CR 03291

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

ROBERT ABEL

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

Transcript of a Decision delivered by Honourable Justice J.E. Richard, sitting at Yellowknife, in the Northwest Territories, on Friday, June 20, A.D. 1997.

APPEARANCES:

Mr. J. Posynick: On behalf of the Appellant

Mr. D. Garson: On behalf of the Respondent

(Charges under ss. 175(1)(a) and 264.2(1)(a)(x2) of the Criminal Code)

THE COURT: I will now give the Court's decision on the appeal of Robert Abel with respect to his conviction and sentencing in Territorial Court in February of this year.

The first ground of appeal relates to the failure of the trial judge to disqualify himself as presiding judge for Mr. Abel's trial in Territorial Court. The background to this submission is that the trial judge, His Honour Judge Bourassa, had, on an occasion some two years earlier, adjudicated at another criminal proceeding involving Mr. Abel, and at that time, in the context of that earlier case, made an adverse finding against Mr. Abel's credibility as a witness at that earlier criminal proceeding.

On the eve of the trial date for the present criminal charges in February of this year, Mr. Abel made a motion for a ruling that his trial should be conducted before a Territorial Court judge other than Judge Bourassa. Judge Bourassa heard submissions on the motion and he declined to withdraw, or recuse, as the scheduled trial judge for the reason requested.

In his factum, Mr. Abel's counsel poses the question: "Did the learned trial judge err in adjudicating on a motion alleging a reasonable apprehension of bias?" I note however, that when the motion was originally put before Judge Bourassa, Mr. Abel's then counsel stated specifically, and he

took some pains to say this, that bias was not being alleged. However, it was, in any event, in reality, an allegation of apprehension of bias.

I find that there is no merit in the proposition that the Honourable Judge Bourassa should have referred the question to another judge of the same court. There is no jurisdiction or authority for one Territorial Court judge to rule on whether another Territorial Court judge should sit or preside at a particular trial, with the possible exception of the chief judge of the Court and then only in his administrative capacity as chief judge in charge of judicial assignments generally.

I note that Mr. Abel did not move, in this court, for any prerogative remedy such as an order of prohibition against His Honour Judge Bourassa or an order in the nature of certiorari quashing the decision of Judge Bourassa, nor did Mr. Abel make any application in this court for Charter relief on grounds of want of an impartial tribunal. Instead, he simply sought to be tried in Territorial Court by a judge other than His Honour Judge Bourassa for the sole reason that Judge Bourassa had made a finding adverse to him in an unrelated case two years earlier.

I find that Mr. Abel's motion, framed as it was, was properly before Judge Bourassa as the Territorial Court judge scheduled to be the presiding trial judge.

It is Mr. Abel's contention that once he filed his motion, then another judge ought to have been assigned to the case. I find no merit in that contention. It is not for a litigant, civil or criminal, to determine which judges will or will not preside over that litigant's court proceedings.

In any event, I find that the trial judge made no error in his denial of the request for disqualification on the grounds of apprehended bias.

It was for Mr. Abel to show a real likelihood of bias. It was for Mr. Abel to show that a reasonable person, a bystander, informed of all of the circumstances would think that Mr. Abel was not going to be tried by an impartial judge. Mr. Abel, on that motion, did not establish a real likelihood of bias.

There is an assumption of judicial impartiality. It is inevitable that in a jurisdiction like ours, where there is a small number of judges, it is inevitable that any trial judge will on occasion have before him or her an accused person with whom he or she has had prior judicial contact.

Trial judges are capable of disabusing their minds of evidence that they have heard before, evidence which as a matter of law is not admissible when considering the guilt or innocence of the accused in relation to the specific charges before them. Prior judicial contact per se is not sufficient to establish an

apprehension of bias or a real likelihood of bias.

The other grounds of appeal from conviction refer to the finding of the trial judge that the Crown had established the mental element, or the mens rea, that is necessarily part of the crime of uttering threats under Section 264.1 of the Criminal Code. I have carefully reviewed the transcript of the evidence and of the reasons given by the trial judge upon convicting the accused, the appellant, and I am unable to find any error made by the trial judge in that regard.

The transcript indicates that the trial judge clearly identified the issue as intent, that he recognized that Section 264.1 offences require specific intent, and he recognized that the Crown had to establish that Mr. Abel knowingly uttered the threats in question. The trial judge considered the evidence and found that the appellant was upset at the police at the time of his arrest, that he was quite agitated about the fact of being arrested and of being detained in the cells, that he was swearing at and was otherwise abusive to the police officers. The trial judge noted certain indicia that led him to conclude that the appellant had an operating mind at the time of making the threats, that he repeated the threats, and that he displayed a clear animus towards the police for arresting him.

The trial judge concluded, properly, in my view,

that the appellant made those threats knowingly and intending to intimidate the police officers and the civilian guard. That was a reasonable inference for the trial judge to draw with respect to the state of mind of Mr. Abel at the time in question.

Counsel points to the use by the trial judge of the expression "continuum of consciousness" and suggests that this was an improper use by the trial judge of evidence on one count as evidence in support of a conviction on another separate account. In my view, the use by the trial judge of the expression "continuum of consciousness" was a comment made to simply indicate that the appellant was, for a period of one or two hours following his arrest, awake and alert to what was happening and what had recently happened, and this notwithstanding the fact of his then intoxication. There was indeed evidence before the trial judge to support that observation.

The submission that this amounted to using similar fact evidence in circumstances not permitted by the Rules of Evidence is, in my respectful view, without merit. There was no issue of similar facts in this case. There was simply a narrative provided by three eyewitnesses of the conduct and behaviour of the accused man over a one or two-hour period.

For these reasons, the appeal from conviction fails.

I turn now to the sentence appeal.

Mr. Abel's complaint about the sentence he received is that he did not get fair credit for the time he spent in pre-trial detention and, also, that generally the total sentence of 17 months is too harsh in the circumstances.

Again I say that I have now had an opportunity to carefully review the Reasons given by the trial judge in imposing sentence and to carefully consider the representations of counsel for Mr. Abel and for the Crown on this aspect of the appeal.

In addressing himself to the issue of remand time, the trial judge considered that the fact that the appellant was unable to obtain his release pending trial was to a large extent due to his own background of violence and of disobeying court orders. That is a proper and reasonable consideration, in my view. In other words, it is not a situation where the only thing that caused him to lose his liberty was the fact of this pending charge.

The trial judge also took into account when determining the amount of pre-trial -- or when determining how the amount of pre-trial custody would affect the ultimate sentence, he took into account that Mr. Abel bore some responsibility himself for the delays in getting the matter on for trial. Again, I find that this is a proper and reasonable consideration

when weighing the impact that remand time will have on the ultimate sentence.

When one reads carefully the reasons of the trial judge in imposing sentence, it is abundantly clear that the trial judge indeed took the six months remand time into consideration and that he indeed reduced the total sentence that would otherwise have been imposed except for the fact of the pre-trial detention. The trial judge simply gave that credit in a particular way.

In my view, there is nothing inappropriate or incorrect in law in reducing the total sentence through the mechanism of making individual sentences concurrent or by reducing the proposed sentence on some counts and not on others. What Mr. Abel must remember and acknowledge is that he was not facing a maximum sentence of 18 months, but, rather, he was facing a maximum sentence of 18 months imprisonment for each of two separate threats, two separate crimes, two separate convictions, and facing yet a further six months for the third threat or the third conviction. The maximum sentence was not 18 months but, rather, 42 months. His sentence, in the circumstances found by the trial judge, was nowhere near 42 months but, one could say, was a mere 17 months.

My role at this stage is simply to determine whether the sentence imposed was an unfit one. In other words, is it unreasonably excessive? I'm not

convinced that it was and I dismiss the appeal from sentence as well. So Mr. Abel's appeals are denied and he will be returned to the correctional authorities to serve his sentence.

Anything further?

MR. POSYNICK: Sir, there is the issue of his being kept in custody until his return to the south. It's an administrative matter, of course, for correctional facilities to deal with. But the original Removal Order specified that he would be returned into the hands of the R.C.M.P. pending his removal south, and what my friend and I have agreed to is to amend that Removal Order so he will be placed at YCC for the time being until his removal south so that he will not spend time in the R.C.M.P. cells.

THE COURT: Could I see the Removal Order?

MR. POSYNICK: This is the amended -- if I may assist, sir. What the amendment really does is allows Mr. Abel to go into YCC where he might be dealt with administratively in terms of his return, and, in the meantime, permits the R.C.M.P. to keep him out of their holding cells for the time being as well.

THE COURT: He's a YCC tenant temporarily down south?

MR. POSYNICK: Yes, that's correct.

THE COURT: So you want to get him back to his landlord?

MR. POSYNICK: Exactly.

THE COURT: The Crown has no difficulty with this?

MR. GARSON: No, My Lord.

THE COURT: I take it, Mr. Posynick, since the Removal Order was drafted by your office, it was simply a slip at that time. It's not that there has been any change.

MR. POSYNICK: No.

THE COURT: It should have originally read this?

MR. POSYNICK: Well, I don't know if it should have, sir, at the time. But certainly the prospect -- if this was the middle of the week, presumably he would be returned immediately, but we're on a Friday afternoon.

THE COURT: I see. He's not necessarily going to stay at YCC.

MR. POSYNICK: He's not going to necessarily stay there. It will be a temporary landlord.

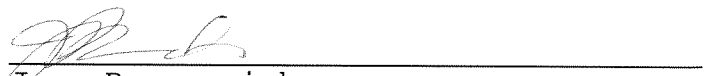
THE COURT: Fine. Then an order is issued amending the earlier Removal Order of May 30th as presented.

MR. POSYNICK: Thank you.

(PROCEEDINGS CONCLUDED)

.....

Certified pursuant to Practice
Direction #20 dated December 28, 1987



Jane Romanowich
Court Reporter