Case Name:
R. v. Sevigny

Between
Regina, and
Denis Albert Sevigny

[2001] Y.J. No. 151

2002 YKTC 4

Whitehorse Registry No. **00-11061**

Yukon Territorial Court
Whitehorse, Yukon Territory

Lilles C.J. Terr. Ct.

Oral judgment: November 21, 2001.

(49 paras.)

Criminal law -- Compelling appearance, detention and release -- Adjournments -- When available -- At opening or during trial.

This was an application by the Crown for an adjournment. When the matter first appeared for trial, Sevigny applied for an adjournment in order to review disclosure and decide whether to retain counsel. On the second appearance, Sevigny was again granted an adjournment as he had just started the process of obtaining legal assistance. The court made it very clear that the matter was to proceed the next time, as there was concern about the delay. The next trial date was adjourned because there was no judge available. On the date finally set for trial, the Crown provided Sevigny with additional disclosure and sought an adjournment because their key witness was unable to appear for medical reasons. Sevigny had not received notification and had four witnesses present.

HELD: Application allowed. The Crown was to reimburse Sevigny for his reasonable costs in relation to the adjournment application. Although the sickness of the witness was beyond the Crown's control, there would have been an adjournment in any event due to the late disclosure.

Statutes, Regulations and Rules Cited:

Criminal Code, s. 446.

Counsel:

Alexis Gauthier, appeared for Crown.
Elaine Cairns and Fia Jampolsky, appeared for defence.

REASONS FOR JUDGMENT

1 LILLES C.J. TERR. CT. (orally):-- I think I am in a position to rule on this matter at this time. It is the matter of Denis Albert Sevigny. He is before the Court today set for trial on two charges contrary to s. 446 of the Criminal Code. These relate to neglect, or failure to provide for, or allowing two animals, namely horses, under his care and control to suffer; the allegation being that he did not properly care for them during the time period May the 9th to October 19th. The circumstances of the file to date are somewhat unusual, and I think it would be helpful for me to quickly review them.

2 The allegation is that the offence took place between May 9, 2000 and October 19, 2000. The offence is dated, however, the Information was not sworn until about six months later, on March 22, 2001. Most of the time period, that is, the time period during which the offences are said to have occurred, would be excluded if a six-month limitation period were applied with respect to swearing the Information. This is a summary conviction matter.

3 This matter was originally set for trial on July 31st. At that time, Mr. Sevigny applied for and --

4 MS. JAMPOLSKY: Your Honour, I apologize for interrupting.

5 THE COURT:-- Yes?

6 MS. JAMPOLSKY: But the trial was actually set for the June circuit, which I believe was June 12th.

7 THE COURT:-- But my note here is confusing because it indicates that there was an appearance before me on July 31st. Let me just check with the clerk.

8 MS. JAMPOLSKY: Certainly.

9 THE COURT:-- There were, in fact, two circuits, I am advised by the clerk. One was June the 12th, and at that point that appearance was in front of Judge Stuart, and at that point Mr. Sevigny, the defendant, applied for an adjournment to review disclosure and to consider whether he would seek assistance from counsel. He appeared further in front of me on July 31st. Again, the matter was set for trial, and at that point Mr. Sevigny advised me that he attended at Mr. Clark's office a couple of weeks ago and had just started the process of obtaining legal assistance. At that time, I made it very clear to all the parties, but particularly Mr. Sevigny, that this matter had to proceed. Obviously, the Court was very concerned about the delay, the fact that the incident went back to early 2000, and the fact that time was running since the swearing of the Information.

10 Indeed, I made some comments which suggested very strongly that Mr. Sevigny was unlikely to get another adjournment. Now, these were directed at Mr. Sevigny because he was the one who was asking for the adjournment, but they should be taken to reflect the Court's concern that the mat-

ter proceed expeditiously and, in my view, should have been noted by both counsel, both the defence and the Crown. The message, I think, was very clear. This is an important matter, it needs to proceed, and the Court is not going to be particularly open to further applications to adjourn.

11 Now, as it turned out, the next trial date was set for September the 11th. We all know what happened on September the 11th; however, counsel has reminded me, and I do recall, that although that circuit was cancelled, this trial was adjourned at the Court's behest because a judge would not be available on that date. This is not a delay that should be visited on Mr. Sevigny. The unavailability or the non-availability of judges is usually a delay that is visited on the state, not on the defendant. It is a problem with the administration of justice. As a result of the unavailability of a judge at that date, this trial was then set for today's date.

12 Now, I have heard the submissions from counsel. Crown counsel advises that they have just received a notice yesterday; a letter from a doctor for their key witness, Carlene Kerr. I am satisfied, based on the representations made by Crown counsel that Carlene Kerr is a key witness, one of three witnesses to be called by the Crown in this matter. They advised that she would lay the factual background, essential for the expert opinion from the veterinarian. So I am satisfied that this is a key witness.

13 The letter indicates that she is under medical care and she has been advised not to participate in the scheduled November 21st trial. I am not familiar with the medical condition referred to in the letter, but I am satisfied that it is serious. I have been advised that, indeed, she had been medivaced out of the territory and had merely returned the day before this letter was written. The letter was written by Dr. Parsons, dated November 20, 2001. It is apparent that this illness was outside the Crown's control.

14 If one applies the criteria set out in Darville (1956), 116 C.C.C. 113, Supreme Court of Canada, the Crown would, upon its face, be entitled to an adjournment based on those principles. I do not, however, read Darville to necessarily apply to a case such as this, where the Court has essentially made the matter of proceeding preemptory on both parties, in terms of the language used at an earlier adjournment. Darville does not set out the criteria for indefinite adjournment of anyone's case, whether it's a Crown case or a defence case. It sets out general criteria, which would apply in the normal course of events. The facts here are not normal for the reasons I have indicated.

15 There is some suggestion that this person's illness, in a small community such as this, should have been known by the police and should have been disclosed to the Crown, which would have then permitted the defence to call off their witnesses. As I understand it, their position is that they have, at some inconvenience and possibly some expense, arranged for four witnesses to be present for today's date. They did not receive notice in a timely manner that would have permitted them to call off these witnesses. I am satisfied that this amounts to a significant inconvenience and possibly a cost to the defendant. It is clearly a factor that I must take into account.

16 The matter is complicated by the fact that the Crown, quite legitimately, comes forward with an application for an adjournment, based on Darville principles. I am sympathetic to that position, in the sense that this key witness is obviously very ill and is not able to proceed today, although she is back in the community. The Crown is saying to me, "As a matter of fairness, you should grant an additional adjournment because this was really outside my control. I might have been able, if I'd been more diligent, to find out about her illness because she was medivaced out sometime ago and I possibly could have notified the defence, but, quite frankly, I didn't know and I did the best I could

and I told the defence as soon as I knew. So, as a matter of fairness, I should have the adjournment." The problem is that today the Crown also handed the defence - or it may have been yesterday - a significant bundle of additional disclosure. I am advised by counsel that this was material disclosure relating to the investigation. I understand it represented notes made by police officers or other investigators in relation to this investigation. That delay is, quite frankly, inexplicable. It should not have happened.

17 I have some difficulty with the Crown coming forward and asking for an adjournment based on fairness when one might say that the Crown has not come with clean hands. That is to say there is a latent unfairness associated with making this late disclosure, and, of course, it has the result that the Crown forces the unwanted adjournment on the defence at the last minute. We are now getting into the area commonly described as abuse of process. I am not saying that that necessarily constitutes an abuse of process. If I were so convinced, I would enter a judicial stay of proceedings, but we are moving in that direction and I think it does suggest unfairness that should, if possible, be remedied.

18 I have taken some time to set out these facts because you can see that the facts push me in different directions. They do not all point in the same direction. I find no fault with Crown counsel's conduct in this case. Indeed, it is his diligence in reviewing the file after arriving in the community that led to the subsequent disclosure. I say to him, "Good for you. That is exactly the work that you should have been doing and you did it," But because he was assigned late to the case late, it resulted in the late disclosure.

19 I have sympathy for the defence. You are here, your client is here, the matter has been delayed again, but I do note that it was delayed earlier at your client's request. Your client is put in a difficult position because, in addition to having to address these charges, he has also incurred, I am sure, additional costs.

20 In the end result, I have come to the conclusion that the application for an adjournment should be granted, but on conditions. The conditions are that the Crown reimburse the defence for the reasonable costs incurred in relation to this adjournment application. Those costs would include any solicitor/client costs, any out-of-pocket costs for witnesses, and if Mr. Sevigny can demonstrate out-of-pocket cost directly associated with this appearance, I will also include those costs. I think counsel can probably work out what that is, but I will indicate that I will be available should counsel have some difficulty in sorting out what those costs should be, that they can address me at a subsequent time to resolve any outstanding matters.

21 MR. GAUTHIER: With all due respect, I was not able to make any remarks on whether the Crown should pay the costs of that. I know that this is --

22 THE COURT:-- No, I understand that. I asked you earlier if you had any other suggestions as to what the remedies might be, so I held that open to you and I heard from both counsel, and that is my conclusion. There is an unfairness here. I recognize that the charges are serious. I did not refer to that, but I do consider the charges to be serious, although summary. Generally, the administration of justice, the public interest, dictates that these matters be resolved, resolved quickly, but the system should not be allowed to run roughshod over defendants, and so the state has to take some responsibility for the inconvenience and costs that it has caused the defendant.

23 MR. GAUTHIER: Again, with all due respect, sir, we didn't cause the adjournment. It wasn't under our control.

24 THE COURT:-- No? No, but you would have caused it by your late disclosure and it would have resulted in an adjournment in any event. So you cannot come forward, on the one hand, saying, "As a matter of fairness, grant me an adjournment, but because of my misfeasance I'm making it very difficult for them to proceed in any event because I've just given them a pile of disclosure that they should have had four months ago." So you cannot come - the English expression is - sucking and blowing at the same time. I think it is a matter of balancing. I think equitable principles apply, questions of fairness apply.

25 If it any comfort to you, I have made exactly the same order on previous occasions. The Crown now has to decide whether your interests in prosecuting this matter is sufficient to justify reimbursing the defendant.

26 MR. GAUTHIER: Okay, and do I understand from your comments that if there is complete conflict regarding the amount of the costs, we could come back in front of you?

27 THE COURT:-- Absolutely. In chambers in Whitehorse.

28 MR. GAUTHIER: Okay.

29 THE COURT:-- I will help you sort it out. Anything further?

30 MS. JAMPOLSKY: Yes, Your Honour. Given that Mr. Sevigny -- as my friend has already set out, he has missed two opportunities to go up to Inuvik to work. He is slated to go back to Inuvik in the new year, in the first week of January, to commence work for the winter. He anticipates that work will be done around April, so we would ask that this trial not be set for February, that it be set for the following circuit to allow Mr. Sevigny the opportunity to work, which he's lost out on this fall, and we would certainly waive the period between February and April for any abuse of process arguments that we may have to make in the new year.

31 THE COURT:-- For delay argument, yes.

32 MS. JAMPOLSKY: Delay arguments.

33 THE COURT:-- First of all, I am going to ask you if you have a problem with that, but I am going to find out what the date is so that we know --

34 MR. GAUTHIER: No objection at all.

35 THE COURT:-- Okay, let's find out what the --

36 THE CLERK: The 10th is the Tuesday.

37 THE COURT:-- The 10th of?

38 THE CLERK: April.

39 THE COURT:-- The 10th of April?

40 MS. JAMPOLSKY: That would be fine.

41 THE COURT:-- So April the 10th at two o'clock, and we may have to fine-tune that in a pre-circuit conference prior to that time. Were we looking at something close to a full day on that?

42 MR. GAUTHIER: More than a day, sir.

43 THE COURT:-- More than a day?

44 MR. GAUTHIER: Yes.

45 THE COURT:-- Well, we will set it for there so we know where it is. Perhaps the thing -- no, we'll leave it there because it should come before a judge. We will sort out at the pre-circuit -- it may end up being another day of that week, but you will know about it because it is going to take at least a day, possibly more.

46 THE ACCUSED: Even if I'm in Inuvik, my son is in town here so --

47 THE COURT:-- Okay, right. In terms of communication?

48 THE ACCUSED: Yes.

49 THE COURT:-- Yes.

LILLES C.J. TERR. CT.

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