COURT FILE No.: Toronto 307479
DATE: 2009·05·26
Citation: *R. v. Jayasekera*, 2009 ONCJ 244

ONTARIO COURT OF JUSTICE

B E T W E E N :

HER MAJESTY THE QUEEN

— AND —

RENNIE JAYASEKERA

Before Justice P. Robertson
Heard on May 6, 2009
Reasons for Judgment released on May 26, 2009

Joe Dart .... **for the Crown**
Robbie Tsang .... **for the accused Rennie Jayasekera**

ROBERTSON J.:

[1] This is an application under s. 11(b) of the Charter for a stay of proceedings.

[2] Section 11(b) of the Charter seeks to protect both the rights of the accused and the rights of society.

[3] It protects three rights of the individual:

i) the accused's right to security of the person by minimizing the anxiety and stigma of criminal proceedings,

ii) the accused's right to liberty by minimizing the effect of pre-trial custody or restrictive bail conditions and

iii) the accused's right to a fair trial by ensuring that the proceedings occur while evidence is fresh and available.

[4] Section 11(b) also seeks to protect two societal interests:

i) the public's interest in having our laws enforced by having those who break the law tried quickly and

ii) the public's interest in having those accused of crime dealt with fairly.

[5] To decide whether there has been an infringement of s. 11(b), the court must balance the individual and society goals, in the context of the length and causes of the delay.

[6] Although the court is to consider both individual and societal interests, the primary purpose of s 11(b) of the Charter is the protection of the interests of the individual.

[7] In R. v. Morin (19920, 71 C.C.C. (3d) 1 (S.C.C.), the Supreme Court of Canada set out a framework for this judicial balancing. Four factors must be considered:

1) the length of the delay

2) waiver of time periods

3) the reasons for the delay including:

(a) inherent time requirements of the case

(b) actions of the accused

(c) actions of the crown

(d) limits on institutional resources and

(e) other reasons for the delay and

4) prejudice to the accused

FACTS OF THE CASE

[8] Mr. Jayasekera is charged with over 80.

[9] He was arrested November 11, 2007. The information was sworn on November 13th.

[10] His first court appearance was December 17th. Counsel appeared for the accused. No disclosure was available and the matter was remanded at counsel's request 4 weeks to January 17, 2008.

[11] On January 17th counsel again appeared for the accused. Disclosure was provided and the matter was adjourned to January 31, 2008.

[12] On January 31, counsel appeared for the accused and a judicial pre-trial was held and a trial date of December 19, 2008 was selected.

[13] On the trial date, the investigating officer was ill and the Crown requested and was granted an adjournment. A new trial date was set for May 6, 2009.

LENGTH OF DELAY

[14] This is the time from the date the information is sworn, November 13, 2007 to the trial date, May 6, 2009. This is a total period of 17 ¾ months.

[15] This is certainly of a length that warrants an inquiry.

WAIVER OF TIME

[16] There is agreement that the defence did not at any time waive their 11(b) rights.

REASONS FOR DELAY

INHERENT TIME REQUIREMENTS OF THE CASE

[17] Every case requires time to prepare for trial. Disclosure needs to be prepared, vetted, copied and provided to the defence. The accused needs time to hire counsel, to review disclosure, meet with their counsel, consider their options and for the defence to prepare for and conduct a pre-trial with the Crown attorney's office.

[18] The period of time to carry out such functions is called the intake period and it is considered neutral in the delay calculus.

[19] The defence submits that the reasonable intake period for this case should be from November 13, 2007 to the first appearance on December 17, a period of slightly more than 4 weeks.

[20] Mr. Tsang submits that given that this is a simple straight forward run of the mill over 80 case, where all of the investigation was completed on the night of the accused's arrest, that the delay in providing disclosure to January 17, 2008 means that the period from December 17th to January 17th should be attributed to the crown.

[21] Mr. Dart submits that a reasonable intake period for such cases in this jurisdiction is in the 2-3 month period and even longer periods have been found to be acceptable. The period from November 13, 2007 to January 31, 2008 is in the middle of the range.

[22] What is guaranteed by the Charter is a trial within a reasonable period of time, not a trial in the fastest time possible. Although the investigation of Mr. Jayaseraka was completed on November 11, there are many other demands on the police and the justice system than processing Mr. Jayaseraka's charges. His charges may not be first and foremost to process. This doesn't mean that the system can take whatever time it wants to process charges, but it equally true that it is not to be held to a standard of processing charges in the fastest possible fashion. An intake period for a charge of 80 of 2-3 months is quite normal, acceptable and is reasonable.

ACTIONS OF THE ACCUSED

[23] It is not alleged that the defence is responsible for any delay in the proceedings.

ACTIONS OF THE CROWN

[24] Mr. Tsang submits that the delay brought about by the adjournment obtained by the crown on the first trial date is delay attributable to the crown and that they are responsible for the time from December 19, 2008 to May 6, 2009, the second trial date.

[25] Mr. Dart submits that the delay of the trial due to the adjournment obtained by the crown was necessitated by the last minute sickness of its investigating officer, and as such the delay is not attributable to the crown, and is properly considered neutral. The crown submits that the officer's illness is just one of those unpredictable things in a human system.

[26] On December 19, 2008 the crown sought and obtained an adjournment of the trial as a result of the breath technician, a key witness for the crown, being unavailable due to an unexpected illness. He had taken ill the night before and had to be relieved of duty. He was bedridden on the trial date. Defence counsel on the trial date stated that he could not reasonably oppose the adjournment given the sudden illness of the officer and admitted that the adjournment was reasonable.

[27] Mr. Tsang does not submit that the crown is at fault for the delay but that they nevertheless are responsible for the delay. He submits that any delay caused by the Crown is crown delay. I disagree. For example, the time it takes for the crown to marshall disclosure is not attributable to the crown, although the crown is the cause for the delay. Although the crown "causes the delay", it is considered neutral in the delay calculus.

[28] In support of his position Mr. Tsang relies in part on the case of R. v. Smith [1989] 2 S.C.R. 1120 (S.C.C.).

[29] I find that Smith is quite distinguishable from the facts before me.

[30] In Smith the crown delayed the setting of a preliminary inquiry date given the unavailability of the officer in charge. Smith was a complex commercial crime case and when the date was being set the officer in charge was on a year leave of absence. The crown was in receipt of a letter from the police service which confirmed that the officer would be able to attend to give his evidence, but he would not be able to attend to provide assistance to the crown for the full week scheduled for the preliminary inquiry. A replacement officer was offered to assist the crown. Instead of accepting this offer, the crown chose to delay the inquiry, not once but twice, pending the availability of the officer in charge.

[31] Sopinka, J. writing for the Court found the resulting delay to be unreasonable. Even on the facts in Smith however, Justice Sopinka stated at para. 34, that the Crown might well have been justified to delay the proceedings to accommodate the officer in charge the first time but when the second date chosen was not going to work out the crown should have proceeded without the original officer in charge.

[32] In Smith the delay was not to accommodate the officer to give his evidence. That he was available to do. The delay was to accommodate the crown's wish to have the original officer in charge of the case in court to assist the prosecutor.

[33] This is quite different from an adjournment due to the unavailability of a key witness due to unexpected sudden illness. In the present case, it would have been impossible for the crown to proceed in the absence of the witness whereas in Smith, it was merely an inconvenience to the crown to proceed in the absence of the original officer in charge.

[34] I believe that the case at bar is much more consistent with the principle set out in R. v. Meisner [2004] O.J. 3812 (Ont.C.A.). In that case it was discovered that the presiding justice had, as a lawyer, acted for the accused. It would have been improper for the judge to continue and therefore, like the case at bar, the case could not proceed due to an unexpected and unforeseen problem. In Meisner, the Court of Appeal found that the delay caused by the required rescheduling of the trial date was neutral. The Court in Meisner at para 3. stated,

> "The adjournment of the appellant's trial is an example of one of those things that happens from time to time in the criminal process for which no one can be faulted and which almost inevitably requires an adjournment and rescheduling. Just as

> intake time is allowed when a case initially comes into the criminal justice system, it is inherent in the process that some time must be allowed to reschedule matters that are adjourned for reasonable and unforeseeable reasons for which no one can be faulted. In this case, the system was ready to accommodate the appellant some three months after the first scheduled trial date. In our view, this was a reasonable accommodation and we would regard that three- month period as neutral for the purposes of the s. 11(b) assessment."

[35] The second trial date was accommodated within 4 ½ months. As stated in Meisner, some time must be allowed to reschedule matters that are adjourned for reasonable and unforeseeable reasons. Meisner was, like the case at bar, a one day drinking and driving case. The second trial date in the present case took a little longer to reschedule than the matter in Meisner, but given the extremely busy schedule of Ontario Court of Justice, a rescheduled trial date within 4 ½ months is a reasonable accommodation.

[36] I also note that in addition to the ultimate trial date selected of May 6, 2009, defence counsel was offered 8 dates within 1 ½ months for the second trial date. Counsel was unavailable on any of these dates.

[37] Mr. Tsang drew my attention to my brother Justice Duncan's decision in R. v. Lof [2004] O.J. 4963 (O.C.J.) wherein the Court found in regard to the offering of blitz dates, that the offering of "only a few dates or dates in a narrow range will mean little or nothing" as regard to calculating delay and to who is responsible for that delay. Lof was approved of in R. v. Rego [2005] O.J. 4768 (Ont.C.A.).

[38] Mr. Tsang submits that the 8 dates offered were too close for him (or his office), as busy counsel to be available and therefore really amounts to no offer at all.

[39] Mr. Dart on the other hand submits that I should be guided by R. v. J.J. [2008] ONCA 133 (Ont.C.A.). In that case, following a mistrial, the matter was rescheduled for retrial in September 2004. Unfortunately the matter was not reached and new trial dates were offered for November 2004, but due to the busy schedule of counsel, these dates were not available and the trial could not proceed until March 2005. The court in J.J. stated,

> "We are not unsympathetic to the position of busy counsel who because of commitments, …, is unable to reschedule a two week trial immediately. However, the dates suggested by the trial court for the new trial date were not unrealistic. We agree with the motion judge when he said, "While an accused has a right to counsel of choice and that counsel is unavailable because of prior trial commitments, it is wrong to attribute delay to the system when , in fact the system could have accommodated an expeditious trial."

[40] I accept Rego as a correct statement of the law and if counsel had been offered a few dates in a narrow range of dates, I agree that this would have done little to effect the delay calculus. But that is not what happened here. Here the defence was offered **8 dates** for a **one day trial** and those dates were **over a 1 ½ month period**. In J.J. the court found dates offered within 2 months for a 2 week trial sufficient to be meaningful. Although in my view nothing turns on this in light of my finding that rescheduling the trial date in 4 ½ months was a reasonable accommodation, I would also find the offer of 8 dates within 6 weeks for a 1 day trial, also to be a reasonable accommodation.

[41] The delay of 4 ½ months caused by the required rescheduling of the trial date, although neutral in the delay calculus, is most appropriately characterized as delay due to "Other", the fifth category under "Reasons for Delay" in the Morin framework.

INSTITUTIONAL RESOURCES

[42] This is the time taken from when the parties are ready to set a date for trial, to the date the system can accommodate them; in this case that is from January 31, 2008 to December 19, 2008, a period of 10 ½ months.

OTHER

[43] As stated above, I would consider the time taken to reschedule the trial and obtain a 2nd trial date is time best considered under the "Other" category and I would consider the time neutral.

PREJUDICE

[44] Prejudice to the accused can be either:

i) *inferred* as a result of the length of the delay or
ii) *actual*, based on evidence called by the defence or dispelled by evidence called by the Crown.

[45] The prejudice that is of concern in a section 11(b) analysis is not prejudice associated with the laying of criminal charges, but the prejudice arising from the "delay" in processing or disposing of the charges; Rahey v. The Queen, [1987] 1 S.C.R. 588 at 624 . The focus is prejudice emanating from a situation "prolonged", as opposed to the situation itself. See also Hill, J. in Regina v. Silveira [1998] O.J. No. 1622 (O.C.J. (General Division)).

[46] The defence submits that prejudice to the accused should be inferred from the length of the delay in this matter. The longer the delay in proceedings, the more likely that inference should be drawn.

[47] While the institutional delay is over 10 months and therefore exceeds the upper limit of the Morin guidelines, the delay is not significantly in excess of those guidelines. Nevertheless, delays of less than 10 months can be unreasonable, depending on the assessment of all of the factors.

[48] If any prejudice is to be inferred in this case, I find it to be minimal.

[49] Section 11(b) protects an accused's security of the person interests, liberty interest and their fair trial interests. Mr. Jeyasakara submitted an affidavit alleging the prejudice he has suffered. He was cross examined on that affidavit.

[50] I would accept that the total delay of 17 ¾ months has no doubt prolonged the agony and stigma associated with having a criminal charge hanging over one's head and from this, I am prepared to infer that the accused's security of the person interests have been infringed.

[51] There is however no evidence that the delay has affected the accused's liberty interests or his fair trial interests. The accused was release on a form 10 and has only made personally, a few court appearances having otherwise appeared by designation of counsel. He has not been subject to any onerous bail conditions and the lost of driving privileges is unconnected with the delay of the trial as the suspension of driving privileges would have occurred even if his trial had been held within 4 months of arrest.

[52] The accused fair trial interests were not affected by the delay in that the accused testified that he can recall the events leading to his arrest. There is no evidence to suggest that the evidence of the crown has faded such that it would make it more difficult to defend against the allegations or that the testimony of a witness has been lost.

[53] In all, although there is inferred prejudice from the length of the delay on the accused' security of the person interests, I do not find it to be beyond minimal.

[54] In addition to some inferred prejudice, I also do find some actual prejudice. It is clear to me that the Applicant is of modest means. I accept Mr. Tsang' submission that the reason this Application was brought on the trial date as opposed to three months before as required by practice direction of this Court, was the fact that the accused could not raise the funds earlier to fund the Application.

[55] I accept that as a result of the need for a 2^{nd} trial date, due to no fault of his, the Applicant has had to pay his counsel twice to prepare for trial. This economic hardship or cost is a form of actual prejudice associated with the delay.

BALANCING OF THE FACTORS

[56] This is a simple routine over 80 case.

[57] In balancing the interests that the section was designed to address, I am cognizant of not only the primary aim of the section but also the community and societal interests of seeing accused persons dealt with on the merits of their case and dealt with fairly.

[58] The total delay in this case is 17 ¾ months. Neutral intake is 2 ¾ months and a further neutral period associated with the required rescheduling of the trial date is 4 ½ months. This leaves an operative delay of 10 ½ months. Little prejudice is inferred in light of the marginal excess beyond the Morin guidelines and although I have found some actual prejudice, it is limited to the economic cost of funding counsel to prepare twice for trial.

[59] In the absence of any impact on the accused's fair trial or liberty interests, the minimal impact on the Applicant's security of the person interests, my finding that the only actual prejudice is economic and that the operative delay is marginally over the upper guideline set out in Morin, I find that the Applicant's section 11(b) rights have not been breached and the Application is therefore dismissed.

Released: May 26, 2009

Signed: "Justice P. Robertson"