Regina v. MacMillan *

Indexed as: R. v. MacMillan (C.A.)

3 O.R. (3d) 588
[1991] O.J. No. 3386

Court of Appeal for Ontario
Grange, Griffiths and Carthy JJ.A.

July 8, 1991

* Application for leave to appeal to the Supreme Court of Canada refused December 10, 1992 (Lamer C.J.C., McLachlin and Iacobucci JJ.). S.C.C. File No. 22549. S.C.C. Bulletin, 1992, p. 2723.

Charter of Rights — Trial within reasonable time — Accused charged in Ottawa with three counts of dangerous driving causing death in January 1990 — Trial set for December 1990 — Accused's right to be tried within reasonable time violated — Relevant period of delay is that between laying of charge and trial — Permissible delay in Provincial Division should be shorter than in General Division — Appropriate standard for comparison with Ottawa is Winnipeg — Permissible delay in Ottawa at relevant time is four to six months — Canadian Charter of Rights and Freedoms, s. 11(b).

The accused was charged on January 31, 1990 with three counts of dangerous driving causing death arising out of an accident which occurred on October 7, 1989. He first appeared in court on February 27, 1990; an adjournment to March 13, 1990 was granted to permit him to retain counsel. On March 13, 1990, the accused elected trial by a judge and jury. An adjournment was granted to March 29, 1990 for a pre-trial hearing, and a further adjournment to April 5 was granted because the Crown had not made full disclosure. On April 5, the accused re-elected trial by a judge alone in the Provincial Division. It was estimated that the trial would take four days, so the trial was set for the first available four-day sequence, starting on December 18, 1990. On that date, the accused applied for and was granted a stay of proceedings on the basis that his right under s. 11(b) of the Canadian Charter of Rights and Freedoms to be tried within a reasonable time had been violated. The trial judge stated that the permissible delay in the Provincial Division should be shorter than in the General Division, that the appropriate standard of comparison for that jurisdiction (Ottawa) should be Winnipeg, and that four to six months was a reasonable time in Ottawa either from the date of election or from the date of first appearance to trial (the reasons were ambiguous as to the starting date). The Crown appealed.

Held, the appeal should be dismissed.

The Provincial Division should be expected to administer justice more rapidly than can be accomplished in the General Division. The trial judge correctly determined that the appropriate standard for comparison for Ottawa was Winnipeg. The permissible delay from the swearing of the information to trial in Ottawa in April 1990 was two to four months. It was appropriate to acknowledge an "intake" period to accommodate the retention of counsel, bail proceedings and disclosure and to add two months for that period in this case, for a total period of four to six months from the laying of the charge to trial. The accused's s. 11(b) rights were violated.

R. v. Askov, [1990] 2 S.C.R. 1199, 75 O.R. (2d) 673, 49 C.R.R. 1, 59 C.C.C. (3d) 449, 79 C.R. (3d) 273, 74 D.L.R. (4th) 355, 113 N.R. 241, 42 O.A.C. 81; R. v. Bennett (1991), 3 O.R. (3d) 193 (C.A.), *consd*

Other cases referred to

R. v. Harrison, Ont. C.A., Dubin C.J.O., Arbour and Osborne JJ.A., May 31, 1991; R. v. J. (M.A.) (1991), 3 O.R. (3d) 241 (C.A.); (1991), 3 O.R. (3d) 223 (C.A.); R. v. Rabba (1991), 3 O.R. (3d) 238 (C.A.); R. v. White (1991), 3 O.R. (3d) 247 (C.A.)

Statutes referred to

Canadian Charter of Rights and Freedoms, s. 11(b)
Criminal Code, R.S.C. 1985, c. C-46, s. 249(4) [rep. & sub. R.S.C. 1985, c. 27 (1st Supp.), s. 36]

APPEAL by the Crown from a stay of proceedings.

Norman P. Farrell, for the Crown, appellant.

Donald B. Payne, for respondent.

The judgment of the court was delivered by

CARTHY J.A.: This is an appeal from an order staying proceedings against the respondent on the ground that he was denied his right to be tried within a reasonable time, as guaranteed by s. 11(b) of the Canadian Charter of Rights and Freedoms. The order was made on December 18, 1990, by Judge B.T. Ryan of the Ontario Court of Justice (Provincial Division), sitting in Ottawa, at the opening of the respondent's trial on three counts of dangerous driving causing death contrary to s. 249(4) [rep. & sub. R.S.C. 1985, c. 27 (1st Supp.), s. 36] of the Criminal Code, R.S.C. 1985, c. C-46.

The appeal presents two issues arising from the application to this case of the decision in R. v. Askov, [1990] 2 S.C.R. 1199, 75 O.R. (2d) 673, 59 C.C.C. (3d) 449. The first issue is: of what guidance is the six to eight month maximum period between committal and trial laid down in Askov for the General Division in Peel in setting the corresponding maximum permissible delay in the Provincial Division in Ottawa? The second overlapping issue is: what constitutes a reasonable time between laying of a charge and trial in the Ottawa Provincial Division when compared with the time interval in similar courts in other jurisdictions across Canada?

The facts upon which these issues arise are quite straightforward. On October 7, 1989, the respondent was the driver of a vehicle which struck a truck; three passengers in the respondent's vehicle were killed. The investigatory reports were prepared without delay, but for some reason the respondent was not charged until January 31, 1990. The first appearance was on February 27, 1990, when an adjournment was granted to March 13, 1990, to permit the respondent to retain counsel. On that date the respondent elected trial by judge and jury and an adjournment was granted to March 29, 1990, for a pre-trial hearing. A further adjournment was granted to April 5 because the Crown had not yet made full disclosure. On that date the accused re-elected trial by judge alone in the Provincial Division. It was thought by counsel and the presiding judge that four days would be required for the trial, and the court accordingly set the trial dates for the first available sequence of four days, commencing on December 18, 1990.

The overall time from charge to trial was ten and a half months, consisting of approximately two months between the date the charge was laid and when the parties were ready to set a date for trial, and eight and a half months thereafter.

Several issues that I consider incidental were pressed by counsel. The respondent says that the police completed their investigation within one or two weeks of the accident and yet delayed swearing an information until January 1990. Full disclosure was made only after a formal demand was lodged at the end of March. The delay prior to the swearing of the information does not fall within the ambit of s. 11(b) of the Charter because the person was not, until that time, "charged with an offence". However, pre-charge delay may be a consideration in judging the reasonableness of the events following the charge. Nonetheless, I agree with the Provincial Division judge that no appreciable time was lost by reason of late disclosure in the overall span between charge and trial

and the apparent tardiness in swearing the information is not a factor affecting that assessment. I therefore put this consideration aside as of little account or, as did Judge Ryan, as neutral time.

The respondent also tenders evidence that during April 1990, he was frightened by threatening telephone calls to his home and on two later occasions by a prowler on his property. The respondent believed these occurrences were motivated by the fact that the charge was outstanding. Even if this belief was misplaced, the incident is worth noting as an example of the type of prejudice to which Cory J. adverted in Askov, which can cause apprehension and suffering to an accused while awaiting trial. However, the Crown did not strenuously press a case based on lack of prejudice and, in the final analysis, other factors weigh more obviously in the scales to determine the outcome.

The Crown contends that this was a serious and complicated case, as indicated by the nature of the accident and the four days requested for trial. Thus, it is argued, the system should be accorded some flexibility and, overall, the time between charge and trial was not unreasonable. Whatever the reason may have been to seek four days for trial, I agree with Judge Ryan that this was not a complex case. The accused was not disputing that he was the driver nor that the passengers died as a result of the collision. There was no drinking involved. The clear evidence was that the vehicle being driven by the accused crossed the median, and that its speed was only modestly in excess of the limit. In any event, neither the seriousness of the offence nor its complexity had any bearing upon the timing of the trial. The evidence indicates that in April 1990 the normal delay in Ottawa between fixing a date and trial was approximately eight months for all cases. There is nothing in the events prior to the fixing of the date for trial suggesting that the complexity or seriousness of the offence influenced the overall delay.

Thus, while Askov, as confirmed by this court [Dubin C.J.O., Arbour and Osborne JJ.A.] in R. v. Bennett, released May 31, 1991 [now reported 3 O.R. (3d) 193], makes it clear that it is the overall delay between charge and trial that must be assessed under s. 11(b), and that no maximum permissible delay should be imposed arbitrarily in all cases, there is nothing in the present case forming a potential basis for unreasonable delay unless it is the time between fixing the date and the trial.

The Provincial Division judge did not treat the issue in that precise fashion. The essence of his reasons can be taken from the following excerpt:

> The difficulty, of course, in determining whether that is an unreasonable delay is in examining the Askov decision. We must remember that we are dealing in that case with a delay from the formal committal to the date of trial. The court clearly enunciated principles by which this court is bound and, in my view, gives this court great solace that we now have some direction from the highest court in the land in dealing with unreasonable delay.
>
> The court clearly defined from the statistical evidence that was produced before it and that court relied upon that the delay should be in the area of six to eight months within that time frame, that is, from formal committal to trial.
>
> No reference was made in respect to proceedings in the Provincial Court or in this court in dealing with matters as to the period of delay but it would seem to me to be inherent from the decision that the very basis by which this court is established, it is a court that should provide faster service to the citizens of the community, to society, to the individuals of our society in a shorter period of time than that as suggested in the committal to trial.
>
> Individuals who elect to be tried in this court, I am sure it is a consideration, or at least it should be a consideration of individuals, when making their election and should desire to be tried in this court, that they expect a reasonable time limit that their trial should be heard and it should be, in my view, from anywhere from four to a maximum of six months and I am using that figure as a result of the directions that were so clearly defined in the Askov decision.
>
> So that I would expect that in this court from the date of the first appearance to the date of trial should be within that time frame, somewhat shorter than the six to eight months.
>
> That feeling, of course, has been confirmed by the statistical evidence advanced and filed as part of the application from other jurisdictions across the land. It seems common now that this court is

> tending towards the comparative studies done in the Winnipeg court, a city of similar size and similar problems, that their situation there is a trial can get on much sooner than even four months.

(Emphasis added)

As I read this, Judge Ryan was saying that the permissible delay in the Provincial Division should be shorter than that in the General Division, that the appropriate standard of comparison for Ottawa should be Winnipeg, and that four to six months is a reasonable time either from the time of election or from the first appearance to trial. The reasons are ambiguous as to the starting date and it must be remembered that the overall time which must be assessed under the Askov decision is that from swearing the information to trial.

The Crown takes exception to this analysis of Judge Ryan and says that it does not take into account the "intake" function of the Provincial Court. In Askov, the delay due to this factor occurred prior to the committal for trial. Thus, it would not have entered into the computation of the eight months. The Crown further objects that all of the statistical evidence available to the court in this case related to times between fixing the trial date and the trial itself rather than the periods to which Judge Ryan referred.

The Crown concedes that proceedings entirely within the Provincial Division should be expected to proceed more quickly than those which proceed to the General Division, but contends that approximately 45 days' intake time should be added to whatever is otherwise considered reasonable.

I accept the argument of the Crown that an intake period to accommodate retention of counsel, bail proceedings, and disclosure must be acknowledged. In the present case, the two months taken for those purposes does not stand out as unreasonable. However, in the course of argument the Crown also had to concede that in this case the eight and a half months between fixing the trial date and the trial could not be justified unless that segment of delay is justifiably the same in the Provincial Division as in the General Division and the appropriate standard of comparison for Ottawa is Peel rather than Winnipeg. My reasons will proceed on the basis of that acknowledgment and deal with time in the Provincial Division as distinct from the General Division and an appropriate standard of comparison for Ottawa.

I agree with the Provincial Division judge and with counsel on both sides that the Provincial Division should be expected to administer justice more rapidly than can be accomplished in the General Division. In light of this consensus elaboration is unnecessary, and a few words will suffice to emphasize the significance of this conclusion. Particularly where an accused is given an election, real meaning should be attached to expedition because rapidity is the principal benefit derived by the accused from the waiver of the rights to a preliminary hearing and a jury trial. On a summary conviction offence, moreover, it is not unreasonable to say that an accused who cannot be charged more than six months after the offence should be provided with a trial within six months of being ready. These are not directly apposite considerations, but both speak to timeliness of the proceedings.

On the other side of the coin, but coincident with the interests of the accused, society is best served by expedition in the Provincial Division. The bulk of the offences that are tried in Provincial Court are considered by the Code, or the prosecutors, to be of lesser gravity. They carry a lesser penalty, and are generally based upon a very simple factual background. Further, they are generally closer to the daily life of the community, in the sense that shoplifting, house-breaking, and driving offences and the like are regularly visited upon all communities on a daily basis. The community is thus entitled to expect that the charges will be dealt with within a time frame that demonstrates effective and responsive control of such conduct.

It is my opinion that more than lip service should be paid to this distinction between proceedings in the Provincial Division and the General Division of the Ontario Court of Justice.

All of the statistical comparison data submitted to Judge Ryan came from the respondent and was not challenged by the Crown. That evidence centred upon areas with comparable population bases to Ottawa, the number of Provincial Division judges, and time periods between date-setting and trial. A synopsis taken from the respondent's factum follows:

Number ofDelay from PopulationProvincialDate-Setting CityBaseCourt Judgesto Trial Date

Ottawa, Ontario600,000-700,0007 (effectively)81/2-13 months Winnipeg, Manitoba700,000281-2 months Edmonton, Alberta600,000223-4 months Old City Hall, Toronto650,000291-4 months

The Crown argued that these are not appropriate comparisons because there is no indication of the number of charges being processed, Ottawa is a capital city with an international airport, and the data does not reveal the number of complex issues that might arise from political issues being presented for trial in Ottawa.

On the basis of some 1991 data presented to this court, the Crown suggests that Peel is a more appropriate area for comparison to Ottawa. Other than for the coincidence of population base I see no basis for such a comparison. Peel has been identified as a centre with a particular problem related to an expanding international airport and burgeoning population base, with the attendant increase in charges laid. On the other hand, the evidence shows that the number of criminal charges dealt with by the Provincial Division in Ottawa has tripled over the past 20 years while the number of Provincial Court judges has not increased. In the table quoted above, the actual number of Provincial Division judges in Ottawa should read ten and is inserted as seven by the respondent because three of the judges were serving administrative duties and extra-jurisdictional duties at the time of preparation of the table. Whether it be seven or ten, and without population growth statistics for Ottawa over the 20 years, it seems obvious that the true problem is not a burgeoning population that has surprised the administration and left it incapable of responding. It is rather a case of failing to appoint sufficient personnel over a long period of time with the result that in April 1990, seven or ten Provincial Court judges are being expected to accomplish the work of 28 or 29. The disparity between Ottawa and the other centres in delay time reflects the problem. It is also significant that the so-called delay-reduction procedures carried on under the auspices of the provincial government during 1990 produced the worst results in Ottawa, where pre-trial delay actually increased from eight months to 13 months between April and October 1990.

In conclusion then, I agree with Judge Ryan that the appropriate standard for comparison for Ottawa is Winnipeg. Allowing for differences between the two cities that may exist but which do not appear from the statistics I would double Winnipeg's statistical result of one to two months from date-setting to trial and say that in April 1990 the permissible delay in Ottawa was two to four months. I would then add two months for intake time, which is more than the Crown contended for, and reach the same numbers as Judge Ryan, i.e., four to six months. However, these times should run from laying the charge to trial.

Every case must be tested on its own facts against this general assessment. The present case bears no unusual features which would suggest treatment distinct from what should be the norm. I therefore share Judge Ryan's view that the s. 11(b) Charter rights of the accused have been violated.

This case was argued concurrently with R. v. Bennett, supra, R. v. Rabba [now reported 3 O.R. (3d) 238], R. v. M. (G.C.) [now reported 3 O.R. (3d) 223], R. v. White [now reported 3 O.R. (3d) 247], R. v. Harrison, Ont. C.A., and R. v. J. (M.A.) [now reported 3 O.R. (3d) 241] (reasons released May 31, 1991). I will now examine whether the above conclusion is consistent with the reasons in those cases, and in particular, those in Bennett, which is the most relevant on its facts.

The theme which I derive from the reasons in Bennett is that the six to eight months referred to in Askov should not be taken as an arbitrary limit which cannot be exceeded in any jurisdiction or under any circumstances; that the time in Askov between committal and trial was only one portion of the time between the charge and trial; that it is specious to conclude that all jurisdictions and all courts must operate more efficiently than Peel simply because it has the largest systemic delay; that comparisons must be made between the court in question and ones in comparable locations, based upon adequate and proper evidence to determine what delay, at that time and in that place, is unreasonable having regard to the cause of the delay; and, overall, that all four factors referred to in Askov must be analyzed and balanced with a conscious effort to prevent a segment of systemic delay from being isolated and driving the result.

Taking these elements of the theme one by one, I see no inconsistency. The point that there is no arbitrary limit is explicitly set forth in my reasons. The overall time from charge to trial was certainly examined, but is not as

complicated as in Askov or Bennett. The time leading to date-setting was nominal and within the range suggested by the Crown for intake activities. Thus, the overall time appears quite the same in terms of being reasonable or unreasonable tested in a broad focus of charge to trial or the narrower focus of date-setting to trial.

The next element of the theme is comparison to Peel. The rationale in the instant case, presented and rejected for comparing to Peel, was not based on its systemic delay record, but rather on its comparable population base to that in Ottawa and its location at a busy airport site.

The next element, the need to compare to other comparable jurisdictions, is the most distinctive feature of the present case which distinguishes it from the facts in Bennett and demonstrates compliance with the directions contained in the reasons of Arbour J.A. at p. 26 of the manuscript [p. 217 O.R.]:

> 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.

Unlike in Bennett, in the case at bar comparisons were made to comparable jurisdictions based upon evidence that was not contested or controverted. Admittedly, it did not include the number of charges laid and disposed of in each jurisdiction, but I remain satisfied that the trial judge had sufficient evidence to make the appropriate comparison and to assess the cause of the delay in Ottawa. Further, this comparison testing separates the case from the obiter remarks at pp. 27 and 28 of the manuscript reasons [pp. 217-18 O.R.] in Bennett, dealing with targets in the Provincial Court.

The final segment of the theme in Bennett is the necessity to fairly balance all four factors referred to in Askov. The Crown did not suggest waiver was a factor; prejudice, if anything, weighs on the side of the accused; and that leaves time, in the overall, and the portion representing systemic delay. As mentioned earlier, in the context of this case I cannot see how the overall time of ten and a half months can have a different weight in the balance than the eight and a half months between date-setting and trial. That eight and a half months failed by six and a half months to meet the test of a comparable jurisdiction. If two months is reasonable for that segment of the process, then, in this case, four months must be reasonable from beginning to trial. Following the model of the reasons is Askov, the time for identifying unreasonable delay was doubled for the second portion from the example set by Winnipeg.

Recognizing the dangers of absolute time periods and the subjective nature of a balancing process, I am left in no doubt that in this case the scales tip to the table level on the side of the accused.

I would therefore dismiss the appeal.

Appeal dismissed.