R. v. *Going*, 2001 NWTSC 56

Date: 2001 07 27
Docket: CR 03836

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

Respondent

- and -

GLEN CARMEN GOING

Applicant

Application for judicial stay of proceedings. Dismissed.

Heard at Yellowknife, NT, on July 12, 2001

Reasons filed: July 27, 2001

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

Counsel for the Applicant: James D. Brydon
Counsel for the Respondent (Crown): Sadie Bond

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

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REASONS FOR JUDGMENT

[1] The applicant, Glen Carmen Going, is charged with sexual assault. His trial was held in October, 2000, but that trial was stopped before its conclusion by a stay of proceedings by the Crown. The Crown has now recommenced proceedings and wishes to proceed to trial. The applicant, however, has brought this application for a judicial stay of proceedings alleging an abuse of process and a violation of his constitutional rights.

History of Proceedings:

[2] The applicant was charged on January 30, 1999. The charge is that, between January 1, 1972 and December 31, 1974, he had sexual intercourse with S.M., a female person not his wife, contrary to s.144 of the *Criminal Code* (as it then was). He

elected to be tried by judge and jury. The preliminary inquiry proceeded and he was committed to stand trial on November 24, 1999.

[3] The allegations generally are that, during parts of 1973 and 1974, the complainant was a resident of a juvenile training centre. She was 14 years old in 1973. The applicant was employed at the centre as a supervisor. The complainant alleges that on one or two occasions the applicant had sexual intercourse with her without her consent. The complainant, however, did not make a complaint to the police until late 1997.

[4] At the preliminary inquiry the complainant testified that she was in possession of her child welfare file. She said there are documents with the applicant's name on it as her supervisor. She also said that she faxed those documents to one of the R.C.M.P. investigators assigned to this case. After the preliminary inquiry, applicant's counsel at the time (not the same one as at trial nor on this application) sought disclosure from the Crown of any records relating to the complainant's residency at the centre. Crown counsel (also not the same one as at trial nor on this application) replied that the Crown did not have possession of those records and that the custodian of any records that may exist, the Social Services Department of the Government of the Northwest Territories, will not disclose them without the appropriate court order. In this jurisdiction, prosecution is the responsibility of the federal Crown, not the territorial government. No application for production, pursuant to s.278.3 of the *Criminal Code*, was brought by the defence prior to the trial.

[5] The applicant's trial proceeded in Fort Smith in early October 2000. The applicant testified. He acknowledged that he was employed as a supervisor at the juvenile centre but claimed that the complainant did not arrive there until the summer of 1975. He denied having sexual intercourse with her. The applicant was cross-examined on an earlier statement he had given in which he related an incident with the complainant in 1974. He said, however, that he discovered after giving that statement that his dates were wrong. The defence called a further witness who testified that he worked with the applicant at the centre and that there were no female residents prior to 1975.

[6] After the close of the evidence, and during a pre-charge conference with counsel, a question was raised by the trial judge as to the significance, if any, of the discrepancy in the evidence as to dates. Both the Crown and defence took the

position that the case was basically a credibility one with the sole question being whether the crime actually happened. Neither counsel took the position that there was a need to amend the Indictment or that the dates set out in the Indictment must be strictly proven as essential elements. The conflict as to dates in the evidence was viewed as going simply to the overall assessment of credibility.

[7] Later that same evening, as counsel were preparing their final submissions, Crown counsel was contacted by the complainant. She informed him that she had documents confirming that she had been at the centre in the time frame that she claimed. The complainant had remained in the courtroom during the defence evidence. She showed to Crown counsel a fax cover sheet indicating that 43 pages had been faxed to the R.C.M.P. detachment in Fort Smith in March of 1999. She drew counsel's attention to four documents in particular which Crown counsel concluded were relevant to the prosecution. Immediately thereafter Crown counsel provided copies of these documents to defence counsel. The complainant consented to release of these specific documents. Crown counsel informed defence counsel that, in light of these disclosures, he was contemplating either making an application to call rebuttal evidence or entering a stay of proceedings. The following morning, in open court, Crown counsel entered a stay of proceedings but announced that the Crown intended to recommence proceedings.

[8] Further investigation revealed the following sequence of events.

[9] The complainant, after speaking with an R.C.M.P. Corporal during the investigation of her complaint, faxed 43 pages from the records in her possession to the R.C.M.P. detachment in Fort Smith. The Corporal does not recall receiving those documents. He says he was under the impression that the complainant was also going to give those documents to Crown counsel since she had an appointment to meet with the prosecutor assigned to the file. Sometime during June, 2000, however, a Constable in the Fort Smith detachment came across some papers related to the complainant while he was in the process of shredding a pile of old papers. He showed them to the Corporal who told him to continue shredding them since he thought the Crown was already in possession of the same documents. He also spoke to a prosecutor (again not the same one as at the trial) who told him that he was aware that the complainant had documents in her possession (although the particular prosecutor has no recollection of any conversation with the Constable about documents). So, the papers were shredded.

[10] I accept, based on the evidence placed before me on this application, that the Crown made the necessary pre-trial disclosure of documents in their possession. I accept that the various prosecutors who had carriage of this file up to and including the trial did not know that the complainant had forwarded documents to the R.C.M.P. I accept that the R.C.M.P. officers did not know that the prosecutors did not have the same documents. I also accept that Crown counsel at trial did not know anything about the earlier course of events and assumed that he had all relevant material. Finally, I accept that the documents disclosed by the complainant were relevant to the case. It is important to note that the evidence was not lost; the records are still in the possession of the complainant (all of them including the originals of the documents already released to applicant's counsel). The complainant claims a privacy interest in the remainder of the records. What also seems obvious is that all of the lawyers who were involved in this case either forgot or overlooked the complainant's preliminary inquiry evidence that she had potentially relevant documents in her possession. Perhaps this is simply a function of the fact that this file, on both sides, went through several hands.

Issues:

[11] The issues were identified in the written briefs of both parties:

1. Did the Crown fail to provide timely disclosure to the defence and, if so, did this result in a breach of the applicant's rights as protected by s.7 of the *Canadian Charter of Rights and Freedoms* or an abuse of process?

2. Was the decision of the Crown to enter a stay of proceedings at the conclusion of the hearing of the evidence an abuse of process?

3. Is the consequence of the Crown's decision to enter a stay and then to recommence proceedings a violation of the applicant's rights against self-incrimination and double jeopardy, as protected by sections 7, 11(h) and 13 of the *Charter*?

4. Is the cumulative effect of any such breaches sufficient to justify a judicial stay of proceedings?

[12] The essence of the applicant's position is, as I understand it, that the Crown's entry of a stay of proceedings deprived him of an acquittal by the jury or, at least, was done to gain a tactical advantage at a subsequent trial. The prejudice is to be found in the fact that the Crown now knows the substance of the defence case. The applicant's evidence is on the record. And, if he decides to testify at his new trial, he may be confronted with his trial testimony on cross-examination. If he testifies as he did at the first trial, the newly disclosed documents may be used to contradict him as to his recollection of dates. If he changes his testimony as to the dates, because perhaps his memory has been refreshed by the newly disclosed documents, then his previous testimony can be used to impeach his credibility. Either way, the jury in the next trial will be adversely influenced in what is still essentially a credibility case. And, of course, all of this may have been avoided if the relevant documents had not been carelessly destroyed by the police officers and if the Crown had fulfilled its disclosure obligations.

Analysis:

[13] A judicial stay of proceedings may be granted to remedy an abuse of the court's process. It may also serve as the appropriate and just remedy, within the meaning of s.24(1) of the *Charter*, in face of violations of the principles of fundamental justice. The common law doctrine of abuse of process largely overlaps with s.7 of the *Charter* which guarantees a fair hearing conducted in accordance with the principles of fundamental justice. In *R.* v. *O'Connor*, [1995] 4 S.C.R. 411, the Supreme Court held that there is very little distinction between the two remedies. The common law doctrine is by-and-large subsumed within s.7 of the *Charter*. The Court also held that although a violation of the *Charter* need only be proven on a balance of probabilities, it was only in the clearest of cases that a judicial stay of proceedings would constitute an appropriate remedy under the *Charter*.

[14] More recently, however, the Supreme Court signalled that the common law doctrine is still available. This may be somewhat of an academic exercise though since the applicable principles are similar and the remedies are the same. Nevertheless the availability of a stay as a remedy under both avenues was explained by Arbour J. (on behalf of the full Court) in *United States* v. *Cobb* (2001), 152 C.C.C. (3d) 270 (S.C.C.), at 285-286:

Although s.7 of the *Charter* incorporates the abuse of process doctrine, it does not extinguish the common law doctrine, as was recognized by L'Heureux-Dubé J. in *R.* v. *O'Connor*, [1995] 4 S.C.R. 411, 103 C.C.C. (3d) 1, 130 D.L.R. (4th) 235, at para.70:

> . . . I conclude that the only instances in which there may be a need to maintain any type of distinction between the two regimes will be those instances in which the *Charter*, for some reason, does not apply yet where the circumstances nevertheless point to an abuse of the court's process.

Canadian courts have an inherent and residual discretion at common law to control their own process and prevent its abuse. The remedy fashioned by the courts in the case of an abuse of process, and the circumstances when recourse to it is appropriate were described by this Court in *R.* v. *Keyowski*, [1988] 1 S.C.R. 657 at pp. 658-59, 40 C.C.C. (3d) 481:

> The availability of a stay of proceedings to remedy an abuse of process was confirmed by this Court in *R.* v. *Jewitt*, [1985] 2 S.C.R. 128. On that occasion the Court stated that the test for abuse of process was that initially formulated by the Ontario Court of Appeal in *R.* v. *Young* (1984), 40 C.R. (3d) 289. A stay should be granted where "compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency", or where the proceedings are "oppressive or vexatious" ([1985] 2 S.C.R. at pp.136-137). The Court in *Jewitt* also adopted "the caveat added by the Court in *Young* that this is a power which can e exercised only in the 'clearest of cases'" (p.137).
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> . . .
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> When a stay of proceedings is entered in a criminal case for abuse of process, "[t]he prosecution is set aside, not on the merits ... but because it is tainted to such a degree that to allow it to proceed would tarnish the integrity of the court": *R.* v. *Conway*, [1989] 1 S.C.R. 1659, at p.1667, 49 C.C.C.(3d) 289. The remedy is reserved for the clearest of cases and is always better dealt with by the court where the abuse occurs: *R.* v. *Jewitt*, [1985] 2 S.C.R. 128, 21 C.C.C.(3d) 7, 20 D.L.R. (4th) 651.

[15] The standard, as noted above, is that a court may stay proceedings where compelling an accused to stand trial would violate those fundamental principles of justice that underlie the community's sense of fairness. This should only be done in the clearest of cases. The courts have the power, both at common law and under the *Charter*, to deal with an abuse of process whether it affects the integrity of the administration of justice or the fair trial rights of the individual accused.

[16] With respect to the first issue, I think it is a mistake to characterize what happened in this case either as a matter of deliberate non-disclosure or lost evidence. The evidence still exists. The records are still in the possession of the complainant. The complainant told everyone at the preliminary inquiry that she had those records and that she sent copies to the police. Why nobody acted on that information is beyond me. For example, one would think that the Crown Attorney would demand to see whatever documents the police had in their possession. After all, it is the Crown that is ultimately answerable for the prosecution. Plus, the Crown has a constitutional obligation to inform the defence of any documents in the possession of state authorities (even if a privacy interest is claimed by the complainant). For another example, one would think that the defence would have brought an application under s.278.3 of the Code for production (especially since the Crown advised defence counsel several months after the preliminary inquiry that no records were in the Crown's possession).

[17] All of this reveals not so much deliberate non-disclosure as a high degree of carelessness on the part of the police and Crown. I would not label it as an "unacceptable degree of negligent conduct", as that phrase is used in *R.* v. *La (appeal by Vu)*, [1997] 2 S.C.R. 680, primarily because, in the end, no prejudice has resulted since the evidence still exists. Some of it has been disclosed to the defence. The rest may also be accessible if the statutory requirements for production are met. Here, there is no evidence of bad faith on the part of the police or Crown. What evidence there is reveals carelessness due to individuals assuming things without checking them out.

[18] I specify the police and Crown because they are the ones bearing the burden of preserving and disclosing relevant evidence. The fact that the defence did not bring a s.278.3 application may have been a tactical decision on its part. I do not know. But it is significant that the defence was aware, certainly as of the preliminary inquiry, that records existed, who had them, and what had been done with some of them.

[19] On the second issue, there is no dispute that the Crown's statutory power to stay proceedings and recommence them is a discretionary one: s.579 of the *Criminal Code.* Generally, the courts are reluctant to review the exercise of this discretion in the absence of evidence of impropriety on the part of the Crown. This was explained in the context of Crown discretion, generally, in *R.* v. *Power* (1994), 89 C.C.C.(3d) 1 (S.C.C.), at 10 (per L'Heureux-Dubé J. for the majority):

> . . . the Attorney-General is a member of the executive and as such reflects, through his or her prosecutorial function, the interest of the community to see that justice is properly done. The Attorney-General's role in this regard is not only to protect the public, but also to honour and express the community's sense of justice. Accordingly, courts should be careful before they attempt to "second-guess" the prosecutor's motives when he or she makes a decision. Where there is conspicuous evidence of improper motives or of bad faith or of an act so wrong that it violates the conscience of the community, such that it would genuinely be unfair and indecent to proceed, then, and only then, should courts intervene to prevent the abuse of process which could bring the administration of justice into disrepute. Cases of this nature will be extremely rare.

[20] Strictly speaking, there is no absolute requirement for improper motives or bad faith on the part of the Crown to establish an abuse of process. This was the conclusion in *R.* v. *Keyowski* (1988), 40 C.C.C.(3d) 481 (S.C.C.). That case, however, dealt with a question external to the exercise by the Crown of a discretionary power. The question in that case was whether a third trial, as a result of appeals or mistrials, would be so oppressing as to constitute an abuse of process. The general principle still applies, however, to this case. Any evidence of improper motives or bad faith on the part of the Crown in staying proceedings is certainly relevant and may even be decisive. But there is no absolute requirement to show prosecutorial misconduct to establish that recommencing proceedings and having another trial would be an abuse of process.

[21] In *O'Connor* (*supra*), the Court's majority held that the conduct and intention of the Crown are always relevant considerations. But, as noted at para.79 of the judgment of L'Heureux-Dubé J.: ". . . while a finding of flagrant and intentional Crown misconduct may make it significantly more likely that a stay of proceedings is warranted, it does not follow that a demonstration of *mala fides* on the part of the Crown is a necessary precondition to such a finding."

[22] There are numerous examples in the case law of situations where a stay of proceedings and the subsequent recommencement of proceedings have been attacked as an abuse of process but upheld as proper. The best known is probably *R.* v. *Scott* (1990), 61 C.C.C.(3d) 300 (S.C.C.), where the Crown stayed proceedings as a result of an adverse ruling by the trial judge allowing defence questioning of a witness that could disclose the name of a police informer. The defence moved for a judicial stay of the recommenced prosecution arguing that the process was an abuse of process. The defence submitted that the Crown had an "oblique" motive because it was simply

using the stay and recommencement power to circumvent an unfavourable evidentiary ruling. The majority of the Court held that the Crown's actions were not abusive; the Crown was entitled to rely on the statutory power to stay and recommence so as to protect the identity of the police informer (a value recognized as important to society).

[23] There were numerous other cases, with varied fact situations but with similar results, cited to me: *R.* v. *Bell* (1981), 23 C.R. (3d) 85 (B.C.C.A.); *R.* v. *Jans* (1990), 59 C.C.C. (3d) 398 (Alta.C.A.); *R.* v. *McArthur* (1995), 102 C.C.C. (3d) 84 (Sask.C.A.); *R.* v. *Durack*, [1998] S.J. No.203 (Sask.C.A.).

[24] There are also numerous cases where the Crown's exercise of its power to stay and recommence proceedings was held to be an abuse of process. In most of those cases it was found that the Crown had ulterior motives to stay proceedings, such as avoiding adverse rulings (sometimes evidentiary rulings or often rulings on adjournment requests due to the unavailability of a witness). Often the applications are combined with a s.11(b) argument alleging infringement of the accused's right to be tried within a reasonable time (something not in issue in this case). Many of these cases are referred to in *R.* v. *Cole*, [1998] N.S.J.No. 245 (S.C.). In all those cases the Crown's exercise of its discretion was held to be arbitrary and for improper purposes.

[25] The point is that the question of whether a stay and recommencement constitutes an abuse of process is highly fact-specific, requiring an examination of the reasons for the stay and the effect of the recommencement.

[26] Crown counsel referred to another case, *R.* v. *S.G.G.* (1997), 116 C.C.C.(3d) 193 (S.C.C.), as being pertinent to this discussion. The issue in that case was whether the trial judge erred in allowing the Crown to reopen its case to call a new witness after the defence had closed its case. The witness came forward to testify only after the close of the defence case. The witness had been known to the Crown and defence prior to that but had been uncooperative. The Supreme Court held that the Crown should not have been permitted to reopen its case. The prejudice to the accused was too great. The Court did, however, contemplate that one of the options available to the Crown was a stay of proceedings and then recommencing the case. All of the proposed testimony could then be disclosed in advance so as to ensure a fair trial. The Court also acknowledged that such a step could be attacked by an abuse of

process application but that would have to be assessed in the context of all the circumstances existing at the time.

[27] Crown counsel argued though that proceeding by way of a stay and recommencement would not be objectionable *per se* when new evidence becomes available during the course of a trial. The relevant excerpt of the judgment in *S.G.G.* is the following from the judgment of Cory J. on behalf of the majority (at 213):

> The likelihood of prejudice to the accused of reopening the Crown's case is such that it should not be permitted at the third stage of the trial save in the exceptional or analogous circumstances referred to in *P.(M.B.)*. If the trial judge refuses the application to reopen the case on this basis, the Crown has two options. It may elect to proceed with the trial without the new witness. In effect this would mean no more than that the Crown would proceed with the very case it originally intended to place before the Court. Alternatively, if the Crown believes that the witness is of such significance that he or she must be called, the Crown can enter a stay of proceedings and recommence the trial within the requisite time period under s.579 of the *Criminal Code*, R.S.C. 1985, c.C-46. The Crown can then give proper notice to the defence of the nature of the testimony that will be elicited from the witness, thus ensuring the fairness of the new trial. Since these situations will rarely arise, this approach will not result in a flood of new trials. Yet it will alleviate the inevitable prejudice to the accused of reopening the trial at this late stage, while still permitting the evidence to be heard in the manner it should be, as part of the Crown's case. The Crown's recommencement could of course be objected to by the accused. That objection might take the form of allegations of abuse of process or of unfairness of such a degree that it violates the s.7 *Charter* rights of the accused. The decision on the application would be for the judge presiding at the new trial.

[28] In my opinion, the scenario in *S.G.G.* is similar to the situation in the present case. New information was brought to Crown counsel's attention after the close of the evidence but before the end of the trial. Crown counsel immediately informed defence counsel of that information. At that point, Crown counsel could have asked to reopen the case to call rebuttal evidence. He could have, alternatively, asked for an adjournment of the trial. Both of these options would have undoubtedly presented procedural difficulties. So, instead, Crown counsel chose to stay proceedings. His intention to recommence proceedings was clearly stated at the time. There was nothing hidden or "oblique" about it. Nor, in my opinion, was the decision arbitrary. Crown counsel was not aware of this new information (perhaps he should have been but I accept that he was not). He had a number of options and he chose one. There is no evidence that he was motivated by some stratagem of gaining an advantage or circumventing some adverse ruling. And, there is a significant difference between

exercising the power to stay proceedings for an unfair reason and simply choosing to stay proceedings as one of a number of available options. The court should not be asked to second-guess as to whether this was the best option available; the court's function is to determine if it was abusive.

[29] The essence of the applicant's submission, however, is not directed so much at Crown counsel's motive in staying proceedings but at the effect of the recommencement of proceedings. He argued that (a) the Crown now has full disclosure of the defence case, thus making irrelevant the applicant's right to silence; (b) the applicant's evidence from the first trial will be available to attack his credibility should he testify again, thereby undermining his right against self-incrimination; and © the effect of standing trial again is tantamount to double jeopardy because he was denied a verdict in the first trial by Crown counsel's actions.

[30] Addressing the last point first, there is some support for the concept of double jeopardy applying to a new trial in these circumstances. Section 11(h) of the *Charter* protects against double jeopardy but only where the first trial has resulted in a verdict. But, the same principle may apply as a principle of fundamental justice under s.7 of the *Charter* where proceedings have been improperly terminated without a verdict. This was the subject of comment in the recent judgment of the Supreme Court of Canada in *R.* v. *Pan*, [2001] S.C.J. No.44 (released on June 29, 2001). In that case the question was whether the trial judge erred in declaring a mistrial when it appeared that there were problems with the jury deliberations. At the subsequent trial, the accused was convicted. He appealed arguing, among other things, that the improper declaration of a mistrial and the subsequent new trial offended the principle against double jeopardy. The Court rejected this argument holding that the *Criminal Code* confers a broad discretion upon a trial judge to declare a mistrial and, in that particular case, the trial judge did not act improperly.

[31] The significant comments, for purposes of this case, were to the effect that the improper termination of a case prior to verdict, whether by a declaration of a mistrial or by a stay of proceedings at the instance of the Crown, could (and I emphasize "could") lead to a breach of the principles of fundamental justice. This was stated by Arbour J. (on behalf of the full Court) at paras. 113-114:

> In my view, an improper declaration of a mistrial by a judge could, depending on the circumstances of the case, lead to the conclusion that a further trial would contravene the principles of fundamental justice. I entirely agree with the remarks of Martin J.A. in *D.(T.C.)*, *supra*, at pp.447-48:
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> > Section 11(h) of the Charter enshrines the principles underlying the pleas of *autrefois acquit* and *autrefois convict* which are applicable, as previously indicated, only where the first trial has proceeded to verdict and do not apply where the first trial has proved abortive. In my view, however, s.7 of the Charter constitutionalizing the requirement of "fundamental justice" might, in some circumstances, bar a second trial where the first trial has been improperly terminated. By way of example only, I consider that if, upon a breakdown of the Crown's case, a judge were to declare a mistrial in order to give the prosecution an opportunity to strengthen its case against the accused by endeavouring to find additional witnesses thereby depriving the accused of an acquittal where the Crown's initial preparation had been negligent, a second trial in those circumstances would contravene the principles of fundamental justice.
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> *The principle of double jeopardy might also preclude a further trial if the Crown were to proceed unfairly in depriving the accused of a verdict. For example, if the Crown were to enter a stay of proceedings at a late stage of the trial in order to preclude the jury from acquitting the accused in light of the deficiencies in the Crown's case, it seems to me that the principles of fundamental justice could preclude further proceedings, despite the fact that double jeopardy within the meaning of s.11(h) of the Charter may not apply*. However, while double jeopardy may be a principle of fundamental justice that could be invoked in some circumstances prior to a verdict being rendered within the meaning of s.11(h), these circumstances do not arise in the appellant's case. (emphasis added)

[32] Accepting that a stay of proceedings could result in a violation of the double jeopardy principle, there is no evidence here that it was entered so as to preclude the jury from acquitting the accused. It would be pure speculation to say how the jury might have decided. There is nothing in the evidence from the trial that reveals such deficiencies in the Crown's case as to make an acquittal inevitable. Furthermore, it would have been highly irresponsible, if not unprofessional, for Crown counsel to simply ignore the new information and proceed to the trial's conclusion. He could not ignore that information; neither could defence counsel. At first blush the information may appear to be helpful to the prosecution but, upon further examination, it may help the defence. No one knows; and certainly no one knew at the time Crown counsel had to make a decision. While undoubtedly there is a societal and individual interest in obtaining a final verdict of guilt or innocence in criminal cases, there is also a strong societal interest in getting the "right" verdict, one decided upon the merits.

[33] With respect to the right to silence and self-incrimination arguments, the applicant is in no different position than anyone else who has to face the prospect of a new trial on the same offence. That can arise if a mistrial is declared after a hung jury. It can arise if a new trial is ordered after a successful appeal. The applicant chose to testify at his trial. His testimony cannot be used as part of the Crown's case at a new trial. He need not testify at that trial. If he does then his previous testimony can only be used to impeach his credibility if he gives inconsistent evidence. None of this is unusual or abusive.

[34] The issue in this case is whether the alleged assaults happened at all. The dates are non-essential elements (or so counsel conceded at the first trial). They go to the overall assessment of credibility. The new evidence, so far as I have been told, may go to supporting the complainant's evidence as to dates. But that may be as far as it goes. There is nothing to suggest that the issue for the jury in a new trial will be any different.

[35] The applicant, as noted earlier, gave a statement to the police during the investigation into these allegations. The defence took no issue with the voluntariness of this statement. In it the applicant basically revealed his defence, that being that these matters never happened. The defence made disclosure (so to speak). The applicant was cross-examined with respect to some discrepancies between this statement and his testimony at trial. On this point I fail to see how anything has changed with respect to the applicant's position at a new trial.

[36] In my opinion, the steps taken by the Crown in this case are neither an abuse of process nor a violation of the applicant's constitutional rights. The integrity of the system of justice is not harmed. The reputation of the police may be tarnished due to their careless destruction of potentially relevant documents; the image of the Crown may be somewhat diminished in terms of their preparation of this case. But none of that affects the integrity of the administration of justice or the ability of the applicant to make full answer and defence. This is not one of those clearest of cases where a judicial stay of proceedings would be an appropriate and just remedy.

Conclusion:

[37] The application for a judicial stay of proceedings is dismissed. This case will be set down for trial in the usual manner.

[38] I thank counsel for their able submissions.

J.Z. Vertes,
J.S.C.

Dated at Yellowknife, NT, this
27th day of July 2001

Counsel for the Applicant: James D. Brydon
Counsel for the Respondent (Crown): Sadie Bond

CR 03836

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