R v. John Phillip Koyczan, 2007 NWT SC 50 Date: 2007 07 19
Docket: S-1-CR20070000017

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

-and-

JOHN PHILLIP KOYCZAN

Applicant

Application for an Order for a stay of proceedings.

Heard at Yellowknife: June 20, 2007

Reasons filed: July 19, 2007

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE J.E. RICHARD

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REASONS FOR JUDGEMENT

[1] The accused is charged with committing a sexual assault in Yellowknife in August 2001, and is awaiting trial on that charge. On this application, he seeks a judicial stay of proceedings based on the delay in bringing this charge against him. He was charged in May 2006. He says that the delay in the investigation and prosecution of the charge is an abuse of process and an interference with his s.7 Charter rights.

[2] The complainant, initials JB, was 17 years old at the time of the alleged offence in August 2001. She told police that she was at a small park in Yellowknife on the evening in question, and was consuming alcohol with severalyoung men. She said she was asked if she wanted to have sex and that she responded that she did not want to have sex. She said she was punched in the face by one of the young men and went unconscious. She awoke hours later in some pain. Her clothes were in disarray. Her panties were missing. Her vaginal area was sore and she had other injuries, including bruises and a missing tooth. She was unable to say who did what to her after the punch

but can say that she did not consent to sex and was in no condition to consent to sexual intercourse. The police took JB to the local hospital where a sexual assault kit was completed. The exhibits, i.e., clothing, vaginal swabs, etc. were seized by the police pursuant to the sexual assault kit procedures and placed in an exhibit locker at the detachment.

[3] The police interviewed some of the young men who had been with JB at the park, including the accused John Koyczan. No one admitted to assaulting JB, nor implicated anyone else. The police investigation lay dormant for some time. The sexual assault kit and other exhibits was not sent to the forensic laboratory for analysis until November 2005. As a result of the analysis, a DNA profile of a male person was obtained from semen located on the exhibits, and when a comparisonwas done against the national DNA data bank, there was a match against the DNA profile of the accused John Koyczan. The accused was subsequently charged, in May 2006, with sexually assaulting JB.

[4] It is the delay between August 2001 and May 2006 in the bringing of the charge of sexual assault that the accused says is an abuse of process. How this pre-charge delay constitutes an abuse of process is not well articulated. No actual prejudice has been established on this application.

[5] There are a number of previous Court decisions, including some from this jurisdiction, which have held that the mere passage of time prior to a charge being laid will not amount to an abuse of process nor a breach of s.7 Charter rights, absent some ulterior purpose or misconduct on the part of the police or prosecuting authorities. See *Rourke v. The Queen* [1978] 1 S.C.R. 1021; *W.K.L. v. The Queen* [1991] 1 S.C.R. 1091; *R. v. French* (1991) 292 A.P.R. 14 (Nfld. S.C.); *R. v. Heron* [1995] N.W.T.J. No. 65; *R. v. J.F.G.* [1997] N.W.T.J. No. 11; *R. v. Harbin* 2005 NWTSC 77; and *R. v. Cleary* 2002 NWTSC 19.

[5A] The following excerpt from the French decision is instructive:

> "...for there to be found an abuse of process, or a violation of rights under s.7 or s.11(d) of the Charter arising from delay in investigating or charging, it must be shown that some actual, as distinct from speculative, prejudice has resulted to the applicant. ...Even with such prejudice, there is a further requirement beyond the simple fact of delay. The delay must either have been caused intentionally or negligently by the authorities in an attempt to thereby interfere with the ability of the

> applicant to make full answer and defence to the charges, or in circumstances where, considering the matter as a whole, the action of the executive, which includes all branches of the administration of justice, including the police and government officials, with respect to the institution of delay and reactivation of proceeding, is offensive to the principles of justice and fair play. In such cases, relief by stay will be available."

[6] In response to this application, the prosecutor presented evidence from police witnesses for the purpose of explaining what transpired and did not transpire between August 2001 and November 2005 in the investigation of this reported offence. I need not go into all the details of that evidence. I am satisfied that the main reason why this investigation was dormant for substantial periods of time was the inadequate level of police resources (i.e. personnel) at the Yellowknife detachment of the RCMP to deal with the high caseload.

[7] The police took a complete statement, videotaped and audiotaped, from the complainant JB on the day of the complaint. As indicated earlier, she was unable to state who had sexually assaulted her.

[8] The RCMP constable who was initially assignedthe role of primaryinvestigator conducted interviews, between August 31, 2001 and December 5, 2001, of five young men, including the accused John Koyczan, who were alleged to be present in the park at the time of the offence. He also wished to interview two other young men but was unable to do so. He states that he was unable to continue to concentrate on this investigation, due to many other investigations which had a higher priority and to the overwhelming volume, generally, of criminal investigations, at the Yellowknife detachment at that time. This officer says that at one point he asked a more senior officer for help on the file, and was told that everyone else was also busy and that he should do the best he could. He says that he never did get the other two witness statements that he wanted to get as part of his investigation. The overwhelming workload caused him a great deal of stress; he felt he was very much "on his own" on this file; and he admits to being relieved when he was transferred in July 2003 to a less busy detachment. During the time that he was the main investigatoron the file, he says he did not consider sending the sexual assault kit exhibits for analysis, as he says his main focus was the completion of the taking of statements. He acknowledges, in hindsight, that he could have sent the exhibits for analysis early in the investigation. While he was in charge of the file, in his view he did not have sufficient grounds to lay

a charge against the accused John Koyczanalthough he consideredJohn Koyczanto be a suspect.

[9] Another RCMP constable was assigned main responsibilityfor this file in 2003; however, he did not do his initial review of the file until September2004, and for much the same reason — his unit was fully tasked on numerous other criminalinvestigations of a higher priority and higher profile. In his eventual review of the file he noted that some of the young men in their statements were alleging "consent"and in this officer's view he felt he ought to personally interview the complainant JB on this issue before deciding whether to continue with the investigation of the sexual assaultcomplaint. By this time, however, the Yellowknife detachment had lost contact with JB. This officer finally was able to locate her at a new address in British Columbia in May 2005 but was not able to interview her until September 2005. After that interview, this officer was satisfied that a non-consensual act had occurred, and he initiated the process for sending the sexual assault kit and exhibits to the forensic laboratory. When that process resulted in a "hit" at the national DNA bank identifying John Koyczan in May 2006, a charge of sexual assault was laid against the accused. Prior to the DNA "hit", this officer, and his supervisor, were of the view that there were not sufficient grounds to lay a charge against John Koyczan.

[10] Those are the circumstancesexplaining the fact that the accusedwas not charged until May 2006. There existed an extremely high case load of criminal cases at the Yellowknife detachment, causing insufficient supervision or oversight regarding this file and also causing insufficient or timely actual work on the file for substantial periods of time. On the evidence on this application I find no ulterior motive or purpose, on the part of the police, associated with the fact that the charge was not laid until May 2006. On this application the accused has not established either misconduct or negligence.

[11] Nor has the accused established on this application that he is prejudiced by the pre-charge delay, or that it prevents him from making full answer and defence.

[12] The only specific submission made on the accused's behalf in that regard relates to one of the clothing exhibits seized from the complainant at the time of the initial complaint, i.e. the pants that she was wearing at the time of the assault. Apparently at the time that this exhibit was placed in the exhibit locker in August 2001, proper "drying" procedures were not followed, with the result that by the time the exhibits

were to be sent for analysis in 2005, mould had developed on the pants, and no analysis for the presence of DNA could be carried out. It is submitted that, but for the improper handling and the delay, evidence may have been obtained indicating the presence of the DNA profile of another male person who may have assaulted or sexually assaulted JB, or had consensual sex with JB. With the greatest of respect,this is mere speculation, this is not actual prejudice. On this application the accused says that he will be asserting a "consent" defence at trial. There is no air of reality to the suggestion that there may have been evidence on the seized pants which would assist the accused in putting in full answer and defence. At most, this is an argument that may be open to the accused during his trial, as the trial evidence unfolds.

[13] For these reasons, I find there is no merit in the accused's application. The request for a stay of proceedings is denied.

J.E. Richard,
J.S.C.

Counsel for the Crown: Shannon Smallwood
Counsel for the Accused: Hugh R. Latimer