SC CR 95 010

CR 02877

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

Respondent

- and -

KEVIN HERON and NOREEN FANTASQUE

Applicants

Applications for judicial stay of proceedings and for Crown disclosure of communications to police.

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE J. Z. VERTES

Heard at Yellowknife, Northwest Territories
on August 30, 1995

Reasons filed: September 5, 1995

Counsel for the Crown: Bernadette Schmaltz

Counsel for the Accused Heron: Hugh R. Latimer

No one appearing for the Accused Fantasque.

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REASONS FOR JUDGMENT

1 The applicants Heron and Fantasque are accused of committing a sexual assault. They bring this pre-trial application seeking orders in the nature of:

(a) a judicial stay of proceedings due to prejudicial pre-charge delay;

(b) a judicial stay of proceedings due to abuse of process, that being an alleged breach of an undertaking by the police investigator to the accused; and,

(c) compelling the Crown to disclose to defence counsel an opinion letter provided to the police.

2 The trial is set to commence before a judge and jury in Fort Simpson on September 18, 1995. This application was heard by me in my capacity as a pre-trial judge. Affidavit evidence was filed and I also received *viva voce* evidence from the investigating police officer. The accused are separately represented and joined in this application but counsel for Fantasque did not appear at the hearing being apparently content to let the matter be argued by Heron's counsel.

3 The accused are jointly charged with the sexual assault of L.M.B. in Fort Liard, Northwest Territories, sometime in November of 1991. The complainant was 14 years old at the time. For purposes of this application, it is not necessary for me to review the alleged facts of the offence, merely the history of the investigation into the offence.

4 The first disclosure of this offence by L.M.B. came in December of 1992. She apparently spoke to a school counsellor (a Mr. Fink) and a social worker (a Ms. Kidd) who then took her to the police. This was in Colwood, British Columbia, where she was attending school at the time. The R.C.M.P. in Colwood took a statement from the complainant and then forwarded the file to the R.C.M.P. in Fort Liard (where the accused persons live).

5 The R.C.M.P. detachment in Fort Liard has assigned to it two officers, a corporal and a constable, and is part of the force's "G" Division headquartered in Yellowknife. The officer in charge of this investigation in Fort Liard was Constable W.J. Dosko. As an example of the workload in the detachment, Cst. Dosko testified that in 1993 there were in excess of 300 open files of which half would be what he referred to as investigation files.

6 In January, 1993, Cst. Dosko obtained warned statements from both accused. In March, 1993, he again spoke to both accused and asked if they would each consent to a polygraph test. Each accused signed a polygraph examination consent in the following form:

> **I, , do hereby voluntarily, without threats, promises of immunity or reward and without duress, coercion or force, agree to take a polygraph (lie detector) examination, to be given to me by a member of the Royal Canadian Mounted Police. I fully realize that I am not obliged to say anything, and that anything I say may be given in evidence.**

7 Cst. Dosko testified that while the decision to seek a polygraph test is in his discretion as the investigating officer, depending of course on the seriousness of the charge and the circumstances of the case, the ultimate decision to proceed with the test must be made by the officer in charge of "G" Division criminal operations branch. He forwarded the request for approval in May, 1993, and on July 2nd, 1993, he received back notification that his request had been denied. Alternative additional investigative measures were recommended and these were pursued. Apparently even though the case rested solely on the evidence of the complainant, and even though the accused were willing to take the test, the superior officers in Yellowknife did not think it was necessary to do tests.

8 In November, 1993, the complainant was re-interviewed by a police officer in British Columbia. In March, 1994, Cst. Dosko re-interviewed the accused Fantasque. There were gaps in the work on this file when nothing was done. Most of the time Cst. Dosko was engaged in keeping up with other work. Some of the time was taken up when he went on annual leave and the file was untouched by anyone else. In September, 1994, Cst. Dosko forwarded his court brief on the case to the federal prosecution office in Yellowknife for review. He received a response in late November and charges were sworn out on December 13, 1994.

Pre-Charge Delay:

9 Defence counsel submitted that the length of time taken up by the police investigation — from December, 1992, to December, 1994 — has prejudiced the accused's ability to make full answer and defence. The alleged prejudice is the apparent inability of the defence to locate the two people who were involved with the complainant's initial disclosure, those being the school counsellor and the social worker, so as to investigate the circumstances leading up to and surrounding the initial disclosure. This is tied into what is said to have been an expectation on the accused's part that they would be given a polygraph test; that no decision as to charging them would be made until after the test; that if they had been charged earlier, or had known at an earlier time that no tests would be done, they would have been able to carry out their investigations at an earlier date instead of now when, so they claim, they cannot locate potential witnesses. The accused's expectations respecting the polygraph test are the subject of the alleged breach of an undertaking by the police thus, according to the accused, being an abuse of process.

10 The prejudice claimed by the defence was explained in several portions of the two affidavits filed by the accused Heron on this application:

> **... During the time between my statement in January, 1993, and the charges almost two years later, I did nothing to investigate the matter as I expected that the polygraph tests would end the situation and I would not be charged. Furthermore, I did not know of the personal activities of the complainant during this period ...**
>
> **... I verily believe a solicitor and investigator back in early 1993 could have carried out a more timely inquiry since only a little more than a year would have passed had I been charged in early 1993; rather than the more than three year period which eventually resulted due to the delay. The fact that we cannot even locate Barbara Kidd and Gerry Fink in 1995 is an example ...**

> **... Assuming I had been charged in early 1993 and given a copy of the complainant's statement, we would have worked from there, interviewing Barbara Kidd and Gerry Fink, as well as the Principal of the school the complainant attended, in order to find out the complainant's circumstances at the time of the complaint, her stability, her troubles, if any, and whether or not the alleged revelation to Fink/Kidd was spontaneous, and things of this nature. Furthermore, as the complainant appeared to have left or fled the Victoria, British Columbia, area in early 1993, what were the circumstances. The inquiry would have been directed towards the reliability of the complainant and the complaint in a timely way and a matter of months only after the complaint itself ...**
>
> **... we would have done in 1993 what we are doing in 1995 to try to contact and interview Gerry Fink, the alleged counsellor, and Barbara Kidd, as well as the school people and others connected. In early 1993, the likelihood is that since this would have been a short time after the complaint, Mr. Fink and Ms. Kidd, and the others presumably concerned, would have been available. We also could have talked to the complainant's school mates in a timely was as to check on her reliability, whether she was in trouble, and her general circumstances at or near time and event of complaint.**

11 Apparently, despite efforts to do so, defence counsel are unable to locate the school counsellor and social worker. This is how the accused Heron described those efforts:

> **I am advised by my solicitor, Hugh R. Latimer, and do verily believe that the Defence has expended many hours in long distance telephone calls to British Columbia, letters, faxes, communications with schools in the Victoria, British Columbia, area, calls and letters to British Columbia Social Services Departments, the RCMP, a private Investigation Bureau, numerous inquiries at B.C. Tel, and to date, we have not even been able to establish that Ms, Kidd and Mr. Fink exist. Nor can we find out to date any information corroborating that the complainant came forward at her school and complained in November or December, 1992.**

There was no substantiation provided for these statements which, of course, were made on the basis of information and belief.

12 Defence counsel acknowledged that the delay complained of does not include the delayed initial disclosure of the alleged offence. There is now a recognition that delayed

disclosure is a common occurrence in these type of cases. The complaint is with the length of time the police took before laying the charges. It is also a complaint over the quality of the investigation. There are no statements from the school counsellor or the social worker and no information as to their whereabouts.

13 I may agree with defence counsel that it would always be advisable to obtain statements, at the earliest opportunity, from everyone involved with a complainant's initial disclosure. But I also recognize that I am in no position to instruct the police on how they should carry out an investigation in any particular case. Crown counsel advised me that the prosecution has no information as to these persons' whereabouts and no efforts have been made to contact them. But the Crown has felt no need to since they are not considered to be material witnesses.

14 The guiding authority on pre-charge delay is the judgment of Stevenson J. in W.K.L. v. The Queen (1991), 64 C.C.C.(3d) 321 (S.C.C.). He wrote (at pages 327 - 328):

> Delay in charging and prosecuting an individual cannot, without more, justify staying the proceedings as an abuse of process at common law. In *Rourke v. The Queen* (1977), 35 C.C.C. (2d) 129 at p. 143, 76 D.L.R. (3d) 193, [1978] 1 S.C.R. 1021, Laskin C.J.C. (with whom the majority agreed on this point) stated that:
>
> > Absent any contention that the delay in apprehending the accused had some ulterior purpose, Courts are in no position to tell the police that they did not proceed expeditiously enough with their investigation, and then impose a sanction of a stay when prosecution is initiated. The time lapse between the commission of an offence and the laying of a charge following apprehension of an accused cannot be monitored by Courts by fitting investigations into a standard mould or moulds. Witnesses and evidence may disappear in the short run as well as in the long, and the accused too may have to be sought for a long or short period of time. Subject to such controls as are prescribed

> by the commission of an offence must be left to take their course and to be dealt with by the Court on the evidence, which Judges are entitled to weigh for cogency as well as credibility. The Court can call for an explanation of any untoward delay in prosecution and may be in a position, accordingly, to assess the weight of some of the evidence.
>
> Does the Charter now insulate accused persons from prosecution solely on the basis of the time that has passed between the commission of the offence and the laying of the charge? In my view, it does not.
>
> Staying proceedings based on the mere passage of time would be the equivalent of imposing a judicially created limitation period for a criminal offence. In Canada, except in rare circumstances, there are no limitation periods in criminal law. The comments of Laskin C.J.C. in *Rourke* are equally applicable under the Charter.
>
> Sections 7 and 11(d) of the Charter protect, among other things, an individual's right to a fair trial. The fairness of a trial is not, however, automatically undermined by even a lengthy pre-charge delay. Indeed, a delay may operate to the advantage of the accused, since Crown witnesses may forget or disappear. The comments of Lamer J., as he then was, in *R. v. Mills, supra,* at p.558, are apposite: "Pre-charge delay is relevant under ss.7 and 11(d) because it is not the *length* of the delay which matters but rather the *effect* of that delay upon the fairness of the trial" (emphasis added). Courts cannot, therefore, assess the fairness of a particular trial without considering the particular circumstances of the case. An accused's rights are not infringed solely because a lengthy delay is apparent on the face of the indictment.

15 More recently, the Supreme Court of Canada affirmed that pre-charge delay, by itself, is not sufficient to justify a stay of proceedings unless the accused establishes actual prejudice by reason of the delay: R. v. Finta, [1994] 1 S.C.R. 701.

16 In my opinion the defence has failed to establish actual prejudice on this application. The arguments of defence counsel are founded on two assumptions: (1) that the school counsellor and the social worker could have been located if efforts were made earlier; and (2) that they have material evidence to give in this case. Both assumptions

are highly speculative. Furthermore, I am not at all satisfied by the evidence as to the efforts actually made by the defence to locate these people.

17 Evidence as to the circumstances of the complainant's initial disclosure may be relevant. In this case the complainant will be available for cross-examination at trial. Her statements to the police (indeed copies of the police officers' notes) have been supplied to defence counsel. The circumstances of the disclosure can be explored through these means. At this point in time it is pure speculation to say that the accused's ability to make full answer and defence has been compromised.

18 All of the case law on pre-charge delay emphasizes the importance of an evidentiary basis for the granting of a stay. There must be evidence of real prejudice, not merely the possibility of prejudice. Hence, I agree with Crown counsel's submission that the effect of prejudice, if any, can only be assessed in the context of the evidence as it unfolds at trial. I think the words of Finlayson J.A. in R. v. François (1994), 15 O.R. (3d) 627 (C.A.), at pages 629 - 630, are apropos of the situation in this case:

> **Where, as here, the respondent contended that the delay so adversely impacted upon the fairness of the trial as to constitute a breach of his s.7 *Charter* rights, it is not apparent to me how this complaint can be evaluated without a trial. In my view, the appropriate course for the trial judge in this case would have been to reserve on the motion for a stay until after the trial, or at least until the Crown had closed its case. The trial judge would then have been in a position to assess the cogency of the witnesses and assess the damage to the defence said to be caused by the delay. He would also have had the opportunity of assessing the explanations for the delay in the light of the conduct of the trial.**

I dismiss the application for a stay on the basis of pre-charge delay. I do so, however, in my capacity as a pre-trial judge. The defence is free to renew its application before the trial judge depending on how the case unfolds at trial.

Breach of Police Undertaking:

20 The accused contend that they were told by Cst. Dosko that they would be given a polygraph test and that the complainant would also be given a test. They say that they were also told that if the test results were favourable then no charges would be laid. Defence counsel submitted that these assurances amount to an undertaking by the police. By not giving the test, it is argued, the police breached this undertaking, to the prejudice of the accused, and this constitutes an abuse of the court's process.

21 Cst. Dosko's evidence was that he told the accused that if they took and passed the test then "this would give credibility to his or her version of events"; the complainant may be spoken to again depending on the results of the tests; and, to proceed with the test he required that each of them sign the consent form (reproduced earlier). Cst. Dosko denied telling the accused that no charges would be laid if they passed the test. He testified that he has no authority to say that the tests will be done, only that the signed consent form is required before consideration can be given to doing the test. He believes he explained to the accused that he had to seek further authorization to administer the test (although there was nothing in writing to this effect recorded in his notes).

22 Crown counsel submitted that there is no evidence that the accused were told that the test would be done or, if done, no charges would be laid if they passed. If the

accused believed they were entitled to a polygraph test then that was a mistaken belief. I agree.

23 In my opinion the evidence fails to establish that any type of undertaking was given by Cst. Dosko. The burden of proof on this application is on the accused. The only evidence on this point is in the accused Heron's affidavit. There is no evidence from the accused Fantasque. I find the suggestion of such an undertaking to be illogical in light of the fact that Cst. Dosko had to seek higher authorization. Furthermore, as pointed out by Crown counsel in her written brief, the consent form signed by each accused stated that such was signed "*voluntarily, without threats, promises of immunity or reward and without duress...*" (emphasis added). No such undertaking can therefore be implied.

24 I have no doubt that a polygraph test may have assisted in evaluating the credibility of the accused's version of events. The police considered the advisability of conducting the tests and decided against it. I cannot say they were right or wrong. There is no evidence of "bad faith" on the part of the police. Furthermore, there is no entitlement to having a test done, even if an accused person insists on one. The test results are not admissible in evidence. Even the fact that an accused volunteered to take a test is not admissible: R. v. Bedgood (1990), 60 C.C.C. (3d) 92 (N.S.C.A.).

25 There are cases where proceedings have been stayed as an abuse of process due to the breach of some undertaking by the prosecution authorities. The most common scenario is where an initial investigation is done, a decision is made to not prosecute, and then the prosecution is re-opened years later: R. v. Vermeylen (1986), 16 C.R.R. 295

(Sask. Q.B.); R. v. Cameron & Sayers (1986), 64 A.R. 161 (Q.B.). Another situation is that referred to by defence counsel in R. v. Bursey (1991), 14 W.C.B. (2d) 136 (N.S.Co.Ct.). In that case proceedings were stayed when charges were laid after an express promise by the police to not prosecute in exchange for testimony in another case.

26 In this case I find there is no evidence establishing either a commitment to administer polygraph tests or an undertaking, express or implied, that charges would not be laid if the accused passed the tests. Even if the accused had that expectation, I conclude that they have not established any prejudice as a result of not being given the tests nor has their ability to make full answer and defence been compromised.

27 In R. v. Antinello (C.A. No. 14597; March 8, 1995), Kerans J.A., speaking for the Alberta Court of Appeal, adopted these words:

> We conclude that in order to establish an abuse of process, as opposed to "mere" violation of a Charter right, an accused must demonstrate conduct on the part of the Crown that is so oppressive, vexatious or unfair as to contravene our fundamental notions of justice and thus to undermine the integrity of the judicial process.
>
> The discretion may be exercised only in "the clearest of cases", which means that the trial judge must be convinced that, if allowed to continue, the proceedings would tarnish the integrity of the judicial process. The societal interest in the prosecution of criminal cases is such as to permit no lesser standard. It is only by having due regard for such a standard that the proper balance can be struck between the society's right to the proper administration of justice and the court's need to preserve and protect the integrity of its process.

28 In my opinion the evidence presented on this application fails to meet this test. Furthermore, the sexual assault charge is of such gravity that the societal interest in bringing these accused to trial outweighs the prejudice, if any, caused by the accused not having their expectations met.

29 For these reasons, this aspect of the application for a stay is also dismissed.

Disclosure of Prosecutor's Opinion Letter:

30 As previously outlined in the summary of facts, Cst. Dosko forwarded a court brief to Crown counsel for review on September 8, 1994. On November 22, 1994, Crown counsel forwarded a memo to Cst. Dosko in response. This memo was referred to in a letter from Mr. Michael Dale, another Crown counsel, to defence counsel on June 19, 1995, which letter provided various items of information as part of the Crown's disclosure obligations:

> **"On November 22nd, 1994, a memo from Crown counsel was forwarded which indicated that there was a reasonable prospect of conviction."**

31 Defence counsel seeks disclosure of the memo from Crown counsel to Cst. Dosko. He submitted that the memo is relevant and may be helpful to the defence in that it could provide information as to the circumstances surrounding the lengthy investigation and the decision to not administer polygraph tests. Crown counsel resists disclosure on the basis of the confidentiality of solicitor-client communications.

32 It is important to keep in mind that the memo sought by the defence is one in response to a review of the court brief prepared by the investigating officer. I am told that the court brief has been disclosed to the defence. Indeed defence counsel advised me that, with the exception of this memo, the Crown has satisfied their disclosure demands. So the defence has already in its possession the same material on which Crown counsel based his opinion. Defence counsel also knows the conclusion of the

memo he seeks, i.e., "that there was a reasonable prospect of conviction". It may be said that anything else in the memo is superfluous and immaterial.

33 There are conflicting opinions as to the existence of a solicitor-client relationship between government prosecutors and police investigators. The current Chief Justice of British Columbia, when he was still a trial judge, rejected the suggestion that such a relationship exists: Re Girouard & The Queen (1982), 68 C.C.C. (2d) 261 (B.C.S.C.). On the other hand, the former Chief Justice of Alberta, when he was still a trial judge, suggested there was such a relationship so as to protect communications in the nature of advice, as distinct from facts, from disclosure. His view was approved by the Alberta Court of Appeal in Re Medicine Hat Greenhouses Ltd. et al (No. 3) (1978), 45 C.C.C. (2d) 27, leave to appeal to S.C.C. refused.

34 Solicitor-client communications are subject to what has been termed as "class" privilege: R. v. Gruenke (1991), 67 C.C.C. (3d) 289 (S.C.C.). By their very nature they are privileged. The exceptions to the privilege are few and were outlined in R. v. Gray et al (1992), 74 C.C.C. (3d) 267 (B.C.S.C.). Solicitor-client communications may lose their protection of confidentiality if (i) they are made in furtherance of a criminal act; or, (ii) if reliance is placed on legal advice to raise a "good faith" defence (usually more applicable in civil proceedings); or, (iii) if, in a criminal case, disclosure of the communication is essential to establish innocence or necessary for the defendant's ability to make full answer and defence.

35 In my opinion the relationship between a prosecutor and a police investigator cannot be categorized for all purposes and at all times as a "solicitor-client" relationship. It may be for one purpose; it may not be for another.. If the communications consist of alleged facts and particulars of a case, then no one I think can say that those would not be subject to disclosure under current law. If, however, the communications consist of legal opinions, advice as to trial tactics, consideration of prosecutorial options, then they would, in the absence of any one of the above-noted exceptions, be subject to the privilege. That is because, in the latter instance, the investigator is seeking the advice and opinion of the prosecutor as "lawyer", as opposed to exchanging information as "co-workers" in the administration of justice. The investigator then becomes a "client" as opposed to being an "associate" of the prosecutor.

36 In this case there is no suggestion of criminal activity or entrapment on the part of the police. There is no evidence that Crown counsel were even consulted prior to September, 1994. There is no evidence of any communications between Crown counsel and the police either at the time of the decision to not administer the polygraph tests or at all during the course of the investigation. There is no evidence that Cst. Dosko did anything other than laying the charge after he received Crown counsel's memo. I fail to see how anything contained in that memo could possibly assist the defence in making full answer and defence. Defence counsel have the court brief so presumably they have as much information as Crown counsel had when he prepared his memo. Absent some foundation to suggest bad faith or oblique motives for the laying of the charge I fail to see how the memo could be relevant to an issue in this case. Crown counsel before me conceded that the sole evidence to support this charge is that of the complainant. I have

already held that the defence has failed to show prejudice flowing from either the pre-charge delay or the failure to give the polygraph tests. The contents of Crown counsel's memo are immaterial to the issues. I do not need to review it to conclude that.

37 In my opinion the circumstances surrounding the memo of November 22, 1994, reveal that it was made in a solicitor-client context. It entailed the seeking by the police, and the giving by Crown counsel, of legal advice and it was intended by the parties to be confidential. I therefore conclude that the memo is privileged.

38 The application for disclosure is dismissed.

9 The order banning publication of the submissions and evidence on this application will continue until the conclusion of the accused's trial.

J. Z. Vertes
J.S.C.

Dated at Yellowknife, Northwest Territories
this 5th day of September, 1995

Counsel for the Crown: Bernadette Schmaltz

Counsel for the Accused Heron: Hugh R. Latimer

No one appearing for the Accused Fantasque

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