CITATION: *R. v. Moore*, 2021 ONSC 942
COURT FILE NO.: 19-RD18130
DATE: 20210205

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Her Majesty the Queen v. Deirdre Moore

BEFORE: C.T. Hackland, J.

COUNSEL: Malcolm Savage, for the Crown

Cedric Nahum, for the Accused

HEARD: January 4, 2021

RULING: (APPLICATION FOR CERTIORARI AND STAY OF PROCEEDINGS)

[1] The accused Deirdre Moore brings this application for a certiorari order quashing her committal for trial and for an order staying the proceedings as an abuse of process.

[2] The accused is charged on a 7 count indictment for certain actions she took in June and July of 2019, involving her efforts to see her 2 children and for internet communications directed to her former husband. At that time, she had been separated from her husband for over two years. He remained in the former matrimonial home with their two children. There were ongoing proceedings in Family Court, including a Family Court restraining order that the accused not attend the residence and requiring that her visitation with her children be supervised. The accused had and continues to have ongoing mental health issues.

[3] According to the Crown summary, the accused was arrested on July 26, 2019 when she went to the family home to see her son. After failing to see her son from the outside through windows in the house, she broke a basement window and gained entrance to the residence and remained inside briefly during which she wrote on the living room wall, with black marker, "I love you (children's names redacted), Love Mommy xoxo. Your dad is a bad man and a liar". She then left the house through the front door and was arrested by police who had just arrived.

[4] Following her arrest, the accused remained in custody from July 26, 2019 to October 30, 2019, a period of 96 days, at which point she was released following a bail review. During this

period of incarceration, she attended a judicial pretrial in the Ontario Court of Justice on August 15, 2019, at which she was unrepresented. Following discussions with the presiding judge and assistant Crown Attorney she advised the judge that she wished to be tried in the Superior Court, by judge alone. She was then duly bound over for trial in Superior Court.

[5] On the present indictment the accused is charged on seven counts, five of which relate to her attendance at the family residence on July 26, 2019, as follows:

- Count 1: entering a dwelling house with intent to commit an indictable offence, contrary to sec.349(1) of the *Criminal Code*;
- Count 2: wilfully damaging a basement window – mischief, contrary to section 430(4) of the *Criminal Code*;
- Count 3: violating a Family Court restraining order to not attend the residence, contrary to sec.127(1) of the *Criminal Code*;
- Count 5: break and enter a dwelling house with intent to commit an indictable offence, contrary to section 348(1)(a) of the *Criminal Code*;
- Count 6: wilfully damaging a wall – mischief, contrary to sec. 430(4) of the *Criminal Code*.

[6] The remaining two counts (counts 4 and 7) allege the accused criminally harassed her former spouse by internet communications and by attending at or near the residence on two prior occasions.

[7] The August 15, 2019 judicial pretrial in the Ontario Court of Justice was the accused's first opportunity to discuss the charges against her. As noted, she remained in custody and was not represented by counsel. This pretrial proceeded in a manner that, in retrospect, did not assist the accused or the administration of justice. Firstly, the assistant Crown Attorney (not the same assistant Crown Attorney appearing on this application), advised the court that a new charge had been laid against the accused, being the charge of break and enter a dwelling house contrary to section 348(1)(a) of the *Criminal Code* (ie. Count 5, noted above). No explanation was provided by the Crown for the laying of this very serious additional charge, which substantially duplicated the existing charge of entering a dwelling house contrary to sec 349(1) of the *Criminal Code*, which was not withdrawn. The accused was not advised that the new charge was an offence

punishable by potential imprisonment for life, nor was she invited to consult counsel in view of the additional jeopardy arising from this charge.

[8] The accused was advised that she would need to decide the mode of trial she would face. It was explained that the new charge was an indictable offence and therefore the matter would necessarily proceed by way of indictment. The accused inquired as to what an indictment was. It was asserted by the assistant Crown Attorney and accepted by the judge that the accused was not entitled to a preliminary inquiry on this charge. The accused was advised accordingly. This information was intended to assist the accused in deciding on her election. This information was wrong. The accused was and is entitled to have a preliminary inquiry if she elected trial in the Superior Court for any offence punishable by 14 or more years of imprisonment. It was not explained to the accused what a preliminary inquiry was, presumably because she was thought not to be entitled to elect for one. The accused indicated a preference for a judge alone trial in the Superior Court, reasoning, she said, that the Superior Court would have more experience with family law issues, which she felt was relevant to the charges she faced.

[9] Unfortunately, at the conclusion of the pre-trial, the accused was not read out her election nor asked to elect, as is required by section 536(1) of the *Criminal Code*. This section provides for the following election for offences punishable by 14 years or more of imprisonment:

> You have the option to elect to be tried by a judge without a jury or to be tried by a court composed of a judge and jury. If you do not elect now, you are deemed to have elected to be tried by a court composed of a judge and jury. If you elect to be tried by a judge without a jury or by a court composed of a judge and jury or if you are deemed to have elected to be tried by a court composed of a judge and jury, you will have a preliminary inquiry only if you or the prosecutor requests one. How do you elect to be tried?

[10] The accused argues on this application that because she was never put to her election as required by section 536 of the *Criminal Code*, nor did she waive her rights in this regard, and because she was wrongly advised that she had no right to a preliminary inquiry, the court has lost jurisdiction and her committal to trial should be quashed. I agree that this proposition is clearly supported by the decision of the Court of Appeal in *R. v. Mitchell* (1997), 121 C.C.C.(3d) 139 in which Doherty, J.A. held (page 8):

> ii) The failure to put the appellant to his election

> If an accused has an election as to the mode of trial, that election should be put to the accused in the language of s. 536(2). Absent waiver of the procedural requirements of that section, a failure to put the accused to his or her election, in terms which at least substantially comply with the section is a procedural error resulting in a loss of jurisdiction to conduct either a trial or a preliminary inquiry (citations omitted).

[11] The Crown acknowledges that both of these matters were errors of law. However, the Crown submits that these procedural errors can be remedied. The Crown says that they will undertake to withdraw count five, being the charge of breaking and entering a dwelling house contrary to section 348(1)(a) of the *Criminal Code*. The Crown points out this is the only count on the indictment that entitled the accused to elect for a preliminary inquiry. The Crown submits that once count five is withdrawn, the procedural errors are remedied and the accused's committal to trial in the Superior Court can stand.

[12] I do not accept that the jurisdictional error committed by the pre-trial judge in not affording to the accused a proper election for her mode of trial can be corrected, in effect, retroactively. The accused never had a proper election, or an accurate appreciation of what her options were. There is no basis for holding her to her prior expressed preference for a judge alone trial in Superior Court. What is required is that the previous committal be set aside and the matter be returned to the Ontario Court of Justice so that the accused can be put to her election, as required by section 535(2.1) of the *Criminal Code*. I say section 535(2.1) rather than section 536(1), because the Crown has undertaken to withdraw the section 348(1)(a) charge. Once this is done the accused can elect the mode of trial she then considers appropriate. The election for cases where the penalty is less than 14 years imprisonment (such that preliminary inquiries are not available) is the following (sec.536(2.1)).

> You have the option to elect to be tried by a provincial court judge without a jury; or you may elect to be tried by a judge without a jury; or you may elect to be tried by a court composed of a judge and jury. If you do not elect now, you are deemed to have elected to be tried by a court composed of a judge and jury. How do you elect to be tried?

Stay of Proceedings

[13] The accused also submits that the charges against her should be stayed as an abuse of process, both because the legal errors surrounding her committal for trial have likely affected the

fairness of the applicant's trial and further that the circumstances of the case affront the Canadian Justice System. Counsel for the accused raises the following points in this regard:

- the accused has no criminal record and there are mitigating mental health issues surrounding these offences which clearly arise out of her efforts to interact with her children, rather than any true criminal purpose. The accused has already been incarcerated for 96 days before her initial bail release, a period well in excess of any likely sentence she might receive in the event of conviction on these charges

- the date of arrest was 18 months ago, with no trial date currently in sight. It is difficult to imagine the accused's trial being completed within constitutionally mandated time limits as required by appellate jurisprudence interpreting section 11(b) of the *Charter of Rights and Freedoms*. Essentially the submission is that the charges would ultimately be stayed on a section 11(b) application at trial.

- the accused was misled, albeit unintentionally, as to her entitlement to a preliminary inquiry and not afforded the appropriate election required by the Criminal Code, all of which reflects negatively on the administration of justice.

[14] In the court's opinion, it would be premature to determine whether there was or will ultimately be an unconstitutional delay in this case, particularly in the absence of a *Charte*r section 11(b) stay application brought by the accused. The length of time the accused has already spent in pre-trial custody is concerning in the circumstances of this case, however that is not the fault of the prosecution or of the courts. The accused has gone through a considerable number of experienced counsel based on choices she has been making. The possibility or likelihood of a time served disposition of the charges can not be the proper basis for a stay application.

[15] The court's understanding is that the Crown will be withdrawing the current charge of breaking and entering a dwelling house (count 5) thus obviating the need to stay that count, which I would otherwise consider doing.

Disposition

[16] An order will issue quashing the accused's committal to trial and remitting the matter to the Ontario Court of Justice in order that the accused can be put to her election pursuant to section 536(2.1) of the *Criminal Code of Canada*.

Hackland J.

Mr. Justice Charles T. Hackland

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Justice Charles T. Hackland

Released: February 5, 2021