COURT OF APPEAL OF YUKON

Citation: *R. v. Schafer*,
2019 YKCA 12

Date: 20190515
Docket: 18-YU836

Between:

Regina

Respondent

And

Christopher Russell Schafer

Appellant

Before: The Honourable Madam Justice Bennett
(In Chambers)

On appeal from: An order of the Supreme Court of Yukon, dated December 7, 2018 (*R. v. Schafer*, 2018 YKSC 52, Yukon Docket No. 18-AP007).

Oral Reasons for Judgment

Counsel for the Respondent:	N. Sinclair
Counsel for the Appellant:	G. Johannson V. Larochelle
Place and Date of Hearing:	Whitehorse, Yukon May 15, 2019
Place and Date of Judgment:	Whitehorse, Yukon May 15, 2019

Summary:

Mr. Schafer seeks leave to appeal his summary conviction on four grounds. Held: Application granted. Mr. Schafer has leave to argue two grounds on appeal: that the summary conviction appeal judge erred in failing to find that the hearing judge erred in admitting hearsay evidence in a s. 810.2 hearing and in admitting opinion evidence. Those grounds are important questions of law with some merit.

[1] **BENNETT J.A:** This is an application for leave to appeal a summary conviction pursuant to s. 839 of the *Criminal Code*.

[2] Briefly, the facts are that in February of 2018, Mr. Schafer completed his sentence in British Columbia for a robbery he had committed in 2010. On returning to Whitehorse later that month, he was arrested at the airport and was brought before the courts for a hearing pursuant to s. 810.2.

[3] On May 10, 2018, Judge Ruddy imposed a s. 810.2 order with conditions, including that he abstain from intoxicating substances.

[4] Mr. Schafer appealed to the Supreme Court of Yukon on December 5, 2018.

[5] On December 7, 2018, the appeal was dismissed.

[6] Mr. Schafer seeks leave to appeal on four grounds. It is my view that leave to appeal should be granted on two of the four grounds.

[7] The test for a leave application was stated by this Court in *R. v. Winfield*, 2009 YKCA 9, and that is:

> [13] To obtain leave to appeal from the decision of a summary conviction appeal court, the applicant must establish that (a) the ground of appeal involves a question of law alone, (b) the issue is one of importance, and (c) there is sufficient merit in the proposed appeal that it has a reasonable possibility of success. The overriding consideration in the exercise of the discretion to grant or refuse leave is the interests of justice: *R. v. Cai*, 2008 BCCA 332, 258 B.C.A.C. 235 at para. 26 (Chambers); *R. v. Gill*, 2008 BCCA 259 at para. 3 (Chambers).

[8] The first ground raises the issue of whether hearsay evidence is admissible in a s. 810.2 hearing. There are inconsistent decisions across the country with respect to the admissibility of hearsay evidence in these hearings. It is my understanding

that no appellate court has dealt specifically with that issue in the context of s. 810.2. I would grant leave to appeal on that ground.

[9] I would also grant leave to appeal on the issue of the admissibility of the "opinion" evidence of Corporal Gale. Corporal Gale reviewed hearsay documents and expressed his opinion, or view, that he was in fear of Mr. Schafer and that Mr. Schafer was at risk to re-offend. In my view, there is an issue of importance with respect to the admissibility of that evidence and how that evidence comes before the Court.

[10] In my view, the two points above meet the *Winfield* test, in that they both raise questions of law alone that are issues of importance. They also meet the merit test, keeping in mind that the merit test is not particularly stringent.

[11] The third point raised is that the Supreme Court justice, in referring to a decision from the Ontario Court of Appeal at para. 32 of her reasons, said:

> [32] It is notable that leave to appeal the decision in *Budreo* to the Supreme Court of Canada was dismissed…

[12] It appears that she may have given the refusal of a leave application by the Supreme Court of Canada some weight. The refusal by the Supreme Court of Canada to grant leave to appeal in any case is of no importance and does not indicate a stamp of approval on the lower court's decision. This is well-settled law. To state it simply, the refusal to grant leave by the Supreme Court of Canada has no bearing on whether the court decision below is correct or not. In my view, this is a well-settled principle that does not need to be considered by this Court, and I would not grant leave on that point.

[13] Finally, the appellant raises for the first time in this Court the issue of an abuse of process. The argument is that the use of s. 810.2 by police authorities as opposed to private citizens is an abuse of process. He submits that there is no further record required and that this is a proper case to be considered for the first time on appeal. Mr. Schafer submits that it is an important issue and that leave should be granted.

[14] The Crown's submission is that there is a considerable body of evidence that would have been called before the trial judge if an abuse of process had been raised at trial. Counsel outlined some of the evidentiary matters that could have been addressed.

[15] In my view, this is an issue that should not be raised for the first time on appeal, and I refer to *Winfield* at paras. 16–18. This would be a significant challenge to the legislation and it would be important, in my view, to have a proper evidentiary foundation, which does not exist in this case. I would not grant leave to appeal on that ground.

[16] Therefore, the application is granted. Leave to appeal is granted on the first two grounds: the issue of the admissibility of hearsay evidence and the admissibility of the expert evidence in this case. Leave is refused on the two additional grounds.

“The Honourable Madam Justice E. Bennett”