Date: 2010 07 13
Docket: S-1-CR-2009-000081

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

Respondent

- and -

ROBERT WALTER BONNETROUGE

Applicant

MEMORANDUM OF JUDGMENT

[1] The Applicant is charged with sexual assault and unlawful confinement. His jury trial was to have taken place in Fort Providence in May 2010, however a mistrial was declared when four of the jurors selected were discharged, leaving eight on the jury. The presiding Judge directed that the trial be rescheduled to take place in Yellowknife. The Applicant now seeks a change of venue so that the trial may be held in Fort Providence, where the offences are alleged to have taken place.

[2] The Applicant argues that he has a right to a trial by a jury of his peers and that his peers are members of the community of Fort Providence. He relies on this Court's long tradition of holding trials in the community most affected by an offence, that being the community where the offence is alleged to have occurred. He submits that in the circumstances of this case, there is no reason to think that an impartial jury cannot be selected in Fort Providence and the Court should make a second attempt there.

[3] The Crown points out that the jury selection that took place in May was not without difficulty. The Crown submits that the presiding Judge made a realistic appraisal of the situation and properly exercised his discretion to direct that the new

trial take place in Yellowknife. In the Crown's submission, the Applicant has not discharged the onus of showing that it is expedient to the ends of justice to move the venue to Fort Providence.

[4] Both the *Criminal Code* and the *Criminal Procedure Rules of the Supreme Court of the Northwest Territories* deal with the venue of trial.

[5] Section 599(1) of the *Criminal Code* states in part:

> 599. (1) A court before which an accused is or may be indicted, at any term or sittings thereof, or a judge who may hold or sit in that court, may at any time before or after an indictment is found, upon the application of the prosecutor or the accused, order 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
>
> (a) it appears expedient to the ends of justice...

[6] The *Criminal Procedure Rules* provide as follows:

> 37. (1) Unless the convenience of the parties and witnesses otherwise requires, a trial shall be held in the community
>
> (a) at or nearest the place where the offence is alleged to have been committed; and
>
> (b) in which there are adequate facilities available to house the court and jury and to conduct the trial.
>
> ...
>
> (6) Nothing in this rule limits the discretion of the Court to determine the place of trial.

[7] Many cases from this jurisdiction have dealt with applications for a change of venue. In the oft-cited decision of *R. v. Lafferty* (1977), 35 C.C.C. (2d) 183 (S.C.), Tallis J. pointed out that the Northwest Territories is not divided into judicial centres or judicial districts as are found in the provinces of Canada and for that reason cases from other jurisdictions must be read with caution when endeavouring to apply them to the Northwest Territories.

[8] In *Lafferty*, Tallis J. described the tradition in the Northwest Territories of holding jury trials even in small communities without adequate courtroom facilities to ensure that justice was brought to all the communities of the Northwest Territories. He also noted that changes in society had affected that tradition, observing that his predecessor, Morrow J., recognized that the practice of holding a jury trial in a small community must be realistically applied and in appropriate cases did not hesitate to arrange to hold the trial in another settlement.

[9] Tallis J. also stated that the power to order a change in the place of trial is discretionary and should be exercised with caution and only upon strong grounds. He was of the view that in applying the principles relating to venue to small communities in the Northwest Territories, the Court must carefully examine the circumstances of each case.

[10] The Applicant emphasizes statements made by Marshall J. in *R. v. Fatt*, [1986] N.W.T.R. 388 (S.C.) and in particular his reference in that decision to *R. v. Pudlock* (1972), 9 C.C.C. (2d) 256 (N.W.T.S.C.), where Morrow J. referred to trial by one's peers and in one's district as prerequisites to a fair trial. In *Fatt*, Marshall J. noted the importance of jurors reflecting the values and cultural mores of the community where the community is a reasonably distinct group with its own language and culture such as the Dene or Inuit. Even then, however, more than 20 years ago, Marshall J. added a qualification, foreseeing that roads, air travel and better communications would bring change that could also bring changes in the Court's policy relating to holding trials in small communities.

[11] In determining whether there are strong grounds for a change of venue, the Court should have regard to what the grounds are as well as the evidence adduced in support of those grounds: *R. v. McDonald*, 2008 NWTSC 96. Circumstances relating to any unsuccessful attempt to select a jury may be taken into account as may other factors, such as the effect of delay on witnesses. It also makes sense for the Court to take into account circumstances relating to jury selection generally in a community or in a previous trial, as in this case.

[12] Context is also important. For example, the Court may consider whether there is anything in the subject matter of the trial that makes similarity of cultural background as between the trial participants and jurors significant, or whether there

is any suggestion of racial or cultural bias or prejudice on the part of potential jurors if the trial is held in one community rather than another: *R. v. Beaverho*, 2009 NWTSC 21.

[13] From the cases referred to and others submitted by counsel, as well as the governing legislation, I extract the following principles: a) a change of venue may be granted if it is expedient to the ends of justice; b) the Judge has a wide discretion which is to be exercised with caution; c) the circumstances of the particular case must be examined carefully to determine what is expedient to the ends of justice; d) the desirability that a jury trial be held in the community where the offence is alleged to have taken place should be balanced with the practicalities of holding jury trials in small communities, including the fact that many people are related to each other; e) the reasons for and against holding jury trials in small communities may change over time; and f) the ultimate aim is always a fair trial with an impartial jury.

[14] The party bringing the application has the onus of establishing the grounds upon which it relies and, ultimately, that the change of venue it seeks is expedient to the ends of justice. In this case, therefore, the onus is on the Applicant.

[15] In this case, upon discharging four of the jurors in Fort Providence, the trial judge proposed directing that the trial be rescheduled to take place in Yellowknife. He asked if counsel had any submissions in that regard. Defence counsel indicated that he would like an opportunity to make a motion at some point to see whether another jury trial could be held in Fort Providence. The trial judge was clearly prepared to hear submissions, but defence counsel did not wish to address the issue at that time. The trial judge directed that the trial be in Yellowknife and left it open to the Applicant to bring the motion that he has now brought. Therefore, there is no merit to the Applicant's complaint that the trial judge did not hear submissions.

[16] The Applicant submits that a trial should only be moved from the community where the offence is said to have occurred if there is a likelihood of hostility or prejudice in that community and cites *R. v. Chinna*, [1990] N.W.T.R. 1 (S.C.) for that proposition. However, *Chinna* is a case where the Crown sought a change of venue on the ground of prejudice so any comments about the test for the change have to be read in that context. If it is established that there is a likelihood

of prejudice in a certain community, holding the jury trial in that community would not be expedient to the ends of justice. Here, neither party relies on hostility or prejudice as a factor so tests relating to those issues are not relevant.

[17] In directing that the trial be held in Yellowknife, the trial judge considered the following factors: that three out of the four jurors selected were discharged because of relationships with one or both of the complainants; that there was a high absentee rate among those summonsed for jury duty for the trial; that a large number of potential jurors were excused because of relationships with the trial participants; that the accused is from a very well-known family in Fort Providence; and that the witnesses come from large extended families there.

[18] As was the case in *McDonald*, there is nothing in the material before me, nor does there appear to have been anything before the trial judge, that explains why so many people summonsed for jury duty failed to appear for the selection process. In some cases, the Court is made aware of a community event or circumstances that may explain why a large number of people fail to attend for jury selection, but no particular reason presents itself in this case. It may be just as likely that there will not be a large turnout on a second attempt.

[19] The Applicant points out that unlike some other cases, such as *McDonald*, in this case a jury was selected, after which seven names remained on the panel list. He submits that this is an indication that another jury can likely be selected in Fort Providence. The fact remains, however, that the panel was almost completely used up by the end of the selection process and that Fort Providence is a very small community with a population of only 759. While it is possible that a second attempt to select a jury would be successful, there has to be some doubt about that. It is clear that relationships between potential and selected jurors and the participants in the trial are circumstances that played a large role in the first jury selection and the mistrial. It is a reasonable conclusion that relationships are likely to affect the ability to hold a second jury trial in Fort Providence.

[20] If a second attempt is made to select a jury in that community and it is not successful, it will mean more delay in holding the trial. The accused is in custody and even if he waives any delay, the Court must also consider on the issue of what is expedient or not to the ends of justice that there are two complainants and other

witnesses who are also likely to be affected. Delay is a negative factor as it is likely to cause stress to witnesses and does not help memories.

[21] On the other hand, there is no evidence before me suggesting that the Applicant cannot get a fair trial by an impartial jury in Yellowknife. Nor is there any evidence or suggestion that the circumstances of the case or the issues in it have a cultural component that may not be understood or appreciated except by a jury in Fort Providence. And relationships between the trial participants and potential jurors are unlikely to play any significant role in jury selection in Yellowknife.

[22] Because of Yellowknife's much larger population, there is really no doubt that a jury can be selected there for this case. In light of what happened in the first attempt to hold the trial, there is doubt whether a jury can be selected in Fort Providence.

[23] This is not a matter of what is convenient to the Court, as the Applicant suggests. The fact is that the Court does not have unlimited resources and must always balance its traditional approach with practicalities and realities. An attempt was made to hold the trial in Fort Providence but unfortunately it failed. There is doubt whether a second attempt will succeed; if it does not, it will only delay the resolution of this case. There is no reason to think that the Applicant cannot have a fair trial in Yellowknife.

[24] For the above reasons, I find that the Applicant has not shown that it would be expedient to the ends of justice to attempt again to hold the trial in Fort Providence. The application is therefore dismissed and the trial will proceed in Yellowknife.

V.A. Schuler
J.S.C.

Dated at Yellowknife, NT, this
13th day of July 2010

Counsel for the Applicant: Nikolaus Homberg
Counsel for the Respondent: Shannon H. Smallwood

S-1-FM 2010000013

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