R. v. *Bekale,* 2010 NWTSC 02

Date: 2010 01 12
Docket: S-0001-CR-2009000079

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

CORY BEKALE

Application to quash Respondent's discharge at preliminary inquiry.

Heard at Yellowknife, December 9, 2009.

Reasons filed: January 12, 2010

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE V.A. SCHULER

Counsel for the Applicant: Glen Boyd.
Counsel for the Respondent: Jay Bran.

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REASONS FOR JUDGMENT

[1] The Crown seeks an order setting aside the respondent's discharge at his preliminary inquiry on two sexual offence charges and remitting those charges back to the preliminary inquiry judge. The preliminary inquiry judge discharged the respondent because she found there was no evidence that the offences occurred in the Northwest Territories. The judge also discharged the respondent on a third charge of breaching a recognizance, however the Crown does not challenge that discharge as it was ordered for unrelated reasons.

Background

[2] The respondent was charged with sexual assault and touching for a sexual purpose involving the same complainant. The information that was before the preliminary inquiry judge alleged that the offences took place "at or near the Hamlet of Behchoko in the Northwest Territories".

[3] The Crown's sole witness at the preliminary inquiry was the complainant. She testified that she lives in Gameti. On the date in question, she had just come back from Yellowknife, presumably to Gameti. A female friend called and asked her to sleep over at her house. The complainant was picked up by the friend and taken to a house in Edzo, where the events giving rise to the charges later took place. Gameti, Yellowknife and Edzo are all communities in the Northwest Territories, as is Behchoko, which includes Edzo.

[4] The complainant's testimony did not contain any reference to Behchoko or the Northwest Territories. There was no admission as to jurisdiction by the defence for purposes of the preliminary inquiry.

[5] The preliminary inquiry judge raised the issue of jurisdiction and the discrepancy between the information and the evidence at trial. She considered whether she could amend the information to change the place of the offences from Behchoko to Edzo pursuant to s. 601(4.1) of the *Criminal Code*. She decided that she could not make the amendment because of subsection (b) of s. 601(4.1), which requires proof that the subject matter of the proceedings arose within the territorial jurisdiction of the court. The territorial jurisdiction of the court is the Northwest Territories and the preliminary inquiry judge found there was no evidence before her that the events occurred in the Northwest Territories. In ruling on whether there was any evidence upon which a reasonable jury properly instructed could convict the respondent, the judge held that because of the lack of any evidence, direct or circumstantial, that the offences occurred in the Northwest Territories, the respondent must be discharged.

Positions of the parties

[6] Neither of the counsel who appeared before me on this application were counsel at the preliminary inquiry. Crown counsel at the preliminary inquiry did not ask to recall the complainant to testify that the events occurred in the Northwest Territories but made brief submissions on the issue of judicial notice. Defence counsel indicated that he was leaving the matter in the hands of the preliminary inquiry judge.

[7] The applicant Crown now argues that the preliminary inquiry judge exceeded or lost her statutory jurisdiction in holding that there was no evidence before her that could satisfy the test in *United States of America v. Shephard*, [1977] 2 S.C.R. 1067, or by imposing on the Crown a test other than the *Shephard* test. The Crown also argues that the judge failed to comply with the requirement of s. 548(1)(b) of the *Criminal Code* to consider the whole of the evidence, failed to take judicial notice that Gameti, Yellowknife and Edzo are communities in the Northwest Territories and erred in finding that a jury could not draw an inference that those communities are located in the Northwest Territories.

[8] The respondent argues that the preliminary inquiry judge did review and take into account the whole of the evidence and that it was within her jurisdiction to find that an inference could not be drawn that the events took place in the Northwest Territories. The respondent says that it was also within the judge's jurisdiction to decline to take judicial notice that the communities referred to are in the Northwest Territories. In the respondent's submission, the preliminary inquiry judge used the correct test in discharging him and if she made any errors, they were errors within her jurisdiction that are not subject to interference by this Court.

Applicable legislation and legal principles

[9] After hearing evidence at a preliminary inquiry, the preliminary inquiry judge is required by s. 548(1) of the *Criminal Code* to do the following:

> 548(1) When all the evidence has been taken by the justice, he shall
>
> (a) if in his opinion there is sufficient evidence to put the accused on trial for the offence charged or any other indictable offence in respect of the same transaction, order the accused to stand trial; or
>
> (b) discharge the accused, if in his opinion on the whole of the evidence no sufficient case is made out to put the accused on trial for the offence charged or any other indictable offence in respect of the same transaction.

[10] The question to be asked by a preliminary inquiry judge under s. 548(1) is whether or not there is any evidence upon which a reasonable jury properly instructed could return a verdict of guilty, known as the *Shephard* test; *United States of America v. Shephard, supra*. Under this test, a preliminary inquiry judge

must commit the accused to trial in any case in which there is admissible evidence which could, if it were believed, result in a conviction: *R. v. Arcuri*, [2001] 2 S.C.R. 828 at paragraph 21.

[11] As the Supreme Court stated in *Arcuri*, the test is the same whether the evidence is direct or circumstantial. Where the evidence on an element of the offence charged is circumstantial, the preliminary inquiry judge must ask whether that element may be reasonably inferred from the circumstantial evidence. In order to answer this question, the judge will have to engage in a limited weighing of the evidence in the sense of assessing whether it is reasonably capable of supporting the inference that the Crown asks be drawn: *Arcuri*, paragraph 23.

[12] The only ground upon which a superior Court reviewing a committal or a discharge at a preliminary inquiry can act is lack of jurisdiction. Jurisdictional error is committed where the mandatory provisions of the *Criminal Code* are not followed: *R. v. Dubois*, [1986] 1 S.C.R. 366. *Dubois* also indicates that in the context of s. 548, there must be some basis in the evidence proffered for the preliminary inquiry judge's decision to commit; the judge has no jurisdiction to act arbitrarily. On a review, so far as the presence or absence of evidence becomes material, the question is whether any evidence at all was given on the essential point.

[13] I conclude from what was said in *Dubois* that where the discharge of an accused at a preliminary inquiry is challenged, the reviewing Court should determine whether any evidence at all was given on the essential point. If there was evidence on the essential point but the preliminary inquiry judge discharged on the basis that there was no evidence, that would amount to an arbitrary decision and would be a jurisdictional error.

Application to this case

[14] The issue that arose before the preliminary inquiry judge was whether there was evidence that the events giving rise to the charges occurred in the Northwest Territories. If there was any evidence on that point, the judge, having found evidence of all the other elements of the sexual offences, was required to commit the respondent for trial. It was also open to her to amend the information pursuant to s. 601(4.1) to refer to Edzo rather than Behchoko.

[15] The preliminary inquiry judge framed and answered the question as follows:

> Is there evidence that this occurred in the Northwest Territories? With the reference to Yellowknife, to Gameti and to Edzo, could a reasonable jury properly instructed draw the inference that the offences occurred in the Northwest Territories?
>
> It is a heavy burden on the Crown. When a person is charged with a criminal offence the Crown has a duty to prosecute it effectively. I have a duty to both Crown and to the accused. I have a duty to the public to apply the law. I cannot see that, if this case were before a jury with respect to that element, the element of jurisdiction only, that it could go to the jury because there is no evidence that this offence occurred in the Northwest Territories. There is no evidence. There is no direct evidence. There is no circumstantial evidence.

[16] The applicant argues that the remarks about the heavy duty on the Crown indicate that the preliminary inquiry judge put a higher or different burden on the Crown or used a different test than required by *Shephard* and *Arcuri*. However, when read in context it is clear in my view that the judge was simply commenting on the duty of the Crown to adduce evidence on all elements of the offence and the necessity of doing so as carefully and precisely as possible. No issue can be taken with that statement.

[17] Notwithstanding that the preliminary inquiry judge stated the test or question correctly, in my view she did not answer it correctly because this was not a case of there being no evidence.

[18] The complainant testified that the sexual offences took place in Edzo and that she had earlier been in Yellowknife and Gameti. Although in argument before me counsel described this as circumstantial evidence that the offences took place in the Northwest Territories, I am not persuaded that characterization is accurate. I would instead characterize the evidence as direct evidence that the sexual offences took place in Edzo and other events in Yellowknife and Gameti. The direct evidence that the sexual offences took place in Edzo, whether on its own or in combination with the evidence of earlier events occurring in Gameti and Yellowknife, was evidence on the basis of which judicial notice could be taken that the offences took place in the Northwest Territories.

[19] In my view the correct approach would be somewhat similar to the approach the Supreme Court said in *Arcuri* should be taken in a case of circumstantial evidence: where the evidence on an element of the offence charged is circumstantial, the preliminary inquiry judge must ask whether that element may reasonably be inferred from the circumstantial evidence. In the case at hand, since there was evidence that the offences took place in Edzo, the preliminary inquiry judge should have gone on to consider whether judicial notice could be taken that the community of Edzo is located in the Northwest Territories.

[20] The respondent argues that the preliminary inquiry judge considered and rejected the option of taking judicial notice and that since it was within her jurisdiction to do so, this Court cannot intervene even if she erred. Put another way, the respondent argues that the preliminary inquiry judge decided that the evidence was not sufficient, which is a task given to her by s. 548(1)(b).

[21] The question of judicial notice was raised by the preliminary inquiry judge during the submissions of Crown counsel. This occurred when the judge noted that the information charged that the offences took place in Behchoko, Northwest Territories, however the evidence referred only to Edzo. The point was not fully argued and no ruling was made at that stage of the matter, although it is fair to say that the preliminary inquiry judge expressed doubt that judicial notice could be taken of something commonly known "here in this region" (the preliminary inquiry took place in Behchoko) as had been submitted by Crown counsel.

[22] The preliminary inquiry judge took a short break after hearing submissions and then gave her decision. She referred to the communities that the complainant had testified about, so it cannot be said that she did not consider the whole of the evidence. However, she made no reference to judicial notice in her decision and there is no indication in the decision that she considered the evidence about where the events took place as a basis upon which judicial notice could be taken that they occurred in the Northwest Territories. Instead, the preliminary inquiry judge simply concluded that there was no evidence that the events occurred in the Northwest Territories.

[23] The respondent's argument that the preliminary inquiry judge did consider and reject the option of taking judicial notice might have merit had the judge ruled that there was evidence based on which judicial notice might be taken that the

offences occurred in the Northwest Territories, and then refused to take such notice. However, she did not do that. Instead she decided that there was no evidence that the offences occurred in the Northwest Territories.

[24] In holding that there was no evidence, when in fact there was, the preliminary inquiry judge exceeded her jurisdiction by acting arbitrarily.

[25] The respondent did not argue that judicial notice could not be taken in this case so I will comment only briefly on that issue. It is clear that a court may take judicial notice of facts that are (i) either so notorious or generally accepted as not to be the subject of debate among reasonable persons, or (ii) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy: *R.v. Find*, [2001] 1 S.C.R. 863; *R. v. Krymowski*, [2005] 1 S.C.R. 101.

[26] What constitutes a notorious fact or common knowledge is to be judged by reference to that which is commonly known in the community where and when the issue is being tried: *R. v. Potts* (1982), 26 C.R. (3d) 252 (Ont. C.A.), leave to appeal to the S.C.C. denied [1982] 1 S.C.R. xi, SCCA No. 301.

[27] Courts frequently take judicial notice of the geographic location of particular places, often in relation to the court's jurisdiction over the trial: *McWilliams' Canadian Criminal Evidence*, 4th edition, The Cartwright Group Ltd., 2009, section 23:30:90:50; e.g. *R. v. Purcell*, [1975] N.S.J. No. 332, 11 N.S.R. (2d) 309 (C.A.); *R. v. Potts, supra*.

[28] A jury can be instructed to accept, as a matter of law, the truth of a judicially noticed fact as established: *R. v. Zundel (No. 2)* (1990), 53 C.C.C. (3d) 161 (Ont. C.A.), reversed on other grounds, 75 C.C.C. (3d) 449 (S.C.C.).

[29] Thus, if this case was being tried with a jury and the complainant testified only that the events took place in Edzo, the trial judge could be asked to take judicial notice that Edzo is in the Northwest Territories. Assuming that judicial notice of that fact was taken by the judge, the jury would be instructed that the truth of that fact was established and they should conclude that the events took place in the Northwest Territories.

[30] It seems to me, however, that the preliminary inquiry judge could also simply take judicial notice that Edzo is in the Northwest Territories and commit the accused for trial, rather than go through the exercise of determining whether there is evidence upon which a jury could make that determination. I say this because at a trial, a jury would in all likelihood be directed to accept the trial judge's determination that the fact has been established in any event. In reality of course, it is highly unlikely that any of this would be necessary at trial because Crown counsel would establish through the witness that the events took place in the Northwest Territories.

[31] To summarize, I find that the preliminary inquiry judge exceeded her jurisdiction by acting arbitrarily when she held that there was no evidence that the offences took place in the Northwest Territories and discharged the respondent on that basis.

[32] I will not deal with amendment of the information since I was not asked to make any order in that regard. Counsel may wish to consider their positions and come to an agreement on that matter when they appear before the preliminary inquiry judge.

[33] For the foregoing reasons I grant the application, quash the discharge and remit this matter to the preliminary inquiry judge to be dealt with in accordance with this judgment.

V.A. Schuler
J.S.C.

Dated at Yellowknife, this
12th day of January 2010.

Counsel for the Applicant: Glen Boyd.
Counsel for the Respondent: Jay Bran.

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