R. v. Eyakfwo, 2015 NWTSC 07

Date: 2015 01 27
Docket: S-1-CR-2012-000091

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

Respondent

- and -

FREDERICK EYAKFWO

Applicant

MEMORANDUM OF JUDGMENT

[1] This is an application by Frederick Eyakfwo claiming that his right to be tried within a reasonable time, guaranteed by s. 11(b) of the *Canadian Charter of Rights and Freedoms*, was violated. The application was heard on November 17, 2014 and I dismissed the application orally on November 20, 2014 indicating that written reasons would follow.

BACKGROUND

[2] On April 7, 2012, Frederick Eyakfwo was arrested and charged with a sexual assault, contrary to s. 271 of the *Criminal Code*. The offence was allegedly committed on March 12, 2012. He was released on an undertaking to a Justice at that time. Mr. Eyakfwo was arrested for breaching his undertaking on May 19, 2012 and remanded into custody on the two breaches as well as the sexual assault charge. There were court appearances on May 20, 23, 25, and 28, 2012 where the matter was adjourned for Mr. Eyakfwo's counsel to review disclosure, put together a plan for release and to arrange for a surety.

[3] Mr. Eyakfwo's show cause was held on May 30, 2012 and he was detained after a show cause hearing. There were further court appearances on June 12 and 19, 2012 before a preliminary inquiry was scheduled for August 1, 2012 in Behchokǫ̀ . The preliminary inquiry was held on August 1, 2012 and Mr. Eyakfwo was committed to stand trial on the sexual assault charge.

[4] Following his committal to stand trial, Mr. Eyakfwo made a number of appearances in this court on September 17, 24, October 1, 15, 29, November 5, 7 and 19, 2012, all in relation to a bail review. On November 19, 2012, Mr. Eyakfwo was released on a recognizance following a contested bail review. He was subject to a number of conditions including that he report to the R.C.M.P. daily from Monday to Friday and abide by a curfew from 8:00 p.m. to 7:00 a.m. unless working.

[5] Meanwhile, on November 13, 2012, a trial date for Mr. Eyakfwo was scheduled to commence July 15, 2013 in Behchokǫ̀. The facility which had been booked in Behchokǫ̀ for the trial became unavailable as community officials had double-booked the facility and were not willing to honour the court's booking, although it pre-dated the other booking. A suitable alternate location could not be found in the short time before the trial and the trial date was cancelled by the court on July 12, 2013.

[6] Mr. Eyakfwo's recognizance was vacated on July 22, 2013 and he entered into a new recognizance with a different surety, his common-law spouse, and was permitted to reside in Hay River with her. In addition, his reporting requirement was reduced to reporting to the R.C.M.P. on Mondays or if he was leaving the community for employment purposes. The curfew condition was removed.

[7] The recognizance was amended again on February 10, 2014 to permit Mr. Eyakfwo to attend a handgames tournament in Wha'Ti and the requirement to report to the R.C.M.P. on Mondays was removed. Most changes to Mr. Eyakfwo's recognizance occurred with the Crown's consent.

[8] A second trial date was scheduled for Mr. Eyakfwo, again to be held in Behchokǫ̀ on March 31, 2014. On that date, jury selection proceeded and eight jurors were selected before the jury panel was exhausted. The court granted the Crown's request for talesmen, which was opposed by Mr. Eyakfwo's counsel, and one additional juror was selected. A second request by the Crown for talesmen was denied and a mistrial was declared.

[9] On April 2, 2014, the Crown provided their availability for a third trial indicating that the Crown was available at any time. On April 3, 2014, Mr. Eyakfwo's counsel provided his availability with various dates from May 2014 to February 2015. On April 8, 2014, Mr. Eyakfwo's trial was scheduled for December 1, 2014 in Yellowknife.

LEGAL FRAMEWORK

[10] Section 11(b) of the *Charter* guarantees an accused person the right to be tried within a reasonable time. The principles that apply in determining whether this right has been infringed have been determined by the Supreme Court of Canada in several cases. In *R.* v. *Morin*, [1992] 1 S.C.R. 771, the factors that must be considered in analyzing whether there has been unreasonable delay were set out (at para. 31):

(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 delay; and

(4) Prejudice to the accused

[11] There is no mathematical formula or specified time period for when delay becomes unreasonable but instead the process is a judicial determination balancing the interests protected by the *Charter* and other factors which result in delay. *Morin, supra* at para. 32.

<u>The Length of the Delay</u>

[12] The approach under *Morin* is to ask whether the length of the delay is sufficient to raise the issue of reasonableness. If the delay does raise the issue of reasonableness, then it warrants an inquiry into the reasons for the delay.

[13] The total time period from when Mr. Eyakfwo was arrested on April 7, 2012 to the date of the trial scheduled to begin on December 1, 2014 is almost 32 months.

[14] There is no evidence that Mr. Eyakfwo waived, explicitly or implicitly, his right to be tried within a reasonable time.

[15] The Crown concedes that the delay in this case is sufficient to raise the issue of reasonableness and warrant an inquiry. I agree.

Reasons for the Delay

[16] As stated in *Morin*, there will be some delay and the criminal trial process itself has inherent time requirements:

> Some delay is inevitable. Courts are not in session day and night. Time will be taken up in processing the charge, retention of counsel, applications for bail and other pre-trial procedures. Time is required for counsel to prepare. Over and above these inherent time requirements of a case, time may be consumed to accommodate the prosecution or defence. Neither side, however, can rely on their own delay to support their respective positions. When a case is ready for trial a judge, courtroom or essential court staff may not be available and so the case cannot go on. This latter type of delay is referred to as institutional or systemic delay.
>
> *Morin, supra* at para. 40

Inherent time Requirements

[17] Inherent time requirements encompass the time it takes the parties to be ready for trial. Essentially, as described in *Morin, supra* at para. 47, it is the point "when the parties are ready for trial but the system cannot accommodate them." See also *R.* v. *Austin*, [2009] O.J. No. 1669 (C.A.) at para. 47. In cases like Mr. Eyakfwo's, the inherent time requirements include the time it takes to retain counsel, receive disclosure, make elections, hold bail hearings and preliminary inquiries, attend pre-trial conferences and submit availability to the court. The complexity of the case is another factor to consider in determining the inherent time requirements of the case. *Morin, supra* at para. 41-43.

[18] Mr. Eyakfwo was charged with a single count of sexual assault and it was anticipated that the trial would take 4 days. The trial was not anticipated to be complex with 9 witnesses expected to testify for the Crown, per the Pre-Trial Conference held on October 12, 2012, although that number was significantly reduced over time. The offence is indictable, so a preliminary inquiry was held, which adds to the inherent time requirements.

[19] The inherent time requirements of this case do not comprise a significant portion of the delay in this case. The preliminary inquiry was completed on August 1, 2012, some 4 months following Mr. Eyakfwo's arrest on the charge. On November 13, 2012, the first trial date for Mr. Eyakfwo was scheduled. Therefore, a little over 7 months elapsed before the parties were ready for trial. In this jurisdiction, that amount of time is not remarkable and the inherent time requirements of this case are not unusual.

Actions of the Accused

[20] The Crown argued some of the delay should be attributed to Mr. Eyakfwo because the trial could have been held as early as July 2014. The Crown's position is that the period from July 2014 to December 2014 should be considered attributable to the accused. I do not agree.

[21] Following the second trial which ended in a mistrial in March 2014, efforts were made by all parties to schedule the third trial at the earliest possible date. The mistrial was declared on March 31, 2014. The Crown provided availability on April 2, 2014 indicating the Crown was available at any time. Counsel for Mr. Eyakfwo provided availability on April 3, 2014 with various dates available from May 2014 to February 2015. Included in the defence availability was the week of July 6-11, 2014 which was offered with the qualifier that defence counsel was scheduled for vacation that week but he was willing to have the trial scheduled that week if no other dates were suitable. On April 8, 2014, the trial was scheduled for December 1, 2014.

[22] On April 24, 2014, the Crown wrote to the court to advise that another Supreme Court matter which had been scheduled for the week of July 7, 2014 had been stayed and so Mr. Eyakfwo's matters could be scheduled for that week instead. Mr. Eyakfwo's counsel responded to the Crown's letter on April 28, 2014 to advise that he was no longer available the week of July 6-11, 2014. As such, the trial remained scheduled for December 1, 2014.

[23] Once the trial date had been scheduled, there was no requirement for defence counsel to hold himself in a "state of perpetual availability" in the hopes that an earlier trial date might eventually be secured. *R.* v. *Godin,* 2009 SCC 26 at para. 23. In my view, this portion of the delay is not attributable to the accused.

Actions of the Crown

[24] Mr. Eyakfwo has not claimed that the Crown is responsible for any of the delay in this case. In reviewing the proceedings, there is no evidence that any period of delay can be attributed to the Crown.

Limits on Institutional Resources

[25] Systemic or institutional delay is the period from when the parties are ready to proceed to trial but the system cannot accommodate them. There are limited resources in the justice system and that contributes to delay. However, there are limits to what is acceptable as institutional delay. At some point, courts will not tolerate delays based on inadequate resources. *Morin, supra* at para. 48.

[26] The Supreme Court of Canada has provided guidelines to assist trial courts in determining whether institutional delay is reasonable. These guidelines, however, are not to be applied rigidly or treated as a limitation period. *Morin, supra* at para. 48; *R.* v. *Latour*, 2013 NWTSC 95.cor1 (unofficial English translation) at para. 72-74.

[27] In *Morin, supra* at para. 55, the Supreme Court of Canada confirmed that a delay of 6 to 8 months between committal to stand trial and trial was the appropriate range of what is reasonable and that in Territorial Court proceedings, the acceptable institutional delay was 8 to 10 months. So, an indictable matter which proceeds with a preliminary inquiry in Territorial Court and then to trial at the Supreme Court level would contemplate a range of 14-18 months based on *Morin.*

[28] This range of time is a suggestion and not a fixed deadline. The Supreme Court of Canada acknowledged in *Morin* that there will be regional differences:

> These periods will no doubt require adjustment by trial courts in the various regions of the country to take into account local conditions and they will need to be adjusted from time to time to reflect changing circumstances.
>
> *Morin, supra* at para. 57

[29] There are local conditions to take into account in this jurisdiction as well as in the north in general, which have been discussed in other judgments: *R.* v. *Caesar*, 2013 NWTSC 65 at para. 21-24; *Latour, supra* at para.76-81; *R.* v. *Oolamik*, 2012 NUCJ 21.

[30] There are challenges in holding jury trials in the Northwest Territories that result in the period between committal for trial and trial being somewhat longer than what is contemplated under *Morin* but that resulting delay is also not unreasonable. The challenge of attempting to hold a jury trial in a small community is not as simple as picking a date:

> Another reality is that setting down jury trials anywhere in the Northwest Territories requires a coordination of a number of different people and things, including judicial schedules, ensuring there is a sufficient complement of court staff, and, of course, the lawyers. Facilities are also limited. We share those facilities with the communities [where] we sit. They are not always available because sometimes communities need to use them. We also share the availability of facilities with the Territorial Court, which sits often. At times it might not be feasible to hold a jury trial in a particular community. There may be assemblies or festivals, it may be a time of the year when people are out on the land. Similarly, there may be activities happening in a particular community that limits the availability of air travel and accommodations for the court parties, the lawyers, the witnesses, and the accused. So given all of these circumstances under which this court operates, the institutional delay in this case is not in and of itself unreasonable. The reality is that the options are limited and the delay is explained.
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> *Caesar, supra* at para. 24.

[31] In this case, the remaining delay from November 13, 2012 to December 1, 2014, some 24.5 months, is attributable to institutional or systemic delay. Within that delay, three trials were scheduled. The first trial scheduled for July 2013 could not proceed because of the facility in Behchokǫ̀ becoming unavailable on short notice. The second trial scheduled for March 2014 could not be completed because a full jury could not be selected. The third trial was scheduled for December 2014.

[32] This case is different from cases like *Morin*, *supra* and *Godin*, *supra*, where the delays were 14.5 months and 30 months respectively between the dates the charges were laid and the first scheduled trial of the matters. In this case, there have been three trials scheduled within the 24.5 month period. In my view, this reflects the reality that it may take longer to have a jury trial in this jurisdiction because of the concerns referred to above and the very real risk, particularly in communities outside Yellowknife, that a jury cannot be empaneled due to the size of the community and the relationships that potential jurors have with the accused or witnesses involved in the case. That is one of the drawbacks to the court's

tradition of attempting to hold jury trials in the community where the alleged offence took place.

[33] Overall, taking into account the delay attributable to institutional resources, the delay itself is not unreasonable and can be explained by the unavailability of a facility to hold the first trial and the failure to select a jury at the second trial.

Prejudice to the Accused

[34] Another consideration is any prejudice which has been suffered by the accused as a result of the delay. The accused can lead evidence of specific prejudice or prejudice can be inferred from the length of the delay. The degree of prejudice or the absence of prejudice is a factor in determining the length of institutional delay that is acceptable. *Morin, supra* at paras. 61- 64.

[35] In this case, the accused is not alleging any specific prejudice but has argued that prejudice can be inferred from the length of the delay. The accused argues that he spent several months in custody prior to being released on restrictive conditions and that he has been on release conditions since his release in November 2012. While his conditions have been relaxed over this period, the accused has had to apply to vary his conditions several times.

[36] The Crown argues that the accused has not suffered prejudice and that almost every time that the accused wanted his recognizance amended, the Crown consented. Over time, his conditions have been relaxed considerably. The result, according to the Crown, is that the prejudice suffered by the accused is minimal and was caused not by delay but by the charge itself.

[37] Any prejudice attributable to the time that Mr. Eyakfwo spent in custody is attributable to the accused himself as he was initially released on this charge. Mr. Eyakfwo was released on an undertaking before being detained following his arrest for two counts of breaching his undertaking. He was in custody from May 19, 2012 until November 19, 2012, some 6 months, before being released on a recognizance. His conditions were amended twice and the conditions were lessened, removing a curfew condition and first reducing, then removing a reporting requirement.

[38] Mr. Eyakfwo likely has suffered some prejudice, however, most of the prejudice is attributable to the fact that Mr. Eyakfwo was charged with a criminal offence. While there may be some prejudice inferred from the length of the delay,

I am not satisfied that the prejudice suffered is serious and Mr. Eyakfwo has not pointed to any actual prejudice that he has suffered as a result of the delay.

[39] The delay of 32 months in this case is attributable to inherent and institutional delay. Taking into account what is reasonable in this jurisdiction, the multiple attempts to hold a trial, and the lack of evidence demonstrating serious prejudice, I cannot conclude that Mr. Eyakfwo's rights under section 11(b) of the *Charter* have been infringed.

[40] For these reasons, the application was dismissed.

S.H. Smallwood
J.S.C.

Dated at Yellowknife this
27th day of January 2015

Counsel for Applicant: Steven Fix
Counsel for Respondent: Marc Lecorre

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