

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: R v. R.E.W, 2010 NSSC 78

Date: 20100226

Docket: Cr.AT. No. 263601

Registry: Antigonish

Between:

Her Majesty the Queen

v.

R .W.

Restriction on publication: Pursuant to Section 486(3) of the Criminal Code of Canada

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

Judge: The Honourable Justice N.M. Scaravelli

Heard: February 15, 2010, in Antigonish, Nova Scotia

Counsel: Catherine Gillis and Diane McGrath, counsel for the Crown
Coline Morrow, counsel for Defence

By the Court:

[1] On the 5th day of August, 2004, R.W. (the Accused) was charged with the offence of incest. The charge reads as follows:

That between December 2, 1998 and August 1, 1999 at, or near W., G. County, Nova Scotia, did have sexual intercourse with [J.W.], while knowing that, [J.W.] was his daughter contrary to Section 155(2) of the Criminal Code of Canada.

[2] This is an application by the Accused for an order staying the charge due to an alleged breach of his rights under Section 7 and Section 11(b) of the *Canadian Charter of Rights and Freedoms (The Charter)*.

[3] Section 7 of the *Charter* reads:

Section 7

Everyone has the right, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[4] Section 11 of the *Charter* reads:

Section 11

Any person charged with an offence has the right

...

(b) to be tried within a reasonable time.

[5] Counsel acknowledge the post charge delay period is 66 ½ months from the laying of the Information in August 2004 to the current trial date of February 2010. This includes an 18 ½ month period in Provincial Court from the charge date to committal for trial. The proceedings saw the involvement of several different Crown counsel, Defence counsel and Judges over the period.

[6] Evidence produced at the hearing by agreement of counsel, includes transcripts of court appearances, correspondence, e-mails and RCMP investigator's notes. In addition, The Accused filed an affidavit and gave *viva voce* evidence. The defence also called Corporal Wood, an investigating officer, to give evidence.

[7] The chronology of relevant events are set out as follows:

[8] **April, 2003** - The Accused is arrested on this charge of incest relating to J.W. as well as a separate charge of sexual assault on one N.M. He was released on an Undertaking with conditions that he remain in the Province of Nova Scotia; abstain from the consumption of alcohol and drugs; abstain from communication with the complainants and others; refrain from attending their residences; refrain from attending certain business establishments; no contact with children under the age of

14; no contact with the Department of Community Services; and finally, report weekly to the RCMP “until Court appearance on June 18th, 2003”.

[9] **August 5, 2004** - The Information regarding the incest charge is laid.

[10] **June 21, 2005** - The Accused makes his first appearance in Provincial Court regarding the incest charge. Election and plea are adjourned to August 2nd, 2005 to enable Defence counsel to review Crown disclosure received the day prior.

[11] **August 2, 2005** - The matter is further adjourned at Defence’s request.

[12] **September 6, 2005** - The Accused elects trial by Judge and Jury. A preliminary inquiry is set for March 7th, 2006.

[13] **March 7th, 2006** - The Accused waives preliminary inquiry and is committed to stand trial. The matter is adjourned to May 9th, 2006 in Supreme Court to set trial date.

[14] **May 9, 2006** - Attendance to set trial date. Defence request trial dates in September 2006. Court advises September term is booked and available dates for jury trial February 5 - 8, 2007. Defence and Crown agree to February date. Defence requests double-book (back-up) date for trial in September 2006 term. Court sets trial date to commence February 5th, 2007 with backup date September 25, 2006. The Accused is placed on further Undertaking to have no contact with J.W.

[15] **January 30, 2007** - Defence counsel filed an application for production of Third Party records pursuant to Section 278 of the *Criminal Code* to be heard on February 9th, 2007. It appears at that time counsel arranged with the trial judge to move the commencement of the trial from February 5th, 2007 to February 19th, 2007. The application was grounded on the issue of the credibility of the complainant. The material sought related to records in possession of the Crown regarding the complainant's stepfather C.R. Also records in possession of the Department of Community Services and St. Martha's Regional Hospital relating to interviews with the complainant. The application alleged inconsistent statements made by the complainant relating to the issue of sexual intercourse with The Accused. On the same date as filing of the Third Party records application, the Crown disclosed to Defence counsel records in its possession relating to C.R. At that time, the Crown

further discloses interview notes relating to a second statement from the complainant “wherein she disclosed facts different from her original statement”.

[16] **February 16, 2007** - Counsel appeared before the judge to re-schedule the jury trial in order to allow time to hear the Third Party records application. The Court advises the next available date for jury term is February 2008. Crown and Defence agree to trial date. No date is set to hear the Third Party records application until a determination is made as to who would be the trial judge designated for the jury term as the trial judge is required to hear the application.

[17] **June 21, 2007** - Crown discloses to Defence counsel video-tape of second statement taken from complainant on February 7th, 2007.

[18] **October 30, 2007** - Defence counsel, employed with Nova Scotia Legal Aid Services, (NSLA) is appointed to the Bench. Other Defence counsel with NSLA assumes the file. On the same date, the Judge confirms November 13th, 2007 as date for hearing the Third Party records application. This application is later adjourned by the Judge to January 10th, 2008.

[19] **December 1, 2007** - Correspondence from Judge to counsel confirming Crown and Defence counsel agreement to adjourn trial to April 21st, 2008. There is no explanation regarding the circumstances necessitating the adjournment.

[20] **January 4, 2008** - Correspondence from Judge following a pre-trial conference confirming Judge and Defence counsel no longer involved in proceedings due to conflict. Trial date of April 21st, 2008 is maintained.

[21] **March 19, 2008** - New and current Defence counsel now represents The Accused. Counsel has not received complete file materials requested from NSLA office necessitating a request for an adjournment. Crown agrees. Court advises the next available date for jury trial is February 2009. Matter is adjourned to June 3rd, 2008 to confirm trial dates.

[22] **June 3, 2008** - Court advises that the tentative February 2009 dates have been filled by another case. The Court double-books this case and maintains the February 2009 trial dates. The matter is adjourned to September 2008 to confirm trial dates and allow Defence to determine whether the Third Party records application is to proceed.

[23] **September 9, 2008** - February 2009 trial dates are confirmed. Defence counsel advises application is likely to proceed.

[24] **January 16, 2009** - Court appearance. Defence counsel requests adjournment of trial scheduled for February 2009 as The Accused underwent surgery on January 14th requiring four to six weeks of recovery and rehabilitation. Crown consents to adjournment. At this time the Court is also asked to re-schedule the other trial regarding The Accused. This related to the 2003 charge of sexual assault against the complainant N.M. which resulted in a necessity for a re-trial following appeal. Trial dates of April 2009 and October 2009 are discussed with counsel. Crown requests the re-trial case be scheduled for the April 2009 date. Defence counsel representing The Accused on both charges consents to proposed dates for the two trials with the present case scheduled for trial commencing October 8th, 2009.

[25] **August 12, 2009** - The Crown discloses a preliminary DNA Forensic Analysis Expert report to Defence counsel.

[26] **August 14, 2009** - Defence counsel files a Third Party records application similar to the application filed on January 30th, 2007 by former Defence counsel.

[27] **September 16, 2009** - Crown further discloses to Defence counsel a 23 page slide presentation explaining DNA and Forensic DNA Analysis.

[28] **September 22, 2009** - Crown and Defence counsel present in Court. Defence counsel requests adjournment of trial scheduled for October 8th, 2009 due to late disclosure of DNA expert evidence. Crown consents to adjournment. Trial is re-scheduled February 15th, 2010. On the same date, a hearing of application for Third Party records disclosure takes place. Court ultimately orders disclosure of portion of requested Third Party records on the basis of the issue of credibility of the complainant.

[29] **December 23, 2009** - Defence counsel files current Charter application.

Unreasonable Delay

[30] The factors to be considered in assessing unreasonable delay are set out in *R v.*

Morin [1992] 1 S.C.R. 771:

- (a) the length of the delay;
- (b) waiver of time periods;
- (c) the reasons for the delay, including
 - (I) inherent time requirements of the case
 - (ii) actions of the accused
 - (iii) limits on institutional resources, and
 - (iv) other reasons for delay; and
- (d) prejudice to the accused.

[31] The period of delay to be examined is the time from the date of the charge to the end of the trial. While recognizing that various districts operate under different circumstances, the Court in *Morin* set out as guidelines only, a period of delay between 14 and 18 months.

[32] In determining whether proceedings should be stayed under Section 11(b), the Court must consider whether the accused's right to trial within a reasonable time

outweighs the interests of society in bringing the accused charged with an offence to trial.

[33] As indicated the current period of post-charge delay is 66 ½ months from the laying of the Information to the end of the trial. This period by itself, merits an inquiry as to reasonableness of delay. While the pre-charge delay period does not form part of the calculation of the length of delay, it may be considered as part of the overall determination of the reasonableness of post-charge delay. (*Morin*).

[34] Regarding this charge of incest, the complainant J.W. alleges that her father The Accused is the father of her child born October *, 1999. Her initial complaint to the RCMP was made in October of 2000. In September 2001, following an investigation, the RCMP made a determination not to further pursue the complaint. In December 2002, the matter was re-opened at the request of the complainant ultimately leading to The Accused's arrest in April 2003 for the offence of incest as well as another charge of sexual assault against a different complainant, N.M.

[35] The sexual assault charge regarding N.M. began its process in Provincial Court in 2003. However, the Information regarding the current incest charge was not laid until August 2004. No explanation was provided for this delay.

[36] There was a 10 month delay from the laying of the incest charge in August 2004 to The Accused's first appearance in Provincial Court in June 2005. Corporal Wood testified the reason for not issuing an initial summons to appear in Court related to The Accused's health. It appears from exhibit evidence the Crown was notified in July of 2004 that The Accused had been diagnosed with having * which led to the delay of his Preliminary Inquiry on the other sexual assault charge that had been scheduled to be heard in August 2004. The Accused became a paraplegic, underwent surgery on his spine requiring a lengthy period of recovery which rendered him unable to appear in Court until the scheduled appearance in June of 2005.

[37] Corporal Wood testified another reason for the delay was that further time was required to gather more evidence, specifically, samples for DNA analysis that was considered critical to the Crown's case.

[38] Although a period of 9 months elapsed from the first appearance in Provincial Court to committal for trial, a total period of 29 ½ months elapsed from the laying of the charge to the initial trial date scheduled for February 2007.

[39] The Crown submits it was ready to proceed to trial on the initial date set for February 5th, 2007. However, it appears that evidence and disclosure issues existed at that time. The Defence's Third Party records application filed January 30th, 2007, initiated an immediate disclosure of documentation. Ultimately, further documentation was ordered disclosed following hearing. In addition, in February 2007, the Crown was in the process of obtaining a second statement from the complainant containing inconsistencies. Even then, the video-taped statement made on February 7, 2007 was not disclosed by the Crown until June 2007. Moreover, DNA analysis had yet to occur.

[40] Events occurred between October 2007 and January 2009 that were beyond the control of the Crown as well as The Accused. In this time period, Defence counsel was appointed to the Bench, subsequent Defence counsel and Judge withdrew from the case due to conflict, new Defence counsel required time to receive and review file materials, and The Accused underwent non-elective surgery.

[41] During the January 2009 court appearance to re-schedule this trial when the Court offered April and October 2009 dates to counsel, Crown counsel requested the later date for this trial on the basis that the Defence Third Party records application was yet to be heard. This demonstrates a lack of urgency on behalf of the Crown when the matter is clearly facing Section 11(b) problems.

[42] The period of delay from October 2009 to February 2010 is attributable to the Crown as a result of late disclosure of DNA analysis and relating documents in August and September of 2009. The Crown offered no explanation for the delay in obtaining and disclosing DNA evidence that was determined to be critical to the Crown's case as early as 2004.

[43] I find the post-charge delay in this case to be unreasonable. Even where the Defence waived time periods for setting trial dates, the length of the delay in this case exceeds by far the *Morin* guidelines.

Prejudice

[44] The Accused filed an affidavit as part of this Charter Application. He also testified at the hearing and was cross-examined. He was rendered a paraplegic in 2004 and utilizes a wheelchair. He stated he attended Provincial Court several times in a wheelchair regarding the other charge involving the complainant N.M. He was subject to two Undertakings with conditions regarding the current charge of incest. The Accused stated he suffered stress throughout the proceedings and also acknowledged that part of the stress related to the other charge that had been concluded. However, he stated the ongoing stress regarding the current charge led him to contemplate suicide in 2009. He currently receives counselling for depression. His physical condition has worsened since the Spring of 2009. A feeding tube was inserted in his stomach in the Spring of 2009 as a result of leakage of food into his lungs. The Accused states he has no control over his bowels and bladder. There is no assertion that his physical condition relates to trial delay. However, HomeCare Services refuse in-house home care due to this outstanding criminal charge.

[45] Prejudice to an accused can be either inferred as a result of the length of the delay or actual based on evidence. In *R v. Godin* (2009), S.C.C. 26, Justice Cromwell, writing for the majority:

[30] Prejudice in this context is concerned with the three interests of the accused that Section 11(b) protects..liberty, as regards to pre-trial custody or bail conditions; security of the person, in the sense of being free from the stress and cloud of suspicion that accompanies a criminal charge; and the right to make full answer and defence, insofar as delay can prejudice the ability of the defendant to lead evidence, cross-examine witnesses, or otherwise to raise a defence. See *Morin* as pp. 801-3.

[31] The question of prejudice cannot be considered separately from the length of the delay. As Sopinka, J. wrote in *Morin*, at p. 801, even in the absence of specific evidence of prejudice, “prejudice may be inferred from the length of the delay. The longer the delay the more likely that such an inference will be drawn”...

[38] Moreover, it does not follow from a conclusion that there is an unquantifiable risk of prejudice to the appellant’s ability to make full answer and defence that the overall delay in this case was constitutionally reasonable. Proof of actual prejudice to the right to make full answer and defence, is not invariably required to establish a S. 11(b) violation. This is only one of three varieties of prejudice, all of which must be considered together with the length of the delay and the explanations for why it occurred.

[46] The delay in this case is inordinately excessive. This is not a complicated case requiring lengthy periods of preparation and court time. The critical elements of the offence of incest are the relationship of father and daughter and the occurrence of sexual intercourse. There were institutional and other delays that cannot be held

against either the Crown or The Accused. Defence's requests for adjournments were for valid reasons and not really for purposes of delay. For the most part, the requests were beyond the control of The Accused.

[47] The delay in arresting The Accused in April 2003 and laying of charges in August 2004 as well as untimely disclosures were not explained by the Crown. Moreover, it appears the Crown gave priority to the other offence for which The Accused was also arrested in 2003. That Information was laid in 2003 and proceeded through Provincial Court to Jury Trial, Sentence, Appeal and re-trial by Jury.

[48] This is a case where the excessive delay leads to an inference of prejudice. There is some evidence of actual prejudice. While there is a strong societal interest in having a charge of this nature tried on its merits, to proceed to trial at this late stage would be contrary to the public interests in the prompt and fair administration of justice. I am satisfied the excessive delay infringed the Accused's right to be tried within a reasonable time under Section 11(b) of *The Charter*.

[49] As a result, the charge against the Accused is stayed.

J.