

SUPREME COURT OF YUKON

Citation: *R. v. Khan*, 2016 YKSC 49

Date: 20160920
S.C. No.: 16-AP004
Registry: Whitehorse

BETWEEN:

HER MAJESTY THE QUEEN

APPLICANT

AND

UMBER BASHIR KHAN

RESPONDENT

Before Madam Justice C.L. Kenny

Appearances:

Kelly McGill

No one

Appearing on behalf of the Applicant

Counsel for the Respondent

REASONS FOR JUDGMENT

[1] KENNY J. (Oral): I have had the opportunity, in advance of the application today, to read all of the material on the file: the affidavit; the outline; and the submissions, including the cases.

[2] First of all, I would note that three attempts have now been made to contact Mr. Khan for today's application, without success. I am satisfied that he has had proper notice of this application today and has been served with all of the documents with respect to this application. If he wished to file documents in response, he was required to do so by September 1, 2016. He did not do so. We had no response from him with respect to this application, although properly served with proper notice.

[3] On that basis, I am prepared to proceed with the application.

[4] The application is by the Crown for a writ of *certiorari*, which is an application to quash the order of Judge Chisholm which allowed Mr. Khan, a self-represented individual, to attend his trial and testify by video from British Columbia without counsel or an agent.

[5] The standard of review is correctness, as this deals with a question of law.

[6] Section 7 of the Yukon *Summary Convictions Act* incorporates provisions of the *Criminal Code* relating to summary convictions and extraordinary remedies.

[7] Section 650(1) of the *Criminal Code* requires the accused to attend the whole of his or her trial.

[8] Section 650(1.1) says that the court can order that an accused attend by counsel or by visual or oral communication only where no witness evidence is being called and only where the accused and the prosecution agree.

[9] Section 650(2)(b) does allow the court to excuse an accused during parts of the trial where the court considers it proper.

[10] There are many examples in the case law of where this would be appropriate, but those situations are rare and very specific. An example would be a long argument with respect to the exclusion of evidence.

[11] The court cannot, however, abrogate from the mandatory language set out in s. 650(1), that is, that the accused must attend the whole of the trial and can only be

excused with counsel or visual or oral communication where there is no witness evidence and where there is an agreement.

[12] That is not the case here. There is no provision in the *Criminal Code* which allows Mr. Khan to attend his trial by videoconference, so Judge Chisholm had no jurisdiction to make the order that he did. His jurisdiction extends throughout the Yukon. He has no jurisdiction over the accused in British Columbia.

[13] In the application before Judge Chisholm, reference was made to the decision of *R. v. Gibbs*, 2014 CanLII 36930 (NL PC). That case is not on point with the facts of this case. In this case, Mr. Khan is not a witness unless he chooses to give evidence; he is the accused. He is not attending videoconference within the jurisdiction of the Yukon. He wishes to attend the trial in the jurisdiction of British Columbia, over which the Yukon Territorial Court has no jurisdiction. Mr. Khan does not have counsel or an agent to appear on his behalf. He acknowledges that he is self represented.

[14] Section 800(2) and s. 650 of the *Criminal Code* are clear, that the accused must appear personally or by counsel or by agent within the jurisdiction of the court, which is the court in the Yukon; otherwise, the court loses jurisdiction.

[15] This is a short trial and Mr. Khan indicates he now resides in British Columbia and wishes to attend by videoconference from British Columbia. He cannot do so. Were that to be permitted, the court would lose jurisdiction. As indicated, he must appear personally or by counsel or by agent.

[16] The order of Judge Chisholm is therefore quashed and Mr. Khan can elect how he wishes to appear and attend for the purposes of his trial on October 4, 2016.

KENNY J.