SUPREME COURT OF YUKON

Citation: *R. v. Etzel*, 2014 YKSC 64

Date: 20141121
S.C. No. 13-01517
Registry: Whitehorse

Between:

HER MAJESTY THE QUEEN

And

JUSTIN LEO ETZEL

Before: Mr. Justice R.S. Veale

Appearances:

Leo Lane	Counsel for the Crown
Malcolm E.J. Campbell and Lauren Whyte	Counsel for the defence

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is an application by the Crown for a change of venue for a jury trial from Ross River, Yukon, to Whitehorse, Yukon.

[2] Justin Etzel has been charged with sexually assaulting the complainant, who was under 16-years of age, in Ross River, Yukon, between June and September 2012, contrary to s. 271 of the *Criminal Code*.

[3] The Crown applied to have the complainant and another witness testify at trial outside the courtroom. Gower J. granted the application in *R. v. Etzel,* 2014 YKSC 50, and authorized their testimony outside the courtroom by way of closed circuit television ("CCTV"). He did so with the knowledge that the portable CCTV equipment, presently

used for trials outside of Whitehorse, would not be adequate for the purposes of trial, as it would not permit proper recording of the evidence.

[4] Gower J. also addressed the issue of a change of venue as it was a submission of defence counsel that granting the CCTV application was in effect a change of venue for the trial. Gower J. suggested at para. 24 of his decision that:

> … the desirability of holding trials in the community of origin must occasionally give way to those circumstances where the testimonial accommodation cannot be provided in that community, unless the accused persuades the court otherwise.

[5] Counsel for Mr. Etzel wishes to do precisely that and opposes this application for a change of venue from Ross River to Whitehorse.

BACKGROUND

[6] Ross River is a small community of 374 persons, the majority of whom are members of the Ross River Dena Council. The community has no hotel or restaurant so the court party has to travel to and from Faro, Yukon, daily, a round trip of 100 km, where there is accommodation and a restaurant. Faro is predominantly non-aboriginal and has a similar population size.

[7] It is no secret that jury selection is problematic in such a small community where many people are related. It is also the case that even when people are not related, everyone knows each other or at the very least knows of each other. If the court is unable to select a full jury in Ross River, which has occurred before, the court then reconvenes in Faro, to continue jury selection. When the jury selection is complete, the trial continues in Ross River at the Community Centre with the Faro jurors travelling from Faro each day. Needless to say, this is a logistical nightmare for the Sheriff who

must prepare jury panels in each community and transport the Faro jurors and the court party to and from Ross River each day.

EVIDENCE

[8] Ms. Sheri Blaker, Director of Court Services, testified that the court's existing portable CCTV equipment is not compatible with the court's digital audio recording system ("DARS") which resulted in no usable transcript record in a previous unrelated trial due to microphone feedback and other technical issues. I indicated to counsel that I was the trial judge on the unrelated case and added that the jury also had difficulty hearing the complainant in that case. Since that case, it has been my practice not to use the existing portable equipment to avoid a malfunction and possible re-trial.

[9] However, additional resources could at least alleviate the concern about a usable transcript of the evidence at trial. One option would be to have a contract technician attend at Ross River to set up recording equipment to ensure recording quality at an estimated cost of $3,000. Alternatively, a court reporter (not presently required with DARS) could attend to independently record the CCTV evidence so that a transcript can be prepared.

[10] The optimal solution is for the Yukon Government to purchase a portable CCTV system compatible with DARS, although there was no evidence on the likelihood of this in the next capital budget nor an estimate of its cost. However, Ms. Blaker did indicate that Court Services was currently developing permanent CCTV systems for Watson Lake and Dawson City, the two largest communities outside Whitehorse with populations of 1,489 and 1,998 respectively, as indicated in the June 2014 Population Report prepared by the Yukon Bureau of Statistics.

[11] I should add that approximately 28,000 of Yukon's population of 36,000 reside in Whitehorse.

THE LAW

[12] Section 599(1)(a) of the *Criminal Code* provides that the location of a trial may be changed where "it appears expedient to the ends of justice."

[13] In *R. v. Daunt*, 2005 YKSC 33, at para. 7, the following principles were applied on the issue of whether a fair and impartial trial could be held:

> 1. a criminal trial should be held in the place in which the crime is alleged to have occurred;
>
> 2. the applicant must establish, on a balance of probabilities that a fair and impartial trial cannot be held in Dawson City;
>
> 3. the discretion to change the location must be exercised judicially, that is on a principled basis;
>
> 4. the applicant must be able to demonstrate that the partiality or prejudice established cannot be overcome by safeguards in jury selection which include peremptory challenges, challenges for cause and trial judge instructions to the jury.

[14] In *Daunt*, a jury trial to be held in Dawson City, the deceased and the accused Daunt were widely known and there had been a petition in support of Mr. Daunt's bail application as well as thirty to thirty-five letters of support. With a population of approximately 1,800 residents at that time, I granted defence counsel's application to move the second degree murder trial to Whitehorse. The defence application was supported by the Crown as there were settled views in the community that cut both ways.

[15] In *R. v. Hainnu*, 2011 NUCJ 14, the Crown applied for videoconferencing and a change of venue to Iqaluit where two 15-year-old female complainants wished to testify by videoconference. Kilpatrick J. concluded:

> 109 This Court does not lightly entertain changes of venue to a different community. Every effort is made to hold trials in the community of origin. There is great value to the community in doing so. It is particularly important in Nunavut for the local community to see justice being done. However, the long-standing practice of this Court may occasionally have to yield to necessity.
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> 110 In the circumstances of this case, the Court is satisfied that the overall benefits accruing to the administration of justice through a change of venue exceed the public benefits associated with access to justice in the community of origin. A change of venue from Community X to Iqaluit is therefore ordered with respect to all four matters.

[16] I note that Kilpatrick J. balanced the overall benefits to the administration of justice with the public benefit associated with access to justice in the community of origin as opposed to the right of the accused to have a jury of his or her peers in the community versus Iqaluit. Counsel for Hainnu did not oppose the change of venue application but counsel for the other three accused did oppose the application. The case also had an added technical aspect in that the complainants would not be in another room in the courthouse but would be testifying from a treatment facility in Saskatchewan. The evidence was that the complainants were at risk of harm and should not be removed from their support network and exposed to the trauma of testifying in open court.

POSITIONS OF COUNSEL

[17] The Crown submits that the community of Ross River has a lot of unknowns and even with the added technical assistance, the portable CCTV equipment may not be

adequate for the purpose. The Crown also submits that there is no guarantee that there will be a jury from Ross River resulting in holding the trial in Faro which could have the same technical unknowns.

[18] The Crown also raises the concern that the portable CCTV may not accommodate the complainant seeing her own videotaped statement played to her, which can be done in Whitehorse. He intends to play the videotaped statement to the complainant.

[19] Defence counsel submits that there are two issues raised to support the change of venue. The first is the additional expense of some $3,000 which he says should be a non-issue. The second is that there is a very low threshold under s. 486.2(1) of the *Criminal Code* and counsel is concerned that it be ordered on a regular basis thereby depriving the accused of the benefit of a jury in his own community.

[20] Counsel also suggested that the court should order the Department of Justice to order the required equipment.

[21] In any event, if the Court grants the change of venue, counsel submits that the Court should order the Crown to pay the expenses for defence witnesses to attend in Whitehorse.

ANALYSIS

[22] I should say that at the outset I advised counsel that I was familiar with the portable CCTV and found it inadequate from the standpoint of judge and jury being able to hear the evidence of the out-of-court complainant.

[23] Added to this is the logistical complexity because of the lack of accommodation or food services in Ross River and the real possibility that we will not be able to get a jury in Ross River.

[24] That said, it appears that the issue of ensuring an adequate court record can be addressed. I indicated to counsel that the additional financial cost is not a consideration for the Court.

[25] In *R. v. Blackduck*, 2014 NWTSC 48, paras. 20 – 26, Smallwood J. lists many of the drawbacks to the practice of holding jury trials in small communities, not the least of which is the declaration of a mistrial when a jury cannot be selected. I agree with Smallwood J.'s observation that the concerns about holding jury trials in small communities must be considered in light of the court's obligation to prevent unreasonable delays in holding jury trials and to ensure that the rights enshrined in the *Charter* are fulfilled.

[26] The Crown is required to establish on a balance of probabilities that the change of venue is expedient to the ends of justice. I am satisfied that because of the risk of not getting a Ross River jury and the technical concerns with the portable CCTV equipment, the change of venue to Whitehorse should be granted. I am of the view, as expressed by Gower J., that this is one of those cases where the desirability of holding a trial in the community of origin must give way to the risk that the CCTV evidence cannot be accommodated.

[27] Counsel for the defence has raised the spectre that the Crown can raise a similar application for CCTV in many cases and deprive the accused of a jury of his peers. I am satisfied that the Court can ensure that this will not be abused and it appears that

appropriate technology will be in place in Dawson City and Watson Lake in the not too distant future.

[28] Pursuant to s. 599(3) of the *Criminal Code*, I order the Crown to pay the expenses of defence witnesses residing in Ross River that will be called at the trial in Whitehorse.

[29] Defence counsel has also indicated the potential for delay in this case as both counsel are not available for a July trial. I have asked the Trial Coordinator to canvas dates before July 2015, subject to counsel's availability.

VEALE J.