

Regina ex rel. Holmes v. Regal Park Homes Inc.

[Indexed as: R. v. Regal Park Homes Inc.]

9 O.R. (3d) 469
[1992] O.J. No. 1215

Ontario Court (Provincial Division),
Fairgrieve Prov. Div. J.
February 4, 1992

Criminal law -- Appeals -- Extension of time for appeal
-- Provincial offences -- Stay of proceedings granted on basis
of violation of s. 11(b) of Charter by 51-month delay in
provincial prosecution -- Prosecutor erroneously seeking
prerogative remedy with respect to stay and then applying for
extension of time for appeal -- No possibility existing that
appellate court would reverse decision -- Prosecutor not acting
with reasonable diligence -- Extension of time denied
-- Canadian Charter of Rights and Freedoms, s. 11(b).

The respondent was charged in June 1987 with 78
contraventions of the Building Code Act . Four years and three
months later, the proceedings were stayed on the ground that
the respondent's right under s. 11(b) of the Canadian Charter
of Rights and Freedoms had been infringed.

No appeal from that judgment was taken within the 30-day
appeal period provided by s. 8 of R.R.O. 1980, Reg. 819, under
the Provincial Offences Act. Instead, the prosecutor challenged
the stay by seeking a prerogative remedy. That application was
dismissed on the ground that, since an appeal was clearly
available to the prosecutor, s. 125(3) of the Provincial
Offences Act precluded an application for a prerogative remedy.

The prosecutor applied, pursuant to s. 85 of the Provincial

Offences Act, for an extension of time for filing an appeal.

Held, the application should be dismissed.

The applicant had shown what amounted to an intention to appeal within the time limited; while the intention to challenge the judgment by seeking a prerogative remedy was not precisely the same thing as an intention to appeal, it nonetheless demonstrated a clear intention, within the appeal period, to have the order reviewed by a higher court.

The 51-month delay in this case appeared to be grossly excessive. The applicant failed to demonstrate there was even a remote possibility that an appellate court would reverse the impugned decision. For that reason, an extension of time should not be granted.

While it was not necessary to consider other factors, it was difficult to understand how there would have been any confusion in this case concerning the right to appeal a stay of proceedings resulting from a finding of a s. 11(b) violation. The applicant did not act with reasonable diligence in pursuing the appeal available to it. There was no reasonable excuse for not initiating the appeal within the appeal period.

R. v. Askov, [1990] 2 S.C.R. 1199, 75 O.R. (3d) 673 59 C.C.C. (3d) 449, 49 C.R.R. 1, 79 C.R. (3d) 273, 74 D.L.R. (4th) 355, 40 O.A.C. 81, 113 N.R. 241; R. v. Beason (1983), 43 O.R. (2d) 65, 7 C.C.C. (3d) 20, 36 C.R. (3d) 73, 1 D.L.R. (4th) 218 (C.A.), consd

Other cases referred to

R. v. Bennett (1991), 3 O.R. (3d) 193, 64 C.C.C. (3d) 449, 7 C.R.R. (2d) 145, 6 C.R. (4th) 22, 40 O.A.C. 99 (C.A.) [affd (1992), 9 C.R.R. (2d) 195, 138 N.R. 388 (S.C.C.)]; R. v. Conway, [1989] 1 S.C.R. 1659, 49 C.C.C. (3d) 289, 40 C.R.R. 1, 70 C.R. (3d) 209, 34 O.A.C. 165, 96 N.R. 241; R. v. Dunbrook (1978), 44 C.C.C. (2d) 264 (Ont. C.A.); R. v. Greely (1990), 80 Nfld. & P.E.I.R. 234, 249 A.P.R. 234 (Nfld.

C.A.); R. v. Gruener (1979), 46 C.C.C. (2d) 88 (Ont. C.A.); R. v. Jewitt, [1985] 2 S.C.R. 128, 21 C.C.C. (3d) 7, 47 C.R. (3d) 193, 20 D.L.R. (4th) 651, [1985] 6 W.W.R. 127, 61 N.R. 159; R. v. Kapoor (1989), 52 C.C.C. (3d) 41, 19 M.V.R. (2d) 219 (Ont. H.C.J.); R. v. Lee, Ont. Prov. Div., Wolder Prov. J., October 9, 1990; R. v. Rahey, [1987] 1 S.C.R. 588, 33 C.C.C. (3d) 289, 57 C.R.N.S. 298, 39 D.L.R. (4th) 481, 75 N.S.R. (2d) 183, 193 A.P.R. 183, 75 N.R. 81; R. v. Scheller (No. 2) (1976), 32 C.C.C. (2d) 286, 37 C.R.N.S. 349 (Ont. C.A.)

Statutes referred to

Building Code Act, R.S.O. 1990, c. B.13

Canadian Charter of Rights and Freedoms, s. 11(b)

Criminal Code, R.S.C. 1985, c. C-46, ss. 676 [am. R.S.C. 1985, c. 27 (1st Supp.), s. 139], 813 [am. idem, s. 180]

Provincial Offences Act, R.S.O. 1990, c. P.33, ss. 31(2), 85, 116, 125(3)

Rules and regulations referred to

R.R.O. 1980, Reg. 87 (Building Code Act)

R.R.O. 1980, Reg. 819 (Provincial Offences Act), s. 8

Authorities referred to

Drinkwater and Ewart, Ontario Provincial Offences Procedure (1980), p. 307

APPLICATION for an extension of time for filing appeal.

Nadia Koltun, for the Crown, applicant.

James Lockyer, for accused, respondent.

FAIRGRIEVE PROV. J.:--This is an application by the prosecutor, pursuant to s. 85 of the Provincial Offences Act, R.S.O. 1990, c. P.33 (POA), for an extension of time to permit the filing of an appeal to this court. The applicant seeks to

appeal the judgment of Her Worship Justice of the Peace C. Starr, presiding in the Provincial Offences Court, which stayed proceedings in this case on September 16, 1991, after she found an infringement of the defendant's s. 11(b) Charter right to be tried within a reasonable time. Pursuant to s. 116 of the POA, the applicant had the right to appeal this "stay" since, the Court of Appeal had long ago held, it was tantamount to a dismissal: see *R. v. Beason* (1983), 43 O.R. (2d) 65, 7 C.C.C. (3d) 20 (C.A.). There is, however, a 30-day appeal period provided by s. 8 of R.R.O. 1980, Reg. 819, under the POA, which governs such appeals.

The reason why an extension of time is now necessary is that the prosecutor, instead of appealing within the prescribed period, chose to challenge the "stay" by seeking a prerogative remedy in the Ontario Court of Justice (General Division). The application for certiorari and mandamus was dismissed with costs on January 7, 1992. In his judgment, Langdon J. held that since an appeal was clearly available to the prosecutor, s. 125(3) of the POA expressly precluded an application of the kind brought before him.

In determining whether an extension of time should be granted, a number of factors need to be considered. In *Drinkwater and Ewart, Ontario Provincial Offences Procedure* (1980), at p. 307, the authors refer to the "well defined and reasonably strict" criteria gleaned from the cases, referring specifically to judgments of the Ontario Court of Appeal in *R. v. Gruener* (1979), 46 C.C.C. (2d) 88 (Thorson J.A., in Chambers), and *R. v. Scheller* (No. 2) (1976), 32 C.C.C. (2d) 286, 37 C.R.N.S. 349 (Lacourciere J.A., in Chambers). The requirements include the following:

1. That the applicant has shown an intention to appeal within the time limited;
2. That there is sufficient merit to the appeal;
3. That the applicant exercised due diligence or has a reasonable excuse for not having instituted the appeal within the appeal period; and

4. That refusal of the application would amount to a denial of justice.

In *R. v. Greeley*, Nfld. C.A., January 19, 1990, an unreported decision of Goodridge C.J.N. provided by Mr. Lockyer [now reported 80 Nfld. & P.E.I.R. 234, 249 A.P.R. 234], His Lordship added to the list consideration of whether an important question of law was in issue (which may not be particularly relevant to POA appeals to this court), and also whether there would be prejudice to the other party due to the delay in instituting the appeal. I will consider each of the above factors in turn.

1. Whether there was "an intention to appeal"

With respect to the first requirement, the applicant has filed evidence that instructions were given between October 10 and 16, 1991, to challenge the order of the learned justice of the peace made on September 16, and that the applicant's counsel had a notice of application seeking certiorari issued in the Ontario Court (General Division) on October 16, 1991, the last day of the appeal period. While this intention to challenge the judgment by seeking a prerogative remedy may not be precisely the same thing as an intention to appeal, it nonetheless demonstrated a clear intention, within the appeal period, to have the order reviewed by a higher court. In *R. v. Kapoor* (1989), 52 C.C.C. (3d) 41, 19 M.V.R. (2d) 219 (Ont. H.C.J.), Watt J. held that a similar error by the Crown in choosing the forum for "impeaching the correctness" of a judgment did not preclude an extension of time to permit the appeal which had been available.

2. Whether the appeal has "sufficient merit"

In determining whether there is merit to the proposed appeal, I accept that the issue is whether there is an arguable ground of appeal, and that the onus is not on the applicant at this stage to establish that the appeal would likely succeed. I am also aware that I have not had the benefit of the full argument that would be available to a court hearing the appeal, and it

would be wrong to assess its merits merely on the basis of how I expect I would dispose of the appeal if it were heard by me. At the same time, I do not think it is enough to state simply that every appeal from an Askov stay, as they are now universally known, is "arguable" in the required sense because one can always argue about how certain facts should be characterized or about how well-settled principles should be applied to them. Nor do I think that it is sufficient merely to impugn particular sentences in the judgment below, as the applicant has sought to do on this application, if it is apparent that the result reached by the justice of the peace would have been the same in any event and it is clear that no appeal court would interfere with that result.

In assessing the merit of the proposed appeal, one cannot lose sight of the fact that the information charging the defendant with 78 contraventions of the Building Code Act, R.S.O. 1980, c. B.13, were sworn June 8 and 9, 1987, i.e., four years and three months before the Askov application was granted by the learned justice of the peace. Whether this 51-month delay could be considered reasonable turned on a balancing of a number of factors (which, incidentally, were the ones expressly considered by Starr J.P.), but *prima facie*, it seems to me, such delay was grossly excessive, and the burden of justifying it was a particularly heavy one.

In addition to being exceptionally long, the history of this case has also been rather tortuous. The first trial, which was aborted in circumstances I will refer to shortly, commenced November 23, 1987. Unfortunately, the evidence and argument at trial consumed much more time than had initially been anticipated, ultimately taking 16 full court days and nine part court days which stretched over a 17 1/2-month period ending May 2, 1989. At least part of the problem resulted from the failure of the court at the outset to remove this case from the usual half-day per month set for the Town of Caledon provincial prosecutions and to give it some priority in the trial scheduling.

The application attributed much of the slow pace of the trial to defence motions occupying 10 full days and five part days of

court time. It does not appear from the excerpted trial transcripts, however, that the motions were frivolous or brought for purposes of delay. One such application resulted from erroneous references by the principal prosecution witness to the applicable Building Code Act regulation, R.R.O. 1980, Reg. 87, which led to the production and review of what was described as a written concordance between the relevant regulation and the one he had mistakenly referred to in his evidence. The applicant similarly described the defence's cross-examination of that witness as "excessively long", occupying more than seven full court days. At the same time, one must observe that the justice of the peace did not intervene to curtail it on the basis that it was improper or needlessly prolix.

At the conclusion of the submissions at the first trial on May 2, 1989, judgment was reserved by the justice of the peace. Three weeks later, without having given a decision in the case, she submitted her resignation to the senior judge. The chief judge determined, pursuant to s. 31(2) of the POA, that the justice was unable to continue with the conduct of the trial, and declined her offer to complete her judgment in the matter. On August 8, 1989, a new trial was directed by the local senior judge to commence before a different justice, with 15 consecutive court days in September 1989 scheduled for the trial.

The defendant moved before Trainor J. in what was then weekly court for an order, inter alia, quashing the chief judge's decision that the first justice could not complete the trial. On October 19, 1989, Trainor J. granted the application and stayed the order for a new trial made by the senior judge. The appeal by the prosecutor and the Attorney General was not heard until a year later when, on November 7, 1990, the Court of Appeal set aside Trainor J.'s order. An application by the defendant for leave to appeal to the Supreme Court of Canada was dismissed on May 2, 1991.

Briefly stated, that is the history of the proceedings which led to the defendant's attendance in the provincial offences court on July 24, 1991, to set a date for its trial, more than

four years after the charges had been laid. It is also what led Starr J.P. on September 16, 1991, after a careful analysis of the chronology and a lengthy review of the factors examined in *R. v. Askov*, [1990] 2 S.C.R. 1199, 75 O.R. (3d) 673, 59 C.C.C. (3d) 449, to conclude that there had been an infringement of the defendant's s. 11(b) right and to grant the minimum remedy for such violation.

While there may appear to be some unfairness in applying current, post-Askov standards to delays tolerated at a time when trial courts, at least in this jurisdiction, were less sensitive to their constitutional implications, the fact remains that s. 11(b) of the Charter operated as fully in 1987 as it does now. Trial courts today could simply not permit a trial to drag on in a fragmented piecemeal fashion over such a protracted period without a waiver by the defendant of its right. It has not been suggested that the conduct of the defence, which undoubtedly prolonged the proceedings, constituted any such waiver in this case.

Neither, to be fair, can it be said that the conduct of the prosecutor was primarily responsible for the excessive delay which occurred. The scheduling of provincial offences trials is a judicial function. Where the prosecutor is a solicitor retained by a municipality like the Town of Caledon and not Crown counsel representing the Attorney General, it is perhaps more difficult than it might be in a criminal case to fault the prosecution for the inadequate court resources causing the delay. As has been repeatedly stated, however, it was not the defendant's responsibility to ensure that its trial was held within a reasonable time. Similarly, neither party can be blamed for the resignation of the justice before the completion of the trial or for the chief judge's decision to terminate the trial (which decision the Court of Appeal later held not to have been wrong), but those unfortunate circumstances do not preclude reliance by the defendant on s. 11(b).

The year's delay before the Crown appeal was heard in the Court of Appeal likewise seems inordinate, given that transcripts were already available and factums would have been prepared for weekly court. While it may only reflect the

current institutional limitations of the Court of Appeal, I do not think that that part of the delay could fairly be attributed by any court to the still untried defendant.

In support of her position that there is merit to the appeal, Ms. Koltun argued, *inter alia*, that Starr J.P. erred by failing to hold that there was no infringement of s. 11(b) because the first trial had commenced within a reasonable period. That strikes me as completely untenable, inconsistent both with the result in *R. v. Rahey*, [1987] 1 S.C.R. 588, 33 C.C.C. (3d) 289, and with the analysis adopted in *R. v. Conway*, [1989] 1 S.C.R. 1659, 49 C.C.C. (3d) 289.

Ms. Koltun further argued that Starr J.P. erred in failing to distinguish the "unique facts and circumstances of this case" from those in *R. v. Askov*, *supra*. I disagree. I am unable to find any arguable error in Starr J.P.'s analysis of the issue, in her application of the *Askov* principles, or in the conclusion which she reached. Starr J.P. did not adopt the "minimalist or reductionist interpretation" of *Askov* criticized in *R. v. Bennett* (1991), 3 O.R. (3d) 193, 64 C.C.C. (3d) 449 (C.A.), at p. 208 O.R., p. 464 C.C.C. She did not focus solely on the length of the delay or reduce the concept of reasonableness in s. 11(b) to "a simplistic computation of time". Instead, she engaged in the balancing process mandated by the Supreme Court of Canada, carefully considering the four factors identified in *Askov*.

I have not been persuaded that there is even a remote possibility that an appellate court would reverse the decision reached below. In my view, the history of the case and the authorities binding on both the learned justice of the peace and this court dictated the finding which she made. An appeal is not "arguable", in my view, if its dismissal is inevitable.

That opinion probably makes it unnecessary to consider the other factors relevant to granting an extension of time. For the sake of completeness, however, I propose to comment briefly on the other requirements.

3. Whether "due diligence" was exercised

The failure to launch an appeal within the prescribed period was, as already stated, the result of the prosecutor's erroneous view of the proper way to challenge the stay ordered by the justice of the peace. Ms. Koltun, counsel for the applicant, explained that the decision was based on an awareness that the prosecutor's right of appeal from a "dismissal" under s. 116 of the POA was not framed as broadly as the Attorney General's right of appeal under ss. 676 and 813 of the Criminal Code, R.S.C. 1985, c. C-46, which, since the 1985 amendments, have expressly authorized appeals against orders of trial courts staying proceedings. The applicant claimed support for its position in a judgment from Judge Wolder of this court, *R. v. Lee*, October 9, 1990, unreported, which held that under the POA, where a stay is entered prior to plea, no appeal is available. The prosecutor also disregarded the advice received from counsel in the Crown law office that an appeal was the right course, as well as a General Division endorsement to the same effect provided by him.

Mr. Justice Langdon accepted the defendant's position that given the 1983 judgment of the Court of Appeal in *Beason*, *supra*, and the judgment of the Supreme Court of Canada in *R. v. Jewitt*, [1985] 2 S.C.R. 128, 21 C.C.C. (3d) 7, both holding that a stay of proceedings was appealable because it was tantamount to an acquittal, the privative clause in s. 125(3) precluded an application for certiorari or mandamus. Langdon J. also agreed, without deciding whether the decision of Wolder Prov. J. in *Lee*, *supra*, was correct, that the defendant in this case had entered a plea four years earlier, so the stay was hardly "prior to plea".

Without wishing to be critical of the prosecutor, it is difficult to understand how in September 1991 there could have been any confusion concerning the right to appeal a stay of proceedings resulting from a finding of a s. 11(b) violation. *Beason* was decided by the Court of Appeal many years earlier, before the 1985 amendments to the Criminal Code, and had clear application, I think, to the situation in this case. Mr. Lockyer argued that where the application for an extension is

made by the prosecutor, the requirements will be more stringently applied than in the case of a convicted person, relying on Lacourcire J.A.'s statement in *R. v. Dunbrook* (1978), 44 C.C.C. (2d) 264 (Ont. C.A.), at p. 267. Certainly, I think, it is appropriate to place a heavier burden on prosecuting counsel than one might place on, say, an unrepresented, misinformed or mistaken defendant. I am not satisfied, in all of the circumstances here, that the applicant acted with reasonable diligence in pursuing the appeal available to it or that there was a reasonable excuse for not initiating the appeal within the appeal period.

4. Whether justice requires an extension of time

Determining whether a refusal of the application would amount to a denial of justice seems problematic. In a sense, it seems to me, any stay of proceedings for unreasonable delay means that justice has been denied. I think that that is an apt description of what has occurred with the 8,000 criminal charges which have been stayed in the Provincial Division here in Brampton, which is only a small portion of the 50,000 or so Askov stays in the province last year. However, it is now beyond dispute that declining to adjudicate the merits of the case is the "appropriate and just" remedy for a s. 11(b) violation. There is no further injustice which results, I think, from the refusal of an extension of time where there has been an absence of due diligence in exercising a right of appeal, particularly where, as I have found, the appeal lacked merit in the first place.

The fact that, as Ms. Koltun submits, the case involved numerous serious Building Code violations affecting virtually a whole subdivision does not alter my assessment of this factor. The importance of the case relative to other provincial offences prosecutions ought to have led the trial court to give it priority starting in 1987. That did not occur, and it is that failure which has produced the injustice in this case, not a refusal to extend the time to appeal the inevitable consequence of that failure.

5. Prejudice to the respondent caused by the delay in appealing

The only other consideration which seems relevant at this stage is whether the respondent defendant has suffered any prejudice as a result of the delay in launching the proposed appeal. Apart from the prejudice to be inferred or presumed merely from adding another few months to the four and one-half years which have already elapsed and to any further period before a new trial could proceed if an appeal were successful, it is difficult to identify any particular prejudice. The defendant is a corporation, and while I accept in theory that its corporate activities could have been adversely affected by the delay in instituting the appeal, Mr. Lockyer could not point to anything other than additional expense to his client. Ms. Koltun submits, correctly I think, that if that is the only prejudice, it could be adequately compensated by an award of costs. Prejudice to the defendant arising from the delay in launching the appeal is not, in my view, a significant factor in this case.

Conclusion

In all the circumstances of this case, I have not been persuaded that I should exercise my discretion to extend the time for filing an appeal. The application is accordingly dismissed. In view of the fact that this application became necessary only because of a procedural error on the part of the prosecutor, I think it is appropriate to order costs against the applicant. I will fix costs should the respondent make an application in the next 15 days to do so.

Application dismissed.