

ONTARIO COURT OF JUSTICE

B E T W E E N :

HER MAJESTY THE QUEEN

— AND —

RYAN STITT

Before Justice D.A. Harris
Heard on December 18, 2012
Ruling on January 31, 2013

M. Eshuis **for the Crown**
M. Wendl **for the accused, Ryan Stitt**

R U L I N G

HARRIS J.:

[1] Ryan Stitt faces a number of criminal charges, including assault with a weapon, assault (x 2), unlawful confinement (x 2), and criminal harassment. These matters are scheduled for trial on February 21, 2013.

[2] In the meantime, counsel for Mr. Stitt brought an application to stay all of these charges pursuant to the *Canadian Charter of Rights and Freedoms* on the basis that Mr. Stitt's right to be tried within a reasonable time, as guaranteed by s. 11(b) of the *Charter* has been infringed here.

[3] For a number of reasons, it was not possible for this application to be heard by the per diem judge who is scheduled to preside over the trial. Both counsel then agreed that I should hear this application since (1) I am the Local Administrative Judge and (2) I was also the pre-trial judge and would thereby already have knowledge of some of the facts which counsel are relying upon in this application.

[4] We therefore proceeded on that basis.

THE LAW

[5] Section 11(b) of the *Canadian Charter of Rights and Freedoms* provides that “Any person charged with an offence has the right to be tried within a reasonable time”.

[6] The primary purpose of s. 11(b) of the *Canadian Charter of Rights and Freedoms* is to protect the individual rights of the accused to liberty, security of the person and to a fair trial.¹

[7] There is a secondary societal interest in having cases tried on their merits - a matter important to the maintenance of respect for the administration of justice.

[8] This application requires a judicial balancing with an examination of the delay and its evaluation in light of other factors in order to determine whether the delay is reasonable. This balancing requires consideration of:

1. The length of the delay;
2. Waiver of time periods;
3. 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,
 - (e) other reasons for delay, and
4. Prejudice to the accused.²

THE LENGTH OF THE DELAY

[9] The total delay in this case will be approximately 19 months. Everyone agrees that this delay is of sufficient length to warrant judicial inquiry.

[10] Mr. Stitt was charged July 16, 2011, with assault with a weapon, assault (x 2), unlawful confinement (x 2) and criminal harassment. He appeared that day in bail court and was released on a recognizance of bail.

[11] He first retained a local lawyer and then subsequently retained Mr. Raftery to represent him. An agent for Mr. Raftery first appeared in court on September 19, 2011 and

¹ Reference may be made to *R. v. Askov* (1990), 59 C.C.C. (3d) 449 (S.C.C.); *R. v. Morin* (1992), 71 C.C.C. (3d) 1 (S.C.C.).

² *Ibid.*

announced that Mr. Raftery was the new counsel of record and requested that the proceedings be adjourned to October 17, 2011.

[12] Disclosure was then returned by the original lawyer to the Crown and sent to Mr. Raftery.

[13] This was then followed by appearances on November 7, December 5, December 9, December 19, all in 2011 and then January 9, February 13, March 5 and March 19, all in 2012. On each of these occasions, counsel for Mr. Stitt or his agent requested an adjournment. These adjournments were to allow counsel for Mr. Stitt and Crown counsel to talk and attempt to resolve the case or to at least agree to a variation in Mr. Stitt's bail terms.

[14] These discussions were frustrated to a considerable extent when Crown counsel became unavailable due to a death in his family. However, counsel for Mr. Stitt continued to request that the matter be adjourned so that he could pursue these discussions with Crown counsel.

[15] It was only on March 19, 2012 after it became clear that the two counsel could not agree on a resolution of the case, that counsel for Mr. Stitt indicated that he wished to set a date for trial.

[16] He had not however held an ITEM (Issues and Time Estimate Meeting) meeting with Crown counsel. It is mandatory that such a meeting be held before setting a trial date in Niagara and therefore counsel was not allowed to set a date. He requested a further adjournment so that he could rectify the situation and the case was adjourned until April 23, 2012.

[17] On April 23, counsel requested a further adjournment to May 7. This was granted.

[18] Then on May 7, a further adjournment was sought, this time until June 11. This adjournment was also granted "peremptory to set a date".

[19] On June 11, when it was determined that the proposed length of the trial made a Judicial Pre-Trial (JPT) mandatory before a date could be set, counsel requested a further adjournment until July 10 when such a JPT could be held.

[20] The JPT was held on July 10 and the matter was then adjourned until July 27 for one last effort at resolution.

[21] On July 27, 2012 a trial date of February 21, 2013 was set.

[22] In between a confirmation hearing was held on November 23, 2012 and this application was brought and heard on December 18, 2012.

WAIVER OF TIME PERIODS

[23] With respect to waiver, the onus is on the Crown to prove or establish waiver. A waiver must be clear and unequivocal with full knowledge of the rights the procedure was enacted to protect and of the effect a waiver will have on these rights. The notion of waiver contemplates a choice has been made between available options. Where no real choice or option exists there can be no waiver. Agreement to a date within the proceedings in question does not constitute waiver where the agreement can be reasonably and fairly characterized as mere acquiescence in the inevitable.³

[24] It is the duty of the Crown to bring an accused person to trial. This requires that the prosecution apparatus and the government strive to expedite the trial to minimize the effect that is inherent in delay in the disposition of criminal litigation. There is no constitutional imperative upon the accused to bring himself or herself to trial. The protection of s. 11(b) of the *Charter* is not restricted to those who demonstrate a desire for a speedy resolution by asserting the s. 11(b) right.⁴

[25] Silence and acquiescence in the face of Crown requests for adjournments or in accepting the trial date that is offered clearly do not constitute waiver.

[26] That being said, most of the adjournments in this case were made at the request of counsel for Mr. Stitt. That was much more than silence and acquiescence. If these actions do not constitute waiver, they still must be viewed as actions by Mr. Stitt when determining the reasons for the delay.

REASONS FOR THE DELAY

[27] The charges against Mr. Stitt are, on their face, very serious charges.

[28] On the other hand Crown counsel proposed a resolution that would have seen Mr. Stitt receive a conditional discharge. Although Crown counsel ultimately declined to agree to an alternate resolution in the form of a “peace bond”, he did consider that counter-proposal before declining. One can certainly draw inferences from all of this with regard to the seriousness of the offences.

[29] I must keep this in mind when assessing the societal interest in having this case assessed on its merits.

[30] In addition, neither counsel suggested that this would be anything other than a straightforward trial which should not take more than one day.

[31] Having said that, I note that there are certain time requirements in any case. These would include the intake period.

³ Askov, *supra*, at pp. 481 to 482; Morin, *supra*, p. 15; Pusic, *supra*, at pp. 701 to 702.

⁴ Morin, *supra*, at p. 23; Pusic, *supra*, at p. 720.

[32] In that regard, I note the comments of Hill J. in *R. v. Mooney*, [2003] O.J. No. 5041 (S.C.J.) at para. 24 where he suggested that this intake process would include such things as “disclosure review, a Crown/defence resolution meeting, and defence preparation for trial”.

[33] It was counsel for Mr. Stitt who chose to engage in a protracted effort to resolve this case. He could have simultaneously taken the necessary steps to set a date for trial. There is no rule against setting such a date while continuing to attempt to resolve the case in the meantime. Counsel declined to do that here even when the assigned Crown counsel was not available for an extended period of time. Counsel for Mr. Stitt chose instead to defer setting a trial date until after resolution discussions had broken down.

[34] Counsel for Mr. Stitt may have had a very good reason for proceeding in this fashion. I can think of a number of good reasons for doing so. That does not change the fact however that counsel did choose to defer setting a trial date and thereby directly contributed to the delay here.

[35] I note that Crown counsel’s personal situation did contribute to the delay here but as I noted, counsel for Mr. Stitt seemed perfectly content to await that Crown’s return.

[36] I note also that Crown counsel also chose to defer requesting that a trial date be set earlier, while continuing with the resolution discussions in the meantime.

[37] In light of all of this, I am not keen on attributing the delay here to either side. It certainly was not institutional delay however. Accordingly I have treated this extended intake process as neutral time.

[38] I take a different view however with respect to the delay caused by the failure to hold an ITEM meeting and a JPT.

[39] Counsel for Mr. Stitt argued that Crown counsel should have made Mr. Raftery aware of the local practices. He suggested that the ensuing delay was attributable to the Crown.

[40] I disagree.

[41] Counsel Mr. Raftery is a very able and experienced lawyer. He practises primarily in Hamilton but I know for a fact that he does occasionally venture out into the neighbouring jurisdictions including Niagara, Cayuga and Halton.

[42] All of these jurisdictions require an ITEM meeting or its equivalent. All require a JPT in cases where a trial is estimated to take a day or more.

[43] I note that even Hamilton has rules requiring the equivalent of an ITEM meeting and requiring a JPT in certain circumstances.

[44] Any experienced lawyer should know that local practices vary from jurisdiction to jurisdiction. Any experienced counsel should know that this information would be readily available either through his/her local agent or through the local Trial Coordinator.

[45] No experienced counsel should expect Crown counsel to advise them as to what must be done to bring a matter to trial.

[46] With respect to the validity of the local practices, I do note the comments of Rosenberg J.A. at paras. 29 and 30 in *R. v. C.R.G.*, [2005] O.J. No. 3764 (Ont. C.A.)⁵ where he stated:

29 I wish to conclude with some comments about the judicial pre-trial. The trial judge was very critical of the use of mandatory judicial pre-trials in all cases where the preliminary inquiry is expected to exceed one day. In his view, there should be more flexibility, so that either the pre-trial is not mandatory or in appropriate cases the pre-trial can be held almost immediately.

30 In my view, reviewing courts should be very cautious about judging the advisability of steps taken by the Ontario Court of Justice to manage its lists. That court has seen a huge increase in its caseload so that, according to statistics filed in the Morin case, it handles 95 percent of criminal cases in Ontario: see *R. v. Morin*, at p. 27. It is entirely reasonable that the court attempt to take measures that will reduce the impact of cases that are expected to be a particular burden on resources. The purposes of the judicial pre-trial are, in part, to assist counsel in narrowing the issues, thus reducing the court time needed, and to obtain an accurate estimate of the time required to hear the case. Whether there is potential benefit from and room for some flexibility in the requirement for, and scheduling of, pretrials in the Hamilton Ontario Court of Justice, is principally a matter for that court. That said, I do agree that the delay needed to schedule the judicial pre-trial is properly considered to be institutional delay, not an aspect of the inherent time requirements of the case. See *R. v. Chatwell* (1998), 122 C.C.C. (3d) 162 (Ont. C.A.) at para. 11.

[47] The situation in our case is different in that extra delay occurred here because counsel failed to inform himself as to local practices in a timely fashion. Very little delay occurred in scheduling the JPT itself.

PREJUDICE TO THE ACCUSED

⁵ An appeal of a case from Hamilton.

[48] Everyone suffers prejudice as a result of being charged. This is inherent in the process itself. The prejudice of concern in the s. 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.

[49] A court may infer or presume the existence of prejudice or it may be otherwise proven. Prejudice may be inferred from the length of the delay. The longer the delay, the more likely that such an inference will be drawn. The inference of prejudice from a very long delay becomes nearly irrebuttable.⁶

[50] In addition, in this case, Mr. Stitt swore to the following in an affidavit which was filed in support of this application:

[51] The past one and one-half years had been extremely stressful. He could not lead a normal life because of the bail conditions imposed on him.

[52] His reputation has been affected by the charge and he has not had a chance to clear his name at trial and therefore, alleviate the suspicion that surrounds him.

[53] He cannot sleep as a result of the stress. He is worried that if he is convicted of this charge, he will lose his job at the casino.

[54] It has affected any potential new relationships he could have developed, since he is embarrassed about disclosing the charges over his head. His bail conditions prohibit him from going to certain establishments and he has an 11:00 p.m. curfew. He is embarrassed and ashamed of these conditions and he would have to disclose them to anybody he potentially wanted to enter a relationship with.

[55] In addition to that, the conditions make him feel isolated because he does not go out with his friends since he has restrictions on places he can attend and an 11:00 p.m. curfew. It is easier for him not to go out at all than to suffer the suspicion when he discloses the situation to people he goes out with, and it is easier for him to stay home than explain why he has to leave or why he cannot go to a certain place.

[56] He has depression and anxiety, specifically he gets depressed around Christmas time and family holidays. As a dealer at a casino, he has to work on holidays, typically until 10:00 p.m. Given my curfew of 11:00 p.m., and since his family resides in Hamilton, he is unable to attend family functions.

[57] Because of the difficulty in his lawyer contacting the Crown, he has only sought one bail variation. Also, given the legal costs he has incurred, going after more bail variations would increase the costs of his legal fees, and this is money which he does not have. Furthermore, he feels a duty to obey the bail conditions that are imposed upon him in any event.

⁶ Askov, *supra*, at pp. 482 to 483, and pp. 484 to 485; Morin, *supra*, at p. 23 and p. 28; Pusic, *supra*, at p. 721.

[58] He feels frustrated because, even though he had to be taken to the hospital that night because he suffered injuries to his hand and was hit from behind from what he believes is a baseball bat; the police officers would not investigate his side of the story. Ultimately, the delay in trial is frustrating because he cannot tell his side of the story where he was actually the one who was attacked.

[59] Crown counsel chose not to cross-examine Mr. Stitt.

[60] Accordingly, I am proceeding on the basis that he suffered the prejudice outlined in his affidavit.

[61] However, I am also proceeding on the basis that Mr. Stitt's counsel was well aware of all this when he and Mr. Stitt chose to defer setting a trial date until after they had exhausted all possibility of resolving the matter without a trial.

ANALYSIS

[62] In *Morin, supra*, the Supreme Court of Canada stated at page 21 that "it is appropriate for this Court to suggest a period of institutional delay of between eight and ten months as a guide to Provincial Courts".

[63] This Supreme Court of Canada guideline is neither a limitation period nor a tariff. It is however, an instructive device for measuring the constitutional state of the inventory of cases before the Court. Still, it is necessary to examine the particular circumstances of each case.⁷

[64] As I see it, counsel for Mr. Stitt was not ready to set a date for trial until June 11, 2012. The matter was adjourned then for approximately one month to allow for the JPT to be held and then the trial date of February 21, 2013 was set.

[65] By my calculation, the time between June 11, 2012 and February 21, 2013 totals a little less than eight and one-half months.

[66] That falls well within the guideline set out by the Supreme Court of Canada in *Morin, supra*.

[67] I find that Mr. Stitt has failed to establish on a balance of probabilities that his right to a trial within a reasonable time was infringed here.

[68] The application is dismissed.

Released: January 31, 2013

Signed: "Justice D.A. Harris"

Justice D.A. Harris

⁷ *R. v. Pusic* (1996), 30 O.R. (3d) 692 (Ont. Ct. Gen. Div.) at p. 719.