R. v. Pawar

British Columbia Judgments

British Columbia Provincial Court

Chilliwack, British Columbia

P.D. Whyte Prov. Ct. J.

Heard: January 9 and 10, 2023.

Judgment: January 24, 2023.

File No.: 70357-1

Registry: Chilliwack

[2023] B.C.J. No. 206 | 2023 BCPC 20

Between Rex, and Ruppreet Singh Pawar

(118 paras.)

Counsel

Counsel for the Crown: A.Burns.

Counsel for the Defendant: B. Mohan.

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RULING ON APPLICATION

P.D. WHYTE PROV. CT. J.

INTRODUCTION

1 Rupreet Singh Pawar is charged with sexually assaulting N.M., contrary to s. 271 of the Criminal Code. The incident is alleged to have occurred on or about the 18th day of July, 2018. The Crown proceeded by way of indictment.

2 Mr. Pawar has retained four counsel since this matter was sworn on May 20, 2020, and has scheduled three separate trial dates. His original counsel elected trial by Provincial Court Judge. His next two counsel maintained that election.

3 Mr. Pawar's trial in the Provincial Court has been adjourned twice. It is now scheduled to commence on February 23, 2023, 1010 days after the information was sworn, and 1682 days after the date of the allegation.

4 Mr. Pawar applies via his Amended Notice of Application to re-elect his form of trial, and seeks to be tried by Supreme Court Judge and Jury. The re-election is opposed by the Crown.

5 This application was heard on January 9 and 10, 2023. I had the benefit of reviewing Mr. Pawar's affidavit, sworn January 2, 2023; and hearing his *viva voce* testimony. Additionally, I have been aided by the able submissions of counsel, and review of some DARS recordings. At the conclusion of counsel's submissions, I reserved my decision. These reasons form my decision on the application.

POSITION OF THE PARTIES

6 Mr. Pawar alleges that he received no advice regarding his right to elect to be tried by Supreme Court Judge and Jury. While an election was made on his behalf, he submits that it was not an informed election, and therefore was void *ab initio*.

7 Mr. Pawar argues that he possesses an inherent, *Charter*-protected right to elect his mode of trial. As he was denied this right, the result is a miscarriage of justice. He submits that ineffective assistance of counsel and a material change in circumstances is sufficient for the Court to intervene, despite of the wording of s. 561(2) of the *Criminal Code* and the Crown's refusal to consent to the re-election.

8 Mr. Pawar submits that s. 555(1) of the *Criminal Code* permits a Provincial Court Judge to decide not to adjudicate a matter, and direct that the charge be prosecuted in superior court. Mr. Pawar argues that his matter is the sort of circumstance that ought to lead the Court to exercise this authority.

9 The Crown submits that, while the legal landscape is not uniform across the country, courts in British Columbia have declined to override the specific wording in s. 561(2) absent evidence of an abuse of process by the Crown. As none is alleged in the Amended Application, it ought to be dismissed.

10 However, if the Court was to consider ineffective assistance of counsel or a material change in circumstances as a valid basis to override s. 561(2), the Crown submits that the Amended Application is incomplete, and does not provide a basis for the Court to find Mr. Pawar's former counsel, or any of them, was ineffective.

11 Here, the claims of ineffective assistance of counsel and material change in circumstances are

based on the alleged failure by former counsel to properly advise Mr. Pawar of his election or re-election rights. The Crown submits that the Court ought to dismiss both arguments because the application is insufficient.

12 The Crown further argues that the Court should consider the meaning of "the day first appointed for the trial", as it appears in s. 561(2). The Crown takes the view that courts in British Columbia have not determined the meaning of this phrase, as they have in other provinces. Despite the fact that Mr. Pawar clearly brought his application less than 60 days prior to the scheduled third trial date, the potential mischief occasioned by a liberal interpretation of "the day first appointed for the trial" calls out for further consideration.

PROCEDURAL HISTORY

13 Mr. Pawar's journey through the legal system thus far has been lengthy and protracted.

14 His first appearance in this Court was on July 28, 2020, approximately nine weeks after the Information was sworn. At that time, Kenneth Beatch, a senior criminal law practitioner, appeared as counsel. Mr. Beatch filed a Counsel Designation Notice with the Court on August 18, 2020, and appeared for Mr. Pawar on eight occasions between July 28, 2020 and February 10, 2021.

15 On February 5, 2021, Phillip Derksen appeared as agent for Mr. Beatch and Mr. Pawar and formally elected trial by Provincial Court Judge. At the time of Mr. Derksen's appearance, Mr. Beatch had already scheduled five days of trial in Provincial Court, commencing March 5, 2021.

16 On February 10, 2021, Mr. Beatch and Mr. Pawar appeared in court by telephone. Mr. Beatch applied to be removed as counsel of record, as he was engaged in a Supreme Court matter and had been directed to schedule more days to conclude that trial than were originally expected. Mr. Beatch submitted that he lacked the time to properly prepare Mr. Pawar's defence. The Application was granted, but the trial dates were preserved because Mr. Pawar informed the Court that he wished to proceed to trial on the scheduled dates.

17 Mr. Pawar next retained defence counsel Sunny Kahler to represent him. Mr. Kahler filed a Counsel Designation Notice on March 30, 2021. Mr. Kahler made four court appearances on behalf of Mr. Pawar, including on February 22, 2021, when the trial dates were struck.

18 Mr. Pawar decided not to continue with Mr. Kahler's representation. He next retained defence counsel Amandeep Sidhu to represent him. Mr. Sidhu filed a Counsel Designation Notice with the Court on June 4, 2021. Mr. Ginena, articled student to Mr. Sidhu, made three appearances on behalf of Mr. Pawar between June 7 and August 3, 2021.

19 Mr. Sidhu appeared for Mr. Pawar a total of twelve times between August 10, 2021 and December 2, 2022.

20 On August 11, 2021 Mr. Sidhu fixed new trial dates for Mr. Pawar, including three days for the hearing of a voluntariness voir dire in March 2022 regarding statements allegedly made by Mr. Pawar to the police, and five days for trial between May and June, 2022.

21 Mr. Sidhu and Crown Counsel came to an agreement regarding the use of Mr. Pawar's statements to police, such that the *voir dire* was no longer required. The matter was adjourned to May 16, 2022, the first day of the second trial.

22 On May 16, 2022, Mr. Sidhu attended for trial, but Mr. Pawar did not. The Crown was ready to proceed. Mr. Sidhu did not know the whereabouts of Mr. Pawar; the trial was stood down for Mr. Sidhu to locate his client. Mr. Sidhu subsequently informed the Court that Mr. Pawar was hospitalized and unable to attend the trial. It was once again adjourned.

23 On June 13, 2022, Mr. Sidhu fixed new trial dates, again in the Provincial Court. The trial was rescheduled to commence February 23, 2023, with six days secured in February and March 2023.

24 Mr. Sidhu got off the record sometime in November or December 2022. On December 5, 2022, Mr. Pawar appeared before Judge Mundstock and requested a two- week adjournment so he could retain new counsel. Judge Mundstock directed Mr. Pawar to advise any counsel with whom he was meeting of the scheduled trial dates in February and March 2023.

25 On December 9, 2022, Mr. Pawar retained his current counsel, Mr. Brij Mohan. Mr. Mohan filed a Counsel Designation Notice on December 16, 2022. During a Pre- trial Conference on January 3, 2023, Mr. Mohan advised the Court and Crown of his client's intention to be tried by Supreme Court Judge and Jury. He sought to re-elect to the superior court.

26 The re-election was opposed by the Crown, who submitted that the delays occasioned by trial adjournments and changes of counsel were impermissible. In *R. v. Jordan*, 2016 SCC 27, the Court directed all participants in the criminal justice system to

> take proactive, coordinated measures to remedy unreasonable delay in matters coming to trial (*Jordan* at para. 108, 137).

27 In the absence of a right to re-elect, and given the crown's opposition, I directed Mr. Pawar to schedule an application to re-elect. The Application was scheduled for January 9, 2023.

28 Mr. Pawar filed his original Application for Re-election on January 6, 2023 (the "First Application"). The First Application sought relief based "...upon the residual power of the court to remedy an injustice to the accused, and in the alternative, s. 561 of the *Criminal Code*".

29 On January 9, 2023, at or shortly after the Application commenced, Mr. Pawar filed a second application (the "Amended Application"). In addition to the grounds listed in the First

Application, The Amended Application alleged ineffective assistance of counsel, and a material change in circumstances.

ISSUES

30 This application engages consideration of three main issues:

1. 1. Does the Provincial Court have jurisdiction to allow a re-election after the 60- day period before commencement of a trial, when the prosecutor does not provide consent?
2. 2. If so, in what circumstances should the Court consider a re-election when the prosecutor does not provide consent?
3. 3. Should the Court consider the meaning of the phrase "the first day appointed for the trial" in the circumstances of this application?

1. Does the Provincial Court Have Jurisdiction to Order Re-election After the 60-day Period Before Commencement of a Trial, When the Prosecutor Does not Provide Consent?

31 Section 561(2) is entitled "Right to re-elect" and reads:

> An accused who elects to be tried by a provincial court judge may, not later than 60 days before the day first appointed for the trial, re-elect as of right another mode of trial, and may do so after that time with the written consent of the prosecutor.

32 A literal reading of s. 561(2) does not permit re-election absent the consent of the Crown when the application is brought less than 60 days before the trial date. Mr. Pawar is within 60 days of the third trial date, which is scheduled to begin on February 23, 2023.

33 However, Section 555(1) of the *Criminal Code* reads:

> If in any proceedings under this Part an accused is before a provincial court judge and it appears to the provincial court judge that for any reason the charge should be prosecuted in superior court, the provincial court judge may, at any time before the accused has entered a defence, decide not to adjudicate and shall then inform the accused of the decision.

34 Section 555(1) authorizes a Provincial Court Judge to direct, for any reason, that a trial take place in Supreme Court. I conclude that I possess the authority to override the 60-day limit to re-elect mode of trial found in s. 561(2) when the Crown declines to provide its consent. This interpretation is consistent with the ordinary meaning of the phrase "for any reason".

35 Additionally, a number of cases supplied by counsel confirm a Provincial Court Judge's ability to override Crown's discretion not to consent to re-election in certain circumstances. Several of those decisions are discussed in more detail, below.

36 Far more complex, however, is a consideration of when and how a Provincial Court Judge ought to exercise this authority.

2. In What Circumstances Should the Court Consider a Re-election Less Than 60 Days Before the Commencement of Trial, When the Prosecutor Does not Provide Consent?

37 Courts in Canada have reached different conclusions regarding the circumstances in which a Provincial Court Judge ought to exercise the authority to allow a re-election without Crown consent.

38 In British Columbia, the authorities appear to be limited to Provincial Court matters. The issue was considered by Judge Gillespie, as she then was, in *Regina v. Malakpour*, 2012 BCPC 0417. The accused in *Malakpour* was charged in a ten-count Information, proceeded by way of indictment. His counsel elected trial by Provincial Court Judge, waived formal reading of the Information, and entered not guilty pleas.

39 On the first day of trial, counsel for *Malakpour* applied to re-elect his mode of trial. Crown did not consent to the re-election. At the time, s. 561(2) allowed re-election as of right up to 14 days prior to the commencement of the trial.

40 Judge Gillespie considered *Regina v. Ng*, 2003 ABCA 1, an appeal of a matter where the trial court allowed a re-election, despite the Crown's lack of consent. In *Ng*, Justice Wittmann determined that the court had no authority to override the Crown's discretion not to consent to re-elect unless there was conduct that amounted to an abuse of process. Additionally, the court concluded that there was no requirement for the Crown to disclose the reasons for the exercise of its discretion. The refusal to provide reasons for declining to provide consent to re-elect was not evidence of an abuse of process (*Malakpour* at para. 8).

41 The Court in *Ng* further determined that the accused bore the onus to prove that the Crown's exercise of discretion amounted to, or would amount to, an abuse of process. The standard of proof was the balance of probabilities (*Ng* at para. 34, citing *Regina v. Cook*, [1997] 1 S.C.R. 1113).

42 Judge Gillespie decided, on the authority of *Ng* and the circumstances before her, that she lacked the jurisdiction to allow the re-election, and directed that the trial proceed in the Provincial Court (*Malakpour* at para. 11).

43 Judge Doherty faced a similar application in *Regina v. Moore*, 2014 BCPC 0135. The accused in *Moore* faced several drug offences. His initial counsel elected trial by Provincial Court Judge. At some point counsel got off the record, and new counsel got on. The original trial date was cancelled. The accused brought application to re-elect. He did so without filing an affidavit to support the application. The Crown opposed the re-election.

44 New counsel advised the Court that he was unable to meet with his client until March 2014. As the original trial date was March 10, 2014, the accused was not within the time limit to re-elect as of right. I note this was the case even though the original trial date had been cancelled.

45 The accused relied on *Regina v. Bennett*, [1993] 83 C.C.C. (3d) 50 in support of their application to re-elect despite being out of time pursuant to s. 561(2). *Bennett* is also relied upon by Mr. Pawar in his application.

46 In *Bennett*, the Ontario Court of Justice approved an application to re-elect, notwithstanding the Crown's lack of consent. Counsel for the accused elected trial by Provincial Court Judge, which was affirmed on the record with the accused present. Two months later, the accused retained new counsel. New counsel secured an adjournment of the trial date. New counsel also advised that they intended to re-elect to trial by judge and jury, and requested a preliminary inquiry. The Crown opposed the re- election, despite the adjournment of the trial date.

47 The accused argued that the initial election was invalid for several reasons, including that it was not read to him; and it was made without full knowledge or appreciation of the effect of the election. The accused submitted that his previous counsel did not inform him of what was involved in a preliminary inquiry, or of his right to a trial by judge and jury (*Bennett* at page 56). This is also the essence of Mr. Pawar's positon.

48 The accused's former counsel gave evidence at the hearing. He was deemed to have equivocated when asked whether he discussed the availability of a preliminary inquiry, or whether the accused was fully aware of the implications of a judge and jury trial.

49 Ultimately, the court ruled that the original election was valid, and that the accused's primary concern was obtaining the fastest mode of trial. The court stated at page 59:

> In my view, where accused persons are represented by experienced counsel, it is a very dangerous precedent for a judge to go behind the representations of the counsel to assess whether what the lawyer has said in court has been fully and completely understood by his or her client. ... If a client objects to how counsel conducts the matter, he or she is free to change counsel or to make a complaint to the Law Society. It is not the role of the court to assess whether a particular counsel has adequately informed his or her client about the applicable substantive and procedural issues, nor whether the accused has fully and completely understood. . . .

50 However, the court went on to state at page 65:

> Where the accused has changed counsel and in so doing has gained a greater appreciation of the benefits to be derived from a preliminary hearing and a jury trial; where that change occurred after the [then] 14-day deadline required for the Crown's consent; where new counsel, according to the customary practice, has secured an adjournment of his initial trial

> date, and a new date (whether for a preliminary hearing or trial) must be set in any event, fairness and the perception of fairness dictates that a re-election be permitted.

51 Mr. Pawar relies on this passage to support his position that trial fairness requires that his election be allowed despite Crown Counsel's refusal to consent.

52 Judge Doherty concluded, however, that *Bennett* was no longer good law, given the Ontario Court of Appeal's 1994 decision in *Regina v. L.E.*, 94 C.C.C. (3d) 228. In *L.E.*, the trial judge allowed the accused to re-elect mode of trial over the Crown's objection and refusal to provide consent. The Crown appealed the trial judge's decision.

53 At para. 23, Justice Finlayson wrote:

> ... In my opinion, the authorities have consistently held that the overriding discretion as to the manner in which the Crown conducts a trial can only be overruled when the accused has established that there has been an abuse of process which impairs the fair trial of the accused. No such case can be made out in this appeal.

54 Further, at paras. 26-27, in reference to counsel's position on appeal:

> [26] ... Their position was that the trial judge had an inherent jurisdiction to review the exercise of discretion by the Crown in withholding its consent, and, if in the trial judge's opinion, it was in the interests of the fair trial of the accused, he could override the Crown and permit the re-election notwithstanding that s. 561(1)(c) had not been complied with.
>
> [27] I cannot accept this proposition. While I do not believe that the Crown has an unfettered right to withhold consent to a re-election under s. 561(1)(c), the court cannot review this exercise of statutory discretion relating to the mode of trial unless it has been demonstrated on the record that there has been an abuse of the court's process by oppressive proceedings on the part of the Crown ...

55 Judge Doherty also noted Justice Finlayson's reference to *Regina v. Ruston*, [1991] 63 C.C.C. (3d) 419. In *Ruston*, the Manitoba Court of Appeal recognized the importance of a trial judge's flexibility in ensuring that prosecutorial discretion is not entirely unfettered. However, the Court rejected the idea that a trial judge can substitute their discretion for that of the Crown and direct a late re-election absent a finding that the Crown's conduct amounted to an abuse of process (*Moore* at para. 23). Judge Doherty also reviewed the decision in *Ng*, which reached a similar conclusion.

56 Ultimately, Judge Doherty concluded that the balance of the authorities favoured the view that a judge's discretion to override Crown's refusal to consent to re-elect was only reviewable on proof of an abuse of process. As no such circumstance was alleged in the application, the motion was denied.

57 Other courts, however, have found it appropriate to expand the grounds upon which a

Provincial Court Judge ought to intervene in the face of Crown's refusal to consent to re-elect mode of trial.

58 The decisions that favour an expanded basis for intervention appear to have concluded that a miscarriage of justice results in circumstances where an accused elects a mode of trial without a full appreciation of the understanding of the advantages and disadvantages inherent in the choice of election. In other words, where the accused alleges ineffective assistance of counsel.

59 Mr. Pawar's position is that Crown's failure to consent to his re-election in the face of ineffective assistance of counsel amounts to a miscarriage of justice that warrants judicial intervention.

60 In *Regina v. Shilmar*, 2017 ABPC 213, the accused, who was charged with a number of indictable offences, sought to re-elect his mode of trial to judge and jury. The accused had been represented by three lawyers at various times, two of whom testified during the application to re-elect. The accused asserted several bases for the application, including abuse of process and ineffective assistance of counsel.

61 At para. 84, Judge Rosborough determined, inter alia, that section 561(2) was clear and unambiguous; that the election and re-election provisions of the *Criminal Code* were Charter compliant; and absent a finding of abuse of process, a court ought not interfere with a prosecutor's exercise of discretion, or substitute its view of what is "fair or just" for that of Parliament.

62 The court referenced *Regina v. Meister*, 2014 ABQB 91, where a prosecutor's refusal to consent to re-election was found to constitute an abuse of process. The circumstances in that case were distinguished from *Shilmar*, as they are from those of Mr. Pawar.

63 Despite concluding that an abuse of process had not been made out, Judge Rosborough went on to consider whether the accused had been provided ineffective assistance of counsel. At para. 112, the court concluded that the accused had to prove that ineffective assistance of counsel would undermine the appearance of fairness at a trial, and that as a result, there was a reasonable probability that the adjudicative process would be unfair.

64 Ultimately, the court determined that the accused failed to prove ineffective assistance of counsel. However, the fact that it was even considered suggests that abuse of process is not the only basis upon which a Provincial Court Judge ought to consider overriding Crown's discretion to refuse an application to re-elect.

65 Interestingly, the court in *Shilmar* considered *Regina v. Effert*, 2011 ABCA 134, where the Alberta Court of Appeal rejected the notion that a general concern for "trial fairness" ought to be sufficient to expand a trial judge's authority to disregard the need for Crown consent to re-elect, based on the central finding in *Ng* (*Shilmar* at para. 81).

66 Nonetheless, *Shilmar* appears to suggest that something other than an abuse of process, such as a general concern for "trial fairness", could form the basis upon which a court might allow re-election in spite of Crown's refusal to consent.

67 In *Regina v. T.B.*, 2018 ABPC 43, the Alberta Provincial Court considered, among other things, the availability of re-election absent prosecutorial consent. The accused, who was a youth, was charged with a variety of sexual offences. The Crown filed a Notice of Intention to Seek an Adult Sentence, therein engaging the election provisions in the *Youth Criminal Justice Act*.

68 At para. 51, Judge Lipton opined that a re-election may be pursued where the court found an abuse of process; where there had been a material change in circumstances; or where there has been ineffective representation of counsel.

69 At para. 68, Judge Lipton quoted with approval from *Shilmar*, where Judge Rosborough determined, *inter alia*, that absent a finding of abuse of process, a court ought not interfere with a prosecutor's exercise of discretion.

70 The court found no basis to conclude that the Crown had engaged in an abuse of process. However, Judge Lipton went on to consider the availability of either a material change in circumstances or ineffective assistance of counsel as the basis to review the prosecution's discretion not to consent to re-election.

71 The court ultimately dismissed the application, as none of the enumerated categories that would allow for re-election applied (*T.B.* at para. 83). Before doing so, the court considered the issue of trial fairness in the context of re-election, quoting from para. 125 of *Shilmar*:

> ... Given that the trial has yet to begin, however, Shilmar's disadvantage would be marginal. He is now left in the position where he may no longer enjoy a fair trial by judge and jury. He is confined to having a fair trial by Provincial Court Judge. A reasonable observer may not see this as a miscarriage of justice ...

72 A final case for consideration is *R. v. Diamonti*, [1981] B.C.J. No. 1127, a decision of Justice Toy of the British Columbia Supreme Court.

73 *Diamonti* was an application for relief in the nature of *mandamus*, directing a Provincial Court Judge to exercise discretion to hear an application to re-elect mode of trial, despite the Crown's lack of consent. The issue was whether or not a Provincial Court Judge possessed the jurisdiction to hear the application, rather than to direct a particular outcome or decision.

74 Justice Toy determined that it was within the Provincial Court's jurisdiction to override Crown's refusal to consent. He further considered it appropriate for the Provincial Court Judge to

do so where an accused was "... genuinely mistaken or uninformed when he did make his election..." (*Diamonti* at para. 16).

75 Based on the authority of *Shilmar, T.B.* and *Diamonti* (although peripherally in the latter case), Mr. Pawar urges the Court to widen the breadth of inquiry to include circumstances for judicial intervention other than abuse of process.

ANALYSIS

76 Having regard to the authorities provided for review in this application, I conclude that I am bound to follow those that limit a Provincial Court Judge's discretion to review Crown's decision to refuse consent to re-elect to circumstances where abuse of process is proven.

77 The British Columbia Provincial Court authorities that have considered this issue have followed Court of Appeal decisions in Alberta, Manitoba and Ontario. While these decisions are not binding upon me, I find their reasoning to be persuasive.

78 The decisions that suggest the Court ought to enlarge the arena of inquiry to include a material change in circumstances or ineffective assistance of counsel are Provincial Court decisions. Additionally, the analysis in *T.B.* and *Shilmar* was undertaken despite conclusions that the Crown's discretion should only be reviewed where the court found an abuse of process.

79 I find I agree with Judge Doherty's conclusion in *Moore*: the finding in *Bennett* has been overtaken by the Ontario Court of Appeal's decision in *L.E.* Additionally, the comments made in *Diamonti*, a case decided before the *Canadian Charter of Rights and Freedoms* formed part of the *Constitution Act*, are clearly obiter dicta. They do not create a binding precedent, in my view.

80 For these reasons, in Mr. Pawar's case, I conclude that a finding of an abuse of process is the only basis upon which I ought to exercise my authority to override Crown's discretion to refuse consent to re-elect mode of trial. As abuse of process has not been pleaded, I dismiss the application.

3. Should the Court Consider the Meaning of the Phrase "the first day appointed for the trial" in the Circumstances of This Application?

81 Crown Counsel urged the Court to undertake an interpretation of this phrase, as it appears not to have been determined conclusively in British Columbia. Mr. Burns submitted that there was a significant potential for mischief if the Court was to conclude that "the first day appointed for the trial" was understood to mean the first day of an adjourned trial. The concern is that an accused who successfully adjourned his trial could prolong the proceedings indefinitely by re-electing as of right at least 60 days in advance of each successive trial.

82 Mr. Pawar's Application was filed on January 6, 2023. He raised the issue of re- election on

the record for the first time during a Pre-trial Conference on January 3, 2023. Each of these days is less than 60 days before the commencement of the trial on February 23, 2023.

83 In light of this, I find there is no need for the Court to conduct an analysis of the meaning of the phrase "the first day appointed for the trial". The Application was tendered less than 60 days in advance regardless. I thus decline to consider this matter further.

84 However, if my analysis on the jurisdictional issue is incorrect, I will consider the other parts of Mr. Pawar's application.

Ineffective Assistance of Counsel

85 Mr. Pawar claims both ineffective assistance of counsel and a material change in circumstances. However, the two are directly linked.

86 In his affidavit, Mr. Pawar deposed that he only learned of his right to elect trial in the superior court, and associated options, when he spoke with his "new lawyers" in his native Punjabi language (Mr. Pawar's affidavit at para. 7). I gather this was a reference to Mr. Mohan's representation.

87 Mr. Pawar deposed that, while Kenneth Beatch did speak with him about his trial options, he did not recall Mr. Beatch discussing with him the possibility of having a jury trial. Mr. Pawar suggested this may have been because English is his second language (Mr. Pawar's affidavit at paras. 4-6).

88 In his *viva voce* evidence, Mr. Pawar said that he recalled discussing the different levels of court with Mr. Beatch. He said the conversation centred around cost, in particular that a trial in Supreme Court would be more expensive. He testified that the option of a jury trial was not discussed with him.

89 Mr. Pawar's affidavit did not address his representation by either Mr. Kahler or Mr. Sidhu. Mr. Pawar testified that he did not speak much with Mr. Kahler or Mr. Sidhu, despite each being counsel of record for significant periods of time. He said his communications with Mr. Kahler centred around court dates, rather than substantive discussions about the charge. He said he had only two or three meetings with Mr. Sidhu between June 2021 and December 2022.

90 In cross-examination, Mr. Pawar said he met with Mr. Beatch on two or three occasions, but not much more than an hour each time. He then said each meeting was perhaps as short as 30 minutes. He followed Mr. Beatch's direction in scheduling the matter in Provincial Court, but said that if he had known he had an option, he would have asked more questions.

91 Mr. Pawar said in cross-examination that he did not know why Mr. Sidhu declined to continue

to represent him. He said he was shocked by the decision. Given the absence of warning, he found himself under exceeding pressure to secure new counsel. He stated that Mr. Kahler had "some issues", but this was not expanded upon in direct or cross-examination.

92 Mr. Pawar's affidavit was sent to Mr. Beatch's former associate, Jayse Reveley, on January 3, 2023. The affidavit was accompanied by an email, requesting that Mr. Reveley forward it to Mr. Beatch, who had, by that time retired from the practice of law.

A portion of the email reads:

> Mr. Pawar is taking the position that he did not understand his right to an Election for his mode of trial. He is not alleging ineffective assistance of counsel per se, just that he did not understand his election when Mr. Beatch discussed it with him and that Mr. Pawar wants a jury trial.

93 On January 4, 2023, Mr. Beatch responded to the email as follows:

> I have read this affidavit. Not sure why the court would want me to, but nevertheless I have. FYI I have retired from Law and now live on Vancouver Island. I rarely check emails, and only did because Revely (sic) brought it to my attention. Good luck with this.

94 Mr. Pawar's affidavit was not sent to either Mr. Kahler or Mr. Sidhu, and consequently no response from either counsel was tendered on the Application.

95 Mr. Pawar claims that he received no cogent advice from Mr. Beatch regarding mode of trial, or the advantages and disadvantages of his options. Had he been informed of his choices, he would have pursued a trial by judge and jury. The result, it is submitted, is a miscarriage of justice that requires judicial intervention in the form of an order allowing Mr. Pawar to re-elect mode of trial.

96 The Crown takes the view that the materials relied upon by Mr. Pawar are deficient for three reasons, and therefore cannot result in a conclusion of ineffective assistance of counsel.

97 Firstly, Mr. Pawar deposed that he did not recall discussing the possibility of a jury trial. This is not the same as not being informed of his election rights. It speaks to memory, rather than a substantive failure on the part of counsel to review the election options.

98 Secondly, Mr. Beatch was not informed that Mr. Pawar was pursuing a claim of ineffective assistance of counsel. In fact, he was specifically told that Mr. Pawar was not raising this as an issue. In these circumstances, Mr. Beatch's failure to respond more fulsomely is unsurprising. The Court ought not take anything from Mr. Beatch's lack of response to an allegation that he was told was not being made.

99 Thirdly, the record is near silent as to the assistance provided by Mr. Kahler or Mr. Sidhu.

Neither counsel was informed of Mr. Pawar's application, and therefore neither has been given an opportunity to respond to it. Between them, these counsel represented Mr. Pawar from March 2021 to December 2022. Mr. Beatch was only the first of Mr. Pawar's (now) four counsel. He was removed as counsel of record in February 2021.

100 In the absence of any information regarding what either Mr. Kahler or Mr. Sidhu advised Mr. Pawar regarding elections during their collective 21 months of representation, the Crown submits that the Court cannot find there was ineffective assistance of counsel. The record is simply inadequate and incomplete.

THE LAW

101 As noted in *Regina v. Ball*, 2019 BCCA 32 (with reference to *Regina v. G.D.B.*, 2000 SCC 22), an accused is entitled to receive effective legal assistance. Such assistance enhances adjudicative fairness of the process by ensuring that the accused receives the full benefit of all available procedural protections.

102 From para. 107 of *Ball*:

> A claim of ineffective assistance of counsel has two distinct components, performance and prejudice. The appellant must establish that counsel's acts or omissions were incompetent (performance) and that, as a result, a miscarriage of justice occurred (prejudice). Professional incompetence is assessed on a standard of reasonableness and it must be proven on a balance of probabilities. A miscarriage of justice resulting from professional incompetence must also be proven on a balance of probabilities, and it may take many forms...

103 Further, at para. 108:

> The bar for establishing professional incompetence is high and surpassing it is challenging. It is strongly presumed that counsel's conduct fell within the wide range of reasonable professional assistance, deference will be accorded to counsel's strategic and tactical decisions and the "wisdom of hindsight" has no place in the analysis...

104 The Court of Appeal in *Ball* went on to conclude that the prejudice component ought to be considered first before the performance component. If prejudice is not shown to the requisite standard, the inquiry should end. The prejudice component is established where the appellant proves that professional incompetence is linked to a miscarriage of justice. A miscarriage of justice can result where there is a reasonable probability that the outcome of the proceedings would have been different, but for the errors made by counsel. Professional incompetence may result in a miscarriage of justice by reason of procedural fairness alone (*Ball* at paras. 109-110).

105 The right to a trial by jury is reflected in section 11(f) of the Charter, and can only be waived

by the accused if the waiver is informed *(Korponay v. Attorney General of Canada*, [1982] 1 SCR 41 at page 50).

106 As noted in para. 115 of *Shilmar* (with reference to paras. 30-32 of *Regina v. Stark*, 2017 ONCA 148), if an accused fails to receive advice from counsel regarding his options, and advantages and disadvantages of the respective options, then he has effectively been denied his right to choose his mode of trial. This results in a miscarriage of justice that does not require a further finding of prejudice.

ANALYSIS

107 The Crown supplied the British Columbia Court of Appeal Practice Directive titled "Ineffective Assistance of Trial Counsel" (the "Practice Directive"). The Practice Directive is not binding upon the Provincial Court. However, it provides a useful blueprint regarding the manner in which such a claim ought to be pursued. Additionally, Mr. Mohan argued that he met his onus to inform Mr. Beatch of the allegation of ineffective assistance, as required by the Practice Directive. In the absence of a fulsome response from Mr. Beatch, Mr. Mohan submitted that the Court ought to consider Mr. Pawar's allegations as being unchallenged.

108 The Practice Directive breaks down an allegation of ineffective assistance of counsel into four stages. In Stage One, counsel is to satisfy themselves that there is a basis for the claim. They are then to notify trial counsel of the nature of the allegations bearing on professional misconduct, and provide trial counsel a reasonable opportunity to respond informally to the allegations.

109 Stage Two describes the logistical steps taken by the Chief Justice to prepare for the hearing, including the designation of a case management judge and scheduling of a case management hearing. The Notice of Appeal is formally served upon trial counsel, along with the appellant's affidavit, and other logistical measures are undertaken by appeal counsel. Additionally, once the Notice is filed, Crown forwards a letter to trial counsel, requesting an affidavit in response to the allegations. Various documents that support the allegation are forwarded to trial counsel as well. Trial counsel then provides an affidavit in response to the allegations.

110 Stage Three deals with case management issues. Stage Four describes the nature of the hearing, and includes the direction that it not be scheduled until appeal books and transcripts have been filed.

111 I asked Crown Counsel why they did not take steps to obtain affidavits from either Mr. Kahler or Mr. Sidhu. Mr. Burns' response was twofold. Firstly, he was only informed of Mr. Pawar's claim of ineffective assistance of counsel upon the filing of the Amended Application on January 9, 2023. There was no time for him to obtain any materials from former counsel, as the application was already underway when the Amended Application was filed.

112 Secondly, ineffective assistance was not alleged against Mr. Beatch until January 9, 2023, and it was never alleged against either Mr. Kahler or Mr. Sidhu. As such, there was no basis for comment from these counsel, and arguably no reason for Mr. Beatch to respond. At the time Mr. Beatch supplied his reply on January 4, 2023, no allegation of ineffective assistance of counsel had been alleged.

113 Here, I find the materials relied upon by Mr. Pawar to be deficient. Mr. Beatch's email was not in response to an allegation of ineffective assistance of counsel. The correspondence sent to him specifically stated that this was not being alleged. Nor did Mr. Pawar's affidavit make such a claim. Mr. Beatch has retired from the practice of law. In the absence of clear notice that he was being accused of incompetent representation, I cannot take his limited response to be an acknowledgment of any wrongdoing.

114 Mr. Mohan suggested that Mr. Pawar's affidavit did not clearly allege ineffective assistance of counsel because he thought highly of Mr. Beatch, and did not want to make accusatory comments. With respect, an allegation of ineffective assistance is serious, and needs to be direct. There is no room to soften the blow for fear it might offend former counsel.

115 Further, the record is entirely silent as regards to Mr. Kahler and Mr. Sidhu. Neither one was accused of ineffective assistance of counsel. Neither one was informed of Mr. Pawar's application. Mr. Mohan took the further position that he was not required to consult each counsel involved in the case to discuss the re-election issue. In his view, the obligation was limited to Mr. Beatch, as he made the original election, and the Court ought to assume subsequent counsel merely followed along without considering the option to re-elect.

116 I cannot accept this submission. It does not make sense that I could determine a claim for ineffective assistance of counsel when two out of three counsel were not notified, let alone given a chance to respond. I am unprepared to assume that two otherwise competent counsel, presumed to be aware of the ability to elect to the superior court on a serious indictable matter, chose to blindly follow the original election and not discuss the election provisions with Mr. Pawar.

117 As noted in *Ball*, there is a strong presumption that counsel's conduct falls within the range of reasonable professional assistance. I find Mr. Pawar has not met the high bar required to establish that Mr. Beatch's assistance was ineffective. Even if I had concluded otherwise, in the absence of any evidence regarding either Mr. Kahler or Mr. Sidhu's representation, I find that Mr. Pawar has failed to rebut the presumption of competence of counsel.

118 For all of these reasons, I dismiss Mr. Pawar's application.

P.D. WHYTE PROV. CT. J.

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