Date: 19980708 Docket: C.A.C. 144393

NOVA SCOTIA COURT OF APPEAL

Cite as: R. v. Tamang, 1998 NSCA 128

Roscoe, Jones, Bateman, JJ.A.

BETWEEN:

HER MAJESTY THE QUEEN	)	
	)	James Gumpert, Q.C.
	)	and Paul Carver
	)	for the Appellant
Appellant	)	
- and -	)	
	)	John Black
	)	for the Respondent
SURYA TAMANG	)	
Respondent	)	Appeal Heard:
	)	June 9, 1998
	)	Judgment Delivered:
	)	July 8, 1998

THE COURT: Appeal dismissed per reasons for judgment of Bateman, J.A.; Jones and Roscoe, JJ.A., concurring.

BATEMAN, J.A.:

This is an appeal by the Crown from a decision of Judge D. William MacDonald of the Provincial Court, on December 16, 1997, ordering a stay of the proceedings against the Respondent, Surya Tamang.

Background:

On June 22, 1995, the Respondent was charged with four **Criminal Code** offences against his wife, Mary Ellen King. These included assault with a weapon (**s. 267(1)(a)**); uttering a death threat (**s.264.1(1)(a)**); common assault (**s.266(a)**); and confinement (**s.279(2)**).

On that same day he was arrested and released on a written undertaking with conditions that he not contact the complainant and that he stay away from her Barrington Street residence. Mr. Tamang was represented by counsel at the court appearance and agreed to the conditions on release. The matter was adjourned to September 6, 1995 to permit the respondent to decide on his election and plea and to instruct counsel.

At some point on or after June 22, 1995 the Crown was advised by the defence that a Nepalese interpreter would be required for the proceedings. A 'request for translation services' form was completed by the Provincial Court Clerk's office for the September 6, 1995 appearance, however, no translator was present.

On that date the Respondent appeared again with his counsel. Although acknowledging receipt of disclosure from the Crown, the defence requested an adjournment to September 27, 1995, to allow counsel to obtain information from a family lawyer. This request for adjournment was not opposed by the Crown.

On September 27, 1995, the respondent returned to Court. After election and a plea of not guilty, the matter was set for trial in Provincial Court on July 23, 1996, a date to which the defence indicated agreement. An interpreter was not present. No comment in this regard was made by the Court, the Crown or the defence.

On June 27, 1996, the respondent and his counsel appeared in Court and requested that the trial scheduled for July 23, 1996, be adjourned to permit defence counsel to attend a conference. This request was granted. The Court, accepting the new date for trial suggested by the defence, scheduled the trial for February 26, 1997. Again, there was no interpreter present, which passed without comment by the defence.

On June 28, 1996, Mr. Dennis W. Theman, Senior Crown Attorney at the Spring Garden Crown Attorney's Office wrote to the Chief Judge's secretary requesting an earlier trial date. In his letter, Mr. Theman noted that he would not have agreed that Mr. Tamang's charges be adjourned, had he realized that they were so serious and arose from a domestic situation. He hadn't noticed because

the defence request to adjourn the Tamang matter was one of a dozen or so matters to be heard on three different dates which the defence lawyer was asking be adjourned. He noted that the complainant was very upset that the defence was able to have this matter adjourned again. He noted, as well, that all adjournments were at the request of the defence. Finally, Mr. Theman also advised in his letter that if time for the trial could be found in the fall, a half-day was needed because there was a need for a Nepalese interpreter.

At the instigation of the Crown Attorney, the Court notified Mr. Tamang's counsel of five trial dates available in November and December of 1996. The trial date remained as scheduled.

On February 26, 1997, the Crown and Defence were ready to proceed to trial with both the complainant and accused present in the courtroom. Because there was no interpreter present in Court the judge adjourned the trial to March 24, 1997.

A request for interpretation services was sent by the Clerk of the Court, Mr. Greg MacIsaac, to Access Language Services on February 26, 1997, for the March 24, 1997, trial date.

By March 24, 1997, no interpreter was found by the Court and the matter was set over to April 14, 1997, to fix a new date for trial.

On April 14, 1997, an interpreter was present. The trial was set for May 6, 1997, with the consent of Crown and defence. The defence advised, however, that the interpreter who appeared that day would not be acceptable for the trial as she would likely be a defence witness. The Clerk informed the Court that it was his information that the only other Nepalese interpreter who had lived in this area was now living in Montreal.

On May 6, 1997 the proceedings resumed. The Court Clerk was asked by the Judge why there was no interpreter. He advised the Court:

> The availability of Nepalese interpreters, your Honor. I am working on one now, trying to get a working permit for a student who lives in Truro. The last person who was here was eligible until the point where the [Defence] were intending to call her as a witness. She had been dismissed. So I am working through Immigration trying to get ahold of somebody and short of that there might be somebody in Montreal.

Defence counsel opposed any further adjournment. Judge Hughes Randall adjourned the trial to November 20, 1997.

On October 16, 1997, there was a brief appearance in Provincial Court during which it was confirmed that contact had been made by the Court Clerk's Office with a suitable interpreter who resided in Vancouver, British Columbia. The Court ordered that the cost of ensuring that interpreter's attendance be incurred.

The next appearance was on November 12, 1997. The Court requested the attendance of the Crown and defence when it was learned that the interpretor

from Vancouver was not prepared to fly to Nova Scotia. The presiding Justice of the Peace discussed with the Crown and defence the availability of another interpreter for November 27, 1997. The Crown Attorney addressed the Court:

> **MR. CARVER**: Your Honour, in relation to the Tamang matter, I understand from speaking to My Friend this afternoon, he's had some conversations with his client that the individual who acted as an interpreter for Mr.Tamang at a bail hearing a couple of weeks ago would be an acceptable interpreter for him.
>
> The question that we have at this point is whether or not that interpreter or that individual would be available on November 20th. He wasn't scheduled to come back because we had thought we would have an interpreter coming in from Vancouver.
>
> I've left a message for that individual at the Biology Department at Dal. I'll follow up with him to confirm that he is available. If he is not, then we may be facing some kind of adjournment application or we'll have to deal with that issue if he is not available.
>
> I have also been provided with a name of another person, Audrey Maw, who I have not spoken to. I have left a message for her. She may have some skills in the Nepalese language as well. If this other individual from the Biology Department at Dal isn't available, maybe we can follow up with this person to see if she might be able to act as an interpreter.
>
> It would appear at this time, and we're hopeful, we can go ahead on November 20th subject to the interpreter actually being available.

The Justice of the Peace replied:

> **MS. DODGE**: Oh, okay. That would certainly be better from our point of view because we've tried everything. We're at wits end as to where to find someone.

On that same appearance, the Crown Attorney outlined to the Court other efforts he had made to assist in finding an interpreter:

> **MR. CARVER**: I can indicate for Your Honour as well of other efforts I have made this afternoon. I spoke with as an individual by the name of Terry Greenburg at the Foreign Affairs Department in Ottawa. He advised that there are half a dozen families in the Ottawa area who are from Nepal. He is going to speak to some of them tonight and see if any of them would be fluent enough to act as an as an interpreter. That may be something to follow up on if these other leads don't pan out. He also advised me that there is a Consulate in Markham, Ontario and there is an Embassy in

> Washington D.C. Those may be additional places to follow up with information.
>
> **MS. DODGE**: Okay.
>
> **MR. CARVER**: I have their phone numbers. If these two people locally don't work out then we have other avenues to explore.
>
> **MS. DODGE**: And I guess then it is a matter of whether Defence and Crown agree to whoever. That is the other problem we have. We can get people but we have to make sure that Mr. Black and ...
>
> **MR. CARVER**: Well I think the issue in terms of people locally was that the community was so small that these people were known to Mr. Tamang. One of them was eliminated for that purpose. I understand Mr. Lacoul is not someone whom he is associated with. And I understand Ms. Maw is also not someone that he is associated ...

On November 20, 1997, the interpreter who had appeared at an earlier bail hearing was not present because he was preparing to write an examination on November 21, 1997. The Crown Attorney, Mr. Paul Carver, advised the Court as an follows:

> **MR. CARVER**: With respect to My Friend, Your Honour, I would simply clarify that I have been unable to obtain an interpreter today on behalf of the Court. I was requested by Ms. Karen Dodge [the Justice of the Peace] to make efforts to obtain an interpreter when we last appeared in relation to the matter last week.
>
> Your Honour, at that time, the Court was advised about continuing efforts with respect to locating an interpreter in this particular matter. During the course of meeting with My Friend, immediately prior to that appearance, I was advised that the interpreter who had appeared at the bail hearing in relation to Mr. Donohue's matter, would be an acceptable interpreter for this matter. I made some efforts to speak with that individual throughout last week but was unsuccessful. I finally managed to get a hold of him on Tuesday. He advised me that he would certainly be willing and able to act as an interpreter in this particular matter but unfortunately, he is a graduate student and he has an exam tomorrow. And like most students, he was needing as much time as he possibly could to study for that exam and was unable to be here today. He advised me that after tomorrow, he is essentially available on any date throughout December, and January, and into the new year.
>
> I can also advise the Court that I spoke with an individual in Ontario who I was placed in contact with by the Foreign Affairs Department. That individual, Your Honour, was unfortunately leaving for India on the day that I was talking to him, which as I recall was last Thursday, but he

> would be returning in three weeks. He advised me that both he and his wife were familiar with the Nepalese language. I believe they are both originally from Nepal. In speaking with him, it was quite apparent to me that he was fluent in English. So he indicated that he would be willing and able to act at any time in the new year.
>
> So the situation, Your Honour, is slightly different from when we were last here when we weren't certain if a Nepalese interpreter could, in fact, be found. We have now found three. And the question is, at this point...
>
> **THE COURT**: Take your pick.
>
> **MR. CARVER**: We can find...we can have Mr. Lacoul, Your Honour, virtually any time after Friday. He is a local interpreter or a local individual. He may need some training which I'll speak to Mr. MacIsaac about, Your Honour. But I understand from speaking with Ms. Kennedy that December the 17th is available for a full day trial. I would ask that the matter go over to that particular day for completion.
>
> I suppose I should clarify, Your Honour, that this, I suppose, would be more accurately a Court motion to put it over to that particular date.

On November 20, 1997, the Court adjourned the trial to December 16, 1997. The defence advised that it would be making a **Charter** application to have the charges stayed on the basis of unreasonable delay. The witnesses were ordered to return to Court on December 16, 1997.

On December 16, 1997, a hearing was held before The Honourable D. William MacDonald, a Judge of the Provincial Court. An interpreter was present. Judge MacDonald granted the defence motion for a stay of proceedings pursuant to **ss.11(b)** and **s.24(1)** of the **Charter**.

Grounds of Appeal:

The Crown says that the trial judge erred in ruling that Mr. Tamang's right

to be tried within a reasonable time, pursuant to **s.11(b)** of the **Canadian Charter of Rights and Freedoms** was infringed by the delay in these circumstances.

In the alternative, the Crown submits that if there was an infringement of Mr. Tamang's **s.11(b)** right, such infringement did not justify a stay of proceedings.

Analysis:

> **Section 11(b)** of the **Charter** provides:
>
> Any person charged with an offence has the right
>
> . . .
>
> (b) to be tried within a reasonable time;

In his decision the trial judge correctly stated that **s.11(b)** of the **Charter** is intended to "minimize the anxiety and stigma of exposure to criminal proceedings, to ensure that proceedings take place while evidence is available and fresh and to minimize exposure to restrictions on liberty which result from pre-trial incarceration or restrictive release or bail conditions". He acknowledged, as well, the competing interests: "on the one hand the right of an accused to trial within a reasonable time and on the other the public interest in the prosecution of criminal offences". The issue before him, he stated, was "whether the failure of the system for arranging an interpreter has accounted for the failure to have a trial within a reasonable time".

> The judge made several findings of fact:
>
> (i) the first scheduled trial date, July 23, 1995, was within the an acceptable time frame;

(ii) the trial did not take place on that date because of the defence request for an adjournment to February 26, 1997;

(iii) the defence had an opportunity to have a trial earlier than the rescheduled date of February 26, 1997;

(iv) on February 26, 1997 no interpreter was available;

(v) there was a waiver of time periods by reason of the defence acquiescence in the first two trial dates that were set;

(vi) the delay has caused Mr. Tamang some anxiety

In **R. v. Morin** (1992), 71 C.C.C. (3d) 1 (S.C.C.) the late Mr. Justice Sopinka, for the majority of the Court, set out the approach by which a court should be guided in determining if the right to be tried within a reasonable time has been denied. At p.13 he wrote:

> The general approach to a determination as to whether the right has been denied is not by the application a mathematical or administrative formula but rather by a judicial determination balancing the interests which the section is designed to protect against factors which either inevitably lead to delay or are otherwise the cause of delay. As I noted in *Smith, supra*, "[i]t is axiomatic that some delay is inevitable. The question is, at what point does the delay become unreasonable?" (p. 105). While the court has at times indicated otherwise, it is now accepted that the factors to be considered in analysing how long is too long may be listed as follows:
>
> 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
> (e) other reasons for delay, and
> 4. prejudice to the accused.
>
> These factors are substantially the same as those discussed by this court in *Smith, supra*, at pp. 105-6, and in *Askov, supra*, at pp. 483-4.
>
> 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 the trial: see *R. v. Kalanj* (1989), 48 C.C.C. (3d) 459, [1989] 1 S.C.R. 1594, 70 C.R. (3d) 260. 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.
> (Emphasis added)

(i) The length of the delay:

The Crown concedes that, *prima facie*, a delay of almost 30 months from the laying of the charge to the date of trial warrants an inquiry by the Court.

(ii) Waiver:

On the issue of waiver, Sopinka, J. said in **Morin, supra**, at p.15:

> If the length of delay warrants an inquiry into the reasons for delay, it appears logical to deal with any allegation of waiver before embarking on the more detailed examination of the reasons for delay. If by agreement or other conduct the accused has waived in whole or in part his or her rights to complain of delay, then this will either dispose of the matter or allow the period waived to be deducted.

There is no question, here, that the accused, by seeking an adjournment of the schedule trial date and consenting to the February 26, 1997 date, waived that period of delay. Indeed, it was the Crown that attempted, unsuccessfully, to have the matter brought on for trial at an earlier time.

In **R. v. Smith** (1989), 52 C.C.C. (3d) 97 (S.C.C.) the Supreme Court of Canada stated at p.109:

> Agreement by an accused to a future date will in most

> circumstances give rise to an inference that the accused waives his right to subsequently allege that an unreasonable delay has occurred. While silence cannot constitute waiver, agreeing to a future date for a trial or a preliminary inquiry would generally be characterized as more than mere silence. Therefore, absent other factors, waiver of the appellant's s.11(b) rights might be inferred based on the forgoing circumstances.

The only reasonable inference on the facts was that the defence waived the time period from June 22, 1995 to February 26, 1997. Indeed, Judge MacDonald held that "there was waiver of time periods by reason of the defence acquiescence in the first two trial dates that were set . . . ". The trial judge failed, however, to exclude this 20 month time period from the total period of delay. As Sopinka, J. said in **Morin**, **supra**, at p. 12, the time elapsed from the date of the charge to the trial "may be shortened by subtracting periods of delay that have been waived." This left a period of delay of slightly less than 10 months - from February 26 to December 16, 1997. The trial judge had stated earlier in his decision that a 10 month delay was within an acceptable time frame. This time period is consistent with the guidance offered by the Court in **Morin, supra** (at p.21).

In my view, the matter can be resolved on the issue of waiver alone. However, it is helpful to consider whether other factors were present which would make this otherwise acceptable time frame, unusually oppressive for this accused.

(iii) The reason for the delay:

Relevant under this head are the "inherent time requirements in the case", "limits on institutional resources", "actions by the Crown" and "other reasons for the

delay", being factors identified in **Morin**.

This was not a situation where the delay was attributable to the lack of institutional resources - in other words, the government's unwillingness to commit sufficient resources to prevent unreasonable delay. (**Morin, supra**, at p.21)

The information before Judge MacDonald revealed substantial efforts by the Court and by the Crown attorney to arrange interpretation services. The Affidavit of Court Clerk Gregory MacIssac, sworn to on December 15 and filed at the hearing before Judge MacDonald sets out, at paragraph 3,4, 5 and 6, the efforts made by him in this regard:

> 3. THAT in my capacity as Court Clerk I was present in Halifax Provincial Courtroom #1 on February 16, 1997, at which time the trial of the accused, Surya Tamang, was adjourned. On that same date, I forwarded a "Request for Translation Services" form to Access Languages for the purpose of ensuring a Nepalese interpreter would be available for the trial which had been rescheduled for March 24th, 1997. I believe a copy of this form is attached to the information.
>
> 4. THAT in my capacity as Court Reporter I was present in Halifax Provincial Courtroom #1 on March 24th, 1997, at which time the trial of the accused, Surya Tamang, was adjourned due to the unavailability of a Nepalese interpreter. That on April 14th, 1997, I forwarded a second "Request for Translation Services" form to Access Languages again requesting a Nepalese interpreter for the new trial date of May 6th, 1997.
>
> 5. THAT in between March 24th, 1997, and November 20th, 1997, I made the following efforts to arrange for a Nepalese interpreter for the accused, Mr. Tamang:
>
> (a) Contacted Access Translations (interpretation services) in Halifax on two occasions inquiring about the availability of a Nepalese interpreter;
>
> (b) Contacted Accent Language (interpretation services) in Halifax

on four occasions inquiring about the availability of a Nepalese interpreter;

(c) Contacted All Languages (interpretation services) in Toronto on two occasions inquiring about the availability of a Nepalese interpreter.

(d) Contacted the office of Citizenship and Immigration in Halifax inquiring about the availability of a Nepalese interpreter;

(e) Contacted two government offices in Ottawa inquiring about the availability of a Nepalese interpreter;

(f) Contacted the Metro Immigration Settlement Association (MISA) inquiring about the availability of a Nepalese Interpreter;

(g) In late September, 1997, and early October, 1997, I contacted A&T Interpreters in British Columbia on five occasions. I was initially advised that a Nepalese interpreter could be provided through their service, but was then told she was not prepared to travel by air. I was then advised that another interpreter could be provided, but was then advised that this individual considered the distance between British Columbia and Nova Scotia too far to travel;

(h) Contacted the Shambalai Association in Halifax inquiring about the availability of a Nepalese interpreter. I was given the name of an individual working as a cook at a restaurant in Halifax. I went to the restaurant and discovered that the individual working there was in fact the accused, Mr. Surya Tamang;

(i) Contacted Mr. Eric Keneally in Toronto, Ontario. His name had been provided to me by A&T Interpreters in British Columbia. Mr. Keneally advised that he was only available to work on Saturdays.

(j) Contacted an interpreter service in Montreal on two occasions in October, 1997.

6. THAT between March 24th, 1997, and November 20th, 1997, I made consistent efforts to locate a Nepalese interpreter and arrange for their attendance in court but had no success.

Judge MacDonald, in his decision, acknowledged Mr. MacIsaac's "significant efforts" to arrange an interpreter. According the guidance provided in **Morin, supra**, it would have been appropriate, as well, for the Court to consider the

inherent difficulty presented by the need to obtain the services of a Nepalese interpreter. Not only was this obvious from the Court's inability to locate an interperter, Mr. Tamang testified on cross-examination that despite residing in Halifax since 1994 he had encountered only one person who spoke his language. The interpreter who was in court on December 16 advised the Court that there are over 60 Nepalese dialects.

(iv) Prejudice to the accused:

On the issue of actual prejudice occasioned by the delay, Mr. Tamang testified that he would not have difficulty, due to the passage of time, in describing the incidents which were the subject matter of the charges. With respect to the restraint on Mr. Tamang's liberty from the time of the charge until, trial, he was subject to only two conditions - not to contact his wife and to stay away from her residence. There was no evidence that these conditions were particularly burdensome. In contrast to the circumstances in **R. v. Maracle** (1998), 122 C.C.C. (3d) 97 (S.C.C.), cited by the defence, this was not a situation of actual prejudice to the accused's liberty interest or his right to make full answer and defence.

The above factors are to be balanced in the process of deciding whether to grant a stay.

Although Judge MacDonald found there to have been a waiver of time periods by the respondent, he appeared to have considered the entire period of time from charge to trial in determining to grant the stay of proceedings. He said:

> In this case there have been 12 court appearances including today, 6 trial dates have been set including today. There were no arrangements for a translator after Mr. Martin gave notice of the need in September, 1995.
>
> . . .
>
> The length of delay in this case is substantial. There was a waiver of time periods by reason of the defence acquiescence in the first two trial dates that were set but during those times no efforts were made to arrange an interpreter. After February 26th, 1997 the 10 month delay was caused by difficulty locating an interpreter. I think I have to consider that that 10 months is added to the long delay up until that time, notwithstanding Mr. MacIsaac's significant efforts to locate an interpreter. That additional delay of 10 months is unacceptable.
> (Emphasis added)

With respect I would find that Judge MacDonald erred, in that he failed to deduct the period of waiver from the total time when assessing the reasonableness of the delay. When that deduction is made, the trial took place within the time period that the Judge had found to be acceptable.

Assuming the matter is not resolved on the issue of waiver alone, I would find that on a balancing of the factors outlined in **Morin, supra**, taking into account, in particular, the lack of prejudice to the accused and the difficulty in locating a suitable interpreter, this is not an appropriate matter in which to order a stay of proceedings. In my opinion the Judge placed undue emphasis upon the Court's failure to make adequate efforts to provide an interpreter during the period when the accused was seeking adjournment of the trial. Any such efforts, even if successful, would clearly not have advanced this matter prior to February 26, 1997 in view of the defence desire to postpone the trial. Balancing the relevant factors, this is not a case of unreasonable delay warranting a stay of proceedings.

Disposition:

Accordingly, I would allow, the appeal, set aside the stay and remit the matter to the Provincial Court for trial.

Bateman, J.A.

Concurred in:

Jones, J.A.

Roscoe, J.A.

C.A.C. No. 144393

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

- and -

SURYA TAMANG

Respondent

REASONS FOR JUDGMENT BY:

Bateman, J.A.