

ONTARIO COURT OF JUSTICE

B E T W E E N :

HER MAJESTY THE QUEEN

— AND —

DRAGAN BARTULOVIC

Before Justice Douglas B. Maund
November 12, 2009

Jane Rodger for the Crown
Douglas Lent for the accused Dragan Bartulovic

R U L I N G

MAUND J.:

[1] The accused, Dragan Bartulovic is charged with impaired operation and operation with a blood alcohol content in excess of 80 mgs percent alleged on September 28th, 2008 at the Town of Caledon. In advance of the trial scheduled to commence on November 17th, 2009 the accused as applicant has brought an application pursuant to Section 11(b) of the Charter of Rights and seeks a stay of proceedings by virtue of unreasonable delay. I am not scheduled as trial Judge on November 17th and accordingly did not arraign Mr. Bartulovic. However counsel are agreed that this Court can determine the issues raised by way of a pre-trial motion.

[2] The time from the incident which gave rise to these charges until the second trial date is a period of thirteen and one-half months. Counsel are agreed that this period of time merits inquiry by the Court.

[3] The time periods involved in this proceeding are as follows:

- 1) November 3, 2008 was the first appearance in Assignment Court. The accused had immediately retained counsel, Mr. Lent, who appeared on that date. Disclosure was immediately provided and the matter was put over for review by counsel at his request to November 13th, 2008;

2) On the second appearance on November 13th, 2008 an agent appeared on behalf of Mr. Lent to set the trial date. Dates offered by the Court available for the first trial date and the indication of Crown and Defence availability are set out in the verification of trial date form prepared by the trial co-ordinator and signed by counsel. These were the dates available to the Court. Mr. Lent also filed as schedule “B” attached to the Affidavit of the Applicant a letter dated November 12th, 2008 which set out all of his available dates for trial. The first of such dates commenced on January 13th, 2009.

3) The Applicant appeared with his counsel on the confirmation date on June 25th, 2009 before myself. Mr. Lent raised the issue of the 9-1-1 tape recording which had not been disclosed to the defence despite his prior request. The Crown was not aware of whether the 9-1-1 tape was available from her file notes but undertook to follow up and advise counsel. Despite the missing disclosure which was clearly an issue for the defence, the matter was remanded to the trial date. However the Court directed the parties to bring the matter back before the Court if failure or lack of disclosure might interfere with the trial proceeding on August 12th, 2009. I note that neither the Crown nor the Defence followed this direction of the Court prior to the trial date.

4) On the first trial date on August 12th, 2009 Defence counsel advised that the 9-1-1 tape had been disclosed by the Crown on the evening before trial. Just before the trial date the assigned Crown determined the issue of the outstanding disclosure had not been dealt with and made heroic efforts to transcribe the 9-1-1 tape and have it delivered to Mr. Lent. No explanation was offered to the Court by the Crown as to why the 9-1-1 tape, which had originally been requested in November, 2008, was not available for disclosure until the day before the trial. While neither the Defence nor the Crown alerted the Court or the trial co-ordinator to the issue of lack of disclosure prior to the first trial date, Defence did serve on July 28th, 2008, an application under Section 7 of the Charter requesting a stay of proceedings due to a lack of disclosure of the 9-1-1 tape. Accordingly the Crown was aware by that date that the lack of disclosure still loomed as a significant issue and might interfere with the trial proceeding on the date scheduled.

5) The presiding Judge on August 12th, Justice Kerrigan Brownridge determined that the Defendant’s right to make full answer defence pursuant to Section 7 of the Charter would be breached if Defence were not allowed to make use of the disclosure at trial. Given the lateness of the disclosure of the 9-1-1 tape the remedy permitted by Her Honour was to allow an adjournment.

[4] Accordingly the matter was adjourned to the second trial date which is pending on November 17th, 2009. Again there were a series of dates offered by the trial co-ordinator as set out in the verification of trial date form. Again the Defence by letter of August 12th, 2009 set out a series of further dates he would be available to proceed in addition to those available dates provided by the trial co-ordinator.

ANALYSIS

[5] As already noted, the length of time to the eventual trial date warrants analysis by the Court. The record reveals that there was no waiver of the time period by the Defence throughout these proceedings. What remains to be determined is the assessment of the reasons for delay and the impact of potential prejudice upon the applicant.

[6] It is common ground that the period from the charge date until the trial date was set on November 13th, 2008 may be deemed part of the neutral intake period. The Crown also conceded in argument that the three month period between the first and second trial dates was institutional delay for which the Crown is responsible. What remains at issue is the degree to which the time period from the set date on November 13th, 2008 until August 12th, 2009 may be deemed institutional delay.

[7] The Defence submits that all of this nine month period was institutional delay. The Crown argues that the period did not commence until January 13, 2009 which was the first date offered by counsel in his letter of November 12th, 2008. With respect I cannot agree with this submission by the Crown. The trial co-ordinator's verification of trial date form indicates that as many as eight available court dates were offered to Crown and Defence prior to January 13th, 2009. Significantly, neither the Crown nor the Defence were available on any of those offered dates. In my view it is simply not logical for the Crown to take issue with the availability of the Defence in this very early period after the trial date was set when the Crown was unavailable to proceed.

[8] In this regard, the Crown relies upon the authorities of R. v. Meisner [2004] O.J. No. 3812 (C.A.) and R.v. Apolinario [2007] O.J. No. 4788 (S.C.J.).

[9] The issue of a starting point for institutional delay in relation to the first available dates of Defence was reviewed by my colleague Justice Duncan in R.v. Tar Singh (O.C.J. at Brampton September 27th, 2004). As noted by Justice Duncan, the decision of Justice Hill in relation to this issue was not resolved by the Ontario Court of Appeal in *Meisner*, nor was it disturbed by that Court. After reviewing the Supreme Court of Canada decisions in *Sharma* and *Morin* Justice Duncan made reference to three Ontario Court of Appeal decisions which also bear on the issue in his view. Namely: R. v. G.C.M (1991) 65 CCC (3d) 232, R. v J(A.M.) (1991) 64 CCC 3d 483, R. v Bennett (1991) 64 CCC (3d) 449 aff'd 74 CCC 384. In the result His Honour concluded as follows at page 11:

“I do not think that Justice Hill meant to, nor did he, establish a rule that periods of concurrent Court/Defence unavailability had to be deducted from the systemic delay period. Accordingly, it is my view that Meisner does not support the Crown’s submission”.

[10] The Defence in argument substantially relied on the relatively recent decision of the

Supreme Court of Canada in R.v. Godin [2009] S.C.J. no. 26. *Godin* was also a case where disclosure by the Crown contributed to delay. Speaking for the Supreme Court of Canada in *Godin* Justice Cromwell at paragraph 23 agreed with the dissent of Justice Glithero when the matter was before the Court of Appeal. He stated as follows:

“To hold that the delay clock stops as soon as a single available date is offered to the Defence and not accepted, in the circumstances when the Crown is responsible for the case having to be re-scheduled is not reasonable.”

[11] The applicant also relies on the decision of the Ontario Court of Appeal on R.v. Rego [2005] O.J. No. 4768. *Rego* is relied upon with reference to the comment at paragraph 3 in relation to Defence availability that “the offer of only a few dates in a narrow range may mean little or nothing.”

[12] The issue in *Godin* about Defence availability was based upon a record where a single date was offered to the Defence. The Court did not deal with the scenario where a series or range of dates may have been offered to the Defence on which the Defence was equally unavailable.

[13] The Crown concedes responsibility for institutional delay for all of the three month period after the case could not proceed until the second trial date. I do not find that the law supports the broad argument by the Defence that no offer of a series of earlier dates on which the Defence is unavailable can ever stop the delay clock in terms of institutional delay. In my view, if the Court offers a variety of earlier dates which are unavailable to the Defence when the matter is originally set for trial, it may not be open to Defence to claim later that the entire period from the set date to the first trial date is a period of institutional delay. While this issue need not be determined on the facts before me I wish to emphasize that I cannot agree with the broad interpretation of the effect of *Godin* as advanced by the Defence.

[14] In any event, on the facts of the case before me, I conclude that the entire period from the first set date on November 13th, 2008 until the first trial date on August 12th, 2009, that is a period of nine months, is a period of institutional delay. Therefore the full period of institutional delay in this proceeding is twelve months.

[15] In relation to prejudice the Defence relies upon the affidavit of Mr. Bartulovic which was filed as exhibit “1”. In addition the applicant testified in relation to this issue.

[16] I agree with the Defence that the increased legal costs in preparation for the second trial date is a specific incurred prejudice. Apart from that aspect of the evidence, the anxiety described by the applicant while he was waiting to have these charges dealt with essentially relates to the fact that he was charged and the potential outcome of these proceedings. That

prejudice is not consequent to the further delay in this matter, rather it related to the charges being laid.

[17] The Defence reminds the Court of the principle in the case law that unreasonable delay per se may give rise to inferred prejudice. An institutional delay of twelve months is in excess of the administrative guidelines of eight to ten months which are to be considered. Prejudice may be inferred from delay in the circumstances.

[18] A stay of proceedings is a remedy of last resort. The Court in an 11(b) Charter application must also assess the impact on society and for the administration of justice from the potential of a case not proceeding to be heard on the merits. The alleged facts in relation to the driving by Mr. Bartulovic on the day in question are serious. Nevertheless where there is a period of institutional delay in excess of the guidelines and also some degree of prejudice has been sustained, the Court must defer to the constitutional right of the applicant to have his trial within a reasonable time.

[19] In the circumstances the time that the application has been established on a balance of probabilities the charges in this matter are therefore stayed.

Released: November 12, 2009

Justice Douglas B. Maund