

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: HER MAJESTY THE QUEEN v. WAYNE BURNETT

BEFORE: DURNO J.

COUNSEL: JERRY McGEACHY, for the Appellant/Crown

DOUGLAS R. LENT, for the Respondent

ENDORSEMENT

[On appeal from the judgment of the Honourable Justice Kathryn Hawke,
dated November 16, 2004]

[1] In appealing from a stay of proceedings, pursuant to s. 24(1) of the *Charter of Rights and Freedoms* based on breach of s. 11(b), the Crown argues the trial judge misapprehended the evidence, failed to take into consideration the respondent delayed the proceedings before a trial date was set, erred in finding it was only if she found the respondent was deliberately delaying the proceedings that it would impact on the s. 11(b) analysis, erred in failing to consider when the trial was not completed on the first date that the respondent had received one and one half hours of court time for a case he agreed was a one hour trial, and failed to consider the impact of delay caused by the respondent in assessing the prejudice component of the s. 11(b) analysis.

[2] I agree with the appellant that the trial judge misapprehended the evidence regarding the respondent's bail conditions. While the Crown sought a term that he not return to his workplace, the location of the offence, and he agreed to that term, the justice of the peace never mentioned the term, and it is not in the release order. There is no evidence the respondent believed he was bound by that condition.

[3] The respondent was precluded from going to his workplace, but that had nothing to do with his release order. On a subsequent appearance, he told the justice of the peace he had received a letter from his employer terminating him, and prohibiting him from returning to the location. There was no evidence that he was fired as a result of being charged, as opposed to allegedly beating up a fellow employee at the workplace.

[4] Accordingly, when the trial judge inferred he had trouble retaining counsel, because he could not return to his workplace as a result of the bail conditions, she was in error. However, Her Honour was referring to this issue in the context of the delay in the respondent retaining counsel, not in regard to prejudice in the s. 11(b) balancing.

[5] There is no doubt the actions of the respondent delayed the proceedings. It took him several months to retain counsel. However, I am not persuaded the

trial judge erred in not finding he did so deliberately. Her finding cannot be said to be unreasonable or not supported by the evidence. He lost his job as a result of the incident. He applied for legal aid, and was refused. He then sought to retain counsel privately.

[6] Counsel have different approaches to retainers. Some will take a deposit, set up a payment schedule, get on the record, and proceed as if they are fully retained. On this scenario, counsel proceeds, accepting the client's good faith and continued ability to pay. Other counsel, or the same counsel in other situations, want to have the full or close to full fee before going on the record and setting a trial date. This is a legitimate exercise of counsel's discretion. Indeed, it is prudent practice.

[7] Here, the two letters defence counsel sent, asking for 3 to 4 week adjournments before setting a trial date, are consistent with the latter practice. To be sure, the procedure delayed the proceedings, and the accused in such a situation cannot later complain that the delay should be attributed to systemic or Crown delay in a s. 11(b) application. However, it is an unwarranted stretch to suggest this procedure detracts from a trial delay application based on events after counsel is retained. In fact, it would only be if there was a finding that defence counsel was somehow complicit in a scheme to build up delay for later

trial delay use, that the adverse inference could be drawn. There was no evidence to suggest that scenario here. Neither does the Crown argue there was.

[8] I agree with the Crown that where the trial judge said it was only if she found the respondent was “truly malingering,” and had deliberately delayed the proceedings, that it would be relevant she erred. Where the accused deliberately delays the proceedings, the conduct is inconsistent with the desire for a trial within a reasonable time: *R. v. Morin* (1992), 71 C.C.C.(3d) 1 (S.C.C.) However, where the actions of the accused delay the proceedings, it is not necessary to assign blame for the conduct before the time can be deducted from the total time of systemic and Crown delay. As Sopinka J. noted in *Morin*, where the accused takes steps such as seeking a change of venue, challenging a wiretap authorization, or adjourning the case short of waiving the s. 11(b) rights, it is not a matter of assigning blame. Rather, it is legitimate conduct by the accused which results in delay, and is not included in systemic delay (p. 17). Again, the trial judge was referring to a period which she included in the intake period, neutral time in the s. 11(b) analysis, not systemic delay.

[9] The Crown argues that this is an “underestimation” of time case, because the appellant set a date for a one hour trial and after one and one half hours the

trial had to be adjourned for completion to another date. In those circumstances, *R. v. Allen* (1996), 110 C.C.C. (3d) 331 affirmed (1997), 119 C.C.C.(3d) 1 (S.C.C.), and *R. v. Qureshi et al* (2004), 190 C.C.C.(3d) 453 (Ont. C.A.) would apply, and the time would be apportioned between systemic delay and the inherent time requirements of the case. An examination of the procedures before and at the setting of the trial date are required to place this argument in context.

[10] Defence counsel conducted a telephone pre-trial conference. Such a conference is mandatory before a date is set. When counsel meet in person for the conference, there is a form that both counsel fill out with their time estimates. They also sign the forms. When there is a conference call, Mr. Lent has copies of the form and completes his copy. He filled his portion out and sent it to court with his “set date” letter with Mr. Burnett. Counsel agree that Mr. Burnett would have to take the Crown’s portion of that form to the Trial Coordinator to set a trial date and mark it on the form. He would then return to court with the date chosen by the Trial Coordinator.

[11] Here, the Crown’s form had a 3 hour estimate and 5 witnesses marked. The only portion of the defence side that was completed was the number of witnesses which indicated “0 –1”. The Crown in court gave that form to the justice of the peace. It was signed by Mr. Burnett personally. It is a reasonable

inference that he was either asked by the Crown in court to sign it, or by the Trial Coordinator outside of court, before returning with the form.

[12] Despite the fact that Mr. Lent's letter had his form attached, it was never given to the justice of the peace, or apparently the Trial Coordinator. That form, which was produced on consent on the appeal, indicated it would be a 3 hour trial. I was advised on the appeal that Crowns do not file defence counsel's copy of the form when they are separate from the Crown's.

[13] When defence counsel take the time to prepare the forms and send them with their client, it is difficult to see why they are not filed. Sending a client with a "set date" letter is a prudent procedure for defence counsel, and saves accused persons money, given the time-consuming nature of the set-date process. Adding one piece of paper to the file would not bring the system to a halt on the basis of paper overload. It is also questionable practice to require individuals who are represented by counsel to sign forms when their counsel is not there and has already completed a form. The agreement of the dates selected with counsel's letter can be placed on the record in court.

[14] When the case was called in court, the following transpired:

CROWN COUNSEL: The next matter, Your Worship, is 25 to 27 Wayne Burnett.
Your name, sir?

MR: BURNETT: Wayne Burnett.

CROWN COUNSEL: Providing new trial forms and Mr. Lent's letter. The date is on the first form.

THE COURT: Mr. Burnett, your trial date has been set for July 26th, courtroom 303, at 10:00, and that's 2004 for one hour of trial time.

[15] First, while the transcript appears to indicate there might have been two forms, the court file contains only the Crown's form. Second, there is no indication by Mr. Burnett that he agrees this was to be a 1 hour trial. Third, it is apparent that the justice of the peace misread the form, which stated it was a three hour trial. Fourth, and of greatest significance, on this record, there is no indication that anyone thought this was a 1 hour trial. According to the procedure used in the Ontario Court, the Trial Coordinator selects the date. Presumably, the scheduling is done on the basis of what appears on the form, since there is no discussion of these issues on the record. In the absence of anything to suggest that Mr. Burnett's matter was only scheduled for 1 hour and therefore he got what he asked for, I am unable to see how the 1 hour on the information is relevant. This issue was not raised at trial. I infer, because everyone knew it was a 3 hour trial.

[16] In terms of prejudice, I agree with the Crown that conduct of an accused, that shows he or she is not interested in having a trial within a reasonable time, is relevant on a claim of prejudice arising from the delay. However, for the reasons

noted above, I am not persuaded the trial judge erred in finding the respondent's conduct was consistent with a desire for a trial within a reasonable time.

[17] While the trial judge referred to the respondent suffering the type of prejudice that all accused persons suffer, there was *some* uncontested evidence of specific prejudice from the delay, in that he had to pay unspecified additional legal fees. That is relevant to his security interest.

[18] Here, the trial judge calculated the systemic delay from the first trial date to the first date offered by the court for the continuation, although Mr. Lent was not available on that date. He had been available on earlier dates which were not open to the court. The trial continued on a later date. It appears that the Court of Appeal proceeds on the basis of the operable date being the first date offered by the court: *R. v. Meisner* (2004), 7 M.V.R. (5th) 1 (Ont. C.A.); *R. v. P.A.* [2002] O.J. No. 2490, affirmed (2003) 174 C.C.C. (3d) 45. Whether this is appropriate has been addressed in other cases (*R. v. Cowall* [2004] O.J. No. 71 (S.C.J.)(QL)), but not directly addressed in the Court of Appeal. While trial and summary conviction appeal courts could benefit from guidance on this issue, I am not persuaded it is necessary to vary from the trial judge's approach in this case, which found the systemic delay was 11 months and 3 weeks.

[19] The charges were serious, and no doubt there was a societal interest in the matter proceeding. The trial judge had heard the evidence of the two independent witnesses. She had not heard the complainant, because the Crown had not made arrangements for an interpreter on the first date.

[20] I agree with the trial judge that this was very, very close to the line, but having regard to all of the circumstances, including that there was some actual prejudice from the delay, as opposed to focusing only on the systemic delay time, I am not persuaded she erred. The errors identified above would not have affected the outcome of the case.

[21] The appeal is dismissed.

DURNO J.

DATE: August 15, 2005

**COURT FILE NO.: 7927/04
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