SC CR 95 005

CR 02921

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

EDWARD CHARLES WATSON

Application by the accused for a judicial stay of proceedings on the basis of an infringement of his right to trial within a reasonable time.

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

Heard at Yellowknife, Northwest Territories
on July 10, 1995

Reasons filed: July 12, 1995

Counsel for the Crown: A. Regel

Counsel for the Accused: Z. Wilson

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REASONS FOR JUDGMENT

The accused applies for a judicial stay of proceedings, pursuant to s.24(1) of the *Canadian Charter of Rights and Freedoms*, on the basis that his right under s.11(b) of the Charter to be tried within a reasonable time has been infringed.

2 The accused is charged with four counts of fraud and theft. His jury trial is scheduled to commence on July 17, 1995.

3 Section 11(b) of the Charter states that "any person charged with an offence has the right...to be tried within a reasonable time." It has been said in numerous cases that the primary purpose of s.11(b) is to protect the individual rights of the accused by seeking to minimize his or her exposure to criminal proceedings. But there is also a secondary societal interest in the pursuit of effective law enforcement through timely proceedings. What is "reasonable", however, must be determined in light of the particular facts of each case.

4 In this case the accused is charged with offences allegedly committed in March and April of 1991. The Information charging him was sworn on April 14, 1992. A summons requiring his attendance in court was not served on him, however, until October 6, 1993. His first appearance in court was set for December 14, 1993. Thus we have an initial period of 20 months from the date of charge to first appearance. It will be over 39 months, since the charge, when his trial commences.

5 From December 14, 1993, until May 25, 1994, there was one adjournment of the preliminary inquiry at the accused's request and one adjournment at the prosecution's request. That request, on May 25th, was due to the absence of a Crown witness who could not be located. That witness was the accused's sister. A new date of September 7, 1994, was set for the preliminary inquiry. On August 25, 1994, a stay of proceedings was entered by the Crown. The proceedings were recommenced on November 10, 1994; a new summons was served on December 1, 1994; a new appearance was made on January 31, 1995; and the preliminary inquiry was held on March 30 and 31, 1995. The total time elapsed from the date of the Crown's adjournment request to the committal was 14 months.

6 In R. v. Morin (1992), 71 C.C.C. (3d) 1, the Supreme Court of Canada set out four factors to be considered in analyzing whether s.11(b) of the Charter has been violated:

(1) the length of the delay;

(2) the reasons for the delay, including

(a) inherent time requirements of the case,

(b) actions of the accused,

(c) actions of the Crown,

(d) limits on institutional resources, and

(e) other reasons for the delay;

(3) waiver of time periods; and,

(4) prejudice to the accused.

7 The accused has the ultimate or legal burden of proof that there has been an infringement of his right. But, as noted in R. v. Smith (1989), 52 C.C.C. (3d) 97 (S.C.C.), the Crown may have an evidentiary burden to put forth an explanation for any delays that appear to be unreasonable. I must examine all of the circumstances, in context, and then determine if the period in question is unreasonable having regard to the interests s.11(b) seeks to protect, the explanation for the delay, and the prejudice to the accused.

THE LENGTH OF THE DELAY

8 In Morin, Sopinka J., writing on behalf of the majority, held (at page 13) that the period to be scrutinized is the time elapsed from the date of the charge to the trial. This follows from the majority ruling in R. v. Kalanj & Pion (1989), 48 C.C.C. (3d) 459 (S.C.C.), where it was held that "charged", for purposes of s.11(b) of the Charter, refers to the point in time when an information has been sworn. That constitutes the initiating step in any court proceeding. There is no support to the suggestion, as postulated in some earlier cases, that an individual is not "charged" until served with a summons or other process to compel his appearance in court. So, the appropriate time period in this case is one of 39 months: from the date of charge (April 14, 1992) to the date of trial

(July 17, 1995). This length of time, in my opinion, is *prima facie* unreasonable and calls for an explanation.

THE REASONS FOR THE DELAY

9 Crown counsel contends that this is a relatively complicated case. The case law recognizes that all offences have certain inherent time requirements which inevitably lead to delay. The more complex a case the longer it will take to prepare for trial.

10 In this case no details were provided to me other than the bare allegations of fraud and theft arising from transactions involving a private company, owned by the accused, and numerous trade creditors of that company. I can take notice that most fraud cases are somewhat complicated depending as they do on extensive analysis of financial records and corporate documents. But this matter was under investigation for a whole year prior to the laying of the charge. Corporal R. A. Douthwright, a 24-year veteran of the R.C.M.P. and at the time an investigator with the commercial crime section, testified at the preliminary inquiry that his investigation commenced in April of 1991. That year-long investigation period is not included within the 39 month period under review. There was no evidence presented that extensive investigation was still required after the charges were laid. Accordingly I am not persuaded that the lengthy period since laying the charge can be put down to the inherent requirements of the case, especially when one sees that the period from committal at the preliminary to trial is less than 4 months.

11 The period of 39 months is highly unusual even for this type of case. I recently presided over a 16-day jury trial involving a complex fraud in which (while the initial investigation took some 6 months) the total time elapsed from charge to trial was only 16 months (the case was R. v. Rogers, N.W.T.S.C. No CR 02665). I do not set up that case as a standard since the question of what constitutes a reasonable time depends upon the totality of circumstances in each case. There is no fixed time approach for any particular case. I raise it merely to show that a delay of 39 months is not necessarily inherent to fraud cases.

12 So what is the explanation provided in this case? Essentially the Crown's explanation comes down to three points:

(i) resource limitations within the police;

(ii) accused being out of the jurisdiction; and,

(iii) inability to locate the witness (being the accused's sister) so as to compel her to testify at the preliminary inquiry.

13 At the preliminary inquiry, Corporal Douthwright testified that from early 1992 to late 1993 he was seconded to assist with police work related to the Giant Mine labour dispute in Yellowknife. In September of 1992, a bomb blast killed nine miners working at the mine. Numerous police investigators from across Canada were assigned to the resolution of that case. He testified:

> Q When did you cease making efforts to locate Mr. Watson?
>
> A I never did cease, it's just that it became apparent through other work requirements that

> it was not convenient at the time to continue with the investigation.
>
> Q It was not convenient, when did it become not convenient to continue with the investigation?
>
> A When I was seconded to other duties.
>
> Q Okay, and when was that sir?
>
> A It was in the latter stages of 1992 through until 199 -- late '91 to '93.
>
> Q I'm sorry, late 1991 or late 1992?
>
> A Early portion of 1992 through until the latter stages of 1993 to be more specific.
>
> Q And was the file -- was this investigation, was it transferred to anyone else?
>
> A No, it was unfortunate I wasn't able to do that.
>
> Q You weren't able to do that? Is it normal policy for -- in the R.C.M.P. for a significant commercial crime matter to be not transferred to another officer if the investigating officer is being transferred to other duties?
>
> A It would be, but in this particular case I was still within the functions seconded to other duties and it left no one to deal with that issue. It was an issue that I chose to keep, resolve before my departure from Yellowknife to Fort Smith.

14 There was no evidence as to when Corporal Douthwright was transferred to Fort Smith but he did testify that by mid-1994 the file in this case was being supervised by Corporal Zeniuk of the commercial crime section. Corporal Douthwright acknowledged that there was significant delay in getting the charge before the courts.

15 Defence counsel argues that the only explanation for the 20-month delay from the charge to the first court appearance was the deliberate decision of Corporal Douthwright to hold on to the file. There is, he argues, no evidence that there was no one else to deal with this matter even if Corporal Douthwright was seconded to other duties.

16 In an attempt to flesh out the evidence on this point, I allowed Crown counsel to call Constable C. Parsons, a current member of the commercial crime section, to give *viva voce* testimony. Constable Parsons, who I gather now has some responsibilities on this file, was not in the section during the 20 months it took for a first court appearance. He testified that as a general policy commercial crime files, since they are usually complicated, are handled by the same investigator and it would not be common for a file to be handed over to someone else even if the investigator was seconded to other tasks. This contradicts to some extent Corporal Douthwright's evidence (quoted above) that it would be "normal policy" to transfer the file. At least that is the only logical interpretation of the last exchange quoted above. In any event, Constable Parsons testified that to his knowledge all of the members of the Yellowknife commercial crime section were assigned to work on the labour dispute/murder investigation task force. Crown counsel submits that the limited personnel resources must be taken into account as a reasonable explanation for the fact that nothing seems to have been done during those 20 months.

17 The reality of institutional limitations has been recognized by the courts as a factor to take into account in assessing the explanation offered for any delay.

In R. v. Atkinson (1992), 68 C.C.C. (3d) 109 (Ont. C.A.), aff'd by S.C.C. at 76 C.C.C. (3d) 288, a complex fraud case that involved a period of 23 months was stayed and then the stay was over-turned on appeal. The reasons for the delay turned in part on the time it took the lead investigator to compile the extensive disclosure materials. Osborne J.A. observed (at page 127):

> Disclosure could have been attended to earlier had Detective Hayes had more assistance in the investigation. Some deference should be given to decisions made concerning the commitment of investigative resources to a particular matter, just as deference must be given to political decisions concerning the provisions of court-house facilities and Crown Attorneys: see *Askov, supra,* at p. 478.

There are, however, limits to how much deference will be shown to operational or policy decisions. The obligation to bring the accused to trial rests on the Crown and at some point the Crown must be held accountable for institutional limitations that result in unreasonable delays. This point was made by Sopinka J. in Morin (at page 19):

> How are we to reconcile the demand that trials are to be held within a reasonable time in the imperfect world of scarce resources? While account must be taken of the fact that the state does not have unlimited funds and other government programs compete for the available resources, this consideration cannot be used to render s.11(b) meaningless. The court cannot simply accede to the government's allocation of resources and tailor the period of permissible delay accordingly. The weight to be given to resource limitations must be assessed in light of the fact that the government has a constitutional obligation to commit sufficient resources to prevent unreasonable delay which distinguishes this obligation from many others that compete for funds with the administration of justice. There is a point in time at which the court will no longer tolerate delay based on the plea of inadequate resources.

20 In the above-noted Smith case, the Supreme Court of Canada examined a case of delay resulting primarily from a decision by the Crown to have the main investigating officer present to assist at the preliminary inquiry.. The officer, however, was not available for a lengthy period because he had been temporarily reassigned for academic studies. The court held, in a unanimous judgment, that this limitation should have been secondary to the expeditious conduct of the preliminary inquiry. Sopinka J. wrote (at page 108):

> The Crown understandably desired the attendance and assistance of the investigating officer. However, such a desire on the part of the Crown must not be permitted to override an individual's s.11(b) Charter rights.

21 Granted an officer's transfer for academic studies is not as important or urgent as assignment to assist in a multiple murder investigation. Greater flexibility and understanding must be shown in this case. But the point is the same: prosecutions are not put on hold because of operational limitations.

22 Even if I accept that there was no one to whom the file could have been transferred while Corporal Douthwright was assigned to other duties, and while I acknowledge the importance of solving what was a horrific murder, surely that cannot justify simply putting other criminal matters on hold indefinitely. The constitution does not mandate trials within a reasonable time only for important cases or for cases that are not superceded by higher priority ones. It is a constitutional requirement for all cases. And while some account has to be taken of the personnel strains on the police during that time period, some steps should have been taken for ongoing matters, especially one such as this where the charges had already been sworn out.

23 I am also not convinced by the evidence, however, that this is the total reason for the delay. What had to be done after April 14, 1992? A summons had to be served so as to get the accused into court. That summons was not served until October of 1993 and then it was served by a member of the R.C.M.P. detachment in Kamloops, British Columbia. Corporal Douthwright testified that he had spoken to the accused in Kamloops in March of 1992. Why did it take 18 months to convey instructions to serve the summons? There is no explanation. Surely even if the Yellowknife members could not contact the accused, the Kamloops officers should have been able to locate him.

24 Crown counsel also submits that matters were delayed because the accused was out of the jurisdiction. He left in March of 1991. But Corporal Douthwright, while he said he had trouble locating the accused in the early part of the investigation, acknowledged that he was told in April, 1991, by someone representing the accused as to where he could be located and, as noted before, he talked with the accused in Kamloops in March, 1992.

25 Finally, Crown counsel submits that delays were encountered due to the inability of the police to serve a witness, the accused's sister, and admittedly an important witness, with a subpoena to attend the preliminary inquiry. Constable Parsons filed an affidavit on this application in which he states:

> 4. Upon assuming my duties with the Commercial Crime Section, I was assigned the within file involving Edward Charles Watson.

5. Although I was not the initial investigator I have reviewed the entire police file, and have had numerous discussions with Cst. Kevin H. deBruyckere of the Kamloops Commercial Crime Section, and Cpl P. Robinson also of that detachment.

6. I am advised by Cpl Robinson and verily believe that he was responsible for attempting to serve a Subpoena on Marlene Bennett requiring her to attend court in Yellowknife for the preliminary inquiry on September 7, 1994. His information was that Marlene Bennet resided at 2485 Park Crest Avenue in Kamloops, British Columbia.

7. I am advised by Cpl. Robinson and do verily believe that based on his numerous inquiries he was unable to locale Marlene Bennett, and further received information that she was no longer in the area. Attached hereto and marked Exhibit "A" is a copy of a memo from Cpl. Robinson to the Department of Justice dated July 14th, 1994 explaining this.

8. I am informed by Cst. deBruyckere and do verily believe that he was responsible for serving Marlene Bennett with a copy of the Subpoena requiring her to attend a Preliminary Inquiry scheduled for March 30th, 1995.

9. He further advises me and I do verily believe that he knows Mr. Edward Charles Watson and spoke with him in an effort to locate his sister, Ms. Bennett. Mr. Watson who was living at 880 Rue Chez Nous, in Kamloops, B.C., at the time, stated that Marlene Bennet, was living in another part of town with a male companion and that they did not see each other very often.

10. She was ultimately served at her place of work.

26 Crown counsel argues that the witness was evading service with the assistance of the accused. Hence the accused should not benefit from his attempt to obstruct justice.

27 Defence counsel, however, points out that, at the preliminary inquiry, Crown counsel sought to have the witness, Marlene Bennett, enter into a recognizance with a

condition that she notify the police of any change of address. The preliminary inquiry judge refused to do so. There was certainly no evidence presented then that the witness was evading service.

28 The inability of the Kamloops officers to locate the witness prior to September 7, 1994, led to the decision to enter a stay of proceedings. There is no evidence set out in paragraphs 6 and 7 of Constable Parsons' affidavit (reproduced above) to suggest any interference by the accused with attempts to serve her. Furthermore, only generalities — and in most instances generalities based solely on hearsay — are provided in the affidavit. There are no details given as to the attempts made to locate her.

29 With respect to the statements in paragraphs 8 and 9 of the affidavit, Crown counsel says that this is evidence that the accused deliberately attempted to mislead the police because, according to Ms. Bennett, she was living at the same address as the accused at that time. Even if this were so, there was no adverse impact since the police did serve the witness with a subpoena and she did attend the preliminary inquiry on March 30, 1995.

30 In any event, I am far from satisfied by this evidence that the police did not know where to locate the witness. Corporal Douthwright testified that he spoke to Ms. Bennett in March of 1992. He knew then that she lived in Kamloops. She was still in Kamloops when she was eventually located and served.

31 The questions surrounding the inability to serve this witness relate to the 14-month time span from May 25, 1994, when the Crown asked to adjourn the preliminary inquiry, to today. In that time the Crown filed a stay of proceedings and then recommenced the proceedings. The stay lasted for less than 3 months. The explanation for the stay was provided by Corporal Douthwright:

> Q And I take it -- is it your understanding that based upon the fact that you couldn't -- you couldn't get a hold of Ms. Bennett it was decided that a stay of proceedings would be entered against Mr. Watson?
>
> A That's correct.
>
> Q And that's the only reason that it was --
>
> A The most significant contributing factor I would say, yes.

32 The stay was entered approximately 2 weeks before the scheduled start of the preliminary inquiry on September 7, 1994. That date was not set peremptory to the Crown. The Crown could have applied for a further adjournment but it chose to enter a stay instead. It had a right to do so.

33 Counsel were unable to provide me with authorities on whether a Crown stay should be computed within the overall time frame of any delay. There is, for example, authority to the effect that the period of time in which it takes the Crown to appeal a judicial stay of proceedings is not to be computed as part of the time for consideration of a s.11(b) breach: R. v. Potvin (1993), 83 C.C.C. (3d) 97 (S.C.C.).

There is, however, recent authority on this point from this jurisdiction. In R. v. Qavavau (N.W.T.S.C. No. CR 02558; September 13, 1994), Power J. granted a judicial stay on a charge of sexual assault. The Crown appealed his decision but then abandoned the appeal on May 29, 1995. The case involved a two-year delay from charge to committal for trial. The total time from charge to trial was 2½ years. Power J. held the delay in the Territorial Court up to committal to be unreasonable. Of that 2 year delay, one year less one day was the result of a Crown stay of proceedings. The stay was entered because, at the originally scheduled preliminary inquiry, the complainant was not able to testify. Power J. held that the Crown had a right to enter the stay but whether a period of one year less one day was necessary was not explained. In the absence of such an explanation, and considering that the case was not complex, a judicial stay was granted.

35 I am not comparing the present case to Qavavau, but I raise it to show that a stay of proceedings can be computed as part of any overall delays that may have to be explained by the Crown. In this case the delay occasioned by the stay was not long but it must be attributed to the Crown. There is no evidence to support a suggestion that the reasons for the stay can be attributed to the accused. Indeed, it can be argued, as defence counsel did before me, that the stay was necessitated because of the dilatory conduct of the file. Corporal Douthwright testified that he did not even know if the accused's sister had been served with a subpoena or what attempts were made to serve her prior to the preliminary inquiries scheduled prior to September 7, 1994.

36 Of the overall time period of 39 months since the charge was laid, I assess only 2½ months delay to the accused. That would be the period of March 8, 1994, when the accused sought the first adjournment of the preliminary inquiry, to May 25, 1994, when the Crown sought its adjournment. Another 3 months from December 14, 1993 (the first appearance) to March 8, 1994 (the first adjournment) can be called operational or inherent delays. The same can be said for the 5½ months from the new appearance on January 31, 1995 to trial in this court. I do not consider the same applies for the time from the recommencement of the proceedings to the next appearance since it took longer by the very nature of a recommencement to serve the accused with a summons and to have another appearance to set a date for the preliminary. That delay is attributable to the Crown's decision to enter a stay of proceedings. So, of the total time, 2½ months can be attributed to the accused, 8½ months can be attributed to operational delays, while 28 months can be attributed to the Crown.

37 There is, as stated before, a wide ambit given to both the police and Crown in their conduct of investigations and court proceedings. But, in my opinion, a delay of 28 months is unreasonable and cannot be explained away by operational limitations or other factors. It has not been sufficiently explained in this case.

WAIVER OF TIME PERIODS

38 The only period of time that can be said to have been waived by the accused is the 2½ month period of delay I have attributed to his request for an adjournment. There has been no clear and unequivocal waiver by the accused of any of his rights. Indeed, at the court appearance on May 25, 1994, his counsel put on the record that his taking no

position on the Crown's request for an adjournment should not be viewed as a waiver of his s.11(b) right.

PREJUDICE TO THE ACCUSED

39 The accused led no evidence of actual prejudice. But, as noted in Morin (at page 28): "The court must still consider what, if any, prejudice is to be inferred from the delay."

40 The long period of stress and stigmatization presumed to be prejudicial to an accused is coupled, in this case, with the Crown's stay and then the recommencement of proceedings. While one whose charges are stayed is not free unconditionally, one is closer to a state of being "not charged" than being "charged". And while the Crown enjoys the discretion to use the stay, it must be acknowledged that having one's hopes raised and then dashed by recommencement can cause additional anxiety.

41 This additional factor, albeit more psychological than physical, coupled with the inordinately lengthy delay in these proceedings, satisfies me that there has been prejudice to the accused in this case.

CONCLUSION

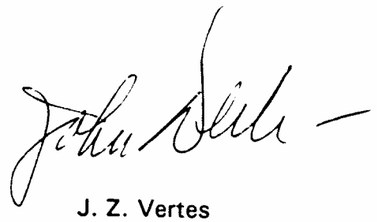
42 Crown counsel submits that even if the delay has been lengthy the remedy should be denied. There is a relatively large amount of money at stake (approximately $171,000) and a large number of creditors have allegedly been affected. On the other

hand this is not a crime of personal violence and the alleged victims presumably have recourse through the civil courts.

43 I recognize that a judicial stay is an extreme step that should be taken only in the clearest of cases. In my opinion, taking all of the factors into account, a total time period of 39 months from charge to trial is unreasonable. Having regard especially to the 20-month delay between the charge and the first appearance, a delay which, even if I accept the explanation offered, is unjustifiable, I conclude that the accused's right to trial within a reasonable time has been infringed.

44 Accordingly, there will be a judicial stay of proceedings entered with respect to the outstanding charges against the accused.

45 I thank counsel for their submissions.



J. Z. Vertes
J.S.C.

Dated at Yellowknife, Northwest Territories
this 12th day of July, 1995

Counsel for the Crown: A. Regel

Counsel for the Accused: Z. Wilson

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