Cite as: R. v. MacPherson, 1992 NSCO 42

PROVINCE OF NOVA SCOTIA
GUYSBOROUGH

C. G. No. 1378

IN THE COUNTY COURT OF DISTRICT NUMBER SIX

BETWEEN:

CHARLES ALEXANDER MACPHERSON

Appellant

-and-

HER MAJESTY THE QUEEN

Respondent

Daniel J. MacIsaac, Esq., Solicitor for the Appellant
William F. Murphy, Q.C., Solicitor for the Respondent

1992, September 10, MacLellan, J.C.C.:-

This is an appeal by Charles Alexander MacPherson from his conviction in Provincial Court at Guysborough, Nova Scotia, on a charge under Section 253(b) of the **Criminal Code.**

The Appellant was charged that he did:-

"On or about the 23rd day of June, 1990 did

> having consumed alcohol in such a quantity that the concentration thereof in his blood exceeded eighty milligrams of alcohol in one hundred millilitres of blood, did operate a motor vehicle contrary to Section 253(b) of the Criminal Code."

On August 29th, 1990, his trial was held at which time he was found guilty of the said charge. He was ordered to pay a fine and on September 7th, 1990, he filed an appeal from the conviction, directed to the County Court of District Number Six.

This matter came on before this Court on July 17th, 1992, at which time the Court heard both parties and received briefs. The decision was reserved and is now rendered.

The only issue advanced by the Appellant is that his rights under Section 11(b) of the **Canadian Charter of Rights and Freedoms** have been violated and that therefore his conviction should be quashed and a stay of proceedings entered.

Section 11(b) of the **Charter** reads:

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

The Appellant contends that because his appeal from conviction was not dealt with in a timely manner, that he is entitled to a remedy under Section 24(1) of the **Charter.**

The Crown, on the other hand, take the position

that the burden is on the Appellant to show that his **Charter** rights have been violated and that this Court sitting as an Appeal Court has no jurisdiction to grant relief under the **Charter.**

The Appellant was charged on June 23rd, 1990, and his trial was concluded on August 29th, 1990. His appeal entered on September 7th, 1990, was delayed until July 17th, 1992, because in March, 1991, Judge Hugh MacPherson retired as Judge of the County Court of District Number Six and no replacement was made until May, 1992.

The Appellant suggests that this Court consider the time from the filing of the appeal to the date of the hearing of the appeal, a period of 22 months.

The Crown contends that this period of time should not be considered because the Appellant has already had his trial and since he instituted the appeal process cannot use this to support his claim that his **Charter** rights have been violated.

This Court has recently dealt with the same issue in **The Queen v. Gary Cusack** (decision rendered September 4th, 1992) wherein I held that an appeal time was to be considered on a Section 11(b) application.

The Crown had also contended that if the appeal time was to be considered it was only to be considered when the Crown was the Appellant. In the **Cusack** case I held that the appeal time was to be considered regardless of which party instituted the appeal. That decision was based on a number of cases including **R v. Rahey,** (1987) 78 N.S.R. (2d) 183; **R v. Conway,** (1989) 49 C.C.C. (3d) 289; **R v. Ushkowski,** (1991) 67 C.C.C.

(3d) 420; and **The Queen v. Francis MacMaster** (decision of MacDonnell, J. dated February 27th, 1992, unreported).

These cases, however, do not resolve the main issue being whether in considering the times involved, the Appellant has shown that his **Charter** rights have been violated.

Here, it is clear that the delay from September, 1990 to July, 1992, was excessive and was caused to a great extent by the lack of an appointment of a County Court Judge before District Number Six. It is also accepted by the Crown that there was no waiver of rights by the Appellant.

Normally, given an appeal filed in September of 1990, that appeal would be heard sometime in the first part of 1991 considering the normal inherent time restraints on the preparation of the factum and so on. Therefore, it would appear that the unusual time delay would be a period of something over a year.

The Appellant has the burden of proving that his **Charter** rights have been violated. On a Section 11(b) application once it is shown that it was a **prima facie** unusual delay, the Court must consider the other factors of waiver, explanation for the delay, and prejudice to the accused. In this case, there was no evidence presented by the Appellant that he has suffered prejudice. The suggestion was that prejudice should be inferred from the unusual delay.

In **R v. Morin**, (March 26th, 1992, unreported), the Supreme Court of Canada dealt with the issue of unreasonable delay and found that the longer the delay

the more likely that an inference of prejudice can be drawn. It also held that where an inference of prejudice cannot be drawn and is not otherwise proven, the enforcement of the individual's rights under Section 11(b) were seriously undermined. In that case, the delay was a period of 14 months from the date of the offence to the date of the trial and was held not to be unreasonable.

In **Morin**, McLachlin, J. discussed the balancing that must be done in deciding a Section 11(b) application. She said at page 29:-

> "An accused person may suffer little or no prejudice as a consequence of a delay beyond the expected and normal. Indeed, an accused may welcome the delay. On the other hand, an accused person can suffer great prejudice because of the delay. Where the accused suffers little or no prejudice, it is clear that the consistently important interest of bringing those charged with criminal offences to trial outweighs the accused's and society's interest in obtaining a stay of proceedings on account of delay, because the consequences of the delay are not great. On the other hand, where the accused has suffered clear prejudice which cannot be otherwise remedied, the balance may tip in the accused's favour and justice may require a stay.
>
> How is prejudice sufficient to outweigh the important public interest in bringing those charged with criminal offences to trial to be established? The matter is essentially a question of fact, dependent on the circumstances of the case. As Sopinka J. points out, the length of delay itself in many circumstances may not support the inference of sufficient prejudice to justify a stay of

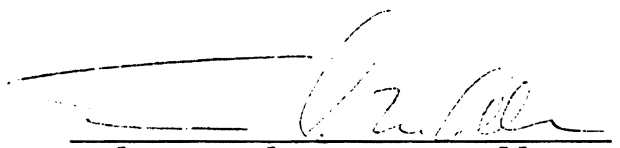
> proceedings. It is well known that accused persons may seek a delay trial and to use the "protective shield" of s. 11(b) as an "offensive weapon", as Cory J. put it in **R v. Askov**, [1990] 2 S.C.R. 1199, at p. 1222. Where no inference as to prejudice can be drawn from the length of the delay, or where the most reasonable inference is the other way, the accused may have to call evidence if he or she is to displace the strong public interest in bringing those charged with an offence to trial.
>
> In the case at bar, the accused was able to meet the first hurdle of establishing a prima facie case. The delay was longer than it should have been, given the nature of the charge and the time reasonably required for processing it. But she failed to show that protection of her interest in a prompt trial or the ancilliary public interest in prompt justice outweighed the public interest in bringing her, a person charged with a criminal offence, to trial. The record permits no inference that her interests in security or the right to a fair trial were adversely affected. In short, the delay appears to have been of little consequence. In the absence of other evidence to establish the need for a stay, the public interest in proceeding to trial was bound to prevail. The trial judge was right to dismiss her application for stay of proceedings."

In this case, while it appears that there was considerable delay in hearing the appeal because of the lack of a Judge, it is to be noted that since the trial has already been held, the task of showing prejudice to the Appellant becomes more difficult and the time required for the Court to infer prejudice is longer. A Court dealing with delay prior to trial must consider the direct impact delay will have on the evidence to

be presented at trial. This would include the affect of delay on the memories and availability of witnesses.

Here, there was no evidence that the Appellant was in any way prejudiced by the delay in the hearing of the appeal. I find that it cannot be inferred that he suffered prejudice, therefore, his application must fail.

Accordingly, I would dismiss the appeal and confirm the conviction, sentence and prohibition entered by the trial judge.



Judge Douglas L. MacLellan
County Court Judge
District Number Six