R v. Kolausok, 2000 NWTSC 1

Date: 2000 01 04
Docket: CR 03711

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

Respondent

- and -

EDWARD KOLAUSOK

Applicant

An application to oust the jurisdiction of the Court in favour of the youth court. Application denied.

Heard at Yellowknife, NT: November 23, 1999

Reasons filed: January 4, 2000

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

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REASONS FOR JUDGMENT

[1] On this application the Court is asked to find that it does not have jurisdiction over the criminal proceedings brought against the accused man and to direct that any criminal proceedings regarding the subject allegations be brought instead in youth court.

[2] The accused is 37 years old.

[3] For the reasons which follow, I find that the accused's application is without merit. Upon reviewing the relevant statute law and case law authorities I find that this Court does indeed have jurisdiction over these criminal proceedings.

[4] In the indictment before the Court, the accused is charged with committing the offence of statutory rape (sexual intercourse with a girl under fourteen years of age) in Aklavik in 1980, when he was himself 17 years of age. At that time that offence carried a maximum sentence of life imprisonment. Today the same criminal activity is termed sexual assault and the maximum sentence is ten years' imprisonment. The accused was not charged with this crime until 1998.

[5] In 1980 in these Territories, any person who was alleged to have committed a Criminal Code offence while under the age of sixteen years was considered a "child" for purposes of criminal proceedings and was dealt with in juvenile court under the *Juvenile Delinquents Act*, R.S.C. 1970, ch.J-3. Those charged with committing any such offence after their sixteenth birthday were dealt with in ordinary (adult) court. The demarcation age between child and adult for purposes of criminal proceedings was not uniform throughout Canada in 1980; however, it was sixteen in the Northwest Territories. Had this accused been charged with this offence in 1980, he would have been dealt with in adult court.

[6] In 1984 Parliament enacted the *Young Offenders Act*, R.S.C. 1985, ch.Y-1 to replace the *Juvenile Delinquents Act*, establishing a new youth justice system in Canada with a uniform national age jurisdiction of 12 through 17. Under this present regime of youth justice, the youth court has exclusive jurisdiction in respect of any sexual assault offence allegedly committed by a 17-year-old youth. Generally, the maximum sentence for such an offence under the *Young Offenders Act* is two years' custody.

[7] It is the accused's assertion on this application that the youth court has exclusive jurisdiction over the criminal proceedings against him. He relies in particular on certain transitional provisions of the *Young Offenders Act* enacted in 1984:

> s.79(4) Any person who, before the coming into force of this Act, while he was a young person committed an offence in respect of which no proceedings were commenced before the coming into force of this Act may be dealt with under this Act as if the offence occurred after the coming into force of this Act.

[8] "Young person" was defined in the *Young Offenders Act* as:

> s.2(1) "young person" means a person who is or, in the absence of evidence to the contrary, appears to be
>
> (a) twelve years of age or more, but
>
> (b) under eighteen years of age or, in a province in respect of which a proclamation has been issued under subsection (2) prior to April 1, 1985, under sixteen or seventeen years, whichever age is specified by the proclamation,

> and, where the context requires, includes any person who is charged under this Act with having committed an offence while he was a young person or is found guilty of an offence under this Act.

[9] A proclamation contemplated by that definition was in place with respect to the Northwest Territories in the period April 2, 1984 to April 1, 1985. The proclamation stated that the definition of "young person" for the purposes of the *Young Offenders Act* was a person between the ages of 12 and 16. In effect, the proclamation continued the demarcation age of 16 between child and adult after the enactment and until April 1, 1985 when the uniform national demarcation age of 18 came into effect across the country.

[10] The accused argues:

a) that he was a young person (as presently defined) when he allegedly committed the offence in 1980,
b) that no criminal proceedings were commenced against him prior to April 2, 1984, and
c) that, therefore, he is now to be dealt with under the *Young Offenders Act* as if it were a present-day offence.

[11] The seminal decision on the interpretation of s.79(4) of the *Young Offenders Act*, is *R v. McDonald*, (1985) O.A.C.321 (Ont.C.A.). In that case Morden J.A. held that the proper jurisdiction of the court is to be determined by the accused's status at the time of the commission of the offence and not at the time of his appearance before the court. Morden J.A. ruled that if the accused was an "adult" under the law in force at the time of the commission of the offence, the youth court had no jurisdiction.

[12] Further, with respect to the interpretation of s.79(4), Morden J.A. stated that the phrase "as if the offence occurred after the coming into force of this Act" meant "as if the offence occurred immediately following the coming into force of this Act". Thus, immediately after April 2, 1984, the present accused would, by virtue of the proclamation, be dealt with as an adult, and the youth court would have no jurisdiction.

[13] An application for leave to appeal *McDonald* to the Supreme Court of Canada was denied. [1985] 2 S.C.R. ix (note).

[14] *McDonald*has been followed by this Court and most Canadian courts in the past fourteen years.

[15] In *R. v. L.G.A.,* [1986] N.W.T.R. 56, de Weerdt J. of this Court held that the law as stated by the Ontario Court of Appeal in *McDonald* was a correct statement of the law applicable in the Northwest Territories.

[16] Both *McDonald* and *L.G.A.* were true transitional cases, as criminal proceedings were in mid-process when the uniform national age categories came into effect in April 1985. Also, both of those accused were young people at the time of their appearance before the court (as opposed to the present accused).

[17] In *R. v. Sampson*, (1993) 83 C.C.C.(3d) 149 (B.C.C.A.) and *R. v. Robert*, (1997) 35 O.R. (3d) 137 (Ont.C.A.), the s.79(4) material facts were more akin to the present case; i.e., criminal charges with respect to pre-1984 alleged criminal offences were not commenced until the 1990s. Yet in both *Sampson* and *Robert* the court agreed with the analysis and principles set out in *McDonald*. These cases uphold the proposition that a person should be tried in accordance with his legal status at the time of the commission of the offence.

[18] In both *Sampson* and *Robert* leave to appeal to the Supreme Court of Canada was denied. [1993] S.C.C.A. 437 and [1997] S.C.C.A. 554.

[19] *McDonald* was also followed by the Alberta Court of Appeal in *P.J.T. v. The Queen*, (1985) 22 C.C.C.(3d) 541. I will not refer to the other cases referred to by counsel; suffice it to say that the preponderance of the case law follows *McDonald*.

[20] Before turning to the Charter arguments advanced by the accused, I want to acknowledge than an adult accused may indeed be dealt with in youth court. Just as with the predecessor *Juvenile Delinquents Act*, the *Young Offenders Act* contemplates that present-day adults can be dealt with in youth court with respect to offences committed by them years earlier while they were young persons. It is just that, in the present case, the adult accused was an "adult" at the time of the alleged commission of the 1980 offence.

[21] Also, let me separate out of the Charter submissions anything to do with punishment and the change in the punishment prescribed for the criminal activity of which this accused stands charged, as mentioned earlier. On this topic, the Charter clearly states:

> s.11 Any person charged with an offence has the right
>
> . . .
>
> (i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

Any argument that this Court, if the accused is convicted, ought to resort to the sentencing regime prescribed in the *Young Offenders Act* is premature, unless and until he is indeed convicted.

[22] I turn now to the Charter arguments advanced by the accused. He asserts that by requiring him to be dealt with in ordinary adult court he is being discriminated against on the basis of age, place of the alleged offence and province or territory of origin. He points to his equality rights under the Charter:

> s.15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[23] In the context of the accused's arguments, the alleged discrimination on the basis of age is more accurately characterized as an alleged discrimination on the basis of the date of the alleged offence. The proposition that it is discriminatory to use the date of an alleged offence to ascertain relevant principles of law was rejected in *McDonald, supra*, and *P.J.T., supra*. I agree with Morden J.A. when he stated in *McDonald* at p.334:

> "...it is logical and fair that people should be dealt with in accordance with the law in effect at the time of their acts. If effect were to be given to the respondent's argument it would be virtually impossible to enact changes in the law without attracting challenges of unequal treatment."

[24] Similarly, the alleged discrimination on the basis of place of offence, or province or territory of origin, in the context of the transition from the *Juvenile Delinquents Act* to the *Young Offenders Act*, was rejected in both *McDonald* and *P.J.T.*.

[25] Section 15 challenges founded on provincial differences in the application of federal law have been denied by the Supreme Court of Canada in *R. v. Turpin*, [1989] 1 S.C.R. 1296 and *R. v. S.S.*, [1990] 2 S.C.R. 254.

[26] Having carefully considered the jurisprudence pertinent to both the "territorial" discrimination and the "date of offence" discrimination that is alleged, I find myself in agreement with the cases cited above.

[27] What causes me more difficulty, however, in consideration of the accused's s.15 submission, is his failure to articulate precisely what aspect of "equal protection and equal benefit of the law" he is being denied because of such discrimination. In the accused's brief it is stated that the accused is being denied the "benefit" of the youth court, its procedures, and the statement of principles embodied in s.3 of the Act. With respect, in the context of this 37-year-old accused, I find that this is an insufficient assertion on which to found a s.15 infringement. The Act's statement of principles and special procedures focus primarily, and properly so, on the situation where young people (not "overage" accused) are being dealt with by state authorities and the youth court. I point out that the definition of "young person" in the Act provides:

> "young person" means a person who is or, in the absence of evidence to the contrary, appears to be twelve years of age or more, but under eighteen years of age and, <u>where the context requires</u>, includes any person who is charged under this Act with having committed an offence while he was a young person or is found guilty of an offence under this Act.
>
> (emphasis added)

[28] Accordingly, not all of the provisions of the *Young Offenders Act* would apply to this 37-year-old accused if he were dealt with in youth court as he proposes. The principles and procedures of youth court that he makes vague reference to are rather directed to "concerns arising out of the fact that the accused is still a youth" -- see *D.A.Z. v. The Queen*, (1992) 76 C.C.C.(3d) 97 (S.C.C.).

[29] This Court's confirmation of its jurisdiction over the accused means that he will have a fair trial, with the option of trial by jury, with all the safeguards and guarantees of a fair trial that are provided for in the Charter. Any discrimination denying him access to the youth court can hardly be characterized as "giving rise to questions of a violation of the dignity and freedom of the individual" -- see *Wong v. The Queen*, (1996) 119 F.T.R. 306 (F.C.T.D.).

[30] For this latter, additional, reason it is my view that there is no merit in the s.15 challenge. And it is for this same reason that the s.7 argument must also fail.

[31] Section 7 of the Charter states:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[32] Once again, the accused has not articulated precisely what aspects of his s.7 rights he is being deprived of by the Court asserting jurisdiciton in this case. In his brief he states that subjecting him "to the jurisdiction of the adult court threatens his liberty interests to a much greater degree than they would be under the *Young Offenders Act*. How so? Apart from the issue of penalty (which I have stated earlier in these reasons is a premature submission) the accused has not satisfied me that any s.7 right is at jeopardy in this case.

[33] For the foregoing reasons, the application is denied.

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

Dated at Yellowknife, NT, this
4th day of January 2000

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