

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- v -

KARMA EYEEVADLUK

Transcript of the Decision on the Mistrial Application
by The Honourable Justice S. H. Smallwood, sitting in
Yellowknife, in the Northwest Territories, on the 26th
day of May, 2017.

APPEARANCES:

Mr. A. Godfrey: Counsel for the Crown
Mr. S. Fix: Counsel for the Defence

Charge under s. 344(1)(b) Criminal Code of Canada

Official Court Reporters

1 THE COURT: Karma Eeyeevadluk is charged
2 with robbery contrary to Section 344(1) (b) of
3 the Criminal Code. She was tried before a jury
4 from February 6th to 9th, 2017. During the trial
5 the Crown called five witnesses and the defence
6 presented no evidence. The jury deliberated
7 for several hours before finding Ms. Eeyeevadluk
8 guilty of robbery.

9 Following the announcement of the verdict a
10 conviction was entered, the jury was discharged,
11 and the matter was adjourned to February 27th,
12 2017, to speak to the date for sentencing.

13 On February 27th Ms. Eeyeevadluk appeared
14 with new counsel, Mr. Fix, who advised that
15 Ms. Eeyeevadluk would be applying for a mistrial.
16 The defence subsequently filed the application
17 and supporting materials, and I heard submissions
18 on May 12th, 2017.

19 The defence seeks a mistrial on the basis of
20 the evidence which was filed, which consists of
21 an affidavit of Karma Eeyeevadluk and that of her
22 counsel at trial, Tu' Pham. Ms. Eeyeevadluk's
23 affidavit refers to what she would say about
24 the charge before the Court and attaches a
25 statement she gave to the police. In essence
26 she denies having committed the robbery. Mr.
27 Pham's affidavit says that he canvassed with

1 Ms. Eeyeevadluk at the close of the Crown's
2 case whether she wished to testify on her
3 own behalf. Ms. Eeyeevadluk was unsure,
4 but ultimately advised Mr. Pham that she
5 did not wish to testify.

6 Following the closing of the evidence,
7 and prior to the end of the pre-jury charge
8 conference, Ms. Eeyeevadluk advised Mr. Pham
9 that she now wished to testify. Mr. Pham
10 advised her that it was too late to testify
11 as the defence had already closed its case.
12 He was unaware that an application could be
13 made to reopen her defence. No application
14 was made to reopen the defence and the matter
15 proceeded. The jury was charged and deliberated,
16 returning its verdict of guilt.

17 The first issue is whether I am functus
18 officio; that is, whether I have any jurisdiction
19 to declare a mistrial following the recording of
20 the jury's verdict and the discharge of the jury.
21 The decisions of the Supreme Court of Canada in
22 *Head*, [1986] 2 S.C.R. 684, and *Burke*, 2002 SCC
23 55, dealt with this issue. The Supreme Court
24 of Canada stated in *Burke* at paragraph 68:

25
26 The general rule has been that
27 after the jury in a criminal

1 trial has been discharged, the
2 trial judge is functus officio
3 and lacks jurisdiction to reconvene
4 the jury and inquire into the
5 alleged error in the verdict.

6
7 The Supreme Court went on to determine
8 that there is an exception to the general
9 rule and stated at paragraph 69:

10
11 ...where the error is one that
12 does not require the jury to
13 reconsider the verdict or continue
14 its deliberations with a view to
15 handing down additional verdicts;
16 there the trial judge retains the
17 limited jurisdiction to recall the
18 jury and conduct a narrow inquiry
19 into the alleged error.

20
21 The Supreme Court of Canada also set out
22 a framework in *Burke* for Courts to follow in
23 this situation, and at paragraph 70:

24
25 The first question that must
26 be asked is whether the error
27 is one that requires reconsideration

1 of the verdict. If it requires
2 redeliberation of the verdict,
3 there are no circumstances under
4 which the judge will retain or
5 otherwise possess jurisdiction
6 to reconvene the jury and conduct
7 an inquiry into the alleged error.
8 The trial has concluded and the
9 jury's function is finished. The
10 jury is not then permitted to change
11 its mind. If the error does not
12 require the jury to reconsider
13 its verdict, then the trial judge
14 possesses jurisdiction to conduct an
15 inquiry, the nature of the inquiry
16 being whether the facts of the case
17 disclose a reasonable apprehension
18 of bias. In determining whether
19 this apprehension is raised, the
20 trial judge must consider all of
21 the relevant circumstances of the
22 case, an important circumstance
23 usually being the dispersal of the
24 jury and its probable effect on the
25 minds of reasonable members of the
26 public. If the facts disclose a
27 reasonable apprehension of bias, the

1 trial judge's remedial jurisdiction
2 is necessarily limited, such that
3 the trial judge cannot alter the
4 originally recorded verdict.

5
6 The case of R. v. Henderson, 2004 CanLII
7 33343 (ON CA), considered the ability of a
8 trial judge to declare a mistrial following a
9 jury verdict. The Court referred to the test
10 in Burke, where the jury does not render the
11 verdict it intended, that exception. It also
12 referred to a second exception where the accused
13 wants to raise the defence of entrapment.

14 In R. v. Halcrow, 2008 ABCA 319, the
15 Alberta Court of Appeal considered whether
16 a trial court retained a residual discretion
17 to declare a mistrial several months after
18 the jury was discharged. The Court held that
19 a trial court retained a residual discretion
20 in narrow and limited circumstances in which
21 the proper recording of the verdict was in
22 doubt, but that:

23
24 It is preferable for an appeal
25 court (should the respondent choose
26 to appeal) to consider whether a
27 new trial ought to be ordered, after

1 taking account of such matters as
2 position adopted by his counsel
3 during the trial.

4
5 That is at paragraph 33.

6 I have read the cases provided by counsel
7 and also looked at other cases. In particular,
8 I have read the Supreme Court of Canada's
9 decision in Burke with a view to the defence's
10 argument that Burke has been wrongly interpreted
11 by appellate courts, that they have wrongly
12 reviewed the decision as relating to the nature
13 of the error when the focus should be on the
14 sanctity of the verdict.

15 With respect to my view the decision in
16 Burke is fairly clear, and the questions to
17 be asked are set out in the decision. The
18 first question I must ask myself is whether
19 the error is one that requires reconsideration
20 of the verdict. If it does, there are no
21 circumstances where I will retain or otherwise
22 possess jurisdiction to reconvene the jury
23 and conduct an inquiry into the alleged error.
24 The alleged error in this case relates to the
25 conduct of the defence.

26 It is not a question of whether there
27 was an error in recording the verdict or

1 that the jury did not return the verdict
2 that it intended. Whether it is characterized
3 as an issue of the competence of counsel or
4 some other ground, one of the questions is
5 whether the defence case could have been
6 reopened had an application been brought
7 prior to the case going to the jury.
8 My understanding is that in exceptional
9 circumstances the defence can be reopened.
10 Whether this case was that exceptional case,
11 whether there was an issue of the competence
12 of counsel are issues that were not argued
13 before me, and are questions that are preferable
14 that they be answered by an appellate court.
15 My reasons should not be construed as positing
16 an opinion on either of these issues.
17 In my view, as this is a question of
18 reopening the defence and calling additional
19 evidence, which would necessarily involve
20 reconsideration of the verdict, I do not
21 retain any jurisdiction to reconvene the
22 jury or declare a mistrial, the jury having
23 rendered its verdict and having been discharged.
24 Therefore, I am dismissing the application
25 for a mistrial. It is in Ms. Eeyeevadluk's
26 best interests to have this matter proceed to
27 sentencing and concluded quickly so that she

1 can consider her next course of action, whether
2 she wishes to appeal or take some other course
3 of action.

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6 Certified to be a true and
7 accurate transcript, pursuant
8 to Rules 723 and 724 of the
9 Supreme Court Rules.

10 _____
11 Joel Bowker
12 Court Reporter