

ONTARIO COURT OF JUSTICE

HER MAJESTY THE QUEEN

v.

NATALIA KORZH

R E A S O N S F O R R U L I N G

BEFORE THE HONOURABLE JUSTICE J.M. COPELAND
on October 14, 2014, at BRAMPTON, Ontario

APPEARANCES:

R. Rota

Counsel for the Provincial Crown

E. Ashurov

Counsel for Natalia Korzh

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1.
R. v. Korzh
Reasons for Ruling - Copeland, J.

TUESDAY, OCTOBER 14, 2014

R E A S O N S F O R R U L I N G

COPELAND, J. (Orally):

This is the matter of Natalia Korzh. The matter was scheduled to have an 11(b) motion proceed returnable today, with trial dates scheduled on December 16th, 2014, and January 2nd, 2015. The materials in support of the 11(b) motion were filed by defence counsel in accordance with the Rules and served and filed on September 11th, 2014. Crown counsel's response to the application was not served and filed in accordance with the Rules and was only served and filed this morning.

The defence seeks a remedy under the Rules of the Court. There are two alternatives put forward by the defence. The first alternative is that the court hear the 11(b) application on the merits today, but deny Crown counsel the right to cross-examine the applicant on her affidavit or to call any evidence in response to the application. The alternative position put forward by the defence is to adjourn the trial dates which have been set, to schedule new trial dates in the normal course, and that that would be without prejudice to the defence's right to continue or renew the 11(b) application or any other *Charter* remedies the defence might seek, such as costs.

5 The criminal rules of the Ontario Court of
Justice set out in Section 1.1, the purpose of
the Rules, the primary and fundamental purpose
is that matters be dealt with justly and
efficiently. And the Rules provide that justly
and efficiency includes dealing with the
prosecution and defence fairly, recognizing the
rights of the accused--and I won't go through
every provision of this--and also scheduling
10 court time and deciding other matters in ways
that take into account the gravity of the
offence, the complexity of what is in issue, the
severity of the consequences for the accused and
others affected, and the requirements of other
proceedings. Section 1.1(3) of the Rules notes
that all counsel appearing before the court,
while fulfilling all applicable professional
obligations, are to comply with the Rules.

20 Section 2.1 of the Rules provides for the
content of applications, and I note that it's
content that includes substance. It has to
include the subject of the application, the
grounds to be argued and a detailed statement of
the factual basis. Similarly, with respect to
25 response, that's addressed in Section 2.2 of the
Rules, and again, the response is intended under
the Rules to be a response of substance. It
must include a concise statement of the party's
reasons for responding to the application, a
response to the applicant's grounds and a
30 detailed statement of the factual basis for the

party's position specific to the individual proceedings. So Section 2.1 and 2.2 of the Rules make it very clear that the materials are required to set out the substance, both for the parties and for the court, so that matters can be decided justly and efficiently.

The timing for applications when they are to be heard depends on the nature of the application, whether it is to be heard ahead of the trial date or on the trial date. Motions for remedies pursuant to Section 11(b) of the *Charter* for unreasonable delay are required under the Rules, subject to relief being otherwise granted under the Rules to be heard at least 60 days before the trial. And that's Section 2.4 of the Rules.

And it's quite clear if one reads the other headings in Section 2.4(1) of the types of motions that are required to be brought before trial dates, that they are the types of motions that potentially, if they are granted, can affect whether a trial will proceed on the scheduled date. And the clear intention of the Rules in this provision is to ensure that if something happens in a motion that is going to affect the scheduled trial date, it happen ahead of time so that the court time can be used efficiently for other matters if need be.

Section 3.1 of the Rules addresses time for service. An applicant is required to serve

5 their application at least 30 days prior to the hearing of the application, and the respondent is required to respond at least 15 days prior to the hearing. And I note the commentary was quite relevant for purposes of this application. It talks about the importance of timely notice and the commentary continues:

10 By way of example, if a stay of proceedings is granted for unreasonable delay under Section 11(b) of the *Charter*, the trial will not proceed, and the time scheduled for the trial will no longer be required. Determination of the application well in advance of the trial date permits the court time to be used for other matters.

15 The Rules address possible non-compliance with the Rules in Section 5.3 and the commentary. Section 5.3 provides the court may excuse non-compliance with any rule at any time to the extent necessary to ensure that the fundamental objectives set out in Rule 1.1 is met, and that's for just and efficient resolution of proceedings. And the commentary notes:

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25 It is expected that the parties will be familiar with these rules of court and will comply with them. It is a professional obligation to do so. However, on rare occasions there may be circumstances that prevent compliance. The Court in its discretion may excuse non-compliance with the rules to the extent required to ensure a fair hearing. Consequences may result from non-compliance, including dismissal of the application without a hearing on the merits.
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I note, and it's noted in one of the cases, the *R. v. Yu* case or the *R. v. Belousov* case that Mr. Ashurov put before me, that on its face the commentary in Rule 5.3 does not speak to a remedy where the respondent to an application has not complied, as opposed to the applicant. But I accept, given the broad wording of the rule generally, that the court has a wide discretion with respect to the remedies it can grant for non-compliance.

In the circumstances before me today, Mr. Ashurov, on behalf of the defence, has argued that it's important to grant a remedy for the Crown's non-compliance with respect to the late filing of its response to the application for purposes of fairness to the parties, for purposes of respect to the court and to ensure that court time is used efficiently and not wasted. And in his submission, just in summary, there's a need for some sanction for the Crown's non-compliance with the Rules.

The Crown in response takes the position that this particular 11(b) application, according to the Crown, is not a complex application and the defence should be able to prepare itself to proceed today. However, I note that the Crown has not put forward anything that I would consider to be a valid explanation for the late filing. In particular, what the Crown has said is simply that he was unable to find the file,

and that there were issues with his schedule and timing in terms of ability to file a response in a timely way.

In the circumstances of this case, I agree with defence counsel that some remedy is required for the Crown's non-compliance with the Rules. In particular, I am concerned on the facts of this case, primarily with two factors, fairness to the accused in that the accused is not able to properly prepare to respond to the application. As I've noted, the Rules are quite clear in their purpose that the purpose of notice and response to an application is to allow the parties to know what's in issue and it's a requirement of substance. You have to know factually what's in issue in a particular case. And the second thing that is of particular concern in this case is the cost to the administration of justice and to this court of a late response by the Crown. It leaves the court unable to prepare in advance for the application, and there's the wasted court time in terms of inefficient use of the public resource of the time of this court. And when I speak of inefficient use of court time I refer to two things, the time spent today on this issue of non-compliance with the Rules, which could otherwise have been used to hear the merits of the 11(b) application had the Crown's response been filed in a timely manner, and the potential time wasted if an 11(b) application is

heard too close to the trial date, such that, subject to what the ruling is, if the ruling was to grant a *Charter* remedy and stay the proceedings, it may be too late to otherwise use the court time.

The first remedy that Mr. Ashurov seeks on behalf of the defence is to proceed with the 11(b) application today with the Crown being denied the right to cross-examine. He relies on the judgments of the Superior Court and the Ontario Court of Appeal in *R. v. Dumont*, in 1999 and 2000 respectively. I've reviewed those cases. In my view, they are not entirely analogous with the situation before the court. There, the Crown was refused the right to call its own viva voce evidence in reply. It's not clear on the facts that the Crown was denied the right to cross-examine defence evidence as part of the remedy. I'd also note that *R. v. Dumont* is decided under the old rules of the court, not the current rules, and I've not been provided with any authority under the new rules for the remedy of not permitting the Crown to cross-examine and having the application heard only on the defence materials.

In any event, absent some authority holding that it's appropriate to proceed in that manner, I'm not persuaded that in the circumstances of this case proceeding with the application solely on the defence materials and without cross-

examination is in the interest of justice. The Rules refer to matters being decided justly and efficiently and dealing with both the prosecution and the defence fairly.

On the facts of this application, having read the materials that are now before me, the defence material and the Crown material, it's clear that one of the issues on this application when it is ultimately heard will be whether the accused suffered prejudice as a result of the delay. In my view, it is not in the public interest to deny cross-examination of the accused because the effect of that is then that the 11(b) application would be decided on an incomplete record. And on that issue, I rely on the decision of *R. v. Belousov*, a decision of the Ontario Court of Justice in 2014 at paragraph 135, and the decision of *R. v. Yu*, also a decision of the Ontario Court of Justice in 2014 at paragraph 12.

This brings me to Mr. Ashurov's second request for a remedy, which is that the trial dates be adjourned without prejudice to his right to pursue the *Charter* remedies at a later date. I asked counsel to inquire with the trial co-ordinator's office about the possibility of the 11(b) motion being heard sometime between now and December 16th so that it would not be necessary to adjourn the trial dates. Although I noted at the time that I asked that I was

concerned if the date was going to be too close to the scheduled trial date, that effectively if the remedy were granted of a stay on the 11(b) motion, it would lead to inefficient use of court resources because it may not be possible to reschedule the court time for other matters.

After the break, counsel came back and advised me that the only available date is December the 9th, 2014, as a possibility for the 11(b) motion. Counsel quite fairly also advised me that dates had been offered in November, one or two dates, but were either not available to defence counsel or not available to Crown counsel. I note the authority of the Supreme Court of Canada in *R. v. Godin*, that defence counsel is not required to keep his calendar permanently open to be available, and so I don't take anything into account about the fact that defence counsel was not able to take a date in November to be able to argue this application.

Pursuant to Rule 2.4(e), 11(b) motions are to be argued, subject to relief being granted by the court, at least 60 days in advance of the scheduled trial date so that court time will not be wasted. It's my holding that it would not be in the public interest to schedule this 11(b) motion for December 9th because it's so close to the scheduled trial date, and in the event that the *Charter* remedy of a stay were granted, it would lead to inefficient use of trial resources

in that it may not be possible to reschedule that court time.

In the circumstances, in my view, the appropriate remedy is to adjourn both the 11(b) motion and the scheduled trial dates without prejudice to the defence right to renew the 11(b) motion, and if the defence chooses to seek other *Charter* relief, for example, such as costs. In coming to this conclusion, I considered the authorities of *R. v. Yu*, a decision of the Ontario Court of Justice in 2014 at paragraphs 5 to 22, and *R. v. Belousov*, also a decision of the Ontario Court of Justice in 2014 at paragraphs 133 to 143. So as a result, I will adjourn, subject to holding this matter down to allow counsel to attend at the trial co-ordinator's office again, adjourn the proceedings today and adjourn the trial dates of December 16th, 2014, and January 2nd, 2015.

...PROCEEDINGS ADJOURNED

11.
R. v. Korzh
Certification

FORM 2
Certificate of Transcript
Evidence Act, Subsection 5(2)

I, G. Armstrong, certify that this document is a true and accurate transcription of the recording of R. v. Korzh, in the Ontario Court of Justice held at 7755 Hurontario St., Brampton, Ontario, taken from Recording No. 3111-H15-20141014-095413, which has been certified in Form 1 by A. Valentine.

(Date)

(Signature of authorized person)