Date: February 14, 2002
Docket: C.R. 171070 & 171071

IN THE SUPREME COURT OF NOVA SCOTIA
Cite as R. v. Dann, 2002 NSSC 37

BETWEEN:

Her Majesty the Queen

-and-

Jamie Dominique DANN

DECISION
(Charter Application)

Heard: Before the Honourable Associate Chief Justice Michael MacDonald at Halifax, Nova Scotia on October 29 and 30, 2001.

Oral Decision: October 30, 2001

Written Release of Decision: February 14, 2002

Counsel: Timothy McLaughlin for the Crown/Respondent
Public Prosecutions (Canada)

Ann Copeland for the Defendant/Applicant
Nova Scotia Legal Aid

MacDonald, A.C.J.:

[1] On June 6th, 2000 at approximately 2:40 p.m. the Accused was arrested at the Halifax International Airport for allegedly having a controlled substance in his possession. He was held and not brought before a judge until approximately 3:00 p.m. the next day when he was charged with possession of cocaine for the purpose of trafficking. Thus he was held longer than the 24 hour statutory maximum set out in s. 508 of the *Criminal Code.*

[2] Therefore the Accused maintains that he was arbitrarily detained and as such his s. 9 *Charter* rights were breached.

[3] Furthermore he submits that a stay of the present charges represents the only appropriate form of relief.

[4] I begin my analysis by considering s. 503 of the *Criminal Code* which provides:

> A peace officer who arrests a person with or without warrant or to whom a person is delivered under subsection 494(3) or into whose custody a person is placed under subsection 163.5(3) of the *Customs Act* shall cause the person to be detained in custody and, in accordance with the following provisions, to be taken before a justice to be dealt with according to law:
>
> (a) where a justice is available within a period of twenty-four hours after the person has been arrested by or delivered to the peace officer, the person shall be taken before a justice without unreasonable delay and in any event within that period...

[5] It is noteworthy that under this section "twenty-four hours" is the outside time limit for bringing the Accused before a justice. In other words, there shall never be "an unreasonable delay" and in any event the Accused must be taken before a justice if one is available no later than twenty-four hours after an arrest. As Defence counsel aptly put it, twenty-four hours is the outer limit of tolerance.

[6] In the case at bar, the Accused was held for approximately twenty minutes beyond this statutory maximum. Here there was a justice available so there was no excuse for missing the statutory deadline.

Was there a Breach of the *Charter* s. 9?

[7] Section 9 of the Charter protects an individual against arbitrary detention.

[8] In *R. v. Pithart,* [1987] B.C.J. No. 633 (B.C. Co. Ct.) Leggatt, Co. Ct. J. at page 18 referred to the definition of arbitrary detention this way:

> There is no single definition of "arbitrarily detained" which has received general acceptance by the courts. In *Smith, supra*, Craig J.A. said at pp. 416-17 C.C.C., p. 314 C.R.: "There are numerous synonyms and phrases for the word 'arbitrary'- such as, 'unrestrained', 'high-handed', 'unreasonable', 'capricious', something 'not determined by rule or principle'".

[9] In the case at bar, the Accused was obviously detained. The issue becomes whether his detention was arbitrary. Applying the above definition to the context of this case, I ask: "Was this detention unreasonable?" I find that it was unreasonable, in the circumstances of this case, to miss a statutorily imposed outside deadline even if only by twenty minutes.

[10] I find, therefore, that the Accused's s. 9 rights have been breached. Individual freedom is fundamental to a free and democratic society. It must be zealously protected. This breach therefore commands relief.

The Appropriate Remedy

[11] I now turn to the appropriate remedy. It must of course be proportional to the seriousness of the breach. In the case at bar, it is clear that the police were attempting to advance their investigation to the point of determining whether or not they had sufficient cause for laying the appropriate Information. They wanted to do this before bringing the Accused to court. In their attempts to do this, they missed this outside deadline by approximately twenty minutes.

[12] I find in the circumstances that it was reasonable for the police to advance their investigation as they did, but for their failure to meet the statutory outside time. Thus, the breach was minor in nature and involved no *mala fides* on the part of the police.

[13] It is with this background that I consider the Accused's request for a stay. It is clear that this drastic remedy is reserved for only those "clearest of cases" where no lesser remedy would be appropriate. See *R. v. O'Connor* [1995] 4 S.C.R. 411.

[14] Given the minor nature of this breach, I find that this is not one of those "clearest of cases" that commands a stay. There are other less drastic, but nonetheless appropriate remedies available in the case at bar.

[15] In other words, continuing this trial in the face of this minor breach would not constitute an affront to the community's sense of fair play and decency. In this regard I refer to the Supreme Court of Canada decision of *R. v. Simpson* (1995), 95 C.C.C. (3d) 96.

[16] Courts in other jurisdictions have resorted to a reduction in sentence when considering similar breaches. I refer to *R. v. MacPherson* (1995), 100 C.C.C.

(3d) 216 (N.B.C.A.). However, in the case at bar there is yet to be a trial and the Accused is presumed innocent. Therefore at this stage it would be premature to consider a reduction in sentence as a remedy.

[17] For present purposes it is sufficient for me to find that a stay is not an appropriate remedy. The trial will then proceed. My remedy will be granted after the trial has been completed. I will then be in a better position to assess the same.

[18] If the Accused is convicted, a decreased penalty may be appropriate. In this regard, I do not share the Accused's concerns as referred to in his brief that the Crown in the face of this remedy may seek an increased penalty. In any event, the Courts and not the Crown will determine the appropriate sentence. If the Accused is acquitted, then the Court will craft an alternative suitable remedy at that time.

Michael MacDonald
Associate Chief Justice