CANADA
PROVINCE OF NOVA SCOTIA
2001
2001 NSPC 32

CASE NUMBERS:884023-4

IN THE PROVINCIAL COURT

HER MAJESTY THE QUEEN

VERSUS

TRECO WARNELL SIMMONDS
Cite as R. v. Simmonds, 2001 NSPC 32

DECISION
SECTION 11(b) CHARTER APPLICATION

HEARD BEFORE: The Honourable Associate Chief Judge R. Brian Gibson, J.P.C.

PLACE HEARD: Dartmouth, Nova Scotia

DATE HEARD: November 9, 2001

DATE OF DECISION: November 20, 2001

COUNSEL: David Bright, for the Prosecution
Terry Nickerson, for the Defence

[1] Treco Warnell Simmonds, the applicant, stands charged with two counts of trafficking in cocaine, allegedly occurring on the 12th and 17th of March, 1999. He was formally charged by way of an Information sworn May 6, 1999. His trial on these charges is scheduled to take place on December 3, 2001.

[2] The issue before this Court is whether the applicant's right to be tried within a reasonable time, found in S.11(b) of the ***Charter of Rights and Freedoms***, (the Charter), was violated. Inferentially the applicant alleges that if his S.11(b) ***Charter*** right was violated, his rights found in S.7 of the ***Charter*** were also violated. Should I find a violation of the applicant's ***Charter*** rights I will be required to determine what, if any, remedy is appropriate. The applicant seeks an order staying these criminal proceedings as the appropriate remedy.

FACTS

[3] The applicant made his first appearance in court on May 10, 1999. He appeared with counsel and was released on a $500 cash Recognizance, bound to comply with the following conditions: 1) keep the peace and be of good behavior; 2) attend court as required by the court; 3) reside at 220 Simmonds Road, North Preston; 4) report any change of address to the Clerk of the Provincial Court, Dartmouth within 48 hours of the change; 5) immediately upon release, attend at Halifax Regional Police Service, Dartmouth location for purposes of fingerprinting and photographing. Before being released, the applicant elected to have his trial in the Provincial Court. Plea was adjourned until June 9, 1999.

[4] On June 9, 1999, the applicant appeared with counsel. Plea was adjourned until June 30, 1999 at the request of the applicant's counsel. The applicant pled not guilty on June 30, 1999. The trial was set for January 6, 2000. On January 6th the trial was adjourned until June 13, 2000. Two subsequent adjournments of the applicant's trial, occurring on June 12, 2000 and February 1, 2001 led to the currently scheduled trial date of December 3, 2001.

[5] The total delay measured from the 6th of May, 1999 until the 3rd of December, 2001 is approximately 31 months. The reasons for the delay, the actions of the Crown and the actions of the applicant will be addressed in greater detail below.

ANALYSIS

[6] I have carried out my inquiry with respect to the delay in accordance with the framework and principles expressed in the decisions of ***R. v. Askov*** (1990), 59 C.C.C. (3d) 449 and ***R. v. Morin*** (1992), 71 C.C.C. (3d) 1. The determination of whether the applicant's S. 11(b) rights have been violated ultimately involves a balancing of the collective societal interest in bringing those who transgress the law to trial with the individual and community interest that accused individuals on trial are treated fairly and justly. The balancing of these competing interests involves an assessment of the seriousness of the charges, the length of the delay, whether there has been a waiver of all or any part of the delay, the reasons for the delay, the prejudice to the accused and the seriousness of the charges. The more serious the charges, the greater the societal interest in ensuring that the accused is brought to trial.

Length of the Delay

[7] I conclude that 31 months is of sufficient length to raise an issue as to its reasonableness.

Waiver of Time Periods

[8] I conclude that the applicant waived only that period of time from February 12, 2001 to March 28, 2001, discussed more fully below under the heading Actions of the Applicant.

Reasons for the Delay

(a) Inherent Time Requirements

[9] The applicant was arrested and brought before the Court on May 10, 1999. He was released following a bail hearing on May 10, 1999. The delay from May 10, 1999 to June 30, 1999, the date when plea was entered, and the first trial date set of January 6, 2000 is not unreasonable. The charges are serious and they arose from a broader undercover police investigation involving other individuals allegedly participating in petty, street level drug trafficking activities.

(b) Limits on Institutional Resources

[10] When the applicant tendered his not guilty plea on June 30, 1999, the first trial date offered by the Court, being that of December 23, 1999, was unacceptable to the applicant's counsel. The next trial date offered by the Court, being that of January 6, 2000, was accepted by both parties. These two dates were one week short of six months and one week longer than six months respectively from the date of June 30, 1999.

[11] The adjournment of the first trial date of January 6, 2000 to that of June 13, 2000 resulted in a further delay of five months and one week.

[12] Although the adjournment of the second trial date actually occurred on June 12, 2000, the parties were not in a position to have the Court assign a new trial date until July 6, 2000. On July 6, 2000 the date of February 12, 2001 was accepted by both parties. The adjournment of the trial date to February 12, 2001 resulted in a further delay of approximately six and one half months.

[13] The adjournment of the third trial date occurred on February 1, 2001. The fourth trial date of December 3, 2001 could not be set by the Court until March 28, 2001. The date of December 3, 2001 represented a further delay of eight months and one week from the date of March 28, 2001.

[14] On all but one occasion, being the date on which the second trial date was set, I was the presiding judge. I have taken judicial notice of the practice of setting Court dates in the courtroom where I regularly preside in Dartmouth. That practice usually involves the Court Clerk offering the first available date in the court schedule that will accommodate the estimated trial time requirements. Occasionally counsel will speak privately to the Court Clerk immediately prior to the Court commencing its daily sittings to determine what dates are available for trial. In those latter described situations, counsel will suggest to the presiding judge when their matter is called in court, the mutually satisfactory date determined from their private discussions with the Court Clerk. The presiding judge will usually set that date to be the scheduled trial date.

[15] The record reflects that the first and third scheduled trial dates of January 6, 2000 and February 12, 2001 respectively, were set in accordance with the usual and most frequently followed practice. The court transcript reflects that the second and fourth scheduled trial dates of June 13, 2000 and December 3, 2001 respectively, were set following the latter, less usual, practice. There is no evidence before me that dates, earlier than those suggested by counsel to the presiding judge, were available in the court's docket for the second and fourth scheduled trial dates above.

[16] Each of the foregoing delays between the scheduled trial date and the setting down or committal date were within the range of six to eight months, found to be a reasonable range of delay between committal and trial in the cases of ***R. v. Askov*** and ***R. v. Morin***, above. I take judicial notice that there are ten Provincial Court judges who regularly preside in a total of ten courtrooms allocated to the Provincial Court in the Halifax-Dartmouth area. These courtrooms are scheduled on a generally similar basis as the courtroom into which this matter was scheduled. There were no additional full-time judges nor additional courtrooms to facilitate an earlier trial of this matter. In fact, the complement of full-time Provincial Court judges has diminished from that of 27 approximately ten years ago to that of currently 23 full-time judges. That has been the situation since January 2001. A Provincial Court, provided with greater resources than those allocated to the Provincial Court during the time that this delay arose, may have had the flexibility to allocate a judge to hear the trial of this matter on a date earlier than those assigned. Ultimately it is the Crown which is responsible for the allocation of resources to the Court. It is the Crown which must justify diminishing resources.

[17] The foregoing represents the systemic delay environment that existed between June 30, 1999 and March 28, 2001, the first and last dates upon which trial dates were assigned for the trial of the applicant. The total systemic delay that accrued in relation to the applicant was that of approximately 26 months and one week. Neither counsel for the Crown, counsel for the applicant, nor the applicant created this systemic delay. Their actions, however, must be assessed to determine whether those actions contributed to the total accumulation of the systemic delay.

(c) Actions of the Crown

[18] The issue of Crown disclosure arose on June 30, 1999 when the first trial date was set. The record reveals that the trial date of January 6, 2000 was accepted by Defence counsel on condition that disclosure would be completed in a timely fashion before that date.

[19] Although there were other reasons that contributed to the adjournment of the first trial date of January 6th, a failure by the Crown to make full disclosure was one of those reasons and I conclude the main reason. The prominence of the Crown's failure to make full disclosure as a reason for the adjournment on January 6, 2000 became more apparent on June 12, 2000 when the Crown's failure to make complete disclosure was acknowledged by Crown counsel as the only reason a further adjournment of the trial was required. I note, in fairness to Crown counsel, that counsel appearing for the Crown on January 6, 2000 was not the same Crown counsel who appeared on June 30, 1999 when the first trial date was set and the disclosure issue first raised on the Court record. The

Court record also reveals that Crown counsel on January 6, 2000 had only received the file on the afternoon immediately prior to the scheduled trial date. Crown counsel appearing on January 6, 2000 was a private practitioner, not an employee of the federal Department of Justice, as was the case with Crown counsel who appeared on June 30, 1999.

[20] No explanation for the disclosure delays was presented or appears from the record. I do note that a total of four different individuals appeared in the capacity as Crown Counsel at various times when this matter was dealt with by the Court. The Court transcript reveals that disclosure remained incomplete as late as July 6, 2000, the date on which the third scheduled trial date of February 12, 2001 was set. Despite incomplete disclosure, Defence Counsel agreed on July 6th to the February 12th trial date.

[21] A further apparent reason for the adjournment on January 6, 2000 was a missing witness, the analyst, who was ill and therefore not present to testify that day. However, had disclosure been completed in a timely fashion prior to January 6, 2000, the transcript reveals that there was sufficient time on the Court's January 20th docket to receive the evidence from the missing witness and complete the trial provided that the evidence available to the Crown on January 6, 2000 could have been presented on that date. That proposal was presented by the Court. This proposal was rejected by both counsel primarily because of the outstanding disclosure issue.

[22] The transcript might appear to indicate that Defence Counsel was also seeking an adjournment on January 6, 2000 for reasons unrelated to the disclosure issue. A careful review of the Court transcript, evidence and submissions, indicates that Defence Counsel perceived the Crown's missing witness problem and the appearance of new Crown counsel as an opportunity to discuss the issue of identification with Crown counsel. The objective of such discussions: to discourage further prosecution of the charges against the applicant. Related to such discussions, however, were undisclosed, still-framed pictures taken or made from a videotape.

[23] It appears that on January 6th both Crown and Defence Counsel discussed these issues prior to making their comments on the record. Those discussions appear to have included the proposed date of June 13, 2000 as the date to which the trial should be adjourned. I characterize Defence Counsel's non-objection to the Crown request for an adjournment, and the apparent acceptance of the revised trial date of June 13th as an acquiescence to the inevitable; that being a further delay of approximately five months and one week, occasioned by the systemic delay in the court, but arising from the Crown's failure to make timely and complete disclosure so as to enable the applicant to make full answer and defence to the charges against him. This is not waiver.

[24] The Crown's failure to make complete and timely disclosure was the cause of further delay from the originally scheduled trial date of January 6, 2000 to February 12, 2001, a total of 13 months and one week approximately.

(d) Actions of the Applicant

[25] The evidence reveals that the applicant's decision to go to Toronto in the fall of 2000 seeking employment contributed to communication difficulties between the applicant and his counsel. Those communication difficulties ultimately led to a court application by his counsel on January 24, 2001, seeking leave to withdraw as counsel of record. An attempt

to personally serve the applicant with a notice of that application was unsuccessful. The application for leave to withdraw was granted solely upon the representations of the applicant's counsel.

[26] Notice of the Court's decision sent to the applicant pursuant to the Court's direction prompted an appearance by the applicant on February 1, 2001. On that date he sought an adjournment of the trial date of February 12th to enable him to retain new counsel. That application was granted. New counsel was retained and ultimately the current trial date of December 3, 2001 was set on March 28, 2001.

[27] The applicant, upon learning of the loss of his counsel, was faced with a difficult decision; either proceed with the scheduled trial in respect of serious charges, representing himself or seek an adjournment to retain counsel. Both choices offered the prospect of prejudice. The choice to avoid one prejudice does not inferentially mean that he was waiving the other prejudice entirely. I do, however, conclude that the applicant waived the delay from February 1, 2000 until March 28, 2001, the time needed to retain new counsel.

[28] A review of the transcript, particularly the representations made by the applicant's counsel on January 24, 2001, and the representations made on February 1st by the applicant, an unidentified person on the applicant's behalf, and his former counsel, who happened to be in court on other matters on February 1, 2001, suggest that if the applicant had been present on January 24, 2001 to respond to his counsel's application, a different result may have occurred.

[29] The systemic implication of the Court's decision permitting the withdrawal of counsel was the immediate loss of Legal Aid representation for the applicant. It is the policy of the Legal Aid Commission to not offer further representation to a former client on the same matter where counsel has withdrawn with leave from the Court. A decision made in accordance with that policy can be appealed to the Appeal Committee. It appears that the Applicant did make a successful appeal to the Appeal Committee.

[30] A further systemic implication arising from the loss of counsel was the delay from March 28, 2001 to December 3, 2001 to secure a new trial date. I am mindful of the fact that it was Defence Counsel on March 28th who suggested the trial date of December 3, 2001, indicating that he had first spoken to the Clerk of the Court. However, there is no evidence before me that there were earlier dates in the Court's schedule. I also note from the transcript that Defence Counsel put Crown Counsel on notice of his intention to "possibly make a S.11(b) **Charter** application". In the face of such notice, it seems likely that Crown Counsel would have stated its ability to proceed on earlier dates in the Court schedule, if there were any. I infer from the transcript that both Defence and Crown Counsel had conferred with the Court Clerk about possible trial dates prior to the Court going into session on March 28, 2001.

[31] A missed appointment on January 11, 2001 appears to have been the precipitating event that led to the application to withdraw by the applicant's counsel on January 24, 2001 and the ensuing delay. There is no evidence before me that the applicant had the knowledge that the missed appointment on January 11th would ultimately lead to the application by his counsel to withdraw nor the further delay implications. The applicant presented as unsophisticated, undereducated and unknowledgeable about the court system. I do not infer that he acted in a manner to intentionally create further delay.

[32] In the case of **Maracle v. The Queen**, 122 C.C.C. (3d) 97, the Supreme Court of Canada accepted the trial judge's finding that:

> 1) The court system ought to be sufficiently flexible to permit an adjournment of a trial date for a relatively short time, where the reason for the adjournment is to permit the accused to change counsel; and
> 2) a request for such an adjournment should not be seen as a form of implicit waiver of the entire segment of the resulting delay.

[33] The implications of the Court's limited flexibility to respond on March 28, 2001 and provide an earlier date for trial than that of December 3, 2001 was exacerbated by the previous adjournments that had been granted and the resulting delay that flowed therefrom. Those implications and that lack of flexibility should not be attributed to the applicant.

Prejudice to the Accused

[34] I infer prejudice to the accused from the prolonged delay. The total delay is that of approximately 31 months. Of that delay, I attribute only the period from February 1, 2001 until March 28, 2001 to the applicant. If I accept as accurate the birthrate of April 10, 1977 attributed to the applicant on the Information, a delay of 29 months represents approximately ten percent of the applicant's entire lifetime. I express the delay in this manner to illustrate the significance of the delay, both in actual and relative terms. Ten percent of an individual's lifetime is a significant length of time.

[35] Concern about the delay was expressed by Defence Counsel on June 12, 2000, July 6, 2000 and March 28, 2001. I am not able to conclude that the applicant was one of those accused disinterested in an early trial date, referred to in the ***R. v. Morin*** above at pages 23 and 24 of that decision. The applicant testified that he wanted the trial to be over a long time ago and that he has always been in Court when he was required to be in Court. I accept his evidence in that regard. The prosecution has not established "that the accused is in the majority group who do not want an early trial and that the delay benefitted rather than prejudiced the accused" as stated in ***R. v. Morin*** above at page 24.

[36] From May 10, 1999 until the present day the accused has been bound to follow the terms and conditions of a Recognizance in the amount of $500 cash bail deposited with the Court. He has been denied the use of that sum of money since May 10, 1999. The accused appears to be a person of limited financial means who has had sporadic employment since his arrest. The sum of $500 in relation to the applicant's financial circumstances is not an insignificant amount of money.

[37] The conditions of the Recognizance are not particularly restrictive. However, a recognizance is the highest form of release order. There is a significant risk of detention pending trial should an accused not abide by the terms and conditions of such a release order. I infer from the applicant's evidence that this significance was understood by him. He testified to not wanting to go out for fear he might end up associating with people having a criminal record or get into trouble. His testimony reveals that he mistakenly believed that the Recognizance prohibited him from associating with those having a criminal record. The evidence revealed that there have been no breaches or allegations of breach of the Recognizance.

[38] The applicant enrolled in a 10 week course through "B.B.I." Following that course the applicant was provided with employment. The applicant claims that he lost his employment because of the outstanding charges. There is no evidence before the Court to substantiate why the applicant lost that position, other than the applicant's stated belief, based upon hearsay evidence. Nevertheless, I infer that outstanding serious charges, which offer the prospect of significant incarceration, are likely to have an impact upon the ability of an individual to make long-term plans and commitments in respect of employment or other relationships. The applicant, who continues to reside with his mother, has become a father since these charges arose. The applicant testified to a desire to reside with the child's mother, a person with whom he is currently in a boyfriend/girlfriend relationship. He claims to have not done so due to the outstanding charges against him. I understand from his evidence that these charges have created too great a level of uncertainty for him to take such steps.

[39] The applicant testified to being under considerable stress arising from these charges. He testified that as a result of this stress, warts began appearing on his legs which had to be "burned off". The applicant further testified that as a result of these charges, he has no life and does nothing.

Seriousness and Complexity of the Charges

[40] Trafficking in cocaine is a serious matter. The maximum sentence is that of life imprisonment. The Court of Appeal stated in the case of ***R. v. Huskins*** (1990) 95 N.S.R. (2d) 109 at 113:

> "Rare indeed is the case where less than federal time should be imposed for trafficking in cocaine."

I do not believe that the Court of Appeal has departed from that position. However, there have been rare occasions when this Court has imposed a conditional sentence for such activity. A sentence that lenient would be predicated upon very small quantities of the narcotic being involved in the offence and the offender having no more than a very minor unrelated criminal record with good prospects of rehabilitation.

[41] No evidence as to the degree of seriousness of the applicant's alleged criminal activity has been presented. If the alleged trafficking activities of the applicant involved large quantities, I assume the Crown would have presented evidence to that effect. I judicially note from the Court record that this charge arose at a time when a number of other Informations charging similar offences against other individuals during the same period of time as those against the applicant were presented in Court. It is a matter of record that those other charges involved the same police agent as these charges against the applicant and arose from an undercover police investigation directed at street level, petty retailing activities. I further note that the time allotment originally set for the trial of this matter was a maximum of two hours, which subsequently was expanded to a half day. Such a time allotment would not suggest a complex trial.

CONCLUSION

[42] The reason for the largest segment of the delay, from June, 1999 until February 12, 2001, was the Crown's failure to make full and timely disclosure. No explanation for such

failure was provided. That failure occurred in the context of a known systemic delay environment which was likely to lead to a significant delay of the trial. A trial, which ought to have been completed within approximately six months of committal, was extended by a further thirteen months due to the Crown's unexplained disclosure difficulties.

[43] The approximate total delay of 21 months from May 10, 1999 to February 12, 2001, in the context of the inferred and actual prejudice to the applicant, together with the reasons for such a delay, may be sufficient to find a breach of the applicant's S. 11(b) ***Charter*** right without regard to the further unwaived delay from March 28, 2001 until December 3, 2001.

[44] The further extension of the delay by approximately eight months arising during that period measured from March 28, 2001 to December 3, 2001, persuades me that the applicant's S. 11(b) ***Charter*** rights were clearly violated.

[45] I conclude that this is one of those clearest of cases, referred to in ***R. v. Conway*** (1989) 49 C.C.C. (3d) 289 (S.C.C.) where a stay of proceedings is the appropriate remedy. Pursuant to S. 24(1) of the ***Charter***, I so direct and order a stay of proceedings with respect to the charges against the applicant arising on March 12th and 17th, 1999.

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R. Brian Gibson
Associate Chief Judge