Citation: *R.* v. *V.J.,* 2013 YKYC 3

Date: 20130215
Docket: 11-03553
Registry: Whitehorse

YOUTH JUSTICE COURT OF YUKON
Before: His Honour Judge Cozens

REGINA

v.

V. J.

Publication of identifying information is prohibited by sections 110(1) and 111(1) of the *Youth Criminal Justice Act.*

Appearances:
Ludovic Gouaillier — Counsel for the Crown
Lynn MacDiarmid — Counsel for the Defence

REASONS FOR JUDGMENT

[1] V.J. has been charged that he:

> On the 27th day of June, 2011, at Carcross, in the Yukon Territory, did commit an offence in that: he did break and enter a certain place, to wit: Matthew Watson General Store situated at Dawson Charlie St, Carcross with intent to commit an indictable offence therein, contrary to s. 348(1)(a) of the *Criminal Code*.

[2] The Information was sworn on February 28, 2012. The matter first came before the court on March 20, 2012 and Crown counsel elected on that date to proceed by way of summary conviction. A plea of not guilty was entered on June 13, 2012 and the matter was set for trial on September 18, 2012. On that date the trial did not proceed as

the co-accused on a separate Information was not in a position to proceed to trial. There is a notation on the court record from September 18 that if the intent was to hold one trial for all accused then a new joint Information would be laid. The matter was then adjourned to November 20, 2012 for trial. On that date, only V.J.'s matter proceeded to trial.

[3] An Agreed Statement of Facts dated November 20, 2012, and signed by both counsel was filed. Crown counsel called several witnesses. Defence counsel called her client to the stand. Crown counsel was allowed to call one witness to provide rebuttal evidence.

[4] Defense counsel made her submissions first. She argued that her client should not be convicted on the evidence. She then advanced a further argument. Her argument was that I could not convict her client as I had no jurisdiction to hear the trial, the Crown having elected to proceed summarily and the Information being laid outside of the 6-month limitation period, as her client had never consented to waive the limitation period.

[5] Crown counsel conceded that it was clear that the Information was sworn outside of the 6 month limitation period for proceeding by way of summary election, and that there had been no express agreement by V.J. to waive this limitation period and to consent to proceed on a summary election rather than an indictable one.

[6] Crown counsel requested, for purposes of expediency, that I allow him to make submissions on the merits of the trial issues in any event. I agreed, heard his

submissions, and adjourned the matter further to allow for counsel to make argument on the issue of jurisdiction, should they decide to do so. The matter came back before me for argument on January 17, 2013.

Positions of Counsel

[7] Defence counsel submits that there was no explicit or implicit consent provided by V.J. to waive the strict requirements of the limitation period. Therefore the only remedy is for me to declare a mistrial. I do not understand counsel to be adhering to her original submission that I find her client not guilty.

[8] Crown counsel submits that V.J. consented to waive compliance with the time limitation requirements, and that his consent was both explicit and implicit. In the event that I do not find that consent was provided, counsel agrees that the only remedy is to declare a mistrial.

Analysis

[9] In ***R.*** v. ***Dudley***, 2009 SCC 58 the court dealt with circumstances where the Crown had elected to proceed by summary conviction on charges of fraud and uttering a forged document contrary to ss. 380(1)(b) and 368(1)(b) of the *Criminal Code*. These were hybrid offences and the Crown chose to elect to proceed summarily. The Information setting out these charges was sworn more than six months after the offences were alleged to have been committed. Within Part XXVII Summary Convictions, s. 786(2) of the *Code* states that:

> No proceedings shall be instituted more than six months after the time when the subject-matter of the proceedings arose, unless the prosecutor and the defendant so agree.

[10] When the matter came before the court for an expected guilty plea, counsel for the defendant moved to have the charges dismissed as a nullity. Crown counsel immediately sought to re-elect and proceed by indictment or, in the alternative, to withdraw the charges. The Provincial Court judge denied the Crown's application and dismissed the charges.

[11] The Alberta Court of Appeal overturned the decision of the Provincial Court judge and held that the original Information remained valid and the statute-barred election to proceed summarily did not create a defence to the charges. The Court of Appeal concluded that the Crown could re-elect to proceed indictably on the original Information since the initial summary election was a nullity, as were all subsequent proceedings in the summary conviction court.

[12] In paras. 31 and 32 Fish J. for the majority, states:

> [31] Absent consent, expiry of the limitation period bars entirely proceedings in respect of an offence that may be prosecuted only by way of summary conviction. A hybrid offence that can no longer be prosecuted summarily without the defendant's consent may nonetheless, absent abuse of process, be prosecuted by indictment, whether the Crown initially elected to proceed summarily – except of course where the accused was acquitted by a summary conviction court pursuant to the Crown's initial election.
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> [32] In its reasons below, the Alberta Court of Appeal held that the Crown may "seek the consent of the accused to continue with a summary procedure" under s. 786(2) where it discovers "it has mistakenly elected to proceed summarily on an information sworn more than six months after the date of an alleged hybrid offence" (para. 42). On this view, which I

> share, the proceedings in the summary conviction court cannot be treated as a nullity *ab initio*.

[13] In para. 36, the court stated:

> [36] The consent of the parties, I repeat, can be given at any time during the proceedings before the verdict. The prosecutor will always be deemed to have consented by virtue of his or her election to try the hybrid offence summarily. The defendant must consent to the proceedings in a manner consistent with the reasons of the Court in *Korpanay v. The Attorney General of Canada*, [1982] 1 S.C.R. 41. That is to say, the consent of the defendant to continue with the proceedings must be "informed, clear and unequivocal": *Korponay*, at p. 58.

[14] Fish J. stated in para. 39 that "Where the Crown elects to proceed summarily beyond the limitation period without the defendant's consent, the Crown's invalid election does not retrospectively invalidate an information". The court goes on to hold that the Crown maintains the ability to elect to proceed by indictment on the original Information unless doing so would constitute an abuse of process. (paras. 41-44)

[15] In his summary of the governing principles applicable to cases where a hybrid offence is prosecuted by way of summary conviction beyond the six month limitation period, Fish J. states that where the invalid election is discovered before an adjudication on the merits, a mistrial should be declared unless the parties agree to waive the limitation period. (paras. 1 – 7)

[16] It is clear in this case that there has been no express waiver by V.J. of the limitation period and consent by him to proceed summarily. Ms. MacDiarmid has, according to the court record, been V.J.'s counsel from the date of his first appearance

in court. There is nothing on the court file or that has been presented to the court by Crown counsel that shows any express waiver and a consent being provided.

[17] Crown counsel submits that I should nonetheless find that V.J. has provided his consent to proceed summarily when I consider all of the circumstances.

[18] Mr. Gouaillier submits that Ms. MacDiarmid would have been aware, at least immediately prior to the trial commencing on November 20, that this court had no jurisdiction to hear the trial. When I look at the circumstances of the court docket that day in Carcross and how the trial proceeded, I find that I agree with Mr. Gouaillier on this point. The trial started at 12:05 p.m. and continued until 1:00 p.m. There was a 10 minute break and the trial continued until 1:36 p.m. After a four minute break, the trial continued until 2:13 p.m. Finally, after a three minute break, the trial continued without further break. Surely, had Ms. MacDiarmid suddenly discovered the issue of the court's lack of jurisdiction in the midst of the trial, the issue could have been placed before me. Indeed, Ms. MacDiarmid makes no claim of having discovered the issue of lack of jurisdiction only after the trial commenced, despite having opportunity to make such a claim, had she wished to do so.

[19] Ms. MacDiarmid, in fact, did not draw the court's attention to the jurisdictional issue until she raised it as her second argument in closing submissions. The only reasonable inference that could be drawn is that Ms. MacDiarmid was aware of the court's lack of jurisdiction prior to the trial commencing but chose to remain silent on the point until argument. I find that it was not something she suddenly became aware of during the trial or after the evidence was concluded.

[20] That said, I cannot reach back any further in time to point to when Ms. MacDiarmid may have first become aware of this jurisdictional issue. She was not prepared to voluntarily provide the court with this information and there is nothing on the record or otherwise that would assist in that regard.

[21] Mr. Gouaillier submits that, given Ms. MacDiarmid's knowledge at the outset of the trial that the court had no jurisdiction to adjudicate the matter, absent V.J.'s consent being given, it is only logical that I find that his consent was provided implicitly, if not explicitly. Had V.J. not been providing his consent to proceed summarily, Ms. MacDiarmid should have pointed this out prior to the trial commencing. By failing to do so, and proceeding to trial, the reasonable inference can be drawn that V.J. was consenting to proceed summarily.

[22] Mr. Gouaillier submits that the limitation period set out in s. 786(2) raises an issue of jurisdiction only, and does not raise a defence. Jurisdiction arises at the outset and, Ms. MacDiarmid, being aware of the jurisdictional issue, did not address the issue and instead chose to proceed to trial. Therefore, she cannot now argue as a defence that the court has no jurisdiction to convict her client. She cannot now take the position that consent to proceed summarily was not provided, when all her actions in proceeding through an entire trial were consistent with consent having been given.

[23] Crown counsel relies on ***R.*** v. ***St-Onge***, 2010 CMAC 7 in support of his submission. ***St-Onge*** was a case where the defendant appealed a decision of a Military Judge to sentence him to 30 days imprisonment following guilty pleas, after a plea-bargain, to possession of marijuana, threatening a superior and insubordination. He

also appealed the conviction for possession of marijuana on the basis that it was time-barred. Counsel for Mr. St-Onge on the appeal was different counsel than counsel when the matter was before the Military Judge.

[24] The charge for possession of marijuana had been laid more than six months after the commission of the offence. Based upon the quantity the Military Judge found Mr. St-Onge to be in possession of as being less than 30 grams, this made the offence strictly a summary offence. The limitation period of six months set out in s. 786(2) of the *Criminal Code* applied to offences punishable pursuant to s. 130 of the *National Defence Act*. (para. 40)

[25] The issue in ***St-Onge*** was "…whether the prosecutor and the appellant agreed to proceed with the charge of simple possession, knowing that the limitation period had expired". (para. 44)

[26] The court further stated in para. 44 that:

> 44. … .Consent can be explicit or it can be implied from all the surrounding circumstances. Clearly an explicit waiver, noted on the Court record, is the preferred practice but the absence of an explicit waiver does not preclude the Court from drawing the inference, on the basis of the surrounding circumstances, that the appellant did in fact waive his right to the benefit of the limitation period: See *R. v. Morin*, [1992] 1 S.C.R. 771, at paragraphs 37 and 38.

[27] ***Morin*** was a case where the issue was delay. The court in ***Morin*** stated in paras. 37 and 38 that:

> 37. If the length of the delay warrants an inquiry into the reasons for delay, it appears logical to deal with any allegation of waiver before

> embarking on the more detailed examination of the reasons for delay. If by agreement or other conduct the accused has waived in whole or in part his or her rights to complain of delay then this will either dispose of the matter or allow the period waived to be deducted.
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> 38. This Court has clearly stated that in order for an accused to waive his or her rights under s. 11(b), such waiver must be clear and unequivocal, with full knowledge of the rights the procedure was enacted to protect and of the effect that waiver will have on those rights. (Korponay v. Attorney General of Canada, [1982] 1 S.C.R. 41 at p. 49; see also Clarkson v. The Queen, [1986] 1 S.C.R. 383, at pp. 394-396; Askov, supra, at pp. 1228-9). Waiver can be explicit or implicit. If the waiver is said to be implicit, the conduct of the accused must comply with the stringent test for waiver set out above. As Cory J. described it in Askov, supra, at p. 1228:
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> > …there must be something in the conduct of the accused that is sufficient to give rise to an inference that the accused understood that he or she had a s. 11(b) guarantee, understood its nature and had waived the right provided by that guarantee.
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> Waiver requires advertence to the act of release rather than mere inadvertence. If the mind of the accused or his or her counsel is not turned to the issue of waiver and is not aware of what his or her conduct signifies, then this conduct does not constitute waiver. Such conduct may be taken into account under the factor "actions of the accused" but it is not waiver. As I stated in Smith, supra, which was adopted in Askov, supra, consent to a trial date can give rise to an inference of waiver. This will not be so if the consent to a date amounts to mere acquiescence in the inevitable.

[28] In deciding that Mr. St-Onge had waived the limitation period, and thus dismissing his conviction appeal, the Military Judge noted the following points:

- That Mr. St-Onge was represented by experienced counsel (para. 46);
- That the limitation period must not have been unnoticed by counsel and that counsel must have been aware of the consequences that flowed from a determination of whether the marijuana was in an amount greater or lesser than 30 grams (para. 45);
- That there was a benefit that would have been apparent to experienced counsel for Mr. St-Onge in proceeding with a guilty plea to the charge of simple possession rather than the more serious trafficking charge he likely would have faced if he had raised as a

jurisdictional issue the matter of the possession charge being time-barred (para. 47); and

- That counsel would have been aware of the limitation period through the extended discussion which occurred between defence counsel and the Military Judge as to the delay in bringing the matter to trial. In that discussion, "…specific reference was made to the fact that the appellant was charged six months after the execution of the search warrant" (para. 48).

[29] In paras. 47 and 49 the court stated that:

> 47. The circumstances surrounding the plea bargain, including the benefit which the appellant derived from it, supports the inference that he knowingly waived the six month limitation period applicable to the possession charge.
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> 49. These considerations lead me to infer that the appellant, as part of his plea bargain with the prosecutor, agreed to waive the six month limitation period applicable to the charge of simple possession in return for the prosecutor's agreement to withdraw Count 1 which alleged the more serious issue of trafficking in a controlled substance. This inference could have been rebutted by the appellant who raised this issue for the first time in his Memorandum of Fact and Law, after having obtained new counsel. If it were the case that the issue of the limitation period had never been discussed by the appellant and his counsel at trial, one would expect that the appellant would have sought leave to put that evidence before this Court. Since he has not done so, there is nothing to rebut the inference which the Court is in a position to draw from the whole of the surrounding circumstances.

[30] Mr. Gouaillier certainly raises a compelling and attractive argument. Given that, absent a successful abuse of process argument, the only logical and likely result of not consenting to proceed summarily is to see the Crown then simply making an election to proceed indictably, it is hard to imagine why counsel would put everyone through a trial process unless V.J. was consenting to proceed summarily. It also makes no sense that Ms. MacDiarmid would, in closing submissions, argue as her first point that I should not

convict V.J. on the evidence, unless she was in agreement that I had the jurisdiction to adjudicate the matter. I would only be able to adjudicate if I had jurisdiction to do so, and jurisdiction is something I would only have if V.J. was consenting to proceed summarily despite the limitation period.

[31] In this case we are dealing with a trial that took place over a fairly short period of time on circuit. The stress and inconvenience on all involved was not particularly significant. However, I cannot help but think of the illogic of raising this jurisdictional argument at the conclusion of a trial. For example, the parties could be involved in a trial that took place over weeks and/or months, involving numerous witnesses and the associated stress and financial impact, including the impact on an accused who was paying for private counsel, when the quite possible and/or likely result would be to have Crown simply re-elect to proceed indictably and commence the process all over again, with potentially greater negative consequences on the accused if he or she is convicted. While the sentence imposed, should the process result in an accused being convicted, may not differ upon conviction for an offence proceeded on indictably rather than summarily, at a minimum there are time stipulations under the *Criminal Records* Act, R.S.C. 1985 c. C-47, as amended, for applying for a criminal record suspension or under the *Youth Criminal Justice Act*, S.C. 2002, c. 1with respect to the period of access to findings of guilt. There are also potentially, depending on the charge, mandatory vs. discretionary prohibitions that may be attached to a conviction.

[32] This is not to foreclose the possibility of a successful abuse of process argument. One would expect, however, that counsel would be aware of the existence of a

jurisdictional issue such as this at least prior to fixing a trial date, and certainly by the trial date. Mistakes can and do happen, and even experienced counsel can miss things; these mistakes, however, do not necessarily lead to the conclusion that an abuse of process argument would be successful.

[33] The facts in this case differ substantially from those in ***St-Onge***. Ms. MacDiarmid is experienced counsel and she has been V.J.'s counsel throughout. There have been no discussions, or at least not any that the court is aware of, in which it would have been readily apparent that the limitation period would have been raised or otherwise apparent to the parties. I find that there is no basis to believe that there was a benefit, that counsel was aware of, to V.J. in consenting to proceed summarily, such as existed in ***St-Onge***. The fact that if Crown counsel re-elects to proceed indictably and a trial follows in which V.J. is convicted, thus resulting in his youth findings of guilt being subject to a greater period of access under s. 119 of the *Youth Criminal Justice Act* than they would be under a conviction in a summary proceeding, does not satisfy me that this was actually a consideration of the parties, and thus it is not a factor to support a finding that there was an implicit waiver of the limitation period.

[34] What I find happened here is that Ms. MacDiarmid made a strategic decision not to raise the issue of jurisdiction until the conclusion of the trial. I cannot say when she first decided to do so, other than finding that it was at least immediately prior to the trial commencing, although I cannot discard the possibility that it may have been earlier. It is clear that V.J. never explicitly consented to proceed summarily. I also find, even in

consideration of all the circumstances that would logically seem to point otherwise, that there is an insufficient foundation to find that his consent was provided implicitly.

[35] What is clear and unequivocal is Ms. MacDiarmid's submission that V.J. was not consenting at any time, and her actions in proceeding through trial and closing submissions that would logically seem to indicate otherwise, were simply an ill-informed strategic decision with no quantifiable benefit to her client. Any potential abuse of process argument against Crown counsel being allowed to re-elect to proceed indictably would likely not be weakened by the issue of jurisdiction being raised immediately prior to the trial commencing rather than several hours later at the conclusion of the trial. I am at a loss as to why counsel waited until the conclusion of the trial and closing submissions to raise this issue. The end result of doing so certainly gave rise to Crown having an arguable point as to consent to proceed summarily being implicit as inferred from the circumstances.

[36] In my opinion, when defense counsel becomes aware, before trial, that a trial court clearly has no jurisdiction to adjudicate on a matter, defense counsel should make the court aware of the issue prior to the trial starting, and certainly before it runs its full course, thus avoiding considerable waste of time, effort and expense, and thus also not unnecessarily putting witnesses through the associated stress and/or other issues related to testifying. To run a trial, knowing all along that it cannot be adjudicated and that the proceedings are a nullity, does nothing to maintain public confidence in the administration of justice. I would expect that by pointing out the jurisdictional issue prior to a trial commencing, counsel would not be compromising his or her duty to the client,

as it is hard to envision any potential negative consequences to the client. In turn, counsel would thereby be complying with his or her obligations as an officer of the court.

[37] In the circumstances I have no choice but to declare a mistrial.

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COZENS, C.J.T.C.