Date: 19980526 Docket: C.A.C. 144667

NOVA SCOTIA COURT OF APPEAL
Cite as: R. v. Thompson, 1998 NSCA 151
Clarke, C.J.N.S.; Hart and Jones, JJ.A.

BETWEEN:

HER MAJESTY THE QUEEN	)	James C. Martin
	)	for the Appellant
Appellant	)	
	)	
- and -	)	
	)	Stanley W. MacDonald
	)	for the Respondent
SALLY GRACE THOMPSON	)	
	)	
Respondent	)	Appeal Heard:
	)	May 19, 1998
	)	
	)	
	)	Judgment Delivered:
	)	May 26, 1998
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THE COURT: Appeal dismissed per reasons for judgment of Hart, J.A.; Clarke, C.J.N.S. and Jones, J.A. concurring.

HART, J.A.:

After an extensive drug investigation, including the use of authorizations to intercept private communications, the RCMP laid three Informations involving eight different persons. The first Information contained four counts against Jonathan Ellis, Ricco Withrow, Sally Thompson, Gary Thompson and Heather Black, alleging that they, at Lake Echo, between August 2nd and November 29th, 1995:

(i) cultivated marihuana contrary to s. 6(1) of the **Narcotic Control Act**, R.S.C. 1985, c. N-1;

(ii) had possession of marihuana contrary to s. 4(1) of the **Narcotic Control Act**;

(iii) conspired with each other to cultivate marihuana contrary to s. 465(1) of the **Criminal Code of Canada**, R.S.C. 1985, c. C-46; and

(iv) conspired to possess marihuana for purposes of trafficking contrary to s. 465(1)(c) of the **Criminal Code**.

The second Information contained four counts against Jonathan Ellis, Ricco Withrow, Brian Jordan and Sally Thompson alleging that between August 5th and October 30th, 1995, at Lawrencetown in the County of Halifax they:

(i) cultivated marihuana contrary to s. 6(1) of the **Narcotic Control Act**;

(ii) had possession of marihuana contrary to s. 4(2) of the

Narcotic Control Act;

(iii) conspired to cultivate marihuana contrary to s. 465(1)(c) of the **Criminal Code**; and

(iv) conspired to have possession of marihuana for purposes of trafficking contrary to s. 465(1)(c) of the **Criminal Code**.

The third Information alleged four similar offences against Ricco Withrow, Robert Seeley and Glen Lynch but the respondent Sally Thompson was not named in that Information. All the Informations were sworn on December 6th, 1995.

The alleged leader of this group of drug offenders, Jonathan Ellis, pled guilty to the offences alleged against him on February 5th, 1996. On March 13th, 1996, Brian Jordan also pled guilty.

On May 1st, 1996, Gary Thompson entered a plea of guilty and the charges against his common-law wife, Heather Black, were withdrawn.

After May 1st, 1996, the only charges left outstanding on the first two Informations were against the respondent, Sally Thompson, and Ricco Withrow, and on the third Information in which the respondent was not involved against Ricco Withrow, Robert Seeley, and Glen Lynch. On September 18th, 1996,

Lynch entered a plea of guilty to the offences for which he had been charged.

The preliminary hearing was set for December 9th to December 17th and the respondent was prepared to meet these dates. On November 1st, 1996, however, Warren Zimmer representing Ricco Withrow, applied for an adjournment of the Preliminary since he was going to be involved in Supreme Court in connection with the Maersk Dubai hearings. James C. Martin, who represented the Crown, was also to be involved in the Maersk Dubai hearings and although it was argued that another counsel could conduct the preliminaries on his behalf the Crown would prefer that the adjournment be granted so that he could be available at a later date for this matter.

Both the respondent and Mr. Seeley argued against the adjournment and insisted that the Preliminary Hearing proceed on the planned dates.

The Maersk Dubai case was an extradition hearing where a number of Taiwanese nationals were being sought to face murder charges in another country and the Chief Justice of the Supreme Court had asked all Provincial Court judges to accommodate these lengthy hearings because of their international importance.

Judge Gibson, who heard the motion for adjournment, suggested that this conflict could be avoided by severing the remaining charges against the

drug offenders. The Crown, however, preferred not to do so since the case, they said, was complex and a number of witnesses were involved.

The judge hearing the application for the adjournment granted the request and set the preliminary inquiry for August 20th to 29th, 1997.

The preliminary hearing proceeded without any unusual difficulty and only three witnesses were called by the Crown.

At its conclusion the respondent was committed to stand trial on four counts from the first Information and two counts in the second. She was directed to appear before the Supreme Court on September 11th, 1997, to set dates for the trial. All four counts against Mr. Withrow in the first Information were withdrawn by the Crown and subsequently the two counts in the second Information upon which the respondent was committed were withdrawn.

On September 11th, 1997, a trial date was set for the respondent on February 2nd, 1998, and a time was set for the respondent's application under s. 11(b) of the **Charter** for a stay of proceedings. This application was heard on December 12th, 1997, before Justice Goodfellow. At the conclusion of this hearing Goodfellow, J. granted the request for a stay and the Crown now appeals that decision on the ground that the respondent's right to a trial within

a reasonable time as guaranteed by s. 11(b) of the **Canadian Charter of Rights and Freedoms** had not been infringed.

Mr. Justice Goodfellow, in his decision, set forth the provisions of ss. 11 and 24 of the **Charter** as follows:

> 11. Any person charged with an offence has the right
>
> . . . .
>
> (b) to be tried within a reasonable time;
>
> 24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

The Chambers judge then considered the decision of the Supreme Court of Canada in **R. v. Morin** (1992), 71 C.C.C. (3d) 1 and thoroughly reviewed the various factors set forth in the decision of Sopinka J. as being germaine to the determination of the balancing of the interests of society with the interests of persons charged with criminal offences. Those factors are:

1. the length of 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
(e) other reasons for delay; and

4. prejudice to the accused.

Based on his assessment of all of these factors, Mr. Justice Goodfellow concluded that the respondent had met the onus upon her of establishing unreasonable delay warranting a stay of the charges.

The Crown had alleged before the Chambers judge that the failure of the respondent to apply for severance of her charges should have been sufficient to remove the delay from being classified as "unreasonable". Counsel for the respondent referred the trial judge, however, to the remarks of Iacobucci, J. in **R. v. Litchfield** (1994), 86 C.C.C. (3d) 97 at p. 111:

> The division and severance order is anomalous in that severance orders are usually made by the trial judge, in which case the order would be appealable as part of the verdict. Indeed, for the reasons that follow, I am of the opinion that no one but the trial judge has jurisdiction to issue a severance order.
>
> Logically, an accused cannot bring a motion to quash an indictment, or to divide or sever counts in an indictment, until the indictment has been preferred. Until the indictment has been preferred, it does not exist as against the accused, it is not legally effectual, and therefore is not subject to being altered or quashed.

For this reason the Chambers judge did not agree that the respondent had any responsibility to apply for a severance.

Before making his decision, the Chambers judge was also cognizant of the caution expressed in cases such as **R. v. Bennett** (1991), 3 O.R. (3d) 193 where Dubin, C.J.O. stated:

> The effect of the stay is tantamount to an acquittal but without a trial. As pointed out by Arbour J.A., heretofore the power to stay proceedings has only been exercised by the courts to remedy an abuse of process where "'compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency', or where the proceedings are 'oppressive or vexatious'" and has been exercised only in the clearest cases: see *R. v. Keyowski*, [1988] 1 S.C.R. 657, 32 C.R.R. 269, 40 C.C.C. (3d) 481, 62 C.R. (3d) 349, 83 N.R. 296, 65 Sask. R. 1, [1988] 4 W.W.R. 97, at pp. 658-59 S.C.R., p. 271 C.R.R., p. 482 C.C.C. The power to stay a prosecution and deny the right of the Crown to put an accused on trial is a power which must be exercised judiciously and with restraint.

On appeal to this Court, counsel for the Crown argues that the trial judge erred in holding that the Crown accommodated the delay of the preliminary inquiry from December 1996 to August 1997; that the trial judge further erred when he held that the Crown failed to arrange an early date for the Supreme Court hearing before the preliminary inquiry was conducted; that the trial judge further failed to consider the effect on the respondent of the co-accused Withrow's request for the adjournment of the preliminary inquiry and that the learned trial judge erred when he determined that there was a high probability that the respondent would have received full-time employment in September 1997 if her trial had been completed by that time. Having reviewed the record, I am satisfied that there was ample evidence upon which the

Chambers judge could have reached the conclusions that he did on these issues and they should not be retried before the Appeal Court.

It is true that trial dates cannot be arranged normally before a preliminary hearing is completed and a committal obtained but, here, when there was a nine month delay in the holding of the preliminary inquiry the Chambers judge felt it was reasonable that counsel for the Crown and the accused make some tentative arrangements for an early trial after the completion of the preliminary hearing if a trial became necessary. Since the respondent was objecting to the adjournment and demanding an early trial and the Crown was unprepared to grant severance to permit this, the Chambers judge was validly concerned with this long period of delay.

In summary, I would find that the Chambers judge, in exercising his discretion to stay the charges against the appellant because of an unreasonable delay, made no error of a kind which would entitle this Court to upset his decision. I would, therefore, dismiss the appeal.

Hart, J.A.

Concurred in:

Clarke, C.J.N.S.

Jones, J.A.

C.A.C. No.144667

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Appellant

- and -

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REASONS FOR JUDGMENT BY:

HART, J.A.