

Case Name:
R. v. Piskun

Between
Her Majesty the Queen, and
Alexandra Piskun

[2008] O.J. No. 3705

Ontario Court of Justice
Brampton, Ontario

S.F. Clements J.

Heard: May 2, 2008.
Oral judgment: May 2, 2008.

(44 paras.)

Counsel:

S. Bauman: Prosecutor.

B. Castlemore: Agent Representing Alexandra Piskun.

RULING ON APPLICATION

1 S.F. CLEMENTS J. (orally):-- This is an appeal pursuant to section 135 of the Provincial Offences Act filed on behalf of the prosecution.

2 The prosecution raises a number of issues with respect to the proceedings before Her Worship Justice H. Weiss on December the 12th, 2006.

3 In particular, the Crown submits that Justice Weiss' reasons for staying the proceedings for unreasonable delay pursuant to section 11(b) of the Canadian Charter of Rights and Freedoms was erroneous, that it was not reasonable, and was an error in law.

4 The prosecution further submits that there was not sufficient time attributed for a neutral intake period, that there was no prejudice to be inferred, and that there was no evidence of actual prejudice.

5 In the material filed by the prosecution, there is a summary of the history of these proceedings before the Ontario Court of Justice, and they are as follows.

6 On November the 8th, 2005, the defendant was stopped by the Peel Police and was given a ticket, or a notice of offence for speeding 95 kilometres per hour in an 80 kilometre zone.

7 On November the 14th, 2005, a certificate of offence was filed with the Clerk of the Provincial offences Court at 5 Ray Lawson Boulevard in the City of Brampton as is required under the legislation.

8 On November the 18th, the defendant filed a notice of intention to appear for her trial in this matter. A copy of that notice is attached to the documents before the court on this appeal.

9 That particular notice is necessary to trigger the setting of a trial date under the legislation and, indeed, a notice of trial, a copy of which is attached to the material, was issued on that same date, November the 18th, 2005, setting a trial date on the 12th of December, 2006, at 9:00 a.m.

10 Parenthetically, I note that from the examination of the respondent at trial, she was asked about whether or not the Clerk of the court at the time of the setting of the trial date asked for any input from her with respect to the date, and whether or not they asked her if she would like an earlier date than the one provided. Her uncontradicted response was no to both of those questions.

11 The portion of the notice of trial document that is for official use only indicates that this notice of trial was sent by mail to the defendant, that it was given to the prosecutor, and it was given to the agent, although to be fair about this, Ms Bauman, on behalf of the prosecution, says that they didn't receive notice in her office for approximately two weeks following the setting of this trial date. This was around the 1st of December 2006, or shortly thereafter.

12 On November the 8th, 2006, an application was filed for a stay of proceedings for unreasonable delay pursuant to section 11(b) of the charter. On December the 12th, 2006, the matter was argued successfully before Justice Weiss, as I've indicated, and she stayed the proceedings.

13 The criteria to be applied in a section 11(b) application is set out in a Supreme Court of Canada judgment in *R. v. Sharma*.

14 They are, the length of the delay, waiver of time periods, reasons for the delay, including inherent time requirements, actions of the accused, actions of the Crown, limits on institutional resources, and other reasons for delay, and finally, prejudice to the accused person.

15 The individual right, which the section seeks to protect are the right to. security of the person,

the right to liberty, the right to a fair trial. As Justice Hill pointed out in *R. v. Pusic*, [1996] O.J. No. 3329, 167, the rights to the security of the person are as jealously safeguarded as the rights to the liberty of the person.

16 The entire time period between the laying of the charge, or in this case, the filing of the certificate of offence, and the completion of the trial must be examined. The issue is the reasonableness of the overall delay. The overall delay can only be assessed in light of the reasons that explain the delay's constituent part. The systemic delay clock starts to run from the time that this matter is ready to set down for trial.

17 In this case, the matter was set down for trial on November the 18th, 2005. On all the information before me, the earliest available date upon which the system could accommodate this matter was December the 12th, 2006, which is in excess of one year beyond the date the matter was set for trial.

18 The prosecution has argued that there was not adequate or appropriate time allowed for intake. That is the period when the parties are preparing to put themselves in a position, so that they can set a date for trial.

19 I note in Justice Andre's decision, which was provided to me by the prosecution, that Justice Andre made the following observation at paragraph 12. And that judgment is to be found at [2007] O.J. No. 4683:

"I should note, however, that the Provincial Offences Act indicates that provincial matters such as Highway Traffic Act offences should ideally be dealt with very expeditiously. Indeed, the protocol for prosecutions set out in the Provincial Offences Act is premised on an assumption that these matters, which perhaps do not require complex administrative requirements of criminal matters, would ensure that these types of matters proceed rather expeditiously in the provincial courts."

20 There can be no doubt that what Justice Andre was alluding to was the fact that in a case such as this, there is very little time required for intake. This was an uncomplicated, straightforward speeding prosecution under the Highway Traffic Act involving, from what I can tell, the evidence of one, perhaps two police officers and the evidence of the defendant, if the defendant chose to give evidence.

21 The disclosure in a matter such as this would be minimal, and there was no issue, on the record raised before me, whether or not disclosure was an issue, whether it was requested, or whether the defendant decided to proceed to trial as soon as possible, irrespective of whether or not disclosure was available.

22 These types of offences, notwithstanding that they are not criminal in nature, require under the

terms of the Act and I believe on the basis of the jurisprudence that I have just read, that they be expedited. That means that resources ought to be put in place to see to it that the earliest possible trial dates are made available and that trial dates be set within the guidelines as outlined in *R. v. Morin* and *R. v. Sharma*. In the Region of Peel, that is eight to nine months. As Justice Hill noted in *R. v. Misener*, it is generally at the lower end of that range.

23 I am aware that that is only a set of guidelines and that those yardsticks can move upwards or downwards, depending on the circumstances of a particular case, and depending on the degree of prejudice.

24 I was referred, as well, to the case of Omar Zadah. That is O-M-A-R, Z-A-D-A-H, [2004] O.J. No. 2212, an endorsement by Justice Doherty of the Ontario Court of Appeal, dealing with a Crown appeal, where they sought to have the stay of proceedings for 11(b) overturned. That appeal was ultimately unsuccessful, and the stay was upheld. The delay in that case was 14 months.

25 The noteworthy parts of this judgment or endorsement is that Justice Doherty indicates and confirms that what the Crown feared was not true, that the judgment below was a precedent for establishing the six month guideline, or that the delays beyond six months would be treated as presumptively unconstitutional, and he made short work of that argument. He confirmed that the *R. v. Morin* summary conviction guidelines should govern.

26 He then went on to articulate the obvious, which is that those guidelines are not to be strictly applied. He commented that it must be acknowledged that any stigma arising out of the delay in the trials like speeding is virtually non-existent. But he, nonetheless, refused to overturn the stay in that particular case where there was a delay of 14 months.

27 When considering the issue of prejudice in the context of 11(b), it is important to bear in mind that it is the duty of the prosecution to bring an accused person to trial.

28 In other words, the state and the prosecution apparatus are required to minimize the prejudice inherent in delays, in the disposition of criminal litigation, as well as litigation under the Provincial Offences Act. I find that that is confirmed by the passage I have already quoted from, Justice Andre's decision, where he indicates that matters under this Act should be moved, or proceeded with expeditiously.

29 There is, first of all, the prejudice which occurs from the fact of being charged and then prejudice caused by delay in bringing a case to trial. Everyone suffers prejudice as a result of being charged. However, absent delay beyond the guidelines, that is not generally the type of prejudice one is concerned with.

30 The focus is on the prejudice arising from prolonged delay. The inherent prejudice suffered by all accused persons waiting their trial can be inferred and no evidence is required to enable a judge to consider it. The longer the wait for trial, the more serious the inferred prejudice.

31 What was initially prejudice from being charged, such as shame, anxiety, may become prejudice caused by institutional delay due to delays beyond the guidelines. And for that proposition, one can refer to the Ontario Court of Appeal judgment in *R. v. Kovacs-Tatar* at Paragraph 33.

32 Prejudice may be negated, where there is evidence that the accused wanted to delay or avoid a trial on its merits.

33 As Justice Hill noted in *R. v. Pusic*, the inference of prejudice from a very long delay becomes nearly irrefutable. An unreasonable delay is virtually synonymous with prejudice to security interests. Those security interests involve the need to minimize the anxiety, concerns, and stigma inherent in exposure to pending proceedings.

34 In Justice Hill's words, they involve the over long subjection to the vexations and vicissitudes of pending criminal accusations which include stigmatization of the accused. Obviously, that does not have the same weight or import in a case under the Provincial Offences as Justice Doherty has noted.

35 However, it does not only deal with stigmatization. It deals with loss of privacy, stress, the anxiety resulting from a multitude of factors, including possible disruption of family, social life, and work, legal costs, uncertainty as the outcome and sanctions.

36 Those forms of prejudice, according to Justice Hill, cannot be disregarded nor minimized when assessing the reasonableness of delay. (See paragraph 167 of *Pusic*).

37 In this case, the defendant, who was 18, testified under oath with respect to the issue of prejudice and she was cross-examined. She indicated that the first thing she did when she got the ticket was that she cried. It is not insignificant that she was an 18 year old, who had recently obtained her licence. She owned her own vehicle and was providing her own insurance, and really did not know what to do at first, but she talked to her dad about it and then eventually sought out the services, very, very shortly thereafter of an agent.

38 This is the first time she had ever been involved with the law. She was worried, both for financial reasons and for psychological reasons about her insurance and what this may do to her insurance, if she were convicted of this matter. She was worried that she might not be accepted for insurance. Under cross-examination, she confirmed this was a very traumatic event for her.

39 The learned Justice of the Peace turned her mind to this issue, as she did to the other issues that are raised by the section 11(b) analysis. She was aware of the judgment in *R. v. Hussain*, and she referred to that judgment at Page 9 of her ruling.

40 *R. v. Hussain* is a judgment of this court by my brother Judge Casey, where he overruled the stay of proceedings imposed in that case, not because of the specific conclusion that the justice had

come to in that case, that the delay was unreasonable, but because the justice had failed to consider the various factors set down in *R. v. Morin*. In referring to *R. v. Kovacs-Tatar*, he concluded that there has to be some aversion or some indication that the Justice of the Peace averted to the requirements of balancing the various interests that the section is designed to protect. I find that Justice of the Peace Weiss has, on balance, when you read her judgment.

41 It is clear that she was aware of *R. v. Askov*, *R. v. Morin* and that she was aware of the need to balance the interests of proceeding to trial, the public interest in that, against the Charter rights of an individual to have her trial within a reasonable period of time. She was aware of the liberty, and security, and fair trial issues.

42 She was aware of the intake provisions. She was aware of the systemic or institutional delay aspects of the analysis. And, indeed, she was aware of the business about prejudice.

43 She concluded, on that issue, that there was not much actual prejudice, and described the prejudice as minimal, but she found that there was inferred prejudice based on anxiety, the potential repercussions with respect to a conviction for this young person. The delay, as I interpret her ruling, beyond the guidelines, gave rise to inferred prejudice to the extent that when she balanced the interests that the section is designed to protect against the interests of the individual in having a trial within a reasonable period of time, that this was, indeed, an unreasonable delay.

44 In my view, I do not find her conclusions to be unreasonable. I do not find her views to be an error in law, nor do I find that she misapprehended the record before her in coming to those conclusions. I am satisfied that she gave proper consideration to all the various factors that she was required to do so in the analysis. And I am not prepared to overturn her on this appeal.

qp/s/qlkxl/qlmxb