R. v. *Michel, Michel and Marlowe*, 2005 NWTSC 63

Date: 2005 07 19
Docket: S-1-CR-2004000029

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

NOEL MICHEL, ANTOINE MICHEL, and RAYMOND MARLOWE

MEMORANDUM OF JUDGMENT

Restriction on Publication: There is a temporary ban on publication of the arguments, facts and reasons set out in this decision pursuant to s. 648 of the *Criminal Code*.

[1] After hearing submissions, I dismissed the application by the three accused for a change of venue of their sexual assault jury trial, currently scheduled to take place in Yellowknife commencing August 29, 2005, and indicated that reasons would follow. These are my reasons.

[2] This is the applicants' second trial on the charge, which arises from events alleged to have taken place in Lutselk'e some 30 years ago. The first trial, held in Yellowknife in September 2004, resulted in a hung jury.

[3] The issue of trial venue has been on the table since before the first trial. A filed pretrial conference memorandum of April 1, 2004 refers to the applicants wanting to have their trial in Lutselk'e or Fort Resolution. In early April 2004 Richard J. directed that the trial would proceed in Yellowknife, without prejudice and subject to any change of venue application. The memorandum containing that direction refers to the lack of facilities to hold a jury trial in Lutselk'e and, equally importantly, the strong

likelihood that the parties would be unable to select an impartial jury in that community in the particular circumstances of the case. The circumstances specifically referred to by Richard J. were that there were six major trial participants with families in the small community of Lutselk'e. At that time, five men were named as accused in the indictment and the sixth trial participant he referred to was no doubt the complainant.

[4] Shortly before the first trial, the proceedings were stayed as against two of the accused, leaving only the three applicants on this application charged. There was no change of venue application prior to the first trial and I accept that the stay against two of the accused was entered too late to make a change of venue application practical. In the applicants' brief on this application, it is stated that the defence concedes that holding the first trial in Lutselk'e was not an option for the reasons expressed by Richard J., although Mr. Boyd, counsel for Antoine Michel, indicated in his oral argument that he has never conceded that Yellowknife was a suitable venue. Be that as it may, the fact remains that there was no application prior to the first trial to have the venue changed from Yellowknife to anywhere else.

[5] The applicants' position is that circumstances have changed since the decision of Richard J., making it more likely that an impartial jury can be selected in Lutselk'e. Alternatively, the applicants say the trial should proceed in Fort Resolution because it is demographically and culturally similar to Lutselk'e.

[6] It is well-established that whether to grant a change of venue is a matter of the Court's discretion. Section 599(1) of the *Criminal Code* provides that an order may be made for the trial to be held in a territorial division in the same province other than that in which the offence would otherwise be tried if [and the only applicable subsection for present purposes is (a)] it appears expedient to the ends of justice.

[7] There is no doubt that for many years now in the Northwest Territories the place of trial has generally been the community where the crime is alleged to have taken place. There is also no doubt that the court is sometimes unsuccessful in selecting a jury in small communities, for example in the case of *R. v. Elias,* S-1-CR-2003000105, in Tuktoyaktuk earlier this year and twice now in the case of *R. v. Sikyea*, S-1-CR-2004000105, in Fort Smith. In both of those cases, there was only one accused and both of those communities are larger than Lutselk'e and Fort

Resolution. Both of those trials have had to be rescheduled in other, larger, communities.

[8] There is no evidence in this case that pre-trial publicity or community divisiveness or the well-being of the complainant are concerns relevant to where the trial is held. The concern in this case with being able to get an impartial jury arises from the number of participants in the trial whose relatives and friends may be among those on the jury panel. The evidence before me indicates that the number of people in Lutselk'e from which the jury panel would be summonsed is 168. Experience indicates those who are summonsed and appear for jury selection would be something less than that, possibly substantially less.

[9] The defence points out that now there are only three accused, two of whom are brothers and would have the same relatives and friends; so, the argument is made, there is not likely to be as much of a problem selecting a jury.

[10] The Crown, on the other hand, points out that the complainant's evidence is expected to be, as it was at the first trial, that nine men, eight of whom she can name, including the three accused, gang-raped her. One man alleged to be a participant, but who was discharged at the preliminary inquiry, is expected to testify as a Crown witness on the trial. The names of the other men who the complainant alleges were part of the gang- rape will likely come out in the evidence. So even though most of those alleged to have participated in raping the complainant are not or are no longer charged, the Crown says the jury should not include anyone closely related or connected to them and anyone who is in that position should be excused or challenged.

[11] The applicants do not dispute that it would be prudent to screen out potential jurors who are related or connected to any of those alleged to have taken part in the offence. It was suggested, however, that the Court should use a less stringent standard in screening for those related or connected to the individuals not charged than for those charged. It was suggested that this would make it more likely that a jury could be selected.

[12] I have some difficulty with the concept of using a different standard for excusing potential jurors depending on whether they are related to one of the accused men or a man who is no longer accused but is said by the complainant to have

participated in the offence. The Court does not, in my experience, normally use a different standard depending on whether a potential juror is related to the accused, the complainant or some other witness, so I have some doubt whether it should do so in the circumstances suggested. I do not think the Court can assume that the number of people who would have to be excused because of connections with non-accused alleged participants would be negligible.

[13] There are additional factors which would have an impact on the likelihood of being able to select a jury in Lutselk'e. In this case, each accused will have 12 peremptory challenges and the Crown 36 for a total of 72. There is also the potential for challenges for cause, which are not limited in number.

[14] The crucial point, in my view, is that it remains likely that with the small number of potential jurors and the large number of participants in the case, an impartial jury cannot be selected. Although the number of accused and therefore peremptory challenges has decreased since Richard J. made his direction in 2004, in my view the likelihood of being unable to select a jury in Lutselk'e has not diminished.

[15] The applicants submitted that the reasons for ordering a change of venue need not be as weighty when the change sought is back to the community where the offence is alleged to have take place. They relied on the case of *R. v. Eng*, 1999 BCCA 425; (1999), 138 C.C.C. (3d) 188, which adopted the view that an application to change back to the district in which the offence is said to have been committed should be favourably considered and does not require to be supported by such strong reasons as are needed when the proposed change is a change from that district. That case does not, in my view, assist because the likelihood of not being able to get a jury in Lutselk'e remains unchanged in the unusual circumstances of this case.

[16] The alternative position advanced by the applicants is that the trial should be held in Fort Resolution because it is similar in size and culture to Lutselk'e. They rely on a passage in *R. v. J.I.*, [1995] N.W.T.J. No. 96, in which Vertes J. said that the practice of this Court has been to move a trial, if necessary to move it, to a community that is demographically and culturally similar to the community where the trial would ordinarily have been held. However, as Vertes J. pointed out, this is not a hard and fast rule and it depends on the circumstances.

[17] The evidence before me is that the number of people in Fort Resolution from which a jury panel would be summonsed is about 353. The applicants' brief indicates that the complainant and others who have been involved in the case have lived in Fort Resolution, although in the case of the complainant, this was some 40 years ago. It is not clear how many other participants in the trial may have lived there, when or for how long. Whether this may cause difficulty in selecting a jury in Fort Resolution is simply unknown.

[18] The applicants rely on the fact that Fort Resolution is a small, largely aboriginal community, whereas Yellowknife is a (relatively speaking) large community with a mix of aboriginal and non-aboriginal people. Experience indicates that both aboriginal and non-aboriginal people are generally on any jury panel summonsed in Yellowknife. However, counsel for the applicants indicated that although there were aboriginal people on the jury panel in the first trial, none were actually selected as jurors. There may have been any number of reasons for that. The applicants ask me to conclude that it is unlikely that there will be any aboriginal people on a second Yellowknife jury. In my view, such a conclusion is unfounded.

[19] The argument I understand the applicants to be making is the same one that was made in *R. v. J.I.*, *supra*, i.e., that the jury should be representative. But as Vertes J. pointed out in that case, there is no principle of law that requires a jury to be representative of the individual accused. And there is no indication that there is any cultural component in this case other than the race of the trial participants. There is no suggestion of racial bias or prejudice on the part of potential jurors should the trial be held in Yellowknife. Nor is it suggested that anything in the subject matter of the trial makes similarity of cultural background as between the trial participants and the jury significant.

[20] There is no evidence or suggestion that a Yellowknife jury would not be fair and impartial in this case. Considering that, along with the fact that the jury trial has been scheduled to proceed in Yellowknife for several months now and is to commence in just over seven weeks, that jury summonses for the Yellowknife assize had been prepared and were ready for service by the time this application was heard, I am not persuaded by the applicants that the venue should be changed to Fort Resolution.

[21] Some of the submissions made to me centred on the insufficiency or otherwise of facilities available in Lutselk'e and Fort Resolution, in particular for

accommodations, and whether it is even appropriate for the Court to consider that in deciding on the venue of a trial. In light of the reasons I have given, I find that I need not deal with that issue.

[22] For the above reasons, it is not expedient to the ends of justice to change the venue of this trial from Yellowknife. On this basis, the application was dismissed and Yellowknife confirmed as the venue for trial.

Dated this 19 day of July 2005.

V.A. Schuler,
J.S.C.

Heard at Yellowknife, NT
July 7, 2005

Counsel for Antoine Michel (Applicant): Glen Boyd

Counsel for Noel Michel (Applicant): Terri Nguyen

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