

Date: 1997 07 15  
Docket: CR 03244

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

**HER MAJESTY THE QUEEN**

- and -

**BRYAN HENRY JEROME**

---

Application for (a) a declaration that the provisions of the **Criminal Code** requiring a timely re-election as to mode of trial are constitutionally invalid as offending the s.11(f) Charter right to the benefit of trial by jury, and (b) a declaration that the accused's waiver of his s.11(f) Charter right was not an informed and voluntary waiver. Application dismissed.

Heard at Yellowknife February 14, 1997 and March 20, 1997

Reasons filed: July 15, 1997

---

REASONS FOR JUDGMENT OF  
THE HONOURABLE JUSTICE J.E. RICHARD

---

Counsel for the Accused: Paul Bolo

Counsel for the Crown: Diane Sylvain

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

**HER MAJESTY THE QUEEN**

- and -

**BRYAN HENRY JEROME**

REASONS FOR JUDGMENT

[1] This case concerns a challenge to the constitutional validity of the provisions of s.561(1)(c) of the **Criminal Code** which restrict the time within which an accused person might re-elect his mode of trial. The accused in this case also submits that his earlier waiver of the benefit of trial by jury is not a valid waiver. This Court dismissed the accused's application for relief on these grounds, with reasons to follow. These are those reasons.

[2] The accused was charged with an indictable offence punishable by a maximum of 10 years imprisonment. The **Canadian Charter of Rights and Freedoms** thus guarantees him the benefit of trial by jury, if he so chooses. When the accused was asked to elect his mode of trial, he refused to do so; accordingly, he was deemed to have elected trial by jury. On the date set for his preliminary inquiry in Territorial Court, he re-elected to be tried by a Supreme Court judge. He waived the holding of the preliminary inquiry and was ordered to stand trial in this Court.

[3] A few months later, and shortly before his trial date in this Court, the accused advised that he wished to re-elect his mode of trial again, to trial by jury. He sought the consent of the prosecutor which consent was denied.

[4] The prosecutor's consent is required in these circumstances by virtue of the provisions of s.561(1) of the **Criminal Code**.

561(1) An accused who elects or is deemed to have elected a mode of trial other than trial by a provincial court judge may re-elect

(a) at any time before or after the completion of the preliminary inquiry, with the written consent of the prosecutor, to be tried by a provincial court judge;

(b) at any time before the completion of the preliminary inquiry or before the fifteenth day following the completion of the preliminary inquiry, as of right, another mode of trial other than trial by a provincial court judge; and

(c) on or after the fifteenth day following the completion of the preliminary inquiry, any mode of trial with the written consent of the prosecutor. (emphasis added)

[5] With the assistance of new counsel, the accused then launched the within application. He seeks alternate forms of relief, set forth in his Notice of Motion as follows:

“1. A declaration that s.561(1)(c) of the **Criminal Code** of Canada contravenes s.11(f) of the **Charter of Rights and Freedoms** and relief under s.24 of the **Charter of Rights and Freedoms** by way of Bryan Henry Jerome being granted a further re-election without the requirement of any consent from the Crown.

2. In the alternative, that the re-election of Bryan Henry Jerome entered by Bryan Henry Jerome in Territorial Court on August 21, 1996 be set aside as having been a decision made without said accused being fully aware or informed as to the impact of said re-election.”

### **Constitutional Validity of s.561(1)(c) C.C.**

[6] The constitutional right at issue here is not a right to re-election at any time but rather the right, guaranteed in s.11(f) of the **Charter**, to the benefit of trial by jury:

11. Any person charged with an offence has the right...

(f) ...to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment.

[7] The right to the benefit of a jury trial can be waived, as can other Charter rights. *R v Turpin* (1989) 48 C.C.C.(3d) 8 (S.C.C.).

[8] The **Criminal Code** (s.536) contains provisions which allow an accused person to choose his mode of trial, in particular, whether he wishes to afford to himself the benefit of trial by jury. The Code further provides, in s.561 cited above, that an accused may **re-elect** the mode of trial in certain circumstances. He must do so in a timely manner; otherwise, he must obtain the consent of the prosecutor.

[9] It is clear that in order to have some procedural certainty in the administration and scheduling of criminal cases there must be some rules regarding the timeliness of re-elections. An accused can change his mind after his initial election, but procedural rules are needed to prevent last-minute re-elections and administrative inconvenience to the justice system.

[10] Parliament has enacted such procedural rules in the **Criminal Code** and has amended these rules from time to time. The present rules are set forth in s.561. Their purpose is to provide for an orderly administration of justice that will not be undermined by late and untimely re-elections by accused persons as to the mode of trial desired. *R. v C.K.L.* (1988) 49 C.R.R. 339 (Ont.Dist.Ct.).

[11] This accused's present counsel acknowledges that the provisions of s.561(1)(c) C.C. have a valid legislative purpose. He concedes that to allow an accused person the right to change his mind at any time as to the mode of trial would lead to inconvenience, delay, abuse and chaos in the judicial system. He submits, however, that the procedure chosen by the state here to ensure the orderly administration of justice does not meet the proportionality test in *R v Oakes* in its interference with an accused's right to the benefit of trial by jury.

[12] It is submitted on behalf of the accused that there is no rational connection between the "cut-off date" in s.561(1)(c) C.C. and the objective of ensuring that the administration of justice is not thwarted by tardy re-elections. I disagree. As stated in *R v Ruston* (1991) 63 C.C.C.(3d) 419 (Man.C.A.), the significance of the preliminary inquiry as the event which triggers the cut-off date for re-election is that it is at the preliminary inquiry that the accused will ordinarily be apprised of the case he has to meet. That information or knowledge can further assist him in the final decision on whether to change his mind about mode of trial. It is not unreasonable to require the accused to make his final decision shortly after the preliminary inquiry. There has to

be some cut-off date, and it is only logical that that date relate to the conclusion of the preliminary inquiry.

[13] The accused's counsel also points to the affidavit evidence submitted with respect to procedures followed in the Sheriff's office in preparation for a criminal jury trial. That affidavit indicates that (a) the process of compiling a jury list and sending out jury summonses generally takes one day, and (b) jury summonses are generally sent to the community for service approximately six weeks in advance of the trial date. Counsel cites this evidence in asserting no rational connection between the cut-off date in s.561(1)(c) and the orderly administration of justice. With respect, this submission overstates the import of the preparation of jury lists and summonses in the overall administration of justice. There is much more involved in the orderly scheduling and administration of criminal jury trials (particularly in this jurisdiction) than these important activities in the Sheriff's office.

[14] In all the circumstances, I am not satisfied that the procedural requirements in s.561(1)(c) C.C. constitute an infringement or denial of an accused's right to the benefit of trial by jury as guaranteed in s.11(f) of the Charter. In the context discussed here, such provisions only come into play **after** an accused has given an informed waiver of his s.11(f) right. In any event, I find that any limitation on the s.11(f) guaranteed right that might be found within s.561(1)(c) is reasonable, fair, and rationally connected to the orderly administration of justice.

[15] Accordingly, the request for relief under s.24(2) of the Charter fails.

[16] Counsel cited other cases wherein s.561 C.C. came under Charter attack. In *R v Forbes* (1987) 89 A.R. 76 (Alta.Q.B.), *R v C.K.L.* (1988) 49 C.R.R. 339 (Ont.Dist.Ct.), and *R v Savage* (Que.C.A., 1990, #500-10-000378-883, unreported) the statutory provisions were held to be constitutionally valid. In *R v Mohammed* (1990) 60 C.C.C.(3d) 296 (Man.Q.B.) and *R v K.J.F.* (1993) 123 N.S.R. (2d) 142 (N.S.C.A.) the accused's contention that the prosecutor's refusal to provide consent under s.561(1)(c) constituted a violation of the accused's s.11(f) Charter right was unsuccessful. In each of *R v Ruston* (1991) 63 C.C.C.(3d) 419 (Man.C.A.) and *R v Bennett* (1993) 83 C.C.C.(3d) 50 (Ont.Prov.Ct.) the Court specifically declined to declare the statutory provisions invalid, however, did "read down" those provisions to allow the applicant-accused relief from the statutory cut-off date for re-election. In these latter two cases, such relief was granted because of the particular facts in each of those cases, facts which distinguish *Ruston* and *Bennett* from the instant case.

### **Informed Waiver of Right to Jury Trial**

[17] It is submitted by the accused, in the alternative, that his re-election before a Territorial Court judge on August 21, 1996 does not constitute a valid, informed waiver of the benefit of trial by jury.

[18] The transcript of the August 21, 1996 proceedings indicates that the accused was represented by competent counsel at that time and that the accused made an unequivocal re-election to trial by Supreme Court judge.

[19] The accused gave *viva voce* testimony on this aspect of the within application. That testimony included a disjointed, incomplete and vague version of events leading up to the August 21, 1996 Court appearance, in which he suggests that certain police officers visited him at the Yellowknife Correctional Centre and induced him into the re-election. He says that the police told him “that they would help me out in Court if I pleaded guilty to a lesser charge”.

[20] Sworn affidavits of the four named police officers were filed in the Court, refuting the accused’s version. They state that in the summer of 1996 the accused contacted them and offered to become an undercover agent or informant for the police in drug investigations, but that this offer was declined by the police. The contents of these affidavits were not challenged by any cross-examination.

[21] When questioned in the witness chair, the accused could not say exactly what it was that the police promised to do for him. He said he really did not expect anything. He was simply “grateful”, he says, for their cooperation, but later became disillusioned when the police would not return his phone calls.

[22] I am not satisfied, on the evidence adduced, that there was any contact between the police and the accused which was in any way related to his re-election on August 21, 1996, thereby waiving his right to trial by jury.

[23] The accused is a veteran of the court system. By his own evidence, he knew exactly what he was doing on August 21, 1996. He had competent legal representation. He made an informed choice of his mode of trial. He made an informed decision to waive the holding of a preliminary inquiry. He voluntarily waived the benefit of trial by jury, a right afforded to him by s.11(f) of the Charter.

[24] For these reasons, the accused’s application is dismissed.

J.E. Richard,  
J.S.C.

Dated at Yellowknife, NT  
this 15th day of July 1997

Counsel for the Accused: Paul Bolo  
Counsel for the Crown: Diane Sylvain

IN THE SUPREME COURT  
OF THE NORTHWEST TERRITORIES

---

---

BETWEEN:

HER MAJESTY THE QUEEN

- and -

BRYAN HENRY JEROME

---

---

REASONS FOR JUDGMENT OF THE  
HONOURABLE JUSTICE J.E. RICHARD

---

---