R v. Unka, 2005 NWTSC 15

Date: 2005 02 25
Docket: S-1-CR-2004000035

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

-and-

RUEBEN THOMAS UNKA

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is an application by the accused for a judicial stay of proceedings based upon an allegation that his right to be tried within a reasonable time has been denied. This right is set out in s. 11(b) of the *Canadian Charter of Rights and Freedoms* and the remedy of a stay is sought pursuant to s. 24(1) of the *Charter*.

[2] The accused was initially charged on July 25, 2001 with sexual interference. That charge was later changed to one of sexual assault. His application for a stay was made at the outset of his trial commencing January 25, 2005. Thus, approximately 42 months have passed between the date the accused was charged and the date of his present trial.

[3] The Crown submits that the accused waived his right to a timely trial for much of that time period and, in any event, has not suffered significant prejudice as a result of the delay. Those are the principle issues on this application.

FACTS

[4] The following is a brief summary of the facts relating to this application: The accused was charged with a single count of sexual interference, under s. 151 of the *Criminal Code*, against a seven or eight-year-old female complainant. It is alleged the offence occurred between January 1st and December 31st, 1995. As stated, the original information was sworn on July 25, 2001 and an arrest warrant was issued.

On July 4, 2002, the accused was arrested on the warrant and released on his undertaking to appear on August 14, 2002.

On August 13, 2002, a replacement Information was sworn, charging one count of sexual assault under s. 271 of the *Criminal Code*.

On August 14, 2002, the accused failed to appear in Court pursuant to the terms of his release and a second warrant was issued for his arrest.

On October 7, 2003, the accused was arrested on the second warrant.

The accused subsequently made three court appearances, with the assistance of agents, while in custody serving a sentence on other matters.

On December 2, 2003, the accused was released from custody in order to appear in court in Fort Good Hope on March 3, 2004, for his preliminary inquiry.

On March 3, 2004, the accused failed to appear for his preliminary inquiry. However, he had previously instructed counsel to appear for him to seek an adjournment, or alternatively to represent his interests in the event the adjournment was not granted. The preliminary inquiry proceeded in the absence of the accused and he was committed to stand trial.

The indictment was filed on March 12, 2004.

There was some delay in the scheduling of a trial date due to a breakdown in communications between the accused and his counsel.

On May 6, 2004, the accused's trial was scheduled for September 27, 2004, before a judge and jury in Fort Good Hope.

On September 27, 2004, the accused failed to appear and a third warrant was issued for his arrest.

The accused was arrested on this third warrant in Yellowknife on September 27, 2004, and released on bail on October 21, 2004.

The accused's trial was rescheduled to proceed in Yellowknife on January 25, 2005, before a judge alone.

ANALYSIS

General Principles

[5] In an application such as this, I am governed by the leading decision of the Supreme Court of Canada in *R.* v. *Morin*, [1992] 1 S.C.R. 771. The majority judgment of Sopinka J. sets out at paragraph 31 the factors that I must consider:

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 the delay; and
4. prejudice to the accused.

[6] Sopinka J. also confirmed at paragraph 32 that:

> ... the period to be scrutinized is the time elapsed from the date of the charge to the end of the trial. … 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 section 11(b) seeks to protect, the explanation for the delay and the prejudice to the accused.

Length of the Delay

[7] The total period from when the accused was first charged on July 25, 2001, to the present trial date of January 25, 2005, is 42 months. The Crown concedes that this is a sufficiently lengthy period to initially raise the issue of reasonableness. I will now move on to the question of whether there has been a waiver of any of this period.

Waiver of any Time Period

[8] I will deal with the easier questions under this issue first. The time from the first trial date of September 27, 2004, to the present trial date of January 25, 2005, is four months. Defence counsel concedes that Mr. Unka waived this period by failing to appear for the first trial. That reduces the total period from 42 to 38 months.

[9] There are then three other time periods which have essentially been conceded by the defence as having been waived by Mr. Unka. The first is from January 14, 2004, to March 3, 2004. January 14th was the first date the preliminary inquiry could have been held after Mr. Unka's second arrest; March 3rd was the date actually requested by Mr. Unka's counsel for the preliminary inquiry. That is a period of one and a half months.

[10] Next there is a period from March 29, 2004 to May 6, 2004. A pre-trial conference was held on March 29th and defence counsel indicated that he had been unable to contact his client to set a trial date; May 6th was when defence counsel confirmed his retainer and instructions to set a trial date. That is approximately a one-month period.

[11] Next there is a period from July 20, 2004 to September 27, 2004. The former date was when the Crown indicated that they were prepared to go to trial; the latter was the trial date scheduled to accommodate defence counsel. That is approximately two and a half months.

[12] To be clear, I find that Mr. Unka waived all three periods. The total of those periods is five months. That reduces the remaining period of 38 months down to 33 months.

[13] I next turn to the more problematic period of August 14, 2002 to October 7, 2003. The former date was when Mr. Unka failed to appear at his first appearance; the latter was the date Mr. Unka was arrested for the second time on this (now sexual assault) charge. That was a period of approximately 13 and a half months. In determining whether this entire period was waived by the accused, it is helpful to remember the role of the burden of proof in these analyses.

[14] The majority in *Morin*, cited above, discussed the issue of burden of proof at paragraph 33. The accused clearly has the ultimate or legal burden of proof throughout on this type of an application. But, on the particular facts of a given case, "a secondary or evidentiary burden of putting forth evidence or argument may shift" to the Crown.

[15] Also, at paragraph 38 of *Morin* Sopinka J. restated that any waiver of an accused's s. 11(b) rights must be "clear and unequivocal, with full knowledge of the rights [protected] and of the effect that waiver will have on those rights".

[16] I find that there was not a clear and unequivocal waiver by the accused for the entire length of this particular period of 13 and a half months. Part of the reason it took that long to execute the second arrest warrant, and continue the prosecution, was probable error by the RCMP. Given that the second warrant was issued on August 14, 2002, it is apparent that an unusually short "expiry" date, of October 30, 2002, was entered by an RCMP member under the CPIC (Canadian Police Information Computer) data system. Also, other than the steps taken immediately preceding the day of Mr. Unka's eventual arrest on October 7, 2003, there was no evidence of any other earlier action by the RCMP to execute that second warrant.

[17] RCMP Sergeant Crowther, the Chief Territorial Analyst for Criminal Operations in Yellowknife, explained in his evidence on this application that when arrest warrants are issued by the RCMP they are usually entered into the CPIC system for variable periods of time, depending upon whether the underlying charges are summary or indictable. In this case, the underlying charge proceeded by indictment. Sergeant Crowther testified that indictable charges might be registered on CPIC for a maximum of three years, but are commonly entered for a period of one year at a time. The officer involved would then diarize his or her own file to review the matter at the end of the one year period to see whether any progress has been made in executing the warrant and to renew the registration of the warrant on CPIC, if necessary (of course, the warrant itself remains valid in law – here I am only referring to its existence within

the database). Incidentally, Sergeant Crowther testified that summary conviction matters are commonly entered on CPIC for periods of six months at a time, subject to periodic renewal as with indictable matters.

[18] In this case, the "indictable" warrant was only entered on the CPIC system for a period of two and a half months. Sergeant Crowther was "surprised" that this warrant had only been entered for "such a short time". The effect of its expiry from CPIC on October 30, 2002, is that it would no longer be displayed on any computer search of Mr. Unka's name and date of birth. Consequently, if the police had reason to do such a search on CPIC after October 30, 2002, they would not have been immediately prompted by the system about the existence of the outstanding second arrest warrant. I will return to this point momentarily.

[19] I pause to recognize that Sopinka J. in *Morin*, at paragraph 62, said I must consider "Action or non-action by the accused which is inconsistent with a desire for a timely trial". However, that comment was made in the context of a discussion about prejudice to the accused and not waiver. Nevertheless, at paragraph 64, Sopinka J. also went on to talk about conduct of the accused "falling short of waiver" which may negate any alleged prejudice.

[20] The Crown submits that the first and third failures of the accused to attend court (on his first appearance and on his first trial date) is evidence indicating an attitude inconsistent with a genuine desire for a timely trial. Further, says the Crown, even though his second failure to appear for his preliminary inquiry was arguably more of a technical default, Mr. Unka had instructed his counsel to initially seek ***an adjournment*** of that inquiry, which shows he was not interested in proceeding promptly. Lastly, after his first and third failures to appear, the Crown submits Mr. Unka did nothing to try to get the proceedings back on track.

[21] On the other hand, there is no obligation on an accused to turn himself in, as was suggested in the decision of this Court in *R.* v. *Kusyj*, [1988] N.W.T.J. No. 37. Further, in another decision of this Court in *R.* v. *Watson*, [1995] N.W.T.J. No. 56, at paragraph 56, I am reminded that the principles in play here include the obligation on ***the Crown*** to bring the accused to trial.

[22] Thus, I tend to agree with defence counsel that in this particular time period (August 14, 2002, to October 7, 2003), the onus begins to shift to the Crown when the

warrant expired on CPIC on October 30, 2002. If it had remained in that database, then it is reasonable to assume that the RCMP would have noticed it on one of the several occasions Mr. Unka came to their attention between October 30, 2002, and October 7, 2003 - almost a year later. The several occasions I am referring to are those identified in the PIRS (Police Information Retrieval System) report on Mr. Unka, which was filed in evidence in this hearing.

[23] In particular, according to Sergeant Crowther, prudent police practice would be to check CPIC when an accused is charged with a *Ciminal Code* offence. That happened on May 8, 2003, when Mr. Unka was arrested and charged for impaired driving in Fort Simpson. Had the second warrant then been on CPIC, as it should have been, he would have also been arrested on the current charge and the additional delay between May 8, 2003, and October 7, 2003, when he was eventually arrested on the current charge, would likely not have occurred. Therefore, I cannot say that Mr. Unka clearly and unequivocally waived that period of additional delay.

[24] Conversely, I find that Mr. Unka only waived the period from August 14, 2002, being the date of his failure to appear at his first appearance, until May 8, 2003, being the date of his arrest and charge on the impaired driving matter in Fort Simpson. That is a period of approximately nine months. Therefore, the remaining time period of 33 months is reduced to 24 months.

The Reasons for the Delay

Inherent Time Requirements

[25] I now turn to the reasons for the delay, and firstly under this heading I am instructed by *Morin* to look at any inherent time requirements of this case. Admittedly, because this was an indictable matter which proceeded to preliminary inquiry, somewhat of a lengthier period of inherent delay would be expected here. However, this was not a complex case. As I understand it, only two Crown witnesses were expected for the trial and the preliminary inquiry only took a couple of hours.

Actions of the Accused

[26] Secondly, I am instructed to consider the actions of the accused. Here I note paragraph 44 of *Morin*, which says that:

> Included under this heading are all actions taken by the accused which may have caused delay.
>
> ...
>
> Actions which could be included in this category include change of venue motions, attacks on wiretap packets, adjournments which do not amount to waiver, attacks on search warrants, etc.

[27] As I understand *Morin*, then, the "actions" of the accused referred to here are those beyond the ones leading to periods of waiver or relating to the issue of prejudice. Otherwise, such "actions" might be accounted for twice in this analysis, to the accused's detriment. To be clear, the actions or inaction of the accused which relate to his attitude towards a timely prosecution of this offence will be dealt with shortly under the topic of prejudice.

Actions of the Crown

[28] Thirdly, under reasons for delay I am instructed to examine any actions of the Crown which contributed to the delay. Here I take the RCMP to fall within the ambit of the Crown. I am initially concerned about the fact that the police failed to take reasonable steps to execute the first arrest warrant. There were options available to them.

[29] First, they could have accessed the particular files that came up on the PIRS report for Mr. Unka. That report indicated that as late as November and December of 2000 (I note that the investigation commenced on May 7, 2001 and continued until the charge was laid on July 25, 2001) Mr. Unka had been presumably in contact with the police, because he had been charged with serious offences such as cocaine trafficking. Thus, there may have been relatively recent information on his whereabouts in those files, or at least information which could have given rise to further leads and investigation.

[30] Second, the officers in Fort Good Hope could have contacted other RCMP detachments in the region with the same objective.

[31] The only evidence on this point came from Sergeant Seafoot, who said in his affidavit that he searched PIRS in an effort to locate Mr. Unka, but was unable to do so. The affidavit did not say the RCMP checked the files identified in the PIRS report and therefore I conclude that was not done. Beyond that, what Sergeant Seafoot did to locate Mr. Unka was limited to speaking with the complainant's family and other RCMP members in Fort Good Hope. He then entered the first warrant on CPIC on July 30, 2001. He was soon after transferred from Fort Good Hope in August 2001 and had no further involvement in the file. There is no evidence of any other police activity on the file until Mr. Unka's arrest in Yellowknife almost one year later.

[32] I also repeat my concerns about the apparent negligence of the police in allowing the second public interest warrant to expire on CPIC, which led to no action being taken to execute that warrant until October 7, 2003.

[33] *R.* v. *Gahan*, [1988] A.J. No. 415, was a fraud case where delay was an issue. There, O'Leary J., of the Alberta Court of Queen's Bench, made some relevant comments about police inaction on a warrant. He noted that the police investigator followed normal practice in entering the particulars of the arrest warrant on the CPIC system, but made no follow-up contact with the accused's ex-wife or the complainants to determine the accused's whereabouts. O'Leary J. said "… it would have been prudent and simple for [the investigator], or another police officer at his direction, to make follow-up inquiries …".

[34] In *R.* v. *Wright*, 2003 ABQB 1003, Slatter J., also of the Alberta Court of Queen's Bench, dealt with a delay of trial application where the accused was charged with assault with a weapon, criminal harassment and uttering a threat. There, the court noted that after an arrest warrant was issued for the accused, it was simply registered on the police information system and no further efforts of any kind were made to locate the accused. At paragraph 6, Slatter J. said that the police were "apparently counting on the Accused eventually coming into contact with a police officer at some time in the future". Later, in discussing the actions of the Crown in review of the reasons for the delay, Slatter J. said at paragraph 22:

> From the record it appears that after the initial attempts to locate the Accused failed, police essentially did nothing. They recorded the warrant on the police information computer, but took no active steps to follow-up

> on the phone numbers and addresses that had been provided for the Accused in Saskatchewan and Red Deer. The strategy of the police appears to have been to wait until the Accused came into contact with the system for other reasons, and then to execute the warrant. An issue in this case is whether this is an acceptable strategy.

[35] Following a review of the case law, Slatter J. concluded at paragraph 30:

> In this case, no evidence was presented as to why the police adopted the passive strategy they did, and whether limited institutional resources played a role or not.

[36] I appreciate the distinction made by the Crown on the present application that the RCMP had no information or knowledge of the accused's whereabouts. Whereas, in the cases just cited, the police did have some knowledge, but failed to act upon it. Nevertheless, I conclude that the RCMP could have done more to attempt to find out information or leads on the whereabouts of Mr. Unka, but they did not. Had they done so, the balance may well have tilted in the Crown's favour with respect to those portions of the overall period of delay just prior to Mr. Unka's first two arrests on this charge. Indeed, with respect to the second period just prior to his arrest on October 7, 2003, it cannot even be said that the police were simply waiting for Mr. Unka to "pop up" in the system, since the second arrest warrant was no longer registered in the system.

[37] It is significant to note that when the accused failed to appear for his jury trial in Fort Good Hope on September 27, 2004, the consequential arrest warrant was executed in Yellowknife on the very same day, largely as a result of some good police work by Sergeant Crowther. This, of course, begs the question why such police work was not done earlier.

[38] I note that in the Crown's brief of argument, at paragraph 22, it is stated:

> ... but for the delay in apprehending the accused on the two warrants that were issued for his arrest, none of the delay in this case is attributable to the Crown.

The obvious corollary to that statement is that the delay in apprehending the accused

on the two warrants ***is*** attributable to the Crown.

Institutional Resources

[39] Fourthly, under reasons for delay I must consider any limits on institutional resources. Although this was not pressed by the Crown, it was to some extent alluded to by Sergeant Crowther. His experience was that the Fort Good Hope RCMP detachment is extremely busy and, in fact, is one of the busiest in the Northwest Territories. The unexpressed implication was that the police there were too busy to pursue Mr. Unka's whereabouts any further than they did. However, there was no direct evidence that the limitations upon the RCMP Detachment in Fort Good Hope was an explanation for their inaction in executing either the first or the second arrest warrant.

[40] In any event, Sopinka J. in *Morin* said at paragraph 48, "There is a point in time at which the Court will no longer tolerate delay based on the plea of inadequate resources". Similarly, as Vertes J. said in *R.* v. *Watson*, referred to earlier, "prosecutions are not put on hold because of operational limitations".

Prejudice to the Accused

[41] The period in issue now is some 24 months, which is a relatively lengthy period compared with those in the several cases referred to on this application. As stated in *Morin* at paragraph 61, "… in an individual case, prejudice may be inferred from the length of the delay. The longer the delay the more likely that such an inference will be drawn."

[42] Also, it must not be forgotten that Mr. Unka at this stage is still presumed to be innocent: see *Kusyj*, cited above. Further, as Marshall J. said in *Kusyj* at page 2:

> It seems to me that failing some compelling reason for delay, the Crown should move on with any serious charge against a citizen to minimize the stress, stigmatization, and anxiety that criminal charges evoke.

[43] There is evidence from the accused of anxiety and stress suffered by him and his family as a result of the charge. Having observed Mr. Unka testify on the point, I accept that evidence as genuine and understandable.

[44] Also, Mr. Unka clearly has memory problems and was easily confused in his testimony. I find that he would logically have been in a relatively better position to make full answer and defence if he had notice of the charge in 2001, rather than having to do so some three and a half years later: see *Morin*, at paragraph 63.

[45] I return to the comments in *Morin* that action or non-action by the accused which is inconsistent with a desire for a timely trial is something that I must consider. In doing so, I must also be careful not to subvert the principle that there is no legal obligation on the accused to assert the right to a timely trial: *Morin*, at paragraph 62. Nevertheless, inaction may be relevant in assessing the degree of prejudice, if any, that an accused has suffered as a result of delay. I repeat that conduct of the accused falling short of waiver may be relied upon to negate prejudice. The degree of prejudice or absence thereof is also an important factor in determining the length of institutional delay that will be tolerated: *Morin*, at paragraph 64.

[46] Mr. Unka was completely unaware of the charge for the first 11 months that it was in existence. After learning of the charge, he did take some steps. He called the Law Line; he apparently called and spoke with a court worker; he made an application for Legal Aid. I believe I heard him say that at one point he spoke to an RCMP member about a court date. He retained defence counsel. He made arrangements for agents and counsel to appear with him and for him in court on a number of occasions. He was concerned about his trial during the summer of 2004. He tried to borrow money from family to get to court. He travelled from Fort Simpson to Yellowknife in an attempt to get to Fort Good Hope for his first trial date, and he subsequently travelled from Fort Simpson to Yellowknife for his present trial date.

[47] Strictly speaking, Mr. Unka failed to appear for his preliminary inquiry in Fort Good Hope on March 3, 2004. Although he had retained counsel to represent him on that date, as this was an indictable matter, the *Criminal Code* provisions of the day did not authorize his counsel to appear as his agent. Therefore, the presiding Territorial Court Judge at the preliminary inquiry made a finding that Mr. Unka had absconded from that appearance and the preliminary inquiry proceeded in his absence. Nevertheless, his counsel was, as I understand it, allowed to cross-examine the Crown witnesses on his behalf. Therefore, as I previously suggested, I regard this failure to appear as a technical default and not an intentional or negligent one.

[48] Admittedly, Mr. Unka acted in a dysfunctional and dilatory manner in dealing with his first and third failures to appear, those being on his first appearance and later on his first trial date. However, he was then and is now relatively impecunious and found it difficult to travel from Fort Simpson to Fort Good Hope to attend court. And he did not totally ignore the process and thumb his nose at it. As defence counsel put it, he was not completely indifferent to the process.

[49] Therefore, having considered the inaction of the accused in preparing his defence, I acknowledge that this, to some extent, negates the prejudice that he claims. However, for the reasons just given, I not only infer prejudice from the lengthy residual delay of 24 months, I also accept that there is evidence of actual prejudice. This prejudice remains significant, even though partially invalidated by the inaction of the accused, and is an important factor in my decision not to tolerate the delay.

CONCLUSION

[50] In conclusion, I grant the application and order a judicial stay of proceedings on the charge in the indictment.

[51] I wish to express my particular appreciation to both counsel for their very careful, thoughtful and helpful submissions.

L.F. Gower
J.S.C.

Dated at Yellowknife, NT this
_____ day of February, 2005.

Crown Counsel: Sadie Bond

Counsel for the Accused: Graham Watt

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Application for a judicial stay of proceedings.

Heard at Yellowknife on January 25, 2005

Reasons filed: February 25, 2005

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE L.F. GOWER

Crown Counsel: Sadie Bond
Counsel for the Accused: Graham Watt