Date: 2004 09 10
Docket: S-1-CR-2004000029

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

ANTOINE MICHEL, NOEL MICHEL, RAYMOND MARLOWE, HENRY LOCKHART, and STANLEY PAUL DESJARLAIS SR.

MEMORANDUM OF JUDGMENT

[1] On this application one of the accused Raymond Marlowe seeks an Order in the nature of *certiorari* quashing his committal for trial following a preliminary inquiry held in Territorial Court in February 2004.

[2] This accused and four other men are charged with committing the offence of rape, contrary to the former s.144 of the *Criminal Code*, in August 1975 in the community of Lutsel'ke (formerly known as Snowdrift) in the Northwest Territories.

[3] At the preliminary inquiry the complainant testified that on the date in question several young men had forcible sexual intercourse with her, and she identified this accused Raymond Marlowe as one of these young men. In her testimony at the preliminary inquiry she gave her own birthdate as April 15, 1961 and said that she was 14 years of age at the time of the rape incident. At one point in her testimony, in reference to the accused Raymond Marlowe, she stated "I think he's a year older than me".

[4] The preliminary inquiry judge committed this accused Raymond Marlowe and four other accused men for trial in Supreme Court. Raymond Marlowe's counsel made a submission that there could not be a committal under the *Criminal Code* as the accused Raymond Marlowe was under 16 years of age at the time of the alleged offence; however, the preliminary inquiry judge was of the view that there was insufficient

evidence before him as to the exact age of Raymond Marlowe at the time of the alleged offence to allow him to consider this submission.

[5] On the evidence presented at the preliminary inquiry, I find that the preliminary inquiry judge acted within his jurisdiction in committing all five accused to stand trial in this Court. There is thus no basis for issuing any Order in the nature of a writ of *certiorari*.

[6] On the present application the accused Raymond Marlowe alternatively seeks declaratory relief "pursuant to the *Canadian Bill of Rights* and the *Charter of Rights* herein declaring that the proceedings against the accused Raymond Marlowe are contrary to law in particular the laws dealing with children and the laws of equality."

[7] The foundation of this aspect of the application is the fact that the applicant Raymond Marlowe was born on February 10, 1960 (established by affidavit evidence submitted on this application and not contested by the Crown). Accordingly Raymond Marlowe was 15 years of age at the time of his alleged commission of the offence of rape in August 1975 at Lutsel'ke,

[8] The *Juvenile Delinquents Act* R.S.C. 1970, c.J-3, which was in force in most parts of Canada in 1975 provided that the juvenile court had exclusive jurisdiction in criminal proceedings commenced against a young person under the age of 16 years (except in certain situations which are not pertinent here).

[9] There were specific provisions in that Act regarding its having the force of law in various parts of Canada:

> s.42 ... this Act may be put in force in any province, or in any portion of a province, by proclamation, after the passing of an Act by the legislature of any province providing for the establishment of juvenile courts, or designating any existing courts as juvenile courts, and of detention homes for children.
>
> s.43 ... this Act may be put in force in any city, town, or other portion of a province, by proclamation, notwithstanding that the provincial legislature has not passed an Act such as referred to in section 42, if the Governor in Council is satisfied that proper facilities for the due carrying out of the provisions of this Act have been provided in such city, town, or other portion of a province, by the municipal council thereof or otherwise.

> s.44 This Act shall go into force only when and as proclamations declaring it in force in any province, city, town or other portion of the province are issued and published in the *Canada Gazette.*

[10] Counsel's research discloses, *inter alia*, a proclamation of the Privy Council dated October 4, 1979, and published in the Canada Gazette on October 24, 1979, as SI 79-161 proclaiming that the *Juvenile Delinquents Act* "shall come into and continue in force in the whole of the Northwest Territories". It appears that prior to 1979, there were various proclamations bringing the Act into force in specific communities of the Northwest Territories, e.g. Fort Smith, Yellowknife, Fort Resolution, Hay River, Aklavik, Tuktoyaktuk and Pine Point; but it appears there is no official record of any specific proclamation for the community of Snowdrift, now known as Lutsel'ke.

[11] In a 1967 decision of this Court, *R.* v. *Morin* 61 WWR 757, Morrow J., in *obiter* at p.758, states that the *Juvenile Delinquents Act* "was made applicable to the Northwest Territories by proclamation, *Canada Gazette*, Pt I, October 27, 1956, p. 3670". With respect, that *obiter* statement appears to be in error, for a close examination of the cited proclamation discloses that it declares the *Juvenile Delinquents Act* "to be in force in that part of the Northwest Territories *lying to the north of the Arctic Circle"*(emphasis added).

[12] Thus, the *Juvenile Delinquents Act* was not in force in Lutsel'ke in August 1975. Had these criminal proceedings been taken in 1975, Raymond Marlowe would have been tried in ordinary court with the other accused, notwithstanding his age of 15 ½ years.

[13] The submissions made on behalf of Raymond Marlowe on this application continue, however, arguing that he is being denied due process of law on discriminatory grounds.

[14] Although not well articulated, the argument appears to be that because he was a 15 year old who allegedly committed the offence of rape in 1975 in Snowdrift, as opposed to, say, Fort Resolution, he is being denied the benefits of the *Juvenile Delinquents Act*. It is submitted that, notwithstanding the clear words of Section 42 and Section 43 of the Act, there has to be an equality of application of the *Juvenile Delinquents Act* in all localities within the Northwest Territories. It is, in essence, argued that at the time of the alleged offence, the statutory regime whereby the *Juvenile Delinquents Act* was in force in some communities but not in others was inoperative because it infringed s.1(b) of the *Canadian Bill of Rights*:

> s.1 It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national

> origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,
>
> ...
>
> (b) the right of the individual to equality before the law and the protection of the law;

[15] The only case authority cited in support of this proposition is *R.* v. *McKay* (1975) 30 CCC (2d) 349 (Alta Dist.Ct.). However, *McKay* involved discrimination on the basis of sex, one of the expressly prohibited grounds of discrimination in the *Bill of Rights*.

[16] The present argument by Raymond Marlowe involves instead discrimination on the basis of locale or geography which is not expressly prohibited by the *Bill of Rights*. In the case of *R.* v. *Dubrule* (1976) 31 C.C.C. (2d) 572 (NWTCA), a case from this jurisdiction in the early 1970's, it was decided that differentiation in the application of the *Juvenile Delinquents Act* based on geography was not an infringement of an accused's equality rights guaranteed by the *Bill of Rights*. The Court of Appeal stated in that case, in upholding the decisions of then Magistrate deWeerdt and of Morrow, J., as he then was, that young persons in those locales where the *Juvenile Delinquents Act* was in force were not exempted from the law, they were "merely proceeded against in a different manner". It was held that "the distinction between proceeding by indictment or under the *Juvenile Delinquents Act* is a matter of practise and procedure and not a matter of substantive law". In the view of the Court of Appeal, using a different procedure did not result in an infringement of the young person's rights under 1(b) of the *Canadian Bill of Rights*. Accordingly I find that the fact that in 1975 the *Juvenile Delinquents Act* was not in force in the settlement of Snowdrift is not and was not an infringement of Raymond Marlowe's equality rights under the *Canadian Bill of Rights*.

[17] Mr. Marlowe also argues that his equality rights under s.15 of the *Charter of Rights and Freedoms* are somehow infringed or denied if he is subjected to criminal proceedings in the ordinary court. Subsection 15(1) of the *Charter* states:

> 15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[18] Mr. Marlowe does not particularize what protections or benefits of the law he is being denied by having his case dealt with in ordinary court as opposed to juvenile court (or its present equivalent, youth justice court). The only specific item that Mr. Marlowe's counsel refers to in this regard is the lesser sanctions that Mr. Marlowe would be

subjected to, in the event of a finding of delinquency under the *Juvenile Delinquents Act*, than he would be subjected to following a conviction under the *Criminal Code*. In my respectful view the "lesser punishment" submission is best left to the sentencing hearing, if and when Mr. Marlowe's case gets that far, when counsel can address the applicability of s.11(i) of the *Charter*.

[19] In support of his *Charter* argument Mr. Marlowe cites *R.* v. *Frohman* (1987) 60 O.R. (2d) 125 (Ont C.A.). That case dealt with a provision of the *Criminal Code* that on April 17, 1985, the date that s.15 of the *Charter* came into force, had not been proclaimed in force throughout all of Canada. The Court ruled that the impugned provision of the *Criminal Code* was invalid from April 17, 1985 to December 4, 1985, the date when the *Criminal Code* provision was proclaimed in force throughout Canada.

[20] The difficulty with this *Charter* argument is that the *Charter* cannot act retrospectively so as to today invalidate a legislative regime as at the year 1975, 10 years before s.15 of the *Charter* came into force.

[21] As articulated before me on this application, I am not satisfied that there has been any breach of Mr. Marlowe's constitutional rights based on the locale of the alleged commission of the offence.

[22] As stated by this Court in *R.* v. *Kolausok* 2000 NWTSC 1, this Court's jurisdiction over an accused person before the Court is to be determined by the accused's status at the time of the commission of the offence. This 44 year old accused Raymond Marlowe was an adult under the criminal law in 1975 where and when the alleged offence occurred, and accordingly he is to be tried in adult court and not in youth court.

[23] For these reasons the application is dismissed.

J.E. Richard
J.S.C.

Dated this 9th day of September, 2004.

Counsel for Raymond Marlowe: Hugh Latimer

Counsel for Her Majesty the Queen: Caroline Carrasco

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