R. v. Michel, Michel & Marlowe, 2005 NWTSC 76 Date: 2005 09 02
Docket: S-1-CR20040000029

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

-and-

ANTOINE MICHEL, NOEL MICHEL and RAYMOND MARLOWE

Reasons for dismissal of an application for a judicial stay of these proceedings.

Heard at Yellowknife, NT on August 15, 2005

Reasons filed: September 02, 2005

REASONS FOR JUDGMENT OF THE HONOURABLE V.A. SCHULER

Counsel for Antoine Michel: Glen Boyd

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REASONS FOR JUDGMENT

[1] In a Memorandum of Judgment filed August 18, 2005, I dismissed an application by the three accused for a judicial stay of these proceedings based on pre- and post-charge delay and abuse of process. These are the reasons for dismissal.

[2] The three accused are charged with a rape alleged to have occurred in 1975. They are said to have participated, with five or six other men, in the gang rape of the complainant. The complainant first made a statement to the police about the incident in May 2001. Informations were sworn against each of these accused on September 6, 2002. Subsequently, three other men were also charged. One of those was discharged at the end of the preliminary inquiry on February 20, 2004. The Crown stayed proceedings against two others on the eve of the first trial, held September 20 to 23, 2004. That trial, which proceeded against the three accused who have brought this application, resulted in a hung jury. At the time this application was heard, the second trial was scheduled to commence August 29, 2005.

Pre-charge delay

[3] The accused rely on their 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 enshrined in s. 7 of the Canadian Charter of Rights and Freedoms.

This right is, they say, violated by the pre-charge delay in this case, and the relief granted under s. 24(1) of the *Charter* should be a stay of these proceedings.

[4] The principles of law relating to pre-charge delay are set out in *R. v. L (W.K.)*, [1991] 1 S.C.R. 1091: delay in charging and prosecuting an individual cannot, without more, justify staying the proceedings as an abuse of process at common law. Staying proceedings based on the mere passage of time would be the equivalent of imposing a judicially created limitation period for a criminal offence. What matters is the effect of the delay on the fairness of the trial.

[5] The accused do not dispute that those are the guiding principles. They rely not solely on the delay, but also on certain events which occurred prior to the charge being laid: the death of three potential witnesses and the destruction of certain medical records.

[6] The dead witnesses are as follows. Noel Marlowe, whom the complainant alleges took part in the gang rape, died before the complainant gave her first statement to the police. It is argued by the accused that Noel Marlowe was older than the other men and might therefore have a better recollection of the events. The accused say that their inability to call Noel Marlowe as a witness or cross-examine the complainant based on what he would say is prejudicial to their ability to make full answer and defence.

[7] The second witness, who also died prior to the complainant making her first statement, is Ruthie Catholique, a friend of the complainant. The complainant has testified that she left her community with Ms. Catholique and told her about the gang rape shortly after it occurred. She has also testified she told Ms. Catholique about her injuries and Ms. Catholique told her to see a doctor. The accused rely on their inability to call Ms. Catholique as a witness or cross-examine the complainant based on what she would say.

[8] The third witness is Florence Sanderson, a sister of the complainant. She also died before the complainant spoke to the police. The complainant says she lived with her shortly after the gang rape and told her about it. The accused say that the complainant has given contradictory testimony about when she left home and where she lived and that the sister's evidence could have been called by them or used in cross-examination of the complainant on that point. Further, they say, since the

complainant testified that she had to seek medical attention, this witness would have been able to give evidence about the complainant's injuries.

[9] Medical records are the final item. The complainant has testified that she saw a doctor at the hospital in Yellowknife after the gang rape. Information from the hospital is that there is no record of the complainant having been admitted and if she was not admitted, but seen as an outpatient, the corresponding record would have been destroyed in a 1996 purge of such records. Counsel for the accused take the position that because the complainant said she saw the doctor for certain tests, it is likely she was seen as an outpatient. The accused say that the destroyed records would reveal whether the complainant sought medical attention when she said she did and for the reasons she says she sought it and what, if any, injuries were observed by the medical professionals who tended to her. The records are said to be needed to test the complainant's version of events.

[10] The accused rely on *R. v. Grandjambe*, [1996] A.J. No. 789 (Q.B.), which involved a forty-year-old allegation of rape. The trial judge was asked to stay proceedings for pre-charge delay based on the death of two witnesses and missing employment records that might have been relevant to whether the accused had an alibi. The trial judge framed the test this way: the accused need not show that he would have been helped by evidence now lost, but only that it is reasonably possible that he could have been helped.

[11] Crown counsel argued that the test is more stringent than a reasonable possibility that the lost evidence could help the accused and is set out in *R. v. Grimes* (1998), 122 C.C.C. (3d) 331 (Alta. C.A.). That case does not refer to *Grandjambe*, but does review jurisprudence from the Supreme Court of Canada that post-dates *Grandjambe*: *R. v. Carosella* (1997), 112 C.C.C. (3d) 289; *R. v. La* (1997), 116 C.C.C. (3d) 97. It also reviews *R. v. Antinello* (1995), 97 C.C.C. (3d) 126 (Alta. C.A.), which was relied on by the trial judge in *Grandjambe*. In *Grimes*, the Alberta Court of Appeal was careful to distinguish between cases of lost or missing evidence and those of evidence in the possession of, but not disclosed by, the Crown, which was the issue in *Antinello*. The test as stated by the Court in *Grimes* is this: to stay proceedings, the trial judge must be satisfied on a balance of probabilities that the lost evidence is of such major importance to the defence case that a fair trial cannot be had without it, or that the loss of that evidence deprives the accused of the opportunity to make a full answer and defence.

The Court went on to say that then, only as a last resort and in the "clearest of cases", should a stay be granted.

[12] The test set out in *Grimes* is in substance the same as that described by the trial judge and quoted with approval by the Ontario Court of Appeal in *R. v. J.T.G.* (2000), 70 C.R.R. (2d) 243: the question is whether there is an air of reality that the missing evidence would in fact, in a material way, assist the accused in his defence, and whether, on a balance of probabilities, the absence of such evidence would deny the accused his right to make full answer and defence. Similarly, in *R. v. D.J.B.* (1993), 16 C.R.R. (2d) 381, the Ontario Court of Appeal said that what must be demonstrated on a balance of probabilities is that the missing evidence creates a prejudice of such magnitude and importance that it can be fairly said to amount to a deprivation of the opportunity to make full answer and defence.

[13] In *R. v. Ledinski* (1995), 102 C.C.C. (3d) 445, the Saskatchewan Court of Appeal said that the test requires the defence to show that there is an air of substantial reality that the missing evidence would in a material way assist the accused. The Court quoted with approval from a trial ruling in *R. v. Finta*, April 24, 1990, Ont. Sup. Ct., unreported, where it was said that the defence has a burden to show what the evidence is and that it would more likely than not tend to rebut some evidence in the Crown's case or would more likely than not tend to assist the accused. If it is not shown that the evidence would help the accused or if it appears that the evidence might just as easily hurt the accused more than it would help him, that tends to rebut any claim that its loss would preclude a fair trial to him.

[14] The ultimate issue, as stated in *Ledinski*, is whether, in the circumstances, the delay would likely preclude a fair trial to the accused.

[15] In my view, the weight of these authorities is to the effect that the accused must show that the missing evidence would probably assist, not that it is reasonably possible that it would assist. The law now is as set out in *Grimes* and not *Grandjambe* or *R. v. L.J.S.*, [1996] A.J. No. 73 (Q.B.).

[16] The accused in this case point out that they have no way of knowing what was in the purged medical records or what the dead witnesses could have said. They say that the Court should not speculate as to what the evidence may be or how it may help

them. They say that without having access to the lost evidence, they are left with only the unchallenged narrative of the complainant.

[17] However, the record shows that there is other evidence. At the first trial, the Crown called as a witness a man who had been charged as a participant in the gang rape, but was discharged at the preliminary inquiry. His evidence could be viewed as contradicting important aspects of the complainant's evidence. There is no indication that the two men against whom charges were stayed are not available to be called as witnesses. The brief filed in support of the abuse of process argument makes reference to various other individuals not called by the Crown at the first trial but who could be called by the accused if they so wished.

[18] None of the accused testified at the first trial and they have put no evidence forward on this application to indicate what their defence is. None of the lost evidence has been linked to the position of any of the accused on any aspect of the case except in the general sense that it may have a bearing on the complainant's credibility, which will be the main issue at trial.

[19] The most that can be said is that the lost evidence could help either the defence or the Crown. It is speculative to say it is more likely to help the defence, unlike, for example, a case where the accused demonstrates evidence of an alibi defence but no longer has access to records that he says would confirm he was elsewhere at the relevant time. It has not been demonstrated that the lost evidence in this case puts the accused in an impossible position, as they allege, precisely because they cannot say whether that evidence would help or hurt them.

[20] Nor has it been shown how the absence of the evidence prejudiced the accused at their first trial. As many of the cases say, this type of application should be assessed in the context of the evidence at trial; counsel is often given leave to revive the application during the trial. There is no indication that the missing evidence in any way impaired the ability of the accused to defend themselves at trial or that the first trial was unfair. The accused did not call evidence and it is clear that the main issue before the jury was the complainant's credibility, which all counsel for the accused forcefully challenged in their addresses to the jury. Specifically, they focused on the lack of any evidence corroborating the complainant's version of events and inconsistencies in her testimony.

[21] The accused have not shown that the pre-charge delay and the lost evidence have likely prejudiced their right to a fair trial, which is why I dismissed that aspect of their application.

Post-charge delay

[22] The accused applied, as an alternative, for a stay of proceedings based on violation of their right to be tried within a reasonable time under s. 11(b) of the *Charter*. The factors to be considered relevant to post-charge delay have been set out by the Supreme Court of Canada in *R. v. Morin* (1992), 71 C.C.C. (3d) 1:

> (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;
>
> (4) prejudice to the accused.

[23] As noted by Vertes J. of this Court in *R. v. Watson*, [1995] N.W.T.J. No. 56, the accused has the ultimate burden of proof that there has been an infringement of his right, but the Crown may have an evidentiary burden to explain any delays that appear to be unreasonable.

(1) Length of the delay

[24] The total period of time from when the accused were charged on September 6, 2002 to the date of the upcoming second trial is almost 36 months. A brief chronology of events is as follows.

[25] The three accused were charged on September 6, 2002. Their case was before the Territorial Court on November 15 and again on January 17, 2003. By the latter date three more individuals had been charged, but not yet arrested. That had been done by March 21, the next appearance. There were further appearances while some of the six accused made arrangements for counsel. On June 6, 2003, the preliminary inquiry was set for July 14, 2003. Prior to the latter date, the matter was brought forward by one of the defence counsel and the preliminary inquiry date was changed to September 22, 2003. The Crown could not proceed with the preliminary inquiry on September 22 as the complainant did not appear and it was adjourned to February 19, 2004. After completion of the preliminary inquiry, counsel appeared at scheduling for the Supreme Court list on March 17, 2004. The clerk's notes indicate they advised the scheduling judge that there were many issues and motions to be dealt with prior to trial. The trial took place September 20 to 23, 2004, ending with a hung jury.

[26] The Crown notified the Court in late September 2004 that it intended to proceed to a second trial. Counsel's available dates for trial were provided and the second trial was scheduled to begin August 29, 2005.

[27] Although copies of the endorsed informations were provided to the Court by counsel for the accused along with a list of appearance dates, and Crown counsel provided transcripts of the various court appearances, there are some gaps in the material and therefore I have had recourse to the court file as necessary.

[28] The accused say that 36 months from charge to second trial is *prima facie* unreasonable. I think the more appropriate approach, under *Morin*, is to ask whether the period is of sufficient length to raise an issue as to its reasonableness. As was said in *Morin*, if the length of the delay is unexceptional, no inquiry is warranted and no explanation for the delay is called for unless the applicant is able to raise the issue of reasonableness by reference to other factors such as prejudice. The delay in this case is, in my view, of sufficient length to raise an issue as to its reasonableness and call for the inquiry as described in *Morin*. This does not mean that the delay is *prima facie* unreasonable.

(2) Waiver

[29] As stated in *Morin*, if by agreement or other conduct the accused has waived in whole or in part his rights to complain of delay, then this will either dispose of the matter or allow the period waived to be deducted. To be effective, such waiver must be clear and unequivocal, with full knowledge of the rights the procedure was enacted to protect and of the effect that waiver will have on those rights; however, waiver can be explicit or implicit.

[30] None of the accused conceded any waiver on their part.

[31] Crown counsel alleged that Antoine Michel waived the delay from the originally scheduled preliminary inquiry date of July 14, 2003 to the second date it was scheduled for, September 22, 2003. The July 14 date had been agreed to by Mr. Michel even though his counsel was not available for that date and would have had to make alternative arrangements for his representation for the preliminary inquiry. When the matter was brought forward by another defence counsel (acting for an accused against whom the charge was later stayed) on July 3, Antoine Michel's counsel spoke in support of that counsel's adjournment request. Although Mr. Michel did not explicitly waive his s. 11(b) rights, I find that there was an implicit waiver as he had been prepared to proceed with the preliminary inquiry in July despite his counsel's unavailability, but then supported the adjournment, apparently in the hope of a new date being set when his counsel would be available. I find that this constituted waiver, in particular because the presiding Territorial Court Judge made it clear that he preferred not to adjourn the preliminary inquiry and was concerned about the delay involved.

[32] The waiver is therefore 2 months, which reduces the delay to 34 months insofar as Antoine Michel is concerned.

[33] As to Noel Michel, the Crown submits that his failure to appear as required constitutes waiver. The record indicates that he failed to appear on November 15, 2002, which was the first court date set and a warrant was issued for his arrest. He was apparently released after arrest and did appear on January 17, 2003 and again on March 21. He failed to appear on April 17 and a warrant was issued. There was still a warrant out for his arrest on September 22, 2003. By the time the preliminary inquiry went ahead on February 19, 2004, Noel Michel was present with counsel. While his

failure to appear may not on its own have caused any delay in this case, it is a circumstance that is inconsistent with a wish to have this matter dealt with in a timely fashion. He, and the other accused present, were told by the presiding Territorial Court Judge on January 17 and again on March 21, 2003 that the charge is serious and they should get counsel as soon as possible. In my view, Noel Michel by failing to appear implicitly waived any delay in the time period November 2002 to January 2003 and April 2003 to February 2004, a total of 12 months. This reduces the delay as far as he is concerned to 24 months.

[34] No waiver was alleged by the Crown on the part of Raymond Marlowe and I accept that there was none.

(3) Reasons for the delay

a) *Inherent time requirements*

[35] In terms of evidence, this is not a complex case. Four witnesses testified at the first trial. Because the offence is indictable, there was a preliminary inquiry, which adds to the inherent time requirements. The main factor, however, in assessing inherent time requirements is that until the end of the preliminary inquiry six accused were involved, each with his own counsel. After the preliminary inquiry, that was reduced to five accused and then reduced to three just prior to the first trial. The number of accused and counsel are what make this a complex case, certainly one that is out of the ordinary. It means that proceedings take longer and more schedules have to be accommodated when setting dates.

b) *Actions of the accused*

[36] As Sopinka J. pointed out in *Morin*, this aspect of the reasons for delay is not to be regarded as putting blame on the accused for certain portions of the delay. It is simply an exercise in identifying all actions which the accused have chosen to take and which contributed to the delay.

[37] This analysis is somewhat complicated by the fact that there were originally six accused and now there are only three. I will proceed on the basis that the actions of each accused should be viewed separately.

[38] Other than what I have referred to above regarding Antoine Michel (which, since it is counted under waiver, will not be counted again in this part of the analysis), the only action on his part pointed to by the Crown relates to his counsel's unavailability on dates offered by the Court when the preliminary inquiry was adjourned on September 22, 2003 because the complainant was not present to testify. The Court proposed dates in late October and early November, neither of which was agreeable to Antoine Michel's counsel due to other court commitments. A date in mid-December was proposed, to which counsel responded that he would be unavailable for the next several weeks from then for personal reasons. February 19 was then set as the new preliminary inquiry date with no objection from counsel for Antoine Michel.

[39] Some of the delay at the beginning of the proceedings is at least in part attributable to Antoine Michel and the other accused making arrangements for counsel. At the appearance on January 17, 2003, the Court was advised that Legal Aid had not yet assigned counsel to any of the accused. The presiding judge throughout the Territorial Court proceedings alerted the accused to the importance of retaining counsel. Whatever the precise reason why all the accused did not have counsel right away, there was some delay in making those arrangements. Antoine Michel did not have counsel until March 21, 2003.

[40] I have already dealt with Noel Michel's failure to appear in the section on waiver. The only other action on his part that is relevant to delay is the fact that he had not retained counsel by the time of his March 21, 2003 appearance, after which he failed to appear as set out above.

[41] Any delay attributable to Raymond Marlowe has to do with his retaining counsel. Mr. Marlowe appeared on the first date scheduled, November 15, 2002. No counsel appeared for Mr. Marlowe until April 22, 2003. Counsel who appeared then applied to be removed as counsel on July 8. On the first date set for the preliminary inquiry, September 22, 2003, Mr. Marlowe's current counsel appeared and indicated to the Court that he had just been retained. His position on the Crown's September 22 adjournment request was that he neither consented to nor opposed the adjournment. He was not available for a November date proposed by the Court for the preliminary inquiry and did not make any submissions as to the February date that was set.

c) *Actions of the Crown*

[42] Again, the point of this analysis is not to cast blame, but simply to determine what actions by the Crown have contributed to the delay. The accused identified in this regard the Crown's actions in failing to have disclosure available, failing to subpoena the complainant for the September 22, 2003 preliminary inquiry and not staying charges against two of the accused until the eve of the first trial.

[43] When this matter was before the Territorial Court on January 17, 2003, Legal Aid had not yet assigned lawyers for the accused men. When the matter was before the Court again on March 21, 2003, only two of the accused (Antoine Michel and one who is no longer accused) were represented by counsel. Noel Michel had not made arrangements for counsel and told the presiding judge he would represent himself. The two defence counsel did not have disclosure from the Crown. Crown counsel who appeared at that time told the Court that a letter had gone out to both lawyers advising them that they could "let the Crown know" and disclosure would be provided. On March 21, Crown counsel had only one disclosure package available.

[44] On this record, and without any other evidence, I have no way of knowing when counsel for Antoine Michel advised the Crown that he was retained or why the Crown did not provide disclosure on or before March 21 when it apparently knew, since it wrote to him, that he was acting in the matter. There is no information before me as to when disclosure was finally provided. Although I am inclined to agree that some delay is attributable to the Crown arising out of the failure to provide disclosure, I have no way of assessing how much time is involved.

[45] The second circumstance identified by the accused is the Crown's failure to subpoena the complainant, who did not appear at the preliminary inquiry set for September 22. Counsel for the Crown concedes that the delay stemming from this must be attributed to the Crown. As I have noted above, the preliminary inquiry did not take place until February 19, 2004, a delay of five months. The Crown's responsibility for that delay is offset somewhat by the fact that available court dates earlier than February 19, 2004 were not taken up by the accused.

[46] The third circumstance relied on by the accused is the Crown's failure to stay the charge as against two of the (by then) five accused until the eve of the first trial. Clearly there was some evidence against both those accused because they were committed for trial after the preliminary inquiry. There is no evidence before me as to

why the charges were stayed or why that was not done until the eve of trial. There is also no evidence as to how the schedules of the counsel of those two accused affected the setting of the trial date. Although the record indicates that when counsel for the five accused appeared before the Supreme Court on March 17, 2004 to speak to a trial date, the Court was told there were numerous pretrial issues to be dealt with, the only pretrial application was brought by Raymond Marlowe, who remains an accused in this case. I accept that some delay is likely attributable to the fact that there were five counsel involved instead of three, but on the evidence before me it is not possible to identify the extent of that delay.

d) *Limits on institutional resources*

[47] Counsel did not refer to any issues under this heading.

e) *Other reasons for the delay*

[48] No other reasons for the delay were identified. The accused did not make any specific submissions about the delay from the conclusion of the first trial to the commencement of the second trial, a period of almost one year. I note from the court file that counsel were advised of that date in December 2004 and also that I was assigned as the trial judge. Counsel had, after the first trial, submitted their available dates and defence counsel advised the Court that there were a number of pretrial issues to be dealt with and that expert evidence might be called by at least one of the accused. I can find no record of any objection to the date scheduled and it was not suggested on this application that there was any date prior to August 29 when the second trial could have proceeded. I infer that the date was scheduled to accommodate other commitments of counsel, witnesses and the Court and to allow sufficient time to address the pretrial and evidentiary issues identified by counsel.

(4) <u>Prejudice to the accused</u>

[49] No evidence was presented about actual prejudice to the accused. Apart from the active opposition by Antoine Michel to the adjournment of the preliminary inquiry on September 22, 2003, there is no evidence that any of these accused took any action to move matters along faster than they were proceeding. As I said above, on September 22, 2003, Noel Michel did not appear and the warrant for his arrest was still outstanding. Raymond Marlowe had just retained counsel who neither opposed nor

consented to the adjournment. In my view the situation is similar to that in *Morin*, where it was noted that:

> While the accused was not required to do anything to expedite her trial, her inaction can be taken into account in assessing prejudice. I conclude for this reason that the accused was content with the pace with which things were proceeding and that therefore there was little or no prejudice occasioned by the delay.

[50] I am asked to infer prejudice from the length of the time these proceedings have been ongoing and while I accept that there is always some prejudice to an accused by reason of a criminal charge hanging over his or her head, I have to weigh against that the inaction of the accused as referred to above. I conclude that the accused were content with the pace of events in this case and accordingly there was little or no prejudice occasioned by the delay.

[51] On reviewing all of the circumstances and balancing the various reasons for delay, I find that most of the delay in this case is inherent in a case involving so many accused. I find that the delay in the case of each of the accused is not unreasonable and has resulted in little or no prejudice to the accused. The accused's s. 11(b) *Charter* rights have not been infringed.

Abuse of process

[52] The accused Antoine Michel and Raymond Marlowe rely on an abuse of process argument contained in a brief filed on Mr. Marlowe's behalf. Counsel did not make oral argument about this aspect of the case, although some of the evidentiary issues referred to in the brief were canvassed in argument on the issue of pre-charge delay. No authorities nor any particular section of the *Charter* were referred to as the basis for this part of the application. The grounds set out in the notice of motion in support of the judicial stay of proceedings sought are that the Crown has no reasonable prospect of conviction and the retrial of this case, in light of delay, the reliability of the complainant and the prospect of conviction, amounts to an abuse of process.

[53] The brief describes various contradictions and alleged weaknesses in the complainant's trial evidence, the lack of other Crown evidence corroborating the complainant's version of events and some evidence that contradicts some of her testimony.

[54] While the matters referred to in the brief may properly be the subject of a jury address (and in some instances were the subject of address at the first trial), it has not been demonstrated that they justify a stay of proceedings either on their own or in combination with the delay arguments set out above. A stay should only be granted in the clearest of cases, where the abuse of process is such that the community's sense of fairness is violated. This is not such a case and accordingly the application for a stay based on abuse of process has also been dismissed.

[55] The foregoing are my reasons for dismissing the applications for a judicial stay of proceedings.

V.A. Schuler
J.S.C.

Dated at Yellowknife, NT
this 2nd day of September 2005.

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