

SUPREME COURT OF YUKON

Citation: *Bays v. Dindia*, 2019 YKSC 61

Date: 20191125
S.C. No. 19-AP010
Registry: Whitehorse

BETWEEN

BRUCE BAYS

RESPONDENT

AND

WENDY DINDIA

APPELLANT

Before Madam Justice S.M. Duncan

Appearances:

Bruce Bays
Vincent Larochelle

Appearing on his own behalf
Counsel for the appellant

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is a summary conviction appeal by Ms. Wendy Dindia, of the Territorial Court Order issued under s. 810 of the *Criminal Code* that she enter into a recognizance to keep the peace and be of good behaviour. The conditions are that she is not to have any contact with Mr. Bruce Bays and she is not to be within 100 metres of his residence at [redacted]. The appeal is based on an absence of procedural fairness

and a legal error. Ms. Dindia says the Justice of the Peace did not extend to her “a helping hand” as required of him when faced with a self-represented defendant; she was not arraigned and did not enter a formal plea; and the Justice of the Peace applied the wrong test for the issuance of a peace bond.

[2] Mr. Bays, who was also self-represented at the trial and this appeal, with the exception of help from a Victim Services worker, responds to the appeal by saying that he believes his safety is in jeopardy; he wants to have nothing to do with Ms. Dindia; and she is familiar with this process as she has been to court many times before, including for a peace bond matter with a former boyfriend.

BACKGROUND

[3] Ms. Dindia was served with a summons for a peace bond hearing in April 2019. The first hearing date was May 7, 2019. Ms. Dindia appeared and was not represented by legal counsel; nor was Mr. Bays.

[4] The Information stated that Mr. Bays feared on reasonable grounds that Ms. Dindia would cause personal injury to him because she assaulted him at his residence between June 20 and 27, 2018. Further she was screaming at him in public and taking pictures of him and he feared future violence from her.

[5] On May 7, 2019, when she arrived at court for the hearing, Ms. Dindia received the statement dated April 24, 2019 prepared by Mr. Bays in support of his application for a peace bond. The statement contained details about the following:

- i. incidents occurring at their shared residence in June, 2018;
- ii. an incident where Ms. Dindia yelled at Mr. Bays in the Independent grocery store in October, 2018;

- iii. missing items from his truck noticed in April 2019 and presumed to be taken by Ms. Dindia as she had a truck key;
- iv. an incident where Ms. Dindia yelled at him in the hospital emergency room in April 2019, leading to his fear of losing his job at the hospital;
- v. Ms. Dindia taking pictures and a video of him on Hospital Road and near Rotary Park.

[6] At the hearing on May 7, 2019, Ms. Dindia was not arraigned and a formal plea was not entered.

[7] Mr. Bays gave sworn testimony about the four main incidents noted above that occurred after they stopped living together. Mr. Bays also testified that their break-up had been difficult. He had been charged with assaulting Ms. Dindia. The charge was stayed and Mr. Bays entered into a recognizance including a condition that he not have contact with Ms. Dindia for a period of one year. That recognizance has now expired.

[8] Ms. Dindia testified in response as follows:

- i. She provided explanations of the incidents occurring at their shared residence in June 2018;
- ii. She does not have Mr. Bays' truck keys and she did not take the missing items from the truck;
- iii. She did speak unkindly to him at the Independent grocery store and explained it as a result of hypnosis therapy the day before; and
- iv. She attended at the hospital emergency room for treatment, saw Mr. Bays when she walked by the security booth and heard him swear at her, which made her upset and intimidated and prompted her to tell the nurse.

[9] Ms. Dindia added in her testimony that she noticed Mr. Bays driving by her residence approximately 17 or 18 times between November 2018 and May 2019.

[10] She also described an incident where she was to meet someone for a blind date on Hospital Road. That person did not appear, but a friend of Mr. Bays, whose vehicle licence plate she recognized, parked near her vehicle on the road and stared at her until she drove away.

[11] She concluded her testimony by saying she did not want to have anything to do with Mr. Bays.

[12] Ms. Dindia sought to introduce additional material at the hearing, including emails, a note in her journal, and a document showing her attendance at a hypnotherapy session the day before the Independent grocery store incident. However, the Justice of the Peace said he did not need to see them.

[13] In her affidavit filed with the Court in support of her application for extension of time, Ms. Dindia swore that she has been unable to obtain a clear criminal record check, as the recognizance appears as “adverse information” on her record. This has adversely affected her ability to obtain employment as a social worker in the Northwest Territories.

Decision of the Territorial Court

[14] The Justice of the Peace ordered Ms. Dindia to enter into a \$500 no deposit recognizance with the conditions to have no contact with Mr. Bays and not to be within 100 metres of his residence.

[15] The Justice of the Peace conducted an intentionally informal hearing, saying “So I like to run these somewhat easier but there’s rules; okay?”.

[16] The only witnesses were Mr. Bays and Ms. Dindia, both of whom provided sworn testimony and submissions.

[17] At the end of the evidence and submissions, the Justice of the Peace said:

Listening to both sides of your stories, neither one of you were able to provide any other witnesses to confirm or deny what's going on...

Bruce is fearful that Wendy could harm him or his personal property, and that's the concern here.

Wendy gives a different side to the story, saying it's almost the reverse, that's [sic] he's making comments to her.

These - you both agree that you don't want to have anything to do with each other...

...

The only thing I got out of this is that both of you don't like each other and you don't want to have any part of each other.

So in my mind, I'm tempted to grant the peace bond only to make sure that there's something in there to keep you apart.

And, like I said, it's not a criminal matter. It's just something there that – in place to ensure that it doesn't.

Grounds of Appeal

[18] Ms. Dindia appeals on the following grounds:

- i. The Justice of the Peace failed to provide a “helping hand” to Ms. Dindia, a self-represented defendant; thereby denying her a fair trial and the opportunity to make full answer and defence;
- ii. The appellant was not arraigned or given an opportunity to enter a plea to the information;

- iii. The Justice of the Peace failed to apply the correct legal test to the determination of whether a peace bond should be issued.

Standard of Review

[19] Section 822 of the *Criminal Code* provides that s. 683 to s. 689 of the *Code* apply to a summary conviction appeal under s. 813, with the exception of ss. 683(3) and 686(5), with such modifications as the circumstances require.

[20] Paragraph 686(1)(a) provides that a summary conviction appeal court

- (a) May allow the appeal where it is of the opinion that
 - (i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,
 - (ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or
 - (iii) on any ground there was a miscarriage of justice.

[21] In this case, whether or not the proper legal test was applied is a question of law to be reviewed on the basis of correctness (*R v. Shepherd*, 2009 SCC 35, at para. 20).

[22] The other two grounds of appeal are matters of procedural fairness. Procedural fairness does apply in the criminal law context (*R. v. Rodgers*, 2006 SCC 15). Courts have assessed procedural fairness on the basis of whether or not the generally accepted principles of fairness in the context of a fair trial were upheld. In a discussion of the judge's obligations to assist a self-represented accused in *R. v. Arnell*, 2012 SKQB 87 at para. 79, the court wrote "[t]he specific initiatives necessary to ensure a fair trial will vary from case to case."

i. Failure to provide a "helping hand"

Legal principles

[23] The issue of the court's provision of adequate assistance to an unrepresented accused in a summary conviction criminal trial was addressed in *R. v. Singh*, 2011

YKSC 42. The court reviewed the applicable law, beginning with *R v. Martin*, 2010 BCCA 526, in which the Court of Appeal began with a quote from *R. v. Darlyn* (1946), 88 C.C.C. 269 (B.C.C.A.):

There are two traditional common law rules which have become so firmly imbedded [sic] in our judicial system that a conviction is very difficult to sustain on appeal if they are not observed. The first is, that if the accused is without counsel, the Court shall extend its helping hand to guide him throughout the trial in such a way that his defence, or any defence the proceedings may disclose, is brought out to the jury with its full force and effect. The second is, that it is not enough that the verdict in itself appears to be correct, if the course of the trial has been unfair to the accused. An accused is deemed to be innocent, it is in point [sic] to emphasize, not until he is found guilty, but until he is found guilty according to law.

[24] The extent to which a trial judge should go in assisting an unrepresented accused was stated generally by the Court in *R. v. McGibbon*, [1988] O.J. No. 1936 (O.N.C.A.) at para. 32:

Consistent with the duty to ensure that the accused has a fair trial, the trial judge is required within reason to provide assistance to the unrepresented accused, to aid him in the proper conduct of his defence, and to guide him throughout the trial in such a way that his defence is brought out with its full force and effect. How far the trial judge should go in assisting the accused in such matters as the examination and cross-examination of witnesses must of necessity be a matter of discretion.

[25] The discretionary conduct of a trial judge with an unrepresented accused must be evaluated in light of the facts and circumstances of the particular case. This contextual analysis requires “a careful and detailed examination of the complete trial record” (*R. v. Phillips*, 2003 ABCA (A.B.C.A.) (aff’d 2003 SCC 57 (SCC)) at para. 26). The unrepresented accused’s “need for guidance varies depending on the crime, the

facts, the defences raised and the accused's sophistication. The judge's advice must be interactive, tailored to the circumstances of the offence and the offender, with appropriate instruction at each stage of a trial" (*Phillips (A.B.C.A)*, para. 22).

[26] Examples of the type of assistance that may be required of the court were set out by the Ontario Court of Appeal in *R. v. Gonsalves*, [2005] O.J. No. 1238 (O.N.C.A.) at para. 3: explanation to the self-represented accused of the court proceedings and how they will unfold; explanation of the entitlement to object to evidence led by the Crown; explanation of the purpose of cross-examination and how to do it; and explanation of the factors that the accused should consider before testifying on his own behalf.

Analysis

[27] In the case at bar, the circumstances were different than the cases referred to above in several ways. First, both parties were self-represented, not just Ms. Dindia. This meant that the Justice of the Peace had to provide assistance to both parties. The power imbalance was not the same as it would have been had Mr. Bays been represented. Second, this was an application for a peace bond or recognizance where the standard of proof is balance of probabilities, not beyond a reasonable doubt. A recognizance issued under s. 810 of the *Criminal Code* does not create a criminal offence, thus the rights and interests at stake are different. Third, as noted in *Bergeron v. Vaneltsj*, 2012 YKSC 19 a peace bond hearing does "allow for some relaxation of the legal formalities required in a punitive offence-driven process (*Haydock v. Baker*)" (para. 14).

[28] After review of the trial record in this case, I note that the Justice of the Peace did

provide some explanation of the process at the outset. He said:

THE COURT: Okay. So, peace bonds aren't so much a criminal matter; okay? There is no record or anything unless they are breached at the end. Basically, a peace bond is an order stopping contact from one another kind of thing; okay?

So you don't – it's basically a no contact order. So that's what it basically is. They are usually in effect for a year. If they aren't breached, there's no criminal record; okay? If there is a breach then you run into – come back into court and you are charged for breaching a peace bond.

So I like to run these somewhat easier but there's rules; okay?

So, Ms. Dindia are – you've read the package?

MS. DINDIA: I just read it, Your Honour.

THE COURT: Okay. Do you – I understand that you just collected it today.

MS. DINDIA: Yes.

THE COURT: Is there any time that you need?

MS DINDIA: I'm – I'm ready as I'm ever going to be.

THE COURT: Okay. So are you against this or are you okay, like –

MS DINDIA: I'm against it.

THE COURT: All right. So what'll happen is each of you will give your side of the story. I'll make a determination at the end of that.

MS. DINDIA: Okay.

THE COURT: So each one of you take the stand, the other person can talk – only ask questions about it – what's pertinent to this. It can't go off – off in a different direction; okay?

[29] The Justice of the Peace also ensured that both Ms. Dindia and Mr. Bays provided sworn testimony. He gave each of them an opportunity to ask the other one questions, which they declined to do. He asked each of them for their final submissions.

[30] However, there were gaps in the explanations and handling of the process by the Justice of the Peace. It is my view that the procedural gaps, considered together, were sufficient to deny Ms. Dindia a fair hearing.

[31] Specifically, those gaps were:

- a. failure to explore or explain the potential consequences of a peace bond;
- b. failure to explain or suggest an adjournment to obtain legal advice, especially about the test to be applied and the consequences; and
- c. failure to consider the admission of additional evidence – either documentary or through other witnesses.

[32] First, the full implications and consequences of a peace bond were not explained or explored. While the Justice of the Peace did say that there would be no criminal record unless there was a breach, he did not explore at any time with Ms. Dindia whether or not it might affect her employment. Although he did ask where she worked, and she answered “Employment Central”, he did not ask for her profession or security requirements of her position. He did not ask if she had obtained legal advice about the consequences of a recognizance/peace bond.

[33] Second, recognizing that Ms. Dindia had received the “package”, meaning the statement of Mr. Bays elaborating on the Information, on the day of the hearing just before court, the Justice of the Peace asked her if she needed any time. She said she did not, but he did not suggest to her that she may want to seek legal advice or representation, especially given this was a first appearance. He did not offer her an adjournment for this purpose.

[34] The Court in *R. v. McGibbon* stated at para. 29:

The trial judge, of course, has a duty to the accused to see that he or she has a fair hearing and that duty will generally cast upon the judge an obligation to point out to the accused that he or she would be at a distinct disadvantage in proceeding without the assistance of competent counsel and the accused is entitled to have such counsel...

This did not occur in this case.

[35] Related to this, at the outset, the Justice of the Peace asked both Mr. Bays and Ms. Dindia whether they understood what the matter was about. Mr. Bays answered that he did understand, but the Justice of the Peace did not wait to hear from Ms. Dindia to ensure she understood the nature and process of a peace bond hearing. Given that the legal consequences to her of a peace bond were potentially significant and there were no adverse legal consequences of this process to Mr. Bays, there was an obligation in this case on the Justice of the Peace to ensure she understood the process and the test to be met. The test for obtaining a peace bond was not explained to either party at the outset.

[36] Third, Ms. Dindia testified that she had documentary evidence to support her attendance at a hypnotherapy session the day before the Independent grocery store incident. She also had other emails between her and Mr. Bays and from her to third parties, emails to the hospital about her treatment, as well as a copy of a note in her journal in support of Mr. Bays' behaviour towards her. The Justice of the Peace declined to admit this evidence and did not look at it. He also said near the end of the hearing that she was "alleging things [and had] nothing to back it up". Ms. Dindia responded "Well, let's see here" but the Justice of the Peace moved immediately into his decision to grant the peace bond and did not entertain any of Ms. Dindia's external evidence. In his ruling, the Justice of the Peace noted that neither of them was able to provide other witnesses to testify about what was going on. Given his reliance on the absence of objective evidence, it was a denial of Ms. Dindia's rights to a fair trial not to consider

whether she had further relevant evidence, either documentary or third party, and give her an opportunity to provide it.

[37] Other concerns were raised by counsel for Ms. Dindia. He argued that the Justice of the Peace helped Mr. Bays more than he did Ms. Dindia. On review of the transcript, I agree that the Justice of the Peace prompted Mr. Bays by asking questions while he was testifying in chief. I believe this was because Mr. Bays, as a self-represented person, although with some support from a Victim Services worker who was present in court, needed the assistance in order to communicate his concerns. By contrast, it is evident from the transcript that Ms. Dindia had a good flow of language, and was able to address almost all of the points Mr. Bays raised, both orally and in his statement, without prompting from the Justice of the Peace. Although she did not address every allegation set out by Mr. Bays, she did respond to the majority of them. I do not believe her right to a fair trial was infringed by the additional assistance provided by the Justice of the Peace to Mr. Bays during his examination in chief.

[38] Counsel for Ms. Dindia also raised concerns that the Justice of the Peace provided insufficient explanation of the process at the outset of trial and during the trial. Once again, while the explanations could have been more extensive, especially with respect to the nature of cross-examination, my review of the transcript does show that the basics of the process of an application for a peace bond, including the requirement to give evidence, the ability to question the other party, and make final submissions were explained.

[39] I conclude that the following failures of the Justice of the Peace in the hearing resulted in a denial of Ms. Dindia's right to a fair trial:

- failure to explain fully the test for and consequences of a recognizance and peace bond;
- failure to suggest she speak to a lawyer and offer an adjournment; and
- failure to consider more fully the additional evidence she wanted to submit.

II. Failure to arraign and require Ms. Dindia to enter a plea

Legal Principles

[40] An arraignment of the defendant is required by s. 801 of the *Criminal Code*.

Arraignment

801(1) Where the defendant appears for the trial, the substance of the information laid against him shall be stated to him, and he shall be asked,

...

(b) whether he has cause to show why an order should not be made against him, in proceedings where a justice is authorized by law to make an order.

[41] The Court in *Bergeron v. Vaneltsi*, a similar summary conviction appeal of the issuance of a peace bond on the basis of a flawed procedure at trial, endorsed the reasoning of the Ontario Court of Appeal in *R. v. Mitchell* (1997), 36 O.R. (3d) 643 (O.N.C.A.). In that case, the Court of Appeal held that failure to arraign was a procedural error, curable by s. 686(1)(b)(iv) of the *Criminal Code*, as long as the error did not go to the court's jurisdiction over the type of offence charged, and the failure to read the charges did not cause the accused any prejudice. The Court of Appeal further wrote at para. 27 that:

Arraignment is intended to ensure that an accused is aware of the exact charges when he or she elects and pleads.

Arrestment also ensures that all parties to the proceeding have a common understanding of the charges which are to be the subject matter of the proceedings which follow.

[42] In *Bergeron v. Vaneltsi*, the Court held that the failure of the Court to arraign the accused formally prejudiced her and prevented her from knowing the case she had to meet. It was not a curable error.

Analysis

[43] In this case, Ms. Dindia was not arraigned and she did not enter a formal plea. As noted above, the Justice of the Peace did not wait for her answer as to whether she understood what the matter was “all about”. The Justice of the Peace did ask for Ms. Dindia’s position on the peace bond, asking “are you against this or are you okay”. Ms. Dindia responded “I’m against it.”

[44] Given the testimony of Ms. Dindia, in which she addressed almost all of the concerns raised by Mr. Bays, in my view the curative provision in s. 686(1)(b)(iv) can be applied. I do not think Ms. Dindia was prejudiced by the failure to arraign or plead formally, as it was clear at the outset she was contesting the application and her detailed testimony showed she understood the factual allegations.

III. Incorrect Legal Test for Peace Bond

Legal Principles

[45] Section 810 of the *Criminal Code* provides that a justice is required to satisfy himself or herself on a balance of probabilities that the person who lays the information, in this case Mr. Bays, has reasonable grounds, subjectively and objectively, to fear that the defendant, in this case, Ms. Dindia, will cause personal injury to him, or his intimate partner, or damage his property.

[46] In this case, as noted above at paragraph 17, the Justice of the Peace concluded that Mr. Bays and Ms. Dindia do not like each other, do not want to have any part of each other, and so he was “tempted to grant the peace bond only to make sure that there’s something in there to keep you apart”. The Justice of the Peace did grant the peace bond for one year with a no contact order between Mr. Bays and Ms. Dindia. In order to arrive at that conclusion, he made no assessment on the evidence that Mr. Bays had objectively reasonable grounds to fear that she would cause personal injury to him or damage his personal property. He relied on the fact that Mr. Bays expressed concern for his safety, a subjective assessment. After acknowledging that they both told him that they feared the other, he made no findings of whether objectively Mr. Bays’ testimony supported the reasonable grounds for his fear.

[47] I conclude that the Justice of the Peace did not apply the correct legal test for the issuance of a peace bond.

CONCLUSION

[48] The appeal is allowed, the decision of the Justice of the Peace is quashed, and a new trial is ordered.

DUNCAN J.