

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- v -

JAMES CAESAR

Transcript of the Oral Ruling on a Section 11(b) application delivered by The Honourable Justice K. Shaner, sitting in Norman Wells, in the Northwest Territories, on the 10th day of September, A.D. 2013.

APPEARANCES:

Mr. A. Godfrey: Counsel for the Crown

Mr. M. Martin: Counsel for the Accused

(Charges under s. 149 and 246.1 Criminal Code of Canada)

BAN ON PUBLICATION OF THE COMPLAINANT/WITNESS
PURSUANT TO SECTION 486.4 OF THE CRIMINAL CODE

1 THE COURT: Mr. Caesar is charged with
2 indecent assault and a sexual assault. The
3 events are alleged to have occurred between 1980
4 and 1987. The investigation by the police began
5 in March of 2007. Mr. Caesar was arrested on May
6 1st, 2010, and released on an undertaking and
7 promise to appear. He has not been detained in
8 connection with this matter since then.
9 Thirty-nine months have elapsed since the
10 Information was sworn.

11 The first appearance was on August 5th,
12 2010, in Fort Good Hope, Northwest Territories.
13 Mr. Caesar appeared with duty counsel and
14 requested an adjournment to permit him to retain
15 counsel. The matter was adjourned to October
16 27th, 2010. Mr. Caesar then appeared with duty
17 counsel again and requested another adjournment
18 as he had not yet had an opportunity to retain a
19 lawyer privately. So the matter was set over to
20 December 8th, 2010. At the December 8th
21 appearance, Mr. Caesar again appeared with duty
22 counsel and entered his election. The matter was
23 set over to March 23rd, 2011, for a preliminary
24 inquiry in Fort Good Hope. The preliminary
25 inquiry proceeded as scheduled and Mr. Caesar was
26 committed to stand trial.

27 Mr. Caesar was, by this time, represented by

1 Mr. Abdul Khan. Mr. Khan advised the Court in
2 writing of his availability for a jury trial on
3 May 11th, 2011, and he attended the pre-trial
4 conference held on June 7, 2011. The Crown
5 submitted its available dates for trial on June
6 25th, 2011.

7 On August 2nd, 2011, Mr. Caesar's legal
8 representation changed again to Mr. Tracy Bock.
9 Mr. Bock submitted available dates in early
10 October of 2011.

11 The matter was scheduled for a jury trial to
12 take place in Fort Good Hope on May 7th, 2012.
13 Unfortunately, the Court was unable to empanel a
14 jury, resulting in a mistrial. The case was
15 returned to the list to be rescheduled.

16 The Court record shows that at list
17 scheduling on May 11th, 2012, the Court suggested
18 setting a date of February 18th, 2013, for a jury
19 trial to be held in Inuvik. Defence counsel did
20 not at that time express concerns about this or
21 seek an earlier date. The case was subsequently
22 scheduled for that date.

23 Mr. Caesar's representation changed one more
24 time to his present counsel, Mr. Martin, in
25 September of 2012. This had no impact on the
26 trial date, nor did it cause any delay.

27 Mr. Caesar became very ill shortly before

1 his scheduled trial in Inuvik. His lawyer sought
2 and was granted an adjournment on his behalf on
3 February 14th, 2013. The chambers judge noted
4 that this was a second adjournment and directed
5 that counsel submit their available dates within
6 30 days. She also noted that although the Court
7 would endeavour to give the case priority for
8 scheduling, the availability of resources and
9 time for a jury trial in Inuvik was limited. The
10 first date that both Crown and defence counsel
11 were available for trial which could be
12 accommodated by the Court was this week here in
13 Norman Wells.

14 There is a very well-established legal
15 framework in which the Court must conduct its
16 analysis to determine if there has been a breach
17 of Section 11(b) of the Charter. The Court has
18 to consider the length of the delay and ask
19 itself if the duration is such to warrant a
20 further inquiry. It has to look at the reasons
21 for the delay and the prejudice to the accused.
22 The Court must examine the reasons for the delay
23 in light of inherent time requirements, the
24 actions of the accused, the actions of the Crown,
25 and institutional delay.

26 The factors leading to the delay must be
27 balanced against the interests that Section 11(b)

1 is intended to protect, namely the individual's
2 right to security of person, liberty, and a fair
3 trial, as well as society's interest in ensuring
4 that accused persons are tried promptly and that
5 those who break the law are tried according to
6 law.

7 Certain guidelines have been suggested in
8 the jurisprudence to assist courts in determining
9 if the delay is excessive, but these are
10 guidelines only and each case has to be
11 determined in light of its own particular facts.

12 With respect to the length of the delay, the
13 Crown conceded that the overall length of time it
14 took for this matter to get to trial, being 39
15 months, is such that an inquiry is warranted.

16 With respect to the reasons for the delay, I
17 will deal first with the inherent time
18 requirements and the delay attributable to the
19 Crown. I address these together because, in my
20 view, neither the inherent time requirements nor
21 the actions of the Crown contributed to the delay
22 in getting this matter heard in any significant
23 way. There was not a bail hearing and there does
24 not appear to have been any type of issue with
25 respect to the timing of disclosure. The matter
26 proceeded to a preliminary inquiry about eight
27 month following the first appearance and about

1 half of that time is attributable to the
2 Defendant. The actions of the Defendant and the
3 institutional delay account for the lion's share
4 of the time it has taken to get this matter to
5 trial.

6 Mr. Caesar's actions and personal
7 circumstances contributed to the delay in three
8 key respects. As noted, Mr. Caesar required
9 three adjournments before he was in a position to
10 proceed to the preliminary inquiry. Now, there
11 is certainly no suggestion whatsoever that
12 Mr. Caesar's difficulties in securing legal
13 representation stemmed from a pattern of hiring
14 and firing lawyers. He was not abusing his
15 rights in any way. As well, it is an accused's
16 right to have counsel, and it is of course very
17 important that the accused have counsel in which
18 he or she has trust and confidence.

19 Nevertheless, the time it took for Mr. Caesar to
20 find and secure legal representation and to get
21 on with things took time and that time was well
22 beyond what I consider to be the parameters of
23 inherent delay.

24 There was an additional delay when
25 Mr. Caesar's legal representation changed from
26 Mr. Khan to Mr. Bock. Again, I do not suggest
27 that either Mr. Caesar or Mr. Bock were in any

1 way dilatory, but the change in counsel meant
2 that there was an additional two months,
3 approximately, before both sides indicated they
4 were ready to proceed to trial and the first
5 trial date could be scheduled.

6 Finally, Mr. Caesar contributed to the delay
7 by his sudden illness. There is no suggestion
8 that this was Mr. Caesar's fault. It was, of
9 course, entirely beyond his control. But because
10 of his illness, a jury trial which had already
11 been rescheduled once was adjourned to
12 accommodate him and this had immediate delay
13 implications. It also had consequences for the
14 institutional delay.

15 In all, I find that Mr. Caesar contributed
16 to approximately thirteen and a half months of
17 the overall thirty-nine-month period that it has
18 taken to get this matter to trial.

19 Institutional delay is the delay
20 attributable to systemic factors and it is
21 counted as the period of time from when the
22 parties are ready to proceed to trial until the
23 trial can be scheduled. That accounts for most
24 of the delay in this case, although I do not find
25 it unreasonable in the circumstances.

26 In this case, the institutional delay is
27 approximately twenty-two months. This is

1 comprised of four months between the December
2 8th, 2010, appearance and the March 23rd, 2011,
3 preliminary inquiry, the eight months between
4 October of 2011, which is when both the Crown and
5 defence were ready to proceed to trial the first
6 time, and the first scheduled trial date in Fort
7 Good Hope, and the ten months between that date
8 and the second scheduled trial in Inuvik.

9 There is a practice, which was discussed at
10 length by counsel at the hearing, of trying cases
11 in the Northwest Territories where the offence is
12 alleged to have occurred. Doing this serves a
13 number of very good purposes. As a practical
14 matter, it often means that witnesses need not
15 travel away from their community to testify about
16 something that happened in their home community.
17 It also allows people throughout the Northwest
18 Territories to see the justice system at work in
19 their communities. The court process becomes
20 something tangible and accessible. It is not
21 something that just happens in Yellowknife or
22 something that only those who live in larger
23 centres get to see and those who live in smaller
24 centres only hear about secondhand.

25 With jury trials in particular, the practice
26 is very valuable.

27 Sitting on a jury is an important

1 responsibility for all citizens and permanent
2 residents of Canada. It is also a privilege.
3 Holding jury trials throughout the North, insofar
4 as that is practicable, provides opportunities
5 for a wide array of individuals to sit as jurors
6 and participate directly in the justice system.
7 The privilege and responsibility is not just
8 reserved for those in certain geographical
9 locations. For an accused, it means that he or
10 she has access to a jury panel that is more
11 likely to be representative of that person's
12 community and culture.

13 This practice is not without consequences,
14 however. Among these is the possibility that is
15 somewhat longer wait for a trial than one would
16 experience in Yellowknife or southern Canada or a
17 longer wait than one would experience upon
18 electing to be tried by judge alone, is possible.
19 In some communities, there is a real risk that
20 the population base is not large enough to allow
21 the Court to empanel a jury. This is especially
22 so in our smaller communities where it is a given
23 that there will be a certain number of
24 individuals served with jury summonses who have a
25 conflict of interest due to a relationship with
26 an accused or a complainant or who feel they
27 cannot be impartial because they have knowledge

1 of or have formed an opinion about the case.

2 There is also bound to be a certain number of
3 individuals unable to serve due to personal or
4 financial hardship.

5 The reality is that resources are limited in
6 smaller communities. People do not have the same
7 access to child care, casual workers, or
8 substitute teachers, for example. And, of
9 course, a certain number of jurors will be
10 challenged necessarily by the Crown and defence
11 counsel. All of this adds up to the definite
12 possibility that there could be a mistrial, and
13 that causes delay. That is what happened here,
14 so another trial had to be scheduled.

15 Another reality is that setting down jury
16 trials anywhere in the Northwest Territories
17 requires a coordination of a number of different
18 people and things, including judicial schedules,
19 ensuring there is a sufficient complement of
20 court staff, and, of course, the lawyers.
21 Facilities are also limited. We share those
22 facilities with the communities where we sit.
23 They are not always available because sometimes
24 communities need to use them. We also share the
25 availability of facilities with the Territorial
26 Court, which sits often. At times it might not
27 be feasible to hold a jury trial in a particular

1 community. There may be assemblies or festivals,
2 it may be a time of the year when people are out
3 on the land. Similarly, there may be activities
4 happening in a particular community that limits
5 the availability of air travel and accommodation
6 for the court parties, the lawyers, the
7 witnesses, and the accused. So given all of
8 these circumstances under which this court
9 operates, the institutional delay in this case is
10 not in and of itself unreasonable. The reality
11 is that the options are limited and the delay is
12 explained.

13 Prejudice to the accused is a key
14 consideration, and, in my view, regardless of any
15 other findings, Mr. Caesar's application would
16 not succeed because there is no basis for a
17 finding that he suffered any prejudice, actual or
18 inferred, as a result of the time it has taken to
19 get this matter to trial.

20 An accused may lead evidence of specific
21 prejudice and the Court can also infer prejudice
22 from the length of the delay. As noted in R. v.
23 Morin, the longer the delay, the more likely that
24 such an inference will be drawn. Prejudice is
25 also assessed in light of the interests that
26 Section 11(b) protect, namely liberty in the
27 context of pre-trial detention and the impact of

1 bail conditions; security of the person,
2 specifically, being free from the stress and
3 stigma of a criminal charge hanging over one's
4 head; and, finally, the right to make a full
5 answer in defence.

6 Mr. Caesar was released on a promise to
7 appear and on condition that he would have no
8 contact with the complainant. Other than that,
9 his liberty interests have not been impaired.

10 In his affidavit and to a certain extent in
11 the answers he gave to questions put to him by
12 Crown counsel during cross-examination on his
13 affidavit in this matter, Mr. Caesar suggested
14 that his right to the security of the person has
15 been affected because of the outstanding charges.
16 Specifically, he asserted that he has been unable
17 to find employment since 2010; that he feels he
18 is being treated by others in the community with
19 suspicion; that people in the community of Fort
20 Good Hope gossip about the charges again him;
21 that having these charges over him has caused him
22 to increase his consumption of alcohol, which, in
23 turn, may have led to his conviction for impaired
24 driving which occurred earlier this year; that he
25 has suffered physically by losing weight and he
26 has difficulty sleeping; and, finally, that his
27 overall standing in the community has been

1 diminished.

2 Mr. Caesar's suggestion that he has been
3 prejudiced in employment and that his standing in
4 the community is negatively affected is not
5 supported by the evidence.

6 With respect to employment, it appears that
7 he perceives that he is being screened out of
8 potential positions because of the charges, yet
9 he has not been advised by any potential
10 employers that this is the reason, nor has he
11 ever been asked whether there are outstanding
12 charges against him. There are any number of
13 reasons that he is not succeeding in his efforts
14 to secure employment, including the possibility
15 that other candidates are thought to be better
16 qualified.

17 With respect to his standing in the
18 community, it was brought out during
19 cross-examination, although it was not stated
20 directly in Mr. Caesar's affidavit, that he was
21 elected to council earlier this year. There were
22 nine positions and twenty-two candidates. When
23 questioned on whether this indicates that he has
24 not, in fact, lost his standing in the community,
25 Mr. Caesar said he believes that he was elected
26 not because of his popularity or unpopularity but
27 rather because of his perceived ability to do the

1 job. Now, obviously the Court cannot get into
2 the minds of voters, but it is reasonable to
3 infer that if a person has lost their standing in
4 the community to the point where their right to
5 the security of the person has been threatened,
6 it is unlikely that they will be successful in a
7 contested election.

8 I do not accept Mr. Caesar's claim that he
9 started drinking more heavily leading to a
10 conviction for impaired driving because of these
11 charges. Consuming alcohol is a choice that he
12 made and he has himself to blame for those
13 consequences.

14 I also reject Mr. Caesar's assertion that
15 having these charges outstanding has caused him
16 to lose weight or have difficulty sleeping.
17 While I do not suggest he is being untruthful in
18 his assertions about what is going on with his
19 health, the fact is there is no medical evidence
20 tieing either of these things to the outstanding
21 charges. The medical evidence is that Mr. Caesar
22 suddenly fell and was seriously ill, about six
23 and a half months ago. He required
24 hospitalization and a significant period of
25 convalescence. If one was to draw a conclusion
26 about what is at the root of his current health
27 problems, this would be the only logical one.

1 Mr. Caesar offered no specific evidence
2 about gossip. He did say that after the police
3 started the investigation in 2007, he had to
4 field questions from community members. That was
5 the extent of it, though, and, from that, I
6 cannot conclude that he suffered the kind of
7 prejudice required to satisfy or justify a stay
8 of proceedings.

9 It has been said that delay has the most
10 significant effect on the ability to make a full
11 answer in defence. As stated by Justice
12 McLachlin, as she was then, in R. v. Morin:
13 "Witnesses forget, witnesses disappear. The
14 quality of evidence may deteriorate."

15 Mr. Caesar says that he is prejudiced
16 because some of the witnesses who would have been
17 at the places where the events allegedly took
18 place are now deceased or no longer live in the
19 Northwest Territories. However, I do not find,
20 nor do I infer, that his ability to make full
21 answer in defence is impaired.

22 It is in everyone's interest, including
23 society's, that alleged criminal acts are
24 prosecuted as soon as possible. But in some
25 cases, as here, the acts simply do not come to
26 the attention of the authorities until long after
27 the fact. That is no reason to not proceed in

1 prosecuting wrongs. In this case, the offences
2 are alleged to have taken place in the early to
3 mid 1980s. In these historical cases, the
4 problems with lost witnesses and faded memories,
5 if there are, in fact, any, are more likely to
6 exist because of the actual age of the offence
7 rather than by the reason of passage of time
8 between the laying of charges and the trial.
9 Further, if an accused is going to assert this
10 argument in the context of an old offence, it is
11 not enough to simply state that unnamed witnesses
12 are deceased or have moved. The jeopardy must be
13 related to the alleged failure to prosecute the
14 charges within a reasonable time. So, for
15 example, the Court needs to know if the witnesses
16 or the witness passed away or became
17 incapacitated after the charges were laid. It is
18 also a reasonable expectation that the Court will
19 be advised why someone cannot be produced as a
20 witness. Similarly, to say that because they
21 have moved from the jurisdiction is not enough.
22 There are legal and technological processes that
23 can be used to facilitate testimony from
24 witnesses who are resident elsewhere.

25 In conclusion, there has been delay here,
26 but it is neither unreasonable nor unexplained.
27 Moreover, Mr. Caesar has not shown that he

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suffered any specific prejudice and none can be
inferred from the circumstances. For these
reasons, the application was dismissed.

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Certified Pursuant to Rule 723
of the Rules of Court

Jane Romanowich, CSR(A)
Court Reporter