R v Panaktalok, 2021 NWTSC 3 **S-1-CR-2019-000104**

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

- and -

BARION DWAYNE PANAKTALOK

Respondent

Transcript of the Reasons for Decision by the Honourable Justice S.H. Smallwood, sitting in Yellowknife, in the Northwest Territories, delivered orally on the 11th day of January, 2021.

APPEARANCES:

A. Godfrey: **Counsel for the Crown**

R. Clements: **Counsel for the Defence, appearing via teleconference**

Charge under s. 266 of the *Criminal Code*

I N D E X

PAGE

RULINGS, REASONS

Reasons for Decision 1

1 THE COURT: This is a Crown appeal from a decision of
2 the Territorial Court in Tuktoyaktuk to acquit the
3 accused, the respondent, Mr. Panaktalok. The
4 respondent, Barion Dwayne Panaktalok, was charged
5 with one count of assault, contrary to section 266 of the
6 *Criminal Code.* The assault was alleged to have been
7 on his domestic partner and have occurred on or about
8 February 28th, 2019, in Tuktoyaktuk, Northwest
9 Territories.
10 Mr. Panaktalok entered a not guilty plea
11 and the matter was subsequently set for trial on August
12 28th, 2019. On August 28th, 2019, the Crown sought
13 an adjournment of the trial on the basis that a witness,
14 a police officer, was not available. The defence did not
15 consent to the adjournment and raised a concern about
16 *laches*.
17 The trial judge denied the adjournment
18 application. As a result, the Crown was unable to lead
19 evidence and the respondent was acquitted. The
20 Crown appeals the decision to deny the adjournment
21 application, arguing that the trial judge provided
22 insufficient reasons for the decision and that the finding
23 of *laches* was made in error.
24 Dealing first with the sufficiency of
25 reasons, the decision of the Supreme Court of Canada
26 in *R. v. Sheppard* 2002 SCC 25 and *R. v. R.E.M.* 2008
27 SCC 51 set out principles to consider in assessing the

1 sufficiency of a trial judge's reasons.
2 Reasons for judgment are integral to a trial.
3 They justify and explain a result. They inform the
4 parties and the public of the reasons for the decision
5 and permit meaningful appellate review. *Sheppard* at
6 paragraph 24.
7 The reasons must be sufficient to explain
8 why the accused was convicted or acquitted, providing
9 public accountability and permitting effective appellate
10 review. *R.E.M.* at paragraph 15.
11 For the purposes of an appeal, if the
12 reasons do not prevent meaningful appellate review,
13 then appellate intervention is not warranted. An
14 appellate court cannot intervene simply because it
15 thinks that the trial judge did a poor job of expressing
16 itself. *Sheppard* at paragraphs 25-26.
17 Reasons are particularly important where
18 the trial court is called upon to address unsettled law or
19 to resolve confusing or contradictory evidence on a key
20 issue, unless the basis for the trial judge's conclusion is
21 apparent from the record. *Sheppard* at paragraph 55.
22 The trial judge's duty to provide reasons
23 is satisfied where the decision is reasonably intelligible
24 to the parties and provides a basis for meaningful
25 appellate review. *Sheppard* at paragraph 55.
26 In considering the sufficiency of reasons,
27 an appellate court should read them as a whole in the

1 context of the evidence, the arguments and the trial
2 with an appreciation of the purposes or functions for
3 which they are delivered. The reasons are sufficient if
4 they, read in context, show why the judge decided as
5 he did. *R.E.M.* at paragraphs 16-17.
6 While judges are presumed to know the
7 law and deal competently with issues of fact, the
8 presumption is of limited relevance. Where the reasons
9 are deficient but an appeal court is able to explain the
10 result on its own reasons, that will be sufficient.
11 *Sheppard* at paragraph 55.
12 It is also important to keep in mind the
13 time constraints and the general business of criminal
14 courts in assessing the trial judge's reasons. Perfection
15 is not required. *Sheppard* at paragraph 55.
16 On the trial date, the Crown sought an
17 adjournment of the trial as a material witness, a police
18 officer, was not available. The Crown advised the
19 Court that the officer had transferred to Alberta on July
20 8th, 2019. The officer was unable to attend court and
21 video testimony was not available in Tuktoyaktuk.
22 The officer learned that he was
23 unavailable for court on July 22nd, 2019, and advised
24 the Crown on August 2nd, 2019, that he was
25 unavailable for another trial which was scheduled for
26 the same circuit.
27 The Crown advised that they would be

1 prepared to proceed with Mr. Panaktalok's trial on the
2 December 2019 circuit to Tuktoyaktuk. The Crown
3 argued that the allegation involved domestic violence
4 so there was a high public interest and that there was
5 no *laches*. The adjournment request could not have
6 been avoided, as the officer could not have attended
7 court that day.
8 The defence did not consent to the
9 adjournment and stated that there was a concern about
10 *laches* and it was not clear that the officer could not
11 have notified the Crown earlier that he was leaving the
12 jurisdiction.
13 Following the Crown's adjournment
14 application and hearing the submissions of the Crown
15 and defence, the trial judge dismissed the application.
16 The entirety of the trial judge's reasons for dismissing
17 the adjournment application were "Yeah, sounds like
18 *laches* to me. Adjournment denied."
19 The context surrounding the application
20 must be kept in mind in assessing the sufficiency of the
21 reasons. This was a Territorial Court circuit to the
22 community of Tuktoyaktuk, a community that the
23 Territorial Court travels to several times a year on court
24 circuits.
25 Charbonneau, C. J. noted in *R. v. Koe,*
26 2019 NWTSC 58 that the Territorial Court is busy,
27 deals with many cases on a circuit, and rulings are

1 often brief, stating at paragraphs 54 to 55:
2
3 Territorial Court circuits are usually very
4 busy. In that court, counsel and the
5 judges are required to deal with a large
6 volume of cases with time constraints and
7 other challenges. The overall pace is fast
8 and sustained. Understandably and
9 especially for routine cases, the
10 submissions and rulings are brief.
11 But even in that environment, legal issues
12 that arise during a criminal trial must be
13 addressed.
14
15 In this case, the ruling was brief and the
16 reasons for denying the adjournment constituted the
17 bare minimum. Aside from denying the adjournment,
18 the reasons told us *laches* and nothing more. We know
19 the context of what the *laches* was about because of
20 the submissions of counsel.
21 Counsel's submissions were brief and
22 the focus was on the issue of *laches*. In submissions,
23 the Crown made arguments about why there was no
24 *laches*, and the defence submission on *laches* was that
25 there was a concern that the officer could have notified
26 the Crown earlier that he was leaving the jurisdiction.
27 While the trial judge apparently found

1 *laches*, the basis on which the trial judge did so is not
2 clear from the reasons. While it appears that the trial
3 judge viewed that the Crown had not taken reasonable
4 steps to procure the attendance of the officer in
5 concluding that they were guilty of *laches*, it is not clear
6 whether this was on the basis of the submission of
7 defence counsel or on another basis.
8 Were there other steps that the trial judge
9 felt should have been taken by the Crown in advance of
10 the trial date? If the officer had notified the Crown of
11 his unavailability earlier, as suggested by defence
12 counsel, would the Crown be not guilty of *laches*? Or
13 was more required of the Crown? And if so, what?
14 The conclusion of *laches* without more
15 raises more questions than answers. Not all of these
16 questions needed to be answered in the decision and it
17 was not necessary that the trial judge embark on a
18 detailed analysis of the concept of *laches*, but
19 something more than simply stating *laches* was
20 required.
21 The reasons of the trial judge also do not
22 address the domestic violence allegation and the high
23 public interest in seeing that these matters are
24 adjudicated. It can be assumed that the trial judge was
25 aware of the nature of the allegation, as the information
26 revealed the respondent was charged with an assault
27 and the Crown in submissions referred to the nature of

1 the allegation being one of domestic violence and that
2 there was a high public interest.
3 The reasons, however, only refer to
4 *laches* and no other considerations. The conclusion
5 that could be drawn is that the trial judge determined
6 that the Crown was not entitled to an adjournment in a
7 case of domestic violence in a jurisdiction with
8 significant domestic violence problems on the first
9 scheduled trial date when the accused was out of
10 custody and there was no apparent prejudice to the
11 accused's position because a police officer failed to
12 advise the Crown at an earlier date that he was leaving
13 the jurisdiction. However, the reasons do not say this.
14 The reasons do not address domestic
15 violence or the high public interest in pursuing the
16 adjudication of cases of this nature. It is not clear what
17 role, if any, those considerations played in the trial
18 judge's decision to deny the adjournment, and it is not
19 clear that there was any balancing of these competing
20 considerations.
21 Taking into account the applicable
22 principles for appellate review of the sufficiency of
23 reasons and keeping in mind the challenges and
24 constraints placed upon Territorial Court judges, I
25 conclude, with respect, that the reasons of the trial
26 judge were not sufficient in this circumstance to let the
27 Crown or the public know why the decision had been

1 made, or to permit meaningful appellate review.
2 Turning to the trial judge's decision to
3 deny the adjournment application, it is accepted that
4 the test in *Darville v. R* (1957), 116 CCC 113 sets out
5 the conditions that must be generally met in order for a
6 party to be entitled to an adjournment on the basis that
7 a witness is not available, and they are:
8 1) the absent witness must be a material
9 witness;
10 2) the party applying for the adjournment must
11 not have been guilty of *laches* or neglect in
12 procuring the attendance of the witness;
13 and
14 *3)* there is a reasonable expectation that the
15 witness will be available at a future trial
16 date.
17 There is no dispute that the only issue
18 was whether the Crown had been guilty of *laches* in
19 procuring the officer's attendance for trial. The officer
20 was a witness who was material, as he was required
21 for a *voir dire* into the accused's statement, which the
22 Crown stated would make out the offence, and the
23 Crown had advised that the officer would be available
24 at a future trial date and the Crown was proposing
25 December 2019, when all of the witnesses would be
26 available for the trial date.
27 So in considering whether there has been

1 *laches*, the party seeking the adjournment is required to
2 have taken reasonable steps to ensure the attendance
3 of a witness for trial. Ultimately, a judge's decision
4 whether to grant an adjournment is discretionary and
5 accorded deference. The discretion of the trial judge
6 must be exercised transparently and in a principled
7 manner.
8 The defence objection at trial with respect
9 to *laches* was that it was not clear that the officer could
10 not have notified the Crown earlier that he was leaving
11 the jurisdiction. Earlier notification of the Crown of the
12 officer's availability would not have changed the fact
13 that the officer was not available for the scheduled trial
14 date in Tuktoyaktuk.
15 The timeline in which this occurred was a
16 relatively short one. The officer learned that he was not
17 available on July 22nd and the Crown was advised of
18 this on August 2nd. The trial date was August 28th.
19 There may have been options available to the Crown
20 that could have addressed this issue: seeking to have
21 the officer testify by video or telephone or seeking an
22 adjournment in advance of the trial date.
23 The officer was a material witness. He
24 was required on a *voir dire* into the admissibility of the
25 accused's statement, which, as the Crown had stated,
26 made out the offence. The victim, the Crown also
27 advised, was not cooperative, so the evidence of the

1 officer was obviously necessary.

2 The Crown advised the trial judge that
3 there was no videoconferencing capability in
4 Tuktoyaktuk for the officer to testify. As for the prospect
5 of the officer testifying by telephone, in those
6 circumstances, it was not ideal and I suspect likely to
7 be opposed. The Crown cannot be faulted for not
8 pursuing that option.

9 The Crown could have sought an
10 adjournment in advance of the trial date by bringing
11 forward the matter. However, that would not have
12 changed the ability of the Crown to proceed on the
13 scheduled trial date. While it may be good practice to
14 bring forward matters for adjournment when possible in
15 advance of a trial date in Territorial Court, I am not
16 prepared to say that it is required to avoid a finding of
17 *laches* in seeking an adjournment because of the
18 unavailability of a witness.

19 At the end of the day, if the witness was
20 truly unavailable, the Crown was not going to be able to
21 procure the witness's attendance for the trial date
22 regardless if the matter had been brought forward or
23 not.

24 All of these may have been
25 considerations that the trial judge considered and took
26 into account in denying the Crown's adjournment
27 application, but the absence of reasons means that an

1 appellate court cannot determine what factor those
2 considerations may have played, if any, in the decision
3 and on what basis the finding of *laches* was made. The
4 failure to address the issue of domestic violence and
5 the high public interest in cases of this nature also
6 cause concern that the trial judge may not have
7 exercised his discretion to deny the adjournment in a
8 principled manner.
9 The reasons that were provided were not
10 sufficient to permit a meaningful appellate review. The
11 reasons were not transparent and it is not clear that the
12 trial judge exercised his discretion to deny the
13 adjournment in a principled manner. For these
14 reasons, I am granting the Crown's appeal.
15
16 **(PROCEEDINGS CONCLUDED)**
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2 **CERTIFICATE OF TRANSCRIPT**

3 Neesons, the undersigned, hereby certify that the foregoing
4 pages are a complete and accurate transcript of the
5 proceedings transcribed from the audio recording to the best
6 of our skill and ability. Judicial amendments have been
7 applied to this transcript.

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9 Dated at the City of Toronto, in the Province of Ontario, this
10 27th day of January, 2021.

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14 Kim Neeson
15 Principal

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