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R. v. Askov (Ont. C.A.)

Between
Her Majesty The Queen, Appellant, and
Elija Anton Askov, Ira Ralph Hussey, Edward Melo,
Samuel Gugliotta, Respondents

Ontario Judgments: [1987] O.J. No. 826

Supreme Court of Ontario - Court of Appeal
Toronto, Ontario
Brooke, Goodman and Grange JJ.A.

Heard: June 11, 12, 1987
Judgment: September 14, 1987

Charter of Rights — Right to be tried within reasonable time — What factors determine reasonableness of delay.

Appeal by Crown from order of district court judge staying proceedings on ground that accused had been denied right to a trial within a reasonable time. Sole reasons for delay lack of institutional resources.

Held by Court of Appeal that accuseds' rights under s. 11(b) of Charter were not infringed notwithstanding a one year delay between committal for trial and first scheduled date for trial, and a further one year adjournment after date first set for trial when matter not reached on list. Court of Appeal reviewed tests of reasonableness of delay. Court set out the Barker v. Wingo (1972) 407 U.S. 514 test followed by the United States Supreme Court and approved, with some modification, by the Court of Appeal in three earlier cases. If the delay appears prima facie excessive, the court must consider four factors in determining whether accused has been deprived of his constitutional right. Those factors are length of delay, reason for the delay, defendant's timely assertion of his right, and prejudice to the defendant. Normally, one must consider these other factors which even in extreme cases may counterbalance the delay and demonstrate that the accused has suffered no breach of his Charter rights. There may be cases, however, where the delay is so inordinate so as to amount in itself to an infringement. The Supreme Court of Canada in Mills v. The Queen (1986), 26 C.C.C. (3d) 481 propounded a different test which involved a consideration of four factors: growing impairment of accused's interests by passage of time; waiver of time periods; time requirements inherent in nature of case; and institutional resources, specifically systemic delays. Court also reviewed Rahey v. The Queen (1987), 75 N.R. 81 and drew from the case the following principles: actual prejudice to accused is a factor in determining whether accused's rights have been infringed; once infringement of accused's Charter rights has been found, minimum remedy is a stay of proceedings; consent or acquiescence by accused must be examined to ensure that it was informed, unequivocal, and freely given; and inadequacy of facilities must be considered but cannot be used to frustrate accused's Charter rights. In the case at bar, Court found that the delay was prima facie excessive. Although there was no misconduct on the part of either the Crown or

accused causing the delay, none of the accused objected at the time to the adjournments and there was no evidence of actual prejudice to the accused. The most important factor, in the Court's opinion, was the accuseds' failure to request a remedy at the time when final adjournment was sought or imposed. Although it is the Crown and not the accused who has an obligation to ensure a speedy trial, the appearance of justice will not be enhanced if accused are permitted to delay or even conceal a claim for relief until any remedy, other than a stay of preceedings becomes impossible to grant. Accused should not be permitted to obtain an advantage which involves a stay of proceedings in a serious offence. While some consideration must be given to shortages of facilities, such shortages cannot be tolerated indefinitely. Further, it must be recognized that part of the delay results from giving priority to trials of persons in custody. Appeal allowed.

Bonnie J. Wein, for the Crown Appellant.

Charles N. Barhydt, for the Respondent Askov.

David J. Maubach, for the Respondent Gugliotta.

Joseph L. Bloomenfeld, for the Respondent Melo.

Michael P. Morse, for the Respondent Hussey.

The judgment of the Court was delivered by

GRANGE J.A.:— The respondents were charged, either in concert or alone, with several offences committed in the Judicial District of Peel involving extortion, threatening with and using a prohibited weapon, assault, and criminal negligence in the operation of a motor vehicle. It is alleged that the victim, one Peter Belmont, was or wished to become engaged in the business of supplying "exotic" dancers to local licensed premises, and that he was harassed by the accused, one of whom was already established in that business. The allegations, if proved (and there was certainly evidence justifying a committal for trial) would reveal a very serious offence. Belmont was asked to pay a large commission for the "privilege" of operating in Toronto. When he refused, the accused are alleged to have pursued him by motor car and threatened him with a sawed-off shotgun and a knife. They were foiled only by the intervention of the police. The proceedings against the accused were stayed by order of Judge Bolan of the District Court of the Judicial District of Peel upon the sole ground that the accused had been denied the right to a trial within a reasonable time as guaranteed by s. 11(b) of the Canadian Charter of Rights and Freedoms.

As will be seen, there was an interval of nearly four years between arrest and trial but the important delays and those that prompted the order in appeal were first, a period of slightly more than one year between committal for trial and the first scheduled date for trial and secondly, an adjournment for a further period of slightly less than one year when trial on that scheduled date proved impossible. The learned trial judge attributed these delays to "the chronic shortage of institutional resources in the Judicial District of Peel". He attached no blame to the prosecution or to the defence in the conduct of the case. It was the system which was at fault. He put it thus:

> I am satisfied that the reason for the delay was caused by the insufficient institutional resources in the Judicial District of Peel. Even if more judges had been available for the jury sittings of October 15, 1985, there would have been no courtrooms in which to hold the trials. It is obvious that this jurisdiction lacks sufficient resources to meet the demands and

> administer the criminal justice system with minimal delay. This has caused a systematic [sic - systemic?] delay in the administration of justice. It was this way when I came here in 1981 and it continues to be this way today. Even this month [September 1986] cases which are to be set for trial are set for September and October of 1987. Those responsible for the proper administration of justice have known about this systematic [sic - systemic?] delay for at least five years; yet nothing has been done about it.

No one could be more familiar with the operation of the District Court in Peel than a judge of that court and it is impossible to quarrel with Judge Bolan's findings of fact. The section does not, however, operate as a limitation upon prosecution after a stated time. The question always for determination is whether, upon those facts, there has been a breach of the Charter rights of the accused to the point where the drastic remedy of a stay was appropriate.

The chronology is, of course, important. It is as follows:

Arrest

The threatening incident involving the pursuit of Belmont's car occurred on November 12, 1983. The accused Melo and Askov were arrested at the scene. The respondents Hussey and Gugliotta were arrested on the charge on November 14 and November 30, 1983 respectively.

Judicial Interim Release

The respondents Melo, Askov and Hussey were detained in custody until May 7, 1984 and then each was ordered to be released on a recognizance of $50,000. The respondent, Askov, was re-arrested on a non-related charge on October 1, 1984. The respondent, Gugliotta, was released on December 2, 1983, on a recognizance of $20,000. The terms of release involved reporting to the police and abstention from communicating with their co-accused. From time to time, these conditions were varied to permit more freedom of movement for the respondents. There is no record of any application therefor being refused but nevertheless the accused were, until the order in appeal, under considerable restraint.

Preliminary Hearing

The Crown was prepared as early as December 7, 1983, to set a date for the preliminary hearing but at the request of the accused, the matter was put over, eventually to February 14, 1984. On that day, a date in the first week in July was agreed upon by all counsel. The court indicated that an earlier date could be arranged if requested by the accused, but no such request was made. The preliminary hearing did commence on July 4, 1984, but there was a conflicting hearing that prevented the conclusion of the preliminary hearing in this matter until September. All accused were committed by September 21, 1984.

Proceedings in District Court

On October 1, 1984, the trial was set for the sittings commencing October 15, 1985, fully one year ahead. Despite the long wait, the case was not reached at that session, cases where the accused was in custody or where the offence date was earlier having priority. On October 25, 1985, when it became apparent that the case would not be reached, all accused and the Crown appeared by counsel and consented to the case being put over for trial to September 2, 1986. On that date when the matter was finally called for trial, counsel for the respondents made the motion now in appeal.

As stated above, Judge Bolan did not consider any delay prior to the committal of the accused to be consequential, unreasonable or undue. Indeed, he notes that the accused, when in custody, were offered earlier dates for their preliminary hearings, which they declined. Nor did the accused at any time object to or raise an issue about the delay until the moment of trial (although, when the first scheduled date passed and a new one was being set, some of the accused noted through their counsel that they had been ready to proceed at that first opportunity). The trial judge found simply that:

> two years in bringing a case to trial once it is in District Court is too long, unless, of course, there are exceptional circumstances. And in this case, there are none.

He therefore found there had been an infringement of the Charter rights of the accused under s. 11(b). He then went on to consider the remedy and, upon the authorities, found that a stay was appropriate.

The sections of the Charter with which we are concerned are, of course, s. 11(b) and 24(1) which are as follows:

> 11. Any person charged with an offence has the right ...
>
> (b) to be tried within a reasonable time;
>
> 24(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

The questions therefore become:

> (1) Was there a failure to grant the accused a trial within a reasonable time?
> (2) What is the appropriate remedy for whatever wrong has been suffered?

This court, in a trilogy of cases, Regina v. Antoine (1985), 5 C.C.C. (3d) 97, Re Regina and Beason (1983), 7 C.C.C. (3d) 20, Regina v. Heaslip et al. (1983), 9 C.C.C. (3d) 480, approved the test with some modification followed in the United States Supreme Court in Barker v. Wingo, (1972) 407 U.S. 514 (the Court was, of course, there concerned with the rights of the accused person to a "speedy trial" under the United States Constitution). That test is that if the delay appears prima facie excessive, the court must consider four factors in determining whether the accused has been deprived of his constitutional right. Those factors are length of delay, reason for the delay, the defendant's assertion of his right and prejudice to the defendant.

Martin J.A. noted in the three judgments that while delay is necessary to trigger the inquiry, there may be cases where the delay is so inordinate as in itself to amount to an infringement. Normally one must consider the other factors which even in extreme cases may counterbalance the delay and demonstrate that the accused has suffered no breach of his. Charter rights.

On the reason for delay, Martin J.A. approved the dicta of Powell J. in Barker at pp. 530-32:

> The length of delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance. Nevertheless, because of the imprecision of the right to speedy trial, the

> length of delay that will provoke such an inquiry is necessarily dependent upon the peculiar circumstances of the case. To take but one example, the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge.
>
> Closely related to length of delay is the reason the government assigns to justify the delay. Here, too, different weights should be assigned to different reasons. A deliberate attempt to delay the, trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay.

It is to be remembered that in the case at bar there was no conduct, either by the Crown or the accused, contributing to the delay, the only reason was the systemic delay, no actual prejudice was shown by any accused and no accused person objected to any of the delays, although some and perhaps all were ready to proceed on the first scheduled date for trial.

On the question of remedy, Martin J.A. had this to say at p. 43 of Beason:

> In my opinion there may well be cases where, balancing all the various factors, even although no concrete prejudice has been shown, such as a witness having become unavailable due to delay, it will be apparent that the point is being approached, although it has not yet been reached, when any significant continuation of the delay in the trial of an accused person will result in an abridgment of his constitutional right to be tried within a reasonable time. In those circumstances the court, in the exercise of its inherent power to control its own process, may direct that the trial proceed at an early date and dismiss the charge if the Crown fails to proceed on that date. Where, however, on balancing the various factors including, of course, the complexity or lack of complexity of the case and the nature of the offence the court has decided that the accused's right to be tried within a reasonable time has already been contravened, I am of the opinion that the only appropriate remedy is the dismissal of the charge: see Strunk, a.k.a. Wagner v. United States (1973), 412 U.S. 434.

The Court of Appeal trilogy has been followed in other Provincial Courts both as to test and remedy: see R. v. Cardinal (1985), 21 C.C.C. (3d) 254 (Alta. C.A.), R. v. Thompson (1983), 8 C.C.C. (3d) 127 (B.C.C.A.).

The Supreme Court of Canada had the problem before it in Mills v. The Queen (1986), 26 C.C.C. (3d) 481 on appeal from the Ontario Court of Appeal. That latter court had dismissed an appeal from a High Court judge who had dismissed a motion to quash the refusal of a provincial judge presiding at a preliminary hearing to stay proceedings on a charge of robbery because of alleged infringement of s. 11(b). The majority of the Supreme Court held that a judge presiding at a preliminary hearing had no jurisdiction to determine whether a Charter right had been infringed or denied and that a court so constituted was not one of competent jurisdiction to provide a remedy under s. 24. The majority, therefore, did not need to inquire into the issue of unreasonable delay. Mr. Justice Lamer, with whom Chief Justice Dickson concurred, did however address the issue. He propounded a test of reasonableness which was somewhat different from that of Powell J. in the United States and approved by Martin J.A. in the Ontario trilogy. That test involved considering four factors:

(1) the growing impairment of the interests of the accused by the passage of time;
(2) waiver of time periods;

(3) the time requirements inherent in the nature of the case; and
(4) institutional resources.

In connection with institutional resources, he made specific reference to systemic delays. While he conceded that some allowance must be made therefor, he warned against legitimizing unacceptable delay resulting from inadequate resources. He suggested at p. 561 that there might be a transitional period enabling governments to remedy institutional and personnel inadequacies in the criminal system, during which time the courts might be more tolerant of delay attributable to that cause. He also suggested that during that same transitional period, silence by the accused in the face of requests for delay by the Crown might more readily be construed as acquiescence.

This issue came on again before the Supreme Court of Canada very recently in Rahey v. The Queen (1987), 75 N.R. 81. The facts involved the failure of the trial judge to render a decision on a motion by the accused for a directed verdict. The delay, comprising some 19 adjournments extending over eleven months all judge made, was sufficient in the unanimous view of the court, to constitute an infringement of the accused's Charter right under s. 11(b) and the appropriate remedy was a stay of proceedings.

On other aspects there were, however, different views expressed. Lamer J. (Dickson C.J.C. concurring) restated the views expressed in Mills. He emphasized that impairment of or prejudice to an accused's security interest was to be presumed, and that actual prejudice need not be proved. While delay consented to by the accused should not be considered, delay imposed by the trial judge could not be weighed against the accused.

Wilson J. (for herself and Estey J.) found prejudice to the accused to be a very relevant concern in weighing the circumstances of the delay. She also considered the consequences of releasing accused persons who allege a s. 11(b) violation but who might well be found guilty if the trial was allowed to proceed. She asked if the solution is to render an accused's s. 11(b) rights worthless by allowing issues to be determined through an unduly slow process or whether the response should be to ensure that the administration of justice works effectively. The answer, in her words, is "to ensure the efficient working of the system" (Rahey v. The Queen, supra, at p. 110).

Le Dain J. (for himself and Beetz J.) generally approved the approach taken by Martin J.A. in the Ontario trilogy which he described as "particularly illuminating and helpful" (Rahey v. The Queen, supra, at p. 115). He also agreed with Wilson J. that demonstrated prejudice to the accused's right to a fair trial, while not essential, was an important factor.

La Forest J. (for himself and McIntyre J.), while agreeing with the result, disagreed that the minimum remedy upon a finding of an infringement of the accused's Charter rights under s. 11(b) was a stay of proceedings. A court of competent jurisdiction enjoys full discretion in choosing a remedy under s. 24(1). As he put it, "there can no more be a single notion of breach than there can be a single remedy to meet it, whether in the form of a stay of proceedings or otherwise" (Rahey v. The Queen, supra, at p. 137).

While all of the judgments in Rahey are of course very helpful in the eventual resolution of the problems relating to s. 11(b), it is difficult to draw a binding precedent except as follows:

(1) While proof of actual prejudice may not be essential, the majority (Beetz, Estey, McIntyre, Wilson, Le Dain and La Forest JJ.) consider actual prejudice to the accused to be a factor in the determination of the infringement of the accused's Charter rights.
(2) The majority (Dickson C.J.C., Beetz, Estey, Lamer, Wilson and Le Dain JJ.) are of the

view that once an infringement of the accused's Charter rights is found, the minimum remedy is a stay of proceedings.

There is no majority finding on the following but there is no dissent therefrom:

(1) Consent or acquiescence by the accused is important but it must be examined closely to ensure that it was informed, unequivocal and freely given.
(2) Inadequacy of facilities is a consideration, but it cannot be used to frustrate the Charter rights of the accused. It probably is to be weighed in the balance against the Crown, perhaps not quite so much now as later after governments have been given the opportunity to take corrective measures.

I consider the whole period from arrest (November 1983) to trial (September 1986) and particularly the last two years from committal for trial to be indicative of a prima facie excessive delay which warrants examination. Indeed, the Crown so concedes. I have come to the conclusion, however, (not without misgivings) that the accused's Charter rights under s. 11(b) were not infringed by the time the trial came on in September 1986. In doing so, I have considered the following:

(1) There was no misconduct on the part of the Crown (or the accused) resulting in the delay or any part of it.
(2) There was no indication of any objection by any of the accused to any of the adjournments, particularly the major ones being the one year delay after committal and the one year adjournment after the trial was not reached on the first scheduled date.
(3) There was no evidence of any actual prejudice to the accused in the delay. There was of course the inherent prejudice of the charge itself, but the accused were all released on bail. While the terms of bail were stringent, there was no evidence that the terms adversely affected the accused to any serious extent in their enjoyment of life or commercial activity. Moreover, there was an indication that where hardship was shown, the terms were varied.
(4) Perhaps the most important factor in my view, however, is the conduct of the accused when the final adjournment was sought or imposed. I reported earlier that some of the accused announced that they had been ready to proceed on the first scheduled date. None, however, objected to the one year adjournment. It may be of course that they thought such action, in light of the facilities available, would be futile, but I am far from certain that it would have so proved. The following is the complete transcript of the proceedings before the Honourable Judge Keenan on October 25, 1985 when the final date for trial was set:

MR. TAYLOR: The next matter is Elija Askov, Samuel Gugliotta, Ralph Hussey and Edward Melo.
MR. BARHYDT: My name is Barhydt, Your Honour, initial C. appearing for my own client, Mr. Askov, and also as agent for Michael Morse who is representing Mr. Hussey. Mr. Askov is the gentleman in the black shirt, and Mr. Hussey is the gentleman in the white shirt.
MR. MAUBACH: Your Honour, Maubach, initial D. I appear for Sam Gugliotta, the gentleman immediately to my left.
MS. RICHARDSON: And I appear as agent for Mr. Bloomenfeld who represents Mr. Melo.

THE COURT: And who is not represented then?

MR. BARHYDT: Everyone is.

THE COURT: Everyone is? Okay.

MR. TAYLOR: The offence date is the 12th of November 1983. It's a matter of some complexity and I would think that we'd need a couple of weeks.
THE COURT: The endorsement made at the time that the matter was set for trial was that Mr. Askov was acting on his own behalf.
MR. BARHYDT: That's correct. That has changed, Your Honour.
THE COURT: All right. We can now record that Mr. Askov is represented by counsel?

MR. BARHYDT: Yes. I believe I had informed the co-ordinator, Your Honour.

THE COURT: All right. September date?

MR. BARHYDT: I'm free.

MS. RICHARDSON: I wish to confirm that Mr. Bloomenfeld would be agreeable to that, Your Honour.

MR. MAUBACH: I'm agreeable.

MR. BARHYDT: Considering my friend's statements earlier, I can indicate on behalf of Mr. Morse and myself that we were prepared to proceed on the 15th of this month.

THE COURT: All right.

MR. MAUBACH: Likewise, Your Honour, with respect to Mr. Gugliotta, we were prepared to proceed.
THE COURT: All right. The sittings of September 2nd, 1986, and I've noted that it's estimated for two weeks.

MR. TAYLOR: That is a reasonable estimate.

MR. MAUBACH: Your Honour, with respect to Sam Gugliotta, I have spoken to my friend and I am going to ask Your Honour to consider a variation pursuant to 457.8(2)(a) his bail. Right now the bail is a recognizance in the amount of twenty thousand dollars with one or more sufficient sureties. The original surety is present in court. The amount of the recognizance is not to be changed, but the reporting frequency is. My understanding is, and my friend will confirm it, that Mr. Gugliotta has no prior criminal convictions.

THE COURT: Well, is that agreed, Mr. Taylor?

MR. TAYLOR: The actual reporting is that he report to the R.C.M.P. 225 Jarvis Street each

Friday between 9 a.m. and 5 p.m. To notify Sergeant Scott, Special Enforcement R.C.M.P. 225 Jarvis Street of any change of address from the above; abstain from communicating with Askov, Hussey and Melo except through counsel for the purposes of defence; not own or possess a weapon and keep the peace and be of good behaviour. I am prepared to change the condition to, that he report to the R.C.M.P. 225 Jarvis Street, Toronto, the first Friday of each month between 9 a.m. and 5 p.m. to the officer in charge. Other than that, all the conditions will remain the same.

THE COURT: All right.

MR. MAUBACH: We agree with that subject to Your Honour. The other thing was --
THE COURT: Wait a minute now. Have you got any written application for variation?
MR. MAUBACH: No. There is no written application. I don't know if it's really necessary under 457.8(2). It gives Your Honour jurisdiction to vacate any order previously made, and make a new order. It's not brought to you in the form of an appeal or anything like that. It's brought before Your Honour sitting as a judge of the court for which my client is to be tried.
THE COURT: With respect to reporting, it's varied to provide that he report to the R.C.M.P. headquarters 225 Jarvis Street, Toronto, the first Friday of each month between 9 a.m. and 5 p.m. and not as previously provided. All other conditions remain the same, and the existing recognizance remains in force until the varied recognizance has been entered into.
MR. TAYLOR: I am not asking that Mr. Gugliotta enter into custody, but it would be up to my friend to get that new recognizance prepared and signed.

THE COURT: Thank you.

As will be seen from that transcript, no earlier date was sought, no hint of prejudice suggested. Indeed no suggestion of infringement of a Charter right was made by any accused until the trial itself was due to commence on September 2, 1986. It seems almost as though the accused had deliberately withheld any intimation of their intention until that time in order to avoid the alternative remedy referred to by Martin J.A. in Beason -- that is to say, a direction that the trial proceed. They knew in October of 1985 that the trial was not then scheduled to proceed until September, 1986. If the accused considered that this delay was an infringement of their Charter right, why did they not proceed then for a remedy?

I will concede that the obligation is not upon the accused to ensure a speedy trial. That obligation is upon the Crown. But it will not enhance the appearance of justice if the accused are permitted to delay their application for relief, or indeed to conceal any claim for such relief until any remedy, other than a stay of proceedings, becomes impossible to grant. The accused should not, in my opinion, be permitted to obtain an advantage in this manner -- an advantage which involves the staying of proceedings in a very serious offence. Had there been the slightest indication of concern by any of the accused at the delay at any stage of the proceedings, particularly on the occasion of the last adjournment, I might have taken a quite different view of the matter.

I do not wish to make light of the apparent lack of facilities in the Judicial District of Peel. While some consideration must be given to large almost explosive population growth such as that occurring in the Judicial District of Peel and the difficulties and shortages of facilities consequent upon that growth, a situation that requires a delay of one year between committal and trial and a further delay of another year if trial is not

reached as scheduled cannot long be tolerated. It must be recognized, however, that part of the delay occurs as a result of giving priority to the trials of persons in custody. Perhaps this is the transitional period referred to by Lamer J. in Mills. I say only that at this time and in these circumstances, I cannot find that the Charter rights of the accused have been infringed. As the trial was indeed scheduled and able to proceed in September 1986, no remedy under s. 24 of the Charter is needed.

I would therefore allow the appeal, set aside the stay and direct that the trial proceed. It need hardly be added that the trial should proceed with expedition.

GRANGE J.A.

GOODMAN J.A.:— I agree.

BROOKE J.A.:— I agree.