SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Ward, 2010 NSSC 66

Date: 20100107
Docket: CRH 303841
Registry: Halifax

Between:

Her Majesty the Queen

v.

Mathew Ward and Shane Ward

Judge:	The Honourable Justice Felix A. Cacchione
Heard:	December 22, 2009, in Halifax, Nova Scotia
Written Decision:	February 24, 2010
Counsel:	Eric Taylor and John Feehan, for the Crown Luke Craggs, for Matthew Ward Alfred Seaman, for Shane Ward

By the Court:

[1] The Applicant Shane Ward [the Applicant] is jointly charged with his brother Matthew Ward with second degree murder, possession of a weapon for the purpose of committing an offence and assault with a weapon. The offences are alleged to have occurred on January 8th, 2007.

[2] On November 10th, 2009, during a pre-trial conference held for the trial set to begin on January 11th, 2010, counsel for the Applicant gave verbal notice of his intention to bring this application for a stay of proceedings based on the infringement of the Applicant's constitutionally protected right, under s.11(b) of the *Canadian Charter of Rights and Freedoms*, to be tried within a reasonable time.

[3] December 22nd, 2009 was set as the hearing date for this application.

[4] A brief of law was filed on December 17th, 2009 and the Applicant's affidavit was filed on December 18th, 2009.

[5] The record filed in support of this application was incomplete. Transcripts of the various court appearances where this case was adjourned were not provided. This makes the analysis of institutional delay and waiver difficult if not impossible. Rather than refusing to hear or dismissing the application summarily, it was heard on its merits because a delay of 37 months from the date when charges were laid until the date of trial completion would on its face appear unreasonable.

[6] The Applicant was cross-examined on his affidavit.

[7] The Respondent filed a brief outlining the history of the proceedings. Attached to its brief were handwritten notes of Crown counsel who attended the various court appearances, together with two letters from counsel then representing the Applicant, two memorandum of pre-hearing conferences held in preparation for the preliminary inquiry and photocopies of several emails from the investigators.

[8] At the conclusion of the hearing on December 22nd, 2009, I advised counsel that I would give my ruling on the application prior to the scheduled commencement of the trial.

[9] On January 7th, 2010 counsel were advised by letter that I was dismissing the application with reasons to follow at a later date. These are my reasons.

The Chronology

[10] This case began on January 8th, 2007 when an incident occurred at the residence of the co-accused Matthew Ward which lead to Shane Ward being arrested that evening and charged on January 9th, 2007 with the attempted murder of Phillip Love. A bail hearing was adjourned to January 12th, 2007. On that day the original information was replaced with a new three count information charging the Applicant with attempted murder, possession of a weapon for the purpose committing an offence and assault with a weapon.

[11] On January 14th, 2007 Phillip Love died as a result of the injuries he had received.

[12] The Applicant was arraigned on a charge of second degree murder on January 17th, 2007, the date initially set for his bail hearing on the original charge of attempted murder. This is the relevant start date for an unreasonable delay analysis. The Supreme Court of Canada in *R. v. Morin* (1992), 71 C.C.C. (3d) 1 at p.14 referred to the relevant period for analysis as being from the date of the charge to the end of the trial. In the present case, it is anticipated that the trial will be completed by February 12th, 2010.

[13] On January 18th, 2007 dates for the preliminary inquiry were set for June 22nd and 29th, 2007. This five month delay was well within the *Morin* guidelines of eight to ten months for institutional delay in the provincial courts. These guidelines were recently affirmed by the Supreme Court of Canada in *R. v. Godin* (2009), S.C.R. 26.

[14] On January 31st, 2007 the Applicant applied for bail in the Supreme Court. Bail was denied on February 5th, 2007 and the Applicant's detention continued until October 15th, 2007 when, after a bail review hearing, he was granted bail and

released from custody on strict conditions including house arrest with exceptions for employment and medical emergencies.

[15] On February 6th, 2007 the preliminary inquiry dates of June 22nd and 29th, 2007 were confirmed.

[16] A pre-hearing conference was held in the Provincial Court on April 19th, 2007 at which time no disclosure issues were identified.

[17] On May 10th, 2007 Matthew Ward was arrested and charged with first degree murder. He was remanded until May 15th, 2007.

[18] On May 15th, 2007 a new information was filed with the Provincial Court charging both the Applicant Shane Ward and his brother Matthew Ward jointly with first degree murder. The separate informations against each accused were withdrawn by the Crown.

[19] The case was adjourned for two weeks to May 29th presumably to effect disclosure and for counsel to obtain instructions.

[20] On May 29th, 2007 preliminary inquiry dates of January 9th, 10, and 11th, 2008 were set. Counsel for the co-accused undertook to check on the availability of earlier dates in the Halifax Provincial Court. A return date of June 5th, 2007 was fixed to confirm either the availability of earlier dates or the dates already set.

[21] On June 5th, 2007 the dates of January 9th to 11th, 2008 for the preliminary inquiry were confirmed.

[22] On December 12th, 2007 a pre-hearing conference pursuant to s.536.4(1) of the *Criminal Code* was to be held in Dartmouth Provincial Court in advance of the preliminary inquiry set to begin on January 9th, 2008. This pre-trial conference was adjourned to December 20th, 2007.

[23] On December 20th, 2007 a further pre-hearing conference was held. The court was notified that all exhibits had not yet been sent to the RCMP forensic laboratory. This failure of not having the exhibits tested in a timely fashion

resulted in a necessary adjournment of the preliminary inquiry then set to begin on January 9th, 2008.

[24] On January 7th, 2008 counsel appeared in Provincial Court to obtain new dates for the preliminary inquiry. A transcript of that proceeding, provided by the Respondent, shows that new dates were set for June 27th, July 4th and 11th, 2008.

[25] At a pre-hearing conference on June 11th, 2008 the court was advised of the status of the forensic testing results; namely that some but not all the results had been received and that one item had yet to be tested. The court was also notified that the beginning of September 2008 was when this test result and the other outstanding test results were now expected to be available.

[26] Counsel for both accused indicated that they needed the test results before the preliminary inquiry and before their cross-examination of the Crown witnesses and would therefore require an adjournment of the preliminary inquiry.

[27] On June 27th, 2008 the defence request for an adjournment was granted and new dates of September 18th, 19th, 24th, and 25th and possibly 26th, 2008 were now set for the preliminary inquiry.

[28] A defence request made on September 16th, 2008 for an adjournment of the preliminary inquiry based on the unavailability of certain forensic reports was denied.

[29] The preliminary inquiry proceeded on the dates set. Because not all exhibit testing results had been received by September 25th, the final day set for the inquiry, it was then adjourned to October 7th, 2008 to obtain the outstanding test results and to see if further witnesses were required as a result of this.

[30] On October 7th, 2008 no further witnesses were required to testify as a result of the latest reports. The inquiry was then adjourned to October 23rd for closing arguments.

[31] Both accused were committed to stand trial on a reduced charge of second degree murder on October 23rd, 2008. They were ordered to appear in the Supreme Court on November 13th, 2008 to have their trial dates set.

[32] This delay of three weeks from the time of committal to stand trial until the time trial dates were fixed is attributable to the defence. In the usual course, accused persons who are committed to stand trial are ordered to appear in the Supreme Court on the Thursday following the date of committal. In the present case, that would have been October 30th, 2008. The preliminary inquiry transcript shows however that counsel representing the Applicant requested that the matter be put on the docket for November 13th, 2008 to accommodate his schedule.

[33] On November 13th, 2008 trial dates were set for September 21st to October 9th, 2009. This ten month delay is outside the *Morin* guidelines of six to eight months delay from the date of committal to the end of the trial. It should be noted however, that the court log on file shows that earlier dates were offered but not taken by the defence.

[34] On August 6th, 2009, nine months after trial dates had been set and six weeks before the scheduled start of the trial counsel for both the Applicant and the co-accused applied to the Crownside chambers judge for permission to withdraw as solicitors of record. August 11th, 2009 was set as the hearing date.

[35] The hearing proceeded on August 11th, 2009. The applications to withdraw as counsel were opposed by the Crown on the basis that the applications were too late, that they were not the result of a breakdown of the solicitor client relationship and that the withdrawal of counsel at this late stage would invariably lead to an adjournment of the trial. The chambers judge reserved his decision until August 20th, 2009.

[36] On August 20th, 2009 both applications were granted and counsel for the Applicant and the co-accused were allowed to withdraw from the case. The accused were then told that the matter would proceed to trial on the dates set, that is September 21st to October 9th, 2009 with or without counsel representing them. The case was then adjourned to August 31st.

[37] On August 31st both accused appeared before me and indicated that they had applied to Legal Aid for representation. The case was then adjourned to September 8th, 2009 to await the results of their application for Legal Aid.

[38] It was very evident from this court appearance that to force the accused to represent themselves at their trial, set to commence in three weeks, would be to invite a miscarriage of justice. The accused are not well educated. They both work as labourers in the construction industry. It appeared that they were not fully aware of the court process and certainly not aware of the complexity of the case.

[39] This case cannot be described as a straightforward case with few complexities. It is a joint trial involving a three count indictment with one of the counts being second degree murder. The case is to be heard by a jury. The prosecution anticipates calling 35 or more witnesses. The prosecution also intends to call expert evidence in the fields of pathology, toxicology, biology, trace evidence analysis and blood spatter interpretation.

[40] On September 8th, 2009 both unrepresented accused applied for an adjournment of their trial and the application was granted on the basis of the seriousness of the charge, the complexity of the case, and the danger of a miscarriage of justice occurring in those circumstances. The matter was adjourned to September 21st, 2009.

[41] By September 21st, 2009 only one accused had retained counsel. The second accused was still attempting to obtain Legal Aid representation. Trial dates were then set for January 11th to February 8th, 2010 with a pre-trial conference scheduled for October 6th, 2009.

[42] On October 6th, 2009 Matthew Ward advised the court that he had retained new counsel and a new pre-trial conference date was set for October 13th, 2009.

[43] A further pre-trial was held on November 10th. The week of November 16th to 20th, 2009 was fixed to hear *voir dires* on the admissibility of the statements taken from both accused.

[44] In addition to the *voir dires* the dates of December 18th for a *Scopelliti* application, December 21st for closing arguments on the *voir dires* and December 22nd, 2009 for the hearing of this application were also set.

[45] The Supreme Court of Canada in *Morin* held that an inquiry into the issue of unreasonable delay should only be undertaken if the period is of sufficient length

to raise an issue as to its reasonableness. If the length of the delay is unexceptional, then no inquiry is warranted and no explanation for the delay is called for unless the Applicant is able to raise the issue of the reasonableness of the period by reference to other factors such as prejudice: *R. v. Morin* (supra) at p. 14.

[46] The court also ruled that the period of time between the date of the charge and the end of the trial may be shortened by subtracting periods of delay that have been waived. Once this is done, it must then be determined whether this period is unreasonable having regard to the interests s.11 seeks to protect, the explanation for the delay and the prejudice to the accused: *R. v. Morin* (supra) p.13.

[47] In an application such as this it is necessary to assess the reasonableness of the overall lapse of time. It may be that each individual period when isolated from others may constitute a reasonable delay, however the total period may nonetheless be unreasonable for the purpose of s.11(b): *R. v. Conway* (1989), 49 C.C.C. (3d) 289 (S.C.C.) at p.307; R. v. MacDougall (1998), 128 C.C.C. (3d) 483 (S.C.C.).

[48] The determination of whether a delay is unreasonable is not reached by the application of a mathematical or a constitutionally prescribed time table, rather it is done by balancing the interests which the system is designed to protect against factors which inevitably lead to delay or otherwise cause delay. The court must determine judicially whether the delay is unreasonable by balancing the interests which the system is designed to protect against factors which inevitably lead to or otherwise cause delay.

[49] The twin purposes of s. 11(b) are the protection of the individual rights of the accused and the societal interest in bringing those charged with offences to trial. In *Morin* Justice Sopinka referred to the individual rights which this section seeks to protect as follows at p. 12:

> The right to security of the person is protected in s.11(b) by seeking to minimize the anxiety, concern and stigma of exposure to criminal proceedings. The right to liberty is protected by seeking to minimize exposure to the restrictions on liberty which result from pre-trial incarceration and restrictive bail conditions. The right to a fair trial is protected by attempting to ensure that proceedings take place while evidence is available and fresh.

> The secondary societal interest is most obvious when it parallels that of the accused. Society as a whole has an interest in seeing that the least fortunate of its citizens who are accused of crimes are treated humanely and fairly. In this respect trials held promptly enjoy the confidence of the public. As observed by Martin J.A. in *R. v. Beason* (1983), 7 C.C.C. (3d) 20, 1 D.L.R. (4th) 218, 36 C.R. (3d) 73 (Ont. C.A.): "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..." (p.41). In some cases, however, the accused has no interest in an early trial and society's interest will not parallel that of the accused.
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> There is, as well, a societal interest that is by its very nature adverse to the interests of the accused. In *Conway*, a majority of this court recognized that the interests of the accused must be balanced by the interests of society in law enforcement. This theme was picked up in *Askov* in the reasons of Cory J. who referred to "a collective interest in ensuring that those who transgress the law are brought to trial and dealt with according to the law" (p.474). As the seriousness of the offence increases so does the societal demand that the accused be brought to trial. The role of this interest is most evident and its influence most apparent when it is sought to absolve persons accused of serious crimes simply to clean up the docket.

[50] The factors which must be examined in this analysis are as follows: (1) the length of the delay; (2) waiver of time periods; (3) reasons for the delay, including (a) inherent time requirements of the case; (b) actions of the accused; (c) actions of the Crown; (d) limits on institutional resources; and (e) other reasons for the delay; and (4) prejudice to the accused.

[51] It is within this framework that the application is considered.

1. Length of Delay

[52] As previously noted the delay in the present case is approximately 37 months and does warrant inquiry.

2. Waiver of Time

[53] In *R. v. Morin* Justice Sopinka stated at p.15

> ...If by agreement or other conduct the accused has waived in whole or in part, his or her rights to complain of delay, then this will either dispose of the matter or allow the period waived to be deducted.
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> This court has clearly stated that in order for an accused to waive his or her rights under s.11(b), such waiver must be clear and unequivocal, with full knowledge of the rights the procedure was enacted to protect and of the effect that waiver will have on those rights: *Korponey v. A.-G. Can.* (1982), 65 C.C.C. (2d) 65 at p.74, 132 D.L.R. (3d) 354, [1982] 1 S.C.R. 41; *R. v. Clarkson* (1986), 25 C.C.C. (3d) 207 at pp. 217-9, 26 D.L.R. (4th) 493, [1986] 1 S.C.R. 383; *Askov, supra*, at pp. 481-2). Waiver can be explicit or implicit. If the waiver is said to be implicit, the conduct of the accused must comply with the stringent test for waiver set out above. As Cory J. described it in *Askov, supra* (at p.481):
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> > ...there must be something in the conduct of the accused that is sufficient to give rise to an inference that the accused has understood that he or she had a s.11(b) guarantee, understood its nature and has waived the right provided by that guarantee.

[54] In *Regina v. Smith* (1989) 52 C.C.C. (3d) 97 S.C.C. at p.109 Sopinka J. speaking for a unanimous court stated:

> ...Agreement by an accused to a future date will in most circumstances give rise to an inference that the accused waives his right to subsequently allege that an unreasonable delay has occurred. While silence cannot constitute waiver, agreeing to a future date for a trial or a preliminary inquiry would generally be characterized as more than silence. Therefore, absent other factors, waiver of the appellant's s.11(b) rights might be inferred based on the foregoing circumstances.

[55] It was not argued, nor is there any evidence to support a finding that the Applicant, at any time, during the entire period under review objected to any of the adjournments or delays.

[56] Throughout this 31 month period from when the Applicant was charged in 2007 until his counsel was granted permission to withdraw by the court in August 2009, the Applicant was represented by experienced and competent counsel.

[57] While it is true that consenting to a trial date or an adjournment does not give rise to an inference of a waiver if the consent amounts to mere acquiescence in the inevitable, there must be some evidentiary basis on which to base a finding

that the Applicant was merely acquiescing to the inevitable. There is no such basis in the present application. The application could be disposed of on this basis alone. However, I will address the remaining factors of reasons for the delay and prejudice to the accused.

[58] The substitution of two separate informations with one information charging both accused jointly with first degree murder caused a delay. The Applicant, when he stood charged alone, would have had his preliminary inquiry in June 2007. The addition of his brother as a co-accused on a joint information had the effect of delaying his preliminary inquiry by over six months.

3. Reasons for the Delay

(a) Inherent Time Requirements of the Case

[59] While the delay caused by having both brothers tried together forms part of the overall delay, it should be considered as neutral because it is attributable to the co-accused. Delay caused by a co-accused is usually considered neutral in the analysis as:

> ...generally speaking, it is in the interests of justice that individuals charged jointly with an offence be tried together: *R. v. L.G.*, [2007] O.J. No. 3611 (at para. 63) (Ont. C.A.).

[60] The Ontario Court of Appeal in *R. v. L.G.* (supra) cited its decision in *R. v. Whylie*, [2006] O.J. No. 1127 (C.A.) for the proposition that a single trial conserves judicial resources, avoids witnesses testifying multiple times, and promotes consistency in verdicts: *R. v. L.G.* (supra) at para. 63. Much can be said about the value of having all of the witnesses testify in one trial in which all prospectives on the commission of the offence may be heard by one jury.

[61] The seven month delay from May 2007 to January 2008 was nonetheless still within the *Morin* guidelines of eight to ten months for institutional delay in the provincial courts.

(b) Actions of the Accused

[62] The Applicant and his co-accused are responsible for two delays. The first being the three week period from October 23rd, to November 13th, 2008. In the usual course, accused persons who are committed to stand trial are ordered to appear in the Supreme Court on the first Thursday after their committal in order to obtain trial dates.

[63] In the present case that would have been October 30th, 2008. A review of the preliminary inquiry transcript shows that counsel representing the Applicant at the time requested that the accused be ordered to appear in the Supreme Court on November 13th, 2008 to accommodate his schedule.

[64] The second delay for which the Applicant bears responsibility is the period from August 2009 to January 2010. Counsel for both the Applicant and the co-accused were granted permission to withdraw. The basis for this was the non-payment of fees. It was the actions of the Applicant and the co-accused in not perfecting the retainer which lead to the withdrawal of counsel.

[65] The Applicant bears responsibility for approximately six months of the total delay.

(c) Actions of the Crown

[66] Consideration of this factor is not a matter of assigning blame. The Crown, however, bears the responsibility of bringing the accused to trial. This extends to a duty to ensure that trial proceedings, once commenced, are not unduly delayed: see *R. v. MacDougall*, (supra).

[67] A pre-hearing conference pursuant to s.536.4(1) of the *Criminal Code* was to be held on December 12th, 2007 in advance of the preliminary inquiry set to begin on January 9th, 2008. This hearing was adjourned to December 20th, 2007.

[68] No transcript was provided to indicate why this hearing had to be adjourned.

[69] The Respondent did however provide a copy of two emails dated December 12th and December 14th, 2007 from R.C.M.P. Sergeant Ferguson of the Halifax Regional Police - RCMP Integrated Major Crime Unit (Homicide Section) advising the prosecutor, who then had carriage of this file, that the police were that

same day (December 12th, 2007) discussing what items seized as exhibits should be sent to forensic laboratory for testing and that the blood spatter expert scheduled to testify at the preliminary inquiry would be unavailable for the January 2008 dates set because he would be testifying at a trial in a different province. (December 14th email).

[70] On January 7th, 2008 the preliminary inquiry scheduled to begin on January 9th, 2008 was adjourned to June 27th, July 4th and 11th, 2008. A transcript of that proceeding was provided by the Respondent.

[71] The transcript indicates the reason why new dates had to be set was because certain information which the defence required was not available. Specifically information concerning the forensic testing and/or fingerprinting of the alleged murder weapon. This had yet to be done at the time of the requested adjournment.

[72] The position taken by Crown counsel, who then had carriage of the file, as contained in the transcript requires some comment. Crown counsel indicated to the court that it was the accused, not the Crown, who sought the preliminary inquiry and the issue which had arisen, regarding the non-testing of the alleged murder weapon, was one that had not been made known to the Crown.

[73] It is true that in the present case the preliminary inquiry was requested by the defence under s.536(4) of the *Criminal Code*. However, it is not the accused's responsibility to ensure that there is sufficient evidence for a committal to stand trial or for a conviction.

[74] It would have been reasonable for both the Crown and the police to assume, once the two accused were charged jointly on the same information, that cut throat defences with one accused pointing the finger at the other, could or would be advanced. Given the likelihood of this occurring it would not have been unreasonable to consider having the seized exhibits tested in order to determine whose blood, fingerprints and/or DNA was present on the alleged murder weapon or weapons, even if that had not been made known to the Crown.

[75] The number of weapons used, whose blood, DNA, and fingerprints, if any, was on those items were all relevant and probative questions which required answers that could be provided by such testing.

[76] This information, even if not requested by the defence, for the preliminary inquiry, was certainly important information for both the prosecutorial and investigatory arms of the case to have especially in a prosecution involving jointly charged co-accused.

[77] In the present case the existence of a lack of communication between the prosecutorial and investigative arms of the case concerning the status of the case as it progressed through the court process is manifest.

[78] The fact that none of the exhibits seized by the police at the scene of the alleged offence or from the vehicle of an alleged accessory after the fact to murder, as probable weapons used in the committing the offences charged had not been sent for forensic testing one month before the scheduled start of the preliminary inquiry and eleven months after the incident in question speaks to this.

[79] The unavailability of the blood spatter expert due to a scheduling conflict also reflects the lack of communication previously noted.

[80] The six month delay from January to June 2008 is attributable to the Crown.

(d) Limits on Institutional Resources

[81] No delay was occasioned by limited institutional resources.

(e) Other Reasons for the Delay

[82] The delay occasioned by not testing the exhibits earlier on in the proceedings caused further delays.

[83] On June 10th, 2008 the prosecution was advised that the forensic testing results for some of the exhibits were expected to be available by June 23rd, 2008, some four days before the scheduled start of the preliminary inquiry, however the test results of the blood samples taken from the co-accused Matthew Ward and the accessory after the fact Bradley Martin and matched to other exhibits would not be available until late June or later.

[84] Counsel for the accused were notified of this development that same day. Counsel then representing Matthew Ward advised the prosecution that he needed to know before his cross-examination of the Crown witness who stood accused of being an accessory after the fact to murder, whose blood was on or might be found on the exhibits seized by the police. Counsel then representing the Applicant expressed concern that the fireplace poker, an item seized by the police some 18 months earlier as an alleged weapon had never been swabbed for the presence or absence of DNA.

[85] Although it could be argued that the delay caused by the defence request for an adjournment for a preliminary inquiry should be attributable to the Crown in this analysis because it was generated as a direct result of the initial failure by the authorities involved to ensure that exhibits were tested, it cannot be so attributed.

[86] It is understandable that the defence would want to know the forensic testing results regarding whose blood, DNA or fingerprints was or was not on an exhibit before embarking on the cross-examination of a witness who might have had some contact with the exhibits.

[87] There were, however, a number of witnesses whose evidence was not related to the exhibits or the test results who could have been called on the date originally set for the start of the preliminary inquiry.

[88] Another reason this delay is not attributable to the Crown is also explained by the unusual strains at the relevant time placed on investigative resources such as DNA testing, by the extraordinary demands of the Robert Pickton case which was ongoing at the relevant time.

[89] Limits on investigative resources was also witnessed by the following: On September 8th, 2008 the Crown was advised by the forensic laboratory that delays in the Ottawa exhibits recovery unit had caused further delays in having some reports completed on time for the preliminary inquiry.

4. Prejudice to the Accused

[90] The Applicant filed an affidavit alleging the prejudice he suffered as a result of these charges. He stated that while in custody he was attacked and suffered a

burst eardrum. He also alleged that during his detention he suffered a nervous breakdown and had to be medicated for several months as a result of this.

[91] According to his affidavit the detention also prevented him from seeing his ailing grandmother until just a few hours before her death.

[92] The Applicant alleged that once released his employment suffered because of the strict conditions of his release and the court appearances he was required to make.

[93] The Applicant also alleged that the publicity surrounding his trial for breaching his release conditions lead to a decline in the availability of employment. This caused him to be unable to continue paying the lawyer who had represented him for two years.

[94] He also referred to the five weeks he spent in custody awaiting his trial on the breach of his bail condition charge as having affected his employment.

[95] Cross-examination of the Applicant on his affidavit revealed that the allegations made in the affidavit were mostly vague and unsubstantiated. He overstated not only the time he spent in pre-trial custody on the breach of his release condition charge, but also the length of the delay caused by the addition of his brother as a co-accused. He could not recall when his grandmother died nor could he recall when, after his release on the murder charge, he found work.

[96] The Applicant's allegation that his employment suffered due to the various court appearances he had to make flies in the face of the fact that he was represented by experienced counsel and could have filed a designation of counsel of record under s.650.01 of the *Criminal Code*. This would have avoided the need for him to attend court each and every time the matter was before the court.

[97] The Applicant's affidavit is the only evidence of prejudice. The allegations contained in the affidavit were discredited on cross-examination. No documentation from the detention facility was provided to support his claim of being attacked, injured and suffering a nervous breakdown while in detention. The time periods referred to in the affidavit were also shown to be inaccurate. As

well, the Applicant's allegation that his employment suffered due to the delay in bringing this matter to trial was not supported by any evidence.

[98] The law provides that prejudice to an accused may be inferred as well as proven. The longer the delay in the proceedings, the easier it may be for a court to infer prejudice simply as a result of the passage of time. In circumstances in which prejudice is not inferred and is not otherwise proven, the basis for the enforcement of the individual right is seriously undermined.

[99] It is the duty of the Crown to bring the accused to trial: see *R. v. Askov* (1990), 59 C.C.C. (3d) 449 at p. 478, 480-482. The purpose of s.11(b) is to expedite trials and minimize prejudice and not to avoid trials on the merit. Any action or inaction by an accused which is inconsistent with a desire for a speedy trial is a factor which the court must consider in assessing the degree of prejudice, if any, that an accused has suffered as a result of delay.

[100] The Applicant has not proven that he suffered prejudice as a result of the delay in bringing this matter to trial. An inference of prejudice resulting from the delay cannot be drawn in this case because for the majority of the time under review the Applicant was represented by experienced counsel. There was no evidence presented to show that the Applicant did not consent to any of the delays which occurred in this case. As noted previously, no transcripts of prior court appearances were filed with this court to establish that the Applicant did not consent to any of the adjournments or from which it could be inferred that the Applicant was merely acquiescing to the inevitable.

[101] In conclusion, the Applicant has not established that his right under s.11(b) of the *Canadian Charter of Rights and Freedoms* has been infringed. Accordingly, his application for a stay of proceedings is denied and the matter will proceed to trial on the dates set.

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Cacchione J.