Date: 20000223
Docket: CAC 155899

# NOVA SCOTIA COURT OF APPEAL

[Cite as: R. v. F.C.B., 2000 NSCA 35]

**Roscoe, Bateman and Cromwell, JJ.A.**

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| **BETWEEN:** | ) | |
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| HER MAJESTY THE QUEEN | ) | William D. Delaney |
| | ) | for the Appellant |
| Appellant | ) | |
| | ) | |
| **- and -** | ) | |
| | ) | |
| F. C. B. | ) | Philip J. Star |
| | ) | for the Respondent |
| Respondent | ) | |
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| | ) | Appeal Heard: |
| | ) | January 27, 2000 |
| | ) | |
| | ) | |
| | ) | Judgment Delivered: |
| | ) | February 23, 2000 |

**Editorial Notice**

Identifying information has been removed from this electronic version of the judgment.

**THE COURT:** The appeal is allowed, the stay of proceedings is set aside and a new trial is ordered as per reasons for judgment of Roscoe, J.A.; Bateman and Cromwell, JJ.A., concurring.

**ROSCOE, J.A.:**

[1] This is an appeal by the Crown from a decision of Provincial Court Judge John Nichols ordering a stay of proceedings against the respondent in relation to charges of gross indecency, indecent assault and incest alleged to have been committed against his daughter, S., between 1974 and 1983.

**Background**

[2] In 1984, S., who was then 16 years old, advised her mother that her father was sexually abusing her. As a result of inquiries made by the mother to an incest support group, the child welfare authorities became involved with the family. A social worker with the child welfare agency contacted the RCMP regarding the allegations and on July 9, 1984, S. gave a statement to Corporal Willard MacPhee. S. told Corporal MacPhee that she did not want to testify in court against her father. The respondent retained counsel and advised the officer that he would not give a statement. The prosecutor involved in the matter, Robert Prince, wrote a letter sending a copy of S.'s statement to Martin Herschorn, the Assistant Director (Criminal) in the Halifax Attorney General's office saying:

> . . . The main difficulty I see will be to have the daughter and wife testify as to the circumstances surrounding the sexual intercourse. Corporal MacPhee indicated that it was his impression that she would not be a willing witness and accordingly, I would like some direction of the Department with respect to whether this matter should proceed further . . .

[3] The decision of the Assistant Director was that the matter should not proceed

further, and the respondent's counsel was so advised. The family was referred to Helen Blau, a psychologist, for counselling.

[4] Several years later, S. learned that her sister also alleged that she had been sexually molested by her father, and in 1995, S. contacted the RCMP and gave another statement alleging sexual abuse by the respondent. On August 15, 1996, the respondent was charged with gross indecency, incest and indecent assault against S. between the dates of May 16, 1974 and May 16, 1984.

**Court Proceedings**

[5] On August 27, 1996 the respondent appeared in Provincial Court with counsel, at which time the matters were adjourned for election and plea. After further adjournments, the respondent elected to be tried in Supreme Court and a preliminary inquiry commenced before Judge Nichols in the Provincial Court on March 20, 1997. In November 1997, the respondent gave notice that an application would be made for a stay of proceedings. After nine more adjournments, the preliminary continued on April 15, 1998 at which time the respondent re-elected to be tried in Provincial Court, and counsel agreed that the evidence that had already been heard would become evidence at the trial. With the apparent agreement of counsel, the stay application proceeded first so that the only evidence led was directed to the issues of why the matter had not proceeded in 1984, and the whereabouts of the original copy of S.'s first statement and Corporal MacPhee's notes. On March 24, 1997, S. and her mother testified and Corporal MacPhee gave evidence on

April 15, 1998. The trial was adjourned on several more occasions. At some point, Crown and defence counsel signed and filed an undated agreed statement of facts respecting the lost evidence, which is summarized in the appellant's factum as follows:

> - Family and Children's Services maintained a file on the [B's] and the contents of the file have been disclosed to the defence.
> - Helen Blau is deceased and the whereabouts of her file regarding the complainant is unknown. Helen Blau's file was never in the custody of the Crown attorney.
> - The RCMP file regarding [F.B.] was destroyed pursuant to policy some time after 5 years had elapsed since the file was closed. The exact contents of the file are unknown.
> - The RCMP had a policy to categorize and destroy files depending on what category the file is in. At the time the file was destroyed, the RCMP policy regarding sexual assault files was to destroy them after 5 years had elapsed. Presently the RCMP policy is to destroy sexual assault files only after 20 years have elapsed.
> - Corporal MacPhee's personal notes from that time have been either lost or destroyed when his basement flooded.
> - The file of the per diem prosecutor at that time, now the Honourable Judge Robert M.J. Prince, has been destroyed, pursuant to the practices of the private law firm with which Mr. Prince was associated at the time.
> - The contents of the file of the Attorney General's office in Halifax is available and has been disclosed to the defence. This includes the typewritten copy of the statement of [S.B.] referred to in the letter of Robert M.J. Prince to Martin Herschorn.

[6] In addition, it is agreed that four reports written by Helen Blau, which contain details of her consultations with the respondent, S., and her mother, were found in the Family and Children's Services file and have been disclosed to the defence. There is also agreement, based on the testimony of Corporal MacPhee and S., that a statement handwritten by Corporal MacPhee and signed by S. was obtained in 1984 and it was presumably contained in the file that was destroyed. A typewritten document contained in the Halifax Crown's office and disclosed to the defence is entitled "STATEMENT OF [S.A.B] Born

May *, 1967 (*editorial note- removed to protect identity*) , Brazil Lake July 9, 1984 - 11:25 p.m." It continues as follows:

> The first time anything happened between my father and me was when I was 13 years old. It happened in our house, I think I was asleep in bed. I slept in a bedroom with another sister but we each had our own bed. I would say that it went on until I was 15 years old. He just stopped on his own, we never had any fight or anything. I cann't (sic) really say how many times it happened. It happened in our van once but most of the time in our house. I kept it to myself quite a long time before I told my mother. It was about the first of this year that I told my mother. I still live at the house and talk to my father. I don't want to go to Court and give evidence against my father. I just want to get on with my life and forget the whole thing.
>
> W.K. MacPhee, Cpl. Signed [S.B.]

[7] On October 21, 1998, respondent's counsel filed a written argument on the stay application and the Crown replied in November, 1998. Oral argument was heard on January 28, 1999. Counsel for the respondent submitted that the unavailability of the original or a photocopy of the handwritten statement was due to unacceptable negligence and the failure of the Crown to disclose it breached the accused's right to a fair trial, or was an abuse of process, the remedy for which should be a stay of proceedings. On April 8, 1999, Judge Nichols granted the stay and rendered the following brief decision:

> I've been trying to get something in writing but I'm prepared, having read the, ah, your **D.M.M.** case as well as the other cases you submitted that the, ah,...I'm prepared... I think it's a proper case, considering that 1984 was the time it was first, first considered and at, at that time, ah, on the advice of Mr. Prince and His Honourable Judge Prince he's now, that it was indicated by Mr. Herschorn that the Department didn't feel there was a basis for prosecution then.
>
> Having said that, I think quite possibly, it's now fifteen years after the event that it's a proper case for staying of the charges against Mr. [B.] and I so order the stay.

**Grounds of Appeal**

1. **THAT** the Provincial Court Judge erred in law in ruling the failure of the Crown to produce for disclosure the original statement of the complainant made to the police constituted a breach of the respondent's right to make full answer and defence under ss.7 and 11(d) of the **Canadian Charter of Rights and Freedoms**.

2 .**THAT** the Provincial Court Judge erred in ruling the destruction of the original of the complainant's police statement amounted to "unacceptable negligence" on the part of the police.

3. **THAT** the Provincial Court Judge erred in ordering a stay of proceedings in the absence of evidence that this was one of the "clearest of cases" justifying a stay of proceedings.

## Analysis

[8] The standard of review applicable in an appeal, such as this, pursuant to s. 676(1)(c), was recently stated by Pugsley, J.A. in **R. v. Hiscock**,1999 NSCA 126, at para. 42:

> The standard of appellate review from the decision of a trial judge granting a stay of proceedings was considered by the Supreme Court in **Canada (Minister of Citizenship and Immigration) v. Tobiass** (1997), 118 C.C.C. (3d) 443. The judgment was delivered by a unanimous Court.
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> [43] At page 470, the Court said:
>
> > A stay of proceedings is a discretionary remedy. Accordingly, an appellate court may not lightly interfere with a trial judge's decision to grant or not to grant a stay. The situation here is just as our colleague Gonthier J. described it in **Elsom v. Elsom**, [1989] 1 S.C.R. 1367 at p. 1375, 59 D.L.R. (4th) 591:
> >
> > > [An] appellate court will be justified in intervening in a trial judge's exercise of his discretion only if the trial judge misdirects himself or if his decision is so clearly wrong as to amount to an injustice.

[9] Because of the brevity of the trial judge's decision, it is difficult to ascertain the reasons for the determination that this was a situation requiring a stay of proceedings. The

one case he specifically mentioned as applicable is **R. v. D.M.M.**, [1998] N.S.J. No. 148, a decision of Judge Brian Gibson of the Provincial Court. Although the circumstances surrounding the loss of evidence in **D.M.M**. are in some respects similar to those of this case, as will be seen, there are also significant differences as to the availability of other evidence from the initial investigation. In **D.M.M**., Judge Gibson undertook a nine step test developed from the principles established by the Supreme Court of Canada in **O'Connor v. The Queen** (1995), 103 C.C.C. (3d) 1; **R. v. Stinchcombe** (No.2), (1995), 38 C.R. (4th) 42; **R. v. Carosella** (1997), 4 C.R. (5th) 139; and, **R. v. La** (1997), 116 C.C.C. (3d) 97. He concluded that a statement given by the complainant in a sexual assault matter had been lost through the unacceptable negligence of the police, and that the loss of the evidence was so prejudicial to the right of the accused to make a full answer and defence, that it impaired his right to a fair trial. Assuming that Judge Nichols granted a stay in this case for the same reasons, did he misdirect himself, or was the decision so clearly wrong as to amount to an injustice?

[10] The basic principles applicable to the analysis of all three grounds of appeal raised in this case were summarized by Sopinka, J. in **R. v. La**, **supra**, commencing at para. 16. Those principles derived from **R. v. Stinchcombe** (No.1), [1991] 3 S.C.R. 326; **R. v. Egger**, [1993] 2 S.C.R. 451; **R. v. Stinchcombe** (No. 2), **supra**; **R. v. Chapman**, [1995] 1 S.C.R. 727; **R. v. O'Connor**, **supra;** and, **R. v. Carosella** , **supra**, and further developed in **La**, are:

(1) The Crown has an obligation to disclose all relevant information in its possession.

(2) The Crown's duty to disclose gives rise to a duty to preserve relevant evidence.

(3) There is no absolute right to have originals of documents produced. If the Crown no longer has original documents in its possession, it must explain their absence.

(4) If the explanation establishes that the evidence has not been destroyed or lost owing to unacceptable negligence, the duty to disclose has not been breached.

(5) In its determination of whether there is a satisfactory explanation by the Crown, the Court should consider the circumstances surrounding its loss, including whether the evidence was perceived to be relevant at the time it was lost and whether the police acted reasonably in attempting to preserve it. The more relevant the evidence, the more care that should be taken to preserve it.

(6) If the Crown does not establish that the file was not lost through unacceptable negligence, there has been a breach of the accused's s. 7 **Charte**r rights.

(7) In addition to a breach of s. 7 of the **Charter**, a failure to produce evidence may be found to be an abuse of process, if for example, the conduct leading to the destruction of evidence was deliberately for the purpose of defeating the disclosure obligation.

(8) In either case, a s. 7 breach because of failure to disclose, or an abuse of process, a stay is the appropriate remedy, only if it is one of those rare cases that meets the criteria set out in **O'Connor**.

(9) Even if the Crown has shown that there was no unacceptable negligence resulting in the loss of evidence, in some extraordinary case, there may still be a s. 7 breach if the loss can be shown to be so prejudicial to the right to make a full answer and defence that it impairs the right to a fair trial. In this case, a stay may be an appropriate remedy.

(10) In order to assess the degree of prejudice resulting from the lost evidence, it is usually preferable to rule on the stay application after hearing all of the evidence.

[11] The **O'Connor** criteria referred to in the eighth point are as stated by Justice L'Heureux-Dubé at para. 82 of **O'Connor**:

> It must always be remembered that a stay of proceedings is only appropriate "in the clearest of cases", where the prejudice to the accused's right to make full answer and defence cannot be remedied or where irreparable prejudice would be caused to the integrity of the judicial system if the prosecution were continued.

[12] The principles elaborated in the **La** case are applicable to cases, such as this one, where the file was destroyed deliberately, provided the destruction was not unacceptably negligent and not for the purpose of thwarting disclosure to the accused.

[13] When the facts of this case are examined in light of these basic principles, it is clear, that the trial judge erred in entering a stay of proceedings.

[14] With respect to the first two principles of **La**, there is no dispute that the Crown has disclosed all the information currently in its possession. However, there has been a failure

to preserve the original statement given by the complainant in 1984 and the police officer's notes taken in relation to the matter at that time.

[15] Since the Crown does not have original documents from the first investigation, it must explain their absence. The explanation offered is that the file was destroyed by the RCMP pursuant to their file retention policy in existence at the time, five years after it was closed, apparently in 1989. The officer's notebook was destroyed when his basement flooded. The evidence does not disclose the date of the flooding, but in any event, the respondent is concerned mainly with the police file which contained S.'s handwritten statement, and the arguments on appeal were directed only to that missing evidence. The fourth question thus becomes: is the police file unavailable at this time due to "unacceptable negligence"?

[16] In examining whether there was negligence, there must be some comparison with what was reasonable at the time the file was destroyed, with appreciation of the fact that the duty of full disclosure by the Crown was first determined to be part of a constitutional right to a fair trial, by the Supreme Court of Canada in **Stinchcombe**, **supra** in 1991. It was not until **Egger**, **supra**, in 1993, that the duty to disclose was said to include a duty to preserve evidence. In assessing the reasonableness of the policy in this case, it is useful to begin with a comparison of it to policies of other police departments around the same time.

[17] In **D.M.M.**, **supra**, Judge Gibson noted that the policy of the Cole Harbour Detachment of the RCMP in 1987 was that sexual assault files were to be retained for eight years. In 1990, the policy was changed to 20 years with respect to sexual assault files because of "the increasing number of complaints of sexual assault pertaining to incidents allegedly occurring many years previous to the date of the complaint." In **R. v. Pizzardi**, [1991] O.J. No. 2536 (Q.L.), it is indicated that the Ontario Provincial Police policy in 1988 was to shred investigation files relating to robberies after six years. As well, the O.P.P. file retention policy in relation to sexual assault investigations was six years in 1985. See **R. v. H.A.**, [1998] O.J. No. 4351 (C.A.). The policy of the Moncton Police Force in 1976 was to destroy files regarding sexual assaults after five years, as is noted in **R. v. Dowd** (1997), 120 C.C.C. (3d) 360 (N.B.C.A.). In the absence of any evidence to the contrary, the conclusion can be drawn that it was not unusual in the pre-**Stinchcombe** era for police departments to destroy inactive files after a period of five to eight years.

[18] The respondent submits that even though the file in this case was destroyed in accordance with the policy, there was unacceptable negligence evident in the application of the policy. It is suggested that since officers were not advised of pending destruction dates of files they had investigated, the files were not reviewed in any way before destruction, and Corporal MacPhee testified that it would not be negligent in his opinion to destroy a file "in which it is possible that a charge may be laid in the future...", the Crown has not provided a satisfactory explanation for its failure to disclose.

[19] I do not agree with the submission of the respondent that the evidence of Corporal MacPhee "defies credulity", in that this answer "implies that material gathered in the course of an investigation is irrelevant to whether charges will be laid in the future". The question is not as clear as counsel suggests. There is no suggestion in the question, as asked, that a file would have been destroyed while the police had either the knowledge or belief that the investigation had any possibility of being reopened; nor is there any other evidence that in 1989, any police officer or Crown attorney had any suspicion that S. would, at some time, come forward asking that the matter be reopened.

[20] The fifth part of the **La** analysis also requires an examination of whether the lost evidence was perceived to be relevant at the time it was lost. Again, from 1984 to 1989, the relevant time in this case, there was no general understanding that the police had a duty to preserve evidence, at least not in any matter that they reasonably considered closed. As Sopinka, J. observed in **La** at para. 21:

> . . . The police cannot be expected to preserve everything that comes into their hands on the off-chance that it will be relevant in the future . . .

[21] There was no evidence in this case that any police officer or Crown attorney had any information that S. was reconsidering the matter while the file was still in existence. Therefore, there would not likely have been any perception that the evidence contained within the file would ever become relevant; nor did the respondent or his counsel recognize the potential usefulness of the file. If they had, there might have been some effort to obtain

copies of its contents for safekeeping, or a request that the police retain their file.

[22] The Crown submits that even though the original handwritten statement has been destroyed, there is substantial circumstantial evidence that the typed copy of it contained in the Attorney General's Halifax office file, is a true transcription of the statement and therefore the loss of the original statement is less important. Whether the copy is a true transcription of the handwritten statement is, of course, also relevant to the issue of the degree of prejudice to the accused, which is a matter for consideration in the eighth and ninth parts of the **La** analysis.

[23] I would agree with the submission that on the circumstantial evidence available at this point, the copy is probably a true transcription. If at a new trial the matter becomes an issue, it will of course be a question for the trial judge to determine on the evidence then available. In Robert Prince's letter to Martin Herschorn, he says "... I enclose a copy of the statement...". It is reasonable to infer that if he had been enclosing a summary, précis or paraphrase of the statement, he would have so qualified it. It is also reasonable to infer, as the Crown submits we should, that when requesting the advice of his superior as to how to proceed, that he would not have sent anything but a true copy of the original handwritten statement. As well, evidence from the form of the statement itself, in that it says it is the statement of S, it is written in the first person and says "signed [S.B.]", could reasonably be relied on to assist in drawing the inference that the statement, as it now exists, is an exact transcription of the statement actually signed by S. in 1984.

[24] Another relevant factor in assessing whether it was negligent to destroy the file, is that in 1984 the police and the Crown attorney were faced with an unwilling youthful witness, who had given a fairly vague statement. The testimony from both S. and Corporal MacPhee confirmed the statement of Mr. Prince in his letter dated July 11, 1984, that S. did not want to testify. Mr. Herschorn, in his reply to Mr. Prince, indicated that given S.'s reluctance to testify, coupled with the vague statement, "the Department cannot conclude that there is basis for a prosecution." Since the statement does not specify what unlawful acts her father is alleged to have done, referring only to "it", the statement is indeed vague. The probability that this matter would proceed to trial which would, in turn, necessitate retention of the file, was remote in 1984. After five years with no further development, the odds did not increase.

[25] The two cases relied on by the respondent can be distinguished. In **D.M.M**., **supra**, as indicated above, Judge Gibson found that there was unacceptable negligence which resulted in the loss of the police file. In that case, charges were laid in 1996 alleging that the accused had committed numerous and various sexual offences between 1978 and 1988. The complainant and the accused and his mother had been interviewed by the RCMP in 1987, but the file with notes and copies of the statements taken were no longer in existence. The policy in 1987 was to retain sexual assault files for eight years. In 1990 the policy was changed so that those files were to be retained for 20 years. The policy was supposed to apply to all existing files. Therefore, the file respecting the **D.M.M.** complaint which had been opened three years earlier, should have still been in existence and should

have been assigned a 2007 destruction date. However, in 1994 the detachment moved to a new location and it was decided, as a matter of administrative convenience, to destroy all pre-1988 files except those “on the C.P.I.C. system”. Judge Gibson decided that the **D.M.M**. file had most likely been destroyed at that time, that is, when it was seven years old. He concluded that it was unacceptable negligence to have destroyed the file contrary to the policy in existence at the time. Another distinguishing factor between that case and the one before this court is that the file contained not only the statement of the complainant, but also a statement of the accused and his mother. As well, there were no transcribed copies of the original documents in existence.

[26] The police, through their policies, do not determine the standard of care applicable to the duty to preserve evidence. However, where a policy appears reasonable according to an appropriate standard at the time it was in force, compliance with that policy strengthens the submission that there was no unacceptable negligence.

[27] The other case relied upon by the respondent is **R. v. Dowd**, **supra**, which was heard and decided by the New Brunswick Court of Appeal after the Supreme Court of Canada decision in **La**, but which does not refer to it. In **Dowd**, a dentist was charged in 1994 with offences involving sexual touching of two patients who were children at the time of the alleged offences in the 1970's. Three families had first contacted the police in 1976 with complaints of sexual touching by Dr. Dowd. At that time the children, the parents and Dr. Dowd were interviewed by a Detective MacLeod who took notes. It was decided not to

proceed and Dr. Dowd was so advised. Sometime later, Detective MacLeod died and his notes "disappeared". The police file was destroyed pursuant to the departmental policy, five years after it was closed. In 1993, at the request of one of the complainants, the matter was reinvestigated. At that time, it was determined not to proceed because it was thought that the police were bound by their original agreement not to pursue the matter. In 1994, another complainant, B.G., first alleged that she had been sexually touched by Dr. Dowd between 1972 and 1976. Three charges were laid, one in relation to the B.G. complaint, and two in relation to G.L., one of the 1976 complainants.

[28] At the trial, before a judge and jury, the application for a stay was made after all the evidence had been heard. It was denied by the trial judge and the accused was convicted on all three counts.

[29] On appeal, the Crown conceded that the inability of the Crown to furnish the statements taken from G.L. and others in 1976, resulted in a breach of the appellant's s. 7 rights to fundamental justice. There was therefore no need to determine whether the evidence was lost due to unacceptable negligence. The issue on appeal became whether a stay was the appropriate remedy. The court concluded that a stay was necessary with respect to the G.L. counts, but did not stay the B.G. charge, since there was no lost evidence in relation to it. The court summarized its finding of irreparable prejudice to the accused in relation to the G.L. charges as follows at p. 369:

> The most telling damage is not simply that a part of the puzzle is missing, it lies in the fact

> that so many parts are missing. G.L.'s statement, given to the investigating officer, fresh at the time of the complaints, is not available for the purpose of cross-examination. Compounding this is the fact that the notes of the officer relating to her complaint as well as his notes of what other witnesses had to say in support, or in contradiction, of what she said, are missing. Further compounding this is the tragedy of the police officer's passing. The importance of the missing evidence and the police officer's death becomes more acute when related to the lengthy passage of time.

[30] In addition to these problems which interfered with the accused's right to make a full answer and defence, the trial judge had found that the contact between the complainants was such that their "... recollections which they now have of the events are bound to have been reinforced to the point where it is difficult today to sort out what is memory based on actual fact and what is recollection based on rumours and other influences." Also important to the ultimate remedy was the trial judge's finding that it was open to infer "an oblique motive" on the part of the Crown in their decision to include one of the "investigated and rejected" charges with the new prosecution.

[31] In my view, the **Dowd** case is readily distinguishable from the present case on several grounds, most importantly, the two findings of the trial judge that there may have been collusion among the complainants and an improper motive on the part of the prosecution. Even on the lost evidence facet of the case, there are critical distinctions: the fact that there was no copy of the 1976 statements, the death of the investigative officer, the concession by the Crown of a **Charter** breach, and the timing of the application for a stay, which allowed the arguments on the extent or degree of prejudice to be made in complete context. Other differences of less significance are that Dr. Dowd did not consult counsel in 1976, and, as a result of being informed in 1976 that the matters would not

proceed, he did not retain his own records of the time which may have been useful in rebutting material particulars of the case against him.

[32] In another case, **R. v. Soucy**, [1999] N.B.J. No. 270 (Q.L.), the New Brunswick Court of Appeal distinguished **Dowd** on the basis that the destruction of the files was not done with the intention to obstruct justice by making evidence unavailable to the defence, none of the witnesses had died, and the defence had been made aware of the contents of the file before its destruction.

[33] To conclude the fifth and sixth aspects of the **La** inquiry, I find that in all the circumstances of this case, it was not unacceptable negligence for the RCMP to have destroyed the file of the 1984 investigation and, if the trial judge found that there was unacceptable negligence, he was in error. At this stage, there has not been shown to be a breach of the duty to disclose in this case.

[34] As there is no indication in this case that the evidence was destroyed deliberately for the purpose of defeating the disclosure obligation, the seventh and eighth parts of the **La** test are inapplicable.

[35] The ninth point from the **La** decision stipulates that even where there has not been unacceptable negligence, there could be a s. 7 breach necessitating a stay as the appropriate remedy, if the loss of evidence is so prejudicial to the right to make a full

answer and defence, that it impairs the right to a fair trial. The tenth point is that the degree of prejudice is best assessed after hearing all the evidence, as in the **Dowd** case.

[36] Although as stated earlier, the respondent may at the trial, after the evidence has been presented, be able to point to some particular prejudice suffered as a result of the lost file, at this point, there is nothing on which the trial judge could have based a finding of impairment of the right to a fair trial. The Crown, on appeal, conceded that the typed 1984 statement is a statement of S. and will be bound by this concession if the respondent chooses to use it for the purposes of cross-examination of the complainant. As well, the various reports of the psychologist and the other contents of the child welfare agency may provide statements made by the complainant close in time to the alleged offences.

[37] There is no suggestion, at this point, that the respondent has relied to his detriment on the Crown's 1984 undertaking not to proceed. If such evidence is presented at trial, for example, evidence that the respondent made an admission of guilt thinking that the Crown would be prevented from proceeding against him, it will be a matter for the trial judge to assess in the context of the whole of the evidence. Is there prejudice? If so, is this one of those clearest of cases where the prejudice cannot be remedied other than to grant a stay, or would exclusion of the evidence of the admission be an appropriate remedy? These are issues for the trial judge after hearing the evidence underlying the charges.

[38] In **R. v. H.A.** , **supra**, the Ontario Court of Appeal, in a case very similar to this one,

except that there was nothing purporting to be a copy of the original statement, found that the trial judge did not err in refusing to stay proceedings. The trial judge had reserved on the application for a stay until having heard all the evidence, and then found that the accused had not met the onus of establishing actual prejudice to his right to make a full answer and defence. On appeal, the court endorsed the trial judge's decision and concluded this issue as follows:

> [para13] Having instructed himself correctly on the law, the trial judge turned his attention to the evidence to determine whether there was a real likelihood that the 1985 statements contained material inconsistencies capable of impacting upon the appellant's right to make full answer and defence. To this end, he tested the complainant's trial testimony against all of the surrounding background facts and circumstances, paying particular attention to the following items of significance:
>
> * any apparent or potential inconsistencies in her testimony;
> * her fragile emotional and psychological state as a teenager;
> * the fact that she had complained prior to the onset of her psychological difficulties and that her present allegations were not the product of recovered memory;
> * her current psychological state;
> * her present ability to recall the contents of the 1985 statements;
> * her inability to recall many of the peripheral details surrounding the various incidents of abuse; and
> * the fact that her evidence went basically unchallenged, apart from one incident which formed the basis of counts 7 and 8 in the indictment.
>
> [para14] In the final analysis, it was the trial judge's considered opinion that, "there is little, if anything, in the complainant's testimony at trial capable of raising a serious suspicion that her earlier statements may have contained material inconsistencies."

[39] The list of considerations relevant to the assessment of whether there has been prejudice to the accused as a result of missing evidence is illustrative of the reason it is

generally preferable to hear the evidence, and to discover the context before ruling on the motion for a stay in a case such as this one.

[40] In this case, the trial judge erred in law in ordering a stay of proceedings in the absence of evidence of prejudice to the respondent's right to make a full answer and defence. At this stage in the proceeding, it cannot be correctly found that this is one of the clearest of cases justifying a stay.

**Conclusion**

[41] The trial judge erred in issuing a stay of proceedings in the absence of a finding of unacceptable negligence on the part of the police, in concluding that there was a breach of the respondent's right to make a full answer and defence, and in ordering a stay of proceedings in the absence of evidence of prejudice to the respondent's right to a fair trial or other evidence that this was one of the clearest of cases justifying a stay.

[42] For these reasons, I would allow the appeal, set aside the stay of proceedings entered by the trial judge, and order a new trial.

Roscoe, J.A.

Concurred in:

Bateman, J.A.

Cromwell, J.A.