NOVA SCOTIA COURT OF APPEAL
Citation: R. v. R.E.W., 2011 NSCA 18

Date: 20110215
Docket: CAC 326328
Registry: Halifax

Between:

Her Majesty the Queen

Appellant

v.

R.E.W.

Respondent

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

Restriction on publication: Pursuant to s. 486(3) of the *Criminal Code*

Judge(s): Fichaud, Beveridge and Bryson, JJ.A.

Appeal Heard: November 15, 2010, in Halifax, Nova Scotia

Held: Appeal is dismissed, per reasons for judgment of Beveridge, J.A.; Fichaud and Bryson, JJ.A. concurring.

Counsel: Mark Scott, for the appellant
Coline Morrow, for the respondent

486.4 (1) Order restricting publication – sexual offences – Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

(i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 172, 172.1, 173, 210, 211, 212, 213, 271, 272, 273, 279.01, 279.02, 279.03, 346 or 347,

(ii) an offence under section 144 (rape), 145 (attempt to commit rape), 149 (indecent assault on female), 156 (indecent assault on male) or 245 (common assault) or subsection 246(1) (assault with intent) of the Criminal Code, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 4, 1983, or

(iii) an offence under subsection 146(1) (sexual intercourse with a female under 14) or (2) (sexual intercourse with a female between 14 and 16) or section 151 (seduction of a female between 16 and 18), 153 (sexual intercourse with stepdaughter), 155 (buggery or bestiality), 157 (gross indecency), 166 (parent or guardian procuring defilement) or 167 (householder permitting defilement) of the Criminal Code, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 1, 1988; or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in any of subparagraphs (a)(i) to (iii).

Reasons for judgment:

INTRODUCTION:

[1] Over five years after being charged with incest, the respondent sought a stay of proceedings on the basis that his right to be tried within a reasonable period of time provided by s.11(b) of the *Canadian Charter of Rights and Freedoms* had been infringed. The trial judge agreed. He granted, what is accepted by the Crown as the only remedy for such a violation – a stay of proceedings.

[2] The Crown appeals to this Court alleging the trial judge erred. Although the analysis of the trial judge could have been clearer in some respects, I am not convinced the trial judge committed reversible error and would dismiss the appeal.

[3] To provide the necessary context to what the Crown readily acknowledges was a substantial delay in bringing the respondent to trial, some background is necessary.

BACKGROUND

[4] Considerable documentary evidence was tendered by the respondent at the hearing before the trial judge. The respondent was cross-examined and he called one of the investigating officers to give evidence. From this material, the following details can be gleaned about the history of the proceedings against the respondent.

[5] A video taped statement was taken from the complainant in October 2000. She said she was the respondent's daughter, and he had had intercourse with her once in December 1998 which resulted in pregnancy. She subsequently gave birth to her son in late October 1999. The investigator noted that the bonus for the investigation was the DNA from the child would be able to confirm the offence.

[6] The necessary medical consents were obtained in 2001 to carry out DNA testing. It was not done. Serious inconsistencies about the complaint against the respondent were discovered. The complainant had told medical staff the respondent was ***not*** the father of her son. Her claim of one act of intercourse in December 1998 was inconsistent with the birth of her child in late October 1999.

The police also became aware of an earlier claim by the complainant against her stepfather that did not proceed due to issues with the complainant's credibility.

[7] The investigator concluded he did not have reasonable and probable grounds to proceed to get a warrant to obtain the DNA of the respondent.

[8] The investigation was re-opened at the request of the complainant in December 2002. This led to further statements being taken from the complainant. The police arrested the respondent in April 2003 in relation to two investigations. One was the allegation of incest. The other was that he sexually assaulted N.M. The respondent was released on an Undertaking with conditions. He was required to remain within Nova Scotia, notify the RCMP of any change of address, employment or occupation, surrender any firearms he may possess or authorization to possess one, report in person every week to the RCMP until Court on June 18, 2003 and to have no contact with the named complainants.

[9] It is not entirely clear what happened nor why. The charge of sexual assault with N.M. as the complainant did proceed. No charge against the respondent of incest was laid until August 5, 2004. From documentary and other evidence tendered at the hearing before the trial judge, it appears that efforts were made by the RCMP and the Crown to obtain biological materials from the complainant and her child in order to obtain DNA profiles. In a letter of May 31, 2004 senior Crown attorney Ronald J. MacDonald Q.C., wrote "Clearly the matching of DNA between the child, the accused and the complainant is critically important evidence for the prosecution." In the meantime, the police and the Crown decided to proceed first with the sexual assault prosecution involving N.M. as the complainant. There were discussions that the Crown wished to use the evidence from N.M. as similar fact.

[10] The charge of incest against the respondent was laid August 5, 2004. The first appearance in court in relation to this charge was June 21, 2005. Election and plea was adjourned to August 2, 2005 since disclosure had been delivered to the respondent the day before. Videotaped witness statements were provided on July 29, 2005. This triggered a further delay to September 6, 2005. On that date election was entered for both the N.M. charges and the incest charge for trial by judge and jury. The preliminary inquiry for the incest charge was set for March 7, 2006. The respondent entered into an Undertaking on September 6, 2005.

[11] The preliminary inquiry on the incest charge was set for March 2006. The respondent subsequently waived his right to a preliminary inquiry and consented to committal to stand trial. He appeared in Supreme Court on May 9, 2006. Trial dates were offered for February 4 to 8, 2007. Counsel for the respondent said they hoped there would be an opening in September 2006 for the trial. The Crown said they would be ready to go in September if necessary. Stand-by dates were agreed for September 2006. The dates did not open up for the respondent's trial to go ahead in September.

[12] The materials before the trial judge do not precisely demonstrate what happened to the trial dates commencing February 4, 2007. The trial did not go ahead. There were disclosure problems.

[13] On January 30, 2007 the Crown disclosed 13 additional items. It included materials from the complainant's allegations against her stepfather that were relevant to the present charge of incest. The Crown advised that they had in their possession additional materials that they would not disclose without a third party records application. The Crown directed the police on February 2, 2007 that the complainant needed to be re-interviewed as a result of new information revealed by her to the prosecutor. This was done on February 7, 2007. The new statement was not disclosed to the respondent until June 2007. In the meantime, the disclosure by the Crown triggered an application by the respondent for production of third party records. The trial was adjourned. The next available date was February 8, 2008.

[14] In the meantime, a jury had convicted the respondent on the sexual assault charge based on the complaint of N.M. The respondent appealed. The conviction was quashed and a new trial ordered due to a number of errors that had occurred in that trial. The Crown wanted to proceed with the re-trial of this charge prior to the incest trial. The trial dates of February 2008 were given up in favour of the re-trial of the N.M. charge.

[15] It was extremely doubtful that the incest charge could have proceeded, in any event, in February 2008. The respondent's original defence counsel was appointed to the bench. His replacement counsel realized he had a conflict requiring new counsel to assume carriage of the file. Another lawyer assumed carriage of the case. She could not proceed on the new date in April 2008. The

trial was then set for the February 2009 term along with the re-trial of the charges arising out of the N.M. complaint.

[16] The trials could not proceed due to the respondent's non-elective surgery. The re-trial was then set for April 2009 and the incest trial for October 8, 2009.

[17] The respondent was acquitted in his re-trial on the sexual assault charge for which N.M. was the complainant. The respondent's application for production of third party records was successful.

[18] The incest trial, set for October 8, 2009, did not proceed due to the late disclosure by the Crown of DNA testing carried out over the summer of 2009. It was adjourned to February 15, 2010.

[19] The respondent gave notice of his *Charter* application in December 2009 to request a stay of proceedings due to unreasonable delay. As noted earlier, at the hearing of the application, the respondent testified, and called one of the investigators, Cpl. Wood as a witness. It is not necessary to recount all of the evidence adduced before the trial judge. It is sufficient to say that Cpl. Wood confirmed the efforts by the RCMP and Crown to obtain what was described as the necessary samples of DNA in 2003-04. He also said the reason for the delay from August 2004 to June 2005 was the health of the respondent and the police were still conducting the investigation into obtaining blood samples.

DECISION BY THE TRIAL JUDGE

[20] Justice N. M. Scaravelli was the trial judge. His reasons are reported at 2010 NSSC 78. In his decision, the trial judge set out a chronology of the events. He then referred to the factors set out in *R. v. Morin*, [1992] 1 S.C.R. 771 that a court should consider when balancing the interests s.11(b) is designed to protect when considering how long is too long. They are (pp. 787-88):

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.

[21] Scaravelli J. specifically acknowledged that the period of delay to be examined is the time from the date of the charge to the end of the trial, and that the time frames set out in *Morin* of acceptable delays of 14 to 18 months are guidelines only. Importantly, he said in determining whether the proceedings should be stayed, he had to consider whether the accused's right to trial within a reasonable period of time outweighs the interests of society in having the accused stand trial.

[22] Scaravelli J. found that the total period of post-charge delay was 66 ½ months from the laying of the Information to the end of the trial. This period, he said, merited an inquiry as to reasonableness of the delay.

[23] The trial judge commented on the delay from August 2004 to June 2005 in getting the respondent to court and the evidence about that delay. The trial judge was plainly skeptical about the Crown's assertion that it was ready to go to trial in February 2007 where further disclosure was being made, DNA analysis had not occurred, and the further statements were being obtained from the complainant. The trial judge also commented on the delays caused by the judicial appointment of defence counsel, new counsel and the trial judge having to withdraw due to conflicts, and the respondent's non elective surgery. He referred to the delay from January 2009 to February 2010. The trial judge concluded the overall delay to be unreasonable. Even accounting for defence waived time periods for setting trial dates, the length far exceeded the *Morin* guidelines.

[24] With respect to prejudice, the trial judge referenced the evidence of the respondent regarding the stress he suffered throughout the proceedings, his suicidal

ideation, counseling for depression, and his worsening physical condition since the spring of 2009.

[25] The trial judge characterized the case as not complicated in the sense of requiring lengthy preparation or court time. He noted the presence of evidence of actual prejudice, and he inferred prejudice as a result of the length of the delay. While he recognized a strong societal interest in having a charge like incest tried on its merits, he concluded it would be contrary to the public interest in the prompt and fair administration of justice to do so at this stage. He was satisfied that the respondent's right to trial within a reasonable time under s. 11(b) of the *Charter* had been infringed and stayed the charge.

[26] The Crown takes no objection with the statements by the trial judge as to the appropriate principles to be applied, nor with respect to the need for the trial judge to assess the reasons for the delay and determine if the overall delay was unreasonable. It is in the application of these principles that it says he erred.

ISSUES:

[27] The Crown advances but one ground of appeal:

> The Supreme Court Judge erred in ruling the respondent's right to be tried within a reasonable time under s. 11(b) of the **Canadian Charter of Rights and Freedoms** had been infringed or denied.

[28] Under its general assertion of error in the trial judge's conclusion that the respondent's right to be tried within reasonable period of time under s. 11(b) of the Charter had been infringed, the Crown argues that the trial judge erred by: improperly considering pre-charge delay where there was no evidence of fair trial prejudice; failing to expressly identify and quantify the reasons for the delay; mischaracterizing the reasons for delay; failing to consider actions of the respondent; improperly blaming the Crown for delays when it was ready for trial; mischaracterizing the proceedings; failing to properly assess the prejudice caused to the respondent by the delay in having his trial and then properly balancing that prejudice against the public interest in having this serious charge tried on its merits.

STANDARD OF REVIEW

[29] Before turning to address the contentions of the appellant, I should say something about the appropriate standard of review. The Crown asserted that all of its complaints of alleged error should be reviewed on the standard of correctness. If this is the correct standard, no deference is accorded to the trial judge's decision. The respondent seemed to acquiesce to this position. I am not convinced the issue is as straight forward as the Crown suggests. Let me explain.

[30] Whether a right guaranteed by the *Canadian Charter of Rights and Freedoms* has been infringed or denied is a question of law. A trial judge is required to articulate and apply the correct legal principles. A failure to do so will be reviewed on a standard of correctness.

[31] However, not every factor that goes into deciding a question of law attracts such a standard. Trial judges are frequently required to make findings of fact that inform the ultimate legal question to be answered. In my opinion, such findings of fact, or of mixed law and fact, without an extricable legal component, are subject to deference and cannot be disturbed unless the trial judge made a palpable and overriding error (see *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, at paras. 25, 26 and 36). I see no reason why this does not also apply generally to facts found in a dispute over violation of rights (see *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, 2004 SCC 48). This imports an assessment of whether the finding is unreasonable or not supported by the evidence (see *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401).

[32] However, if a trial judge, in the course of making findings of fact or mixed law and fact, seriously misapprehends important evidence or ignores relevant evidence, deference evaporates since these kinds of errors are errors of law on their own, although they frequently underlie findings that are found to be errors that are palpable and overriding.

[33] In addition, in my view, where a trial judge is required to balance competing interests, some deference is appropriate (see *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353). In carrying out the final analysis in determining whether a delay has caused a denial of an accused's right to be tried within a reasonable period of time, a trial judge is required to balance the prejudice suffered by the accused with the public interest in seeing a trial on the merits. On this aspect of the analysis,

assuming the trial judge has correctly identified the appropriate approach and considered the relevant factors, considerable deference is owed.

[34] There are certainly a number of authorities that support the Crown's assertion that at least some of the alleged errors are reviewable on a standard of correctness. (See for ex. *R. v. Qureshi* (2004),192 O.A.C. 50; *R. v. Schertzer*, 2009 ONCA 742 (paras. 2-4; 71-72).) Of course, much depends on how a trial judge's findings are characterized – are they truly findings of fact based on the direct or circumstantial evidence adduced before her or do they involve properly categorizing events according to legal principle? The thrust of this distinction was set out by Juriansz J.A. in *R. v. N.N.M.* [2006] O.J. No. 1802:

> **5** Second, the respondent's counsel submitted that the trial judge's findings are findings of fact deserving of deference, absent palpable or overriding error. I do not agree. In *R. v. Chatwell* (1998), 122 C.C.C. (3d) 162 (Ont. C.A.), appeal to S.C.C. quashed (1998), 125 C.C.C. (3d) 433 (S.C.C.), this court applied the normal standard of review to the assessment of institutional delay. The court said (at para. 10):
>
> > The determination of whether certain factors constitute institutional delay for the purpose of an analysis pursuant to s. 11(b) of the Charter is one which, in our opinion, attracts the normal standard of appellate scrutiny. The adjudication of the s. 11(b) rights of an accused is not akin to the exercise of judicial discretion.
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> **6** In *R. v. Qureshi* (2004), 190 C.C.C. (3d) 453 at para. 27 (Ont. C.A.), Laskin J.A. stated that a trial judge's accounting of the inherent time requirements is to be reviewed on a standard of correctness. In my view, this applies to the process of assessing the various periods of delay, ascribing legal character to them and allocating them to the various categories set out in *R. v. Morin* (1992), 71 C.C.C. (3d) 1 (S.C.C.). For example, whether the Crown had produced documents by a certain date is a question of fact. However, the questions of whether the failure to produce those documents constitutes a failure of the Crown's duty of disclosure and whether such failure makes the Crown responsible for ensuing delay, involve the application of legal principles. The questions raised by this appeal primarily involve alleged errors in the way the trial judge accounted for various time periods, which is reviewable on a standard of correctness.

[35] In the case at bar, some of the alleged errors do not involve an attack on findings of fact, but rather in the application of the correct legal principles and as

such, except where otherwise mentioned, will be reviewed on a standard of correctness.

ANALYSIS

Consideration of pre-charge delay

[36] The Crown correctly advocates that the usual time period a trial judge must focus on for determining if the delay in bringing any accused to the end of his trial is one that starts at the date of his charge. Here the Crown says the trial judge considered pre-charge delay in the course of assessing overall reasonableness. In support, it notes the trial judge's comments at two points in his decision that no explanation was provided for the delay between the arrest of the respondent and the laying of the charge.

[37] The relevant portions of the trial judge's reasons that make reference to pre-charge delay are as follows:

> [33] As indicated the current period of post-charge delay is 66 1/2 months from the laying of the Information to the end of the trial. This period by itself, merits an inquiry as to reasonableness of delay. While the pre-charge delay period does not form part of the calculation of the length of delay, it may be considered as part of the overall determination of the reasonableness of post-charge delay. (***Morin***).
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> . . .
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> [35] The sexual assault charge regarding N.M. began its process in Provincial Court in 2003. However, the Information regarding the current incest charge was not laid until August 2004. No explanation was provided for this delay.
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> . . .
>
> [47] The delay in arresting the accused in April 2003 and laying of charges in August 2004 as well as untimely disclosures were not explained by the Crown. Moreover, it appears the Crown gave priority to the other offence for which the accused was also arrested in 2003. That Information was laid in 2003 and proceeded through Provincial Court to Jury Trial, Sentence, Appeal and re-trial by Jury.

[38] This leads the Crown to argue " It cannot be said the pre-charge delay did not affect the trial judge's assessment of Crown actions and prejudice". With respect, this is not quite the correct question. In my opinion, it should be, has the appellant demonstrated that the pre-charge delay improperly influenced the analysis by the trial judge? For the following reasons, I am not convinced it did.

[39] The trial judge clearly directed himself (para. 31) that the period of time to be examined is the time from the date of the charge to the end of the trial. He then calculated the period of post-charge delay, from time from the laying of the information to the end of the trial, to be 66 ½ months. The Crown does not argue he made any error in this statement of principle or in calculating the time period to be examined. Nor does the Crown dispute that the Supreme Court of Canada in *R. v. Morin* allowed for pre-charge delay to influence the analysis of whether the post-charge delay is unreasonable. Sopinka J. there wrote (p. 789):

> As I have indicated, this factor [length of delay] requires the court to examine the period from the charge to the end of the trial. Charge means the date on which an information is sworn or an indictment is preferred (see *Kalanj, supra,* at p. 1607). Pre-charge delay may in certain circumstances have an influence on the overall determination as to whether post-charge delay is unreasonable but of itself it is not counted in determining the length of the delay.

[40] There were a number of factors or events that caused a delay of over five and one-half years. There were at least three periods of delay caused by disclosure. The first was from the respondent's first appearance in Provincial Court on June 17, 2005 to September 7, 2005.

[41] The charge had been laid on August 4, 2004. While the health of the respondent plainly was a factor in delaying compelling his appearance in court until June 2005, there was no explanation provided by the Crown as to why it delayed until July 29, 2005 to provide such basic disclosure as statements by the complainant so that when he was able to appear in Court, election and plea could proceed without delay.

[42] Two of the periods of delay caused by the disclosure problems were mentioned by the trial judge. The first was the substantial disclosure just prior to the first trial date in February 2007. This led to an adjournment of the trial to February 2008.

[43] The second was the loss of the trial date in October 2009 caused by the late disclosure by the Crown of the DNA evidence it wanted to lead at trial. In my opinion, it was open to the trial judge to take cognizance of the substantial investigation that already occurred prior to the charge being laid, including the recognition by the authorities from the very beginning of the significance of the complainant's allegations against her stepfather and of DNA evidence. This informs two aspects of the analysis about delay: the reasonableness of the reasons for the delay and the seeming lack of importance the authorities attached to carrying out their tasks in a timely manner in order to bring the respondent to trial within a reasonable period of time.

[44] The trial judge noted the other charge for which the respondent had been arrested in 2003. It had proceeded through arraignment, preliminary inquiry, trial by judge and jury, appeal and re-trial, also by judge and jury, the latter occurring more than nine months prior to proposed start of the trial on this charge.

[45] I am not convinced that the trial judge improperly considered the pre-charge delay in assessing the overall reasonableness of the delay in bringing the respondent to trial.

*Errors in carrying out the **Morin** Inquiry*

[46] Under this general heading, I will address the Crown's allegations of error by the trial judge in: failing to expressly identify and quantify the reasons for the delay and in what they say was a mischaracterization by the trial judge of the reasons for delay.

[47] There is some merit in the Crown's complaint that the trial judge did not carry out a detailed analysis of the reasons for the delay by categorizing the passage of months into the inherent time requirements, actions of the accused, actions of the Crown, limits on institutional resources, and other reasons for the delay. I disagree the failure here by the trial judge fatally flawed his ultimate conclusion that the right of the respondent to be tried within a reasonable period of time was infringed.

[48] An examination for the reasons for delay occur only after the length of the delay is such to warrant an inquiry. The guidelines for a case to proceed from arraignment to trial were set in *R. v. Askov*, [1990] 2 S.C.R. 1199 and re-visited by the Supreme Court of Canada in *R. v. Morin, supra*. These suggest that the systemic or institutional time frame for provincial courts is 8 to 10 months and from committal to trial of 6 to 8 months for a total of between 14 and 18 months. Obviously the delay in this case far exceeded the norm.

[49] In *R. v. White* (1998) 131 C.C.C. (3d) 33 (Nfld. C.A.) the Crown also complained of a failure by the trial judge to carry out a detailed analysis of the component parts of the delay. The delay from charge to trial would have been 1,100 days. I note the total delay here is almost twice that long. In *White*, the Provincial Court in Davis Inlet was forced to relocate causing almost a two-year delay. Cameron J.A., for the majority, addressed the complaint by the Crown:

> **5** Counsel for the Crown also complains that the trial judge failed to do an analysis of the component parts of the delay. Certainly it is common to see examinations of delay to be broken down into; time from laying of charge to 1st appearance, time to preliminary and time to trial. However, in the final analysis, s. 11(b) of the Charter protects "the right to be tried within a reasonable time," and the ultimate question to be asked is whether that right has been violated.

[50] The finding by the trial judge was upheld. Mahoney J.A. dissented. On appeal to the Supreme Court of Canada, Cory J., for the Court, announced: “We are all in agreement with the reasons of O’Regan J. at first instance and those of Cameron J.A. in the Court of Appeal ([1998] 3 S.C.R. 534).

[51] The goal of the inquiry is not to engage in an accounting exercise, but to balance the interests which the right is designed to protect against factors which either inevitably lead to delay or are otherwise the cause of delay (*Morin, supra*, para. 26). This was emphasized in *R. v. Godin*, 2009 SCC 26 where Cromwell J., for a unanimous panel, wrote:

> [18] The legal framework for the appeal was set out by the Court in *Morin*, at pp. 786-89. Whether delay has been unreasonable is assessed by looking at the length of the delay, less any periods that have been waived by the defence, and then by taking into account the reasons for the delay, the prejudice to the accused, and the interests that s. 11(*b*) seeks to protect. This often and inevitably leads to minute examination of particular time periods and a host of factual questions

> concerning why certain delays occurred. It is important, however, not to lose sight of the forest for the trees while engaging in this detailed analysis. As Sopinka J. noted in *Morin*, at p. 787, "[t]he general approach . . . is not by the application of a mathematical or administrative formula but rather by a judicial determination balancing the interests which [s. 11(*b*)] is designed to protect against factors which either inevitably lead to delay or are otherwise the cause of delay."

[52] In my opinion, while it would have been preferable for the trial judge to have broken down in more detail the periods of delay that occurred, ultimately he did not err as he considered the reasons for the delay, the prejudice to the accused and the interests that s. 11(b) is designed to protect.

[53] Under the rubric of mischaracterizing the reasons for delay, the Crown complains the trial judge: wrongly attributed the period from charge to arraignment against the Crown; failed to consider the actions of the respondent; improperly blamed the Crown for delays when it was ready for trial; and mischaracterized the proceedings.

[54] With respect, I do not interpret the trial judge's reasons as attributing the delay from charge to arraignment against the Crown. The trial judge clearly noted the *vive voce* evidence of Cpl. Wood that the reason for not issuing a summons for the respondent to appear on the incest charge was related to the health of the respondent. He had been diagnosed with *, resulting in *. He underwent surgery which rendered him unable to appear in court until June 2005. The trial judge also noted Cpl. Wood's evidence that another reason for the delay was the ongoing investigation to gather more evidence, specifically DNA samples that were considered critical to the Crown's case.

[55] There was no clear indication by the trial judge that he was attributing the whole of this ten-month delay to the Crown. He did not say so. The only other mention of this general time period was when the trial judge turned to a consideration of the prejudice that the respondent may have suffered as a result of the delay. The respondent filed an affidavit and gave *vive voce* evidence. During his evidence he described being rendered a * in 2004, but had attended Provincial Court a number of times * regarding the other charges involving the complainant N.M. The problem with the complaint by the Crown is that nowhere did the trial judge purport to make a finding that the respondent should have been brought to

court earlier than June 2005. I do not attach the same significance to the comments of the trial judge.

[56] The Crown argues that the only time periods attributed to the respondent were those periods of delay that he had waived, and even these were not quantified. With respect, waiver of time by the respondent had little role to play here. The principles are firmly established. To be valid, any waiver must be clear and unequivocal with full knowledge of the rights the procedure was enacted to protect, and of the effect waiver will have on those rights. Consent to a trial date can give rise to an inference of waiver, but not if consent is merely acquiescence to the inevitable (see *Morin* at para. 33).

[57] The record before the trial judge demonstrates the only delay waived by the respondent was the delay of appearance in Crownside from April 2006 to May 2006. On his appearance in Supreme Court in May 2006 when trial dates were offered for February 2007, he requested dates in September 2006. I will say more about the subsequent adjournments below. For now it is sufficient to say the trial judge found the requests for adjournment were for valid reasons and not for the purposes of delay, and were for the most part beyond the control of the respondent.

[58] The Crown does not identify any real instances of waiver by the respondent. It does suggest that the respondent somehow waived the period from January to October 2009. It is not clear how the respondent can be taken to have waived this time period. It was the Crown which, in keeping with its stance from the inception of the two sets of charges against the respondent, told the Court it wanted to proceed first with the re-trial of the charge involving the complainant N.M.

[59] The Crown candidly acknowledges that where there are two or more indictments before a Court, it has the prerogative to decide the order in which they proceed. I do not accept that the acquiescence by the respondent about how the Crown exercised its prerogative amounted to waiver.

[60] In addition, the Crown says the trial judge should have considered actions of the respondent short of waiver and their effect on the process. In this basket they throw in the notice before the February 2007 trial date of his intention to challenge the admissibility of his police statement on the basis of the *Canadian Charter of*

Rights and Freedoms; his application for production of third party records; and the respondent maintaining his election for a trial by judge and jury. I am unable to accept that the trial judge erred as suggested.

[61] The Crown at any trial would be required to establish the admissibility of any statement by an accused to a person in authority. The notice from the respondent that he would also be asserting an additional basis for inadmissability by a violation of his rights could hardly have caused any further delay. The Crown called no evidence to try to establish this, and the record does not support that conclusion either by direct or circumstantial evidence.

[62] The third party record application was triggered by the disclosure by the Crown, on the eve of the trial, of relevant evidence that it considered required such an application. No explanation was offered by the Crown as to why it had not disclosed this information long before January 30, 2007.

[63] I agree that the election of trial by judge and jury by the respondent made the overall process longer than perhaps would be the case for other modes of election. However, to put it into perspective, the charge against the respondent was an indictable one. He had a right to a preliminary inquiry, and then following committal a right to a jury trial. Electing and maintaining his election to trial by jury cannot be used to diminish his right to a trial within a reasonable period of time.

[64] In *R. v. Morin*, over 18 years ago, the Supreme Court of Canada set out the rough guidelines that should govern: eight to ten months in provincial court, and six to eight after committal, for a total of 14 to 18 months. Some cases may take longer due to the inherent time requirements of a complex case or pursuit of legal proceedings by an accused. That was not the case here. It is the responsibility of the Crown to ensure any accused's right to trial within a reasonable period of time is respected. It bears the obligation to ensure sufficient resources are available. It is no excuse to say to an accused you must give up your right to a jury trial since if you don't, you will not be able to stand your trial within a reasonable period of time.

[65] The Crown says the trial judge erred in his analysis and balancing exercise because he failed to appreciate the Crown was proceeding to trial with a statement

from the respondent. It says the Crown maintained that they were always ready to proceed to trial but the judge was suspicious of this position and, at least implicitly, did not consider the Crown to be ready to go to trial.

[66] I agree that the general tenor of the trial judge's reasons was he did not accept the submissions of the Crown they were always ready to proceed to trial. The trial judge said this:

> [39] The Crown submits it was ready to proceed to trial on the initial date set for February 5th, 2007. However, it appears that evidence and disclosure issues existed at that time. The Defence's Third Party records application filed January 30th, 2007, initiated an immediate disclosure of documentation. Ultimately, further documentation was ordered disclosed following hearing. In addition, in February 2007, the Crown was in the process of obtaining a second statement from the complainant containing inconsistencies. Even then, the video-taped statement made on February 7, 2007 was not disclosed by the Crown until June 2007. Moreover, DNA analysis had yet to occur.

[67] With respect, the Crown's submissions on appeal are nothing more than a request that we substitute our views of the appropriate inferences to be drawn from the evidence before the trial judge. The Crown called absolutely no evidence to substantiate its position that it was ready to proceed to trial. The trial judge did not accept the Crown's position. The Crown can point to no error in the fact finding process that led to the views expressed by the trial judge. In my opinion, they are reasonable and supported by the evidence.

[68] The Crown also argues that the trial judge mischaracterized the proceedings by referring to them as uncomplicated. With respect, I am unable to agree. The comment by the trial judge must be read in context. In the course of balancing the interests of society in seeing a trial on the merits, and the prejudice to the respondent caused by the delay, the trial judge wrote:

> [46] The delay in this case is inordinately excessive. This is not a complicated case requiring lengthy periods of preparation and court time. The critical elements of the offence of incest are the relationship of father and daughter and the occurrence of sexual intercourse. ...

[69] The Crown says mere recital of the essential elements of the offence may not truly reflect the difficulties and dynamics in proving them. This is true. The

Crown also says the respondent's counsel referred to the third party application as a complicated issue. That may also well be true. But the fact remains that the case itself was not complicated either legally or factually. The total time for a jury trial was always referred to as four or five days. The Crown argued in its factum that all it needed to proceed to trial was the statement of the respondent and the testimony of the complainant. To then say the case was complex and this complexity accounted for or contributed to the lengthy delay that occurred is inconsistent with its earlier position. I see no error by the trial judge in how he characterized the proceedings.

Assessment of prejudice

[70] The Crown contends the trial judge erred in a number of respects. First in finding prejudice by failing to consider the actions of the respondent falling short of waiver, and in failing to properly consider the heightened societal interest in having a trial on the merits on such a serious charge. I have already declined to accept the suggestion of the Crown that the trial judge erred in failing to consider the actions of the respondent short of waiver.

[71] The trial judge set out his views on prejudice, and concludes as follows:

> [48] This is a case where the excessive delay leads to an inference of prejudice. There is some evidence of actual prejudice. While there is a strong societal interest in having a charge of this nature tried on its merits, to proceed to trial at this late stage would be contrary to the public interests in the prompt and fair administration of justice. I am satisfied the excessive delay infringed the Accused's right to be tried within a reasonable time under Section 11(b) of ***The Charter***.

[72] The Crown does not dispute that there was indeed some evidence of actual prejudice to the respondent. He was inflicted with a very serious disease unconnected to either charge against him. The disease created an acknowledged need for extensive personal care. While the charges remained outstanding he was denied home care services. In addition, the respondent eloquently described the incredible stress from having the incest charge hanging over his head, causing depression and suicidal ideation.

[73] It cannot be disputed that a trial judge is entitled to infer prejudice based on the length of the delay (see *R. v. Smith*, [1989] 2 S.C.R. 1120 at para. 42, *R. v. Askov*, [1990] 2 S.C.R. 1199 at para. 67; *R. v. Morin*, *supra*, *R. v. Godin*, *supra*). The trial judge quoted the governing principles articulated by Cromwell J. in *R. v. Godin*:

> [30] Prejudice in this context is concerned with the three interests of the accused that s. 11(*b*) protects: liberty, as regards to pre-trial custody or bail conditions; security of the person, in the sense of being free from the stress and cloud of suspicion that accompanies a criminal charge; and the right to make full answer and defence, insofar as delay can prejudice the ability of the defendant to lead evidence, cross-examine witnesses, or otherwise to raise a defence. See *Morin*, at pp. 801-3.
>
> [31] The question of prejudice cannot be considered separately from the length of the delay. As Sopinka J. wrote in *Morin*, at p. 801, even in the absence of specific evidence of prejudice, "prejudice may be inferred from the length of the delay. The longer the delay the more likely that such an inference will be drawn." Here, the delay exceeded the ordinary guidelines by a year or more, even though the case was straightforward. Furthermore, there was some evidence of actual prejudice and a reasonable inference of a risk of prejudice.

[74] The trial judge did refer to the strong societal interest in having the charge of incest tried on its merits. I am unable to accept the Crown's argument that the trial judge failed to take into account what it says is the heightened societal interest in having a trial on such a heinous allegation. The seriousness of the charge is a relevant factor. It does not dictate the analysis. For example, in *R. v. R.M.* (2003),180 C.C.C. (3d) 49 (Ont. C.A.) far more serious charges involving aggravated assault, sexual assault, unlawful confinement and incest were stayed on the basis of a delay of 61 ½ months.

[75] The trial judge was entitled to find there was an excessive delay, prejudice to the respondent, and despite a strong societal interest in a trial on the merits, conclude that the respondent's right to be tried within a reasonable period of time was infringed. As noted at the outset, once that conclusion has been reached, the minimum remedy is a stay of proceedings (see *R. v. Rahey*, [1987] 1 S.C.R. 588, *R. v. Kporwodu* (2005) 75 O.R. (3d) 190 (C.A.), *R. v. Thomson*, 2009 ONCA 771). Accordingly, despite the able efforts of Mr. Scott for the Crown, I would dismiss the appeal.

Beveridge, J.A.

Concurred in:

Fichaud, J.A.

Bryson, J.A.