IN THE SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Graham, 2009 NSSC 196

Date: 20090519
Docket: CRAT. 300548
Registry: Antigonish

Between:

Stevie Graham

Appellant

v.

Her Majesty the Queen

Respondent

D E C I S I O N

Judge:	The Honourable Justice Douglas L. MacLellan.
Heard:	December 19, 2008, March 10, 2009 and May 19, 2009 in Antigonish, Nova Scotia
Written Decision:	June 10, 2009
Counsel:	Daniel J. MacIsaac, Esq., for the appellant Allen Murray, Esq., for the respondent

By the Court: (Orally)

[1] This appeal by Stevie Gillis Graham initially dealt with a decision of Judge Embree of the Provincial Court to not hear a **Charter** application alleging unreasonable delay advanced by his counsel. That application was made on the day set for the appellant's trial on a charge of assault causing bodily harm.

[2] After hearing both counsel on the issue of whether the learned trial judge should have permitted the accused to raise the **Charter** issue, I determined that the trial judge should have done that and that I would consider the merits of the **Charter** application in this Court.

[3] I have now heard the evidence from the appellant and the Crown and I heard counsel on the legal issues involved in the application. The central issue in the **Charter** motion is whether the appellant was aware that he was facing a charge when he left Nova Scotia, or after leaving Nova Scotia, in the fall of 2003.

[4] The background of the matter was that on June 29th, 2003, the appellant was at Piper's Pub in Antigonish. According to the evidence presented at his trial, he became

involved in an altercation with one Shawn Northfield which resulted in the victim sustaining injuries which the trial judge found caused him bodily harm.

[5] The trial judge heard all the evidence and found the appellant guilty of that offence under Section 267 of the **Criminal Code**.

[6] The police, and specifically, Constable Geoffrion, was called to Piper's that night and was advised that the victim was being taken to the hospital and that the appellant, Mr. Graham, and an associate, who was also apparently involved in the altercation, had left the Pub.

[7] Cst. Geoffrion said that she spoke to Mr. Northfield, the victim, on July 3rd, 2003, and was told that he could not really identify who had struck him, but that a witness, one Dawn Moxsom was there when it happened and should be able to identify the person who had struck him.

[8] On July 16th, 2003, Cst. Geoffrion spoke with Dawn Moxsom, but she was not prepared at that time to give a written statement about what she had seen. Earlier, on July 3rd, apparently the managers of Piper's Pub called Cst. Geoffrion and asked her

to give notice to the appellant under the ***Protection of Property Act*** to not attend at Piper's or that he would be charged under that ***Act***.

[9] Based on that request, Cst. Geoffrion attended at the appellant's residence in South Side Harbour on July 4th and spoke to the appellant. She told him she was there to serve him with notice under the ***Protection of Property Act*** but that she did not have the document with her. She told him that he was not return to Piper's and that the matter was still under investigation. She said the conversation with the appellant at that time was for only two minutes. She said she felt it was clear that she would be talking to him again. On July 5th, the next day, another Constable served the appellant with notice under the ***Protection of Property Act*** advising him not to attend at Piper's Pub.

[10] The evidence is that Cst. Geoffrion was not able to speak with Dawn Moxsom until September 21st, 2003 at which time she obtained a statement which implicated the appellant in the assault of Mr. Northfield and also indicated another potential witness to the assault. On September 29, Cst. Geoffrion took a statement from that person.

[11] On October 15, 2003, Cst. Geoffrion called the home of the appellant's mother in Judique where she understood he might be residing. She asked to speak to the appellant and was told he was not there. The lady answering the phone identified herself as Marjorie Graham, the appellant's mother. She asked the Constable why she was calling and was told by Cst. Geoffrion that she could not discuss the situation with her because the appellant was an adult. She said Ms. Graham became upset by that and that she told Cst. Geoffrion that the appellant had left Nova Scotia and that she had no idea where he was. Cst. Geoffrion said that she told the lady to tell the appellant to contact her. Cst. Geoffrion said that about two weeks later she found out that the appellant was probably residing in Asia teaching school. She then proceeded to lay the charge against him on October 29th, 2003 and obtained a Warrant for the Arrest of the appellant on November 28th, 2003.

[12] Following that, Cst. Geoffrion said that she received confidential information that the appellant was coming back to Nova Scotia each year, and based on that she asked the RCMP in Inverness, which would be the detachment that covers Judique, and at the Halifax airport, to be aware of the Arrest Warrant which had been put on the C-PIC system.

[13] On cross-examination, Cst. Geoffrion indicated that she had no notes of her conversation with the appellant on July 4th at South Side Harbour and that her entry about the conversation with his mother was simply that she could not discuss the matter with the mother and that he had left Nova Scotia and she did not know where he was.

[14] The appellant testified that his only contact with the RCMP following the incident at Piper's was when he was served with the ***Protection of Property Act*** notice at South Side Harbour. He testified that he was not told by his mother about any call from the RCMP and that he left Nova Scotia to go to Thailand in late August 2003. He said he stayed there for four years, but came home each summer for about a month. He said when he would come home in the summer he would either stay at his sister's place in South Side Harbour where he had been served by the police officer or with his mother in Judique. He said that when he found out that there was a Warrant for his Arrest when he went to renew his license in 2007, he arranged to appear in Court to address the charges.

[15] Marjorie Graham is the appellant's mother. She denied talking with Cst. Geoffrion on the phone about the whereabouts of her son in the fall of 2003. She said that if she had had that conversation, she would have advised her son of the call.

[16] Counsel agree that the issue here is whether the appellant was aware that charges were pending against him, and therefore, should have checked into the situation prior to 2007 particularly when he returned to the Province each summer.

[17] Crown counsel concedes that the period between October 2003 and August 2007, a period of about four years, is so long that the Court must look at the reasons for the delay.

[18] In the ***Queen v. Morin*** (1972) 71 C.C.C. (3d) 1 (S.C.C.) the leading case from the Supreme Court of Canada, the Court held that periods of delay are to be considered by deciding who was responsible for the delay and if it is found that the accused was responsible the time period does not run against the Crown.

[19] I have already referred in my earlier decision on this matter to the cases quoted in both counsel's brief which were ***R v. Chan*** [2008] B.C.J. No. 590; ***R v. Wright***

[2003] A.J. No. 1540 and ***R v. White***, [1997] O.J. No. 961 from the Ontario Court of Appeal.

[20] In the ***White*** case the Court held that if an accused was away or out of the country, and he was aware that he would face charges if he came back to Canada, and he choses to remain outside of the jurisdiction, the time does not run against the Crown on the issue of unreasonable delay.

[21] If I apply that principle to this case, I conclude that there is no evidence here that the appellant was aware of the fact that he might faces charges if he came back. I therefore conclude that all of the time involved here is to be considered on the **Charter** motion.

[22] Crown counsel appropriately suggests that despite the long delay there has been no actual prejudice to the accused. In the circumstances, however, I would infer prejudice to the accused based on the long period between charge and trial. Authority for that is found in the ***Morin*** (supra), case.

[23] I therefore allow the Charter motion and order that the conviction entered against the appellant be quashed and a stay of proceedings entered under Section 24(1) of the **Charter**.

[24] Mr. MacIsaac, if you would prepare the order I will sign it.

J.