2001 S.K. No. 10,029

IN THE SUPREME COURT OF NOVA SCOTIA
[Cite as: R. v. Sawler, 2001 NSSC 184]

BETWEEN:

HER MAJESTY THE QUEEN

APPELLANT

- and -

SCOTT ALLISON SAWLER

RESPONDENT

D E C I S I O N

HEARD: At Kentville, Nova Scotia, on June 7, 2001.

BEFORE; The Honourable Justice Allan P. Boudreau.

DECISION: December 6, 2001.

COUNSEL: Eric Taylor, Esq.,
Counsel for the Crown.

Christopher Manning, Esq.,
Counsel for the Respondent.

Boudreau, J.

INTRODUCTION:

[1] An accused whose trial on a summary conviction charge was delayed for some eighteen months argued that his right "to be tried within a reasonable time" had been infringed. The trial judge found that the accused's 'Charter Rights' had in fact been violated and a stay of proceedings was ordered. The Crown appealed.

FACTS:

[2] Scott Allison Sawler was charged on July 3, 1999, with an assault causing bodily harm which was alleged to have occurred on that day. He appeared in Provincial Court on August 16, 1999 and the Crown indicated it was proceeding by way of summary conviction. His trial was set for May 16, 2000. The court was advised that the matter would be lengthy because there were numerous witnesses.

[3] The trial did not take place on May 16, 2000 because it was not called until 2:00 p.m. on that date and there was not sufficient time. The provincial court judge took the view that the entire matter should be adjourned. The first available date for the anticipated length of the trial was January 31, 2001. The Crown queried if there were earlier dates but that date was ultimately set without significant protest by either party. The only defence request was that no other trials be booked for that day because of the anticipated length of the trial.

[4] On January 31, 2001, Mr. Sawler made a motion that the charge be stayed because his right to be tried within a reasonable time had been infringed. Mr. Sawler testified and presented evidence of the extended prejudice he had suffered because of the delay. The trial judge found that eighteen months for a summary conviction matter was "*prima facie"* unreasonable and she accepted Mr. Sawler's evidence of prejudice. She granted the stay application and the Crown has appealed.

The GROUNDS OF APPEAL:

[5] 1. That the learned trial judge erred in ruling that the respondent had not acquiesced to or waived a portion of the delay in bringing the charge to trial;

2. That the learned trial judge erred in finding actual prejudice or placing undue emphasis on the prejudice to the respondent occasioned as a result of the delay;

3. Such other and further grounds of appeal as may appear from the record of the proceedings under appeal.

ANALYSIS:

[6] The trial judge appropriately reviewed the law and the evidence in arriving at her findings of fact and the conclusions that she drew. She recited the law from the case of **R. v. Morris** [1992] 1 S.C.R. 777, [1992] S.C.J. No. 25. She was well aware of the burden of proof on Mr. Sawler and the tests to be applied. She reviewed and applied the appropriate law on the issues of waiver and delay. She found as a fact that neither the Crown nor the defence were responsible for the eighteen months delay. It was all as a result of institutional delay.

[7] With regard to the first ground of appeal, the trial judge concluded that, while the defence may have acquiesced in the setting of the original and the adjourned trial dates, that there was no clear waiver as required by the authorities. Her conclusions are reasonably supported by the evidence and therefore should not be interfered with, considering the standard on appellate review. As a result, the appeal must fail on the first ground.

[8] With regard to the second ground of appeal, the conclusions of the trial judge and findings of actual prejudice are also reasonably supported by the evidence and they should not be interfered with. It should also be noted that the Crown did not seriously challenge Mr. Sawler on this issue. It would invite that I substitute my own view on the question of actual prejudice or the emphasis that should be placed on that prejudice. With all due respect, that is not my function unless the trial judge's findings and conclusions are not reasonably supported by the evidence. I have found that they are so supported.

[9] The Crown has stated that the trial judge also placed undue emphasis on the prejudice which she found as a result of the delay. The trial judge was well aware of the tests applicable to the analysis that she undertook. She first found that an eighteen month institutional delay for a one day summary conviction matter was unreasonable. The Supreme Court of Canada in **R. v. Dutra**, 2001 Carswell BC 1014, 2001 SCC 29, 269 N.R. 379, 155 C.C.C.(3d) 270, 151 B.C.A.C. 270, 249 W.A.C. 270, [2001] 1 S.C.R. 759, a judgement rendered May 16, 2001, stated the following at paragraph 2:

> We are all concerned with the length of the delay in light of the restrictive bail conditions imposed in this case, and in particular with the fact, agreed to by the parties and confirmed by the British Columbia Court of Appeal, that in 1996 a trial date for a two-day trial could not be obtained in the provincial court in less than a year.

[10] After finding that Mr. Sawler's right to a trial within a reasonable time had been infringed and that he had suffered actual prejudice as a result, the trial judge considered whether a stay should be granted. She weighed society's interest in having prosecutions proceed to trial when balancing Mr. Sawler's and the public's interest. She found the fact that the matter was one warranting a proceeding by way of summary conviction to be a relevant factor in the balancing of these interests.

[11] The trial judge, after considering all the factors mentioned above, exercised her discretion in favor of the stay in the circumstances as she found them.

[12] I do not find that the trial judge exercised her discretion unreasonably. As was alluded to by Saunders, J.A., in **R. v. Christie**, 2001 NSCA 147, trial judges, in rendering their judgements, do not always make decisions which academically cover all reasons which in retrospect could have been covered. Saunders, J.A., went on to comment at paragraph 16 of **Christie** that, when considering appeals from trial judges, the standard of appellate review is not what I would have done. He states it as follows:

> It is not for me to ask what I might have done had the case come before me in first instance. I am not to substitute my discretion for that of the trial judge.
>
> > . . . appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way (from **Charles Osenton & Co. v. Johnston,** [1942] A.C. 130 (H.L.), at p. 138 with approval by Laforest, J. in **Oldman River**, supra at p. 310)

CONCLUSION:

[13] For the reasons stated above, the appeal is hereby dismissed without costs.

Boudreau, J.