

IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: Todd Stephen Abbass v. Her Majesty the Queen 2004NSPC 8

Date: 20040108)

Docket:1231795/96

Registry:Halifax

Between:

Todd Stephen Abbass

v.

Her Majesty the Queen

Judge: The Honourable Judge Pamela S. Williams

Heard: December 18, 2003, Halifax

Oral Decision: January 8, 2004

Written Decision: January 8, 2004

Counsel: Duncan Beveridge, for the Applicant
Christopher Morris, for the Crown

By the Court:

[1] This is an application for a stay of proceedings based on a violation of the right to be tried within a reasonable time pursuant to s. 11(b) of the Canadian Charter of Rights and Freedoms.

THE FACTS

[2] On August 28, 2002, the applicant was charged with exceeding the Breathalyzer and impaired driving contrary to sections 253(b) and 253(a) of the Criminal Code. On November 12, 2002, he was arraigned on the information, (sworn to on September 29, 2002). The applicant, represented by counsel, entered a not guilty plea and requested “the first available date for trial,” and was given the date December 18, 2003. It was anticipated that one full day would be required as the Defense intended to make a Charter motion and lead “evidence to the contrary.”

LEGAL PRINCIPLES

Relevant Time Period

[3] The relevant time period to consider on a s. 11(b) application is from the date of the charge to the end of the trial, *R.v. Morin* (1992), 71 C.C.C. (3d) 1 at page 14. For the purposes of this application it is the date the information was sworn, September 29, 2002 to the date set for commencement of trial, December 18, 2003. The time span is a little more than 14 ½ months.

Purpose of s. 11(b)

[4] On a s.11(b) application it is important to be forever mindful of the rights s.11(b) of the Charter seek to protect and uphold and the purpose of those rights. Section 11(b) has two purposes. The primary purpose is the protection of the individual’s right of liberty and security of the person and the right to fundamental justice. The secondary purpose is a community or societal interest which has a dual dimension. Mr. Justice Cory, writing for the majority in *R.v. Askov* (1990), 59 C.C.C. (3d) 449 SCC clearly stated these objectives at p. 474:

I agree with the position taken by Lamer J. that s. 11(b) explicitly focuses upon the individual’s right of liberty and security of the person. Like the specific guarantees provided by 11, this paragraph is primarily concerned with a right of fundamental justice guaranteed by s.7 of the Charter. There could be no greater frustration imaginable for innocent persons charged with an offence than to be denied the opportunity of demonstrating their innocence for an unconscionable time as a result of unreasonable delays in their trial. The time awaiting trial must be exquisite agony for accused persons and their immediate family. It is a fundamental precept of our criminal law that every individual is presumed innocent until proven guilty. It follows that on the same fundamental level of importance, all accused persons, each of whom is presumed innocent, should be given the opportunity to defend themselves

against the charges they face and to have their name cleared and reputation re-established at the earliest possible time.

Although the primary aim of s.11(b) is the protection of the individual's rights and the provision of fundamental justice for the accused, nonetheless, there is, in my view, at least by inference, a community or societal interest implicit in s. 11(b). That community interest has a dual dimension. First, there is a collective interest in ensuring that those who transgress the law are brought to trial and dealt with according to the law. Secondly, those individuals on trial must be treated fairly and justly. Speedy trials strengthen both those aspects of the community interest....

[5] There are important practical benefits which flow from a speedy trial. Memories fade with time and witnesses are likely to be more reliable testifying to events in the recent past than in the more distant past. All crime disturbs the community and all members of the community are entitled to see that the justice system works fairly, efficiently and within a reasonable time frame. At p. 475 Mr. Justice Cory identifies a very real concern:

The failure of the justice system to deal fairly, quickly and efficiently with criminal trials inevitably leads to the community's frustration with the judicial system and eventually to a feeling of contempt for court procedures. When a trial takes place without unreasonable delay, with all witnesses available and memories fresh, it is far more certain that the guilty parties who committed the crimes will be convicted and punished and those that did not, will be acquitted and vindicated. It is no exaggeration to say that a fair and balanced criminal justice system simply cannot exist without the support of the community. Continued community support for our system will not endure in the face of lengthy and unreasonable delay.

Factors to be taken into account in determining whether or not there has been an infringement of s. 11(b)

[6] The test for unreasonable delay established by the Supreme Court of Canada and confirmed in *R.v. Askov* and *R.v. Morin*(supra) involves a consideration of the following factors:

- (1) Length of delay - is the delay sufficient to raise a question as to its reasonableness? If not, the application should be dismissed without further inquiry.
- (2) Waiver - Even if the delay is long enough to embark on an inquiry, has the applicant waived the delay or part of it such that the remainder is not unreasonable?
- (3) Reasons for Delay - If waiver does not resolve the issue, are there other explanations for the delay?
 - (a) Inherent Time Requirements - Some delay is unavoidable in all cases. The more complex a case the longer the unavoidable delay.
 - (b) Actions of Accused - Legal processes used by the applicant, including adjournments and pre-trial motions that contribute to the delay will be considered.

- (c) Actions of the Crown - Actions of the Crown which delay the trial, such as adjournment requests, and failure or delay in providing disclosure will be taken into account.
 - (d) Limits on Institutional Resources - The government has a constitutional obligation to commit sufficient resources to prevent unreasonable delay. If the lack of resources contributes to the delay, beyond the inherent time requirements of the case, the delay is attributable to the state, and the Crown.
- (4) Prejudice to the Accused - Prejudice to an accused may be inferred. The longer the delay, the easier it may be for the court to infer prejudice. Either party may rely on evidence to either show prejudice or dispel it. An accused may allege prejudice to his or her liberty interest, security interest, or right to a fair trial, (to be given an early trial before his interests may be affected by the loss or deterioration of defense evidence). Where the Crown demonstrates that there was no prejudice to the accused flowing from the delay, then such proof may serve to excuse the delay.

[7] What the court must do is to determine judicially whether the delay is unreasonable. This is done by balancing the interests the system is designed to protect against the factors that inevitably lead to delay or otherwise cause delay.

ANALYSIS

[8] *The length of the delay*

The information before this court was sworn September 29th, 2002 and Mr. Abbass's trial was scheduled for December 18th, 2003. The total time period between charge and trial is a little better than 14 ½ months. The accused at no time waived his right to a trial within a reasonable time. The length of delay therefore totaled just over 14 ½ months, roughly the same time period the Supreme Court of Canada considered in *R. v. Morin* (supra). As in *Morin*, I find that the length of the delay sufficient to raise the issue of reasonableness and the inquiry must turn to the reason why it took 14½ months to bring Mr. Abbass to trial.

[9] *Waiver of time periods*

Waiver must be clear and unequivocal and with full knowledge of the right one is waiving. It cannot be said here that Mr. Abbass waived any of his rights, explicitly or implicitly. Mr. Abbass retained and instructed counsel, entered his plea at arraignment and set the matter for trial.

[10] *The reasons for the delay*

(a) *Inherent time requirements*

Mr. Abbass was charged with failing the Breathalyzer and impaired driving. This is a one-witness case for the Crown. All relevant testing and investigation were completed on the day of arrest. The Defense advised on arraignment of the need for one full day for trial as it intended to raise a Charter motion (s. 8 and s. 9) and present evidence to the contrary. Some preparation time was required, particularly as a result of issues raised by the defense, thereby necessitating some delay, but it can be inferred that the inherent time requirements for this case were no more than a couple of months.

(b) *Actions of the accused*

At his first court appearance Mr. Abbass requested the first available date for trial and was given a date over 13 months in the future. From the transcript of the court proceedings, it is clear that counsel for Mr. Abbass was advised by the clerk that the first available date for trial was December 18th, 2003. Other than this court appearance, there is no action on record taken by the accused from the point of his charge to the date of trial.

(c) *Actions of the Crown*

There is nothing to suggest that the Crown in any way contributed to the delay in this matter.

(d) *Limits on Institutional Resources*

The single most important factor, and indeed the only factor in this case, is the limit on institutional resources. The parties could have been ready for trial much sooner but courtroom #3 at Halifax Provincial Court could not accommodate them. An institutional delay of a little over 13 months existed.

In *R.v. Morin* (supra) Sopinka J. stated at p. 21-22:

...It is appropriate for this court to suggest a period of institutional delay between eight to ten months as a guide to Provincial Courts...These suggested time periods are intended for the guidance of trial courts generally. These periods will no doubt require adjustment by trial courts in the various regions of the country to take into account local conditions and they will need to be adjusted from time to time to reflect changing circumstances. The Court of Appeal in each province will play a supervisory role in seeking to achieve uniformity subject to the necessity of taking into account the special conditions and problems of different regions in the province.

A delay of 14 ½ months is well outside the 8-10 month guideline established in *Morin*. However, the application of the guideline will also be influenced by the presence or absence of prejudice.

[11] *Prejudice to the Accused*

There is a duty on the Crown to bring the accused to trial. The purpose of s.11(b) is “to expedite trials and minimize prejudice and not to avoid trials on the merits”. Action or non-action by the

accused which is inconsistent with a desire for a timely trial is something that the court must consider, *R.v. Morin* (supra at p. 24). In this case the accused asserted his right to a speedy trial by requesting the first available trial date. He retained counsel and was prepared to fight the merits of the case at trial. It cannot be said that he deliberately or otherwise was attempting to escape a trial on the merits.

[12] This court is asked to infer prejudice from the length of the delay having regard to the nature of the charges. Mr. Abbass is charged with offences which, by their very nature, often involve technical legal arguments based on the evidence which is very fact-specific. Adherence to specific time frames and procedures is essential. Specific recollection of times and events is necessary when leading evidence to the contrary. The longer the delay the greater the risk that the evidence given by witnesses may not be as reliable as it might otherwise be, due to fading memories.

[13] There is no evidence before me to suggest that institutional delay of 13 months is the norm in other metro provincial courts. Given the nature of the charges and the technical nature of Breathalyzer law, the fact that the Defense has verbalized an intention to raise s. 8 and s.9 Charter motions and lead evidence to the contrary, I find that prejudice can be, and is, inferred on the basis that the length of the delay is likely to interfere with the quality of evidence tendered, given the passage of time that has occurred since the circumstances giving rise to the charges.

[14] The issue before me is where the line is to be drawn between the rights of the individual to a trial within a reasonable time, and the societal right to bring those accused of crime to trial. I am mindful that a stay of proceedings is a very potent remedy and should only be granted “in the clearest of cases,” *R.v. Conway* (1989), 49 C.C.C. (3d) 289 SCC.

[15] On the whole of the evidence, I am satisfied that the applicant has established, on a balance of probabilities, that his right to be tried within a reasonable time has been infringed. Institutional delay of 13 months in the context of this particular offender charged with these particular offences gives rise to an inferred prejudice, and renders his trial unfair in that he is not able to be tried within a reasonable time. The prejudice is such that it can not be remedied in any other way than by entering a stay of proceedings. Accordingly, the proceedings are stayed.

Pamela S. Williams
Judge of the Provincial Court