CR 03414

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

Respondent

- and -

THOMASIE HAINNU

Applicant

MEMORANDUM OF JUDGMENT

[1] This is an application by the accused for an order staying the first degree murder charge on which he is scheduled to be tried on December 9, 1997 and providing that he be tried on a charge of second degree murder only.

[2] The accused bases his application on a statement made by Crown counsel at a pre-trial conference held on October 9, 1997. It is agreed that the statement was "I don't think this is first degree murder". The accused alleges that the Crown's decision to prosecute on the first degree murder charge is arbitrary and capricious and an abuse of process because the statement made by Crown counsel conflicts with Crown policy on deciding whether to prosecute. It is agreed that the policy is as follows: "In the assessment of the evidence, a bare prima facie case is not enough; the evidence must demonstrate that there is a reasonable prospect of conviction."

[3] The accused was committed to stand trial on the charge of first degree murder after a preliminary hearing. There has been no attack on the committal.

[4] The court file contains a pre-trial conference memorandum for a conference held on July 11, 1997. It indicates that there had been some discussion about resolution of the case

and that it was anticipated that a further conference might be beneficial. A second conference was accordingly held on October 9 with the same pre-trial conference Judge. The affidavit of Crown counsel indicates that her understanding of the purpose of the second conference was to discuss possible resolution of the case and that the Judge said he would not prepare the usual written memorandum because of the nature and purpose of the discussion. Counsel for the accused took no issue with this. It was at the second conference that the impugned statement was made.

[5] The nature of the pre-trial conference is important because the court should, in my view, be cautious about doing anything which might discourage counsel from having a free and frank discussion of the issues in a case with a pre-trial conference Judge with a view to possible resolution of the case without the necessity of a trial. Indeed, the standard form of pre-trial conference memorandum used by the Judges of this Court contains the following notice:

> The positions and agreements reflected herein are without prejudice and purely for the assistance of the court in the resolution of trial problems. The contents of this memorandum shall not be published or broadcast unless by leave of a Judge of this Court.

[6] Conducting a pre-trial discussion on a "without prejudice" basis is particularly appropriate when the purpose is to discuss possible resolution of the case and not simply matters such as the witnesses to be called and anticipated legal issues.

[7] Crown counsel on the application (who was not counsel at the pre-trial conference) points out that the accused is relying on one sentence taken from the context of an hour-long discussion. She submits, and I agree, that I should be cautious about acting on a sentence presented in isolation from its surrounding context. In my view it would be dangerous for that reason to interpret what Crown counsel did say as an admission by the Crown that the evidence does not "demonstrate that there is a reasonable prospect of conviction", to use the words of the policy.

[8] No suggestion was made before me that the committal was not a proper one or that there is any new evidence which would cast doubt on the committal or that there is no evidence upon which a reasonable jury properly instructed could convict of first degree murder in this case. All I have before me is evidence of a comment presented out of context and which was made in the course of a resolution-oriented discussion. Further, I have to consider that it may well represent the opinion of an individual counsel only.

[9] The burden on an applicant who seeks a stay of a charge for abuse of process is a substantial one. I was referred to no authority for the grant of a stay in these circumstances.

[10] The court has a discretion to remedy an abuse of the court's process in the "clearest of cases" where there is conduct which shocks the conscience of the community and renders the proceedings contrary to the interest of justice: R. v. Power (1994), 89 C.C.C. (3d) 1 (S.C.C.).

[11] This is not one of the clearest of cases. It has not been demonstrated that it would be unfair to the accused that he be tried on the charge of first degree murder. The isolated comment by Crown counsel in the context of without prejudice discussions does not render the proceedings on first degree murder contrary to the interest of justice.

[12] This application bears some similarity to the application ruled on by Vertes J. in R. v. Cockney (CR 03304, September 19, 1997, S.C.N.W.T., unreported). In that case, a judicial stay was sought on the basis of alleged abuse of process by the prosecution. One of the grounds was that the prosecution had subpoenaed the defence lawyer to testify against his client, apparently about statements made to defence counsel by the accused and revealed in a "without prejudice" letter to the Crown about plea negotiations. Vertes J. dismissed the application, but noted that the issuance of a subpoena to defence counsel has repercussions for, amongst other things, "the sense of confidence by which defence counsel feel they can share information and negotiate with Crown counsel on the effective resolution of cases".

[13] It seems to me that a similar point can be made about bringing before the court positions taken by Crown counsel in the course of a without prejudice pre-trial conference or plea negotiation. While the considerations may be somewhat different for the Crown than for an accused, the use of what is said in such discussions may have repercussions for the sense of confidence by which Crown counsel feel they can negotiate with the defence on the effective resolution of cases. Those repercussions may be simply a disinclination on the part of Crown counsel to engage in open discussion or to speak without qualifying everything that is said. Even that may have an adverse effect on the attempts which counsel make to resolve cases, attempts which are so important to the efficient operation of the criminal justice system.

[14] I am not suggesting that there can never be a case where the court will consider what is said by Crown counsel (or defence counsel for that matter) in a pre-trial conference. There may be cases where it would be appropriate. I would expect, however, that such cases would be rare and that they would involve more than an expression by Crown counsel of an opinion about the case. In the circumstances, I need not say anything further about that issue.

[15] The application is accordingly dismissed.

[16] Dated this 13th day of November, 1997.

V.A. Schuler
J.S.C.

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Counsel for the Respondent

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Memorandum of Judgment of the Honourable Justice V. A. Schuler