

DATE: 2009/09/22

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

Her Majesty the Queen

- and -

Omar Allen

Accused

Christopher Leafloor, for the Plaintiff

Jason dos Santos, for the Accused

HEARD: September 21, 2009

Ruling on s.11 (b) of the Charter

BACKHOUSE J.:

[1] The accused was charged on June 26, 2007 with one count of trafficking in cocaine and possessing property consisting of the proceeds of crime.

[2] His trial commenced on September 21, 2009, approximately 27 months from the date he was charged. The accused has brought an application to stay the proceeding on the ground that his right under s.11(b) of the *Charter of Rights and Freedoms* to a trial without unreasonable delay has been violated.

[3] In a recent decision of the Supreme Court of Canada, *R. v. Godin*, [2009] S.C.J.No.26, the Supreme Court reiterated the analytical framework and factors which control resolution of a

Section 11(b) complaint. Justice Cromwell who delivered the Supreme Court's unanimous reasons noted the guidelines set out in *Morin* for institutional delay in the provincial courts was 8 to 10 months. After a committal to trial, a further 6 to 8 months is allowed. The total is 14 to 18 months. (*R. v. Morin*, [1992] 1 S.C.R.771). A delay of 27 months substantially exceeds the outer limits of the guidelines. In itself, this fact does not make the delay unreasonable.

[4] Justice Cromwell noted at p.7:

“Whether delay has been unreasonable is assessed by looking at the length of the delay, less any periods that have been waived by the defence, and then by taking into account the reasons for the delay, the prejudice to the accused, and the interests that s.11(b) seeks to protect. This often and inevitably leads to minute examination of particular time periods and a host of factual questions concerning why certain delays occurred. It is important, however, not to lose sight of the forest for the trees while engaging in this detailed analysis. As Sopinka J. noted in *Morin*, at p.787, “[t]he general approach...is not by the application of a mathematical or administrative formula but rather by a judicial determination balancing the interests which [s.11(b)] is designed to protect against factors which either inevitably lead to delay or are otherwise the cause of delay.”

[5] A 27 month delay is 9 months longer than the 18 month guidelines. The accused submits that given that the entire disclosure was 60 pages including the officers' notes, 1 month was sufficient time to make disclosure as opposed to the 3 months that was taken. The Crown concedes that 1 month of delay is attributable to its delay in making disclosure. Although there is considerable merit in the accused's submission, I am not satisfied that requiring disclosure to be made in 1 month is reasonable. Accordingly, of the total delay beyond 18 months, 8 months are attributable to the Crown, 1 month for disclosure and 7 months for the lapse of time between the original trial date of February 23, 2009 and the adjourned trial date of September 21, 2009.

[6] The trial was adjourned on the Crown's application because one of its witnesses, a police officer, was on vacation. The application for adjournment was made 3 days before the trial was to commence. The transcript of the adjournment proceedings discloses that the Crown was unable to explain how it happened that its witness, a police officer, was on vacation. It had been unable to speak to the police officer for his explanation. The Crown indicated that its witnesses had been informed of the trial date in December, 2008. The February 23, 2009 trial date was confirmed at a trial readiness conference on February 2, 2009.

[7] On the s.11(b) application, the Crown advised that the officer made a mistake and only realized this three days before the February 23, 2009 trial date. By the time he realized this, he had already booked a vacation to Mexico.

[8] The Crown submitted that an earlier trial date of September 21, 2009, was offered at practice court on February 23, 2009, but was not accepted by the accused's counsel. The Crown submitted that only 4 of the 7 months' delay should be attributed to it in these circumstances.

[9] A transcript of the practice court proceedings was not introduced by either the Crown or the accused. Defence counsel ordered the transcripts of all of the appearances but incorrectly named the judge sitting in practice court on February 23, 2009 and did not notice the omission of the transcript until the Crown brought this to his attention one week ago. Defence counsel then reordered the transcript on an expedited basis and heard nothing further until he was advised on Friday, September 18, 2009 that the reporter was on vacation. The Crown then ordered the transcript on September 18, 2009 and was advised on September 21, 2009 that the reporter was ill. The Crown submitted that an earlier trial date may have been offered within 2 months but his colleague who attended in practice court could not recall exactly. The Crown filed no affidavit evidence of what occurred at practice court.

[10] In my opinion, the Crown has the onus of adducing evidence to support an argument of waiver of the delay by the accused's unwillingness to proceed at an earlier available date. (See *R. v. Smith*, [1989] 2 S.C.R.1120).

[11] It is clear from *R. v. Godin*, supra, that accused's counsel is not required to be available on every suggested date to avoid findings of waiver in circumstances where a scheduled trial date is adjourned at the Crown's request.

[12] It appears from the evidence that the accused generally was seeking the earliest possible date for all proceedings. When on November 14, 2007 the date for the preliminary hearing was set for June 12, 2008, 7 months later, that was the earliest date the court had available and defence counsel had dates prior to that available. There was no waiver of any part of the 8 months of delay caused by the Crown.

[13] There is no explanation as to why the police officer only realized three days before the trial that the trial was scheduled for February 23, 2009. The transcript of the proceedings on the adjournment discloses that the Crown witnesses were notified in December, 2008 of the trial date which was set on September 10, 2008. Moreover, when the trial was set, the Crown advised that the police officer was shown as not being on vacation. This late awareness of the trial date can only be the result of negligence on the part of the police officer. As well, having discovered the trial date in advance of the actual trial, no explanation is offered as to why he preferred his own interests in a vacation to the s.11(b) rights of the accused. On any view of the facts, the Crown or the police officer is responsible for this delay. I note that in *R. v. Smith*, supra, the Supreme Court of Canada held a delay caused by the Crown's understandable desire for the attendance and assistance of the investigating officer could not be permitted to override an individual's Section 11(b) Charter rights. The delay in this case cannot be compared to the case of the disappearance of the victim (see *R. v. Robinson*, [1996] O.J.NO.5433 (C.A.)) or an adjournment arising from a trial judge's decision to recuse himself due to a conflict in interest (see *R. v.*

Meisner (2004), 190 O.A.C.24 (C.A.)) because these types of delays cannot be attributed to the Crown.

[14] In this matter, had the Crown, in what is a straightforward case with no complexity which requires a very modest amount of court time (1 week) proceeded on February 23, 2009 when the trial was scheduled, there would have been no violation of Section 11(b), albeit that date was 19 months from the date of the charge.

[15] Once February 23, 2009 had passed, even if an earlier date were available, the maximum guideline of 18 months would have been surpassed by a number of months. Moreover, in a case lacking complexity and requiring a 1 week trial, the lower end of the timeline range is likely engaged. In the result, the delay was caused by the Crown and there is no acceptable explanation for its occurring. The fact that on February 2, 2009, at the trial readiness conference, the Crown was unaware of any problem with its witness, a police officer, also suggests that reasonable care was not taken to ensure compliance with the accused's Section 11(b) rights.

[16] I turn to consider the issue of prejudice. Again I quote from Justice Cromwell's decision in *Godin*, supra, at p.9:

“Prejudice in this context is concerned with the three interests of the accused that s.11(b) protects: liberty as regards to pre-trial custody or bail conditions; security of the person, in the sense of being free from the stress and cloud of suspicion that accompanies a criminal charge; and the right to make full answer and defence, insofar as delay can prejudice the ability of the defence to lead evidence, cross-examine witnesses, or otherwise to raise a defence. See *Morin*, at pp.801-3.

The question of prejudice cannot be considered separately from the length of the delay. As Sopinka J. wrote in *Morin*, at p.801, even in the absence of specific evidence of prejudice, “prejudice may be inferred from the length of the delay. The longer the delay the more likely that such an inference will be drawn”. Here the delay exceeded the ordinary guidelines by a year or more, even though the case was straightforward. Furthermore, there was some evidence of actual prejudice and a reasonable inference of a risk of prejudice.”

[17] The accused's bail conditions required him to move from his home in Toronto and to live in Mississauga with his surety. He had been living with his mother and sister and had to move. He was also subject to a curfew which was removed when the trial was adjourned on February 23, 2009.

[18] I conclude that the accused's liberty interests were affected by the delay. His interests in security of the person were also affected as they are in any case of delay. Delay increases the stress, anxiety, and cloud of suspicion that accompanies a criminal charge.

[19] There is no evidence of “actual” prejudice in making full answer and defence in the sense, for example, that a defence witness died or disappeared, who would have been available at the original trial date.

[20] The Crown argues that the risk of prejudice from delay is significantly reduced where the Crown’s case relies on the evidence of police witnesses who made notes of their observations. Counsel for the accused argues that in a case such as this where identity is in issue, delay affects the reliability of the evidence of identity because memories fade and appearances alter with the passage of time. In my opinion, given the length of the delay, I infer that there is real risk of some prejudice because the fact finding function is impaired by a delay of 27 months from the date of the offence. The issues in this case are fact specific ones.

[19] Trafficking in cocaine is a very serious indictable offence. I appreciate that the public interest in prosecuting crime is not well served when allegations are not pursued to conclusion because of a Charter violation. However, the public interest is also not served when an accused’s right to trial without unreasonable delay is violated without any reasonable explanation.

[20] In the result, when I consider the length of the delay in this case, the fact that 8 months are the fault of the Crown or the police officer and that the accused has been prejudiced by this delay, I conclude that the accused has satisfied the legal onus of proving that his Section 11(b) rights to a trial without unreasonable delay have been violated. In these circumstances, the proceedings must be stayed. The accused is discharged.

Backhouse J.

Released: September 22, 2009

COURT FILE NO.: 1-591842

DATE: 2009/09/22

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

Her Majesty the Queen

Crown

- and -

Omar Allen

Accused

Ruling on s.11(b) of the Charter

Backhouse J.

Released: September 22, 2009