IN THE SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Abbass, 2004 NSSC 109

Date: 20040608
Docket: S.H.214552A
Registry: Halifax

Between:

Her Majesty the Queen

Appellant

v.

Todd Stephen Abbass

Respondent

Judge:	The Honourable Justice C. Richard Coughlan
Heard:	April 29, 2004
Decision:	June 8, 2004
Counsel:	Catherine A. Cogswell, for the Appellant Duncan R. Beveridge, Q.C., for the Respondent

Coughlan, J.:

[1] On September 29, 2002, Todd Stephen Abbass was charged that on or about August 28, 2002 he committed offences contrary to s. 253(b) and s. 253(a) of the *Criminal Code of Canada.*

[2] An order of suspension (Administrative License Suspension) was issued to Mr. Abbass effective September 4, 2002. The suspension lasted for a period of three months. On November 12, 2002, Mr. Duncan Beveridge, Q.C., on behalf of Mr. Abbass appeared in Provincial Court, entered pleas of not guilty and obtained a date for trial of December 18, 2003. Mr. Beveridge requested a full day hearing as he was alleging a breach of Mr. Abbass' rights pursuant to the *Canadian Charter of Rights and Freedoms.* Prior to court being in session, Mr. Beveridge spoke with the clerk of the court who advised him the earliest available date was December 18, 2003. In dealing with the trial date Mr. Beveridge stated in Court:

> MR. BEVERIDGE Your Honour, Duncan Beveridge appearing for Mr. Abbass, [examined?] the original information, waive reading of the two counts therein, enter pleas of not guilty, set a trial. I understand from speaking to the clerk that the first available date for trial is December 18, 2003.

[3] Crown counsel wrote to Mr. Beveridge by letter dated November 13, 2002 requesting particulars of the breach of the *Charter* Mr. Beveridge was alleging. Mr. Beveridge responded by letter dated October 20, 2003 that the challenges were in relation to s. 8 and s. 9 in connection with Mr. Abbass' arrest and detention. By letter dated November 5, 2003, Mr. Beveridge gave notice of an intention to make a motion arising from an alleged breach of s. 11(b) of the *Charter*. The section 11(b) challenge was argued before the trial judge on December 18, 2003 and the judge found Mr. Abbass' right to be tried within a reasonable time had been infringed and ordered a stay of proceedings.

[4] The issue for the Court is whether the Provincial Court Judge erred in ruling Mr. Abbass' rights pursuant to s. 11(b) of the *Charter* had been infringed or denied, and further erred in ordering a stay of proceedings.

[5] The standard of review from a decision of a trial judge granting a stay of proceedings was set out by Pugsley, J.A., in giving the Court of Appeal's decision in *R. v. Hiscock* (1999), 179 N.S.R. (2d) 350 at p. 357:

> The standard of appellate review from the decision of a trial judge granting a stay of proceedings was considered by the Supreme Court in *Canada (Minister of Citizenship and Immigration) v. Tobiass et al.* (1997), 218 N.R. 81; 118 C.C.C. (3d) 443 (S.C.C.). The judgment was delivered by a unanimous court.
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> At p. 470, the court said:
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> "A stay of proceedings is a discretionary remedy. Accordingly, an appellate court may not lightly interfere with a trial judge's decision to grant or not to grant a stay. The situation here is just as our colleague Gonthier, J., described it in *Elsom v. Elsom*, [1989] 1 S.C.R. 1367, at p. 1375, 59 D.L.R. (4th) 591:
>
> > '[An] appellate court will be justified in intervening in a trial judge's exercise of his discretion only if the trial judge misdirects himself or if his decision is so clearly wrong as to amount to an injustice.'

[6] Section 11(b) of the *Charter* states:

> Any person charged with an offence has the right
>
> . . . .
>
> (b) to be tried within a reasonable time;

[7] The method of analyzing a s. 11(b) application was set out by Sopinka, J., in giving the majority judgment in *R. v. Morin* (1992), 71 C.C.C. (3d) l (S.C.C.) at p. 13:

> .... While the court has at times indicated otherwise, it is now accepted that the factors to be considered in analyzing how long is too long may be listed as follows:
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> 1. the length of the delay;
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> 2. waiver of time periods;
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> 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

(e) other reasons for delay, and

4. prejudice to the accused.

LENGTH OF THE DELAY

[8] In considering the overall length of delay, the relevant period is from the date of the charge to the end of the trial (*R. v. Morin, supra)*. In this case that period is from September 29, 2002 to December 18, 2003 - a period of approximately fourteen and one-half months. As the trial judge found, the delay is sufficient to raise the issue of reasonableness and triggers the inquiry as to why it took fourteen and one-half months for the matter to come to trial.

WAIVER OF TIME PERIODS

[9] The trial judge found Mr. Abbass had not waived any of the fourteen and one-half month time frame, stating at para. 9 of her decision:

> Waiver must be clear and unequivocal and with full knowledge of the right one is waiving. It cannot be said here that Mr. Abbass waived any of his rights, explicitly or implicitly. Mr. Abbass retained and instructed counsel, entered his plea at arraignment and set the matter for trial.

[10] The test for waiver is stringent. As Sopinka, J. stated in *R. v. Morin, supra,* at p. 15:

> This court has clearly stated that in order for an accused to waive his or her rights under s. 11(b), such waiver must be clear and unequivocal, with full knowledge of the rights the procedure was enacted to protect and of the effect that waiver will have on those rights: *Korponey v. A.-G. Can.* (1982), 65 C.C.C. (2d) 65 at p. 74, 132 D.L.R. (3d) 354, [1982] 1 S.C.R. 41; *R. v. Clarkson* (1986), 25 C.C.C. (3d) 207 at pp. 217-9, 26 D.L.R. (4th) 493, [1986] 1 S.C.R. 383; *Askov,*

> *supra*, at pp. 481-2). Waiver can be explicit or implicit. If the waiver is said to be implicit, the conduct of the accused must comply with the stringent test for waiver set out above. As Cory J. described it in *Askov, supra* (at p. 481):
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> > ... there must be something in the conduct of the accused that is sufficient to give rise to an inference that the accused has understood that he or she had a s. 11(b) guarantee, understood its nature and has waived the right provided by that guarantee.
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> Waiver requires advertence to the act of release rather than mere inadvertence. If the mind of the accused or his or her counsel is not turned to the issue of waiver and is not aware of what his or her conduct signifies, then this conduct does not constitute waiver. Such conduct may be taken into account under the factor "actions of the accused" but it is not waiver. As I stated in *Smith, supra*, which was adopted in *Askov, supra*, consent to a trial date can give rise to an inference of waiver. This will not be so if consent to a date amounts to mere acquiescence in the inevitable.

[11] The judge stated in her decision Mr. Abbass, through his counsel, requested "the first available date for trial". The affidavit of Elizabeth A. Buckle sets out that Mr. Beveridge spoke with the clerk of the court prior to court being in session and was advised the earliest date for the trial was December 18, 2003. Then in court Mr. Beveridge related to the judge that he understood when speaking to the clerk that the first available date for trial was December 18, 2003. He did not request the first available date from the judge.

[12] There was not an explicit waiver of the time period by Mr. Abbass. Mr. Abbass was represented by learned and experienced counsel. Mr. Abbass, through his counsel, had full knowledge of his rights pursuant to s. 11(b) of the *Charter* and the effect waiver would have on those rights.

[13] Consent to a trial date can give rise to an inference of waiver unless the consent to a date amounts to acquiescence in the inevitable. While stating waiver must be clear and unequivocal, with full knowledge of the rights one is waiving, the trial judge did not address whether Mr. Abbass' consent to the trial date, through Mr. Beveridge, amounted to a waiver or was merely acquiescence in the inevitable. However, the trial judge found Mr. Abbass did not waive his rights. Given my role on hearing the appeal, I am not willing to interfere with that finding.

REASONS FOR THE DELAY

(a) Inherent time Requirements

[14] The trial judge determined the inherent time requirements of the case was approximately two months.

(a) Actions of the Accused

[15] While I was not willing to infer waiver of the time period from the setting of the trial date to the scheduled trial date, I am not convinced Mr. Abbass could not have obtained an earlier trial date. His counsel did not inquire of the judge if earlier dates were available, but merely stated he understood December 18, 2003 was the earliest available date. He did not protest the date or the non-availability of an earlier date. As Sopinka, J. said in *R. v. Sharma* (1992), 71 C.C.C. (3d) 184 (S.C.C.) at p. 194:

> ... If the accused was anxious to proceed, one would have expected something more in the form of protest or inquiry about other dates. While this is a matter which I will deal with in relation to prejudice, it is also pertinent to consider under this factor.

[16] Mr. Abbass' counsel also advised the Crown a full day was required to advance a *Charter* argument. Crown counsel wrote Mr. Abbass' counsel on November 13, 2002, requesting particulars of the alleged breach of the *Charter*; Mr. Abbass' counsel did not respond until October 20, 2003.

[17] These actions by Mr. Abbass, while completely appropriate, contributed to the delay and, therefore, will be taken into account when determining what length of delay is reasonable.

(b) Actions of the Crown

[18] The Crown did not do anything to occasion any delay of the case.

(c) Limits on Institutional Resources

[19] Considering the inherent time requirements of the case of approximately two months, the institutional delay was approximately twelve and one-half months - in excess of the guidelines of eight to ten months for Provincial Courts as set out in *R. v. Morin, supra.*

(d) Other Reasons for Delay

[20] This factor does not apply in this case.

PREJUDICE TO THE ACCUSED

[21] The trial judge inferred prejudice to Mr. Abbass from the length of delay as the delay was likely to interfere with the quality of evidence tendered, given the nature of the charges and the fact the defence intended to raise s. 8 and s. 9 *Charter* applications and lead evidence to the contrary.

[22] In addressing the issue of prejudice in *R. v. Morin, supra,* Sopinka, J. stated at p. 23:

> ... Accordingly, in an individual case, prejudice may be inferred from the length of the delay. The longer the delay the more likely that such an inference will be drawn. In circumstances in which prejudice is not inferred and is not otherwise proved, the basis for the enforcement of the individual right is seriously undermined.

and at p. 24:

> ... The purpose of s. 11 (b) is to expedite trials and minimize prejudice and not to avoid trials on the merits. Action or non-action by the accused which is inconsistent with a desire for a timely trial is something that the court must consider. ... Inaction may, however, be relevant in assessing the degree of prejudice, if any, that an accused has suffered as a result of delay.
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> ... Evidence may also be adduced to show that delay has prejudiced the accused's ability to make full answer and defence.

[23] In addressing the issue of prejudice, McLachlin, J., as she then was, stated in *R. v. Morin, supra,* at p. 31:

> An accused person may suffer little or no prejudice as a consequence of a delay beyond the expected and normal. Indeed, an accused may welcome the delay. On the other hand, an accused person can suffer great prejudice because of the delay. Where the accused suffers little or no prejudice, it is clear that the consistently important interest of bringing those charged with criminal offences to trial outweighs the accused's and society's interest in obtaining a stay of proceedings on account of delay, because the consequences of the delay are not great. ...
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> ... Where no inference as to prejudice can be drawn from the length of the delay, or where the most reasonable inference is the other way, the accused may have to call evidence if he or she is to displace the strong public interest in bringing those charged with an offence to trial.

[24] Here, society's interest in bringing those charged with criminal offences to trial clearly outweighs Mr. Abbass' and society's interest in obtaining a stay of proceeding. There was no evidence of actual prejudice to Mr. Abbass. Mr. Abbass did not attempt to obtain an earlier trial date. His counsel took over eleven months to response to Crown counsel's request for particulars of the alleged breach of Mr. Abbass' *Charter* rights. Mr. Abbass' inaction can be considered when assessing prejudice. I conclude Mr. Abbass was content with the pace at which things were proceeding, and there was little or no prejudice occasioned by the delay. As Sopinka, J. stated in *R. v. Sharma, supra*, at p. 196:

> As for inferred prejudice, I am unwilling to infer more than nominal prejudice as a result of the mere passage of time. Mr. Sharma's inaction from his set date appearance to his scheduled trial date shows a noticeable lack of concern with the pace of litigation. ...

[25] In the absence of evidence of actual prejudice, on the facts of this case, an institutional delay of twelve and one-half months is not sufficient to allow a court to infer an accused's s. 11(b) right has been infringed. The trial judge misdirected herself as to the test for inferring prejudice and erred in inferring prejudice from the passage of time on the facts of this case. Mr. Abbass was not denied a trial within a reasonable time.

[26] I allow the appeal and direct the matter be remitted to the Provincial Court for trial.

Coughlan, J.