Citation: *R. v. Suska,* 2015 YKTC 4

Date: 20150211
Docket: 14-00158
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: His Honour Judge Cozens

REGINA

v.

JOZSEF SUSKA

Appearances:
Ludovic Goualillier — Counsel for the Crown
Andre Roothman — Counsel for the Defence

RULING ON APPLICATION

[1] Joseph Suska has been charged with having committed offences contrary to ss. 267(a) and 266 of the *Criminal Code*.

[2] Counsel for Mr. Suska filed a Notice of Application on November 25, 2014, followed by an Amended Notice of Application on January 8, 2015, seeking a judicial stay of proceedings, alleging a breach of Mr. Suska's s. 11(b) *Charter* rights for unreasonable delay.

History

[3] Mr. Suska is alleged to have committed these offences on or about May 9, 2014. The Information was sworn on June 16 and Mr. Suska's first appearance in court on these charges was June 18, 2014.

[4] Mr. Suska subsequently retained counsel, Mr. Roothman, and on July 2, 2014 he entered a not guilty plea.

[5] On July 11, 2014 the matter was set over to October 2, 2014 for trial.

[6] The trial was brought forward to October 1 and adjourned on consent of both counsel. The reason for the adjournment was that the Crown had not yet received copies of the transcripts of the statements of the accused and witnesses for disclosure purposes.

[7] On October 3, 2014, the matter was set over to November 26 for trial. On November 21, 2014, Crown counsel requested a further adjournment of the trial. The reason for the adjournment request was the unavailability of a Crown witness. The Crown subsequently conceded that there had been an oversight in agreeing to the November 26 trial date in that the officer's leave sheets had not been considered. Counsel for Mr. Suska advised on that date that he may be seeking a judicial stay of proceedings due to the delay.

[8] Counsel's original application went before Chisholm J. on November 28, 2014. The application was then adjourned to January 13, 2015 for argument. A trial date of February 11, 2015 was set at the same time.

[9] When the matter was before Chisholm J., Crown counsel stated that, in expectation that all transcripts would be disclosed prior to trial, Crown would have been prepared to proceed to trial on November 26 without the unavailable witness, had counsel known that the issue of delay was going to be raised by defence counsel. I note that Mr. Gouaillier did not appear as counsel for the Crown on the November 21 adjournment application.

[10] Mr. Roothman stated that defence counsel required the unavailable officer for cross-examination purposes and that a new trial date would need to be set for when the officer was available. The officer was not available until after January 15, 2015 and the February 11 trial date was set in order to comply with Mr. Roothman's schedule.

[11] The first request for disclosure was sent to the Crown's office by fax on June 26, 2014. On June 24, 2014, disclosure was provided directly to Mr. Suska. No disclosure was provided in regard to any statements taken, although Mr. Suska was advised that he would receive a CD containing statements once he had retained counsel. On June 26, defence counsel requested full disclosure, including statements of Mr. Suska and any potential witnesses. Transcripts of these statements were not specifically requested, although counsel also requested copies of any audio- and video-tape statements taken.

[12] On July 7, 2014, Mr. Roothman made a written request for disclosure of the transcripts of the statements of the two complainants. On September 2, 2014 Mr. Roothman again wrote to the Crown and made this disclosure request. On September 23, 2014, having not yet received any response to the correspondences of July 7 and

September 2, Mr. Roothman again wrote to Crown counsel requesting disclosure of the transcripts. He also advised Crown counsel of his intent to bring an application for a judicial stay of proceedings or adjournment of the trial.

[13] On September 25, 2014, Mr. Roothman wrote to the Crown and requested the transcripts of the statements of two further witnesses. On September 30, 2014, Crown counsel provided Mr. Roothman with written notice of a request to have the matter brought forward to October 1 in order to make application to adjourn the trial.

[14] On October 20, 2014, Mr. Roothman again wrote to the Crown, both in an e-mail and by letter, requesting disclosure of the transcripts of the statements of the complainants, the accused and other witnesses.

[15] On October 24, 2014, Mr. Roothman received disclosure of the transcript of one of the three statements provided by one of the complainants.

[16] On November 13, 2014, Mr. Roothman again wrote the Crown by e-mail requesting the remaining two transcripts of the statements of the one complainant as well as all the other outstanding transcripts. Crown counsel e-mailed back that the Crown had not yet received these transcripts from the RCMP who appeared to have misplaced the CD of the statements and had, in fact, had to be provided a copy of the CD from the Crown's office. By e-mail to the trial co-ordinator dated November 18, Crown counsel confirmed that there was some difficulty in receiving these transcripts from the RCMP and that, without the transcripts, he would not be seeking to have the trial proceed on November 26.

[17] On November 19, 2014, Crown counsel provided further outstanding transcripts of the statements of the complainants, the accused and one witness to Mr. Roothman.

[18] On November 20, Mr. Roothman, by e-mail, requested disclosure of the remaining transcripts of the first statement of the complainant and the remaining witness. Crown counsel also provided Mr. Roothman with information that the one officer was unavailable on the scheduled trial date of November 26. Crown counsel advised that he was hopeful of providing the outstanding transcripts by November 24 at the latest. These final two transcripts were provided on November 24, 2014.

Issue

Submission of Defence Counsel

[19] The basis of the defence application is that the failure of the Crown to provide disclosure in a timely fashion has caused Mr. Suska's trial to be pushed back beyond a date that was reasonable in the circumstances.

[20] Mr. Roothman submits that the delay in this case is not directly due to the actions of the Public Prosecution Service of Canada ("PPSC"), but to the failure of the RCMP to exercise diligence in the preparation of disclosure and provision of this disclosure to the Crown. This has resulted in the trial of Mr. Suska being delayed such that it is now scheduled to proceed approximately nine months after his arrest.

[21] Counsel states that the period of five months between arrest and trial is not, in and of itself, undue delay. He submits, however, that the just over four months from October 2 until February 11 is a delay wholly attributable to the actions of the Crown in

the wider context, as a delay in providing disclosure to the Crown on the part of the RCMP, is nonetheless a delay the Crown must take responsibility for.

[22] Further, counsel submits that although the delay from May 11 to October 2 is reasonable in and of itself, the failure of the RCMP to exercise diligence in providing transcripts of the statements to the Crown goes back to a date earlier than the first trial date. In order for the trial to have proceeded on October 2, 2014, the RCMP would have been required to provide the transcripts some time prior to this date in order to allow for the Crown to disclose these transcripts and for defence counsel to have properly prepared for trial.

[23] Mr. Roothman submits that this delay has been prejudicial to his client in that he has been under the stress of awaiting trial for longer than he should have been. Other than noting that a delay in time could impact upon the memories of witnesses and the right to make full answer and defence, he acknowledges that there is no actual evidence that this has occurred and that any such impact on memory could also impact upon the Crown's ability to present its case.

[24] He also acknowledges that his client has been on fairly non-restrictive conditions on the undertaking he was released on.

Submission of Crown Counsel

[25] Mr. Gouaillier submits that the delay is not unreasonable in this case. He acknowledges that there was delay on the part of the RCMP in preparing and providing the transcripts of the statements to the Crown. However, he submits that the s. 11(b)

Charter right is not intended to "punish" the Crown or the RCMP for perceived misbehaviour unless the result of the behaviour has a direct bearing on the fairness of the trial process. As such, although there was delay on the part of the Crown, inasmuch as the Crown was not provided the transcripts of the statements in a timely fashion, and thus could not provide them to defence counsel, the length of this delay is not unreasonable within the timeframes set by case law and there has been no substantial prejudice to Mr. Suska that would make the delay unreasonable in his circumstances.

Law

[26] In the case of ***R.*** v. ***Morin***, [1992] 1 S.C.R. 771, the Court defined the issue on appeal as follows:

> [21] The major issue to be determined in this appeal is whether the accused's right to a trial within a reasonable time as guaranteed by s. 11(b) of the Charter has been infringed by the delay experienced in this case. A subsidiary issue arises if the answer to the above question is in the affirmative. That subsidiary question is whether the delay can be excused as a result of a need for a transitional period to allow the government to discharge its burden of proving trials within a reasonable time.

[27] In ***Morin***, 14.5 months had passed between the time of arrest and the time of trial.

[28] The primary purpose of s. 11(b) of the *Charter* is to protect individual rights, which include (1) the right to security of the person, (2) the right to liberty, and (3) the right to a fair trial. There is a secondary societal interest as well. These are explained by the Court is paras. 28 and 29 as follows:

> 28 The right to security of the person is protected in s. 11(b) by seeking to minimize the anxiety, concern and stigma of exposure to criminal proceedings. The right to liberty is protected by seeking to minimize exposure to restrictions on liberty which result from pre-trial incarceration and restrictive bail conditions. The right to a fair trial is protected by attempting to ensure that proceedings take place while evidence is available and fresh.
>
> 29 The secondary societal interest is most obvious when it parallels that of the accused. Society as a whole has an interest in seeing that the least fortunate of its citizens who are accused of crimes are treated humanely and fairly. In this respect trials held promptly enjoy the confidence of the public. As observed by Martin J.A. in R. v. Beacon (1983), 36 C.R. (3d) 73 (Ont, C.A.): "Trials held within a reasonable time have an intrinsic value. The constitutional guarantee enures to the benefit of society as a whole and, indeed, to the ultimate benefit of the accused…"(p.96). In some cases, however, the accused has no interest in an early trial and society's interest will not parallel that of the accused.

[29] The Court set out the factors for consideration in assessing whether a delay violates the guarantees in s. 11 in paras. 31 and 32:

> 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 [page 788]
>
> (e) other reasons for the delay; and
>
> 4. prejudice to the accused. …
>
> 32 The judicial process referred to as "balancing" requires an examination of the length of the delay and its evaluation in light of the other factors. A judicial determination is then made as to whether the

> period of delay is unreasonable. In coming to this conclusion, account must be taken of the interests which s. 11(b) is designed to protect. Leaving aside the question of delay on appeal, the period to be scrutinized is the time elapsed from the date of the charge to the end of trial. See R. v. Kalanj, [1989] 1 S.C.R. 1594. The length of this period may be shortened by subtracting periods of delay that have been waived. It must then be determined whether this period is unreasonable having regard to the interests s. 11(b) seeks to protect, the explanation for the delay and the prejudice to the accused.

[30] In paras. 55-57, the Court concluded that, as a general guideline and subject to making allowances and adjustments for regional circumstances, a period of between 8 to 10 months for institutional delay in provincial courts is reasonable. Institutional delay is "…the period that starts to run when the parties are ready for trial but the system cannot accommodate them." (***Morin*** at para. 47)

Application to this Case

Length of the Delay

[31] In this case the length of the delay is from the time of arrest on May 9, 2014 until the trial date of February 11, 2015. This is a period just in excess of nine months. From the date that the matter was set for trial on July 11, 2014 until the February 11, 2015 trial date, the delay is seven months, which is at the middle of the range stated as a guideline in ***Morin***.

[32] For the Yukon, this is a fairly lengthy delay to have summary election assault charges brought to trial. In particular, in cases where the alleged assault occurs in the context of a domestic relationship, the trial coordinator has received direction from the Territorial Court to expedite the matter proceeding to trial. I do not, however, in this

case have any information before me to establish that the alleged assaults occurred within the context of a domestic relationship.

Waiver of the Time Periods

[33] I do not consider there to be any period of time for which Mr. Suska waived any delay in the matter proceeding to trial. The consent adjournment on October 1 was required due to disclosure issues. Defence counsel really had no choice at that time but to agree to an adjournment. The November adjournment was at the Crown request and, although Crown counsel was able to provide disclosure just prior to the trial date and was prepared to proceed without the unavailable witness, defence counsel, while not opposing the adjournment, made it clear on the record that the delay was an issue that would form the basis of a *Charter* application.

Reasons for the Delay

Inherent Requirements of the Case

[34] It takes some time to have a matter proceed from the point that an accused is arrested and charged to when a trial can occur. The retention of counsel, the request for, receipt of, and consideration of disclosure, and the need to appear in court to attend to matters such as the entering of a plea and fixing a trial date, all take some time. The availability of trial dates and of counsel to attend on the available dates will extend the time period in some cases. The amount of time set aside for this trial is one day.

[35] In this case, the trial date of October 2, 2014 was a reasonable date from the arrest of Mr. Suska to the matter proceeding to trial. I note that counsel for Mr. Suska

was not available for trial until mid-August. I have no information that one day for trial could have been found in the time counsel was unavailable. I will presume that there was no availability for trial that met the court calendar and that of counsel until October 2.

[36] Therefore I consider the approximately five-month period of time between May 9, 2014 and October 2, 2014 to be attributable to the inherent requirements of the case.

Actions of the Accused

[37] I find that there were no actions on the part of Mr. Suska that caused any of the delay for the period of time from October 2, 2014 until February 11, 2015. Given the lateness of the disclosure and the unavailability of a Crown witness that defence expected to have available for cross-examination, an adjournment was reasonable.

[38] I appreciate that Crown counsel sought the adjournment on the basis of the unavailability of the witness and incomplete disclosure. I make this point to counter any position from the Crown that the trial could have proceeded on November 26, as all disclosure had been provided, albeit at a late stage, and the Crown was prepared to proceed without the one unavailable witness, therefore, defence "caused" the adjournment. This said, Crown counsel in this case did not take this position and accepts that the further delay to February 11 is attributable to the Crown. The only caveat on this is that earlier dates were available on January 29 and February 5, 2015 but were turned down by defence counsel due to his unavailability.

[39] With respect to this latter point, defence counsel cannot be expected to keep dates open for the possibility of a trial that should have been concluded two months earlier. In the absence of any reason to think otherwise, I would assume that the unavailability of Mr. Suska's counsel on those two dates is for good reason and not to enhance any *Charter* argument based on unreasonable delay. Again, Crown counsel has not made any such argument.

Actions of the Crown

[40] I find that the adjournment of both the October 2 and November 26 trial dates are entirely attributable to the actions of the Crown.

[41] The adjournment of the October 2 trial date was due to outstanding disclosure. I acknowledge that there was no negligence on the part of the Crown in this regard, inasmuch as I am referring to the PPSC. The problem was with the delay at the RCMP in preparing the transcripts of the statements to provide to the Crown for disclosure purposes.

[42] I do not have much in the way of information as to why these transcripts were not ready in time for the trial. I operate on the presumption that when Crown counsel fixes a trial date, counsel is satisfied that everything required for the trial to proceed on the scheduled date will be taken care of. In cases where the Crown is uncertain, it is normal for counsel to put on the record that the trial date is subject to, for example, outstanding disclosure being provided and/or confirmation of witness availability. That is reasonable and, frankly, facilitates earlier trial dates than if the Crown were to wait for 100% certainty before fixing a trial date.

[43] There will also be times when something unexpected happens and a trial cannot proceed. These things happen despite best efforts on the part of the Crown.

[44] In the present case there were no concerns about trial readiness stated on the record when the trial dates were fixed.

[45] As I understand from the materials provided to me and submissions of counsel, the problem appeared to be with limitations on resources at the RCMP Detachment and the misplacing of a CD by the RCMP on which the statements were recorded. From what I can see, the Crown made a number of requests to the RCMP and provided, from their own files, a copy of the missing CD back to the RCMP in order to allow for transcripts to be prepared. The Crown appears to have been fairly diligent but for reasons not entirely known to me, it took the RCMP longer than expected to provide the transcripts.

[46] This said, the Crown is nonetheless responsible for the delay in disclosure even though the difficulty was not directly related to any action or inaction on the part of the PPSC but rather the RCMP.

[47] Even though the outstanding disclosure was provided on November 19 and 24, it was still late enough that it necessitated another adjournment of the trial date. Again, this delay is attributable to the RCMP and thus to the Crown. I accept that there was also witness unavailability which was due to the failure of Crown counsel at the fix-date stage to ensure that the most up-to-date officer availability sheet was taken into account. Had this been reviewed, it is fairly certain that the November 26 trial date would not have been set. I am not able to say that an earlier date than February 11,

2015 would have been set on October 1 at the adjournment application, although I would expect that in the normal course, earlier trial dates would have been available. I understand, however, that the police officer was not available until the middle of January, 2015 in any event.

[48] Further, with respect to the delay caused by the failure to provide transcripts of the statements, I note that defence counsel did not raise the issue of the CD of the statements not being disclosed in due course. I am prepared to assume, in the circumstances before me, that defence counsel received this CD. As such, it is not as though defence counsel was left entirely unable to prepare for trial by the lack of these transcripts. Certainly, even outside of the importance of having transcripts available at trial for the purposes of examination and cross-examination, transcripts are of assistance from a practical point of view for trial preparation in that they provide easier access to the information than jotting down notes from a CD. It may be that in some circumstance not receiving transcripts until just before trial may not compromise the ability of defence counsel to prepare for trial and make full answer and defence. In this case, however, the unexpected unavailability of the police witness, together with the late disclosure of the transcripts satisfies me that defence counsel should not have been required to proceed to trial on November 26.

[49] I am satisfied that the delay from October 2, 2014 until February 11, 2015 is entirely attributable to the actions of the Crown.

Limits on Institutional Resources

[50] Institutional delay runs from the time the parties are ready for trial but the system cannot accommodate them (***Morin*** at para. 47.)

[51] I find that there was no institutional delay in this case.

Other Reasons for the Delay

[52] I find that there was no other reason for the delay than the actions of the Crown.

Breakdown of the Delay

[53] I consider the delay to be as follows:

- The period from the arrest on May 9 and the fixing of the date for trial on July 11 is neutral delay and was acceptable in order to allow for the Information to be sworn and the matter brought to court and for Mr. Suska to retain and instruct counsel and to receive disclosure.

- The period from July 11 to the scheduled October 2 trial date is also neutral delay or perhaps even attributable in some part to the accused, in that his counsel was not available for trial in July and until the middle of August. While the delay from mid-August until October 2 could perhaps have been considered to be institutional delay, as I am not actually aware of why a trial date was not set within this time, I am not prepared to consider this delay as such. There may have been further issues of witness and counsel availability for example. In any event, the delay between the charge, the first appearance in court, and the

> October 2 trial date is reasonable for a one day trial in Whitehorse. Also, based on when the transcripts were ultimately disclosed, I expect that Crown counsel would not have been in a position to move the matter along at an earlier date and would perhaps have found even more actual time of delay attributable to the actions of the Crown. This latter point underscores the reality that the inaction on the part of the RCMP with respect to the preparation of transcripts goes back to a point in time somewhat well before October 2. While I am not increasing the period of resultant delay attributable to the Crown because of this, it is certainly something that raises a concern for me, in that I would have expected that if the Crown is responding to defence counsel requests for disclosure of the transcripts by requesting the RCMP prepare and forward these, I would have expected the Crown to know well in advance of the October 2 trial date that these would not be forthcoming, rather than just immediately prior to the date set, and to have communicated this to defence counsel.

Prejudice to the Accused

[54] In para. 61 of ***Morin***, the Court stated that prejudice can be inferred from a lengthy delay and the longer that the delay is, the more likely that the inference will be drawn.

[55] Mr. Suska has done what he could to have his matter brought to trial as quickly as is reasonably possible. Certainly, I accept that Mr. Suska found it stressful to be focusing on a trial date and preparing for it, only to have it adjourned so close to trial.

He then had a second trial date adjourned. Now, he is required to go through the physical and emotional stress of preparing for trial one more time.

[56] This said, there is no evidence that Mr. Suska has suffered any notable serious impact, whether physically or emotionally, as a result of the stress created by these trial adjournments. So, while there is indeed a negative impact upon him as a result of the adjournments caused by the actions of the Crown, I find that this impact is not particularly significant.

[57] I also note that he has been on minimally restrictive conditions of release, being simply to have no contact with the complainants and not to attend at either of their residences.

[58] This is also not a case where there is any evidence that a critical witness is no longer available or where any witnesses' evidence is comprised by the delay, such as by illness or a significant memory loss. While there may be the routinely trotted out "diminished memory through the passage of time" impact upon the recollection of any of the witnesses, to the extent that this may be true, I find that there is no reason to believe that it would be outside of the ordinary. It is not unusual for trials to take place where witnesses are recalling events that occurred much longer than nine months ago.

[59] I am satisfied that, in these circumstances that any prejudice suffered by Mr. Suska as a result of the delay is on the lower end of the scale.

Conclusion

[60] As stated earlier, the Court in ***Morin*** held that, in considering a s. 11(b) application, there is a balancing between its primary purpose, the individual rights of the accused and its secondary purpose, the public interest, taking into account all of the factors set out above.

[61] As stated in para. 52 of ***R.*** v. ***Ghavami***, 2010 BCCA 126, a case dealing with delay caused by prosecutorial conduct:

> In our view, balancing makes sense only if weight is attributed to the causes of delay. Inherent time requirements should receive little if any weight, because they are not attributable to either the state or the accused, and because some delay is inevitable. Actual or inferred prejudice to the accused will be accorded a certain weight, but it may be counter-balanced by delay caused or contributed to by the deliberate actions of the defence. Correspondingly, if the organs of state – Crown, justice system, or judiciary – are responsible for some of the delay, then the public interest will be entitled to less weight when balanced against the accused's right to a timely trial, because the protectors of the public interest have failed to live up to the standard expected of them. However, institutional and judicial delays will be accorded less weight than delays actually within the scope of the Crown's ability to expedite proceedings, because they are not the result of voluntary Crown action.

[62] Nine months from the date of the charge to a one-day trial involving two allegations of assault simpliciter in which the Crown has elected to proceed summarily is at the high end of the time-frame for cases in the Yukon, in particular when a not-guilty plea is entered and the matter fixed for trial within two months of the date of the alleged offences. It is not, however, clearly outside of the range for such trials.

[63] Of this nine months, I have found that the first five months are not as the result of anything other than the normal processes involved in bringing a matter to trial, including the need to find time in counsel's schedule, including that of Mr. Roothman.

[64] I have found that the delay of four months between the October 2, 2014 trial date and the current trial date of February 11, 2015 to be wholly attributable to the actions of the Crown. I do not find these four months of delay to be reasonable per se. There is an expectation that when matters are set for trial, disclosure will be provided by the RCMP to the Crown as soon as reasonably possible, and from the Crown to defence. In this case, the RCMP did not provide the PPSC with the transcripts of the statements of the witnesses within a time that I find would be reasonably expected. There was no delay on the part of the PPSC once they received the transcripts. Given my assumption that the CD of the statements was disclosed to defence counsel in a reasonable time (note the reference in Tab B of the Affidavit of Mr. Suska to the CD being disclosed once counsel was retained), it is not as though defence counsel was deprived of the statements of these witnesses, only the transcripts of these statements.

[65] However, just because this delay was not reasonable does not mean that it is so unreasonable as to result in a breach of Mr. Suska's s. 11(b) *Charter* rights. I have found that there has not been any significant prejudice to Mr. Suska, either through stress, restrictive bail conditions or his ability to make full answer and defence. There has not been shown to be any loss of or deterioration of the evidence that is to be presented.

[66] The public interest in this case to have the matter brought to trial is diminished somewhat through the cause of the delay being attributable to the actions of the Crown and the summary election which indicates the relative perceived seriousness of the alleged offences as compared to offences prosecuted by indictment. When weighed against the overall delay in this case between the date of the alleged offences and the February 11 trial date and the somewhat minimal impact on the rights of Mr. Suska. I am not satisfied on the requisite balance of probabilities that his s. 11(b) *Charter* rights have been breached and I dismiss the application. Had the circumstances been otherwise and demonstrated a greater prejudice to Mr. Suska or to his right to make full answer and defence, I may have found otherwise.

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COZENS T.C.J.