

**IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES
IN THE MATTER OF:**

HER MAJESTY THE QUEEN

- and -

FRANKIE JAMES SMITH

REASONS FOR DECISION

of the

HONOURABLE JUDGE B. E. SCHMALTZ

Heard at: Fort McPherson, Northwest Territories
May 27 & 28, 2015

Date of Decision: May 28, 2015

Reasons filed: June 5, 2015

Counsel for the Crown: Wendy Miller

Counsel for the Accused: Steven Fix

[Section 267(b) of the *Criminal Code*]

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I. INTRODUCTION

[1] On May 28, 2015, in Fort McPherson, I found that an Information charging Frankie James Smith with assault causing bodily harm was a nullity and therefore the proceedings based on that Information could not continue. The Information had been sworn on January 22, 2014, and the matter was scheduled to proceed to trial on May 27, 2015. Below are the reasons for my decision.

II. BACKGROUND

[2] Frankie James Smith was charged with assault causing bodily harm on an Information that read as follows:

This is the information of:

Name

Frankie James SMITH

Address

Fort McPherson, NT

Occupation

unemployed

hereinafter called the informant

The informant has reasonable and probable grounds to believe and does believe that

FRANKIE JAMES SMITH

Count 1:

on or about the 1st day of January in the year 2014 at the Hamlet of Fort McPherson in the Northwest Territories, did in committing an assault upon John ROBERT cause bodily harm to him contrary to Section 267(b) of the *Criminal Code*.

“S. Pollock”

Signature of informant

Sworn before me)
This 22 day of January)
2014 at Ft. McPherson)
In the Northwest Territories)

“illegible signature”

Justice

[3] When the matter was called it was noted that on the face of the Information, Frankie James Smith appeared to have charged himself. I heard submissions from both Crown and Defence on May 27 and May 28, after which I did not allow the Crown to bring an application to amend the Information as I found the Information to be a nullity and consequently there was not a valid information before me on which an application could be made.

III. **Criminal Code**

[4] The Crown proceeded summarily on this matter, and therefore Part XXVII of the *Criminal Code* applies.

[5] Section 788 of the *Criminal Code* states:

788. (1) Proceedings under this Part shall be commenced by laying an information in Form 2.

Unless and until there is an Information in Form 2, nothing is before the Court upon which to base jurisdiction.

[6] Section 789(1)(a) of the *Criminal Code*, sets out the formalities of an Information:

789. (1) In proceedings to which this part applies, the information

(a) shall be in writing and under oath¹;

[7] Being a statutory court, the Territorial Court can only act within its jurisdiction.

That the Territorial Court is acting within its jurisdiction should be apparent on the face of the Information upon which its jurisdiction is based².

[8] On the face of the Information in the instant case the statement in writing is the statement of Frankie James SMITH; the statement of Frankie James SMITH is not under oath as he did not swear the Information before the Justice. "S. Pollock" did swear something before the Justice, but it is not clear on the Information what she swore as the statement *in writing* is the statement of Frankie James SMITH. The statement in writing is not under oath, and the oath sworn by "S. Pollock" does not relate to a written statement of "S. Pollock". The mandatory requirements of section 789(1) of the *Criminal Code*, i.e. 'in writing' and 'under oath', have not been complied with.

[9] Not being in writing and under oath, the Information before the Court was not a valid Information. There being no valid Information before the Court, proceedings

¹ The remainder of s. 789 of the Criminal Code has no application to this case.

² *R. v. Ingham*, [1988] N.S.J. No. 68 (N.S.C.A.) at p. 4

before the Court had not been validly commenced. The proceedings before the Court, not being validly commenced, could not continue as the Court had no jurisdiction.

IV. CAN THE INFORMATION BE AMENDED?

[10] The Crown submitted that identifying Frankie James SMITH as the informant on the Information was a defect in form only, and could be amended pursuant to s. 601 of the *Criminal Code*.

[11] The issue is whether the Information is defective, and therefore amendable, or is it a nullity. In *R. v. Dean*³, the Crown's appeal from a decision of the Provincial Court that an Information was a nullity because the jurat failed to disclose the date on which the Information was sworn was allowed. The limitation period had not expired, so there was no issue with respect to whether or not the information had been laid within the prescribed period. McFadyen, J. in finding there was a valid Information stated:

The administration of the oath is essential to the validity of an information. Unless the written allegations of the informant are verified by his oath, there is no information. (my emphasis)

[12] In the instant case on the face of the Information, the written allegations are those of Frankie James SMITH and Frankie James SMITH has not verified those allegations by his oath. Consequently there is no Information.

[13] Section 601 gives a court the power to amend and cure a wide range of defects on an Information. As the Supreme Court of Canada held in *R. v. Moore*⁴:

My understanding of s. 529 [now s. 601], when read in its entirety, is that it commands the following to the trial judge: absent absolute nullity and subject to certain limits set out in subs. (9), the judge has very wide powers to cure any defect in a charge by amending it; if the mischief to be cured by amendment has misled or prejudiced the accused in his defence, the judge must then determine whether the misleading or prejudice may be removed by an adjournment. If so, he must amend, adjourn and thereafter proceed. But, if the required amendment

³ [1985] A.J. No. 1047 (Q.B.)

⁴ [1988] 1 S.C.R. 1097 at p. 1128-9

cannot be made without injustice being done, then and only then the judge is to quash. (my emphasis)

[14] Recognizing the very wide powers and duties to amend, also clear from the above passage in *Moore* is that section 529 (now section 601) could not be used to rectify *jurisdictional* errors; the trial judge cannot amend an Information that is a nullity. There must be a valid Information before a court before a defect can be cured by an amendment.

[15] The Crown submits the statement in the Information that says “This is the information of Frankie James SMITH, Fort McPherson, NT, unemployed” is obviously a mistake that can and should be corrected to read that S. Pollock be the informant on the Information. Crown further submits that the insertion of the Informant’s name is a matter of form and should be subject to amendment.

[16] There is no evidence that whoever completed the typed portion of the Information did not intend to put “Frankie James SMITH” on the Form 2 Information and intended to put “S. Pollock”; if in fact it was intended to put “S. Pollock” after “This is the information of:”, then I would have expected it would say ‘peace officer’, or the like, under “Occupation”, yet it says “unemployed”. It may well be that the person completing the typed portion of the Form 2 Information did not understand what he or she was doing, but misidentifying the informant is not in the nature of a misspelled word or a name entered on a wrong line or a portion of the Information left blank. It may be that identifying Frankie James SMITH as the informant on the Form 2 Information was wrong, but it nevertheless forms the basis of the document that was before the Court.

[17] I find that “name Frankie James SMITH, address Fort McPherson, NT, and occupation unemployed”, is neither a matter of substance or form on the Information before me. Numerous cases have set out the difference between matters of form and matters of substance: “... if the matter pleaded be in itself insufficient, without reference to the manner of pleading it, the defect is substantial; but that if the fault is in the

manner of alleging it, the defect is formal.”⁵ In the instant case there is no insufficiency in the charge set out in the Information, and there is no fault in the manner of alleging it, that being “the Informant has reasonable and probable grounds to believe and does believe that”. The fault is that that written statement of the Informant is not verified by his oath – there is no Information.

[18] In the case of *R. v. Eddy*⁶, the name and occupation of the Informant had been left blank on the Form 2 Information. From the reported case, everything else on the Information was complete. The Court held that the omission of the name and occupation of the informant was not a deviation affecting the substance of the information. The application to quash the Information was dismissed.

[19] The facts in *Eddy* are distinguishable from the instant case in that the only indication before the Court as to who the Informant was, was where the Informant had sworn the Information. In the instant case the name and occupation of the Informant is *not* missing; the Informant is Frankie James SMITH, however Frankie James SMITH did not swear the written statement contained in the Information.

[20] Without expressing agreement or disagreement with the outcome in *R. v. A.N.*⁷, I find the logic of Judge Stuart compelling in his approach to the issue of whether or not an Information could be amended. In that case the informant had stated that he was “informed and believed that” a delinquency had been committed, which was not in keeping with Form 2, which requires that if an informant does not have personal knowledge, he is to state that he has “reasonable and probable grounds to believe and does believe” that a delinquency has been committed. After referring to a number of cases dealing with whether or not an information could or should be amended, Judge Stuart stated:

⁵ *R. v. Edgar and Rea* (1962), 132 C.C.C. 396 (B.C.C.A.); see also *R. v. Mah, et al.*, 2001 ABQB 321 (April 23, 2001)

⁶ [1982] B.C.J. No. 1715; *contra R. v. Denton*, *infra*, at paragraphs 22 - 24

⁷ [1983] Y.J. No. 18 (Y.T.T.C.)

In seeking the solution through the provisions of s. 732 for errors in processing the information, the courts, in my view, have not asked the right preliminary questions. The first question is not whether the defect is one of form or of substance, or whether the error appears in the pleadings, but rather: Is the defect in the information a procedural error which denies jurisdiction to continue the proceedings?

[21] In the instant case, the error in the Information, being that the Informant has not sworn his statement, or the affiant has not made a statement in writing, is what Judge Stuart would call procedural; and the error is such that “there is no information” as McFadyen, J. stated in *Dean*. Consequently there is no jurisdiction to continue the proceedings.

[22] In *R. v. Denton*⁸, the Court held that the Information was defective on its face as the name and occupation of the Informant had not been filled in. The Court stated:

I do not consider that requiring that the blanks in a printed form of Information be completely filled up is by any means reverting to the “punctillio” of a former age. The form of Information is mandated by the *Criminal Code* and approved by Parliament. The blank spaces no less than the text were approved by Parliament. It was obviously intended that the blanks be filled up with the appropriate information and doing so would be the simplest of tasks. ... (my emphasis)

[23] The trial judge in *Denton* refused to convict the accused on the Information, finding that the Information was invalid. The appellate court dismissed the Crown’s appeal, holding that there was a defect apparent on the face of the Information.

[24] I agree with the appellate court in *Denton* that completing a Form 2 Information with the appropriate information “would be the simplest of tasks”. In the instant case the error is even more egregious in that this is not a situation where no information was put in the blank spaces for the name, address and occupation of the Informant, which then may be able to be corrected by an amendment as was held in *Eddy, supra*. In this case the Crown has not sought to provide the name, address, and occupation of the Informant – that information is already on the Information, but the Crown now seeks to change who the Informant was in order to make the Information a valid Information.

⁸ [1990] N.S.J. No. 437 (N.S.Co.Ct.)

[25] The existence of an Informant is essential to a valid Information, i.e. an Information that will vest a court with jurisdiction to commence proceedings, and the Informant must swear his or her written statement. Where the Informant has not sworn the Information, no Information exists.

V. CONCLUSION

[26] It cannot be that the Court can amend an Information that on its face is a nullity, in order to attain jurisdiction. The Court must have jurisdiction before considering whether or not to amend an Information. In the instant case the Information before the Court could not vest the Court with jurisdiction to commence proceedings. The fact that proceedings had been improperly commenced, could not give the Court jurisdiction to continue them. I agree with the comments of the Court in *R. v. Peavoy*⁹:

The important principle to be borne in mind is that a defect in the information once disclosed cannot be allowed to stand. It must be the subject of adjudication and correction if the integrity of the trial is to be maintained. ... It is of first public importance that all criminal proceedings should in fact and in appearance be regular on their face.

[27] Whereas I agree that a defect cannot be allowed to stand, I find in the instant case “correction” is not possible in that the defect here is jurisdictional or procedural; the Court has no jurisdiction to correct the defect, and no jurisdiction to continue these proceedings as there was no jurisdiction to commence proceedings. The Information is a nullity.

B. E. Schmaltz
Territorial Court Judge

Dated this 5th day of June, 2015
at Yellowknife, Northwest Territories

⁹ [1974] O.J. No. 103 at para.35

R. v. Frankie James Smith

2015 NWTTC 11

Date: 2015 06 05

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