HMTQ v. Cleary 2002 NWTSC 19

Date: 20020306
Docket: S-1-CR-2001000083

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

LENA CLEARY

Application for a stay of proceedings based on pre-charge delay.

Heard at Yellowknife, NT on February 8, 2002

Reasons filed: March 6, 2002

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE V.A. SCHULER

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Counsel for the Crown (Respondent): Ari Slatkoff

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REASONS FOR JUDGMENT

[1] On February 8, 2002, I dismissed the accused's application for a stay of proceedings in this matter and said that written reasons would follow. These are those reasons.

[2] The application was heard just a few days before the Applicant, Ms. Cleary, was scheduled to be tried on an indictment containing three counts: Count 1: theft in excess of $5000.00, contrary to s. 334(a) of the Criminal Code; Count 2: fraud in excess of $5000.00, contrary to s. 380(1)(a) of the Criminal Code; Count 3: breach of trust by a public officer, contrary to s. 122 of the Criminal Code. It was alleged that the Applicant, who was the housing manager of a local housing society, had fraudulently billed personal goods to and obtained benefits and stolen money from her employer. The trial has since been held and the Applicant has been convicted on counts 1 and 2.

[3] The Applicant applied for an order "staying proceedings as an abuse of process pursuant to the Canadian Charter of Rights and Freedoms, particularly sections 7 and 24". The grounds put forward were unwarranted pre-charge delay, prejudice to the accused and an adverse effect on the administration of justice.

[4] Section 7 of the Charter provides:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[5] Section 24(1) provides:

> 24(1). Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

[6] The offences were alleged to have taken place between 1990 and 1996. In March 1996, the Applicant was removed from her position as housing manager and an audit was undertaken by the territorial government's audit bureau. The auditors completed their report by June or July 1997.

[7] The Crown submitted as evidence on this application the affidavit of Corporal Fleury of the Royal Canadian Mounted Police, whom defence counsel cross-examined. Corporal Fleury testified that the Cleary matter was handed over to the R.C.M.P. in August 1997, but the Commercial Crimes Section, which had responsibility for it, was unable to start its investigation until September of that year.

[8] In due course, the auditors' report was reviewed and in December 1997 a constable recorded that it was well put together and drew a clear picture of how the accused was alleged to have committed the offences. In January 1998, that constable, who was involved in other investigations, met with one of the auditors and obtained the documents reviewed by the auditors. By mid-April 1998 it was determined that it would take a minimum of three weeks fully committed to complete the police investigation but that the time and resources were not available because of other priority investigations. A decision was made to transfer the Cleary investigation out of the Commercial Crimes Section into G.I.S. (now the Major Crimes Unit).

[9] After the transfer, Corporal Fleury became involved with the Cleary investigation briefly in July 1998 while he was in G.I.S., but he was also investigating other matters involving missing persons or homicide. He was transferred out of G.I.S. in September 1998 and another constable took over the Cleary investigation. That constable arranged for the investigation be re-assigned back to the Commercial Crimes Section in December 1998 when he transferred to that section. A major review of the file was completed at

about that time by another police officer and the conclusion reached that there was a strong case against the Applicant.

[10] In May 1999, a superior officer asked for a status report on the Cleary investigation, expressing concern at the lack of progress. At the time, the Commercial Crimes Section had only two members whose full attention was directed to one particular other investigation. The Cleary investigation was assigned to another constable, who was also working on other files. In August 1999, two of the main witnesses in this case, co-employees of the Applicant, were interviewed. Also in August 1999, another major fraud investigation was assigned to the Commercial Crimes Section and another in April 2000. By September 2000 some focus was brought on the Cleary investigation and in October of that year the charges were laid and the Applicant was arrested. Some of the investigations that were pending at the time of the Cleary investigation were still ongoing at the time Corporal Fleury swore his affidavit in February 2002.

[11] From all this I conclude that the delay in laying charges in this case is attributable to insufficiency of police time, investigators and resources and the fact that other investigations were assigned a higher priority than this one. The evidence does not suggest any improper motive on the part of the police in giving other investigations priority or in not getting to this one promptly.

[12] In her affidavits, the Applicant says that her last contact with the auditors investigating this matter was in mid-1996 and that she was not told of the audit's conclusions when the report was completed in 1997. She says that she went on with her life and in 1997 started new employment, which she still maintains. She started classes in accounting at the local college. She also refers to the fact that she is married and endeavouring to help support four children.

[13] The Applicant took the position that virtually all the investigative work had been done by the auditors by the fall of 1996, culminating in the July 1997 report, and that anything the police did subsequent to that could have been done within a year, that is, by July 1998.

[14] The Applicant submitted that the mere fact of the delay, along with the prejudice to her and an adverse effect on the administration of justice, should result in a judicial stay of the proceedings.

[15] The Applicant has the burden of showing that her rights have been infringed and that a stay of proceedings is the appropriate remedy: *R. v. L. (W.K.)*, [1991] 1 S.C.R. 1091; (1991), 64 C.C.C. (3d) 321.

[16] Since this application was argued, the Supreme Court of Canada has, in *R. v. Regan*, [2002] S.C.J. No. 14, summarized some of its earlier jurisprudence on abuse of process in the Charter era. The majority judgment in *Regan* points out that when the courts are asked to decide whether the judicial process has been abused, the analysis under the common law and the Charter will dovetail so that it will be concerned not only with the protection of individual rights but also with proceedings that are unfair to the point of being contrary to the interest of justice. The Court also confirmed that breach of the s. 7 Charter right to fundamental justice may amount to an abuse of process.

[17] LeBel J., speaking for the majority in *Regan*, confirmed that a stay of proceedings is only one remedy for an abuse of process, but the most drastic one, and therefore reserved for the clearest of cases. There must be actual prejudice of such magnitude that the public's sense of decency and fairness is affected. Regardless of whether the abuse prejudices the accused because of an unfair trial, or prejudices the integrity of the justice system, a stay of proceedings will only be appropriate when the following two criteria are met:

(1) the prejudice caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome; and
(2) no other remedy is reasonably capable of removing that prejudice.

[18] LeBel J. described the first criterion as critically important and reflective of the prospective nature of a stay of proceedings as a remedy. A stay aims to prevent the perpetuation of a wrong that will otherwise have a continuing effect. This prospective aspect must be satisfied even in those cases under s. 7 of the Charter where the abuse does not affect the fairness of the trial but still undermines the fundamental justice of the system (*Regan*, paragraphs 53 to 55).

[19] In argument, counsel for the Applicant relied mainly on the words of Lamer J. in his dissenting judgment in *R. v. Mills* (1986), 26 C.C.C. (3d) 481 (S.C.C.) at 558, where he reviewed the relationship between pre-charge delay, abuse of process and Charter rights:

> 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. Pre-charge delay is as relevant as any other form of pre-charge or post-charge conduct which has a bearing upon the fairness of the trial. In other words, pre-charge delay is relevant to those interests which are protected by the right to a fair trial whereas it is irrelevant to those which are protected by s. 11(b). Similarly, pre-charge delay may be a relevant

> consideration under the doctrine of abuse of process in the same manner as any other conduct by the police or the Crown which may be held to constitute an abuse of process.

[20] The key points in the above passage are that for pre-charge delay to warrant a remedy it must have an effect on the fairness of the trial or, because of some other circumstance, amount to an abuse of process. The requirement of effect on the fairness of the trial is also reflected in *R. v. L.(W.K.)*, referred to above, where Stevenson J. said that delay in charging and prosecuting an accused cannot, without more, justify staying the proceedings as an abuse of process at common law. Nor does the Charter now insulate 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. Stevenson J. also said that the fairness of a trial is not automatically undermined by even a lengthy pre-charge delay and that such delay may operate to the advantage of the accused, since the Crown witnesses may forget or disappear. He pointed out that staying proceedings based on the mere passage of time would be the equivalent of imposing a judicially created limitation period for a criminal offence.

[21] The accused also relied on the earlier case of *R. v. Kalanj* (1989), 48 C.C.C. (3d) 459 (S.C.C.), in particular the following words from the majority judgment at p. 471:

> The length of the pre-information or investigatory period is wholly unpredictable. No reasonable assessment of what is, or is not, a reasonable time can be readily made. Circumstances will differ from case to case and much information gathered in an investigation must, by its very nature, be confidential. A court will rarely, if ever, be able to fix in any realistic manner a time limit for the investigation of a given offence. It is notable that the law - - save for some limited statutory exceptions - - has never recognized a time limitation for the institution of criminal proceedings. Where, however, the investigation reveals evidence which would justify the swearing of an information, then for the first time the assessment of a reasonable period for the conclusion of the matter by trial becomes possible. It is for that reason that s. 11 limits its operation to the post -information period. Prior to the charge, the rights of the accused are protected by general law and guaranteed by ss. 7, 8, 9 and 10 of the Charter.

[22] The foregoing passage highlights the difficulty of making any assessment of pre-charge delay because of the unpredictability of the investigative process. Here, the Applicant relied on the passage in support of the proposition that the Court can look at the evidence and determine at what date an information could have been sworn, and compare that to the date the information actually was sworn to assess whether the pre-charge delay was reasonable.

[23] While I understand the above passage to be concerned more with post-charge delay, even if I were to accept the Applicant's argument, the evidence elicited on the cross-examination of Corporal Fleury did not pinpoint any date earlier than October 2000 when the charges could have been laid. Although there was evidence that certain police officers assessed the case and found it a strong one, it was not clear that there was any point prior to October 2000 at which all witness interviews and other investigatory matters were completed to an extent that the police felt they could establish Ms. Cleary's guilt beyond a reasonable doubt. So although the Applicant submits that the evidence collected by the audit bureau would have justified the swearing of an information in 1997 or 1998, it is not clear that by then the police had done all the work they felt was needed before bringing the matter before the courts. In fact, as I have noted above, the evidence was that by mid-April of 1998, it was determined that a minimum of three weeks was needed to complete the investigation, time that was not available with the existing resources.

[24] Police misconduct may, of course, be the basis for a finding of abuse of process. In this case, however, no separate misconduct is alleged. The allegation is that the failure to charge the Applicant earlier than October 2000, standing alone, is, whether described as negligence or otherwise, a form of misconduct. But the Court cannot be put in the position of supervising the efficiency of the police in their investigations. This point was made by Dubin J.A. in *R. v. Young* (1984), 13 C.C.C. (3d) 1 (Ont. C.A.) in the following words (at p. 32):

> Courts cannot undertake the supervision of the operation or the efficiency of police departments and to be asked to determine whether the police proceeded as expeditiously as they should have in any given case.
>
> Furthermore, to compel the police or Crown counsel to institute proceedings before they have reason to believe that they will be able to establish the accused's guilty beyond a reasonable doubt would ... have a deleterious effect both upon the rights of the accused and upon the ability of society to protect itself.
>
> There is the further consideration that to hold otherwise would permit the court to impose an *ad hoc* limitation with respect to the institution of proceedings for indictable offences where no statutory prescription is in place.

[25] In *R. v. L. (W.K.)*, referred to above, Stevenson J. quoted with approval the following passage from the judgment of Laskin C.J. C. in *Rourke v. The Queen*, [1978] 1 S.C.R. 1021:

> 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 *Criminal Code*, prosecutions initiated a lengthy period after the alleged 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.

[26] Very much the same argument that was made by the Applicant in this case was made before Rooke J. in *R. v. Sample*, 2002 ABQB 0057, where the police received a complaint of theft in October 1996 but did not charge the accused until early 2000. The reason for the delay was agreed by counsel in that case to be the fact that the investigator had other criminal investigation files to work on. Rooke J. found that there was no abuse of process on those facts.

[27] Defence counsel also invited me to compare how another investigation, which was referred to the police after the Cleary case was, resulted in charges before the Cleary charges were laid. Corporal Fleury testified as to why certain cases might be given priority in the attention devoted to them; for example, where the evidence had not already been seized and secured, as was the situation in the case which was dealt with before the Applicant's was. To compare the two cases and make judgments about which should have been given priority and why, would, in my view, engage the Court in supervising the efficiency of pre-charge police investigative work, which is not the Court's proper function in these circumstances.

[28] I emphasize that there was nothing in the evidence suggesting that there was, behind the delay in this case, some ulterior motive or purpose to harm the Applicant in her ability to defend herself against the charges. Nor was there any evidence that the Applicant's ability to answer the charges was in any way affected by the pre-charge

delay. For the same reasons, I am unable to say that the proceedings are unfair to the point of being contrary to the interest of justice or its administration.

[29] Accordingly, the Applicant has not established that the pre-charge delay amounts to an abuse of process.

[30] Even if the delay could be said, in the circumstances, to amount to an abuse of process, the Applicant has not established that this is one of those cases where a stay of proceedings would be the appropriate remedy. The prejudice she alleged has nothing to do with her ability to defend herself against the charges, but is purely personal and she is in no different position now than she was in late 1997 and 1998. In *Regan*, LeBel J. referred to the Supreme Court's decision in *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, 2000 SCC 44, for the necessity of a causal connection between the abuse of process alleged and "actual prejudice of such magnitude that the public's sense of decency and fairness is affected" (paragraph 52 in *Regan*). The prejudice must, therefore, be real and it must in some way affect the fairness of the trial [see also *R. v. Heron*, [1995] N.W.T.J. No. 65 (S.C.); *R. v. J.F.G.*, [1997] N.W.T.J. No. 11 (S.C.)]. In my view, the prejudice alleged in this case does not come within that description.

[31] The above are my reasons for dismissing the application for a stay of proceedings.

V.A. Schuler
J.S.C.

Dated at Yellowknife, NT, this
6th day of March 2002

Counsel for the Accused (Applicant): Hugh Latimer
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