COURT OF APPEAL OF YUKON

Citation: *R. v. Carlick*,
2018 YKCA 5

Date: 20180511
Docket: 15-YU773

Between:

Regina

Respondent

And

Christina Gladys Carlick
also known as Christina Marie Asp

Appellant/Applicant

Corrected Judgment: The text of the judgment was corrected at paragraph 28 where changes were made on May 28, 2018.

Before: The Honourable Madam Justice Bennett
(In Chambers)

On appeal from: An order of the Supreme Court of Yukon, dated October 5, 2012 (*R. v. Asp*, 2012 YKSC 80, Whitehorse Registry File Nos. 10-01510 and 11-01506).

Counsel for the Applicant:	J.A. Cunningham
Counsel for the Respondent:	N. Sinclair
Place and Date of Hearing:	Vancouver, British Columbia April 17, 2018
Place and Date of Judgment:	Whitehorse, Yukon May 11, 2018

Summary:

The applicant seeks an order to extend the time to file her notice of appeal against her conviction for second degree murder. She says that the extension is justified, due to the merit of her proposed grounds of appeal and the fact that the Crown respondent is not prejudiced by the passage of time. Held: Application dismissed. It is not in the interest of justice to grant the extension. While the applicant's grounds of appeal are at least arguable, her chronic and inordinate delay in advancing an appeal against a conviction entered nearly six years ago weighs heavily against granting the extension.

Reasons for Judgment of the Honourable Madam Justice Bennett:

[1] Christina Gladys Carlick, also known as Christina Marie Asp, was charged with first degree murder, and convicted of second degree murder of Gordon Seybold on June 22, 2012. She was sentenced to life imprisonment and a 15-year eligibility before parole on October 5, 2012. She seeks leave to extend the time to file her notice of appeal against her conviction to February 15, 2016.

Background

[2] Some of the circumstances are drawn from the trial of Norman Larue with the agreement of the parties as all of the transcripts in the Asp trial have not been prepared.

Initial investigation

[3] On March 26, 2008, the Royal Canadian Mounted Police ("RCMP") attended the scene of a fire at a marihuana grow operation, after firefighters found human remains at the scene. The firefighters found the body on or near a mattress as they were removing the roof of a burnt cabin from the embers of the fire. By examining an intact right-side jawbone found at the scene, a dentist, Dr. Severs, identified the remains as belonging to Mr. Seybold, who ran the grow-op on the property, and on an adjoining property.

[4] That same day, the police found an aluminum baseball bat and rifles in a garbage can at a rest area. The rifles came from Mr. Seybold's residence, and blood

stains on the bat and the rifles contained DNA matching that of Mr. Seybold. A DNA profile on the bat also matched Mr. Larue, who was also prosecuted for the killing. Ms. Carlick and Mr. Larue were in a romantic relationship during the entire police investigation.

[5] At the scene of the grow-op, investigators collected paint chips off a tree trunk matching the type of paint used on the model of vehicle owned by Jessie Asp (Ms. Carlick's mother), a Green GMC Jimmy truck ("GMC"). In the course of the investigation, the RCMP purchased the GMC. Analysis of the GMC uncovered a hair containing unidentified female DNA, a bloodstain containing DNA belonging to Mr. Seybold, a knife with bloodstains that matched Mr. Larue's DNA, and another bloodstain containing male DNA that did not match Mr. Larue.

[6] Witnesses testified that the GMC had a large dent in its bumper, and that Jessie Asp's daughter Christina and Mr. Larue had access to the vehicle that day**.**

[7] The police searched Jessie Asp's home with her consent. They found a notebook belonging to Ms. Carlick, and two bloodstained towels. The notebook contained a map to Mr. Seybold's residence in handwriting consistent with Ms. Carlick's**,** and one of the towels contained bloodstains matching DNA from Ms. Carlick and Mr. Seybold**.**

[8] At some point in early April 2008, Mr. Larue and Ms. Carlick left Whitehorse to visit Mr. Larue's sister in High River, Alberta. On April 22, 2008, the pair were arrested in Edmonton and re-incarcerated for violating parole terms flowing from prior offences**.** A flashlight with DNA consistent with Ms. Carlick and Mr. Seybold was seized from her when she was arrested on the parole violation.

Mr. Big Operation

[9] The Mr. Big operation began on February 8, 2009 when Ms. Carlick was released from custody for the parole violation. Two female undercover officers approached her with an offer of employment in a criminal organization. At the time, she was unemployed and living in a halfway house. Over the course of seven

months, she participated in scenarios involving surveillance, threatening people, and smuggling weapons across the border. She was given gifts of nominal value, the organization paid her rent, and she was flown to Halifax on recreational trips**.**

[10] Over the seven months, Ms. Carlick gave statements to the undercover officers at least five times regarding the killing of Mr. Seybold. In some of the statements she was an active participant, and in others she was only a lookout or a witness to Mr. Larue's actions.

[11] On February 27, 2009, Ms. Carlick told undercover operators "me and Norman [Larue] got into something somewhat deep…I seen pretty much Norman do something…pretty much that person is not alive". Later that day, Ms. Carlick described the killing to another undercover operator, saying that Mr. Larue beat Mr. Seybold with an aluminum bat and burned the cabin down.

[12] The next day, February 28, 2009, Ms. Carlick met "Mr. Big" in Red Deer. In this case, the "Mr. Big" figure was a female officer. Ms. Carlick told "Mr. Big" that Mr. Larue was fighting with Mr. Seybold and was getting the worst of it. She grabbed an aluminum bat that Mr. Seybold had wielded, and beat Mr. Seybold with it. She said Mr. Larue took the bat, and beat Mr. Seybold some more and then burned the cabin down**.**

[13] On March 3, 2009, Ms. Carlick re-enacted events around the killing with two undercover officers. She described how she and Mr. Larue beat Mr. Seybold with a bat and then Mr. Larue lit the cabin on fire. She could not find Mr. Seybold's property when she attempted to bring undercover officers there during the re-enactment, but she did take them to the rest stop where the police had recovered rifles and the bat linked to the property.

[14] On July 13, 2009, Ms. Carlick participated in another re-enactment, where she said "someone ended up dying", that there was a baseball bat involved, and that the victim "…ended up dying and we end up burning him, burning his whole house with him inside it".

[15] During the first part of the Mr. Big operation, Mr. Larue was in jail for a prior offence. Ms. Carlick corresponded with him, and told him during a visit that she now worked for a powerful criminal organization. She told Mr. Larue that she had implicated him to the criminal organization in Mr. Seybold's killing.

[16] Ms. Carlick testified in her own defence. She testified that she was with Mr. Larue at Mr. Seybold's residence, and saw him knock Mr. Seybold out during a fight. She saw a fire in the residence when they left. She took the position that she was only a witness to any offence committed by Mr. Larue.

[17] Mr. Larue was tried separately and convicted of first degree murder. His appeal has been argued and judgment is reserved.

Details of the Mr. Big Operation

i) The Structure of the Operation

[18] The undercover operation took place with 71 interactions between the undercover officers and Ms. Carlick between February 9, 2009 and August 4, 2009. The undercover operation was continued on Ms. Carlick for many additional months after her statements and re-enactments were completed. During this time, the undercover operators continually enforced Ms. Carlick's belief that she was part of a criminal organization and engaged her in employment and travel across Canada. The intent of the continued operations was to ensure that Ms. Carlick would introduce Mr. Larue to the undercover officers so that they could attempt to elicit a statement from him in a staged scenario. Mr. Larue was released from prison on July 29, 2009.

[19] Ms. Carlick first met two female undercover operators (H. and L.) in February 2009 in a mall food court. She was asked to work with them. The job was presented to her as an all-female criminal team seeking to "ball-break" men: in particular, to photograph men cheating on their wives, or to elicit important information from people in the oil industry. The operators told Ms. Carlick they liked her "native" look.

[20] Ms. Carlick was interested in the opportunity, and the operators acted quickly to befriend her by taking her for meals and out shopping. They helped her get groceries and a phone card and helped her to obtain her lost identification. They also helped her get her possessions out of the halfway house and brought them to her new basement apartment. Ultimately, the police paid for Ms. Carlick's rent and utilities, bought her a bed to sleep on, and otherwise supported her financially for the duration of the operation. The officers presented their work for the purported criminal organization as highly lucrative, with their leader having a vacation home in Costa Rica and giving a Cadillac to a valued employee.

[21] Ms. Carlick was assigned "work" by the undercover police officers. Initially, she was tasked to do surveillance. For example, the female officer H., posed with a male undercover officer by putting her arms around him while Ms. Carlick took photos, purportedly to show the man cheating on his wife. The photo was used as some form of extortion and Ms. Carlick was told to tell him "D-day is coming" and deliver him an envelope. Ms. Carlick was subsequently taken on the road for various "jobs" over the course of several months. She stayed in hotels, went to restaurants and participated in simulated criminal activity.

ii) Statements to the Undercover Operators

[22] Ms. Carlick first shared details about Mr. Seybold's death on February 22, 2009 with H., who was feigning distress. H. told Ms. Carlick that she killed a person and that Ms. Carlick would not understand. Ms. Carlick told her they had more in common than she knew and that "she had a secret with Norm in which somebody else had ended up dead." The undercover officers then asked her to tell everyone higher up the chain what she had shared with H.

[23] When Ms. Carlick next spoke with H. about Mr. Seybold's death, she said her role was as a lookout in the murder. H. told her higher-up associate L. that she made a mistake in telling Ms. Carlick that she had committed a murder. It was a trusted secret and now Ms. Carlick was involved. H. stated that she trusted Ms. Carlick and

that is why she shared the information with her. H. told Ms. Carlick she liked it when she killed the guy, and that it made her feel capable and powerful.

[24] Ms. Carlick was told to share her story with L., who was higher up in the criminal organization than H., and then she was told to share with an even higher-ranking male operative. The undercover officers informed Ms. Carlick that she was potentially creating problems for their criminal organization with the unsolved murder. The male undercover operator advised Ms. Carlick that the organization did not need “undue attention coming towards us” and told her that he knew a lady who could make the problem go away.

[25] In her statement to the male operator on February 27, 2009, Ms. Carlick said that she did not know that Mr. Seybold was going to be killed. She stated that she was at his house and that she knew that her mother asked Mr. Larue to “take care” of Mr. Seybold. She did not think Mr. Seybold was going to die but she suspected that “something” was going to happen. She stated that she would have helped Mr. Larue if Mr. Seybold got the better of him.

[26] Later in this same statement, Ms. Carlick changed her story completely and stated that she was at the house, and that she helped Mr. Larue by hitting Mr. Seybold with the bat on his head and she could hear cracks when she hit him. In this rendition of the events, Ms. Carlick stated that Mr. Larue then took over again after she intervened.

[27] Ms. Carlick was asked by the male operator on February 27, 2009 if she wanted the help of the organization with her problem. Ms. Carlick was aware from her relationship with H. and L. that there was a leader of the criminal organization, and she was told that this crime boss would help her with her situation. Ms. Carlick was told that, now that she was connected, being a suspect in a murder investigation could jeopardize the criminal organization if she did not act to fix her problem. Ms. Carlick met with the crime boss and the interview was recorded on February 28, 2009.

[28] During this statement, the crime boss asked Ms. Carlick if the plan was "just to eliminate him, get him out of the picture altogether" and Ms. Carlick concurred. Ms. Carlick informed the crime boss that there was a 15-minute fight before the bat was used. She said that the deceased used the bat first when things got rough, then Mr. Larue used it, and then she used it. She stated that she hit Mr. Seybold three times and heard a crack in his skull.

[29] After the conversation with the crime boss on February 28, Ms. Carlick was instructed to immediately go to Whitehorse with the undercover officers for the purpose of showing them the locations relevant to the murder. Ms. Carlick was unable to find the location of Mr. Seybold's residence. The interactions on March 3, 2009 were recorded, and Ms. Carlick said some things that were different and new such as:

- Both Ms. Carlick and Mr. Larue masked up;
- While Mr. Larue was assaulting Mr. Seybold, Ms. Carlick went upstairs to see if anyone was there;
- Mr. Larue shot a blank with a 8mm near Mr. Seybold's ear to scare him and later he chucked it in the river;
- Ms. Carlick also agreed that she was being hard on herself and that she and Mr. Larue did plan everything.

[30] Ms. Carlick added new details during subsequent statements. On April 4, 2009, Ms. Carlick stated that her mother wanted Mr. Seybold beat and his house all burnt up. She heard a little bit of the conversation but stated that it was directed to Mr. Larue. On July 13, 2009, during a second re-enactment, Ms. Carlick pointed to a place where Mr. Larue wiped down a gun and threw it over a cliff. She also added new information about sitting on Mr. Seybold's lap to get Mr. Larue "psyched up" and she stated also for the first time: "I think the last crack at his head was from me" because he "almost got the best of Norm".

Legal Test for the Extension of Time to File a Notice of Appeal

[31] Rights of appeal are wholly statutory. In the criminal context they are governed by the *Criminal Code*, R.S.C. 1985, c. C-46: *R. v. Franc*, 2015 SKCA 146 at para. 7. Under s. 678(2) of the *Criminal Code*, an applicant may seek an extension of time to advance their appeal:

> (1) An appellant who proposes to appeal to the court of appeal or to obtain the leave of that court to appeal shall give notice of appeal or notice of his application for leave to appeal in such manner and within such period as may be directed by rules of court.
>
> (2) The court of appeal or a judge thereof may at any time extend the time within which notice of appeal or notice of an application for leave to appeal may be given.

[32] A person seeking to appeal against their conviction must file a notice of appeal within 30 days after the imposition of their sentence. If more than 30 days have elapsed, the person may appear before a justice of the Court to seek an extension of that time limit: *Yukon Territory Court of Appeal Criminal Appeal Rules, 1993*, S.I./93-53, ss. 3(1)-(2), 16.

[33] The criteria applicable to granting an extension of time are found in *Davies v. C.I.B.C.* (1987), 15 B.C.L.R. (2d) 256 at 260 (C.A.): see *Holmes v. Matkovich*, 2008 YKCA 2 at para. 22; *C.S. v. S.N.*, 2008 YKCA 11 at para. 7. These factors apply equally to the criminal context: *R. v. Kereliuk*, 2007 YKCA 2 at para. 2. They are summarized as follows:

1) Was there a *bona fide* intention to appeal?
2) When were the respondents informed of the intention?
3) Would the respondents be unduly prejudiced by an extension of time?
4) Is there merit in the appeal?
5) Is it in the interests of justice that an extension be granted?

[34] In *Davies*, Seaton J.A. for the Court said the fifth factor “encompasses” the other factors and “states the decisive question” (at 260). Mr. Justice Lambert, concurring in the result, stated at 261:

> … I agree with Mr. Justice Seaton that the fifth question, relating to a consideration of the interests of justice, is an overriding question and embraces the first four questions. But each of those first four questions is properly a question to be considered in relation to how the interests of justice would be affected by the refusal of an extension or by the granting of an extension.

[35] In *Clock Holdings Ltd. v. Braich*, 2009 BCCA 437, the Court said, at paras. 23–24:

> [23] … the first four factors are not all that comprises the fifth factor, otherwise there would be no need for the fifth factor.
>
> [24] The interests of justice encompass a myriad of factors, including the interests of the parties and compliance with the *Rules of Court* …

[36] The community's interest in avoiding a wrongful conviction is also a consideration of the interests of justice: *R. v. Caron*, 2013 BCCA 475 at para. 26.

[37] In *R. v. M.A.G.*, 2002 BCCA 413, the Court made it clear that the five factors should not be treated as an exhaustive checklist. The governing principle is that the applicant must establish special circumstances, and different factors may be accorded different weight in this analysis:

> [28] ... the list of five factors set out in para. 5 are points which the court takes into account in deciding whether there are "special circumstances" which justify granting an extension. The five factors should not, although they sometimes are, be treated as an exhaustive checklist of conditions, all of which the applicant must meet in order to succeed on the application. The governing principle is that the applicant must establish special circumstances. In making that determination, the matter must be approached on the basis that the weight to be given to any factor will depend on the circumstances of each case. In my view, it must follow that in some cases the weight to be given to one or more criteria will be negligible because it is so heavily outweighed by the weight which must be given to others.

[38] Furthermore, finality in criminal proceedings is also a factor to weigh in assessing whether to grant an extension of time to file a notice of appeal: *R. v. Tallio*, 2017 BCCA 259 at para. 17; *R. v. R. (R.)*, 2008 ONCA 497 at para. 16.

[39] In *R. v. Thomas* [1990] 1 S.C.R. 713, a three-justice panel of the Supreme Court discussed an application to extend time to file an appeal in the context of a change in the law. In *Thomas*, it was a dramatic change. Mr. Thomas had been

convicted of second degree murder under the constructive murder provisions of the *Criminal Code*. While his appeal to the Court of Appeal for British Columbia was pending, *R. v. Vaillancourt* [1987] 2 S.C.R. 636, which challenged the constitutionality of the constructive murder provisions in the *Criminal Code* had been argued and judgment was reserved. Mr. Thomas's appeal was heard and dismissed on January 26, 1987, with no constitutional issue raised. On December 3, 1987, the constructive murder provisions were struck down as unconstitutional. Mr. Thomas had not brought his application for leave to appeal to the Supreme Court within time, and he did not bring it until December 1989, citing ignorance of the change in law, and difficulties obtaining legal aid to help him file his application. The Court held that to take advantage of the new law, he had to be "in the system" as set out in *R. v. Wigman* [1987] 1 S.C.R. 246 at 257, meaning that he had to have a live appeal pending when the new decision was released.

[40] The Court concluded that Mr. Thomas should not artificially be brought into the system by granting an extension of time, citing that the court cannot do "perfect justice". The Court concluded that there was no intention established to appeal within the time; and the delay had not been adequately explained.

[41] The Supreme Court of Canada enumerated a set of factors to guide a court in exercising its discretion to grant an extension of time to appeal to that Court in a criminal matter: *R. v. Roberge*, 2005 SCC 48 at para. 6. The Supreme Court's factors, as well as the factors outlined by other provincial appellate courts are similar to those identified by this Court, but vary somewhat in wording:

> The power to extend time under special circumstances in s. 59(1) of the Act is a discretionary one. Although the Court has traditionally adopted a generous approach in granting extensions of time, a number of factors guide it in the exercise of its discretion, including:
>
> 1. Whether the applicant formed a *bona fide* intention to seek leave to appeal and communicated that intention to the opposing party within the prescribed time;
> 2. Whether counsel moved diligently;
> 3. Whether a proper explanation for the delay has been offered;
> 4. The extent of the delay;

> 5. Whether granting or denying the extension of time will unduly prejudice one or the other of the parties; and
>
> 6. The merits of the application for leave to appeal.
>
> The ultimate question is always whether, in all the circumstances and considering the factors referred to above, the justice of the case requires that an extension of time be granted.

[42] In *Roberge*, the application for leave to appeal was filed four months out of time, due to counsel's increased workload, brought about by illness in the law firm. The Court concluded that despite the applicant forming a *bona fide* intention to appeal and notifying the other side, the delay was lengthy, and counsel did not prioritize bringing the extension application. The Court refused the application.

Application of Principles to this Case

i) *Bona fide* intention to proceed

[43] Ms. Carlick deposes that her trial counsel did not advise her to appeal her sentence or conviction. Her trial counsel has since passed away, and nothing in his file assists with this application.

[44] She filed an application for leave to appeal her sentence on her own on November 2, 2012, but abandoned the appeal on July 25, 2013. She learned about the decision in *R. v. Hart*, 2014 SCC 52 and discussed it with Ms. Cunningham in November 2014. This appears to be the first formation of an intention to appeal her conviction. She did not apply for legal aid until March 30, 2015.

ii) When were the Respondents first informed of this Intention?

[45] After making her application for legal aid, an astonishing delay occurred in relation to whether Ms. Carlick's application would be funded by the Yukon Legal Services Society ("YLSS"). The chronology is set out in Ms. Carlick's affidavit as follows:

> 7. Ms. Cunningham advised me that her opinion was that there was merit to an application and that I should apply to the YLSS for funding for this case since I was not able to afford a lawyer myself. I faxed an application to

YLSS on March 30, 2015. I did not hear anything from YLSS through April 2015 and I asked Ms. Cunningham if she would follow up on my behalf. She wrote a letter June 3, 2015 to follow up.

8. After June 3, 2015, Ms. Pritchard from YLSS told me that YLSS was conducting a merits assessment. I did not hear anything further about the outcome of the merits assessment, so I asked Ms. Cunningham to follow up and she wrote to YLSS on July 9, 2015.

9. After July 10, 2015, I communicated by phone and fax with Gordon Coffin who advised me that he was the lawyer at YLSS who was assessing the merits of my appeal. I informed Ms. Pritchard I was concerned that Mr. Coffin may be a friend of the victim in my case. I was informed he was only assessing merit. I did not raise this issue directly with Mr. Coffin.

10. In August 2015, I had still not yet heard back from YLSS about their assessment of the merit of my appeal and Ms. Cunningham wrote to YLSS to follow up on my behalf.

11. On September 8, 2015, I received a letter from David Christie, Acting Executive Director of YLSS that stated that my application for YLSS coverage for my appeal was denied due to lack of merit. The letter also said that I could appeal this decision to the Board of YLSS and I did so to meet the time requirement that my matter be addressed at the September 22, 2015 Board Meeting.

12. On November 9, 2015, I received a letter from Vincent Larochelle of YLSS that was a merits opinion addressed to Mr. Clarke. I understood this to be a preliminary merits assessment. I understood that YLSS was having a second lawyer look at the merits of my case.

13. I had not heard a response from YLSS and Ms. Cunningham followed up to ask when I would have an answer from YLSS on December 18, 2015 and on January 18, 2016.

14. On January 29, 2016, I received a fax which was a letter from Mr. Larochelle to Mr. Clarke assessing the merits of my appeal. I did not receive anything from YLSS to say that they had approved my appeal and were going to provide coverage for my case.

15. On April 15, 2016, Ms. Cunningham wrote to YLSS as I was very concerned about the time it was taking and I had never heard back from YLSS about whether or not my merits assessment and my coverage was accepted by YLSS. On April 18, 2016, the YLSS Board wrote to Ms. Cunningham. This was the first time I was informed that the Board of Directors had agreed to my appeal and was authorizing legal aid to cover my appeal. The letter advised me that a legal aid certificate had been issued for assistance with an extension of time to appeal my conviction for murder.

16. I asked Ms. Cunningham to respond to this letter and clarify the communications from my perspective. I had not agreed to any lawyer being my appeal lawyer and the way the process was explained to me, I thought that I had to accept a lawyer as my counsel before they became my lawyer. I thought Gordon Coffin and Vincent Larochelle were assessing merits to advise the Director of YLSS if YLSS would fund my appeal. In the letter of

> April 21, 2016, I asked Ms. Cunningham to advise YLSS of my concern that Mr. Larochelle was also assisting Mr. Larue in a merits assessment. Norman Larue is my co-accused and our trials were severed. I was very concerned about a conflict of interest for the same lawyer to be working on my case and Mr. Larue's case.
>
> 17. On May 13, 2016, Ms. Duncan on behalf of YLSS responded to my request to have Ms. Cunningham act as my counsel and be funded through YLSS. This request was denied, and I was assigned Mr. Larochelle. In this letter, Ms. Duncan described that Mr. Larochelle was not in a conflict of interest because Mr. Larochelle had not commenced any review or assessment of Mr. Larue's case and had not spoken to Mr. Larue.

[46] Although the YLSS ultimately funded and appointed counsel, Ms. Carlick declined YLSS-appointed counsel and pressed to have Ms. Cunningham appointed. Although Mr. Larochelle eventually had conduct of Mr. Larue's appeal, he did not have conduct at the time Ms. Carlick deposes she was concerned about a conflict of interest.

[47] Mr. Larochelle filed an application to extend the time to file the notice of appeal on February 15, 2016. However, as Ms. Carlick refused Mr. Larochelle's assistance, more delay ensued.

[48] Despite Ms. Carlick forming the intention to file an application for an extension of time to appeal around November 2014, the Crown did not become aware of that intention until it was served with the materials in support of this application on February 22, 2016, almost four years after the conviction was entered.

[49] More correspondence with YLSS continued, including whether it affirmed the appointment of Mr. Larochelle.

[50] The first case management conference in this Court occurred on May 18, 2016. Two more case management conferences ensued, and on June 29, 2016, Ms. Cunningham advised that YLSS had not agreed to change counsel. She concluded that she would seek an appointment pursuant to s. 684 of the *Criminal Code*, despite the fact that YLSS had appointed counsel. Four more case conferences were held, and each time Ms. Cunningham indicating that she would bring a s. 684 application. On March 14, 2017, a date of April 10 was set for the

s. 684 application. That date was adjourned as YLSS was reconsidering the request for Ms. Cunningham to be appointed. That process was again delayed, apparently by the YLSS, but that is not entirely clear.

[51] The case continued to languish, until eventually, Ms. Cunningham was appointed to act and was on record on October 17, 2017. The application was set for March 27, 2018, in the hope that if the extension was granted, the appeal could be heard in the May 2018 sittings. That date was adjourned and the application was finally brought on April 17, 2018.

iii) Prejudice to the Respondents

[52] The Crown submits that there will be prejudice if this Court grants Ms. Carlick an extension of time due to her track record of advancing the appeal in a dilatory manner, and the readily foreseeable, further lengthy delays before a hearing of the appeal and a potential retrial.

[53] In my view there is prejudice to the Crown, given the lengthy delay not only in filing the application to extend the time to file a notice of appeal (almost four years), but also a further two-year delay in bringing the application forward. The memories of witnesses fade, they sometimes become unavailable, and justice generally is not served.

iv) Is there Merit to the Appeal?

[54] Ms. Carlick raises the following grounds of appeal:

i) The jury charge with respect to the Mr. Big statements;

ii) The admissibility of the Mr. Big statements in light of *Hart*; and

iii) The failure to give a limiting instruction with respect to the opinions expressed by the investigating officer;

[55] Ms. Carlick submits that only ground 2 is a direct effect of the change in the law.

[56] Ms. Carlick submits that the trial judge failed to properly instruct the jury on the evidence tendered by the Crown of her bad character. The bad character evidence was admitted as part of the "Mr. Big" operation, in that she had a criminal history, and was willing to be involved in a criminal organization. This is an instruction that would have been required pre- *Hart* and pre- *R. v. Mack*, 2014 SCC 58. The trial judge gave clear instructions when the evidence was tendered as "mid-trial" instructions. The comprehensive mid-trial instruction was unfortunately not repeated during the final instructions, but the trial judge delivered a general warning with respect to the limited permissible uses of Ms. Carlick's previous criminal convictions.

[57] While this is not a strong ground of appeal, it is an arguable ground.

[58] Next, Ms. Carlick submits that her "Mr. Big" statement would not have been admitted under the new framework for admission as set out in *Hart*.

[59] Part of the *Hart* analysis is to examine confirmatory evidence to give support to the reliability of the Mr. Big statement, and to guard against a false confession. In this case, there was a great deal of confirmatory evidence which would have supported the admissibility of Ms. Carlick's statements to the undercover officers, were that issue raised at trial.

[60] For example, Ms. Carlick refers to their having a flashlight with them that night, and there is in evidence a flashlight found in her possession with Mr. Seybold's DNA on it. Ms. Carlick says they drove out to Mr. Seybold's residence in Jessie Asp's GMC and left in it after the killing. There was evidence of Mr. Seybold's DNA found on a floor mat in the GMC after Mr. Seybold's death. She describes that after the killing, Mr. Larue backed the GMC into a tree; knocking it down and putting a dent in the rear bumper. There was evidence that a tree was found knocked down across the road at Mr. Seybold's property, as well as plant-like

material being found in the trailer hitch area of the GMC. There were also some paint chips found at the scene, and evidence suggesting they matched the paint on the GMC. Ms. Carlick told K.B. that they had to come up with a story to explain the dent in the bumper so she told Mr. Larue to back into a light standard at the hockey arena. There was also evidence from another witness, Mr. O'Connor, that he saw the GMC back into a light standard at the hockey arena.

[61] Ms. Carlick talked about alarm sensors on Mr. Seybold's property the night of the killing. There was evidence that there were, in fact, sensors installed on Mr. Seybold's property. Ms. Carlick describes both she and Mr. Larue hitting Mr. Seybold with an aluminum bat. An aluminum bat was found with Mr. Seybold's DNA on it. Ms. Carlick said that Mr. Larue took two rifles from Mr. Seybold's residence, and that she put them in a garbage container or a dumpster at a rest stop. Two rifles with Mr. Seybold's DNA were found in a dumpster following the killing. Ms. Carlick identified the rest stop during their re-enactment where she put the rifles, and she corrected D.L. when he mistakenly said that the rifles were taken into the Seybold residence. Ms. Carlick made it clear that that was not the case, they were taken from the Seybold residence. She also said in her statement to D.L. that Mr. Larue smashed the rifles before she put them in the dumpster. The rifles found were broken or damaged.

[62] On the other hand, there is evidence that the police played on Ms. Carlick's vulnerabilities, gave her money, took her on trips, and the operation lasted seven months.

[63] In my view, there is little merit to this ground of appeal, but it is at least arguable.

[64] Finally, Ms. Carlick submits that there was opinion evidence from a police officer, while admissible because of the nature of the defence, should have resulted in a limiting jury instruction. The officer testified with respect to how he eliminated all of the suspects except Ms. Carlick, her mother Jessie and Mr. Larue. He testified that he believed her guilty. Again, this is an arguable ground.

Interests of Justice

[65] The interests of justice takes into account a number of factors, and not just the interests of Ms. Carlick. The importance of the finality of criminal proceedings is a significant factor. “Justice delayed is justice denied” is not an empty phrase. Permitting an appeal to be launched years out of time does not assist the proper administration of justice. Even in the normal course, appeals “exacerbat[e] the uncertainty and anxiety the process causes to individuals caught up in it”: *R. (R.)* at para. 16. Recently, in the context of trial delay, the Supreme Court in *R. v. Jordan*, 2016 SCC 27, addressed this significant problem, and the concomitant reduction of public confidence in the criminal justice system. The majority excoriated the “culture of complacency towards delay”, which was apparent in this case, starting with Ms. Carlick, and continuing with the delay of the YLSS and of Ms. Cunningham.

[66] In addition, Ms. Carlick did not form a *bona fide* intention to appeal her conviction until more than two years after the fact. Once she formed the intention, it was four months before she applied for legal aid and another year before she filed a notice of application to extend the time to file her appeal. In 2012, Ms. Carlick filed a sentence appeal on her own. She knew how to launch an appeal, yet took no timely steps to file an appeal against her conviction. Once the YLSS appointed counsel to Ms. Carlick, she, for no apparent good reason, refused to accept the appointment, which further prolonged prosecuting her appeal.

[67] As a result of her refusal, lengthy delays ensued while Ms. Cunningham purported to intend to bring a s. 684 application to have her appointed as counsel – despite the fact that the YLSS had already appointed counsel. That was an application that was bound to fail and should never have delayed the prosecution of the appeal.

[68] While Ms. Carlick has met the low threshold of having an arguable appeal, none of her grounds of appeal demonstrate much strength.

[69] Weighing all of the factors, including the inordinate delay, which is greatly attributable to Ms. Carlick, in my view it is not in the interests of justice to grant an extension of time to file her notice of appeal.

[70] The application is dismissed.

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The Honourable Madam Justice Bennett