COURT OF APPEAL OF YUKON

Citation: *R. v. Buyck*,
2017 YKCA 8

Date: 20170620
Docket: 15-YU775

Between:

Regina

Respondent

And

Roy Kenneth Buyck

Appellant

Before: The Honourable The Honourable Chief Justice Bauman
The Honourable Mr. Justice Donald
The Honourable Madam Justice Tulloch

On appeal from: An order of the Yukon Territorial Court, dated February 5, 2016
(*R. v. Buyck*, 2016 YKTC 71, Whitehorse Docket 13-00373).

Counsel for the Appellant:	J. Cunningham
Counsel for the Respondent:	L. Gouaillier
Place and Date of Hearing:	Whitehorse, Yukon May 19, 2017
Place and Date of Judgment:	Vancouver, British Columbia June 20, 2017

Written Reasons by:
The Honourable Madam Justice Tulloch

Concurred in by:
The Honourable Chief Justice Bauman
The Honourable Mr. Justice Donald

Summary:

Mr. Buyck appeals the sentence imposed on his conviction for sexual assault. After unsuccessfully applying to withdraw his guilty plea, he refused to admit the facts the Crown sought to present to court at sentencing. The sentencing judge directed the Crown to read into the record a draft agreed statement of facts. Mr. Buyck seeks a new trial on the basis that he erred in imposing sentence based on the draft statement. Held: Appeal allowed. The judge erred in imposing sentence based on facts that were not in evidence and had not been proven beyond a reasonable doubt. The proper remedy is the procedure employed in R. v. Pahl, 2016 BCCA 234: the appointment of a judge of the Territorial Court to conduct a Gardiner hearing and report back to this Court all of the facts proven for the purpose of assessing the fitness of sentence.

Reasons for Judgment of the Honourable Madam Justice Tulloch:

[1] This is a case where many adjournments, a lengthy passage of time, Mr. Buyck's inability to provide consistent instructions and the involvement of different lawyers has resulted in a sentencing hearing whereby the trial judge took into account facts which were not properly in evidence.

[2] There were 31 court appearances lasting well over two years. Mr. Buyck was assisted by three experienced counsel and one lawyer appointed as *amicus curiae*. He was finally sentenced by Judge Chisholm in the Yukon Territorial Court on February 5, 2016.

Background:

[3] A brief history of the case is as follows:

[4] Mr. Buyck was charged with sexual assault on or about August 16, 2013 pursuant to s. 271 of the *Criminal Code,* R.S.C. 1985, c. C-46.

[5] His first appearance in Territorial Court was September 25, 2013 at which time the Crown elected to proceed by indictment. Mr. Buyck requested an adjournment to retain counsel.

[6] On October 23, 2013 Mr. Buyck, with the assistance of experienced counsel, elected to be tried by a court composed of a judge and jury. He waived the need for a preliminary inquiry and the matter was sent to the Yukon Supreme Court to set a date for trial.

[7] By June 5, 2014 Mr. Buyck had retained another experienced counsel, Ms. Atkinson, who advised the court that she had received instructions to seek re-election to judge alone in the Territorial Court.

[8] The Crown consented and Mr. Buyck pled guilty to the sexual assault and another unrelated offence. In preparation for sentencing, Ms. Atkinson asked for the preparation of both a pre-sentence report and a *Gladue* report. The Crown consented and the adjournment was granted.

[9] Ms. Atkinson, through affidavit evidence agreed to by Mr. Buyck, advised the court that prior to Mr. Buyck's plea she was careful to review the requirements of s. 606(1.1) of the *Criminal Code*, which provides:

> **Conditions for accepting guilty plea**
>
> **(1.1)** A court may accept a plea of guilty only if it is satisfied that the accused
>
> **(a)** is making the plea voluntarily; and
>
> **(b)** understands
>
> **(i)** that the plea is an admission of the essential elements of the offence,
>
> **(ii)** the nature and consequences of the plea, and
>
> **(iii)** that the court is not bound by any agreement made between the accused and the prosecutor.

[10] Ms. Atkinson also reviewed a Crown-prepared draft of an agreed statement of facts, with which Mr. Buyck took no issue. A few hours after he pled guilty, Mr. Buyck did, however, contact Ms. Atkinson to say that he wanted the fact that he and the complainant were in a relationship at the time to be added to the facts. Ms. Atkinson contacted the Crown but received no response.

[11] The sentencing was adjourned repeatedly by Mr. Buyck.

[12] On December 12, 2014, Ms. Atkinson applied to be removed as counsel. She indicated to the court that there had been a breakdown in her relationship with Mr. Buyck and that he may wish to apply to strike his plea of guilty.

[13] The matter was again adjourned a number of times for Mr. Buyck to get new counsel and on March 20, 2015 another experienced counsel Ms. MacDiarmid appeared on behalf of Mr. Buyck. She indicated to the court that he wanted to bring an application to strike his plea and the matter was adjourned for a hearing.

[14] On May 26, 2015, with the assistance of Ms. MacDiarmid, Mr. Buyck abandoned his application and advised the court that he no longer wished to withdraw his plea of guilty. The court was told that the disagreement in the facts did not go to the essential elements of the offence but that an *R. v. Gardiner* [1982] 2 S.C.R. 368, 140 D.L.R. (3d) 612 (S.C.C.), hearing would be required.

[15] The *Gardiner* hearing was to take place November 19, 2015. Ms. MacDiarmid appeared and advised the court that Mr. Buyck was now not admitting any of the facts in support of his plea. On that date the court had two options: to hold the *Gardiner* hearing or to allow Mr. Buyck to proceed with his previous application to withdraw his plea. The complainant was not present on that date to give evidence as she had not been subpoenaed. The judge set a date to hear Mr. Buyck's application to withdraw his guilty plea.

[16] On November 27, 2015, Mr. Buyck appeared on his own behalf—having now exhausted the services of three counsel—to ask that his plea of guilty be withdrawn. A full hearing took place.

[17] The reason Mr. Buyck gave to be allowed to withdraw his plea at that time was that he thought he was going to have a circle sentencing and his plea was based on that expected outcome. He wanted to be able to tell his side of the story.

[18] It is unfortunate that Mr. Buyck was not questioned further during the hearing about what, if any, facts he was prepared to admit.

[19] On December 2, 2015, Judge Chisholm denied Mr. Buyck's application to strike his plea. I can find no error with his decision. [2015 YKTC 56]

[20] Judge Chisholm also indicated once again that a *Gardiner* hearing may be necessary. He found that Mr. Buyck would benefit from further legal advice and therefore he appointed an *amicus curiae* to assist the appellant further. The judge also ordered the clerk of the court to provide Mr. Buyck with a copy of the draft agreed statement of facts, which had not changed since his plea was entered.

[21] On February 5, 2016, Mr. Buyck appeared with Mr. Dick acting as *amicus*. Sentencing was expected to proceed and the reports requested were before the court to assist the judge in crafting a fit sentence.

[22] On that date, Mr. Buyck indicated through his amicus that he was unable to admit the facts which the Crown sought to present to the court. He indicated that he had been drinking and was on medication the night of the incident so he could not say if the sexual assault took place or not.

[23] At that point, Judge Chisholm invited the Crown to read into the record the draft of the agreed statement of facts.

[24] A very brief summary of those facts is as follows:

[25] Mr. Buyck sexually assaulted the complainant in a hotel room in Whitehorse. She was the daughter of a woman that he had been in a relationship with and had come to Mr. Buyck and his friend's hotel room to seek a ride home. She was promised a ride the next morning. She then drank with the two men, became intoxicated and was sleeping when Mr. Buyck sexually assaulted her. Digital penetration is alleged. Afterwards she reported soreness in her vaginal area and the accused's DNA was found on her clothing.

[26] The sentencing judge found that these facts supported a finding that this was a serious and invasive sexual assault and since the complainant was there to get a ride home and Mr. Buyck knew her, it could be considered a breach of trust.

[27] The Crown prosecutor sought a sentence of 22 months in jail plus probation while Mr. Buyck asked for significantly less jail time. Mr. Dick as *amicus* made no submissions on sentence but the accused addressed the court at length and asserted a lack of memory for the key events at issue in this appeal.

[28] The final sentence imposed by the judge was 18 months' jail plus probation.

Argument:

[29] The appellant argues that Mr. Buyck is entitled to a new trial because the conviction was not registered by the trial judge until the date of sentencing.

[30] It is common practice in many jurisdictions, including the Yukon, for clients to enter guilty pleas and adjourn matters for sentencing without a conviction being registered or the facts read in.

[31] Section 606 of the *Criminal Code* does not prohibit this practice and builds in a number of safeguards to prevent any miscarriage of justice between the entering of the plea and the sentencing.

[32] In *R. v. Ross*, 2013 SKCA 45, [2013] S.J. No. 258 (Q.L.), the Court of Appeal found that not reading in the facts prior to the plea did not lead to the plea being uninformed. The court stated at paragraphs 29-30:

> [29] …Significantly, the *Code* does not require that the Crown or the court read in a statement of facts prior to taking a guilty plea. It is enough that the accused understands the essential elements of the offence.

> [30] … The failure to follow such a procedure does not, in and of itself, affect the integrity of a guilty plea. See, for example, *R. v. Eizenga,* 2011 ONCA 113, 270 C.C.C. (3d) 168, at paras. 47-48. Indeed, s. 606(1.2) of the *Code* expressly provides that a failure to fully inquire whether the conditions referred to in s. 606(1.1) are met does not affect the validity of a plea."
>
> [Emphasis added.]

[33] However, the court also noted that it is a preferable practice—though "not a rigid legal requirement"—for the Crown to recite the facts on which the charge is based before a judge accepts a guilty plea (at para. 30).

[34] Not all cases are resolved by an agreed statement of facts. In many cases, the plea is entered and facts are simply read in based on the Crown disclosure at the time of sentencing. This could happen immediately following the plea or, in cases such as this, where reports were requested to assist the judge in coming to a fit sentence, many months later.

[35] This procedure allows an accused to apply to withdraw his guilty plea prior to conviction if he has good reasons to do so.

[36] In this case, the application to withdraw received a fair hearing and was denied.

[37] In my view, the appellant's request for a new trial in these circumstances cannot succeed.

[38] Mr. Buyck's valid guilty plea to sexual assault, in law, constitutes an admission of the essential elements of the offence.

Issue on Appeal:

[39] The issue for this Court to decide is whether the trial judge erred in proceeding with the sentencing hearing without the underlying facts being admitted by the accused or proven by the Crown?

Analysis:

[40] I find that the trial judge did err in this regard.

[41] Judge Chisholm made an error when he allowed the Crown to read in facts that were not in evidence. These were facts that were not consented to and facts that had not been proven pursuant to s. 724(3) of the *Criminal Code*, which provides:

> **(3)** Where there is a dispute with respect to any fact that is relevant to the determination of a sentence,
>
> **(a)** the court shall request that evidence be adduced as to the existence of the fact unless the court is satisfied that sufficient evidence was adduced at the trial;
>
> **(b)** the party wishing to rely on a relevant fact, including a fact contained in a presentence report, has the burden of proving it;
>
> **(c)** either party may cross-examine any witness called by the other party;
>
> **(d)** subject to paragraph (e), the court must be satisfied on a balance of probabilities of the existence of the disputed fact before relying on it in determining the sentence; and
>
> **(e)** the prosecutor must establish, by proof beyond a reasonable doubt, the existence of any aggravating fact or any previous conviction by the offender.
>
> [Emphasis added.]

[42] These 1995 amendments of the *Criminal Code* codified the *Gardiner* principles. On June 5, 2014, the only facts that were admitted by Mr. Buyck were the essential elements of the offence. Given the fact that sexual assault encompasses an extremely broad set of circumstances capable of founding a conviction, an evidentiary hearing was necessary.

[43] I believe that the case of *R. v. Pahl*, 2016 BCCA 234, 336 C.C.C. (3d) 221, is applicable and the unique procedure employed in that case is appropriate to apply in the case at hand.

[44] *Pahl* was an appeal by the Crown from a sentence imposed following a guilty plea to a charge of possessing drugs for the purpose of exportation. Mr. Pahl used his position as an airport screener to take drugs into the secure side of the terminal

and deliver them to a courier. Following his arrest, Mr. Pahl told an undercover officer that he had previously taken drugs through airport security. At the sentencing hearing, Mr. Pahl's counsel submitted that his statement to the undercover officer was "bravado" and that he had taken drugs through security only once and only because of threats made by an unnamed man. Defence counsel tendered a psychologist's report containing the same explanation. The Crown relied on Mr. Pahl's statement to the undercover officer as an aggravating factor and disputed his mitigating explanation. The sentencing judge accepted Mr. Pahl's explanation.

[45] The majority decision by the British Columbia Court of Appeal allowed the Crown's appeal but appointed a Provincial Court Judge to conduct an evidentiary hearing to resolve the disputed facts and to report back to the court.

[46] I believe that the present case provides an even greater reason to follow the procedure set out in *Pahl*.

[47] This is a case where only the essential elements of the offence of sexual assault were admitted to by the appellant.

[48] Although the Crown concedes that the trial judge made an error, Mr. Gouaillier's position is that the sentence of 18 months in these circumstances for this offender was fit and that the appeal should be dismissed.

[49] Ms. Cunningham's position on behalf of Mr. Buyck is that there was an error made and the appropriate remedy is for this Court to order a new trial.

[50] With the greatest of respect, I find that both positions are not sustainable in law.

[51] Mr. Buyck's guilty plea is valid and the only case put forward by Ms. Cunningham for her position that a new trial should be ordered is *Adgey v. R.* [1975] 2 S.C.R. 426, 39 D.L.R. (3d) 553 (S.C.C.). This case is not helpful. It was decided before the enactment of s. 606(1.1) and it does not cast doubt on the fact

that by pleading guilty Mr. Buyck admitted the essential elements of the offence before the court.

[52] For all of the reasons mentioned I would grant leave to appeal and make an order, pursuant to s. 683(1)(e) of the *Criminal Code*, appointing a judge of the Territorial Court, other than the sentencing judge, as a special commissioner to conduct a *Gardiner* hearing and report back to this Court all of the facts proven. The Chief Judge of the Territorial Court shall assign the special commissioner.

[53] Counsel are directed to arrange for the earliest possible hearing date before the judge who is assigned.

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The Honourable Madam Justice Tulloch

I agree:

_____
The Honourable Chief Justice Bauman

I agree:

_____
The Honourable Mr. Justice Donald