IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *R.* v. *Eby et al*, 2005 YKSC 49

Date: 20050902
Docket No.: S.C. No. 04-01548
Registry: Whitehorse

Between:

HER MAJESTY THE QUEEN

Respondent

And

LAURA ANN EBY and
CARY MELVIN GOODMAN

Applicants

Before: Mr. Justice R.S. Veale

Appearances:

David A. McWhinnie — for the Crown
Edward J. Horembala Q.C. — for the Applicants

MEMORANDUM OF JUDGMENT

INTRODUCTION

[1] The Crown charged the two accused on August 30, 2004, with fraud exceeding $300,000. The Royal Canadian Mounted Police (RCMP) learned of the offence in August 2002. The accused have confessed with the advice of counsel. Counsel for the accused applied for a judicial stay of proceedings based upon the two-year delay in laying the charges. For reasons that follow, I dismissed the application on June 20, 2005.

THE FACTS

[2] There is no dispute about the facts, although counsel may disagree on how they should be interpreted.

[3] On August 8, 2002, Yukon Housing Corporation (YHC) reported an allegation of fraud to the RCMP. The accused, Laura Eby, was a program manager for YHC. She issued two fraudulent loans: the first, for $158,675, was issued under completely false circumstances to a person who was totally unaware of the loan in her name; the second, for $159,900, was issued under a falsified inspection report and photographs prepared by Laura Eby. The other accused, Cary Melvin Goodman, was involved in both transactions.

[4] On August 13, 2002, Laura Eby confirmed to YHC that she had created the two false loan files. YHC fired her on August 16, 2002.

[5] On August 15, 2002, at the request of the RCMP, Laura Eby gave a full and complete statement of her involvement in the two loans. Similarly, on August 22, 2002, Cary Goodman gave a full and complete statement to the RCMP of his involvement in the two false transactions. On August 30 and September 1, 2002, the persons in whose names the loans were issued gave statements to the RCMP.

[6] The RCMP did not lay the fraud charges until August 30, 2004, resulting in a two-year delay which defence counsel says has prejudiced the accused who have been unable to get on with their lives. There is no specific allegation of prejudice to the case of the accused.

[7] Following their statements to the RCMP in August 2002, the accused negotiated agreements to secure the repayment of the fraudulent loans. The repayment

agreements were completed in April 2003. The accused have paid significant amounts of interest as well as the legal fees of YHC of approximately $14,000.

[8] On September 15, 2003, the $159,500 loan was paid off. The payment of the $158,675 loan continues according to the terms of repayment secured by the family homes of the accused as well as personal guarantees of their spouses and a mortgage against the property of Yukon Appliances Ltd. The RCMP advised YHC that settlement of their civil case against the accused would not stop the criminal investigation.

[9] I find as a matter of fact that there has been pre-charge delay on the part of the RCMP in prosecuting this case. However, there has been no improper motive but rather delays caused by the transfer of RCMP personnel. The RCMP did not interview additional witnesses until March 2003. Warrants to search bank accounts were delayed until July and October 2003. It was not until May 27, 2004, that the RCMP applied for search warrants in connections with related bank accounts to determine if related parties were involved.

[10] The RCMP swore an information on August 30, 2004, alleging various *Criminal Code* offences of the accused, two years after having received complete statements from the accused.

ISSUES

[11] There are two issues:

1. Is this a clear case of abuse of process that renders the trial unfair?
2. If not, does the delay connote unfairness to such a degree that it contravenes fundamental notions of justice and thus undermines the integrity of the judicial process?

THE LAW

[12] A judicial stay of proceedings is reserved for the “clearest of cases” that meet a very high threshold.

[13] *R.* v. *Regan*, 2002 SCC 12, sets out two categories of abuse of process in paragraphs 54 and 55. Most cases of abuse of process cause prejudice by rendering the trial of an accused unfair. There is also a “residual category” of abuse which causes prejudice to the integrity of the justice system. As stated by LeBel J. in *R.* v. *Regan,* at paragraph 54:

> “Regardless of whether the abuse causes prejudice to the accused, because of an unfair trial, or to the integrity of the justice system, a stay of proceedings will only be appropriate when 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.”

[14] The law is that even though an individual may have been treated unfairly in the past, a stay of proceedings will not be issued unless that abuse is ongoing. A stay of proceedings is a prospective remedy rather than a retroactive remedy. See *Tobiass*, [1997] 3 S.C.R. 391, at paragraph 91.

[15] The case of *R.* v. *Wubbolt*, [2004] O.J. No. 3591 (Ont. C.A.), is a case that aptly demonstrates the principle that a stay of proceedings is only issued in exceptional circumstances or the clearest of cases.

[16] In that case, in 1986, the Brockville police investigated allegations of sexual abuse involving Wubbolt and his sister. The accused was arrested and made a

statement acknowledging the incest. He agreed to take some counselling and the police decided not to proceed with criminal charges in 1986.

[17] In 2000, the incest allegations were re-examined as part of a broader investigation involving his sister, a younger brother and a childhood friend of his sister. The police decided to proceed with all charges relating to all three individuals.

[18] The accused acknowledged his guilt on the charges but argued that to proceed fifteen years after a decision not to proceed is an affront to fair play and decency requiring a stay of proceeding. However, there was no suggestion that Wubbolt could not obtain a fair trial, that the police reneged on an agreement or that Wubbolt had taken steps in reliance upon the decision not to prosecute. Doherty J.A. concluded at paragraph 13 that the societal interests in proceeding with charges must be considered as well as the interests of the accused. The mere fact that the police had reconsidered an earlier, perhaps unwise, decision does not require a stay of proceedings.

[19] In the case of *R.* v. *Young* (1984), 13 C.C.C. (3d) 1, the accused was a lawyer and secretary of a company. He swore an affidavit in 1976 pursuant to the *Land Speculation Tax Act*, R.S.O. 1974. There was an issue about the proper interpretation of the statute. The ministry involved was considering the matter as well as the bar association and Law Society. No action was taken by the ministry, bar association or Law Society.

[20] In January 1982, a citizens' group brought a large member of documents to a police officer, including the 1976 affidavit of the accused. No new information was uncovered. However, the police officer laid a fraud charge under the *Criminal Code* in

January 1983 as the six-year limitation period for swearing a false affidavit under the *Land Speculation Tax Act* had expired.

[21] Dubin J.A. concluded for the court at pages 26 – 35 that:

1) there is a residual discretion to be exercised only in the clearest of cases, to stay proceedings where compelling an accused to stand trial would violate the fundamental principles of justice to prevent the abuse of a court's process through oppressive or vexatious proceedings.
2) The courts cannot supervise the efficiency of police departments to determine whether they have acted expeditiously in a particular case. To do so would result in the imposition of a limitation period where none exists.
3) A distinction must be drawn between delay prejudicial to the accused and executive action offensive to the fundamental principles of justice.

[22] Dubin J.A. concluded that it was a case where the institution of proceedings was offensive to the fundamental principles of justice for the following reasons:

1) In 1976, the ministry, in consultation with its legal advisors, concluded that the good faith of the accused was not in issue and the question was whether there had been a misinterpretation of the statute.
2) When no action was taken by the ministry, bar association or Law Society in 1976, the accused was free to restore his professional reputation in the community, which he apparently succeeded in doing.
3) The police and Crown had no ulterior motive, but as a result of their delay the accused was charged with fraud and perjury, rather than swearing a false affidavit.

4) The trial judge accepted the claim of the accused that his ability to make full answer and defence was impaired and as well as his reputation in the community.

[23] Dubin J.A. found that to now put the accused on trial for fraud and perjury was contrary to the fundamental principles of justice found in section 7 of the *Charter*, i.e. the right to life, liberty and security of the person.

ANALYSIS

[24] The crucial test in applying the law regarding a judicial stay of proceedings is whether or not the delay has a prospective impact. On the facts of the case before me, I can find no prospective prejudice to the accused.

Issue 1: Is this a clear case of abuse of process that renders the trial unfair?

[25] Defence counsel submits that the delay in the police investigation is unfair to his clients. He submits that it is not a complicated fraud case and the police must be held accountable.

[26] While I agree that there has been unnecessary delay on the part of the police, it is significant that it is pre-charge delay in the investigation process. That delay has not affected the trial process. In this particular case any unfairness in preventing the two accused from getting on with their lives can be mitigated in sentencing. This is not a case for a judicial stay of proceedings on the ground of trial unfairness.

Issue 2: If not, does the delay connote unfairness to such a degree that it contravenes fundamental notions of justice and thus undermines the integrity of the judicial process?

[27] Has the integrity of the judicial process been undermined by the delay? I think not. There is a greater societal interest in prosecuting fraud cases especially involving

the public purse and in my view, this interest transcends the inconvenience that this police delay in investigation has caused the accused.

[28] I do not say that the police delay should go without comment. The delay in this case is an inconvenience to both the public and the accused. It is in the interest of all concerned that criminal cases proceed with some dispatch. A two-year delay does no credit to the reputation of the RCMP and does not sit well, I am sure, with the general public interest in concluding this case.

[29] Nevertheless, it is not a ground for a judicial stay of proceeding. In particular, it has not been accompanied by any improper motive on the part of the police.

[30] The application is dismissed.

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Veale J.