IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

SITTING AS YOUTH JUSTICE COURT

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- v -

K.M.

(A YOUNG PERSON)

Transcript of the Oral Decision delivered by The Honourable Justice L. A. Charbonneau, sitting in Yellowknife, in the Northwest Territories, on the 27th day of July, 2015.

The information contained herein is prohibited from publication pursuant to s. 110 and 111 of the Youth Criminal Justice Act and s. 648 of the Criminal Code of Canada

APPEARANCES:

Ms. A. Piché and Ms. J. Scott:	Counsel for the Crown
Mr. C. Davison:	Counsel for the Young Person

(Charge under s. 235(1) of the Criminal Code of Canada)

THE COURT: Mr. M faces a charge of first degree murder and his trial is scheduled to proceed in January 2016. The events giving rise to that charge occurred in Fort Good Hope, but the trial will be proceeding in Yellowknife.

Mr. M has filed an application challenging the constitutional validity of Section 642 of the Criminal Code. That provision is in the part of the Code that sets out the process for the selection of the jury, and it is a provision that arises when the jury panel is exhausted before a full jury is empanelled.

The specific paragraph that is challenged by the defence in its motion is the first paragraph of the section and it reads as follows:

> If a full jury and any alternate jurors considered advisable cannot be provided notwithstanding that the relevant provisions of this Part have been complied with, the court may, at the request of the prosecutor, order the sheriff or other proper officer to summon without delay as many persons, whether qualified jurors or not, as the court directs for the purpose of providing a full jury and alternate jurors.

Mr. M takes the position that the section as it currently reads violates his rights under paragraph 11(b) of the Charter because it gives only to the Crown the right to have additional persons summonsed when a jury panel is exhausted.

The remedy that he seeks is to have the section read down and have the words "at the request of the prosecutor" struck from it. He wants this application heard in advance of the trial.

The Crown has filed an application seeking to have the hearing of this motion adjourned until such time as Section 642 is actually engaged. The Crown's position is that at this point the application is premature and that the Court should decline to hear it.

I will first talk about what I understand to be the applicable legal principles in this matter.

Conceptually, a moot issue and a premature issue are completely different things. One is an issue that was at one point a live issue but no longer is. The other is an issue that could arise, has not arisen yet and may not arise at all. But despite this conceptual difference, Crown and defence submit, and I agree with them, that the legal principles that are engaged are the same when dealing with both types of issues.

The underlying reasons why courts generally do not entertain issues that are moot are very similar to the reasons why courts do not generally decide issues that have not yet arisen and may not arise.

The leading case on the doctrine of mootness is Borowski v. Canada (Attorney General), [1989] 1 S.C.R. 342. The main principles that emerge from that case are that courts do have the discretion to entertain a legal issue even if it is moot, and in deciding whether to exercise that discretion, the Court should keep in mind the reasons that underlie the general policy whereby courts do not usually entertain moot issues. As the Court said at page 358 of the decision:

> To the extent that a particular foundation for the practice is either absent or its presence tenuous, the reason for its enforcement disappears or diminishes.

The foundations that were identified by the Supreme Court in Borowski, that is, the reasons why, in general, courts should not entertain issues that are moot, were the following: First, the desirability of issues being decided in an adversarial context; second, the need to use judicial resources efficiently; and, third, the importance for courts to remain within their role as the adjudicative branch in our political framework, as opposed to intruding in the role of the legislative branch.

The Supreme Court revisited the mootness principles in the context of a criminal case, in

R. v. Smith, 2004 SCC 14. The accused had been convicted of murder, had appealed his conviction but had died before the appeal could be heard. The issue was whether the appeal should still proceed. The Supreme Court reiterated the general principles outlined in Borowski and said they applied in the context of a criminal appeal. But it added other factors to consider when deciding whether to hear an appeal involving a deceased person.

The Court said that the strength of the ground of appeal was one of the factors that should be considered. The Court also noted that special circumstances might "transcend the death of the individual" and make it appropriate to hear the matter. Such special circumstances, the Court said, include whether the case raises an issue of general importance, particularly if it is otherwise evasive of appellate review; whether the case raises a systemic issue related to the administration of justice; and whether the case gives rise to collateral consequences to the family of the deceased or to other interested persons or to the public.

The case I am dealing with now of course is not an appeal and it is also not a case where the issue of mootness arises because of the death of

one of the parties to the litigation. But it is a criminal case and, for those reasons, I find the principles articulated in Smith quite relevant.

At paragraph 51 of the decision, the Supreme Court summed up the nature of the analysis to be undertaken and said:

> What is necessary is that, at the end of the day, the court weigh up the different factors relevant to a particular appeal, some of which may favour continuation and others not, to determine whether in the particular case, notwithstanding the general rule favouring abatement, it is in the interests of justice to proceed.

There are factors that weigh in favour of not hearing this motion until Section 642 has been engaged and there are other factors that weigh in favour of hearing the motion before knowing that for sure. In the end, I think the decision to hear this matter or not in advance does boil down to that basic question: whether it is or not in the interests of justice to hear and decide this issue knowing that it may not actually arise in this case.

Of the three broad considerations evoked in Borowski, I think the only one that is truly engaged here is the concern for judicial economy. The two others are not really a concern.

As far as the need for an adversarial context, the Crown has conceded, and I think it is a fair and proper concession, that there will be an adversarial context if this matter proceeds. I have every confidence that I will get thorough and full submissions from both Crown and defence if this motion proceeds.

As for the importance of the Court remaining within its proper role as the adjudicative branch of government as opposed to the legislative one, the principle is that courts are there to make decisions about actual disputes. If courts adjudicate on something that is not an actual dispute, this may be seen as an improper intrusion into the role of the legislative branch.

That was the very concern expressed by this court in Werner v. Molenkamp, 2009 NWTSC 1, which was one of the cases referred to by the Crown. In that case, what was at issue was whether a senior administrative officer in Hay River had exceeded her powers in dealing with a petition to put the proposed amendment to a bylaw to a vote by the citizens of Hay River. The senior administrative officer had concluded that there was an insufficient number of valid petitioners to engage that process. In the end, the proposal

to amend the bylaw was defeated and that is why the issue was moot by the time the matter came to a hearing.

In seeking a judicial review of the senior administrative officer's decision in that case, the applicant wanted the Court to look at the scope of the officer's powers pursuant to certain sections of the Cities, Towns and Villages Act. The applicant was asking the Court to provide an interpretation of those provisions that would essentially create a whole framework for the exercise of some of those powers. The Court declined to engage in that analysis, in part, out of concern for the respect of that proper role for the courts.

Here, the situation is quite different. What is at issue is not the interpretation of a particular provision but its constitutional validity. Assessing whether provisions of an Act comply with the Charter is very much a part of the Court's role in our system. The courts are responsible for making sure that Parliament and the legislatures of provincial governments comply with the Charter when they enact legislation. So I do not see here any concern about this motion leading to an improper intrusion of the Court in the field of the legislative branch.

The concerns about judicial economy, however, are clearly engaged. Judicial resources are scarce, counsels' resources are also limited. There already are a number of other issues that need to be litigated on this matter in advance of trial, and adding a constitutional challenge to the list is not an insignificant matter. It should not be done lightly in circumstances where it is not clear that the issue will even arise.

In both Borowski and Smith, the Supreme Court of Canada acknowledged that there are circumstances where the deployment of judicial resources for a moot issue is less of a concern. If the issue is of public importance and its resolution is in the public interest, the concern about using judicial resources to deal with it is lessened.

In Borowski, the Court said the use of judicial resources to deal with a moot issue may be warranted if the issue in question is of a recurring nature and brief in duration. The Court gave the example of an interlocutory injunction prohibiting strike action during a labour dispute.

In Smith, as I have already noted, the Supreme Court talked about special circumstances that might override the usual concerns about

using judicial resources to deal with an appeal rendered moot by the death of the appellant and it gave the three specific examples that I have mentioned already. I find it useful to look at the present situation in light of those factors that the Court talks about in Smith.

The first is the existence of a legal issue that is of general public importance, particularly if it is otherwise evasive of appellate review.

From a practical point of view, the issue that defence wishes to have addressed in this case can potentially arise every time a jury trial is held. In this jurisdiction, there is a very large number of jury trials, and a particular and somewhat unusual feature of this jurisdiction, in comparison with most jurisdictions in Canada except perhaps Nunavut, is that in the Northwest Territories jury trials are held in communities that have small populations. Due to the size of the communities and familial and other relationships within those communities, it is quite normal and to be expected that in every jury selection process, a large number of prospective jurors ask to be excused because they do not feel they can be impartial. Indeed, for most jury selection

processes this court undertakes, a large number of people are excused. Because of this, in this jurisdiction, it is not a rare occurrence that the panel is exhausted and that Section 642 is, in fact, engaged.

So this issue that the defence now wants a ruling on, while it does not arise in every case, is, I think, of a recurring nature in the context of this jurisdiction. It is also an issue which is very much evasive of appellate review. If the Crown does not make the application, the result is a mistrial. The matter then has to be rescheduled. If an accused is later convicted when the trial does proceed, the mistrial ordered at the first attempt to hold the trial would not be a ground of appeal on the trial that did proceed.

Section 642 is a provision that could escape appellate review or any form of judicial scrutiny entirely unless it is examined before it is actually engaged.

The second consideration mentioned in Smith is whether the issue raised is a systemic issue that relates to the administration of justice. Here, the issue that the defence wants to raise has to do with an alleged imbalance or unfairness in the jury selection process and one that could

potentially manifest in any jury trial. It would be difficult not to see this as a systemic issue that relates to the administration of justice. The right to a jury trial is a fundamental one and no one can question the importance of the interests at stake in a criminal trial.

The third factor mentioned in the Smith case is collateral consequences to others. As I have already noted, the disposition of this particular issue is not only relevant to the young person charged here, it is potentially relevant to any accused person who elects to have a jury trial.

Without conceding anything on the merits of the defence's application or on the issue of whether it would ever be appropriate to have this issue heard in advance of trial in another case, the Crown asked the Court during submissions to consider that even if it were found to be proper to deal with this issue in advance, is this the right case to do it? The Crown says it is not, first, because there are already a lot of issues to be litigated in this case; it already has a lot of layers of complexities and adding a constitutional challenge to it, the Crown says, is not a good use of resources. The second reason that the Crown emphasized is that the risk of the provision will even arise is extremely

remote. This case is proceeding in Yellowknife, which is the largest community in this jurisdiction. And because it is a murder case, the jury panel would likely be an expanded one, meaning that more people would be summonsed for jury duty.

These are valid points. It is the practice of the Court to direct a larger panel be summonsed for murder cases and other major cases. It is also true that in Yellowknife jury trials, it is more rare than in some other places that the talesman procedure has to be resorted to. It is not unheard of, but it does happen less frequently than in some other places where the Court sits.

On the other hand, there are other features of this case that may result in a larger number of people asking to be excused than might otherwise be the case. The first is there is a large number of witnesses. This increases the risk of jury panel members being related to someone connected to this case, even if it is proceeding in a community other than where the events are said to have happened. People move a lot in the Northwest Territories. It would not be surprising if there were Fort Good Hope residents, or relatives of Fort Good Hope

residents, or people connected to that community who live in Yellowknife and may end up on our jury panel.

The second reason is that by the standards of this jurisdiction, this will be a longer trial than most of our trials. It is scheduled to take three weeks. A larger number of people may ask to be excused because of this. Work related issues, child care issues, existing travel arrangements, medical travel are all issues that come up frequently in jury selection processes and their impact may be stronger on a trial that is expected to take three weeks than it would be for a trial expected to take one week. This may add an element of challenge in the selection process.

On balance, I do tend to agree with the Crown that the risk of the jury panel being exhausted is somewhat remote, but I am not convinced that it is as remote as the Crown has argued. I also accept the Crown's submission that there will be other cases where the risk of exhausting the jury panel will be greater than perhaps in this case.

As I already said, the fundamental question here boils down to what is in the interests of justice. Considering that means considering the

disadvantage and undesirability of using resources and everyone's time to deal with this issue knowing it may well not arise. But it also means considering the risk of the issue arising and not having been dealt with in advance, and what the consequences of that might be.

As I said during the hearing of this application, to me, the question presents in this way: Where is the greater harm? If I were to grant the Crown's adjournment application and it turned out that Section 642 did become engaged and the defence's motion had to be dealt with, I think there is a very realistic risk it could derail this trial entirely. We would have to embark upon the hearing of the defence's motion, which counsel seem to agree would require a day; then the Court would need to rule on it. And even if all that was done quickly and efficiently, there would be an interruption of the jury selection process while that takes place and those days would be lost days as far as trial time. In this jurisdiction, jury trials are virtually never interrupted to resume several weeks or months later, contrary to what sometimes happens in southern Canada. And because of the way our scheduling works and the demands of circuit court, the limited infrastructure and

resources, and the many logistical constraints that we face, the Court's ability to simply add time to a case in order to be able to finish it is almost non-existent.

So simply put, the risk in dealing with this issue only when and if it arises is that this trial could be derailed and not completed in January 2016. This would mean having to reschedule it and it would mean substantial additional delay. Whether it is from the perspective of the person charged, who is detained at this time, or from the perspective of the witnesses who are to be called, or from the perspective of the family of the deceased, I do not think it is a desirable outcome and it is a factor that weighs heavily in favour of dealing with the issue in advance.

I have given a lot of thought about the Crown's submission that perhaps there might be a better case than this one to have the issue dealt with, but I think many of the same problems would arise. It seems to me, whatever case this issue were raised in, refusing to deal with it in advance of the trial would place the accused in a catch-22 situation if they wanted to challenge this provision. They would have the choice of making the argument when the issue arises at the

risk of having their own trial derailed, or not raising it, to ensure that their trial proceeds as scheduled. I do not think it is fair to impose on any one accused the burden of litigating this issue at the cost of possibly not having their trial proceed as scheduled. For that reason, my conclusion is that practically speaking, this issue has to be dealt with in advance of trial, whatever case it is to be raised in.

As for whether this is the right case, I do not see a compelling reason for it not to be this case. The motion is filed, the matter has been raised, and although everyone's schedules are very packed, I am certain, there are still a number of months between now and the trial and hopefully it will be possible to find one day over the next five and a half months where this issue can be argued.

The other practical point I have given some thought to is that if I were to grant the Crown's adjournment application, there would remain that possibility that the issue would arise and the section would be engaged and then we would have to proceed with the motion. That means that one way or another, Crown and defence would have to be essentially ready to argue this when and if it

did arise. So work would have to be done, presumably, and some resources expended on the issue before anyone knows for sure that it will arise. By contrast, if this gets heard ahead of time, a hearing date can be set. I do not think it needs to be in August. I think it would be better if it were in the fall, actually. Counsel would be able to deal with it when they are not on the verge of starting the jury trial in a first-degree murder case.

So, on balance, although I have to say I found this to be a difficult decision to make, I am not persuaded that this is the wrong case for this matter to be argued. I am persuaded that more harm than good would come from adjourning the motion at the risk of having to deal with this once the trial actually starts.

So although I do agree that at this point in time the application is premature in the sense that the issue has not arisen, I do think that this is one of those perhaps rare cases where it should be heard in advance to the trial.

For those reasons, the Crown's adjournment application is dismissed.

(CONCLUSION OF ORAL DECISION)

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Certified Pursuant to Rule 723
of the Rules of Court

Jane Romanowich, CSR(A)
Court Reporter