R. v. Nitsiza, 2001 NWTSC 34

Date: 2001 04 17
Docket: S-1-CR-2000000030

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

Respondent

-and-

LEON NITSIZA

Applicant

Application to quash committal for trial. Granted.

Heard at Yellowknife, NT on April 5, 2001
Reasons filed: April 17, 2001

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

Counsel for the Crown (Respondent): Sadie Bond
Counsel for the Accused (Applicant): Hugh Latimer

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REASONS FOR JUDGMENT

[1] After a preliminary inquiry, the applicant accused person was committed to stand trial on three charges, each of them alleging an offence under s. 151 of the Criminal Code (sexual interference with a person under 14 years of age). One charge related to the complainant L.A.; the two other charges related to the complainant L.L. The accused has now applied to quash the committal for trial on the two charges relating to the complainant L.L.

[2] A committal for trial may be quashed where there has been jurisdictional error in the preliminary inquiry proceedings. Such error may arise (a) where a committal is made in the absence of evidence capable of supporting a conviction; or (b) where the preliminary inquiry judge fails to observe a mandatory provision of the Criminal Code; or (c) where there has been a denial of natural justice. Generally speaking, however, an error of law made within jurisdiction, such as an erroneous ruling on the admissibility of evidence, does not result in a loss of jurisdiction: *Forsythe v. The Queen*, [1980] 2 S.C.R. 268.

[3] In this case the applicant argued that the preliminary inquiry judge lost jurisdiction by reason of his failure to follow a mandatory provision of the Criminal

Code. It is submitted that the inquiry judge failed to take the evidence of the complainant L.L. under oath thereby contravening s.540(1)(a) of the Code:

> 540.(1) Where an accused is before a justice holding a preliminary inquiry, the justice shall
>
> > (a) take the evidence under oath, in the presence of the accused, of the witnesses called on the part of the prosecution and allow the accused or his counsel to cross-examine them;

Applicant's counsel urged that the failure to take the evidence under oath results in there being no evidence to support the committal.

[4] To fully appreciate this submission, it is necessary to relate exactly what happened at the preliminary inquiry. The complainant L.L. was the only witness called with respect to the two charges relevant to this application. While she was under 14 years of age at the time of the alleged offences, she was 14 by the time of the preliminary inquiry. The following is the exchange recorded in the inquiry transcript:

> (CROWN COUNSEL): The Crown calls (L.L.).
>
> THE COURT: How old is this witness?
>
> (DEFENCE COUNSEL): Fourteen, Sir.
>
> THE COURT: (L.L.), do you understand that it's a criminal offence t o intentionally tell a lie in a court proceeding?
>
> THE WITNESS: (Affirmative, non-verbal response).
>
> THE COURT: Yes?
>
> THE WITNESS: (Affirmative, non-verbal response).
>
> THE COURT: Do you promise to tell the truth in this proceeding?
>
> THE WITNESS: Yes.

The witness was then examined and cross-examined by Crown and defence counsel.

[5] Crown counsel took the position on this application that what happened here, the exchange between the presiding judge and the witness, was the functional equivalent of an oath or at least a solemn affirmation. Alternatively, counsel submitted that if it was error to proceed in this fashion then it was merely a procedural error made within jurisdiction and thus curable. Counsel also informed me that this manner of proceeding, i.e., putting these two questions in lieu of the traditional oath, is common in Territorial Court proceedings with respect to adult witnesses. Counsel, however, could not provide me with the authority by which this is done.

[6] I think it is important to note what the situation was not in this case. This was not a situation of a proposed witness who is under 14 years of age. This was not a situation where an objection had been taken to the proposed witness' mental capacity. Thus, it was not a situation where the presiding judge was obligated to conduct the inquiry required by s.16 of the Canada Evidence Act. The proposed witness was, for all intents and purposes, to be treated as would any adult witness. In such a situation, the proposed witness is presumed to be competent to give sworn testimony: Sopinka, Lederman & Bryant, *The Law of Evidence in Canada* (2nd ed., 1999), at para. 13.29; *R. v. Dyer* (1971), 5 C.C.C. (2d) 376 (B.C.C.A.), leave to appeal to S.C.C. refused [1972] S.C.R. x.

[7] There can be no doubt that what was done here was that the witness' evidence was not taken under oath. The requirement to do so, as stipulated by s. 540(1) of the Code, was explained in *R. v. Greenwood* (1992), 70 C.C.C. (3d) 260 (Ont. C.A.), leave to appeal to S.C.C. refused (1992) 71 C.C.C. (3d) vii. First, the direction that the evidence of witnesses at a preliminary inquiry be taken under oath is mandatory; second, this mandatory direction is subject only to the provisions of the Canada Evidence Act. This is so on the basis of the maxim *generalia specialibus non derogant*, i.e., the general provision, in this situation the Criminal Code provision, must yield to the special provision, that being the Canada Evidence Act which, in sections 14 and 16, provides exceptions to the requirement for sworn evidence.

[8] There is no need here to review the lengthy history of the requirement for sworn testimony in judicial proceedings. The common law rule is that no person may testify unless he or she swears an oath to speak truthfully. The historic rationale was that the

fear of divine retribution would focus one's mind and heart on telling the truth: see Schiff, *Evidence in the Litigation Process* (4th ed., 1993), at 213-214. Today, in our secular, modern multi-cultural Canadian society, the fear of divine retribution may seem a quaint anachronism, if not a complete irrelevancy. The law, however, still recognizes the importance of an oath even if it is not directly tied to a belief in spiritual retribution. Even in the absence of some religious significance, the solemnity of taking an oath still increases the witness' perception of the importance of telling the truth. This point was made in *R. v. Fletcher* (1982), 1 C.C.C. (3d) 370 (Ont. C.A.), leave to appeal to S.C.C. refused (1983) 48 N.R. 319, at 377:

> It is recognized that as society has changed over the years the oath for many has lost its spiritual and religious significance. Those adults to whom the sanctity of the oath has lost its religious meaning, none the less have a sense of moral obligation to tell the truth on taking the oath and feel their conscience bound by it. That is the nature of the oath for many adult witnesses today. Nor do they object on grounds of conscientious scruples to taking the oath.

See also Sopinka, Lederman & Bryant, *op. cit.*, at para. 13.24.

[9] The importance of the oath as the prerequisite to testifying is still expressly recognized in today's law. In the Criminal Code, sections 557 and 646 make s.540(1) applicable to non-jury and jury trials on indictment; s.802(3) states that, in a summary conviction trial, every witness shall be examined under oath. Sections 21 and 22 of the *Evidence Act*, R.S.N.W.T. 1988, c. E-8, similar to many provincial evidence statutes, set out the manner of administering and the form of the witness oath. Swearing an oath is certainly not a relic of history no matter that it may be perceived somewhat differently today. And, as Professor Schiff points out in his text (*supra*, at 216), a witness' liability to conviction for perjury has never influenced judicial doctrine defining capacity to testify nor have such references been included in the standard formulation of the witness oath.

[10] As an initial proposition, one can say that there was a failure, at this preliminary inquiry, to follow a mandatory provision of the Criminal Code. This results in a loss of jurisdiction. The Crown's argument that what was done here was the functional equivalent of an oath is untenable. All of the cases that the Crown relies on in support of that argument are ones where there has been some defect in the procedure used in the inquiry under s.16 of the Canada Evidence Act with respect to a witness under 14

years of age or where there has been some deficiency in the promise to tell the truth required under that section: *R. v. Krack* (1990), 56 C.C.C. (3d) 555 (Ont. C.A.); *R. v. Barsoum*, [1991] N.W.T.J. No. 171 (C.A.); *R. v. Fong* (1994), 92 C.C.C. (3d) 171 (Alta. C.A.); *R. v. Peterson* (1996), 106 C.C.C. (3d) 64 (Ont. C.A.); *R. v. R.J.B.* (1999), 33 C.R. (5th) 166 (Alta. C.A.). The witness in the present case was not under 14 years of age, nor was her competence to testify challenged, so s.16 of the Canada Evidence Act has no bearing on this issue. And it cannot be realistically argued that the questions answered by the witness here were tantamount to swearing an oath.

[11] I also cannot accept the cases cited by the Crown as standing for the proposition that this is a mere procedural irregularity that can be cured. All of the above-noted cases were appeals from trial decisions. In such a situation the appeal court may have recourse to the curative proviso in s.686(1)(b)(iv) of the Code provided that there has been no prejudice caused by the irregularity. On a review of a committal, however, there is no such curative power. The question is whether jurisdiction has been lost due to a failure to follow a mandatory provision. That must be resolved on a standard of correctness as opposed to one of reasonableness or harmless error: *R. v. Wilson* (1995), 38 C.R. (4th) 209 (N.S.C.A.), at 217-218.

[12] I think there is greater potential merit in the Crown's further submission that what occurred in this preliminary inquiry was that the witness gave the functional equivalent of a solemn affirmation. This requires a consideration of s.14 of the Canada Evidence Act:

> 14.(1) A person may, instead of taking an oath, make the following solemn affirmation:
>
> > I solemnly affirm that the evidence to be given by me shall be the truth, the whole truth and nothing but the truth.
>
> (2) Where a person makes a solemn affirmation in accordance with subsection (1), his evidence shall be taken and have the same effect as if taken under oath.

[13] The solemn affirmation is set out in a specific format in s.14(1). For purposes of this question, I am prepared to assume that the specific wording of the affirmation is not mandatory. Any form of words may suffice provided that the substance of the message is the same and the binding effect on the witness' conscience is not diminished in any way. That was the conclusion of the British Columbia Supreme

Court in *R. v. Hannah* (1993), 80 C.C.C. (3d) 289 (leave to appeal to S.C.C. refused (1994) 94 C.C.C. (3d) vii), where a defectively worded affirmation was administered to a 13 year old witness (but that case as well was an appeal after a trial and the curative proviso was relied on to cure what was described as a procedural irregularity).

[14] If it can be said that what occurred here was a solemn affirmation, but merely using a different formulation of words, then this could be regarded as a mere error made within the preliminary inquiry judge's jurisdiction. Thus the committal would stand. But, in my respectful opinion, that argument ignores what is in effect a reversal of the presumption that evidence will be given under oath and the direction in the Criminal Code to do so..

[15] As Professor Schiff explains (*op. cit.* at 225-226), s.14 of the Canadian Evidence Act has its origins in English statutes enacted during the 19th century which, in order to ameliorate the common law rule, permitted a prospective witness to substitute an affirmation or declaration in the place of an oath on grounds of conscientious objection. The version of s.14 in force up until its amendment in 1994 was worded as follows: "Where a person called or desiring to give evidence objects, on grounds of conscientious scruples, to take an oath...that person may make the following solemn affirmation..." The jurisprudence under that section required the prospective witness to state the grounds of objection and the judge would then have to determine if the statutory condition was satisfied: see, for example, *R. v. Bluske* (1948), 90 C.C.C. 203 (Ont. C.A.); *R. v. Dawson*, [1968] 4 C.C.C. 33 (B.C.C.A.). The 1994 amendment did away with this requirement and now the prospective witness may choose to affirm without having to state the grounds for so choosing.

[16] The amendment to s.14, however, did not change the statutory intent of leaving the choice as to whether to testify under oath or by affirmation to the witness. In my opinion, the present wording of s.14 necessarily implies that the capacity to testify on the basis of an affirmation is dependent on a choice being expressed by the witness, not one imposed by the court on the witness. The reference in the current s.14 to "a person may" make an affirmation must mean that it is the witness who possesses the power to choose. I do not think it can be read as a discretionary power to the court, e.g., the court being able to direct that a person otherwise competent to swear an oath make an affirmation instead. Such a discretion in the court would defeat the point of the right to choose to testify under oath or affirmation given to the witness.

[17] The legislative evolution of s.14 suggests this interpretation. It is also supported, in my view, by the commentary of Ewaschuk J. in his *Criminal Pleadings & Practice in Canada* (2nd. ed.), at section 16:13020:

> A competent witness may *choose* to testify under oath or by *solemn affirmation* and the "choice of solemn affirmation" need *not* be made on grounds of conscientious scruples. The witness may *affirm* where she objects to taking an oath or where she has no "religious belief". (emphasis in original)

[18] With all due respect to the preliminary inquiry judge in this case, what he has in effect done is to ignore the mandatory direction that evidence be taken under oath and the fact that it is the right of the witness to choose to swear an oath or affirm. While the law recognizes that there is an equivalence between evidence given under oath and that given pursuant to an affirmation, it does not extend the power to select the option to be used to the court. It is the right of the witness to choose. The right of a witness to choose to affirm is not the same thing as the power of a court to impose an affirmation in the absence of a choice being exercised. Here it cannot be said that what happened was the exercise of a choice by the witness. Thus this is more than a mere error made within jurisdiction; it is the exercise of a power not given to the preliminary inquiry judge and one that is contrary to the direction of the Criminal Code. An affirmation is the exception to the rule that evidence be given under oath. I do not think a preliminary inquiry judge has the jurisdiction to presume that evidence will be given under an affirmation where the Criminal Code presumes that it will be given under oath. As it is, there is no properly adduced evidence in this case.

[19] For these reasons, the application is allowed. An order will issue quashing the accused's committal on the two charges relating to the complainant L.L.

[20] Having said all that, I must confess to some sympathy with what the preliminary inquiry judge was attempting to do here. In fact, the procedure he adopted is similar to what was recommended, some twenty years ago, by the Law Reform Commission of Canada in a proposed "Evidence Code". That proposal would have abolished the oath, replacing it with the witness' promise to tell the truth and an acknowledgement that a lie might be the subject of criminal prosecution. The proposal would have also authorized the presiding judge to explain the duty to tell the truth to the witness. This may indeed be a preferable way of doing things but, in my opinion, it will have to await legislative sanction before it can be automatically applied in a criminal proceeding.

J. Z. Vertes
J.S.C.

Dated at Yellowknife, Northwest Territories
this 17th day of April, 2001.

Counsel for the Crown (Respondent): Sadie Bond
Counsel for the Accused (Applicant): Hugh Latimer