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R. v. Formosa

Between
Her Majesty the Queen, and
Wendy Formosa

[1998] O.J. No. 4674
DRS 99-00806

Ontario Court of Justice (Provincial Division)
Scarborough, Ontario
Chandhoke Prov. J.

Oral judgment: November 3, 1998.
(23 pp.)

Civil rights — Trials, due process, fundamental justice and fair hearings — Speedy trial, accused's right to — Waiver of right — Denial of right — What constitutes within a reasonable time.

This was an application by Formosa for a stay of a criminal proceeding. Formosa was issued an offence notice for proceeding contrary to a sign at an intersection. A certificate of offence was issued, and Formosa gave notice of intention to appear. She wanted to challenge the evidence of the issuing officer. A trial date was scheduled 13 months later. The trial was adjourned so that Formosa could apply for a stay of proceedings. Formosa claimed that she was deprived of her right to trial within a reasonable time under section 11(b) of the Canadian Charter of Rights and Freedoms, and that she was prejudiced by the delay. The Crown argued that the delay was the result of a transitional period in the court structure relating to provincial offences.

HELD: The application was allowed. The delay was prima facie unreasonable. The matter was aggravated by the minor nature of the charges. Formosa did not consent to a lengthy delay. The sole reason for the delay was a lack of institutional resources. Proper steps were not taken to address the lack of resources. Formosa was prejudiced by the delay. The only appropriate remedy was a stay of proceedings.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, ss. 11(b), 24(1).
Courts of Justice Act, s. 109.
Highway Traffic Act, ss. 144(9), 219(1).
Provincial Offences Act, ss. 3(1), 5.1, 5.2(1), 6, 7(1), 8, 9.

Counsel:

R. Neilson, for the Attorney General.

C. Orr, provincial prosecutor.
M. Booth, for the defendant.
J. McKinnon, for the defendant.

¶ 1 **CHANDHOKE PROV. J.** (orally):— The defendant, Wendy Formosa, was issued an Offence Notice under Part 1 of the Provincial Offences Act on July 11, 1997 for the offence of 'Proceed contrary to sign at intersection', contrary to s. 144(9) of the Highway Traffic Act.

¶ 2 The proceedings were commenced against this defendant by filing a Certificate of Offence, number 29017644 on July 16, 1997, pursuant to s. 3(1) of the Provincial Offences Act.

¶ 3 The right to be tried within a reasonable time is attached once the Certificate is filed and the proceedings are commenced.

¶ 4 A defendant who does not wish to dispute the charge may pay the set fine and surcharge to the Provincial Court and the matter is concluded, pursuant to s. 8 of the Provincial Offences Act.

¶ 5 If the defendant wishes to plead guilty with an explanation, he may attend before a Justice of the Peace and the Justice will impose the appropriate penalty and the matter can be concluded in a summary fashion, pursuant to s. 7(1) of the Provincial Offences Act.

¶ 6 If the defendant fails to respond to the Offence Notice within 15 days, in accordance with the above-mentioned Sections 6, 7 or 8, the defendant shall be deemed not to dispute the charge and the Justice of the Peace shall impose a set fine if the Certificate is complete and regular on its face, pursuant to s. 9 of the Provincial Offences Act.

¶ 7 In this jurisdiction, if the defendant wishes to dispute the charge, the defendant must appear in person or by agent, (not by mail or fax etcetera), at the Court specified in the Offence Notice to apply for a trial, pursuant to s. 5.1 of the Provincial Offences Act.

¶ 8 This defendant gave Notice of Intention to Appear on July 26, 1997. She also indicated that she intended to challenge the evidence of the provincial offences officer, pursuant to s. 5.2(1) of the Provincial Offences Act.

¶ 9 The defendant applied for trial on July 24, 1997 and was issued a Notice of Trial on August 20, 1997 with a first trial date being August 13, 1998 at 7 p.m. a delay of about 13 months.

¶ 10 The defendant, if convicted, is subject to a minimum fine of $60 and maximum fine of $500, pursuant to s. 219(1) of the Highway Traffic Act, and a loss of or accumulation of two demerit points. The demerit points are applied to the driving record from the date of the offence but activated only upon conviction.

¶ 11 The defendant appeared through her agent, M. Boothe, on August 13, 1998 and sought an adjournment so that he could seek remedy for a s. 11(b) violation for his client. He needed time to serve notice, pursuant to s. 109 of the Court of Justice Act to the Attorney General of Ontario and the Federal Attorney General. The defendant was granted such adjournment on August 13, 1998 and the case was adjourned at the request of the defence to October 13, 1998 when a Notice of Constitutional Question was served where the defendant is seeking a stay of the proceedings pursuant to s. 24(1) of the Charter because

the delay is systemic delay, and as such, weighs against the Crown, and the delay has caused the defendant irreversible prejudices, and these proceedings have weighed heavily on the defendant's mind.

> S. 11(B) OF THE CHARTER
> "Any person charged with an offence has the right to be tried within a reasonable period of time."
> S. 24(1) OF THE CHARTER
> "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 he Court considers appropriate and just in the circumstances."

¶ 12 The defendant carries a burden of proof and must establish on the balance of probabilities that his rights under s. 11(b) of the Charter have been violated.

¶ 13 So, the Court is presented with yet another Askov motion. The Supreme Court of Canada in R. v. Askov (1990) 59 C.C.C. (3d) 449 (S.C.C.) considered the relevant factors for 11(b) analysis, which viewed as establishing a specific time-frame of six to eight months as a reasonable length of time.

¶ 14 However, R. v. Morin (1992) 71 C.C.C.(3d) 1 (S.C.C.), another Supreme Court of Canada decision, sets an eight to 10 month guideline, but subject to various factors.

¶ 15 Mr. Justice Sopinka stated, writing for the majority decision,

> "The general approach to a determination as to whether the right has been denied is not by the application of a mathematical or administrative formula, but rather by a judicial determination balancing the interests which the section is designed to protect against factors which either inevitably lead to delay or are otherwise the cause of delay.

¶ 16 It is clear from R. v. Morin that delay is not a fixed limitation period of time. Even though the decision of Mr. Justice Sopinka suggests tolerable periods of institutional delay of eight to 10 months in Provincial Court, and suggests that these ranges are guidelines, and do not constitute a limitation period.

¶ 17 The case before the Court deals with a minor regulatory offence where it takes less than 10 minutes, an average run of the mill trial, and there are means of resolving these charges by payment or guilty pleas well before trials. These methods are used to encourage out-of-Court settlements and reduce the number of trials for the Courts. The Court has to determine if this delay of 13 months is reasonable for this regulatory Highway Traffic Act offence on the balance of probabilities.

Analysis

¶ 18 In R. v. Morin, the current leading decision regarding the right to all trial within a reasonable period of time, Mr. Justice Sopinka set out the following analytical framework for s. 11(b).

(i) The length of delay.
(ii) Waiver of time period.
(iii) The reason for delay

(a)
Inherent time requirements of the case.

(b) Actions of the Accused
(c) Actions of the Crown

(d) Limit on institutional resources.
(e) Other reasons for delay.

(iv) Prejudice to the Accused

¶ 19 This court has to consider all these factors as applicable to this quasi criminal regulatory minor offence before arriving at any conclusion. Length of delay, reason for delay, and prejudice to the accused are more relevant, as waiver of time period is not in issue in these proceedings.

LENGTH OF DELAY

¶ 20 The clock starts ticking against the Crown from the moment the Certificate of Offence is filed. Thirteen months delay for a minor regulatory offence is prima facie excessive.

¶ 21 The Crown has indicated to the Court that this 13 months delay is nominal and is not unreasonable. Ruth Neilson, who also appeared for the Crown, has informed the Court that the Ministry became aware of this problem in August, and now, since October 19, 1998, they are looking into these matters and have opened up four-tier Day Court to reduce the length of delay. These delays only exist in Scarborough or Metro East Court. Other Courts in Toronto have trial dates set within six to eight months.

¶ 22 Joe McKinnon, who appeared for the defendant, along with Michael Boothe, on October 29, 1998, submitted, to the Court that over the last 18 months, the Courts have been closed in Scarborough and that caused the increased caseload and the lengths of delay.

¶ 23 The defendant relies on the decision of R. v. Winstone, a judgment by Judge Hogg, dated April, 1990 at Newmarket. On Page 15 of his Ruling, Judge Hogg orally indicated,

> "I am of the opinion that the learned Justice of the Peace did indeed err in this situation. A 12 month delay in a Provincial Offences matter should never exist. The most this matter should be on is within 60 to 90 days. It is an absolute disgrace, and therefore, I shall allow the appeal. The charges will be stayed. Thank you."

¶ 24 The defendant has further relied on Judge Bogusky's judgment. Judge Bogusky in R. v. Caruso, November 07, 1991 indicates,

> "If a criminal prosecution which affects society greatly has to be resolved within six to eight months, surely it's something that is administrative in nature. I mean, speed is not found on the tablets from the mountain. It is a law that is sent to test us. It is supposed to be a regulatory thing. It is supposed to regulate speed on the highway. Some argue quite well that it is strictly a revenue thing. Surely, that type of issue should be resolved a lot faster."

He further goes on at Page 24 and says,

> "The bottom line is that I concur with the Justice of the Peace, Bates, when he says five and

> a half months is pretty shabby, and it will contravene somebody's rights. That person is entitled, as a tax-payer, to have a better shake in a Courtroom than waiting around for five and a half months. So, I see nothing wrong with the logic of Justice of the Peace Bates. I dismiss the appeal."

¶ 25 Madam Justice Arbour in R. v. Bennett (1991) 64 C.C.C.(3d) 449 (Ont. C.A.) quoted Justice Cory at Page 473 citing,

> "In my view, Cory J. in Askov was well aware of the difficulty of the enterprise and, for that reason, he engaged in what he called 'a rough comparison'. Furthermore, even after having completed this rough exercise, Cory J. doubled the results, thereby stating clearly, once again, that the concept of reasonableness was not encapsulated in a scientific or mathematical formula but rested upon an exercise of judgement. This is also consistent with the concluding remarks of Cory J. to the effect that, although Courts will frequently be asked to stay proceedings, most regions of this country are operating within reasonable and acceptable time limits with the result that such relief will be infrequently granted.
> Acceptable time-limits must thus not only be set locally, but adjusted periodically to reflect the comparative position of that jurisdiction, at that time, to the best similar one in the country."

¶ 26 The Crown has argued it is a transitional period. They have opened one additional Night Court and a four-tier Day Court, effective October 19th. It is a coincidence that the Crown has picked this day to argue, or vigorously argue this motion -- and the Crown has told the Court that the Crown will argue every 11(b) motion with the same gallant -- on the first day of adding one court to reduce the backlog.

¶ 27 The Provincial Prosecutors have, before this day, for weeks, have invited this Court to stay proceedings for s. 11(b) violations or withdraw charges for length of delay reasons.

¶ 28 The Honourable Judge Corbett considers this issue on appeal under s. 20 of the Summary Convictions Appeal Act in 1989. The defendant was charged for parking infractions,

> "I can not find that their failure to appear constituted to the delay. I also do not find the cases with respect to delay where the accused is represented by counsel to be determinative in this case. This case raises the question of what is a reasonable time to have a matter adjudicated upon in the absence of the accused.
> I am of the opinion that cases going up to 20 months for a parking violation is excessive and does infringe the right to trial within a reasonable time. I cannot legitimize this delay on an ex-parte basis of a parking infraction. The trial should take place at the instance of the Crown within a period of 12 months from the laying of the Information, and that, in the absence of any other evidence. I can only conclude that the delays in excess of 12 months are excessive and violate the respondent's right to he tried within a reasonable time."

¶ 29 In R. v. Michael O'Donnell at Orangeville, His Honour Judge Rice on an impaired driving charge, and over 80 milligram charge, in staying the proceedings at the delay of 111/2 months stated,

> "I quote from the Ontario Law Reform Commission Report only to emphasize that in 1973 that the Commission, after considerable research and study, recommended a 90-day period as a reasonable time.
> In 1978 the Canadian Law Reform Commission after extensive research and study

> In 1978, the Canadian Law Reform Commission, after extreme research and study made its report No. 9 containing Criminal Procedures Part 1 and at Page 9 of the Canadian Law Reform commission reported as following:
> "D. - Discharge of the Accused
> Apart from a few minor exceptions, there is no limitation period screening the commencement of a prosecution by indictable offences. Once a charge is laid, there is no rule specifying how soon the case must be brought to trial. The law ought reasonably express some formal recognition of the vice of delay. The Commission proposes that where an accused has not been brought to trial within 180 days in proceedings under Part XXIV of his or her first Court appearance on a charge, the accused should be entitled to apply to a Judge of the trial court for a discharge, unless the period has been lawfully intended in the manner provided. Then, the accused would simply be discharged. It should not be a matter of discretion, it should be a matter of passage of time."

¶ 30 No reports of any Commission have ever indicated that such a delay, of 13 months is acceptable for minor offences, even though most of the reports or the caselaw is directly dealing with quasi criminal offences or summary conviction matters.

¶ 31 In a further case, Judge Zimmerman, in R. v. Michael Quillan, at Newmarket, stated, in staying the proceedings in an impaired driving charge that "13 months delay is clearly too long", and he has referred,

> "The Chief justice of the Province has expressed, in another forum, his view that 60 to 90 days is the appropriate time within which a trial of this nature should be held."

¶ 32 But, these offences are much more minor. They take much less time. They do not require the same requirements of a criminal trial, including disclosure, pre-trials or any judicial pre-trials. These matters should be brought to trial I much sooner than the criminal trials.

WAIVER OF TIME PERIOD

¶ 33 There is no issue of waiver of time period. When the defendant sought an adjournment on August 13 to October 19, that period is not being considered as delay period.

REASONS FOR DELAY.

¶ 34 Delays attributable to inherent time requirement is generally viewed as neutral time and is not attributed against the Crown. Some delay is expected in lengthy and complex matters, but this is an ordinary run of the mill case.

¶ 35 On October 19, 1998, I had 49 matters on the list. These Night Courts are set up for about two hours Court sitting time, and to have no more than 35 cases on the list, but we end up with 45 to 50 cases every night. It works out to be less than three minutes per case. Courts have accommodated the docket, but still, if one gets a traffic ticket in Scarborough and wants a trial, he will have to wait for 13 months or longer for a three-minute scheduled trial time.

¶ 36 I find the criminal cases jurisprudence does not have a comfortable comparison as to those Provincial Offences Act matters. Criminal charges have pre-trials, vetting by Crowns and have a trial time unlike Provincial Offences Act trials. It is simple speedy justice for regulatory offences.

¶ 37 There is no actions on the part of the defendant or the Crown to cause any delay. It is, institutional resources that is the cause of the delay. This situation is not the fault of the Crown or the Prosecutor personally, but the responsibility for the same does lie with the Crown. The Crown can not avoid its responsibility and attendant consequences by a simple assertion that the existing system and procedure is inadequate.

¶ 38 There are several Courtrooms sitting vacant every night that can assist with clearing the backlog. I have personally made it known to our Administrative Senior Justice of the Peace that there are several Justices willing to take on extra Night Court assignment to ease the backlog. We have Courtrooms, Justices willing to work extra, but no Courts are being set up, except one Night Court is added now and a temporary two-month four-tier Day Court.

¶ 39 There is no such delay in other area Courts in Toronto since Askov. The Crown has argued that the government is spending money on healthcare or community safety zone areas.

¶ 40 Mr. McKinnon, in his reply submissions, has indicated that he has brought the delay problem to the attention of the Deputy Attorney General, but to no avail. He stated, 'It is a self-induced delay by the Ministry of the Attorney General.'

¶ 41 There is no real explanation for delay by the Crown, except it takes too long to bring these matters for trial.

¶ 42 R. v. Smith, [1989] 2 S.C.R., 1120 (1969) 52 C.C.C.(3d) 97, the Court ruled,

> "In the absence of an explanation, one could infer that the delay was unjustified."

¶ 43 The Court finds that the government is stressing upon health and the community safety zone area, which the point is well-taken, but at the same time, I find that the community safety is at jeopardy if there is no proper enforcement of the legislation.

¶ 44 It is preferred that the violator be prosecuted as soon as possible and be brought to trial as soon as possible, and 13 months is not justified.

PREJUDICE TO THE ACCUSED (DEFENDANT)

¶ 45 The presence or absence of prejudice endured by an accused or a defendant as a result of delay in the proceedings is one of the most significant factors in determining whether or not s. 11(b) rights have been violated.

¶ 46 Mr. Justice Sopinka in R. v. Morin states.,

> "In circumstances in which prejudice is not inferred and is not otherwise proved, the basis for the enforcement of the individual right is seriously undermined."

¶ 47 Prejudice may be inferred and/or proven. Prejudice to an accused may be interred, or presumed from the period of delay in and of itself. In fact, there may be a point at which inference of prejudice will become virtually irrebuttable as a result of the excessive delay.

¶ 48 Justice Lamer in R. v. Mills, [1986] 1 S.C.R. 863 (S.C.C.) states,

> "There is an irrebuttable presumption that as of the moment the charge is laid, the defendant/accused suffers a prejudice and the Charter guarantee is aimed at limiting that prejudice incurred over time. An accused is not required to do anything to expedite his trial. Any inaction on the part of the accused will be taken into consideration in assessing any alleged prejudice suffered as a result of delay."

¶ 49 A person charged with a criminal or a quasi criminal offence will be subject to prejudices that come with the charge, but similar prejudices may or may not apply for regulatory strict or absolute liability offences. One may suffer different prejudices and may be serious in comparison to the kind of charges faced by the defendant.

¶ 50 The Crown has argued there is no prejudice to the defendant, or minimal at the most. The Crown submits that the defendant actually benefits from delay because points are not activated until conviction, and upon conviction, applies from the offence date.

¶ 51 The defendant has argued that there is interred and proven prejudice and argues that the defendant must apply in person for trial, one can not do that by mail or modern means available to other civil procedures. This requirement puts the entire burden on the defendant either to take time off work or engage an agent to represent him and attend to apply for trial.

¶ 52 The defendant has argued that she faced further prejudices by preparing and arguing the s. 11(b) motion and costs of the procedure to comply with s. 109 of the Courts of Justice Act. This is much more onerous procedurally than the original charge of 'Proceed contrary to sign at intersection'.

¶ 53 I agree, the Court has to consider prejudices caused by delay, not otherwise. The defendant further states, that automobile insurance is affected by being charged, and insurance becomes renewable within less than 12 months. Insurance companies have assessed the premium, it is based on driving record or driving charges pending before the Courts, and not convictions.

¶ 54 The defendant argues the same applies to those employees who are required to disclose to their employers if the defendant is facing any moving traffic violations for driving offences. If the defendant has to wait for 13 months to be proven innocent, it prejudices the defendant.

¶ 55 The defendant has further argued that the defendant suffers a memory loss over a period of time. The Crown has argued the defendant should make notes. It is clear that memory fades over a period of time.

CONCLUSION

¶ 56 The primary objective of s. 11(b) is that any person charged with an offence be tried within a reasonable period of time for the protection of individual interest and societal interest.

¶ 57 Justice Lamer in R. v. Mills indicated,

> "By giving effect to the rights of the accused under s. 11(b), government will be addressing the problem of providing sufficient resources for the administration of criminal justice. Failure to do so, however, will lead to a result which all will prefer to avoid, the freeing of the guilty for reasons other than failure on the part of the Crown to discharge its burden of proof."

¶ 58 In R. v. Rabey, at Page 292, four Justices concurred and held that,

> "Inherent in the constitutional right to be tried within a reasonable time is the right not to be tried beyond that point in time and thereafter. No Court has jurisdiction to try the accused or order that he be tried in violation of that right. After the passage of an unreasonable period of time, no trial, not even the fairest trial, is permissible."

¶ 59 Many Courts, including this one, have stayed several and thousands of cases over the last ten years, but the back log problem in Scarborough Courthouse has gone from bad to worse. No-one should have to wait for 13 months and suffer the prejudices for a minor regulatory absolute/strict liability offence. These cases should be tried like any other jurisdiction in the province, no later than the outer limits of 8 to ten months in this jurisdiction, so that it can be consistent with other comparable jurisdictions.

¶ 60 I am satisfied by the defendant, on a balance of probabilities, that her rights to a trial within a reasonable period of time have been infringed. This is based on my judicial experience, the evidence of the limitation on resources, and the train imposed on them, and the process in the comparable jurisdictions within the Province of Ontario.

¶ 61 Therefore, the proper remedy is to grant a stay in this matter, pursuant to 24(1) of the Charter. Proceedings stayed.

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