R. v. Harbin, 2005 NWTSC 77

Date: 2005 09 01
Docket: S-1-CR 2005000028

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

Respondent

-and-

KRISTA HARBIN

Applicant

Application seeking stay of proceedings due to unreasonable delay.
Application dismissed.

Heard at Yellowknife, NT on August 29, 2005

Reasons filed: September 1, 2005

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

Counsel for the Respondent (Crown): Shelley Tkatch
Counsel for the Applicant: James D. Brydon

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REASONS FOR JUDGMENT

[1] The applicant, Krista Harbin, is awaiting trial on a charge of fraud. The charge was laid on February 7, 2005, and, at her first appearance to the charge, the applicant waived her right to a preliminary inquiry and elected to proceed directly to trial in this court. The trial date has not yet been set.

[2] In May, the applicant filed this motion seeking a stay of proceedings on the basis that (a) her right to be tried within a reasonable time as guaranteed by s.11(b) of the Canadian Charter of Rights and Freedoms has been violated, and (b) these proceedings are an abuse of process in that the criminal process of the court is being used to collect a civil debt. At the hearing of this application, however, applicant's counsel stated that the sole ground being advanced in support of a stay was delay in bringing the applicant to trial.

[3] Generally speaking, a court will not entertain an application for a stay premised on trial delay unless the period in question is of sufficient length to raise an issue as to

its reasonableness. If the length of delay is unexceptional then no inquiry is warranted: *R. v. Morin*, [1992] 1 S.C.R. 771 (at para. 36). In this case, applicant's counsel quite properly conceded that there is nothing exceptional about the time elapsed since the laying of the charge (some 7 months) and, if that was the only period under consideration, this application would not meet the threshold test of unreasonableness. However, the application is also based on a period of pre-charge delay which, according to the applicant, resulted in prejudice to her and an abuse of process warranting the remedy of a stay.

Facts:

[4] The applicant was employed by an auto service shop from August 2003 until March 2004. In April, the owner of the business complained to the Royal Canadian Mounted Police that his ex-employee had written cheques to herself for more money than she should have and without authorization. There was a total in excess of $12,000.00 in alleged unauthorized transactions. The business owner told the RCMP officer assigned to the case, Cpl. Leith, that he had confronted the applicant about paying back what she owed and had received $3,500.00 towards repayment. The employer, however, wanted to pursue criminal charges.

[5] On July 9, 2004, Cpl. Leith met with the applicant. She formed the belief that there were grounds to charge her. She issued to the applicant an Undertaking and a Promise to Appear for an initial court date of August 31, 2004. The only requirement on the Undertaking was that the applicant abstain from communicating with any one connected with her former employer.

[6] Instead of proceeding to confirm the Promise to Appear by swearing an Information so as to charge the applicant, Cpl. Leith decided to investigate further. She had been told by the applicant that there was an agreement with her employer to pay back all the money. The applicant was asked to provide that document for Cpl. Leith's review (but apparently it was never provided). Cpl. Leith, however, was unsure if this was a civil matter as opposed to a criminal one. She sought the advice of counsel with the Department of Justice.

[7] On August 31, 2004, Cpl. Leith informed the applicant that the matter was still under investigation and that she would contact her at a later date. Eventually, after receiving and considering the legal opinion she requested, and conducting further

investigations, Cpl. Leith proceeded to swear an Information and charged the applicant on February 7, 2005. She then personally served a summons on the applicant on February 11th.

[8] The applicant stated that, throughout the period since July 9, 2004, she has suffered from considerable stress and anxiety due to the spectre of the criminal proceedings. She has been unemployed for the main part of this time and unable to find work. These assertions were not challenged at the hearing of this application.

Pre- and Post-Charge Delay:

[9] Section 11 (b) of the Charter states that "any person charged with an offence has the right ... to be tried within a reasonable time." In *Morin*, the Supreme Court held that the period to be scrutinized is the time elapsed from the date of charge to the trial. This follows the majority ruling in *R. v. Kalanj* (1989), 48 C.C.C. (3d) 459 (S.C.C.), where it was held that "charged", for purposes of s.11(b) of the Charter, refers to the point in time when an Information is sworn.

[10] In this case, the Information was sworn on February 7, 2005. But the applicant maintains that the relevant time period should be calculated from July 9, 2004, the date that Cpl. Leith issued an Undertaking and Promise to Appear to the applicant. The applicant's counsel argued that the applicant was in jeopardy from that point on and, as far as the applicant knew, she had been charged. Her liberty was restrained from that moment on, because she was on conditions pursuant to the undertaking, and thereby she was prejudiced.

[11] Crown counsel submitted that the law is clear: the only period relevant to the s.11(b) analysis is that since the Information was sworn. Any prior period is not to be analysed within the parameters of the s.11(b) jurisprudence but, instead, is to be analysed within the context of an abuse of process, whether as a common law remedy or as a breach of the s.7 Charter right to fundamental justice. And, whether under the common law or the Charter, the applicant has the burden of demonstrating that her rights have been infringed and that a stay of proceedings is the appropriate and just remedy.

[12] I agree with Crown counsel.

[13] The Supreme Court of Canada, since *Kalanj*, has clearly held that s.11(b) is applicable only after a person is charged with an offence. That occurs when an Information is sworn alleging an offence or where a direct Indictment is laid when no Information is sworn. As stated by McIntyre J. in *Kalanj* (at 470-471):

> The specific language of s.11 should not be ignored and the meaning of the word "charged" should not be twisted in an attempt to extend the operation of the section into the pre-charge period. The purpose of s.11(b) is clear. It is concerned with the period between the laying of the charge and the conclusion of the trial and it provides that the person charged with an offence will be promptly dealt with.

[14] The applicable principles and factors to consider with respect to post-charge delay are well-known since they were first delineated in cases such as *R. v. Askov*, [1990] 2 S.C.R. 1199, and *Morin (supra)*. But, as I noted previously, the applicant has conceded that there is nothing presumptively unreasonable about the post-charge period in this case. Therefore, I need not review those principles and factors.

[15] This leaves for consideration whether the length of time for which the applicant was under the threat of criminal prosecution amounts to an abuse of process. Crown counsel submitted that it was reasonable for Cpl. Leith to carry on her investigation, after July 9, 2004, especially in light of the possibility that this matter was more properly left to be resolved as a civil dispute.

[16] There is no question in my mind that the officer was justified in proceeding cautiously when confronted with indications raising the possibility that the criminal complaint was merely being used to collect a civil claim. Many cases have held that such a purpose can amount to an abuse of the court's process (see, for example, *R. v. Inuvik Coastal Airways Ltd.*, [1984] N.W.T.R. 92).

[17] There have been several cases in this jurisdiction that have addressed delays caused by operational limitations or problems during an ongoing police investigation: *R. v. Watson*, [1995] N.W.T.J. No. 56 (S.C.); *R. v. Unka*, [2005] N.W.T.J. No. 19 (S.C.). But these were all in the context of post-charge delay. No case has held that the mere passage of time prior to a charge being laid, and while an alleged crime is under investigation, can amount to an abuse of process absent some ulterior purpose or misconduct on the part of the police or prosecuting authorities. As noted in *R. v. W.K.L.*, [1991] 1 S.C.R. 1091, the question is not whether there is delay, but whether the effect of any delay has undermined an accused person's right to a fair trial.

[18] The standard to justify a stay of proceedings, whether under the Charter or at common law, is high. 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 or where continuing the proceedings would be oppressive or vexatious. But the remedy is reserved for the clearest of cases.

[19] A case similar to the present one, addressing many of the same principles, is *R. v. Cleary*, [2002] N.W.T.J. No. 19 (S.C.). There the offences, fraud and theft, allegedly occurred between 1990 and 1996. In 1996 and 1997 audits were conducted by the accused's employer. The matter was handed over to the police in August 1997, and an investigation was launched in September. Due to changes in personnel and other priorities, the investigation continued until charges were eventually laid in October 2000. The accused brought an application for a stay of proceedings arguing unjustifiable delay in the pre-charge phase of the investigation. Schuler J., who heard the application, concluded that the delay in laying charges was attributable to insufficient police resources. There was no suggestion, however, of any improper motive on the part of the police in dragging out the investigation. And, as she noted, it is not the job of the courts to supervise police investigation procedures.

[20] In her judgment, Schuler J. referred to the standard to be met when a stay is sought on the basis of an abuse of process (at paras. 16-18):

> Since this application was argued, the Supreme Court of Canada has, in *R. v. Regan*, [2002] S.C.J. No 14, summarized some if 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.
>
> 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.
>
> 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).

[21] Schuler J. went on to note that for pre-charge delay to warrant a remedy it must have a deleterious effect on trial fairness or prejudice the integrity of the administration of justice. But mere delay in charging, without more, does not justify a stay. She also emphasized (at para. 30) the need for a causal connection between the alleged abuse of process and real prejudice affecting the fairness of the trial. In that case, Schuler J. found no evidence of irremediable prejudice and dismissed the application.

[22] Similarly, in this case, I can find no evidence that the applicant's fair trial right or ability to make full answer and defence have been corrupted. There is no evidence of some "wrong" that will have a continuing effect unless the proceedings are stayed. And there is nothing to suggest that the public's sense of decency and fairness have been implicated. The things the applicant points to are matters of personal prejudice, i.e., stress, anxiety, employment difficulties. I am sure these matters are serious for the applicant but nothing has been identified that is not inherently part of the usual effects on most people awaiting a criminal trial. The overall time frame, even if one goes all the way back to July of 2004, is not so extreme as to presume prejudice to the integrity and public perception of the justice system. Finally, there is no evidence of police misconduct or negligence in the investigation. To the contrary, Cpl. Leith demonstrated a careful awareness of the potential problem in simply proceeding to lay a charge without satisfying herself that this was not properly a civil matter.

[23] For these reasons, the application to stay these proceedings is dismissed.

J.Z. Vertes
J.S.C.

Dated at Yellowknife, NT
this 1st. day of September 2005.

Counsel for the Respondent (Crown): Shelley Tkatch
Counsel for the Applicant: James D. Brydon