IN THE SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Doston, 2008 NSSC 417

Date: 20081024
Docket: Docket CRY 292697
Registry: Halifax

Between:

Daniel Doston

Plaintiff

v.

Her Majesty the Queen

Defendant

Judge:	The Honourable Justice Simon J. MacDonald.
Heard:	October 24, 2008 in Digby, Nova Scotia
Written Decision:	**March 25, 2009**
Revised Decision:	**The text of the original decision has been corrected on June 12, 2009 and replaces the previously distributed decision**
Counsel:	Martin J. Pink, Q.C., for the Applicant Diane L. McGrath, for the Crown

By the Court: (Orally)

[1] Mr. Doston is charged in a four count Indictment alleging he committed criminal offences contrary to Sections 380 (1) (a), Section 357 (a), Section 368 (1) and Section 334 (a) of the Criminal Code of Canada.

[2] The alleged offences occurred between the first day of September 1998 and the 31st day of May 2002 at or near Montagen, in the County of Digby, Province of Nova Scotia. The crown laid the above charges on October 16, 2007.

[3] Daniel Doston claims his Section 7 Charter right to life, liberty and security to person has been infringed contrary to the principles of fundamental justice. He requests the Court grant a Stay of Proceedings under Section 24.1 of the Charter.

FACTS:

[4] Counsel for the applicant and crown submitted to the court a 26 paragraph Agreed Statement of Facts which they agreed and states as follows:

1) The accused, Daniel Doston [Doston] was born on November 01, 1961 and was hired to work at the college de L'Acadie [College] in September of 1998 as the Director of Administration and Finance;

2) Doston has a Bachelor of Accounting degree from the University of Quebec in Montreal. He does not have an accounting designation;

3) Doston held the position of Director of Administration and Finance until his resignation on May 6, 2002;

4) Administrative Assistant to the President of the College, **Vicki LeBlanc [LeBlanc]** discovered financial irregularities relating to banking records of the College on April 18, 2002;

5) LeBlanc notified Allister Surette [Surette] President of the College by telephone on April 18, 2002 of her discovery.

6) Surette reviewed the documents discovered by LeBlanc on April 20, 2002 and began to investigate Doston's actions;

7) Surette engaged the services of KPMG LLP [KPMG] on May 3, 2002 and to investigate financial irregularities at the College;

8) KPMG was engaged to investigate and identify evidence, which would assist in supporting or refuting management's concern that potential irregularities may have occurred in relation to financial transactions under the control of Doston. The scope of engagement included a review of the College's business records, interviews with Doston and related witnesses, a review of the personal bank account information of Doston and an investigation of all relevant facts surrounding any/all irregular financial transactions discovered during the review. In addition, KPMG was engaged to perform a quantification of the potential loss to the College as a result of the irregular financial transactions.

9) Doston, when first interviewed on May 6, 2002 by Andrew Arsenault [Arsenault] of KPMG was given the Standard Police Caution by Arsenault and invoked his constitutional right to speak with a lawyer.

10) Doston and Arsenault travelled in separate vehicles to Yarmouth to allow Doston to speak to counsel on May 6, 2002 after which he cooperated fully with Arsenault in his investigation;

11) Doston immediately told Arsenault that he was willing to cooperate with KPMG and provide assistance in determining the extent of the financial loss to the College, including identifying the methods by which Doston carried out the financial transactions and in determining how and where the money was spent;

12) Doston in the interview with Arsenault took responsibility for his actions indicating that he would cooperate fully with the investigation and gave assurances that he would liquidate his remaining assets and provide the money from that liquidation to the College through his lawyers;

13) Doston told Arsenault that he wanted to bring the matter to a close as quickly as possible hurting the least amount of people possible in the process.

14) Arsenault met with Deputy Minister of Education Dennis Cochrane on May 8, 2002 and was told that the RCMP would be involved very soon;

15) RCMP member Al Langille [Langille] met with Arsenault and Crown Prosecutor Bernadette MacDonald [MacDonald] on May 9, 2002 and learned details of what had transpired at the College in relation to the financial irregularities;

16) In that meeting Arsenault, a retired member of the RCMP with 31 years service, recommended to Langille that it would appear to be a prudent course of action to lay a charge of fraud, using three altered cheques discovered by LeBlanc in monthly bank records on April 18, 2002 as the foundation to have Doston arraigned on one charge, for the purpose of allowing the courts to possibly restrain his movements;

17) Gilles Deveau, President of the Board of Directors for the College, referred the matter to the RCMP Commercial Crime Unit for investigation on May 16, 2002;

18) Doston submitted the first of three payments of restitution to the College on September 12, 2002, in the sum of $33630.29 representing money realized from the liquidation of some of Doston's assets;

19) KPMG issued its report entitled ***Investigation of Financial Irregularities*** at College de L'Acadie Nova Scotia on September 25, 2002;

20) RCMP received a copy of the KPMG report shortly after it was completed;

21) Doston does not now nor has he at any time disputed the facts as presented in the aforementioned KPMG report of September 25, 2002. Doston aided in the preparation of this report and gave full detailed disclosure to the best of his ability in relation to his actions.

22) Doston paid in restitution to the college a total of $102,589.52 in three installments between September 12 and November 21, 2002. These funds were raised from the liquidation of his assets;

23) Doston was served an Originating Notice (Action) issued in the Supreme Court of Nova Scotia on March 14, 2003 naming him as defendant in a civil suit claiming $1,042.672.00 less the $102,589.52 restitution paid to that date on behalf of Universite Sainte-Anne-College de L'Acadie plus interest and costs;

24) This suit was not contested by Doston and judgment was able to be entered in April of 2003;

25) Upon request of the RCMP, Doston presented at the Montreal offices of the RCMP on March 7, 2006 expecting to be charged but instead was questioned and released without charges.

26) On October 16, 2007 Doston was charged with four offences under the ***Criminal Code of Canada****;* 1 Count s.380(1)(a) fraud over $5000, 1 count s.367(a) forgery; 1 Count s. 368(1) uttering forged documents and 1 Count s. 334(a) theft over $5000. These charges were laid over five years after the RCMP were in receipt of evidence sufficient to support their being laid in 2002.

[5] In addition to the Agreed Statement of Facts both counsel tendered by agreements, the Affidavit's of Daniel Doston, Andrew Arsenault and Lisa MacLeod.

ISSUES:

Has Mr. Doston's Section 7 Charter Rights been infringed and if so, is he entitled to a remedy under Section 24 of the Charter?

THE LAW:

[6] Section 7 of the Canadian Charter of Rights and Freedoms provides as follows:

> Everyone has the right to life, liberty, and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[7] Section 24 of the Charter states as follows:

> (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;
>
> 2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

DISCUSSION AND ANALYSIS:

[8] The Agreed Statement of Facts reveal Allister Surette, the President of the College de L'Acadie (College) engaged the services of KPMG LLP (KPMG) on May 3, 2002 to investigate financial irregularities at the College. He became aware of irregularities in the banking records of the College from a staff.

[9] KPMG was to conduct a review of the business records and do an investigation of all relevant facts surrounding any or all irregular financial transactions discovered during a review. He, as well, wanted them to quantify the loss.

[10] Andrew Arsenault of KPMG spearheaded the investigation. It was determined there was over One Million Dollars missing. The investigation led

Mr. Langille to Mr. Doston who readily admitted the theft and cooperated in determining the extent of the financial loss to the College. He explained the way in which he carried it out and took responsibility for his actions.

[11] Mr. Arsenualt, it should be noted, was a retired member of the RCMP, having had 31 years of service. He met with the Deputy Minister of Education and he met with a member of the RCMP and a Crown Prosecutor, on May 9, 2002. He told them about the financial irregularities and the involvement of Mr. Doston. He recommended criminal charges be laid based on the results of his investigation.

[12] Mr. Doston had told Mr. Arsenault he wanted to bring the matter to a close as quickly as possible, having accepted full responsibility for the theft.

[13] After a six month investigation KPMG issued its report entitled "Investigation of Financial Irregularities at College de L'Acadie, Nova Scotia" on September 25, 2002 and shortly thereafter supplied a copy of the report to the RCMP.

[14] As a result of an uncontested civil action for the missing money the College obtained a judgment against Mr. Doston on March 14, in 2003 in the amount of $1042,672,00 less restitution of $102,589.52,00, plus interest and costs.

[15] The applicant argues at that time there was sufficient information before the RCMP to lay the charges before the court and they didn't have to wait until October 2007. Mr. Doston says he was treated unfairly. He was trying to move on with his life and wanted to put the matter behind him but instead was confronted with the charges before the court some five years later.

[16] He says even when he was interviewed by the RCMP in March 2006 and he thought he was in fact going to be charged.

[17] The crown argues before the court this is not a case wherein there's been a breach of Mr. Doston's Charter Rights. The crown argues the RCMP investigators in this matter had an obligation to the victim and the public at large to conduct their own, independent objective investigations separate and apart from that done by the College or KPMG.

[18] Crown counsel concedes the investigation is not one which would take five years to complete if an investigator had been available to devote his or her full attention to this matter. She says however, that was not and has never been the case.

[19] She argued the RCMP Commercial Crime Unit section was at the time facing a number of challenges including medical issues faced by the initial investigator, under-staffing, coupled with a high volume of work and transferring of members in and out of this section and such was set forth in the Affidavit of Lisa MacLeod who was a Constable employed with the RCMP. She also stated sometimes the RCMP would be pulled away from the Unit to do VIP duties.

[20] In short, crown argues the evidence and argument of Mr. Doston is completely devoid of any factual foundation to establish he has suffered any prejudice to his right to a full Answer and Defence as a result of the length of time it took the police to complete the police investigation.

[21] Crown counsel says this is not the case in which the court ought to grant a Stay of the Proceedings which has been requested by the applicant.

[22] Having read the affidavits, especially Lisa MacLeod, I have real concern as to whether or not there was actually a continuing investigation of this particular matter up until the charges were laid.

[23] I am aware of the comments of Dubin, J.A. (as he then was) in **R. v. Young** (1984) 46 O.R. (2d) 520, C.A. when he said at 551:

> "Courts cannot undertake the supervision of the operation or the efficiency of police departments and to be asked to determine whether the police proceeded as expeditiously as they should have in any given case.
>
> Furthermore, to compel the police or Crown counsel to institute proceedings before they have reason to believe that they will be able to establish the accused's guilt beyond a reasonable doubt would,...have a deleterious effect both upon the rights of the accused and upon the ability of society to protect itself."

[24] It is not for me to set a timetable or tell the police or RCMP how to do their investigation, yet, surely, the Charter must provide protection to a citizen who faces criminal charges to complete their investigation in a reasonable time. In my view, the public would expect this. It seems to me this file was not handled in the normal course or efficiency one would expect for a matter as serious as the one

before the court. It is not for me to tell the police or the RCMP how to do their investigations.

[25] It is interesting to note as well, after five years since the events, the amount of funds claimed to be missing by the RCMP is the same as that found in the KMPG report. Again, it took them six months.

[26] I appreciate the RCMP have other duties but to me it seems to take a period of five years to investigate this particular complaint is an extraordinarily long time and would cause concern to the public. I do not attribute any ulterior or bad motives to the RCMP or for that matter Crown counsel who were consulted, yet as a result of systemic delay the accused is facing these charges five years later than he would have been had it not been for the delay.

[27] Mr. Doston's affidavit deposed to what he suffered by the delay in the laying of the charges. He refers to employment issues in which he had been in legal limbo for five years unable to start over, unable to properly apologize and atone for his personal mistakes which he regretted horribly, unable to plan for the

future, unable to plan for financial security for retirement, unable to face past friends and explain his inexcusable mistakes and seek forgiveness.

[28] The prejudice here in this matter is not confined to the impairment in the ability to make full answer and defence. Here, Mr. Doston's asserts his prejudice is further damaged.

[29] Martin, J.A. in **Regina and Bisson** (1983), 43 O.R. (2d) 65 at p. 86 in talking about prejudice in a different context stated as follows:

> "The policy underlying the constitutional guarantee of a trial without unreasonable delay is not, however, predicated exclusively in the more obvious forms of prejudice to an accused such as the impairment of the right to make full answer and defence that may be caused by unreasonable delay. Nor is the constitutional guarantee merely a recognition of the anxiety and social stigma that an accused charged with a criminal offence may suffer. Trials held within a reasonable time have an intrinsic value. The constitutional guarantee enures to the benefit of society as a whole and, indeed, to the ultimate benefit of the accused, even though he may wish to put off the confrontation which a trial involves. If innocent, the accused should be cleared with a minimum disruption of his social and family relationships. If guilty, he should be found guilty and an appropriate disposition made without unreasonable delay. His interest is best served by having the charge disposed of within a reasonable time so that he may get on with his life. A trial at some distant date in the future when his circumstances may have drastically changed may work an additional hardship upon the accused, and adversely affect his prospects for rehabilitation.

[30] In speaking about delay McIntyre J. speaking on behalf of the majority in **R. v. Kalanj** (1989) 48 CCC (3d) 459 (SCC) wrote at page 471:

> "It is notable that the law - save for some limited statutory exceptions - has never recognized the time limitation for the institution of criminal proceedings. Where, however, the investigation reveals evidence which would justify the swearing of an information, then for the first time the assessment of a reasonable period for the conclusion of the matter by trial becomes possible. It is for that reason that s. 11 limits its operation to the post-information period. Prior to the charge, the rights of the accused are protected by general law and guaranteed by ss. 7, 8. 9 and 10 of the Charter."

[31] The counts on the Indictment against Mr. Doston are serious allegations and are matters of public order requiring redress by society. The RCMP undertook the investigation and they, along with the crown attorney had the responsibility of determining whether or not the allegations would warrant putting Mr. Doston on trial. Once that decision is made surely there must be a corresponding duty that those charges be proceeded in a reasonable and expeditious fashion.

[32] I believe in the eyes of the public the perception of the criminal justice system would be impacted badly if the police were able to delay the laying of charges where warranted, for a period of over five years until late 2007, when in fact, they had been in receipt of evidence sufficient to support them being laid in 2002 as set forth in the Agreed Statement of Facts at paragraph 26.

[33] I find it difficult to comprehend why the police would take so long in investigating this particular fact situation when they had all the material at the outset in 2002 supplied to them.

[34] I do agree the RCMP should do their own investigation independent of anybody else. However, when one looks at what had transpired - the way Mr. Doston was cooperating, prepared to give Statements of Admission, explain where the money went and Mr. Arsenault was able to obtain all the documents in three months that it took the RCMP alleged it took five years to obtain to me is unreasonable.

[35] Mr. Doston's Affidavit deposed to what he suffered by the delay in the laying of the charges where he refers to employment issues because his life was in limbo for over five years; unable to start over, unable to properly apologize and atone for his personal mistakes which he regretted horribly, unable to plan for the future, unable to plan for financial security for retirement, unable to face past friends and explain his inexcusable mistakes and seek forgiveness. The prejudice

here in this matter is not confined to the impairment and the ability to make full answer and defence. Here Mr. Doston asserts his prejudice is further damaged.

[36] The charges Mr. Doston faces are very serious, as I said before. They involve a significant amount of money and breaches of public trust.

[37] One has to also consider in this particular case the anxiety, the trauma and the stigmatization this type of investigation would have had upon the accused. The charges Mr. Doston faces are very serious. They involve a significant amount of money and as well, breaches of public trust in dealing with same.

[38] Because the circumstances vary in each case a court would find it most difficult to set time frames for the investigation of any particular given offence. There has not been, recognized by the court, a time limitation for the crown and police for the institution of criminal proceedings.

[39] It is not the court's intention to do so in this particular case. However, on the agreed facts of this case and a review of the materials supplied I find the

crown and the police were in a position to lay charges in 2002. They chose not to do that.

[40] I conclude in the circumstances here, the actions of the police indicated a high degree of inefficiency or a lack of professionalism in the manner they investigated the allegations against Mr. Doston.

[41] This is especially unreasonable in my view when you look at the short time frame KPMG were able to come to the same conclusions. Even if they were not in a position to lay charges in 2002 and that they required further investigation, on the material before me in this particular case I fail to understand why it would take five years for the RCMP to be in a position to lay the charges before the court.

[42] Mr. Doston agreed that he was prepared to plead guilty at the outset to the charges arising from the investigation. However, I note there was a caveat in that he did not want to do jail time. Whether or not the crown would have agreed to that could have impacted on whether or not he would have pled guilty in fact.

[43] Therefore it is understandable the RCMP would want to insure they have the proper evidence before them to present to court in order to obtain a conviction. They had that evidence per paragraph 26 of the Agreed Statement of Facts in 2002.

[44] I am not satisfied the reasons or excuses given by Lisa MacLeod in her affidavit justifies in any way, shape or form the lengthy delay the police took in investigating this particular matter.

[45] In **R. v. O'Connor** [1995] 4 SCR 411 (S.C.C.) at paragraph 73, Justice L'Heureaux-Dubé stated:

> "...In addition, there is a residual category of conduct caught by s. 7 of the Charter. This residual category does not relate to conduct affecting the fairness of the trial or impairing other procedural rights enumerated in the Charter, but instead addresses the panoply of diverse and sometimes unforeseeable circumstances in which a prosecution is conducted in such a manner as to connote unfairness or vexatiousness of such a degree that it contravenes fundamental notions of justice and thus undermines the integrity of the judicial process."

[46] I believe the actions of the police and the time it took them before they laid charges would offend principles of fair play and decency which the community

has the right to expect in cases such as this. This is especially so since the crown agreed they were in a position to lay charges in 2002.

[47] There has been no material placed before me that the lengthy time of pre-charge investigation would affect the right of Mr. Doston to make a full answer and defence to the charges.

[48] However, surely in cases such as the one before me, the facts of this case must give rise to impact on the integrity and fairness of the criminal proceedings.

[49] On the facts of this application and in the interest of justice and fair play I consider the pre-charge delay in this particular matter has been an exceptional situation and such action would amount to an abuse of the process as referred to in O'Connor, (supra).

[50] I conclude the actions of the police in the length of time it took on pre-charge delay amounted to such unfairness that Mr. Doston suffered sufficient prejudice to bring him within the words of section 7 of the Charter.

[51] I find their actions would violate the principles of fundamental justice and fair play which has been recognized in section 7 and therefore conclude the accused's Section 7 Charter Rights have been violated.

[52] Having found a violation of Mr. Doston's Charter Rights I must now consider Section 24 of the Charter.

[53] The approach to that section was set forth in **R. v. Collins** [1987] 1 SCR 265. In that case Lamer J. said at pages 280-81 as follows:

> "Misconduct by the police in the investigatory process often has some effect on the repute of the administration of justice, but s. 24(2) is not a remedy for police misconduct, requiring the exclusion of the evidence if, because of this misconduct, the administration of justice was brought into disrepute. Section 24(2) could well have been drafted in that way, but it was not. Rather, the drafters of the Charter decided to focus on the admission of the evidence in the proceedings, and the purpose of s. 24(2) is to prevent having the administration of justice brought into further disrepute [emphasis in original] by the admission of the evidence in the proceedings. This further disrepute will result from the admission of evidence that would deprive the accused of a fair hearing, or from judicial condonation of unacceptable conduct by the investigatory and prosecutorial agencies. It will also be necessary to consider any disrepute that may result from the exclusion of the evidence. It would be inconsistent with the purpose of s. 24(2) to exclude evidence if its exclusion would bring the administration of justice into greater disrepute than would its admission. Finally, it must be emphasized that even though the inquiry under s. 24(2) will necessarily focus on the specific prosecution, it is the long-term consequences of regular admission or exclusion of this type of evidence on the repute of the administration of justice which must be considered....

[54] I conclude as I consider the three prong test set forth in Collins and I weigh the facts in this case, the breach of trust involved, the significant amount of money missing, this is not one of those clearest of cases that calls for a Stay of Proceedings.

[55] The actions of the police in pre-charge delay in my view have not effected the right of Mr. Doston to a full answer and defence and there has been no evidence presented to me to show this case as a malicious attempt on behalf of the police or the crown.

[56] Making a decision under s.24 of the Charter requires a balance between the interests of truth on one side and integrity of the judicial system on the other, **R. v. Simmons** (1998) 2 S.C.R. 495.

[57] I am satisfied the public has an interest in charges being properly tried. I would think that not to proceed with these charges would cause a greater prejudice to the integrity of the judicial system if the crown were not permitted to proceed with the charges.

[58] To stay the proceedings under all the circumstances here, in my view would more likely tend to bring the administration of justice into disrepute.

[59] For the above reasons I dismiss the Application for an Order Directing a Stay of the Proceedings. The accused is not entitled to a remedy pursuant to s. 24(2) of the Charter and the matter shall proceed.

[60] The application to stay the proceedings is dismissed and the charges will proceed.

J.