

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES
BETWEEN:

L. (P.J.)¹

Applicant

-and-

HER MAJESTY THE QUEEN

Respondent

MEMORANDUM OF JUDGMENT

[1] This is an application for an order in the nature of *certiorari*. The Applicant seeks to quash a decision of a Territorial Court judge (the “Judge”) denying an application to adjourn a preliminary inquiry.

BACKGROUND

[2] In October of 2016, the Applicant was charged with two counts of sexual assault and one count of sexual interference under ss. 271 and 151 of the *Criminal Code*, RSC 1985, Chap C-46. These are both “hybrid” offences, which the Crown may elect to try summarily or by indictment.

[3] The matters came forward in Territorial Court in November and December of 2016. The Crown did not enter an election at any of those appearances, indicating at an appearance on December 13, 2016 that the results of DNA analysis were outstanding and it wished to wait until they were available before making an election. The Judge adjourned to January 17, 2017 to allow the Crown the

¹ Initials have been used because the Applicant’s criminal charges remain outstanding and there are references to potential admissions in this decision.

opportunity to make argument on whether he would be exceeding his jurisdiction were he to put the accused to his election prior to the Crown making its election.

[4] At the January 17, 2017 appearance, after hearing argument, the Judge decided to treat the matter as proceeding by indictment, based on the deeming provision in s. 34(1) of the *Interpretation Act*, RSC 1985, c I-21, rather than waiting for the Crown to enter its election. He then put the Applicant to his election. The Applicant elected trial by judge and jury. The Judge issued written reasons for his decision. Although that decision is not the subject of this application, the Judge expressed therein concerns about delaying the matter and the possibility of failing to meet the presumptive ceilings set out in *R v Jordan*, 2016 SCC 27, [2016] 1 SCR 631. Concerns about delay formed a key part of the basis of the decision in question here.

[5] The preliminary inquiry was scheduled for the week of February 28, 2017 in Behchokò, as part of a Territorial Court circuit. Defence counsel requested an adjournment when the matter was called. By that time, the results of Crown's initial DNA analysis had been disclosed, but it indicated it planned to obtain another analysis, using the Applicant's DNA. The purpose was to determine if his was a match to that which was recovered initially. Defence counsel wanted to have that information before the preliminary inquiry. It was not clear at the time if the results of the other DNA analysis would be dispositive of the charges (or any one of them), but Defence counsel's comments on the record indicated it would be an important factor in how he would proceed with the case. Among other things, it would bear on whether the Applicant would enter a guilty plea before the preliminary inquiry, thereby avoiding the need to have the complainants and others testify, and operating as a mitigating factor on sentence.

[6] In response to inquiry from the Judge, Crown counsel indicated she was prepared to proceed with the preliminary inquiry on that day. She also acknowledged, however, that there would be benefit in sparing the witnesses the burden of testifying.

[7] The Judge initially indicated he would grant the request and directed counsel speak with the Clerk about securing a future date in Yellowknife. After a brief adjournment, however, he stated he wished to revisit the matter, expressing concern about the need to move it forward. This was followed by another brief adjournment, after which Defence counsel made additional submissions in support of his request. The Judge then made inquiries of Crown counsel about how long

she anticipated it would take to obtain the further DNA analysis. She estimated it would take two months.

[8] There were then discussions about delay and the Judge asked Defence counsel whether his client would be prepared to waive the *Jordan* ceiling, more specifically, his right to a trial within a reasonable time under s. 11(b) of the *Canadian Charter of Rights and Freedoms*. The matter was then adjourned overnight to give Defence counsel an opportunity to obtain instructions.

[9] The matter was addressed again the next day. Defence counsel indicated he did not have instructions from the Applicant to waive his rights under s. 11(b) and he made submissions on why it would be inappropriate at that point in time to do so. He then reiterated his position that the further DNA analysis was required to properly inform how he would manage the case and that an adjournment was therefore required. The Crown had no further submissions.

[10] The Judge denied the application for the adjournment, stating:

[...] I'm not granting the request for an adjournment. The matter will proceed tomorrow as originally directed. The accused does not have the right to perfect disclosure, especially before a preliminary inquiry. And under the circumstances I don't find the reasons provided by Mr. Harte compelling. I certainly appreciate that to some extent the cross-examination of the witnesses in question might change somewhat, but I also think that Mr. Harte can adequately take into account certain possibilities when he does cross-examine the witness in question.

So, under all of the circumstances I'm not - given that this matter does have to proceed, in my view, on a very timely basis I am requiring the matter proceed tomorrow. [...]

[11] Defence counsel then indicated that in the circumstances he did not feel a preliminary inquiry would be fruitful. He waived it and consented to committal for trial. He informed the Judge that the Applicant had been advised he was doing so. This is confirmed in the Notice of Motion at paragraph 11:

11) Anticipating this possible ruling, and not wanting to put a 13-year-old through a possibly needless preliminary hearing [...] Defence counsel had obtained instructions to waive the preliminary hearing if necessary and consent to committal [...]

ISSUES

[12] There are two questions. The first is whether the Judge exercised his discretion improperly in refusing to grant the adjournment, thus exceeding his jurisdiction. If that question is answered affirmatively, then I must determine whether it is appropriate to exercise my discretion to grant the remedies sought.

PARTIES' POSITIONS

Applicant's Position

[13] The Applicant's position is that the cumulative effect of refusing the adjournment was to breach the Applicant's right to disclosure and deny him natural justice. The refusal to grant the adjournment was based on factually unfounded concerns about the possibility of unconstitutional delay in moving the charges to trial. It left the Applicant with little choice but to waive the preliminary inquiry. The alternative was to hold the preliminary inquiry without the results of the second DNA analysis. Those results may have led to a guilty plea, obviating the need to hold the preliminary inquiry and relieving the complainants, one of whom was thirteen years old, of the burden of testifying. This would also preserve for the Applicant the full mitigating effect of any guilty plea by reason of it coming without requiring the witnesses to testify.

[14] The Applicant also suggested the Judge had a conflict of interest in relation to the Applicant because he had represented the Applicant on a criminal matter in 1998, prior to his appointment to the Territorial Court. Copies of the Information, the endorsements, the warrant of committal and the probation order pertaining to that case were submitted as an exhibit during this hearing. No additional evidence was provided on this point.

The Crown's Position

[15] The Crown's position is that the Judge did not exceed his jurisdiction and as such, the decision should remain undisturbed. It says Defence counsel made a tactical decision to waive the preliminary inquiry and had anticipated the possibility the adjournment request would be denied. Moreover, the Judge was correct in stating the Applicant was not entitled to "perfect" disclosure prior to the preliminary inquiry. Disclosure is an ongoing obligation.

[16] With respect to the Applicant's suggestion of bias, the Crown argued the Judge's prior representation of him did not result in actual or apprehended conflict of interest.

ANALYSIS

Legal Framework

[17] The power to adjourn a preliminary inquiry is granted expressly by s. 537(1)(a) of the *Criminal Code*:

537(1) A justice acting under this Part may

- (a) adjourn an inquiry from time to time and change the place of hearing, where it appears to be desirable to do so by reason of the absence of a witness, the inability of a witness who is ill to attend at the place where the justice usually sits or for any other sufficient reason;

[18] A judge's decision to grant an adjournment is entirely discretionary. Like any other judicial decision, however, it must be exercised transparently and in a principled manner: *902906 NWT Ltd. v R*, 2015 NWTSC 06 at para 27; *R v Werner*, 2000 NWTSC 2 at para 9. Where that discretion is exercised in a way that interferes with an accused's right to make a full answer and defence, or otherwise violates principles of fundamental justice, it is subject to review and an order in the nature of *certiorari* may be granted: *Re Dick*, 1968 CarswellOnt 12 (SC), [1968] 2 OR 351; *R v Carter*, 1972 CarswellOnt 385 (HCJ), [1972] 3 OR 50.

Did the Judge base his decision on unfounded concerns about delay?

[19] There is no question that Defence counsel's request for an adjournment was founded on legitimate considerations. It was aimed at achieving efficiency and fairness. He wished to avoid what might be unnecessary proceedings, sparing the complainants and other witnesses the burden of testifying. He wished to preserve for his client the mitigation that typically accompanies an early guilty plea.

[20] Defence counsel's reasons for requesting the adjournment were not the only relevant considerations, however. It is clear from the transcript of the proceedings that the presumptive timelines set out in *Jordan* were at the forefront of the Judge's mind, and properly so. The message in *Jordan* is clear: all actors in the justice system, including judges, have an obligation to ensure charges proceed to trial on a timely basis and, but for exceptional circumstances, that they do so within certain

presumptive ceilings. Among other things, this requires judges to keep cases moving forward and to consider the impact of any delay on the length of time it will take to proceed to trial.

[21] The Crown estimated the additional DNA analysis would take another two months to complete. Those results may have been dispositive, although Crown and Defence counsel did not appear to agree entirely on this. It was not a certainty upon which the Judge felt he could rely. Rather, he had to presume the preliminary inquiry would proceed.

[22] Assuming a preliminary inquiry would be held and that a committal for trial would result, the minimum two month delay in holding the preliminary inquiry to await the DNA analysis would have significant implications for scheduling the trial itself. Scheduling jury trials is a complex process. Court time, particularly in blocks sufficient to hold a jury trial, is at a premium. Scheduling requires coordination of judges, counsel, witnesses, court reporters, sheriff's officers and clerks. Court facilities in Yellowknife are limited, there being but one courtroom in which jury trials can be held. Scheduling trials in communities outside of Yellowknife presents even more challenges. Other than Fort Smith, Hay River and Inuvik, there are no dedicated courthouses and thus, community facilities are used. Those facilities are, of course, used for community events and are not available exclusively for the Court. Moreover, Supreme Court proceedings – and the use of facilities in communities - must be coordinated with the Territorial Court's busy circuit schedule. Finally, in the intervening period between when the Applicant's preliminary inquiry was originally scheduled and the date to which it might have been adjourned, other matters which were ready for trial would be scheduled. All of this means that a two month delay at front end of the process would result in a much longer delay in getting a matter scheduled for trial.

[23] In *Jordan*, the Supreme Court of Canada said, a paragraph 40, “a culture of complacency towards delay has emerged in the criminal justice system”. The Applicant's counsel submitted there is no such culture in the Northwest Territories and referred to a Statement of Agreed Facts respecting practice in the criminal courts here. He also submitted transcripts from various unrelated cases where adjournments were requested and granted for various reasons. Neither this argument, nor the materials in support, lead me to conclude the Judge erred in deciding not to grant the adjournment.

[24] First, the Agreed Facts consist primarily of opinion based on the combined observations and experiences of the Applicant's and Crown counsel. While I do

not suggest those opinions and observations are unfounded, neither they, nor the transcripts of examples of other adjournment applications in the Territorial Court, are particularly helpful in this case. What I must consider is what was before the Judge, and the reasons he gave for his decision, in this particular case.

[25] Second, *Jordan* considerations are not dependent on the existence of complacency. *Jordan* is about timely trials. Regardless of whether a “culture of complacency” exists in a specific jurisdiction or in a particular court, judges must do what is necessary to move matters forward so that the presumptive ceilings are met. Good intentions alone are unlikely to be an “exceptional circumstance” which will rebut a presumptive ceiling. This does not mean there can be no adjournments or delays. There will always be unforeseen circumstances that result in delay. Witnesses get sick. Flights get cancelled. Juries cannot be empanelled. Experts may require more time to complete reports. There are interruptions in legal representation. The list goes on. As stated earlier, however, judges must do their part to minimize unnecessary delay and that may entail refusing an application for adjournment where, despite a reasonable basis for the application and the best intentions of counsel, the judge determines an adjournment will not serve the overall interests of justice.

[26] For the foregoing reasons, I find the Judge’s concerns about delay were a legitimate consideration in deciding to refuse the adjournment.

Did the Judge infringe on the Applicant’s right to disclosure in refusing the adjournment?

[27] The Judge did not infringe on the Applicant’s right to disclosure in refusing the adjournment, nor did the absence of the additional DNA analysis deprive the Applicant of the ability to effectively proceed with the preliminary inquiry, had he chosen to do so.

[28] Respectfully, the Applicant’s arguments conflate the purpose of the preliminary inquiry with that of an accused’s right to disclosure. The purpose of a preliminary inquiry is, simply, to determine if there is enough evidence to commit an accused to stand trial. It is not a process through which guilt or innocence is determined. It may serve the secondary purposes of affording defence an opportunity to test the Crown’s evidence through cross-examination of witnesses and operating as a form of discovery, but it operates independently from the right to disclosure.

[29] Disclosure serves a different purpose. It is a “principle of fundamental justice and a component of the constitutional right to make full answer and defence.” *R v Girimonte*, 1997 CanLII 1866 (ONCA). The point of disclosure is not to determine whether the Crown has enough evidence to take a case to trial, but rather, to discover *what* that evidence is. It is a continuing duty and, indeed, it is not unusual for further disclosure to be made at various points in the process after the initial disclosure, even following a preliminary inquiry.

[30] Given the respective purposes of preliminary inquiries and an accused’s right to disclosure, it cannot be said that requiring the Applicant to either proceed with or waive the preliminary inquiry without the results of the second DNA analysis resulted in a breach of fundamental justice. The absence of this information would not have prevented him from cross-examining witnesses on their observations and experiences, or from making submissions on whether the Crown had enough evidence to proceed to trial. His choice to waive the preliminary inquiry was a matter of case strategy, made with the assistance of Defence counsel, in anticipation the adjournment would be refused.

[31] Finally, the Applicant’s argument about preserving the mitigating effect of an early guilty plea is moot, since he waived the preliminary inquiry and thus the complainants and other witnesses were not required to testify.

Should the decision be set aside for bias?

[32] The argument that the Judge was biased (or that there is a reasonable apprehension of bias) because he once represented the Applicant in a criminal matter cannot succeed.

[33] Presumably, this was something well within the Applicant’s knowledge when he came before the Judge, but he did not raise it as a concern at any of his appearances. In my view, it was incumbent upon him to do so in order that it be addressed appropriately in Territorial Court, or at the very least, provide an explanation in this Court as to why he did not do so.

[34] Further, the evidence presented is insufficient to conclude there was a conflict of interest which would lead to real or apprehended bias on the part of the Judge. The evidence consists only of a copy of the Information from that case with endorsements showing the Judge as counsel in 1998. Not every past interaction will support a finding of bias or a reasonable apprehension thereof. For example, it is not unusual in this jurisdiction for individuals to appear before the same judge at

different times on different charges. That does not, by itself, give rise to a reasonable apprehension of bias. There must be some evidence about the nature and duration of the relationship or, particularly in a case where actual bias is claimed, something on the record to support it. In this case, there is only evidence of three court appearances almost twenty years ago.

CONCLUSION

[35] The Judge did not exceed his jurisdiction in dismissing the application to adjourn the preliminary inquiry. The Applicant was not denied fundamental justice.

[36] The application for an order in the nature of *certiorari* is dismissed.

K. M. Shaner
J.S.C.

Dated at Yellowknife, NT, this
5th day of July, 2017

Counsel for the Applicant: Mr. Peter Harte
Counsel for the Respondent: Mr. Marc Lecorre

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