

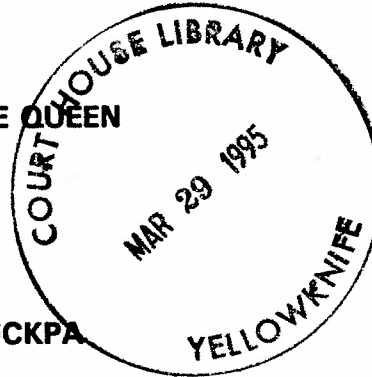
IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

PAULOOSIE MUCKPA



Crown application for change of venue. Denied.

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE J.Z. VERTES

Heard at Yellowknife, N.W.T.
on October 26, 1994

Judgment filed: October 28, 1994

Counsel for the Crown: L. Rose

Counsel for the Accused: V. Foldats

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REASONS FOR JUDGMENT

The Crown applies for a change of venue for the accused's trial.

Pauloosie Muckpa is charged in a four-count Indictment with sexual offences against two young boys. His trial is scheduled to be held before a judge and jury in Arctic Bay, the place of the alleged offences. Arctic Bay is an Inuit community of approximately 500 people at the northern end of Baffin Island.

Crown counsel submits that the atmosphere in Arctic Bay has been tainted against the prosecution so much so that it is unlikely that any jury selected for this trial would be impartial. The Crown relies on an affidavit from Rebecca Williams, a life-long resident of Arctic Bay, a former social worker and currently a community justice specialist employed by the Government of the Northwest Territories. The substance of her affidavit reads:

3. I have known Pauloosie Muckpa for many years. He is a long standing member of the community of Arctic Bay and he is a very active participant in the Anglican Church. He has been the highest Lay Reader in the Church, a People's Warden and a Sunday School teacher. He is held in high regard by the church congregation.
4. On April 13, 1994, Mr. Muckpa's preliminary Hearing was heard before Her Honour Judge Browne who denied the Crown application for closed court and he was committed to stand trial on two counts of sexual interference.
5. On April 17, 1994, I attended a Sunday Worship Service held at the Anglican Church in Arctic Bay. Reverend Aloolloo conducted the service and he advised the congregation that Pauloosie Muckpa had been charged with sexual offences involving young boys. He then went on to state, in Inuktitut, to the congregation "but we all know he didn't do that". An elderly man who was present then stated "We used to be able to teasingly play touch each other on the genital areas but we are being oppressed by the laws today and we can't live the way we want to anymore." The question was also raised whether he should continue his church duties as he had been asked to discontinue them and Reverend Aloolloo advised that if the congregation wanted him back, he could come back.
6. During the Anglican Church service held the following Sunday, the matter of Pauloosie Muckpa's criminal charges was again raised by the congregation. During the service Andrew Oyukuluk, a local Justice of the Peace, commented that he had heard the testimony of the children at the preliminary hearing and it sounded like an exaggeration of what really happened. L. L., the Grandmother of the complainant (D.O.), also spoke during the service. She advised the congregation that Pauloosie Muckpa is a good person in the Community, he has done good work and he has prayed for her when she has asked him to. The question was then discussed whether the accused could come back to church to hold Sunday school and to preach in the church as he had been banned from his duties in the school. A vote was taken and the majority (22/14) wanted

- the accused to resume his church duties.
7. Arctic Bay is a small Inuit community on Baffin Island with a population of approximately five hundred people. The vast majority of it's residents subscribe to the Anglican faith.
 8. I am of the opinion that the representatives of the Anglican Church in Arctic Bay have taken the position in public that Mr. Muckpa is innocent of the criminal charges he is facing. Since the Anglican Church is held in very high esteem in Arctic Bay, there is a reasonable probability of partiality to such a degree that it is very unlikely an impartial jury can be constituted to hold a fair and impartial trial in the matter of Pauloosie Muckpa.
 9. It is my opinion that the statements made by Reverend Aloolloo, Justice of The Peace Oyukuluk, and others regarding Mr. Muckpa's charges have exercised considerable influence on the people of Arctic Bay and would make a jury reluctant to render an impartial verdict as they would feel compelled to find him not guilty.

4

There was no evidence placed before me as to how many people were in attendance at the two church services referred to by Ms. Williams. Crown counsel conceded that one could fairly infer that, at least at the second service referred to by Ms. Williams in paragraph 6, there were 36 people present since that was the total vote taken in church. Information received from the Sheriff's office during this hearing revealed that there are 260 people on the community voter list from which the jury panel is to be selected and in fact a preliminary jury list with 175 names has already been prepared.

5 The reference in paragraph 4 by Ms. Williams to the denial of the Crown's application for a closed court at the preliminary hearing also needs to be put in context. The application was made on the basis that the two complainants, both of them being 9 years old, would be distracted by other people in the courtroom, causing a lack of concentration, and therefore they would not do as well as they could in giving their testimony. There was no suggestion that the complainants felt intimidated or pressured by members of the community. As it turned out both complainants testified in open court and the accused was committed to stand trial.

6 Crown counsel emphasized in his submission that the concern about improper influence on potential jurors is heightened by the prominent positions held by the Anglican minister and the local Justice of the Peace in this small community. Certainly it was improper for the Justice of the Peace, even though he is a lay person, to comment on the evidence given at the preliminary hearing.

7 Defence counsel submits that the concern about lack of impartiality in prospective jurors is merely speculative. The comments made in church may have only affected a small group of people in the community and those incidents took place over 6 months ago. He also argues that the discussions in church reveal nothing more than that the congregation were trying to decide whether or not to allow the accused to resume his church activities, not whether he was guilty or innocent of these charges.

The defence relies on an affidavit from Judah Taqtu, the mayor of Arctic Bay.

His affidavit reads:

2. THAT I am familiar with the general circumstances of the case before this Court - that there are allegations that the accused Pauloosie Muckpa touched boys in a sexual manner while he was the janitor at our local school
3. THAT based upon my discussions with many members of this community, there is no general bias, for or against, the accused with respect to his charges, nor is there any concern that holding the trial here would cause divisiveness or turmoil in the community.
4. THAT our community has a long standing tradition of community justice, in particular, we have the Innumarit, who attempt to deal with criminal justice matters within the community.
5. THAT our traditional system of justice requires us to be fair and impartial, just like the jury system.
6. THAT the members of my community strongly feel that they should have input into the criminal justice system, including participation in the jury system.
7. THAT the members of my community feel that any trial regarding criminal matters should take place where the alleged offence occurred. We should be able to see for ourselves what the evidence is.
8. THAT I have not heard and do not believe that the majority of community members want this trial moved to a different place.
9. THAT I am told that Reverend Allooloo and other members of the Anglican Church made comments regarding this case which could be interpreted as belief in Pauloosie Muckpa's innocence.

- 10. THAT I am confident that the system of challenges and warnings by the trial judge would eliminate all biased persons from the jury and that it is very likely that an impartial jury can be selected in Arctic Bay for this matter.
- 11. THAT it is my opinion that the statements made by Reverend Allooloo and others regarding Mr. Muckpa's charges have not exercised considerable influence on the people of Arctic Bay and would not make a jury reluctant to render an impartial verdict.
- 12. THAT it is my opinion that the jury oath, which requires a juror to swear to God that he or she will give a true verdict according to the evidence, is protection against any suspected influence from Church members.
- 13. THAT based upon my knowledge of the people of Arctic Bay, it is my opinion that an impartial and fair jury can be selected in this case.

9 This application requires the balancing of two principles: one being the desirability of holding the trial in the community where the offence is alleged to have taken place; the other being the necessity for an impartial jury. I do not say these are necessarily competing principles nor do I say that either one of them favours the defence or the prosecution in particular. As noted by L'Heureux-Dubé J. in R v. Sherratt (1991), 63 C.C.C. (3d) 193 (S.C.C.), at page 204:

The perceived importance of the jury and the Charter right to jury trial is meaningless without some guarantee that it will perform its duties impartially and represent, as far as is possible and appropriate in the circumstances, the larger community. Indeed, without the two characteristics of impartiality and representativeness, a jury would be unable to perform properly

many of the functions that make its existence desirable in the first place.

10 It is well known that in the Northwest Territories this court has, from its modern-day inception, travelled to the place of the alleged offence to hold jury trials. There are no judicial districts in the Territories but there are 61 communities (ranging in population from over 15,000 to under 50) spread out over 1.3 million square miles, with different ethnic groups, and a variety of languages and customs. It is in recognition of this diversity that the tradition of local jury trials, even in very small communities, developed. This court has in the past few years travelled on occasion to Arctic Bay to hold jury trials (the last time being in March of this year).

11 The practice of this court was described by Tallis J. in R. v. Lafferty (1977), 35 C.C.C. (2d) 183 (N.W.T.S.C.) at page 186:

Traditionally the Supreme Court of the Northwest Territories has held jury trials throughout the Northwest Territories in many small settlements regardless of whether or not adequate courtroom facilities are available. This practice evolved from the position taken by the first Judge of the Territorial Court, Mr. Justice Sissons who stated as a general rule that the proper place for a trial is the place where the offence was committed. In other words, every effort was made to ensure that justice was brought to all the communities in the Northwest Territories.

This practice was carried forward and improved upon by my immediate predecessor Morrow, J. However, as changes took place in society in this jurisdiction, Morrow, J., recognized that

the practice of holding a jury trial in a small community must be realistically applied and in appropriate cases, he did not hesitate to arrange to hold the trial in another settlement.

12 The "general rule" referred to in the above-noted extract is the common law rule that the trial be held in the place where the offence occurred and tried by people from the community of that place. This was referred to in R v. Cardinal (1985), 21 C.C.C. (3d) 254 (Alta.C.A.). That case dealt specifically with the issue of delay of trial caused by the accused being taken, after his arrest in British Columbia, to Alberta for trial. Kerans J.A. referred to the rule as possibly being one of fundamental justice (at page 257):

We do well to remember that this accused was to be brought back to Calgary for trial, not just as a convenience to witnesses or because of doubt about the jurisdiction of a British Columbia court, but also because it may be that the rules of fundamental justice give him the right to be tried at the sitting-place nearest the venue where he allegedly offended, which in this case is Airdrie, Alberta, a city-suburb of Calgary. As was observed in R v. Lynn (1910), 19 C.C.C. 129, 4 Sask.L.R. 324 (Sask. C.A.), this rule is not expressly stated in the Criminal Code, but is assumed: see, for example, Criminal Code, s.527 [now 599]. Salhany, Canadian Criminal Procedure, insists that (p. 17):

... The principle that the accused has a prima facie right to be tried in the county or district in which the offence is alleged to have been committed still prevails.

13 The test for deviating from the "general rule" is that set out in s.599 of the

Criminal Code: the place of trial may be changed "if it appears expedient to the ends of justice". The factors that may make it "expedient" to change venue depend on the circumstances. They include primarily the necessity to ensure that the accused has a fair trial before an impartial jury. They may also include factors such as community divisiveness or hostility (such as in Lafferty), oppression of complainants or witnesses, or a widespread public or systemic bias of some sort. But, as Tallis J. stated in Lafferty (at page 189): "The power to order a change in the place of a trial is discretionary and should be exercised with caution and only upon strong grounds."

14 A change of venue will not be ordered on the mere possibility of prejudice. Defence counsel referred to a presumption that jurors can be relied on to do their duty and decide the case only on the evidence. As noted by Doherty J.A. in R v. Parks (1994), 84 C.C.C. (3d) 353 (Ont.C.A.) , at page 360, this "presumption" is "well established, both as a fundamental premise of our system of trial by jury, and as an operative principle during the jury selection process."

15 I am not convinced that the Crown has put forth anything more than the possibility of prejudice in this case. The fact that 22 out of 36 people voted in church to restore the accused to his church duties bears no logical connection to a concern that an equivalent proportion of 175 potential jurors would vote for acquittal in a trial. The influence of a church minister, and a local Justice of the Peace, may be quite high

but so is that of a superior court judge in giving instructions to a jury.

16 There is no evidence in this case that holding the trial in Arctic Bay would be a source of divisiveness in the community. There is also no evidence of oppression or intimidation of the complainants nor that the type of conduct of which the accused stands charged (that is to say "criminal" touching as opposed to "accidental" or "playful") is something that is condoned by any sector of the community. There is no evidence that the accused belongs to some coercive element of the community that wields power over others. If any of these factors were present then my decision may be different.

17 In my opinion there are numerous safeguards to ensure a fair jury trial, including:

- (a) the instruction of the trial judge that the case is to be determined only on the evidence presented at the trial;
- (b) the jurors' oath which can be expected to bind the conscience of most persons who might otherwise be disposed to decide the case on the basis of their preconceptions;

- (c) any screening of the panel done by the trial judge prior to the actual selection process;
- (d) the statutory right to challenge for cause and peremptory challenges;
- (e) the dynamics of group decision-making so that individual reliance on personal preconceptions must be subdued under the scrutiny of eleven other jurors; and,
- (f) the seriousness of the jury's task and the solemnity of the trial process which can also be expected to focus the minds of the jurors on the evidence.

All of these factors, in one form or another, have been cited in many cases (see, for example, R v. Koyina, [1989] N.W.T.R. 337). There is no reason why they are not as applicable in Arctic Bay as anywhere else.

18

The judges of this court routinely make inquiries of a jury panel so that people may be excused if they are closely related to the accused or complainant, or if they have familiarity with the case, or if for any other reason they feel they could not be

impartial. If, through this process and the right to challenge, a jury cannot be selected from a 175 person panel, then there would be no choice but to move the trial to another community. But I am not convinced that will be the result in this case.

19 There is a further reason why I am reluctant to change the venue.

20 All studies made of the jury system point out that participating on a jury both educates and enhances regard for our system of justice. In the Sherratt case, L'Heureux-Dubé J., in commenting on the importance of the jury system, noted (at page 203) as one of its rationales that "it provides a means whereby the public increases its knowledge of the criminal justice system and it increases, through the involvement of the public, societal trust in the system as a whole." In a 1985 study, entitled Problems of Jury Trials in Small Jurisdictions, prepared for the Commonwealth Secretariat on the benefits and problems of jury trials in the smaller former colonies of the British Commonwealth, Sir John Spry wrote (at page 10):

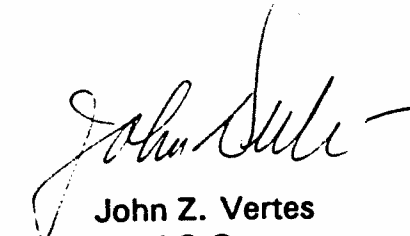
It should be added that it is most desirable that whenever possible, trials be held locally. This is particularly important where small communities are concerned, because there is usually a much greater interest taken in court proceedings. The public may have preconceived ideas and they may be disappointed if the verdict is other than they expected, but they will understand if some of them have attended the trial, listened to the evidence and heard counsel and the judge analyzing it and pointing out the gaps and inconsistencies. On the other hand, if the accused has been taken away for trial elsewhere, and the verdict was not what had

been expected, there will be suspicions of improper practices and "fixing".

These comments are apropos to the situation in this jurisdiction.

21 Many of the communities in the north are grappling with deep social and economic problems. One of the ways they are trying to come to grips with these problems is by development of community justice measures. In this way they can take on greater self-responsibility in addressing community problems. Arctic Bay is no different (as evidenced by the salutary fact that a full-time community justice specialist is working there). In my opinion the holding of jury trials in that community is one of the best ways of creating a sense of trust and "ownership" in the justice system. I do not think we should undermine that in the absence of strong evidence to show that a fair trial could not be held in the community.

22 For the foregoing reasons, the Crown's application is dismissed.


John Z. Vertes
J.S.C.

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Counsel for the Accused:

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CR 02572

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