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CANADA
PROVINCE OF NOVA SCOTIA
COUNTY OF INVERNESS

C.P.H. No. 03430

IN THE COUNTY COURT JUDGE'S CRIMINAL
COURT OF DISTRICT NUMBER SIX

BETWEEN:

HER MAJESTY THE QUEEN

-and-

EDWARD JOSEPH WEAVER

HEARD: At Port Hood, Nova Scotia, before the Honourable Judge N. Robert Anderson, County Court Judge for District Number One, and an Additional Judge of the County Court for District Number Six.

DECISION: July 22, 1991

COUNSEL: Richard J. MacKinnon, Esq., for the Prosecution.

Blaise MacDonald, Esq., for the Defence
Lisa Fraser

D E C I S I O N

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1991, July 22, Anderson, N.R., J.C.C. (Orally)

These applications for remedy under 24 -- Section 24 of the Charter are very serious matters particularly

in light of the **Askov** decision and probably more so because of Justice Cory's public pronouncements off the bench with regard to his decision on the bench. However, I've heard Counsel for the accused and the Crown, I've read the brief and Affidavit of the accused and I've considered the authorities cited and provided to me by Counsel.

The accused makes application under Section 24(1) of the Charter of Rights and Freedoms seeking a stay of proceedings because his Section 11(b) right to a trial within a reasonable time has been breached.

It is well established law that the onus is on the person asserting a breach of a charter right to establish it on a preponderance of evidence.

Section 24(1) of the Charter reads:-

> "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."

Section 11 reads:-

> "11. Any person charged with an offence has the right
>
> (b) to be tried within a reasonable time;
>
> (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal."

The relevant dates, in this matter, February 5th, and I take these from the brief of the Defence which has not been disagreed with by Counsel for the Crown, so they are in by agreement as far as I'm concerned.

February 5, 1990 - Mr. Weaver given Appearance Notice on that date alleging a Section 271(a) offence;

February 5, 1990 - Indictment issued alleging indecent assault contrary to Section 149(1);

March 5, 1990 - Mr. Weaver appears in Court, elects trial by Supreme Court Judge and Jury, Preliminary Inquiry set for June 18, 1990;

June 18, 1990 - Preliminary Inquiry held; Mr. Weaver was committed to stand trial in Supreme Court on November 19, 1990 on charges of sexual assault and sexual indecency;

October 23, 1990 - Indictment amended;

November 19, 1990 - Prior to term or the commencement of the term, I take it, Mr. Weaver appears in Court and re-elects to a County Court Judge without a Jury with the consent of the Crown. (There was some discussion vis-a-vis times of the trial in Supreme Court and to the docket;)

November 22, 1990 - Letter sent to defence by the Prothonotary's Office indicating trial dates would be May 29th, 30th, and 31st, 1991;

May 22, 1991 - Defence counsel was notified that His Honour Judge MacPherson had retired, and that the trial would be cancelled pending the appointment of another Judge;

June 4, 1991 - Letter sent to defence counsel by the Prothonotary's Office indicating the trial was rescheduled for July 22, 23, and 24th at the Court House, Port Hood, Nova Scotia;

June 6, 1991 - Letter sent by defence counsel to Crown Prosecutor and the Prothonotary's Office requesting an earlier date for trial;

June 11, 1991 - Letter from His Honour Judge Anderson to defence counsel and the Crown Prosecutor confirming the trial dates given and advising that July 22, 23, and 24th, 1991, were the earliest dates available;

I would just add to that that the docket in Halifax is such that cases are set down for every day. I was scheduled to, and did, go away on a course early in July, consequently, these were the dates that became available.

Another date of relevance is the former Judge MacPherson's retirement. It cannot be said that his retirement on March 6th, 1991 as County Court Judge for District Number Six came as any surprise. It was necessary for him to resign because he had reached the compulsory retirement age of 75 years. This was a matter of statute and was known to the authorities. As of today's date no replacement has been named.

Madam Justice Arbour, Ontario Court of Appeal in **The Queen v. Bennett**, a judgment of May 31, 1991, said referring to the Supreme Court of Canada in **Askov**.

"After reviewing the authorities, Cory J. said at pp. 483-84:

From the foregoing review it is possible, I think, to give a brief summary of all the factors which should be taken into account in considering whether the length of the delay of a trial has been unreasonable:

(i) The length of the delay

The longer the delay, the more difficult it should be for a court to excuse it. Very lengthy delays may be such that they cannot be justified for any reason.

(ii) Explanation for the delay

(a) Delays attributable to the Crown

Delays attributable to the action of the Crown or officers of the Crown will weigh in favour of the accused. The cases of Rahey and Smith provide examples of such delays.

Complex cases which require longer time for preparation, a greater expenditure of resources by Crown officers, and the longer use of institutional facilities will justify delays longer than those acceptable in simple cases.

(b) Systemic or institutional delays

Delays occasioned by inadequate resources must weigh against the Crown. Institutional delays should be considered in light of the comparative test referred to earlier. The burden of justifying inadequate resources resulting in systemic delays will always fall upon the Crown. There may be a transitional period to allow for a temporary period of lenient treatment of systemic delay.

(c) Delays attributable to the accused

Certain actions of the accused will justify delays. For example, a request for adjournment

or delays to retain different counsel.

There may, as well, be instances where it can be demonstrated by the Crown that the actions of the accused were undertaken for the purposes of delaying the trial.

(iii) Waiver

If the accused waives his rights by consenting to or concurring in a delay, this must be taken into account. However, for a waiver to be valid it must be informed, unequivocal and freely given. The burden of showing that a waiver should be inferred falls upon the Crown. An example of a waiver or concurrence that could be inferred is the consent by counsel for the accused to a fixed date for trial.

(iv) Prejudice to the accused

There is a general, and in the case of very long delays and often virtually irrebuttable presumption of prejudice to the accused resulting from the passage of time.

Where the Crown can demonstrate that there was no prejudice to the accused flowing from a delay, then such proof may serve to excuse the delay. It is also open to the accused to call evidence to demonstrate actual prejudice to strengthen his position that he has been prejudiced as a result of the delay."

In the case at Bar, I must consider:-

1. The length of the delay.

2. The explanation for the delay.

3. If there was a waiver.

4. Prejudice, if there was prejudice to the accused.

(i) **The length of the delay**

Total time to trial about 17 months, about eight months from the time of re-election to County Court. The statutory right of an accused to re-elect does not necessarily waive his right to a trial within a reasonable time. Is the eight month span of time reasonable?

Like Madam Justice Arbour in the **Bennett** case, I do not read the reasons for judgment of the Supreme Court of Canada as prescribing a statutory limitation period which, if exceeded, must result in an automatic stay of charges.

(ii) **Explanation of the delay**

Each particular situation, each particular case, each particular jurisdiction, in my mind, must be considered, and eight months for this jurisdiction is more than should be required.

The most obvious explanation for the delay is the lack of an appointment to the Court Court for District Number Six. If an appointment had been made in March this matter could in all likelihood have been heard on a scheduled date in May.

Chief Judge Palmeter in **R v. Sabean**, referring to the failure to expeditiously appoint a replacement judge,

that was in District Number Two, said:-

> "This in effect constituted a lack of institutional resources. In **R v. Mills**, supra, Lamer, J., at p. 550 states:
>
> > "In an ideal world there would be no delays in bringing an accused to trial and there would be no difficulties in securing fully adequate funding, personnel and facilities for the administration of criminal justice. As we do not live in such a world, some allowance must be made for limited institutional resources.
> >
> > It is imperative, however, that in recognizing the need for such a criterion we do not simply legitimize current and future delays resulting from inadequate institutional resources. For the criterion of institutional resources, more than any other, threatens to become a source of justification for prolonged and unacceptable delay. There must, therefore, be some limit to which inadequate resources can be used to excuse delay and impair the interest of the individual."

At p. 554 Lamer, J., also states:

> "In many ways, the problem of systemic delay poses one of the first significant challenges to this Court's interpretation and application of the **Charter.**"

And at p. 555:

> "There can be no assumption that the

> constitutional right to be tried within a reasonable time must conform to the status quo; rather, it is the system for the administration of criminal justice which must conform to the constitutional requirements of the **Charter**."

In **Askov** at p. 478, the majority of the Supreme Court of Canada states:

> "The right guaranteed by s. 11(b) is of such fundamental importance to the individual and of such significance to the community as a whole that the lack of institutional resources cannot be employed to justify a continuing unreasonable postponement of trials.
>
> --- ----
>
> However, the lack of institutional facilities can never be used as a basis for rendering the s. 11(b) guarantee meaningless."

Judge Palmeter went on to say:-

"I do not find the failure to appoint a replacement judge for District Number Two for a period of some five months a reasonable or satisfactory explanation for the delay."

Nor do I so find in this case.

(iii) **Was there a wavier**.

After the re-election there was no waiver and I am

not totally satisfied that a right to do something at law would amount to a waiver of a right under the Charter.

(iv) **Prejudice to the accused.**

It must be the delay that causes the prejudice and not merely the consequences of the laying of the charge.

The laying of a charge in any instance has consequences both detrimental to the accused and his family.

That certain persons cannot testify, or have lessened capacity to testify or whose recollection has faded appreciably are matters affecting the defence's ability to make full answer and defence.

In **Askov**, Cory, J., pp. 482-483 states:

> "The different positions taken by members of the court with regard to the prejudice suffered by an accused as a result of a delayed trial are set forth in **Mills** and **Rahey**. Perhaps the differences can be resolved in this manner. It should be inferred that a very long and reasonable (sic) delay has prejudiced the accused. As Sopinka J. put it in **Smith**, at p. 111:
>
> > 'Having found that the delay is substantially longer than can be justified on any acceptable basis,

> it would be difficult indeed to conclude that the appellant's s. 11(b) rights have not been violated because the appellant has suffered no prejudice. In this particular context, the inference of prejudice is so strong that it would be difficult to disagree with the view of Lamer J. in **Mills** and **Rahey** that it is virtually irrebuttable.'

Nevertheless, it will be open to the Crown to attempt to demonstrate that the accused has not been prejudiced. This would preserve the societal interest by providing that a trial would proceed in those cases where despite a long delay no resulting damage had been suffered by the accused. Yet, the existence of the inference of prejudice drawn from a very long delay will safely preserve the pre-eminent right of the individual. Obviously, the difficulty of overcoming the inference will of necessity become more difficult with the passage of time and at some point will become irrebuttable. None the less, the factual situation presented in **Conway** serves as an example of an extremely lengthy delay which did not prejudice the accused. However, in most situations, as Sopinka J. pointed out in **Smith**, the presumption will be 'virtually irrebuttable.'

Furthermore, the option left open by Sopinka J. in the **Smith** case whereby accused persons who have suffered some additional form of prejudice are permitted to adduce evidence of prejudice on their own initiative in order to strenthen their position in seeking a remedy under s. 24(1) of the Charter is consistent with the primary concern of protecting the individual's right under s. 11(b)."

And Madam Justice Arbour again in **Bennett**.

(iv) Prejudice to the Accused

> "There is a general, and in the case of very long delays an often virtually irrebuttable presumption of prejudice to the accused resulting from the passage of time. Where the Crown can demonstrate that there was no prejudice to the accused flowing from a delay, then such proof may serve to excuse the delay. It is also open to the accused to call evidence to demonstrate actual prejudice to strengthen his position that he has been prejudiced as a result of the delay."

In this particular case there is some evidence that the delay has prejudiced the accused.

The right of the accused to a trial within a reasonable time pursuant to Section 11(b) of the Charter has been breached in this case. The application, under Section 24(1) of the Charter is granted and a stay of proceedings is ordered.

Anything further Counsel?

MR. MACKINNON:

No, Your Honour.

MR. MACDONALD AND MS. FRASER:

No, Your Honour.

COURT CLOSED: (TIME: 1:45 p.m.)