CR 03094

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

B E T W E E N:

HER MAJESTY THE QUEEN

- and -

JAMES KEEVIK

REASONS FOR JUDGMENT

1 The accused is charged with committing the crime of sexual assault at a residence in Tuktoyaktuk on February 6, 1994. He was arrested and charged the following day, February 7, 1994. On that date the police also charged one Robert Andrew Gruben with committing a sexual assault upon the same complainant on the same day, i.e. February 6, 1994, at the same residence. Mr. Gruben's jury trial took place on September 26, 1994 in Tuktoyaktuk. Mr. Keevik's jury trial is scheduled to take place next Wednesday, May 1, 1996 in Tuktoyaktuk.

2 Mr. Keevik says that his constitutional right to a trial within a reasonable time has been infringed, and he asks the Court for a judicial stay of proceedings pursuant to s.24(1) of the *Canadian Charter of Rights and Freedoms*.

3 The following chronology of events gives the context of the accused's application:

Feb. 7, 1994	Information sworn against accused.
Mar. 23, 1994	First court appearance. Crown elects to proceed by Indictment. Accused elects trial by judge and jury. Preliminary inquiry is set for April 27, 1994.
Apr. 27, 1994	Crown seeks adjournment due to absence of key Crown witness (Eileen Jacobson). Defence does not object to an adjournment to a June date. The preliminary is adjourned to July 20, 1994, peremptory on the Crown. Crown agrees to July 20 date being peremptory on Crown.
July 20, 1994	Crown prosecutor appears and states "Your Honour, on close review of the file, the Crown does not believe in this case there's a reasonable prospect of conviction on the evidence currently available to the Crown. I direct a stay of proceedings at this point." Proceedings stayed pursuant to s.579(1) C.C.
May 1, 1995	Crown notifies Clerk of recommencement of proceedings pursuant to s.579(2) C.C.
June 27, 1995	New information sworn. Accused to appear in Court on July 12, 1995.
July 12, 1995	Crown elects to proceed by Indictment. Accused elects trial by judge and jury. Preliminary inquiry set for August 23, 1995.
Aug. 23, 1995	Crown witnesses present. Substitute defence counsel, for personal reasons, seeks adjournment to October 4. Crown witnesses not available on October date, so Court adjourns preliminary to November 22, 1995. Defence waives delay between August 23 and October 4.
Nov. 22, 1995	Crown witness Jacobson not present, as stranded at camp outside of Tuktoyaktuk on account of weather. Preliminary adjourned to January 17, 1996.
Jan. 17, 1996	Preliminary held, resulting in committal for trial.
May 1, 1996	Scheduled trial date.

4 There is thus approximately 27 months between the date the accused was charged to the date of his trial.

5 The accused, through counsel, acknowledges that on April 27, 1994 he in effect waived delay for 1½ months to a date in June and, again, on August 23, 1995 he waived delay to October 4, another period of 1½ months. It is the remaining 24 months delay of which the accused complains on this application. He says this delay is unreasonable, and infringes his s.11(b) *Charter* right "to be tried within a reasonable time".

6 The interests which s.11(b) is designed to protect, and the approach to be followed in determining whether there has been an infringement of s.11(b) in a particular case, was discussed by the Supreme Court of Canada in *R.* v. *Morin* (1992) 71 C.C.C. (3d) 1, at pp. 12-14:

> *The purpose of s.11(b)*
>
> The primary purpose of s.11(b) is the protection of the individual rights of accused. A secondary interest of society as a whole has, however, been recognized by this court. I will address each of these interests and their interaction.
>
> The individual rights which the section seeks to protect are: (1) the right to security of the person; (2) the right to liberty, and (3) the right to a fair trial.
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> The right to security of the person is protected in s.11(b) by seeking to minimize the anxiety, concern and stigma of exposure to criminal proceedings. The right to liberty is protected by seeking to minimize exposure to the restrictions on liberty which result from pre-trial incarceration and restrictive bail conditions. The right to a fair trial is protected by attempting to ensure that proceedings take place while evidence is available and fresh.
>
> The secondary societal interest is most obvious when it parallels that of the accused. Society as a whole has an interest in seeing that the least fortunate of its citizens who are accused of crimes are treated humanely and fairly. In this respect trials held promptly enjoy the confidence of the public. As observed by Martin J.A. in *R.* v. *Beason* (1983), 7 C.C.C. (3d) 20, 1 D.L.R. (4th) 218, 36 C.R. (3d) 73 (Ont. C.A.): "Trials held within a reasonable time have an intrinsic value. The constitutional guarantee enures to the benefit of society as a whole and, indeed, to the ultimate benefit of the

accused ..." (p.41). In some cases, however, the accused has no interest in an early trial and society's interest will not parallel that of the accused.

There is, as well, a societal interest that is by its very nature adverse to the interests of the accused. In *Conway*, a majority of this court recognized that the interests of the accused must be balanced by the interests of society in law enforcement. This theme was picked up in *Askov* in the reasons of Cory J. who referred to "a collective interest in ensuring that those who transgress the law are brought to trial and dealt with according to the law" (p. 474). As the seriousness of the offence increases so does the societal demand that the accused be brought to trial. The role of this interest is most evident and its influence most apparent when it is sought to absolve persons accused of serious crimes simply to clean up the docket.

The approach to unreasonable delay - the factors

The general approach to a determination as to whether the right has been denied is not by the application of a mathematical or administrative formula but rather by a judicial determination balancing the interests which the section is designed to protect against factors which either inevitably lead to delay or are otherwise the cause of delay. As I noted in *Smith, supra*, "[i]t is axiomatic that some delay is inevitable. The question is, at what point does the delay become unreasonable?" (p.105). While the court has at times indicated otherwise, it is now accepted that the factors to be considered in analyzing how long is too long may be listed as follows:

1. the length of the delay;

2. waiver of time periods;

3. 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 delay, and

4. prejudice to the accused.

These factors are substantially the same as those discussed by this court in *Smith, supra*, at pp.105-6, and in *Askov, supra*, at pp.483-4.

The judicial process referred to as "balancing" requires an examination of the length of the delay and its evaluation in light of the other factors. A judicial determination is then made as to

> whether the period of delay is unreasonable. In coming to this conclusion, account must be taken of the interests which s.11(b) is designed to protect. Leaving aside the question of delay on appeal, the period to be scrutinized is the time elapsed from the date of the charge to the end of the trial: see *R.* v. *Kalanj* (1989), 48 C.C.C. (3d) 459, [1989] 1 S.C.R. 1594, 70 C.R. (3d) 260. The length of this period may be shortened by subtracting periods of delay that have been waived. It must then be determined whether this period 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 role of the burden of proof in this balancing process was set out in the unanimous judgment of this court in *Smith, supra*, as follows (at pp.106-7):
>
> > I accept that the accused has the ultimate or legal burden of proof throughout. A case will only be decided by reference to the burden of proof if the court cannot come to a determinate conclusion on the facts presented to it. Although the accused may have the ultimate or legal burden, a secondary or evidentiary burden of putting forth evidence or argument may shift depending on the circumstances of each case. For example, a long period of delay occasioned by a request of the Crown for an adjournment would ordinarily call for an explanation from the Crown as to the necessity for the adjournment. In the absence of such an explanation, the court would be entitled to infer that the delay is unjustified. It would be appropriate to speak of the Crown having a secondary or evidentiary burden under these circumstances. In all cases, the court should be mindful that it is seldom necessary or desirable to decide this question on the basis of burden of proof and that it is preferable to evaluate the reasonableness of the over-all lapse of time, having regard to the factors referred to above.
> >
> > Sopinka J, at pp. 12-14

7 With these guidelines in mind, I find, firstly, that the 24 month delay(not waived by accused) is lengthy and *prima facie* unreasonable. Crown counsel appearing on this application concedes that this delay is unusual but submits, however, that it is not unreasonable.

8 I agree with the submission of Crown counsel that the delay between February 7, 1994 and July 20, 1994 is not unusual in this jurisdiction, nor by itself unreasonable in the circumstances. I do note, however, that the April 27, 1994 - July 20, 1994 delay was apparently, on the record, precipitated by the failure of the Crown to

subpoena an essential Crown witness. More importantly, however, this initial delay of 5½ months ought not be characterized as reasonable or unreasonable in isolation but rather together with the other periods of delay.

9 Again, there is some merit in the Crown's submission with respect to the latter period of delay, i.e. from May 1, 1995 (the recommencement of the proceedings) to date of trial on May 1, 1996. That period is only 12 months, and includes adjournments made at the request of each of Crown and defence | not, in itself, a lengthy delay.

10 Of greater concern is the "middle" period, caused by the Crown's action in staying and then recommencing these criminal proceedings.

11 The explanation for this period of delay offered by Crown counsel appearing on this application (albeit not via affidavit or *viva voce* evidence) is as follows:

> (i) Subsequent to April 27, 1994, the Crown received a copy of a statement given by one Peter Louis, Jr. to the police on April 22, 1994. Mr. Louis was apparently in attendance at the house party that gave rise to the sexual assault charges against Mr. Gruben and Mr. Keevik. Upon a review of this statement, the Crown considered it did not have as strong a case against the accused as previously thought. Thus the decision to direct a stay of proceedings, as announced to the Court on July 20,

1994.

(ii) An assessment by the Crown of the testimony/credibility of Peter Louis, Jr. as a defence witness at the Gruben trial in September 1994 caused the Crown to now retreat from its earlier concern about the weakening of the Crown case by potential witness Peter Louis, Jr.

(iii) On a reassessment of the matter, it was decided to recommence proceedings against the accused.

With respect, I do not view this as a satisfactory or adequate explanation in justification of a further delay of 9½ months (i.e. in addition to the first and third periods of delay mentioned above). I should not be taken as being critical of the Crown's decision on July 20, 1994 to, in light of the Crown's then most recent information, direct a stay of proceedings on the basis of the test enunciated by then Crown counsel | indeed that decision of the Crown I find commendable. However, on the information provided with respect to the ensuing months, it appears the Crown thereafter simply sat back and awaited developments. There is no evidence that the Crown sought to interview the potential witness Mr. Louis. From the information provided, it appears it was a mere happenstance that Crown counsel had an opportunity to observe Mr. Louis testify in the witness box (he having been called as a defence witness on the Gruben trial) in September 1994. But what of the seven months following this observation in September 1994? There is no evidence, or information, concerning this further delay before recom-mencing proceedings on May 1, 1995.

12 While it is true that Parliament has afforded the Crown, in s.579(2) C.C., the right to recommence criminal proceedings against an accused person within one year after the entry of a stay of proceedings, the intervening time is nonetheless "delay" prejudicing an accused's right to a speedy trial. The s.11(b) clock is still running during the period of the stay.

13 There is nothing complex about this case, or this type of case, which results in any inherent time requirements or inevitable delay (*vide*, the timeliness of the *Gruben* trial).

14 As to the conduct of the accused, it cannot be said that the lengthy delay in this case can be attributed to his action or inaction, or that of his counsel, beyond the three months already mentioned.

15 Although a portion of the first period of delay and the third period of delay can be fairly attributed to systemic or institutional limitations, that cannot be said of the middle period which is solely a result of the action of the Crown.

16 As to the fourth factor listed in *Morin*, i.e. prejudice to the accused, the Court there held that prejudice to the accused can be inferred from lengthy delay. It is the duty of the Crown to bring an accused to trial. It is not necessary for an accused, at each stage within the proceedings, to actively insist on his right to a speedy trial. A *fortiori*, this accused James Keevik could hardly be required to urge the Crown to move quickly against him once the Crown directed a stay of proceedings in July of 1994.

17 Taking into consideration all of these factors, I am of the view that the delay in bringing Mr. Keevik to trial is too long. I find that this accused has shown, on a balance of probabilities, that he is not being tried "within a reasonable time", in all of the circumstances. His constitutional rights under s.11(b) of the Charter have been breached. In the circumstances, I grant a judicial stay of proceedings, as requested.

18 On this application the accused sought a judicial stay of proceedings on an additional and separate ground, i.e. abuse of process. On this ground, it was submitted that the Crown's action in directing a stay of proceedings and later recommencing those proceedings, in circumstances of a court-imposed peremptory date, amounted to a circumvention of a court ruling, an abuse of the Crown's s.579 C.C. prerogative and an abuse of the Court's process. In view of my decision on the "unreasonable delay" ground, it is not necessary for me to adjudicate on this additional ground and I do not do so.

J.E. Richard
J.S.C.

Yellowknife, Northwest Territories
April 24, 1996

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