Date: 2013 09 04
File: Y2-YO-2011-000126

IN THE YOUTH JUSTICE COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

D. D.

REASONS FOR DECISION
of the
HONOURABLE JUDGE GARTH MALAKOE

Heard at:	Yellowknife, Northwest Territories July 22, 2013
Date of Decision:	September 4, 2013
Counsel for the Crown:	Jennifer S. Bond
Counsel for the Accused:	Charles Davison

[Section 271 of the *Criminal Code*]

[*Failure of Crown to Elect*]

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A. ISSUE AND BACKGROUND

A.1 Issue

[1] After trial, the accused young person was found guilty of a sexual assault pursuant to section 271 of the *Criminal Code*. A pre-sentence report was ordered. On the day scheduled for sentencing, it was determined that the Crown had not made an election with respect to the hybrid section 271 charge. The Court must decide whether as a result of the Crown's failure to elect, the offence is deemed to be summary or indictable.

A.2 Background

[2] On November 26, 2012, after a trial held in Fort Liard, Northwest Territories, D. D. was found guilty of a sexual assault on A. B. contrary to section 271 of the *Criminal Code*. The sexual assault took place on September 21, 2011.

[3] A pre-sentence report was ordered and sentencing was adjourned to January 21, 2013. Prior to the date scheduled for sentencing, the accused young person made an application for a declaration of a mistrial based on evidence that had come to the attention of counsel since the finding of guilt. The sentencing did not proceed on January 21, 2013. The application for a mistrial was denied by this Court on April 12, 2013 and the sentencing was scheduled for June 6, 2013 in Fort Liard.

[4] On June 6, 2013, the Court was made aware that the Crown had not elected the mode of trial. Counsel for the accused young person took the position that D.

D. should be sentenced as if the Crown had elected to proceed summarily. Crown took the position that D. D. should be sentenced as if the Crown had elected to proceed by indictment. Sentencing was adjourned so that the matter could be argued. Submissions were made on July 22, 2013.

A.3 Introduction

[5] In deciding this issue, the starting point is the provision in the *Interpretation Act* which deems all hybrid offences to be indictable. This applies to all hybrid offences, whether they be in adult court or in Youth Justice Court. Then, it is helpful to look at the case law with respect to the failure of the Crown to elect in adult court. The case law is useful; however, it is not determinative because the procedure when dealing with young persons in Youth Justice Court is different than in adult court. In Youth Justice Court, hybrid offences are tried in the same way regardless of whether the Crown elects to proceed by way of indictment or by way of summary conviction (assuming that the Crown has not given notice that it is seeking an adult sentence). This difference in procedure requires a different analysis when determining the effect of the Crown's failure to elect.

[6] When I refer to "adult court", in most instances, I am referring to either provincial or territorial court, i.e., the court of first appearance for an adult charged with a hybrid offence.

[7] This decision is organized as follows. First the law, as it applies to adults is reviewed. Next, the reason why the election is important to D. D. at this stage of the proceedings is explained. Then, the difference in procedure between adult court and Youth Justice Court is identified. The existing case law in respect of the *Young Offenders Act* and the *Youth Criminal Justice Act* is examined. Finally, the various arguments in favour of displacing the deeming provision of the *Interpretation Act* are considered.

B. THE LAW AS IT RELATES TO ADULTS

B.1 The Starting Point – Section 31 of the *Interpretation Act*

[8] Both the *Criminal Code* and the *Youth Criminal Justice Act* are acts of Parliament. The *Interpretation Act*¸ R.S.C. 1985, c.I-21, as amended, applies to all acts of Parliament unless a contrary intention appears. This is stated in section 3 of the *Interpretation Act*.

[9] Section 34(1) of the *Interpretation Act* states:

> 34.(1) Where an enactment creates an offence,

> (a) the offence is deemed to be an indictable offence if the enactment provides that the offender may be prosecuted for the offence by indictment;
>
> (b) the offence is deemed to be one for which the offender is punishable on summary conviction if there is nothing in the context to indicate that the offence is an indictable offence; and
>
> (c) if the offence is one for which the offender may be prosecuted by indictment or for which the offender is punishable on summary conviction, no person shall be considered to have been convicted of an indictable offence by reason only of having been convicted of the offence on summary conviction.

[10] The offence of sexual assault under section 271 of the *Criminal Code* is a hybrid offence and can be prosecuted as an indictable offence or an offence punishable on summary conviction. Since the offender "may be" prosecuted for the offence by indictment, section 34(1)(a) of the *Interpretation Act* applies and the offence is deemed to be an indictable offence.

B.2 When is the Presumption Set Aside?

[11] An adult who finds himself or herself in Territorial Court for a trial on a sexual assault charge will have followed one of two routes to get there. The first route is if the Crown has elected to proceed with the hybrid charge as an offence punishable on summary conviction. Once the Crown has made this election, the accused has no choice but to proceed in the Territorial Court.

[12] The second route is if the Crown has elected to prosecute the hybrid charge as an indictable offence. The accused is then given the choice to be tried in either the Supreme Court or the Territorial Court. He or she may elect to have the trial proceed in Territorial Court. Section 536(2) of the *Criminal Code* requires that the election be put to the accused when charged with an indictable offence and section 536(4) states that if the accused does not elect, then the accused is deemed to have elected to be tried by a court composed of a Supreme Court Justice and jury.

[13] Based on these procedures, an accused person cannot be in Territorial Court for a trial on an indictable offence unless he or she has elected to be tried in Territorial Court.

[14] Hence, in the normal situation, the deeming provision of section 34(1)(a) of the *Interpretation Act* with respect to a hybrid offence is required only to the point where the Crown makes its election as to the mode of trial. After the election, there is no need for a deeming provision since the Crown will have explicitly stated that it is proceeding by way of indictment or by way of summary conviction.

[15] What happens if the Crown fails to elect? It is reasonable to accept that the effect of the deeming provision would continue to the next step, i.e., that the offence would be deemed to be indictable and the accused would be put to his election. The dilemma would occur if the accused was not given the opportunity to elect and found himself or herself tried in Territorial Court. On one hand, the offence is deemed to be an indictable offence by operation of section 34(1)(a) of the *Interpretation Act*. On the other hand, the accused should only be tried in Territorial Court with respect to an indictable (hybrid) offence if the accused elected to do so.

[16] The case law which has developed with respect to the Crown's failure to elect the mode of trial for a hybrid offence recognizes that there are elections on both the part of the Crown and the accused before a hybrid offence is tried as an indictable offence in the Territorial Court.

[17] The courts have recognized this reality and if the Crown fails to elect and the accused does not elect but simply enters a "not guilty" plea and proceeds to trial, the Courts have deemed the offence to be a summary conviction offence*: R. v. Robert* (1973), 13 C.C.C. (2d) 43 (Ont. C.A.) and *R. v. Bouchard* (1976), 10 Nfld. & P.E.I.R. 409 (Nfld. C.A.). This is a reasonable result since for a trial to have taken place in Territorial Court with respect to a hybrid offence proceeding by way of indictment, the accused would have to have explicitly chosen or elected to have the trial in Territorial Court. If the accused did not elect but simply entered a "not guilty" plea and proceeded to trial, it would be clear that the accused was treating the offence as a summary conviction offence. This defeats the deeming provision in section 34(1)(a) of the *Interpretation Act.*

[18] If the Crown fails to elect and the accused elects to be tried in Supreme Court, then the Crown is deemed to have elected to have proceeded by indictment: *R. v. Coupland* (1978), 45 C.C.C. (2d) 437 (Alta. C.A.).

[19] For the reasons stated, the law as it relates to hybrid offences and the Crown's failure to elect in adult court can be summarized as it was in *R. v. S.D.*, [1997] 119 C.C.C. (3d) 65 (Nfld. C.A.):

> 36. Thus, the presumption in s. 34 of the *Interpretation Act* can be displaced where it is clear from what subsequently happens that it was intended to proceed by one way or the other, and the parties acted accordingly.
>
> 37. The decisions in *Robert, Bouchard* and *Coupland* were made in the light of trials that had been completed. External indicia based on the events that occurred, enabled the court to treat the matter as if an election had been made.

and by Justice Cromwell in *R. v. Paul-Marr*, [2005] N.S.J. No 279 (N.S. C.A.):

> I conclude, therefore, that section 34 of the *Interpretation Act* governs unless the Crown makes an election. That election may either be express or implied from the way the proceedings unfold.
>
> The effect of section 34 of the *Interpretation Act* may be displaced not only where there is an express Crown election but also where it is clear from what subsequently happens that the Crown intended to proceed one way or the other.

C. THE LAW AS IS RELATES TO YOUNG PEOPLE

C.1 Why is the Election Important in this Case?

[20] With respect to the accused young person, at this stage in the proceedings, whether this Court is dealing with an indictable or a summary offence will potentially affect his sentence.

[21] Section 39(1) of the *Youth Criminal Justice Act* sets out the so-called "gateways" to custody:

> 39. (1) A youth justice court shall not commit a young person to custody under section 42 (youth sentences) unless
>
> (a) a young person has committed a violent offence;
>
> (b) the young person has failed to comply with non-custodial sentences;
>
> (c) the young person has committed an indictable offence for which an adult would be liable to imprisonment for a term of more than two years and has a history that indicates a pattern of findings of guilt under this Act or the *Young Offenders Act*, chapter Y-1 of the Revised Statutes of Canada, 1985; or
>
> (d) in exceptional cases where the young person has committed an indictable offence, the aggravating circumstances of the offence are such that the imposition of a non-custodial sentence would be inconsistent with the purpose and principles set out in section 38.

[22] According to the submissions of Crown on November 26, 2012, D. D. has no criminal record and subsections 39(1)(b) and 39(1)(c) do not apply. If the Crown is deemed to have proceeded by way of summary conviction, then D. D. can be committed to custody only if the Crown can establish pursuant to section 39(1)(a) that he has committed a violent offence. If the Crown is deemed to have proceeded by way of indictment, then D. D. can be committed to custody provided the Crown can establish that the requirements of sections 39(1)(a) or 39(1)(d) have been met.

[23] In short, whether D. D. has been convicted of an indictable offence or a summary offence may affect whether he receives custody or not.

C.2 Existing Case Law

[24] This Court has considered the following cases which have been decided under either the *Young Offenders Act: R. v. F.H.M.*, [1984] 14 C.C.C. (3d) 227 (Man. Q.B.), *R. v. S.D.*, [1997] 119 C.C.C. (3d) 65 (Nfld. C.A.) or the *Youth Criminal Justice Act*: *R. v. R.F.*, [2010] N.S.J. No. 702 (N.S. Y.J.C.), *R. v. J.L.W.*, [2011] A.J. No. 935 (Alta. P.C.).

[25] In *F.H.M.*, the accused 12 year old was charged with mischief and sentenced to a two year open custody sentence. The Crown had not specified whether it was proceeding by indictment or summarily prior to the accused entering his guilty plea. The maximum sentence would have been 6 months had the Crown proceeded summarily given the provision in the *Young Offenders Act* that states that young persons are not to be exposed to more serious sanctions than adults (s.20(7)). In *F.H.M.*, while acknowledging the operation of the *Interpretation Act*, the court appeared to accept the authorities from adult court such as *Robert* as applying in a court subject to the *Young Offenders Act* without further analysis.

[26] In *S.D.*, the young person had been charged with assault. The proceedings had been instituted more than 6 months after the offence took place. The charge was hybrid. The accused entered a "not guilty" plea before the Crown made its election. The matter was set for trial and the trial judge dismissed the charge. He found that since the Crown had not elected the mode of trial, it was deemed, therefore, to have proceeded summarily and therefore the charge was statute barred.

[27] The appeal court determined that the Crown was presumed to have elected to proceed summarily "in the absence of any subsequent action by the Crown or in the absence of any circumstances demonstrating a contrary intent." The appeal court then went on to say that although the offence was deemed to a summary conviction offence, the Crown could still elect to proceed by way of indictment, following plea and before the calling of evidence provided no event had occurred which was prejudicial to the defendant.

[28] In *R.F.*, the Crown failed to elect with respect to a charge of being in a vehicle that contained firearms. The accused young person entered a guilty plea. The Crown was seeking a sentence of 18 months incarceration which was in excess of the 6 months maximum if the matter was proceeding by way of summary conviction. The court stated that the presumption in section 34(1)(a) of the *Interpretation Act* should not be displaced since there was nothing that occurred in

the process that indicated a contrary intent by either the Crown or defence. Further, the accused was not prejudiced in any way since the Crown had indicated its intention to seek a sentence of a custody and supervision order in the range of 18 months during plea discussions with the accused.

[29] In *J.L.W.*, the accused young person was charged with sexual assault and theft under $5,000. The accused entered a plea of "not guilty" and the trial commenced. Two days into the trial and prior to verdict, the Crown advised the court that through oversight, an election had not been made. The court accepted that there was nothing in how the matter unfolded to displace the presumption in the *Interpretation Act* that the offences were preceding by way of indictment. The Crown had indicated during the bail hearing that it intended to proceed by indictment and the court found no prejudice to the accused in the finding that the offences were deemed to be preceding by way of indictment or the timing of the Crown's election.

D. ANALYSIS

[30] The first step in the analysis, like in the adult court, is section 34(1)(a) of the *Interpretation Act*. Unlike an adult in adult court, a young person in Youth Justice Court normally does not make an election if the Crown is proceeding by way of indictment (except for the exceptions stated in section 67(1) of the *Youth Criminal Justice Act*). The young person simply enters a "not guilty" or "guilty" plea. With a hybrid offence, whether the Crown proceeds by way of indictment or summarily, the provisions of Part XXVII (summary conviction offences) of the *Criminal Code* apply. This is stated in section 142(1) of the *Youth Criminal Justice Act*.

[31] With respect to the matter before this Court, there appears to have been nothing indicated by the Crown or defence; nor any action taken by the Crown or defence which could be identified as showing that either the Crown or defence were treating this sexual assault offence as anything other than indictable.

[32] Unlike the cases of *R.F.* and *J.L.W.*, there is nothing to point to, such as statements by the Crown at the bail hearing or plea negotiations which confirm that it was the intent to proceed by way of indictment all along.

[33] It is also apparent that there was no statement or action that indicates that it was reasonable to assume that the offence was proceeding by way of summary conviction. Counsel for the defence has fairly acknowledged that the facts that were found after trial were in substance, to have been the facts that were alleged in the disclosure. After trial, I had found that the 17 year old D. D. was having sexual

intercourse with a 16 year old female who was too drunk to consent; whose eyes were closed and who was not moving.

[34] This type of offence is a serious offence which when proceeded by way of indictment in adult court would attract a starting point sentence of three years imprisonment [*R. v. Arcand*, [2010] A.J. No. 1383 (Alta. C.A.)]. There would be no expectation on the part of D. D. that given these facts, the Crown would be proceeding by way of summary conviction.

[35] Given the lack of facts or circumstance peculiar to this case that indicate an intent by the Crown to proceed by indictment or by summary conviction, is there some other reason to displace the presumption dictated by section 34(1)(a) of the *Interpretation Act* that the offence is indictable?

[36] If such a reason exists, it would therefore have to exist in the structure or philosophy of the *Youth Criminal Justice Act.* The accused argues that the following are such reasons:

(a) Section 37(7), dealing with a deemed election for the purpose of appeals, and section 121, dealing with a deemed election for the purposes of record retention, both deem an offence to be an offence punishable on summary conviction if the Crown fails to elect. It should follow that this should be a general rule for all situations where the Crown fails to elect because otherwise application of these sections would lead to an absurdity;

(b) Section 38(2)(a) states that the sentence for a young person must not result in a punishment that is greater than the punishment that would be appropriate for an adult who has been convicted of the same offence committed in similar circumstances. Given the case law, an adult who found himself convicted of a hybrid offence in Territorial Court after a trial where the Crown failed to elect, would be convicted of a summary offence. A young person should also be convicted of a summary offence after a trial where the Crown failed to elect; otherwise, the young person would be facing a higher sentence than the adult;

(c) The failure of the Crown to elect creates a degree of uncertainty or ambiguity for the accused young person and the ambiguity or uncertainty should be dealt with in a way that results in the least serious consequences to the young person.

[37] Let me deal with each of these arguments in turn.

Sections 37(7) and 121 YCJA

[38] The *Youth Criminal Justice Act* explicitly deals with the Crown's failure to make an election with respect to a hybrid offence in two situations:

> 37. (7) For the purposes of appeals under this Act, if no election is made in respect of an offence that may be prosecuted by indictment or proceeded with by way of summary conviction, the Attorney General is deemed to have elected to proceed with the offence as an offence punishable on summary conviction.
>
> 121. For the purposes of section 119 (Persons Having Access to Records) and 120 (Access to R.C.M.P. Records), if no election is made in respect of an offence that may be prosecuted by indictment or proceeded with by way of summary conviction, the Attorney General is deemed to have elected to proceed with the offence as an offence punishable on summary conviction

[39] If the Court determines that the deeming provision in the *Interpretation Act* prevails, then on one hand, D. D. will be sentenced as having committed the indictable offence of sexual assault, but on the other hand, if he wishes to appeal his conviction or sentence, according to section 37(7), he has to appeal to the court dealing with appeals of summary conviction offences.

[40] The accused argues that this is an "absurdity" and that the legislation should be interpreted in such a way as to avoid absurdities. In *S.D.*, the Court refers to this as a "curious result", i.e., the situation where a court such as the Supreme Court of the Northwest Territories, which normally deals with appeals of summary offences, might be dealing with an appeal from an indictable offence, something that would be traditionally reserved for the Court of Appeal.

[41] In my view, the contrary argument is more persuasive. In drafting sections 37(7) and 121, Parliament clearly had put its mind to the situation where the Crown failed to elect with respect to a hybrid offence under the *Youth Criminal Justice Act*. The legislators chose to carve out those situations where the deeming provision of the *Interpretation Act* should not apply, i.e., with respect to appeals and records. Had they chosen to displace the deeming provision of the *Interpretation Act* with respect to other situations, they would have included provisions in the *Youth Criminal Justice Act* to do so.

[42] That the application of section 37(7) then results in a "curious result" is not an "absurdity". The *Youth Criminal Justice Act*, by design, already treats indictable offences differently than they are treated in adult court. Under the *Youth Criminal Justice Act*, Territorial Court Judges in their capacity as Youth Court Judges are hearing cases involving indictable offences which in adult court would likely be heard in Supreme Court after election by the accused. That a Supreme

Court Judge might hear an appeal of an indictable offence is not illogical given that indictable offences are treated differently in Youth Justice Court.

[43] What does seem illogical is to extend the effect of sections 37(7) and 121 beyond what was clearly stated, i.e., "for the purposes of appeals under this Act" and "for the purposes of sections 119 and 120". In this regard, I am not in agreement with the court in *S.D.* at paragraph 43, where it states with respect to the equivalent of sections 37(7) and 121 in the *Young Offenders Act*, "There is, however, no general express statutory presumption in the *[Young Offenders] Act* which provides, for all purposes, that where an election is not made, the matter is deemed to be summary conviction. Nevertheless, it is difficult to envisage how failure to elect can lead to a presumption of summary proceedings for some purposes but not for others."

[44] In my view, it is difficult to envisage how provisions which refer specifically to appeals and records should displace a provision which has general application, except with respect to appeals and records.

Section 38(2)(a) YCJA

[45] Section 38(2)(a) of the *Youth Criminal Justice Act* states:

> 38.(2) A youth justice court that imposes a youth sentence on a young person shall determine the sentence in accordance with the principles set out in section 3 and the following principles:
>
> > (a) the sentence must not result in a punishment that is greater than the punishment that would be appropriate for an adult who has been convicted of the same offence committed in similar circumstances;

[46] In adult court, the maximum liability for sexual assault is 18 months incarceration if the offence is a summary conviction offence and 10 years if it is an indictable offence.

[47] Under the *Youth Criminal Justice Act*, a young person may receive up to two years under a custody and supervision order (section 42(2)(n)). The argument is that in a situation where the Crown has failed to elect on a hybrid offence, an adult who is convicted in Territorial Court will be found to be convicted of a summary offence and subject to a maximum of 18 months incarceration. If the young person, who is charged with the same offence committed in the same circumstances, is deemed to have been convicted of an indictable offence, then the young person could be subject to a greater punishment then the adult.

[48] In my view, this application of section 38(2) to the issue before the Court is not helpful. Section 38(2) uses the language of "punishment that would be

appropriate" where it is the "same offence committed in similar circumstances." The Alberta Court of Appeal, in *Arcand*, deemed a three year prison sentence as the starting point for sexual intercourse with an unconscious woman.

[49] Let us suppose that there is a sexual assault where the "appropriate" sentence given the circumstances of the offence and the offender is a period of custody of three years. It is true that if the Crown failed to elect its mode of trial and the accused adult was not given an election and the matter proceeded to trial in Territorial Court and was therefore deemed to be a summary conviction offence; or, if the Crown elected summarily and the matter proceeded to trial in Territorial Court and there was a conviction, the Judge would not be able to impose a jail sentence greater than 18 months. Clearly, in both cases, the Crown has made a mistake in either failing to elect or making the incorrect election. The Judge is bound to sentence as if the offence was a summary offence. It does not mean, however, that the sentence is "appropriate".

[50] Section 39(2)(a) should not be interpreted to mean that a young person should benefit from the inadvertence of the Crown (in the case of failing to make an election) or an error of the Crown (in making the wrong election) in the same way as an adult.

Uncertainty and ambiguity should be resolved in favour of the young person

[51] In *S.D.*, the court points out that the onus should not be on a young person who is been tried in Youth Justice Court to have to inquire as to what mode of trial he or she is being subject to. The duty is on the Crown to elect. If there is an uncertainty or ambiguity resulting from the Crown's inadvertence, it should be resolved in favour of the accused young person.

[52] The difficulty with this analysis is that it presumes an uncertainty or ambiguity. Section 34(1)(a) of the *Interpretation Act* is not uncertain or ambiguous. The uncertainty or ambiguity arises because of the case law which comes out of the adult situation.

[53] The case law from adult court dealing with the Crown's failure to elect cannot be simply be imported into the situation where the Crown fails to elect in Youth Justice Court. As I stated earlier, the situation in adult court is different because of the requirement that the accused be given an election if it is an offence that is proceeding in Territorial Court by way of indictment.

[54] In the situation in Youth Justice Court such as the one with D. D., there was a realization by the Crown and the defence on the day of sentencing that the Crown had failed to elect. It is correct to say that there is conflicting case law with respect

to whether the deemed election is indictable or summary, but that does not mean that whenever there are cases that are favourable to an accused, that they need to be followed.

E. CONCLUSION

[55] A hybrid offence in Youth Justice Court is deemed indictable until the Crown elects otherwise, either explicitly or implicitly, and provided that the Crown does not act in such a manner that would either:

(a) lead the accused young person to believe that the Crown was proceeding summarily; or,

(b) allow the accused young person to proceed as if the Crown was proceeding summarily.

[56] It is the duty of the Crown to elect with respect to a hybrid offence. Where the Crown fails to elect, the accused young person should not suffer as a result of this inadvertence; not should he or she benefit from this inadvertence.

[57] In this case, there is no reason to believe that either the Crown or the defence treated the sexual assault as a summary offence and therefore the provision of the *Interpretation Act* deeming the offence to be indictable applies.

[58] D. D. has been convicted of sexual assault. It is deemed to be indictable. Given my finding, I do not find it appropriate or necessary to deal with the Crown's application to enter its election at this point.

Garth Malakoe
Y.J.C.J.

Dated at Yellowknife, Northwest Territories, this 4th day of September, 2013.

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