

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

MARTY RYAN BOUVIER

**Restriction on Publication:** By Court Order, there is a ban on publishing information that may identify the person/persons described in this judgment as the complainant/witness. See the *Criminal Code*, s. 486.4.

**There is a temporary ban on publication on this judgment pursuant to s. 648 of the *Criminal Code*.**

MEMORANDUM OF JUDGMENT  
(APPLICATION FOR CHANGE OF VENUE)

INTRODUCTION

[1] The accused is charged with two offences, sexual assault and uttering threats to cause death, both on J.C., and which are alleged to have occurred on January 1, 2016 in Behchokò, Northwest Territories. He has elected trial by judge and jury. The accused had a preliminary inquiry and was ordered to stand trial on July 20, 2016. His jury trial has not been scheduled yet.

[2] The Crown has filed a Notice of Motion to have the venue of the trial changed from Behchokò to Yellowknife claiming that it would be impracticable to empanel a jury in Behchokò given the reputation of the accused in the community and that it would place an unnecessary and inappropriate burden on the complainant to hold the trial in Behchokò.

[3] The Defence is opposed to having the trial held outside of Behchokò arguing that the paramount consideration is the accused's and the community's interest in having the trial held in the community in which the offence is alleged to have occurred. The Defence also argues that jury trials have been held in Behchokò in the past and that the evidence adduced on the application is insufficient to establish that a jury could not be empaneled in Behchokò.

## ANALYSIS

[4] Rule 37 of the *Criminal Procedure Rules of the Supreme Court* states that:

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.

[5] This Rule entrenches the long held practice of this Court to hold jury trials in the community where the alleged offence occurred. This practice has been described as being an integral part of this Court's operations: *R v Lafferty*, 2010 NWTSC 36 at para. 6.

[6] There are many benefits to this practice, as stated by Vertes J. in *R v Beaverho*, 2009 NWTSC 21 at para. 26:

The benefits of local trials are obvious. It makes it easier for the accused and witnesses to attend the proceedings. Jurors from the community have some sense of the atmosphere in which the participants acted and thus can put their behaviour into context. Members of the immediate community are usually the ones most affected and most concerned about local crimes. They have a stake in the outcome of trial. A trial in the community will also help avoid misconceptions of how the justice system works and misunderstandings about the results. There is greater understanding if people have the opportunity to attend and watch the proceedings.

[7] The benefits of this practice continue to be relevant to the administration of justice in the Northwest Territories. However, this practice must be applied in conjunction with other considerations like the responsible use by the Court of its limited resources and ensuring that the rights guaranteed in the *Charter of Rights and Freedoms* are upheld.

[8] One of these considerations is section 11(b) of the *Charter* which guarantees an accused person the right to be tried within a reasonable time. Trials within a reasonable time are essential to protecting accused person's interests as well those who have been impacted by criminal acts. It is also essential to promoting the public's confidence in the administration of justice. *R v Jordan*, 2016 SCC 27 at paras. 20-25.

[9] The Supreme Court of Canada in *Jordan* reaffirmed the Court's obligation to ensure that trials are held within a reasonable time. The Supreme Court of Canada delineated time limits for the prosecution of offences in provincial courts and in superior courts; 18 months for trials in provincial courts and 30 months for trials in superior courts. The ceilings that were imposed in *Jordan* were designed "to encourage conduct and the allocation of resources that promote timely trials." *Jordan, supra* at para. 107.

[10] *Jordan* also recognized that resources in the justice system are finite and the Courts must manage them responsibly while ensuring that trials occur within a reasonable time. Even prior to *Jordan*, this Court recognized that it has an obligation to use its' resources responsibly: *Lafferty, supra* at para. 9; *R v Blackduck*, 2014 NWTSC 48 at paras. 20-29.

[11] The practice of holding trials in the community where the offence is alleged to have occurred has not always been followed with respect to all communities. It has been acknowledged, either because of past attempts or the small size of the community, that it would be very unlikely to empanel a jury in some communities. For example, jury trials which arise from small communities like Colville Lake or Fort Liard are typically held in neighbouring communities. In a community like Whatì, there have been occasional attempts to empanel a jury, often without success: *Beaverho, supra*.

[12] In the post-*Jordan* era, with the renewed focus on managing trial delay, the Court will have to seriously consider whether a jury trial will be scheduled in a community where there have been unsuccessful attempts in the past to empanel a jury or where the community size is such that it may be problematic to empanel a jury.

[13] The jurisprudence on change of venue applications has consistently held that the power to order a change of venue is a discretionary one which should only be exercised where there are strong grounds for doing so. There have been cases where the Court has ordered a change of venue for various factors and others for which the Court has refused to order the requested change:

Past cases in this jurisdiction reveal a variety of reasons for ordering a change of venue. These include factors such as community divisiveness or hostility (as in *Lafferty, supra*); psychological harm to or oppression of witnesses (as in *R. v. J.K.*, [1990] N.W.T.R. 388; and *R. v. J.I.*, [1995] N.W.T.J. No. 96); community prejudice (as in *R. v. G.H.*, [1991] N.W.T.J. No. 104; and *R. v. Anablak*, [1984] N.W.T.R. 118); or, most commonly, where attempts to obtain a jury in a community have failed (as in *R. v. McDonald*, 2008 NWTSC 96 (CanLII), [2008] N.W.T.J. No. 93). But there have also been many cases where a change was refused, even in small communities where there were close family ties and intense interest in the case (as in *R. v. Koyina*, [1989] N.W.T.R. 337; *R. v. Chinna*, [1990] N.W.T.R. 1; *R. v. Lafferty (C.T.)*, [1992] N.W.T.J. No. 151; *R. v. Mukpa*, [1994] N.W.T.J. No. 60; and *R. v. Taniton*, [1996] N.W.T.J. No. 26).

*Beaverho, supra* at para. 29

[14] In this case, the Crown is seeking a change of venue on the basis that it would be impracticable to empanel a jury in Behchokò and it would place an unnecessary and inappropriate burden on the complainant to hold the trial in Behchokò.

[15] The Defence has argued that the accused and the community have an interest in having the trial held in the community and that should be the paramount consideration. There is a strong interest in having the trial held in the community where the offence is alleged to have occurred but, in my view, it is not the paramount consideration. The accused's right to a fair trial must be the primary consideration, as stated in *R v Greenland*, 2001 NWTSC 9. Justice Chrumka in *Greenland* cited the Supreme Court of Canada in *Harrer v R* (1996) 101 CCC (3d) 193 at p. 212 in explaining what is meant by a fair trial:

At base, a fair trial is a trial that appears fair both from the perspective of the accused and the perspective of the community. A fair trial must not be confused with the most advantageous trial possible from the accused's point of view, nor must it be conflated with the perfect trial. In the real world, perfection is seldom attained. A fair trial is one which satisfies the public interest in getting at the truth, while preserving basic procedural fairness to the accused.

[16] There are three components to the Crown's argument that it would be impracticable to empanel a jury in Behchokò: 1) the reputation of the accused in the community; 2) the number of familial relationships to the people involved in the case; and 3) the recent failures to empanel a jury in Behchokò since 2013.

[17] The accused has a criminal record with twelve convictions between 2014 and 2016 with multiple convictions for failing to comply with release conditions as

well as convictions for resisting or obstructing a peace officer. The accused also has a conviction for an assault and a conviction for sexual assault, both in 2015.

[18] The Crown also filed several affidavits, that of Cst. Lee Bennett, John Gouthro, S.C. and Dianna Nguy, all of which addressed the accused's reputation within the community.

[19] Cst. Lee Bennett was stationed in Behchokò from 2014 to 2106. During that time, he was involved in three investigations involving the accused. One was a sexual assault investigation where the victim later recanted and the charge was stayed. He was also the lead investigator in the matter currently before the Court.

[20] Cst. Bennett deposed that he regularly spoke with various members of the community and the accused's name arose in many discussions, sometimes because people were complaining about the accused's intoxication or behaviour. Cst. Bennett's belief, based on these conversations is that the accused is well-known to members of the community. The accused was first known as a talented soccer player but by 2016, most of the people that Cst. Bennett spoke to were aware that the accused had been convicted of sexual assault and were aware that he was on conditions not to be alone with children.

[21] John Gouthro is the Principal at the elementary school in Behchokò. He says that the accused assaulted two students behind the school and at the time, was prohibited by a court order from attending the school. Following the incident, he reported receiving several calls from parents and community members regarding safety on the school grounds.

[22] S.C. is the biological aunt and adoptive mother of J.C. and lives in Behchokò. She knows the accused, his parents and family. S.C. believes that prior to the alleged incident with J.C., the accused had gotten away with "a lot" of unreported assaults. She believes that the accused assaulted her friend's daughter and also assaulted two children behind the school. S.C. says that the incident behind the school was reported on Northbeat and APTN. S.C. believes that members of the community are aware of the accused's past and watch their children when he is around.

[23] Dianna Nguy is a Crown Witness Coordinator with the Public Prosecution Service of Canada. Attached as an exhibit to her affidavit is a CBC.ca news report regarding the accused which came up on a google search. The news report is about the accused's arrest for assaulting two girls near the elementary school in Behchokò.

[24] While the evidence is somewhat vague, it appears that the accused is known in the community and that his reputation is not a positive one. The incident involving the assault on the two children at the school seems to have been well known in Behchokò and has resulted in people being concerned for their children's safety when the accused is around. This reputation, regardless of whether it is accurate or not, raises concerns about whether the accused can receive a fair trial in Behchokò. This concern is magnified when you consider the allegations in this matter, a sexual assault on a teenage girl, which bear some similarity to the negative reputation which the accused has in Behchokò. There is a risk that some jurors may try the accused on the basis of his reputation.

[25] In her affidavit, S.C. states that J.C. is related to some of the Rabesca family in Behchokò. She also says that the accused comes from a large family and is also related to the Lafferty and Rabesca families. S.C. claims that the Lafferty and the Rabesca families are the two biggest families in Behchokò.

[26] The number of witnesses, the size of the family and extended family of the accused, the complainant and other witnesses are factors that frequently result in people being excused from jury duty, particularly in smaller communities. It is not uncommon, in Behchokò and other communities, for the jury panel to be significantly reduced when family members are excused from serving on the jury.

[27] There is little information about the size of the accused's family and whether or not it would impact upon the ability to empanel a jury in Behchokò. I expect that some people would seek to be excused based on familial relationships with the accused or complainant, but it is difficult to conclude that those familial relationships would make it impracticable to empanel a jury in Behchokò.

[28] Behchokò is a community where jury trials have been held over the years. Juries have been selected without an issue there. However, recently this has not been the case. As I stated in *R v Blackduck*, 2014 NWTSC 48 at para. 27-28:

Behchokò has a population of approximately 2,025 people of which half are estimated to be over the age of 25, and thus meet the age requirements of the *Jury Act*. With over 1,000 people potentially eligible to serve on a jury, selecting a jury in Behchokò should not be an issue and in the past, it frequently has not been an issue.

On the past two occasions that the Court has come to Behchokò, for this trial and *R. v. Eyakfwo* (S-1-CR-2012-000091) in March 2014, a full jury could not be selected and mistrials were declared. In *Eyakfwo*, of the 126 people on the nominal list, 75 did not attend which equated to 60% absenteeism. In this case, of

the 120 people on the nominal list, 63 did not attend which equated to 53% absenteeism. There are times at jury selection when other members of the community who are present will offer an explanation for why a person has not attended or inform the Court about a community event like a funeral or meeting which might impact upon attendance for jury selection. In this case, there were very few explanations offered and it is not clear why so many people did not respond to their jury summons. It is a worrisome trend that appears to be developing in Behchokò and, if it continues, may jeopardize the Court's ability to hold jury trials in that community.

[29] The Crown has filed the Statistical Profile of Behchokò from 2016 which indicates that the population profile of Behchokò is consistent with that in 2014. The community has grown slightly and there are slightly more people who are potentially eligible to serve on a jury.

[30] In addition to the *Blackduck* and *Eyakfwo* cases referred to above, the Court has attempted unsuccessfully to hold several jury trials in Behchokò. The Crown has reviewed the jury trials scheduled in Behchokò between January 1, 2013 and January 31, 2017. Of the 8 trials scheduled, 3 were successful in empanelling a jury on the first attempt. The other five trials were unsuccessful in empanelling a jury on the first attempt, of which one jury trial was successfully held on the second attempt. The other four matters were rescheduled to Yellowknife. Significantly, a jury has not been successfully empaneled in Behchokò since December 2013.

[31] In the jury trials that I was scheduled to preside over, there was significant unexplained absenteeism. Often during the jury selection process, members of the jury panel will advise the court of community events like meetings, funerals, etc. to explain why some members of the jury panel are not present. However, in my recent experiences in Behchokò, there have been no community events mentioned to explain the significant absenteeism. As I stated in *Blackduck*, it is a worrisome trend that is jeopardizing the Court's ability to hold jury trials in Behchokò. Since *Blackduck*, the Court has attempted to empanel a jury on two other occasions, both unsuccessfully.

[32] The accused was charged with these offences on January 2, 2016. The trial is expected to be scheduled for the week of January 8, 2018. If the trial were held in Behchokò, there is a real risk that a jury could not be empaneled either because of the number of people who do not attend jury selection, the possibility that a significant number of the jury panel will be excused because of a familial relationship or because of their knowledge of the accused's reputation. If a mistrial were declared, another trial would be several months later. The *Jordan*

deadline in this matter is in July 2018 and there is a significant possibility that a further trial could not be scheduled by that date.

[33] In my view, the trial should not be held in Behchokò. When considering the accused's reputation in the community, the general difficulty in empaneling a jury in Behchokò and the possibility of delay arising from a mistrial, the trial should be held in another community. For these reasons, I am granting the Crown's application and the jury trial will be scheduled in Yellowknife.

[34] Since I have concluded that the trial should be moved because of the impracticability of empaneling a jury in Behchokò, I have not considered the Crown's other ground that holding the trial in Behchokò would place an unnecessary and inappropriate burden on the complainant. Although it seems that the witness aids that are available in the *Criminal Code* would address the concerns about the complainant which were referred to in the evidence.

S.H. Smallwood  
J.S.C.

Dated in Yellowknife, NT, this  
24<sup>th</sup> day of May, 2017

Counsel for the Crown:  
Counsel for the Defence:

Mr. Brendan Green  
Ms. Alexandra Seaman



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