CR 03704

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HANK MARK LAFFERTY

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

Transcript of Reasons for Decision on an Appeal delivered by The Honourable Justice J.Z. Vertes, sitting at Yellowknife, in the Northwest Territories, on May 6, A.D. 1999.

APPEARANCES:

Mr. A. Mahar:	On behalf of the Appellant
Ms. L. Colton:	On behalf of the Respondent

THE COURT: The appellant, Hank Mark Lafferty, appeals his convictions by a Territorial Court judge on three charges. His appeal and a Crown cross-appeal on sentence were abandoned.

The appellant raises two grounds of appeal. One applies to all charges while the other applies specifically to one of the charges, that being a charge of assault on his spouse.

The first ground relates to an issue of trial fairness. The trial commenced on October 28th, 1998. At the close of the Crown's case, the appellant dismissed his counsel. The trial judge adjourned until November 27th, at which time new counsel appeared with the appellant. New counsel requested that the trial judge either declare a mistrial so that the trial could start all over again or at least allow him to re-cross-examine the Crown witnesses who had already testified. Counsel said, essentially, that since the case turned on credibility, he was at a disadvantage at not having had an opportunity to personally assess each Crown witness. The trial judge rejected both requests. The trial continued on December 9 with the defence calling evidence and, ultimately, submissions and judgment.

Appellant's counsel argued here that there was no pressing reason not to allow new defence counsel to re-examine the Crown witnesses.

There is agreement that the decision made by the trial judge was an exercise of his discretionary power to control the trial process. An accused has the right to discharge his lawyer during the trial. At that point, a trial judge may allow an adjournment so that the accused can obtain a new lawyer, or a trial judge may refuse an adjournment if he or she forms the opinion that the accused is employing delay tactics or trying to manipulate the process. To allow a party to re-open its case or to re-examine a witness are also discretionary matters. The discretion, however, must be exercised judiciously.

In this case, the new defence counsel did not identify any particular areas that he wished to question the witnesses about. There was no suggestion that previous counsel had overlooked some line of questioning. This appeal has not raised allegations of incompetence on the part of that previous counsel. The trial judge could have directed a limited re-examination of the witnesses, but he was not asked to do that. He was asked to direct another cross-examination of the witnesses. The trial judge, quite rightly, in my opinion, expressed a concern over the implications to the orderly trial process of allowing an accused to discharge his counsel and then automatically have the trial, in effect, start all over again. He characterized the problem as one of trial

tactics arising from a disagreement as to those tactics between the appellant and his previous counsel. In my opinion, it was open to the trial judge to so characterize it. There is nothing in the transcript of the trial or in the submissions on this appeal to support an argument that the appellant's right to a fair trial was compromised by this decision.

A discretionary decision made during a trial by the trial judge who is alive to the dynamics and issues of that trial is to be shown great deference. I cannot say that the trial judge erred in the exercise of his discretion in this case.

The second ground of appeal relates to the failure of the Crown to call the complainant (the appellant's spouse) as a witness at the trial, and specifically in relation to the assault charge.

During his closing submissions, defence counsel at trial invited the trial judge to draw an adverse inference from the failure of the Crown to call the complainant. In his decision, the trial judge said the following in response to this submission:

> "I think it was 1986 when the Attorney General for Canada instructed the RCM Police to charge spousal assaults, regardless, if they had reasonable and probably grounds. In other words, the discretion residual in the RCM Police to charge or not charge was removed in these matters.
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> Since that time this Court, and I don't know about the Courts in southern

jurisdictions but certainly in the Northwest Territories, the Territorial Court has been frequently faced with alleged victims who come to court, who either refuse to be sworn or are sworn and refuse to answer questions from the Crown. If they do answer the questions, the patently and obviously lie to protect their spouse from the criminal consequences of his conduct. It has become a regular feature in dealing with assault cases and it's very very difficult. I addressed this matter quite a few years ago in the King case I think it is. What do you do with a spouse who doesn't want to testify? Charge her with contempt? Theoretically the charge is sound, then put her in jail because she doesn't want to testify? It's a conundrum all because, of course, the police have no discretion.

The evidence before me indicates that Sharon Lafferty is the spouse of the accused. I made no inquiry. When the matter was first raised by defence, the Crown advised that they would not be calling Sharon Lafferty. I made no inquiry as to why or why not. There is no suggestion of an oblique motive, no suggestion of anything sinister. It's the Crown's discretion on what witnesses they call.

The critical issue is, always, has the case been proved beyond a reasonable doubt? The alleged victim is no different than any other witness and always at the end of the day the Court has to ask itself if the case has been proven beyond a reasonable doubt? I certainly echo the comments of the Supreme Court that it may be difficult for the Crown to prove a case beyond a reasonable doubt when the alleged victim is not called. It may be difficult, but not impossible.

I'm very conscious of the obligation on the Crown to prove its case beyond a reasonable doubt and I'm doubly conscious in light of the fact that one of the witnesses -- or one of the participants

> in this event was not called. I'm also cognizant that she's his wife and that we're in an era where the Crown is facing an impossible situation of calling witnesses they know may lie or recant because of a family or emotional connection with an accused. I think that sometimes if the Crown takes those matters into consideration, it's commendable that they do not taint the process by bringing witnesses into Court that patently lie. That's all I have to say about that."

Appellant's counsel submitted that what, in effect, the trial judge did was reverse the possible adverse inference to be drawn from the Crown's failure to call the complainant. In R. v. Cook, [1997] S.C.R. 1113, the Supreme Court of Canada said that a trial judge may draw an adverse inference from the Crown's unexplained failure to call a complainant when considering whether the Crown has proved its case. Here, appellant's counsel argued that what the trial judge did was not only not draw an adverse inference against the Crown, but to assume that the complainant was not called because she would lie on the stand. Why would she lie? Because she wanted to protect the accused and because he really did assault her. Therefore, this reasoning, it was argued, reveals a reversal of the presumption of innocence. It, in fact, presumes guilt by presuming that the complainant would have lied.

If this were all to the judge's reasoning, I would have had serious reservations as to the reasonableness

of the conviction on this charge. This type of speculation is dangerous, with all due respect, because it makes assumptions about the witness's character and motivations and about the Crown's trial strategy (all in the absence of evidence).

But these statements by the trial judge are not the reasons why a conviction was entered on this charge. These statements relate to the defence submission as to an adverse inference to be drawn. While some of these comments are unfortunate, there is nothing in them to suggest that the trial judge went from this assumption of why the complainant was not called to an assumption that the accused was guilty.

Right after this extract from his reasons, the trial judge went on to carefully analyze the evidence presented on each charge. With respect to the assault, he commented on the evidence that was before him. There's nothing to suggest that these earlier comments influenced his conclusion that the charge had been proven beyond a reasonable doubt.

The trial judge made a thorough review of the evidence on each charge. The convictions are based on fact-findings and his assessment of each witness's credibility. All of this was unrelated to the failure of the Crown to call the complainant. There was ample evidence upon which the trial judge could reasonably convict the appellant of all charges.

For these reasons, the appeal is dismissed.

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Certified Pursuant to Rule 723
of the Rules of Court

Jane Romanowich
Court Reporter