IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. Coughlan, 2003NSPC025

Date: 2003-06-30
Docket: 1111530-1
Registry: Dartmouth

BETWEEN:

HER MAJESTY THE QUEEN

v.

CONRAD FRANK COUGHLAN

DECISION

HEARD BEFORE:	The Honourable Associate Chief Judge R. Brian Gibson, J.P.C.
PLACE HEARD:	Dartmouth, Nova Scotia
CHARGES:	S.254(5), 253(a) of the *Criminal Code*
SUBJECT:	Section 11(b) *Charter* Application
COUNSEL:	Alonzo Wright, Crown Attorney Kelly Serbu, counsel for the Defendant

[1] On the 14th day of September, 2001, Conrad Frank Coughlan, herein referred to as the Applicant, was allegedly operating a motor vehicle when it collided with an RCM Police vehicle at an intersection at or near Cole Harbour in the County of Halifax, Province of Nova Scotia. The intersection where the collision occurred was governed by traffic lights. The Crown concedes that the vehicle, allegedly operated by the Applicant, proceeded into that intersection on a green light. A criminal investigation of suspected impaired driving commenced soon after the collision. That investigation resulted in the arrest of the Applicant on September 14th, 2001.

[2] The Applicant was subsequently released on the same day by the police on his written promise to appear in Court and, on an Information sworn October 18, 2001, was charged with offences pursuant to the provisions of S.254(5) and S.253(a) of the *Criminal Code*. The trial of these charges is now scheduled for June 30, 2003 at 1:30 p.m. A full afternoon has been allocated to conduct the trial.

[3] The Applicant alleges that his right to a trial within a reasonable time, as prescribed by S.11(b) of the *Charter* has been violated. He seeks a judicial stay of proceedings of these two *Criminal Code* charges pursuant to the provisions of S.24(1) of the *Charter*.

ANALYSIS

[4] The post-charge delay in this case is that of 20 months, 13 days, measured from October 18, 2001 until June 30, 2003. This post-charge delay was preceded by 34 days of pre-charge delay measured from the date of the Applicant's arrest and release on September 14, 2001 until October 18, 2001 when the Information herein was sworn. While the pre-charge delay is not to be counted in the determination of the length of the delay, it may be relevant to an overall determination as to whether the post-charge delay in this case was reasonable.

[5] 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 have allegedly transgressed 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 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 is likely to be in ensuring that an accused is brought to trial. The record reflects that the Crown elected to proceed summarily against the Applicant in respect of the two charges herein.

LENGTH OF THE DELAY

[6] I conclude that the delay of 20 months and 13 days is of sufficient length to raise an issue as to its reasonableness.

Waiver of the Time Periods

[7] I conclude on my review of the Court record that the Applicant at no time, either explicitly or implicitly waived his rights under S.11(b) of the *Charter*.

Reasons for the Delay

(a) Inherent Time Requirements

[8] On October 31st, the Applicant, through counsel, appeared for the first time in Court with respect to the charges herein. The record reveals that "new"

disclosure had been received by Defence Counsel on the previous day. The Court granted Defence Counsel's request to adjourn plea for a period of two weeks to permit a review of the disclosed material with the Applicant. On this first Court appearance, the Crown and Court were advised that applications involving allegations of S.10(b) and S.9 *Charter* violations would be made and that the Crown and Court would be provided with formal notice and particulars thereof at a later date.

[9] Further adjournments of the plea occurred on November 14, 2001 and December 12, 2001 pending disclosure of an accident reconstruction report being prepared by the police. There is no evidence before me as to when the decision was made by police to prepare an accident reconstruction report or whether the police advised counsel as to the date on which it was expected to be completed. I do note from the Court record that the accident reconstruction report was not available for the December 12, 2001 appearance. It was Defence Counsel who suggested a return to Court on February 6, 2002 for purposes of tendering a plea. I assume, based upon the knowledge that both Defence and Crown counsel would have had on December 12, 2001, that this was a reasonable further delay to accommodate the preparation, disclosure and review by Defence Counsel with the

Applicant of the accident reconstruction report. Submissions made on June 4, 2003 indicate that Crown Counsel received the report late in December and provided it to Defence Counsel by letter dated January 3, 2002. Absent any evidence to the contrary, I am unable to conclude that the length of time to complete, disclose and review the accident reconstruction report was outside the scope of inherent time constraints. The preparation of an accident reconstruction report added a degree of complexity to the issue of disclosure which is not usually found in relation to charges of this nature. Otherwise the charges and the trial thereof would appear to be rather straightforward.

[10] On February 6, 2002, the record reflects that disclosure was complete and on that day a not guilty plea was tendered.

(b) Limits on Institutional Resources

[11] Upon tendering the not guilty plea, the first date offered for trial by the Court, being August 29, 2002, was unsatisfactory to Defence Counsel. The next date offered for trial, being September 18, 2002 at 1:30 p.m., was acceptable to both parties. I judicially note that it is the Court's scheduling practice to offer the first available date that will accommodate the expected

trial time requirements. August 29, 2002, being the first date offered, was approximately one week short of being seven months from February 6, 2002. The date of September 18, 2002, being the date on which this matter was originally scheduled for trial, represented a delay of slightly in excess of seven months from February 6, 2002.

[12] On September 18, 2002 and February 18, 2003, further adjournments were granted at the request of the Crown due to the unavailability of a material Crown witness. I will address the adjournments below in greater detail under Actions of the Crown.

[13] On the first trial adjournment date of September 18, 2002, the Court initially offered a trial date of February 13, 2003, representing a further delay of slightly less than a five months. The date of March 5, 2003, being the first date mutually satisfactory to both parties to conduct the trial, represented a further delay of just over five and one half months.

[14] An adjournment of the March 5, 2003 trial date occurred on February 18, 2003. Both parties were available for trial on June 30, 2003 being the first date offered by the Court. The date of June 30, 2003 represented a further delay of slightly less than four months from the then scheduled trial date of March 5, 2003.

[15] Notwithstanding the reasons that triggered the adjournment requests, I attribute the length of the delays to the limits on institutional resources. As I commented in the case of R. v. Symonds [2001] N.S.J. No. 459, this was the known context or environment within which the Crown's actions occurred, and must be assessed, for it was the Crown who sought adjournments of the September 18, 2002 and March 5, 2003 trial dates. I note that each of the foregoing delays between the scheduled trial dates and the setting of those trial dates was either 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, or below that range. Although this matter has been, at all times, dealt with in the courtroom where I normally preside, on the dates of September 18, 2002 and February 18, 2003, when the adjournment requests were granted, I was not the presiding judge. If it were otherwise, there might well be a perception that I could not fairly and impartially hear this application if I was also the judge who acceded to the Crown's requests and granted the adjournments. In fact, the record reflects that two different judges heard the adjournment requests on September 18, 2002 and February 18, 2003.

(c) Actions of the Crown

[16] The adjournments of the trial on September 18, 2002 and February 18, 2003 were granted at the request of the Crown. The record reveals that the unavailable witness, an RCM Police Officer, had suffered a heart attack shortly before the originally scheduled trial date of September 18, 2002 and had either undergone or was about to undergo open heart surgery. The record reveals that this witness was represented to be a material witness, essential for proof of one of the elements of the alleged offences. The record also reveals that this witness likely had material evidence to give in relation to the S.10(b) and S.9 *Charter* applications which the Applicant was likely to raise.

[17] The circumstances which made this witness unavailable on September 18th were unfortunate and unforeseen. I conclude that the adjournment on September 18, 2002 was necessary. The record reveals that Defence Counsel viewed the adjournment request as reasonable under the circumstances. Nevertheless, Defence Counsel at that time raised, on the record, a S.11(b) *Charter* concern and stated that he was seeking the earliest possible trial date. In response to the Court's suggestion of a one month delay, Crown counsel suggested that a delay of something "way more than a

month" was required in relation to the health issues which were making this essential Crown witness unavailable.

[18] The record would suggest that a trial date in December would have been acceptable to the Crown, however, the Court was not asked to canvas possible dates in that month based upon representations that Defence Counsel was committed to a jury trial in December and was unavailable in December for a trial of these charges against the Applicant. February 13, 2003, being the first date offered by the Court, was a date on which Defence Counsel was already scheduled to conduct a trial in another courtroom. The next offered date, being March 5, 2003 at 1:30 p.m., was acceptable to both parties.

[19] It is apparent from the transcript of the Court proceedings of February 18, 2003 that the reason advanced by the Crown for a further adjournment of the trial scheduled for March 5, 2003 was the unavailability of the same Crown witness. Having reviewed the transcript of those proceedings, the only reasonable inference to draw from the record of the proceedings on February 18, 2003 is that the same witness who was unavailable on September 18, 2002 was to be unavailable on March 5, 2003 due to the same related health

concerns that gave rise to the adjournment on September 18, 2002. The following is the relevant portion of the transcript dealing with this issue:

> Crown Counsel: "This is an application being brought by the Crown for the purposes of an adjournment request. One of the officers involved in this matter, Constable Frank O'Brien, has suffered a heart attack last September. He is currently off on leave and has advised that he will be off for the next little while and will be off during the scheduled trial date of March 5, 2003. Your Honour will note that this matter had been scheduled for September 18th of 2002. The Crown, at that time, made an adjournment request and it was granted and my friend advised at that time there would be a *Charter* application, S.10(b) and 9 of the *Criminal Code of Canada*. This is the second adjournment request that's being requested by the Crown. This witness I believe would be crucial to both the Crown's case and I believe would also be the material witness for the purpose of the Defence in their case as well. It is the Crown's position that this adjournment is necessary. I'm not sure of the length of the adjournment request that we're seeking today but the letter indicates that it should be put over until some time after – he has an appointment with a cardiologist for April 9, 2003 and he is off work until then in any event. So I'll be in a better position to advise the Court and my friend as to Constable O'Brien's medical condition after April 9, 2003."

[20] Following this submission, the trial date of June 30, 2003 was set and the matter scheduled for an appearance on April 16, 2003 to confirm the trial date of June 30, 2003. On April 16, 2003 both Crown and Defence counsel appeared and the trial date was confirmed for June 30, 2003.

[21] Submissions which were made to me on June 4th regarding this *Charter* application have caused me to conclude that the entire circumstances giving rise to the Crown's adjournment request on February 18th were not put before the Court at that time. Based upon submissions made June 4, 2003, it is apparent that Crown Counsel was aware on February 18, 2003 that

Constable O'Brien, who at that time was still on medical leave, had plans to leave on a trip out of the country and would be in Florida on March 5, 2003. Defence Counsel submitted that the first time he had heard about a trip to Florida was approximately two weeks previous to the hearing of this *Charter* application on June 4, 2003.

[22] The Crown carries the burden to establish that there was a reasonable basis for the adjournment on February 18, 2003. There is no evidence before me establishing that Constable O'Brien was unable, for health reasons, to testify on March 5, 2003. It is not for me to speculate on what the presiding Judge would have done on February 18th if she had been provided with all the relevant information, including Constable O'Brien's planned trip to Florida. I suspect that she would have had some questions. I certainly would have had some questions if I had been the presiding Judge at that time. For example, I would have wanted to know when Constable O'Brien had made his plans to go to Florida; whether it was after or before he was notified by the Crown of the March 5, 2003 trial date; and whether, absent any trip, in the opinion of his physician, there were medical or health concerns associated with his testifying under oath on March 5, 2003, sufficient to justify an adjournment. Based upon the submissions before me I cannot, at

this time, conclude that the adjournment granted February 18, 2003 was due to the health concerns that gave rise to the September 18, 2002 adjournment nor that there was any other reasonable basis for the adjournment

[23] The actions of the Crown must also be assessed within a context. The first aspect of this context were the limits on institutional resources, otherwise known as systemic reasons for delay. Thus, any adjournment request made, as was the case on February 18, 2003, would likely have been known to the Crown to lead to a delay of as much as six or seven months. It turned out that the delay was less than that, in part by virtue of the Crown bringing the application on February 18, 2003, rather than waiting until the scheduled trial day of March 5th. That was a laudable attempt to minimize the delay, however, without fully disclosing all that Crown Counsel knew on February 18, 2003, both the Court and Defence Counsel were deprived of relevant information upon which to reach an informed decision. The second aspect of the context upon which the February 18th appearance occurred were the S.11(b) *Charter* concerns that Defence Counsel had raised on September 18, 2002 when the first adjournment request was made. The record of the February 18th proceedings reveals that Defence Counsel was not consenting to the requested adjournment and stated that if the Court was inclined to

grant the request, the Defence was seeking the earliest date possible in order to have this matter proceed to trial.

(d) Actions of the Accused

[24] I conclude that there is no evidence or submissions to indicate that the Applicant contributed in any way to the delay of this matter.

Prejudice to the Accused

[25] It cannot be said that this is one of those cases where the accused was not interested in a speedy trial or that delay worked to the advantage of the accused. It appears that Defence Counsel was retained prior to the first scheduled appearance. Thus, had disclosure been fully made to Defence Counsel by the Crown, it appears that the Applicant would have been in a position to tender a plea. Absent full disclosure, including the accident reconstruction report, the Applicant was in a position of not fully knowing the case he had to meet nor have his counsel adequately assess and comment upon anticipated trial time requirements.

[26] It would appear that on first appearance, the Applicant had already given his counsel instructions to raise S.10(b) and S.9 *Charter* issues. Such prompt

retainer and instruction with respect to the *Charter* issues is consistent with a desire to proceed to trial promptly without undue delay.

[27] On September 18, 2002, when the first adjournment request was made by the Crown, notwithstanding the reasonable basis upon which the request was made, Defence Counsel expressed that he had some S.11(b) *Charter* concerns. On February 18, 2003, Defence Counsel did not consent to the Crown's request for a further adjournment and asked the Court to provide the earliest date in order to have the matter proceed to trial if the Court was inclined to grant the adjournment request made by the Crown. The record reveals that on February 18, 2003 when the second trial adjournment request was made, that the Applicant, as expressed through his counsel, continued to have an interest in bringing forward the *Charter* applications alleging S.10(b) and S.9 *Charter* violations. In this individual case I conclude that prejudice to the Applicant ought to be inferred from the delay.

[28] Aside from inferred prejudice flowing from the length of the delay, the record of these proceedings reveals that in addition to the appearance made on June 4, 2003 with respect to this S.11(b) *Charter* application, Defence Counsel has made seven appearances in Court on behalf of the Applicant to deal with this matter. With the exception of the initial delay in making full

disclosure of the 30 page accident reconstruction report, this appears to be a rather straightforward matter and it is submitted to be so by Defence Counsel. Ideally there ought to have been no more than three appearances, including the trial. The first appearance for arraignment purposes; the second appearance after full and complete disclosure had been made, including the accident reconstruction report, at which time the plea would have been entered, and the final appearance being on the date scheduled for trial. The Applicant retained private counsel and each of these appearances by Defence Counsel would likely have involved a legal expense for the Applicant. It is apparent that on all appearances in Court the Applicant was not personally present except for the originally scheduled trial date of September 18, 2002.

[29] Finally on the issue of prejudice, I note that the Crown has not adduced any evidence that the Applicant is in the majority group who do not want an early trial and that the delay benefited rather than prejudiced the accused.

Seriousness and Complexity of the Charges

[30] Allegations of impaired driving are serious matters. However, the Crown has elected to proceed summarily and thus while this is a serious matter, it is

certainly not about one of the most serious of offences prescribed by the *Criminal Code*.

CONCLUSION

[31] It was an unfortunate, unforeseen circumstance that gave rise to the adjournment request on September 18, 2002. I note that the original trial date of September 18, 2002 was more than 12 months after the arrest of the accused in relation to these charges and 11 months exactly after the date on which the Information was sworn. A delay of 11 months was already outside the range of some six to eight months between committal and trial, deemed to be the outside limit of what is reasonable by the case of R. v. Askov.

[32] The institutional limitations within which the Court must function led to a further delay of slightly less than five months. Thus, had the trial proceeded on March 5, 2003, the delay from the date the Information was sworn and March 5, 2003 would have been approximately 16 and one half months, a delay well outside the reasonable limit suggested by the case of R. v. Askov. Nevertheless, I believe that had this application under S.11(b) been brought on or before March 5, 2003, a balancing of the societal interest with the

accused's interest within the circumstances of this case would not likely have led me to conclude that this was 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 would have been the appropriate remedy. However, the further delay from March 5, 2003 to June 30, 2003, for which I cannot find that there is a reasonable basis, causes me to conclude that this has now become one of those clearest of cases referred to in R. v. Conway where a stay of proceedings is the appropriate remedy. Pursuant to S.24(1) of the *Charter* I order a stay of proceedings with respect to the charges against the Applicant arising on September 14, 2001 as revealed in the Information sworn October 18, 2001.

[33] Had the Crown established that the unfortunate health concerns, which necessitated the September 18, 2002 adjournment, continued to prevail on March 5, 2002 thus necessitating a further adjournment, I believe it is fair to say that a delay of 20 months and 13 days, when considered within the context of these charges and the desire of this Applicant for a prompt trial, might have brought this matter to a point where this Applicant's S.11(b) *Charter* rights were violated. I am not required to put my mind to that particular issue because, based upon the findings I have made, that issue is

not before me. However, I simply refer to that possible outcome to illustrate the point that delay, even where it is explained and the basis for adjournments, if any, are reasonable, can reach a point where it is society, and not the accused, which must bear the cost of the delay through an order staying the

charges. Even in those situations, however, the societal interest in seeing that an accused is treated fairly and justly will be served.

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R. Brian Gibson
Associate Chief Judge