

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- v -

ARCHIE ALBERT HORESAY

Transcript of an Oral Decision on Mistrial Application
delivered by The Honourable Justice L.A. Charbonneau,
in Fort Simpson, in the Northwest Territories, on the 13th
day of December, A.D. 2011.

APPEARANCES:

Mr. A. Godfrey: Counsel for the Crown

Mr. S. Petitpas and
Mr. M. Martin: Counsel for the Accused

(Charges under s. 271 and 266 Criminal Code of Canada)

BAN ON PUBLICATION OF THE COMPLAINANT/WITNESS
PURSUANT TO SECTION 486.4 OF THE CRIMINAL CODE

1 THE COURT: Counsel, these are my reasons
2 dealing with the application that the trial be
3 declared a mistrial in this case.

4 As I indicated before the break, I agree
5 with counsel that, most unfortunately, there is
6 nothing that I can do at this point to preserve
7 the fairness of this trial.

8 Just for the record, the defence counsel has
9 indicated that there are three broad categories
10 of reasons or concerns that he has and that he is
11 bringing forward in support of his application
12 for a mistrial. The first is concerns with the
13 translation; the second has to do with potential
14 interference with the Crown's main witness, the
15 complainant; and the third has to do with the
16 fact that during her evidence in-chief, the
17 complainant did make reference to something that
18 the accused had said to the police, which of
19 course is not admissible coming from her. It
20 turns out in this trial that I was already aware
21 that defence was not taking issue with the
22 admissibility of Mr. Horesay's statement, but,
23 still, that is not proper evidence to get from
24 this witness, and my understanding was the
25 intention was to use the statement only for
26 cross-examination purposes; but as I said before,
27 that is not really an admissibility issue. In

1 any event, that is a third area of concern.

2 I thank counsel for providing me with the
3 Ontario case mainly because it does refer to the
4 Supreme of Canada decision R. v. Burke which sets
5 out the test for granting a mistrial. As counsel
6 did, I will quote from paragraph 74 and 75 of the
7 Burke decision which is quoted in the case that
8 counsel provided me:

9 The common theme running through
10 this case law is the test of
11 whether there is a real danger of
12 prejudice to the accused or danger
13 of a miscarriage of justice.

14 In declaring a mistrial, the
15 trial judge therefore turns his or
16 her mind to the question of
17 whether a mistrial is needed to
18 prevent a miscarriage of justice.

19 This determination will
20 necessarily involve an examination
21 of the surrounding circumstances.
22 Injustice to the accused is of
23 particular concern, given that the
24 state with all its resources acts
25 as the singular antagonist of the
26 individual accused in a criminal
27 case. This factor should be

1 balanced against other relevant
2 factors, such as the seriousness
3 of the offence, protection of the
4 public and bringing the guilty to
5 justice.

6 So the test "real danger of prejudice to the
7 accused" is the one that I must apply.

8 For the record, the concerns that have
9 arisen about the translation must be put in some
10 context. We have two interpreters assisting the
11 court this week: Ms. Denneron and Ms. Deneyoua.
12 Both were sworn as interpreters. Neither of them
13 is from Wrigley. I understand that in preparing
14 for this circuit, there were attempts made to
15 retain the services of an interpreter from here
16 in Fort Simpson and that no one was available to
17 do so. Both interpreters have at different times
18 indicated that there are some differences between
19 the dialect spoken in Wrigley and the dialect
20 spoken in other parts of the region.

21 Ms. Deneyoua was the interpreter who was
22 translating the evidence of the complainant, but
23 Ms. Denneron was in the courtroom throughout as
24 she was there to assist Mr. Horesay as needed.

25 The first concern that was raised about the
26 translation came to my attention. First, just so
27 that the record is clear, I did not receive a

1 note from the person who had the concern. What
2 happened was that the concern was expressed to
3 the Deputy Sheriff who then passed it on to the
4 clerk. The note that I received was either
5 written by the clerk or by the Deputy Sheriff,
6 but it was not written by the person who had the
7 concern. What was expressed in the note was that
8 there was concern about the accuracy of
9 translation, and this happened during the first
10 part of the examination-in-chief of the
11 complainant. Upon learning of this - and it was
12 later explained that the person who had the
13 concern was the complainant's daughter - I
14 interrupted the proceedings and I inquired of our
15 second interpreter, Ms. Denneron, of what her
16 view was as to the accuracy of translation so
17 far, and she expressed that, in her view, the
18 translation was proper. She thought there was
19 maybe some communication problems. The witness
20 is very elderly. She is very, very hard of
21 hearing. So there may well be communication
22 problems that are not linked into the translation
23 or language question per se. But, in any event,
24 based on that, we continued.

25 But in another break we took later in the
26 morning, it came to my attention that the jury
27 had a concern. They were asked, for the record,

1 to put that concern in writing and their note was
2 made an exhibit in this trial, Exhibit J1. That
3 note essentially states that two of the jury
4 members are fluent in the language of the
5 complainant and had concerns that the translation
6 was not word for word.

7 Knowing that there are distinctions between
8 the dialects and again having had the second
9 interpreter confirm that in her view the
10 translation was accurate, I am left with now
11 three people that seem to be concerned enough to
12 raise the point, which is not necessarily calling
13 into question the competence of either of the
14 Court's interpreters. It may simply speak to
15 some of the nuances arising from the differences
16 in dialect. But it is not possible for me, who
17 does not speak these two languages, to really
18 know for sure how significant the nuances could
19 be. Evidently, for the three people who
20 expressed the concerns, they were significant
21 enough to raise.

22 Now, as I say, there might be other reasons
23 why there are some communication issues here, but
24 the problem I am left with now, this having been
25 raised: What could I do short of granting the
26 application for a mistrial?

27 There is no one else, as far as I am aware,

1 who is available or who would be available to act
2 as an interpreter this week. It would not be
3 proper to ask a family member of the complainant
4 to act as interpreter in these proceedings. Our
5 second court interpreter has indicated already
6 that she essentially would be doing the same,
7 working the same way as the other interpreter is,
8 so that is not an option.

9 So what I would be left with would be either
10 directing the two jurors who have different
11 interpretations of the evidence to disregard what
12 they know about their own language or, on the
13 contrary, tell them that they can feel free to
14 explain to others the nuances that they are
15 detecting as far as differences between the
16 evidence of the complainant and how it is being
17 translated. I do not think that either of those
18 solutions is appropriate.

19 It is important that every member of the
20 jury have access to the same evidence and the
21 same information, but it is also important from
22 the point of view of fairness of the trial that
23 there be a record of what that information is.
24 So if members of the jury share with other jury
25 members a different translation on some aspects
26 of the evidence, then Mr. Horesay has no way of
27 knowing what information was taken into

1 consideration or what evidence was considered by
2 the members of the jury in deciding his case.
3 That does compromise the trial fairness.

4 I do not think it would be realistic to
5 direct the two jurors who are fluent in the
6 language to ignore their knowledge of their own
7 language. I am also uncertain that it would be
8 appropriate for me to do that because in this
9 jurisdiction the territorial legislation, the
10 Jury Act, provides that anyone who speaks any of
11 the official languages of the territory has the
12 right to sit on a jury. This is an unusual
13 feature of our jurisdiction. It is shared by the
14 jurisdiction of Nunavut. It is not the same as
15 in the rest of the country where all the Criminal
16 Code says is that trials must proceed in French
17 or English. But the net result of this Act is
18 that a unilingual speaker of an aboriginal
19 language can sit on a jury if the interpretation
20 services exist to provide for that service.

21 We no longer have running courses in the way
22 we used to where the specific translation of jury
23 trial matters is something people can take
24 courses in and ongoing training on. But
25 according to our statute, a unilingual speaker
26 could sit on a jury, and unless the entire jury
27 is unilingual, there would inevitably be

1 conversation between the jury members where they
2 would have to tell each other what they
3 understand the evidence to be. So especially in
4 the context of our jurisdiction, I do not think
5 it would be appropriate or fair to tell whoever
6 the two jury members are who have a different
7 understanding of the evidence than what is being
8 translated to ignore what they are hearing and to
9 ignore their comprehension of their own language.

10 So I do not think this is a surmountable
11 problem. It is very unfortunate. At this point,
12 I know that this issue was discussed by the jury.
13 Obviously they had the concern and they brought
14 it to my attention. So I do not know that there
15 is a solution to this problem. I agree with
16 counsel: It is fatal to our ability to continue
17 with this trial today.

18 I want to address briefly the other concerns
19 that were raised, just for the record.

20 During the same break it came to the Court's
21 attention through the interpreter, Ms. Deneyoua,
22 that the complainants's daughter had spoken to
23 the complainant during the break. I asked
24 Ms. Deneyoua to say this on the record.
25 According to her, the daughter told the
26 complainant to say what is on her mind, to not
27 leave anything out, and then that she started

1 criticizing or saying names in relation to
2 Mr. Horesay. It is difficult to know if the
3 interpreter heard everything that was said. On
4 the face of it, it may not be something that
5 would have been fatal. It is always of concern
6 when someone speaks to a witness during their
7 evidence. And there is nothing here suggesting
8 that she was inviting the complainant to tell
9 untruths, but if she used critical or derogatory
10 language towards Mr. Horesay while the witness is
11 about to come back on the stand and testify, that
12 certainly raises concerns. Given the other
13 problems, I do not need to decide here if that in
14 of itself would have been sufficient reason to
15 grant a mistrial. Interference with witnesses is
16 something that can sometimes be dealt with in
17 cross-examination. These types of influences can
18 be brought out and affect the credibility or the
19 reliability of the evidence. Sometimes it can
20 also be cause for a mistrial. In this case,
21 given the other problems, I do not really have to
22 decide one way or another on that.

23 Just for the record, on the translation
24 issue, counsel also referred to the fact that the
25 interpreter from time to time was, rather than
26 translating in the first person as though she was
27 the witness talking, using the third person.

1 That is a common thing in working with
2 interpreters. Of course, the proper way to
3 interpret in a court proceeding is to stick to
4 exactly what is being said and speak in the first
5 person. But that in of itself is not something
6 that I would have been greatly concerned about.
7 It makes the court reporter's work more
8 difficult, but I do not think it compromises
9 trial fairness because it was pretty clear this
10 morning when the interpreter was repeating the
11 words of the witness. So that would not have
12 been a fatal concern for me.

13 As for the evidence about what Mr. Horesay
14 said to the police, there may be situations where
15 it could have been fatal, but I do not think this
16 case was one of them. I gave an immediate
17 direction to the jury telling them to disregard
18 it, and, in fact, at the time this happened,
19 there was no application for mistrial. Had one
20 been made, I would not have been inclined to
21 grant it. So I understand why counsel put these
22 concerns on the record, but I really think the
23 first two are the most significant ones.

24 So for these reasons, I am satisfied that
25 there is not anything I can do at this time to
26 ensure that all the jury members will decide the
27 case on the same information, the same evidence,

