R. v. Bouvier, 2017 NWTSC 45

S-1-CR2016000065

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- vs. -

MARTY BOUVIER

Transcript of the Decision (Defence Application to Recuse Her Honour) by The Honourable Justice S. H. Smallwood, at Yellowknife in the Northwest Territories, on April 5th A.D., 2017.

APPEARANCES:

Mr. B. Green: Counsel for the Crown

Mr. J. Bran, agent
Ms. A. Seaman: Counsel for the Accused

No information shall be published in any document or broadcast or transmitted in any way which could identify the victim or a witness in these proceedings pursuant to s. 486.4 of the Criminal Code

An Order of the Court has been made prohibiting publication, broadcast, or transmission of information contained herein pursuant to s. 648 of the Criminal Code

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THE COURT: Good morning.

MR. GREEN: Good morning, Your Honour.

MR. BRAN: Good morning, Your Honour, I am appearing as agent for Mr. Bouvier's counsel. Mr. Bouvier is appearing by video and I have spoken to him, and we are ready to receive the Court's decision.

THE COURT: Okay, thank you.

So first, we will deal with the decision which I had given on the previous date, on the 27th, following the application for the change of venue regarding the recusal application made by defence.

So the accused Marty Bouvier is charged on an Indictment with two counts, that he committed a sexual assault on J.C. contrary to section 271 of the Criminal Code, and that he uttered a threat to J.C. to cause death to her and her family contrary to section 264.1(1)(a) of the Criminal Code, both of which are alleged to have occurred on January 1st, 2016, in Behchokò.

Mr. Bouvier has elected trial by Judge and jury, and the trial has yet to be scheduled.

The Crown brought an application to have the venue of the trial moved from Behchokò and the grounds for seeking the change of venue

were stated to be that it would be impracticable to impanel a jury in Behchokò given the notoriety of the accused, and that it would impose an unnecessary and inappropriate burden on the victim to hold the trial in Behchokò.

The application was heard before me on February 27th, 2017, and I reserved decision at that time.

Following the application, counsel for Mr. Bouvier requested that I recuse myself from the eventual trial of this matter. I heard submissions from the Crown and the defence and dismissed the application to recuse myself, indicating that reasons would be provided at the next date. So the reasons that I am providing now are on the application for the recusal.

The accused's request that I recuse myself was based upon the bad character information that I had heard about the accused during the change of venue application and that the information that had been provided was prejudicial and would impact how I would view the accused and how I would treat him during the trial.

The test for a Judge to recuse themselves

is whether the applicant has established that there is a reasonable apprehension of bias on the part of the Judge. The applicable principles were stated by Justice Vertes in Werner v. The Queen, 2005 NWTCA 05 when he was sitting as a member of the Northwest Territories Court of Appeal. I am going to quote several paragraphs of Justice Vertes' decision because it succinctly sets out the applicable principles, starting at paragraph 11:

> That test, for recusal of judges on the basis of a reasonable apprehension of bias, is well-established. It is based on the formulation set out by deGrandpré J. in Committee for Justice and Liberty v. National Energy Board, 1976 CanLII 2 (SCC), [1978] 1 S.C.R. 369 (at p. 394): Would the reasonable, right-minded and properly informed person, viewing the matter realistically and practically, think that there is a real likelihood or probability of bias so as to render the trial unfair?
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> This test for recusal has been restated time and again as the sole test: R. v. R.D.S., 1997 CanLII 324 (SCC), [1997] 3 S.C.R. 484; Wewaykum Indian Band v. Canada, 2003 SCC 45 (CanLII), [2003] 2 S.C.R. 259.
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> There are a number of points that need to be noted so as to provide context to the issue of judicial recusal.
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> There is a strong presumption of judicial impartiality and the

> threshold for a finding of bias, real or apprehended, is necessarily high. Thus there must be cogent grounds. Mere suspicion is not enough. And it is important to note that the test is not whether a party to the proceeding (such as the applicant) would reasonably apprehend bias but whether the reasonable and informed member of the public would apprehend it.
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> Numerous cases and articles also emphasize the fact that it is not in the public interest to have judges easily disqualified. A low standard would lead to delays because it would encourage tactical motions by litigants seeking another Judge when they may anticipate an unfavorable outcome. It would also make it extremely difficult run cases on an efficient basis in small centres (such as Hay River) where there may be few judges and a likelihood that litigants who appear frequently in the courts would often appear before the same judge.
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> These principles were restated recently in

Heffel v. Registered Nurses Association 2015

NWTSC 16 where, at paragraphs 95 and 97,

Justice Schuler stated:

> The accepted test for reasonable apprehension of bias was stated by de Grandpré J. in Committee for Justice and Liberty v. National Energy Board, 1976 CanLII 2 (SCC), [1978] 1 S.C.R. 369 (at p. 394): "what would an informed person, viewing the matter realistically and practically - and having thought the matter through - conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously,

would not decide fairly."

> The cases note that there is a strong presumption of judicial impartiality and the threshold for a finding of real or apprehended bias is high, requiring that there be cogent grounds. Mere suspicion is not enough. As Vertes J.A. noted in Werner, the test is not whether a party to the proceeding would reasonably apprehend bias, but whether the reasonable and informed member of the public would apprehend it (at paragraph [14]). The member of the public is one who is reasonable, not a person of "very sensitive or scrupulous conscience".

In this application, there was evidence that was filed by the Crown, and it was filed in support of the application for the change of venue. It consisted of the offence record report for the accused which indicated that he had a number of convictions, mainly convictions for breaches of court-ordered conditions, that he also had a conviction for an assault in 2015, and a conviction for sexual assault in 2015.

Affidavits were also filed by S.C., who is the adoptive mother of the alleged victim in this matter; from John Gouthro, the principal of school in Behchokò, and Constable Bennett, who had been stationed in Behchokò from 2014 to 2016.

The Crown also filed other material

relating to statistical information regarding the community of Behchokò as well as to the difficulties in selecting juries in Behchokò since 2013.

The affidavits that were filed primarily speak to the accused's reputation in the community and his alleged reputation as someone who has committed sexual assaults against young persons. The affidavits refer to the deponents' concerns as well as the concerns that they say that other members of the community have about Mr. Bouvier.

They allege that Mr. Bouvier has a reputation in Behchokò and is known amongst at least some members of the community for having committed a sexual assault and perhaps other sexual assaults for which he was either not charged or convicted.

Judges are called upon to make applications regarding the admissibility of evidence on a daily basis; for example, whether the accused can be cross-examined on a criminal record, whether a statement given by the accused to the police is admissible, whether prior acts committed by the accused are admissible as similar-fact evidence. Many of these applications involve hearing evidence

that do not cast an accused in a positive light. Judges are required to make a ruling and are then expected to continue on with the trial. It is not presumed that following this that a Judge will be required to recuse themselves because of the bad character or other negative evidence that they have heard about the accused.

There is a strong presumption of judicial impartiality. Judges are expected to put aside inadmissible evidence and decide cases impartially and on the basis of the admissible evidence before them. That is not to say that there cannot be situations where a Judge may be in a position where there is real or apprehended bias, but as the cases state there must be cogent grounds and mere suspicion is not enough.

The affidavits filed on this application are somewhat vague and do not provide a lot of information about the incidents that Mr. Bouvier is alleged to have committed. It also appears that they refer to incidents for which Mr. Bouvier was either never charged or convicted of a criminal offence. And I am not certain how helpful these affidavits are in terms of providing specific evidence about Mr.

Bouvier's actions, but they do indicate that some members of the community have concerns about Mr. Bouvier and that he has a certain negative reputation amongst those members. Whether those concerns or that reputation is well founded or not is another issue.

Mr. Bouvier has also had a show cause hearing on these charges and he has had a section 525 bail review in front of Justice Mahar of this Court. At that hearing, similar information was put before Justice Mahar regarding Mr. Bouvier's background and more specific information was provided regarding the offence itself and his criminal history. If I were to recuse myself on the basis of the information provided at the change of venue application, then it seems that there would be grounds for Justice Mahar to be asked to recuse himself on a similar basis.

It may be, as well, that Mr. Bouvier will appear in front of another Judge for another section 525 bail review or another application which could result in another Judge hearing similar information about Mr. Bouvier.

As Justice Vertes observed in the Werner case, a low standard for having Judges disqualified would inevitably result in delays

and it can be difficult to have matters proceed expeditiously in this jurisdiction where there are only four resident Supreme Court Judges.

In my view, the evidence which has been filed on this application is not sufficient to raise a concern that the Judge hearing the application would have a bias, real or apprehended. A reasonable and informed member of the public would not view the information that was submitted at the change of venue application as resulting in the Judge having a bias against the accused. Members of the public expect Judges to hear these types of applications and then to continue on with the trial. They expect justice to occur in a fair and expeditious manner and not to be delayed or interrupted by a Judge having to recuse themselves following an application where they have heard evidence that is of the type that is regularly considered by a trial Judge.

So for these reasons, I dismiss the application to recuse myself.

So there is also the issue, Mr. Green, about the publication ban and the notice, which on the last date, the notice requirements had not been complied with.

MR. GREEN: Yes, Your Honour, before we move to that, in your reasons on recusal you did identify S.C. as being the adoptive mother of J.C. In light of the 486.4 publication ban, I would ask that in the transcript or any published reasons that Ms. S.C.'s [initials inserted] name also be anonymized.

THE COURT: That's fine.

Certified to be a true and accurate transcript pursuant to Rules 723 and 724 of the Supreme Court Rules,

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Lois Hewitt,
Court Reporter