

COURT OF APPEAL FOR ONTARIO

Grange, Griffiths and Carthy JJ.A.

B E T W E E N :	)	
HER MAJESTY THE QUEEN	)	<u>RIVA ROTTER</u> , for the
	)	appellant
Respondent	)	
	)	<u>DAVID BUTT</u> , for the
- and -	)	respondent
DOUGLAS ROBERT FRANKLIN	)	
Appellant	)	<u>Heard</u> : March 25, 1991

GRIFFITHS J.A.:

A provincial court judge at Brampton, by order dated July 27, 1988, stayed charges against the appellant on the ground that those charges had not been brought to trial within a reasonable time, contrary to s. 11(b) of the Canadian Charter of Rights and Freedoms. On appeal by the Crown, the summary conviction appeal court judge reversed the order of the provincial court judge, set aside the stay, and ordered a trial on the charges.

The appellant seeks leave to appeal to this court pursuant to s. 839 of the Criminal Code on a question of law from the summary conviction appeal court decision. The narrow issue of law raised is whether, in the circumstances of this

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(8)

case, the appellant waived his Charter rights to be tried within a reasonable time.

The Crown conceded for the purpose of this appeal that the reasoning of the majority judgment of the Supreme Court of Canada in Askov et al. v. The Queen (1990), 59 C.C.C.

3d) 449 applied to proceedings in the provincial court and that the delay of thirteen months in this case from charge to trial date was prima facie excessive under the rulings in Askov.

FACTS

The appellant was arrested on June 21, 1987 and charged with impaired driving of a motor vehicle, contrary to s. 237(a) of the Code and with operating a motor vehicle while his blood-alcohol level was in excess of .08, contrary to s. 237(b) of the Code. The appellant was released on a Promise to Appear which required him to make his first appearance in court on July 10, 1987.

On July 10, 1987 the appellant appeared in the Assignment Court of the Provincial Court. The appellant advised the presiding justice of the peace that he did not wish the charge to be read to him on that date. Instead he

presented a letter addressed to the Crown attorney from a Mr. John Burd, a paralegal agent. The letter was not read in full but Crown counsel informed the court that he had a letter from John Burd "indicating dates in May, June and July of '88, except for the 5th, 6th, 10th and 13th"

The Crown attorney further stated that he was not at that point in a position to elect whether to proceed summarily or by way of indictment on the charges. The justice of the peace then spoke to the appellant:

THE COURT: I just want to make sure that Mr. Franklin understands that. For the purposes of today's date, Mr. Franklin, unless the Crown is making an election, that that letter isn't of any assistance to you because that person can't act for you unless that election is made.

MR. KILLABY: The Crown at this point is not, it is my understanding, is not in a position to make that election.

THE COURT: So, in fact, Mr. Franklin, you're on your own.

FRANKLIN: Pardon me.

THE COURT: The letter from the ... that you brought, Mr. Franklin, only applies if the matter is a summary conviction offence. This matter before the Court isn't a summary conviction offence. They cannot act for you and they properly put out in their letter that, in fact, unless the Crown makes an election to proceed by way of summary ... summarily, that they cannot act for you. This Crown Attorney is not making that election, therefore, you, yourself, will be setting the date because the letter means nothing at this

point. I mean, we can perhaps choose a date that's in that letter, but you should understand yourself that those people can't act for you, not at this point.

After a further exchange, the appellant asked if he to set a trial date that day. The justice of the peace advised the appellant that he was not required to set a date trial at that time but that he could have time to speak to a lawyer. The justice of the peace then offered a three week adjournment to July 31, 1987 to set a trial date, to which both the appellant and the Crown agreed.

On July 31, 1987, the appellant and his paralegal agent John Burd appeared in court before the same justice of the peace. The Crown gave no indication of an intention to elect to proceed summarily or by way of indictment on that date. The record reveals that the following brief exchange took place:

MR. BURD: Good morning, Your Worship. I appear on behalf of the accused. My name is Don [sic, John] Burd, B-U-R-D, and we're here to set date for trial.

THE COURT: Thank you. The 27th of July.

MR. BURD: That is acceptable, Your Worship.

THE COURT: July the 27th then, for trial on the matter, ten o'clock in the morning, courtroom number nine.

MR. BURD: Thank you, Your Worship.

THE COURT: Thank you

On July 26, 1988 the appellant retained legal counsel, Ms. Riva Rotter. The next day, July 27, 1988, the date set for trial, the appellant and his counsel, Ms. Rotter, appeared before the Provincial Court judge slated to hear the trial if it were to proceed summarily. Counsel for the Crown informed the Court that she had just been advised that morning of defence counsel's intention to bring a s. 11(b) Charter application to stay the charges. The appellant's counsel advised the court that in view of the lack of notice to the Crown regarding the application she would consent to an adjournment and waive that period of delay should the Crown request the adjournment. The court indicated to Crown counsel that under the circumstances she was undoubtedly entitled to more advance notice of an intention to raise a constitutional challenge and that an adjournment would be granted if requested. Crown counsel advised that she did not seek an adjournment.

The appellant was then arraigned on the two charges and the Crown indicated for the first time an intention to proceed summarily. The appellant pleaded not guilty to each charge.

Counsel for the appellant advised the Court that she did not have transcripts of the prior appearances of appellant before the court but that she proposed to adduce the viva voce evidence of the agent John Burd to establish circumstances under which the trial date was set. Prior to the hearing of that evidence, a brief exchange took place wherein John Burd advised the court that prior to appearing in open court, he had been advised that July 7, 1988 was earliest trial date available:

THE COURT: As to the question as to whether July the 27th, 1988 was the earliest trial date available.

MR. BURD: That's why I did consent to it because I was informed that that was the earliest trial date.

THE COURT: All right. Does the Crown say anything other than that July the 27th, 1988 was the earliest trial date. I would be surprised if you told me you could have given him an early date, but refused.

MS. KASTNER: Well I would definitely not agree with Your Honour's latter suggestion because there would be no refusal for an earlier date if there's one available.

THE COURT: Exactly.

MS. KASTNER: The only difficulty that there is, Your Honour, it's really not a disagreement so much as an assertion of the right. If an accused in this jurisdiction asserted that he wanted an earlier trial date he was permitted at that time as well as this time, except His Honour Judge August is now ill, but to go before Judge August in courtroom

eight and request an earlier date and we were back filling earlier dates if there was a direct assertion that they wanted something earlier. And that was being ... that has been done in this jurisdiction for approximately one year and a half that we were back filling dates, such that even this past May some of these July dates that we are having now were given for offence dates of last May if they were requests. If they're for instance assaults with children involved, where families are being apart for a period of time and there was a request on a humanitarian basis for an earlier date the senior judge was back filling dates where adjournments were granted and so on. So although I really don't have a disagreement with Mr. Burd indicating that he may have been told that's the earliest date the assertion stops there and there could have been other steps is really what I would be examining on that the accused could have taken.

John Burd then gave viva voce evidence the substance of which was as follows: Burd had been a police officer for twenty-three years but was then working as a court agent defending people on Highway Traffic Act offences. He had been retained by the appellant whom he had known for many years and was acting without remuneration. He had given a letter to the appellant to take to court on his first appearance on July 10, 1987. That letter (which was never produced) stated that the intention of the appellant was to enter a plea of not guilty and indicated that Burd had a wide open calendar and except for certain dates mentioned, was prepared to proceed at an

early date. On July 31, 1987, Burd appeared with the appellant at the assignment court to set a trial date. Prior to appearing in assignment court, Burd spoke with the Crown attorney in charge and requested the earliest trial date but was told that the earliest date available was July of 1988. Burd testified that he told the Crown his calendar was wide open and he could accept any date. Burd said that he was taken back by the proposed trial date as he had previously been unaware of the delays in Peel Region. He testified he strongly objected to the proposed trial date and asked for an earlier one but was informed by the Crown attorney there was no alternative and that the earliest date was July of 1988. Only after learning that no other date was available did Burd agree to the proposed trial date of July 27, 1988. He further testified that he was not aware of any procedure whereby a motion could be brought to secure an earlier trial date.

THE RULING OF THE TRIAL JUDGE

The trial judge granted the application under s. 11(b) of the Charter to stay the charges on the ground that the delay had been excessive. He began with the proposition that the delay which he believed to be thirteen months was prima facie excessive. He then dealt with the issue of waiver as follows:

What I have to be concerned about, however, is whether in the Franklin case a Charter violation occurred. First of all, it seems to me that on the basis of the evidence presented to me that an effort was made to get as early a trial date as could be. It might have happened had information been brought to Mr. Burd, or to Mr. Franklin, or indeed to counsel that an earlier date may have been set. It wasn't. I must conclude that an earlier date might have been given had an application been made for it. I cannot bring myself to fault the accused for not bringing an earlier date in an effort to avoid a Charter violation it is to be his fault.

As I said earlier, I think if he knew about the procedure he would have taken advantage of it. The evidence is capable of no other conclusion. A charge of impaired driving, driving over 80 as is demonstrated by other jurisdictions is something that should be dealt with certainly before 13 months and probably before six or seven months. That happens on a regular basis at the Old City Hall where I usually sit, although I do travel across the province.

I think that the time of 13 months is prima facie excessive. I do not think that when one considers the factors of the length of the delay, the reason for the delay, the defendant's assertion of his rights, and the prejudice to the defendant that I should conclude other than [sic] that there has indeed in this case been a Charter violation. Again, to repeat, primarily because of the fact that the application of the matter might have been dealt with earlier was kept from the accused. Accordingly, there will be a stay of proceedings.

THE REASONS OF THE SUMMARY
CONVICTION APPEAL COURT JUDGE

The District Court judge presiding in the summary conviction appeal court reversed the above decision. He was critical at the outset of the failure of the appellant and his counsel to give advance notice of the intention to bring the s. 11(b) application to stay the proceedings and to have the transcripts of the earlier proceedings before the court. In his reasons he said:

Counsel for the respondent who was counsel at the time this motion was successfully argued before the trial judge advised the court that the reason she didn't give notice was because she had only just recently been retained and didn't have an opportunity to serve notice and I accept that as being so as I am sure the trial judge did. But having said that, it is necessary to be said that when a motion such as that is to be brought on, it is most important that prior notice be given. It is even more important that transcripts be presented to the trial court. It is very apparent, when one looks at the bold transcripts of what transpired, that one gets a very very different impression about what happened here than when one listens to the viva voce evidence and the submissions that were made.

It goes without saying that if information is put forth even by way of affidavit or by way of viva voce evidence, on a motion like this without some notice to the other side, then that evidence should be given somewhat less weight than if there had been an opportunity ahead of time for the other side to prepare for it. It does not

answer that argument to say, well, the crown could have had an adjournment, they were invited to seek an adjournment on that occasion. That is not an answer to the question. To do that further delays the proceedings, further inconveniences the witnesses and further clogs the courts.

So, I say that there should be notice. There should be Notice of Motion. There should be notice of what is intended to be called, be it by the way of an outline or who the witnesses would be or the affidavit and I think it imperative that the transcripts be filed.

With respect to the issue of the unreasonable delay, the summary conviction appeal court judge said:

There is no question there is delay and the delay that occurred is basically a systemic delay. But it is not a delay, as I understand it, that could not at least be attempted to be overcome if the person asserts their desire for an earlier trial date. It goes without saying that the judicial process is in the hands of the judiciary. Even if I or the trial judge accepted in total what was inferred by Mr. Burd on his evidence, the information that he received was from a crown attorney that an earlier date was not available. He did not receive that from a court.

There may well be in some situations an estoppel against the crown arguing that an earlier date could have been had, had they asked for it in court, but in this circumstance, this is a man, as I have said, and as he pointed out has had 23 years as a police officer dealing in the courts, as I believe a breathalyzer officer. I could be wrong on that, but I know he spoke at some length about his involvement in the "Ride" programme when

he was a police officer. He certainly knows that the setting of dates is a matter that is determined in court and it is for the judiciary to determine. Had he, an experienced person raised the issue, it may well be that an earlier date could have been given. He did not raise the issue. In determining that issue, the trial judge should have considered, first of all the length of delay, the reason for the delay, the defendant's assertion of his right and the prejudice to the defendant.

In this case there is a delay, a substantial delay, 12 months, actually a little less than 12 months from when the accused was ready to set a date for trial. The reason, I would take it, is systemic. The defendant did not assert his right to an earlier date and I am not satisfied that there is any evidence of any prejudice to the defendant. I therefore conclude that the trial judge was in error in concluding that he was satisfied on balance that the applicant had satisfied the onus of establishing on balance that there was a violation of his right to an earlier trial, that there had been an unreasonable delay and as a result the stay must be set aside and it will be sent back for a new trial.

**THE REQUIREMENTS AS TO NOTICE
OF A CHARTER CHALLENGE**

I am in complete agreement with the reasoning of the summary conviction appeal court judge that, in general, an accused who intends to raise a Charter challenge at trial or any other hearing should give the Crown a reasonable notice of such a proceeding. A formal Notice of Motion indicating the

nature and grounds of the challenge along with affidavit and other material relied upon in support of the application should be served. Transcripts of hearings relevant to the application should certainly be delivered and filed. Since the onus is on the Crown to prove that the delay in bringing the matter to trial is not contrary to s. 11(b) of the Charter, where such delay appears prima facie to be excessive then the Crown in fairness should be given advance notice of any challenge so that the Crown will have adequate time to organize whatever evidence is necessary to meet the challenge.

Clearly, however, it is open to the Crown to waive formal notice and the delivery of transcripts of earlier proceedings. Here, counsel for the appellant offered to adjourn the application without prejudice to allow the Crown time to prepare for the motion. The court also invited the Crown to seek an adjournment but the Crown elected to proceed with the hearing at that time and to waive prior notice.

It is not clear that an adjournment would have served any useful purpose to the Crown. The appellant was relying principally on the evidence of the agent Burd whose evidence for the most part appears to have been accepted by the Crown. It seems unlikely the Crown required an

adjournment to call further evidence, when the evidence of Burd was not challenged.

THE PROOF OF PREJUDICE TO THE APPELLANT

I agree with the summary conviction appeal court judge that the appellant did not establish any actual prejudice in this case. However, it appears from the record that Crown counsel conceded, and the trial judge held, that it was unnecessary for this appellant to adduce evidence of actual prejudice where the delay was conceded to be unreasonably long; prejudice to the accused may be inferred. As Cory J. said in Askov, pp. 482-3:

The different positions taken by members of the court with regard to the prejudice suffered by an accused as a result of a delayed trial are set forth in Mills and Rahey. Perhaps the differences can be resolved in this manner. It should be inferred that a very long and unreasonable delay has prejudiced the accused. As Sopinka J. put it in Smith, supra, at p. 111:

Having found that the delay is substantially longer than can be justified on any acceptable basis, it would be difficult indeed to conclude that the appellant's s. 11(b) rights have not been violated because the appellant has suffered no prejudice. In this particular context, the inference of prejudice is so strong that it would be difficult to disagree with the view of Lamer J. in Mills and Rahey that it is virtually irrebuttable.

Nevertheless, it will be open to the Crown to attempt to demonstrate that the accused has not been prejudiced. This would preserve the societal interest by providing that a trial would proceed in those cases where despite a long delay no resulting damage had been suffered by the accused. Yet, the existence of the inference of prejudice drawn from a very long delay will safely preserve the pre-eminent right of the individual. Obviously, the difficulty of overcoming the inference will of necessity become more difficult with the passage of time and at some point will become irrebuttable. None the less, the factual situation presented in Conway serves as an example of an extremely lengthy delay which did not prejudice the accused. However, in most situations, as Sopinka J. pointed in Smith, the presumption will be "virtually irrebuttable".

Generally, the failure of the accused to prove actual prejudice will not necessarily be fatal to an application for s. 11(b) relief. The lack of evidence of actual prejudice is but one of the factors to be taken into consideration in determining whether an accused's Charter rights have been infringed. Here, it was conceded that the delay of thirteen months was excessive and could not be justified and therefore it would be difficult to conclude that the appellant's s. 11(b) right had not been violated, even in the absence of proof of actual prejudice.

WHETHER THE APPELLANT WAIVED HIS
RIGHTS TO AN EARLIER TRIAL DATE

I turn now to the main issue on this appeal and that is whether the appellant, by consenting to the July 1988 trial date, waived his right to be tried within a reasonable time.

Before this court counsel for the Crown submitted that the waiver of the appellant's s. 11(b) Charter rights may be inferred from the fact that the appellant's agent accepted on record at least, the July 27, 1988 date. Counsel points out that on the date of the appellant's first appearance in court, he provided a letter from his agent Burd requesting a trial date in May, June or July of 1988. The Crown submitted that although the trial date was not set at that time, the agent for the appellant later expressly agreed to the July 1988 date and made no request to proceed on the earlier dates set out in his letter or on any earlier date. At worst, the Crown submitted, there was a short delay of a few weeks or months beyond the earliest May 1988 date suggested by Burd on behalf of the appellant.

The summary conviction appeal court judge placed primary emphasis on the failure of the appellant "to assert a right to an earlier date" and, in particular, on the failure to assert that right in open court rather than relying on the

information received from the Crown attorney that an earlier date was not available

We must keep in mind the words of Cory J. in Askov on the subject of waiver. He said at pp. 481-2:

The accused should not be required to assert the explicitly protected individual right to trial within a reasonable time. It is now well established that any waiver of a Charter right must be "clear and unequivocal ... with full knowledge of the rights the procedure was enacted to protect and of the effect the waiver will have on those rights in the process": see Korponey v. A.-G. Can. (1982), 65 C.C.C. (2d) 65 at p. 74, 132 D.L.R. (3d) 354 at p. 363, [1982] 1 S.C.R. 41 sub nom. Korponay v. A.-G. Can. The failure of an accused to assert the right does not give the Crown licence to proceed with an unfair trial. Failure to assert the right would be insufficient in itself to impugn the motives of the accused as might be the case with regard to other s. 11 rights. Rather 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. Although no particular magical incantation of words is required to waive a right, nevertheless the waiver must be expressed in some manner. Silence or lack of objection cannot constitute a lawful waiver. The matter was put in these words by Dickson J., as he then was, in Park v. The Queen (1981), 59 C.C.C. (2d) 385 at pp. 392-3, 122 D.L.R. (3d) 1 at pp. 8-9, [1981] 2 S.C.R. 64:

No particular words or formula need be uttered by defence counsel

to express the waiver and admission. All that is necessary is that the trial Judge be satisfied that counsel understands the matter and has made an informed decision to waive ... Although no particular form of words is necessary the waiver must be express. Silence or mere lack of objection does not constitute a lawful waiver.

If the Crown is relying upon actions of the accused to demonstrate waiver, then the onus will lie upon the Crown to prove that a specific waiver can be inferred. It may well be that the setting of trial dates and the agreement to those dates by counsel for the accused may be sufficient to constitute waiver. This possibility was noted by Sopinka J. as stated in Smith, supra, at p. 109:

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.

In sum, the burden always rests with the Crown to bring the case to trial. Further, the mere silence of the accused is not sufficient to indicate a waiver of a Charter right; rather, the accused must undertake some direct action from which a consent to delay can be properly inferred. The onus rests upon the Crown to establish on a balance of probabilities that the actions of the accused constitute a waiver of his or her rights.

In this case, although the appellant "accepted" a trial date of July 27, 1988, he did so on the basis that agent Burd had been informed by the Crown attorney that an earlier trial date was not available. As mentioned above, Burd's testimony that he had told the Crown that he had a wide open calendar, that he objected to the July 1988 date but was advised that no earlier date was available was accepted by trial judge.

I do not see how, on this evidence, the Crown has met the burden of proving that a specific waiver should be inferred. Further, I do not agree that the failure of the accused to request an earlier date in open court in these circumstances should constitute a waiver of his rights. The appellant, as the evidence indicates, accepted the trial date having been told by the Crown attorney, a representative of the Attorney General and an officer of the court, that an earlier trial date could not be obtained. The Crown has not met the burden of proving that the appellant, with full knowledge of his right to an earlier trial as guaranteed by s. 11(b) of the Charter, either expressly or by implication waived that right

Moreover, the evidence does not establish that an earlier trial date was available to the appellant even if he had made the request in open court. I say this, even though the trial judge concluded that an earlier date might have been given had the appellant applied for it. In my respectful view, there is no evidence to support that conclusion. I have cited earlier a statement made by the Crown attorney during argument that an earlier trial date might be obtained if the accused made special application to His Honour Judge August. But the reasons given for expediting the trial were "if they're for instance assaults with children involved, where families are being apart for a period of time and there was a request on a humanitarian basis for an earlier date, the senior judge was backfilling dates where adjournments were granted and so on".

Even assuming the Crown statement constituted evidence, there is no suggestion here that the appellant would have qualified for a speedy trial under the criteria mentioned. The burden rested on the Crown to establish, first, that in the circumstances of the case, the appellant should reasonably have requested an earlier trial date and, second, that the request of the accused would have been accommodated.

DISPOSITION

In my view, the Provincial Court judge applied correct principles of law and made findings of fact open to him on the evidence. His conclusion that the appellant's s. 11(b) Charter rights had been violated and that appellant had not waived such rights ought not to have been disturbed on appeal.

Accordingly, leave to appeal is granted, the appeal is allowed and the initial stay of judicial proceedings on both charges is restored.

W. D. S. J.
I agree
I agree
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NO. 151/89

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B E T W E E N :

HER MAJESTY THE QUEEN

Respondent

- and -

DOUGLAS ROBERT FRANKLIN

Appellant

J U D G M E N T

RELEASED:

8 July 91

[Signature] JA