I must do, in view of the fact that this matter can be dealt with in four days' time in Ross River. I am going to allow the adjournment for that limited time to that place at 2:00 p.m. on Friday, March 4th, and I am going to make that peremptory on the Crown. I am also going to ask the Crown to file case law in support of their position, as I understand it, that Mr. John should receive additional custodial time as part of his sentence.

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GOWER J.