Sharma v. The Queen et al.

71 C.C.C. (3d) 184

Supreme Court of Canada
Lamer C.J.C., La Forest, Sopinka, Gonthier, McLachlin, Stevenson and Iacobucci JJ.

March 26, 1992

Charter of Rights — Trial within reasonable time — Systemic delay — Waiver — Thirteen-month delay between date of arrest and date of trial in Provincial Court on charges of impaired driving causing bodily harm, "over 80" and obstructing peace officer — Three months of delay attributable to preparation for trial — Nine months of delay due to limitation on institutional resources only slightly exceeding appropriate guideline — Accused waiving two weeks of delay — During entire period, accused prohibited from driving as condition of bail — Accused not however seriously prejudiced — Accused's right to trial within reasonable time not infringed — Canadian Charter of Rights and Freedoms, s. 11(b).

On February 17, 1988, the car which the accused was allegedly driving was involved in a motor vehicle accident. The driver of the other vehicle suffered serious and permanent injuries. Witnesses at the scene indicated that the accused was the driver, although he denied this to police. As a result of the investigation, the accused was charged with impaired driving causing bodily harm, "over 80" and obstructing a peace officer. The accused was held in custody overnight and following a bail hearing, was released on a recognizance which included a term that he not operate a motor vehicle until the charges had been dealt with. One week later, the accused appeared in court and requested a one-month adjournment upon instructions from counsel because he had only applied for legal aid the previous day. The accused attempted to inquire about getting his driving privileges reinstated but the presiding justice told him to speak to duty counsel. One month later, the accused appeared in court with a letter from counsel indicating acceptable trial dates, the earliest of which was March 7, 1989. These dates were allegedly chosen after counsel had consulted with court staff and had been advised that trial dates were being set for March, 1989. The trial was set for March 8, 1989. On that date, counsel applied for a stay of proceedings on the grounds of unreasonable delay. Because the Crown had not been given previous notice of the application, defence counsel agreed to an adjournment. On March 22, 1989, the charges were stayed by the trial judge. An appeal by the Crown to the Ontario Court of Appeal was allowed and a new trial ordered.

On appeal by the accused to the Supreme Court of Canada, held, Lamer C.J.C. dissenting, the appeal should be dismissed.

Per Sopinka J., La Forest, Gonthier, Stevenson and Iacobucci JJ. concurring: The total delay in this case was 13 months. Of that period, the accused waived the two weeks between the date when he first applied for a stay of proceedings and when the motion was ultimately dealt with. Given that the accused was prepared to argue the motion and readily acceded to an adjournment caused by his lack of notice and preparation, it can be assumed that the accused was fully aware of his rights and that by agreeing to an adjournment, he was waiving his right to complain about the subsequent two-week delay. This was one of the circumstances in which consent to an adjournment may amount to a waiver. It was not shown, however, that the entire period from March, 1988, until March, 1989, was waived by the accused even though the letter from counsel suggested trial dates in March, 1989. A waiver must be clear and unequivocal and with full knowledge of the right ***[page185]*** one is waiving. While the Crown attempted to produce evidence that earlier dates could have been set, that evidence was not inconsistent with evidence tendered on behalf of the accused to the effect that the dates in March, 1989, were suggested following consultation with court staff. This one-year period was not explicitly waived and the court could not infer from the letter and the circumstances surrounding the letter that the accused implicitly waived the time period. In considering the reasons for the delay, the first matter to be considered is the inherent time requirements of the case. While these charges were based on a discrete event, the case was a complicated one

involving a number of police, civilian and possibly expert witnesses. This complexity will be reflected in more time being necessary, both for the prosecution to prepare its case and for the defence to prepare to meet the case. Up until the set date appearance of March 24, 1988, the accused appears to have been in the process of obtaining and instructing counsel and therefore, clearly he was not ready for trial. As the accused at no time indicated that he was prepared for trial or that he wished the first available trial date, it was not possible to determine when he was ready for trial. Given the complexity of the case, it may not have been until some time in May, 1988, that the accused was ready for trial. Thus the inherent time requirements were approximately three months. As regards actions of the accused, even though the accused did not waive the period from March, 1988, to March, 1989, it is clear that the action of providing the letter suggesting dates in March, 1989, guaranteed that no date prior to that time could be set. While the events do not establish waiver, it was also not shown that a date that far in the future was necessarily inevitable. As far as actions of the Crown, the defence conceded that the Crown did not do anything to occasion any of the delays. With respect to limits on institutional resources, since this case arose in a jurisdiction which has experienced delays for a longer period of time and therefore has had more time to address the problem, the lower range of the guidelines for institutional delay should be adopted. Those guidelines are in the range of eight to 10 months for Provincial Court, subject to deviation by reason of the presence or absence of prejudice. In this case, approximately nine months of the period could be assigned to institutional delay. With respect to prejudice to the accused, although he suffered some prejudice as a result of the delay by reason of the bail conditions, this prejudice was minimal. If the accused was seriously prejudiced by the delay, he could either have pressed to have his case tried or made some effort to vary the bail conditions. As for inferred prejudice, again no more than nominal prejudice should be inferred as a result of the mere passage of time. The accused's inaction from his set date appearance to his scheduled trial date showed a noticeable lack of concern with the pace of litigation. Some account must be taken of the fact that the accused was not altogether unfamiliar with the criminal justice system. Applying these factors, particularly the actions of the accused, the minimal nature of any prejudice and the guidelines concerning institutional delay and taking into account the interests designed to be protected, particularly the relative seriousness of the charge, the delay in this case was not unreasonable. The accused's rights under s. 11(b) have not been violated and the appeal must be dismissed.

Per McLachlin J.: While a prima facie case for delay was made out, the prejudice to the accused did not outweigh society's interests in bringing him to trial. On the one hand the accused suffered some prejudice because of the bail condition suspending his licence; on the other hand the offence was serious and the societal interest in bringing this accused to trial was strong.

Per Lamer C.J.C. dissenting: Even placing the onus on the accused to prove prejudice, in this case actual prejudice has been established. The accused's liberty ***[page186]*** interest was clearly prejudiced by the bail condition to which he was subject for the entire 13-month period. Those conditions included a complete prohibition on driving, a prohibition which would have been imposed as part of a sentence had he been found guilty following a prompt trial. Essentially, the accused had already begun serving his sentence, a state of affairs which calls for haste in bringing a matter to trial. The fact that the accused agreed to the condition cannot be given any weight. It cannot be said that an individual exercises any real choice in agreeing to a bail condition when the alternative is to be refused bail. Moreover, giving this factor some weight would be tantamount to suggesting that prejudice can be discounted if it is waived by the accused. In any event, only one week after the prohibition was imposed the accused inquired about having it lifted, indicating that his job was at stake. Even if the driving prohibition was clearly justified by the accused's record and he made no attempt to have the condition removed, this cannot minimize the prejudice suffered. Accordingly, the appeal should be allowed and the stay of proceedings restored on the ground that the accused suffered prejudice beyond the length of time that can be legitimately supported on the basis of limited institutional resources.

R. v. Morin (1990), 55 C.C.C. (3d) 209, 76 C.R. (3d) 37, 38 O.A.C. 298, 10 W.C.B. (2d) 96; affd 71 C.C.C. (3d) 1, 15 W.C.B. (2d) 276 *apld*;

Cases referred to:

R. v. Askov (1987), 37 C.C.C. (3d) 289, 60 C.R. (3d) 277, 33 C.R.R. 319 [revd 59 C.C.C. (3d) 449, 74 D.L.R. (4th) 355, [1990] 2 S.C.R. 1199, 79 C.R. (3d) 273, 49 C.R.R. 1, 42 O.A.C 81, 75 O.R. (2d) 673, 113 N.R. 241, 11 W.C.B. (2d) 224]; R. v. Smith (1989), 52 C.C.C. (3d) 97, [1989] 2 S.C.R. 1120, 73 C.R. (3d) 1, 45 C.R.R.

314, 63 Man.R. (2d) 81, 102 N.R. 205, 8 W.C.B. (2d) 801; Korponey v. A.-G. Can. (1982), 65 C.C.C. (2d) 65, 132 D.L.R. (3d) 354, [1982] 1 S.C.R. 41, 26 C.R. (3d) 343, 44 N.R. 103, sub. nom. Korponay v. A.-G. Can.; R. v. Clarkson (1986), 25 C.C.C. (3d) 207, 26 D.L.R. (4th) 493, [1986] 1 S.C.R. 383, 50 C.R. (3d) 289, 19 C.R.R. 209, 69 N.B.R. (2d) 40, 66 N.R. 114, 16 W.C.B. 454; R. v. Palmer (1979), 50 C.C.C. (2d) 193, [1980] 1 S.C.R. 759, 14 C.R. (3d) 22, 30 N.R. 181, 4 W.C.B. 171 [affd C.C.C., S.C.R. & W.C.B. loc. cit.]; R. v. C. (M.H.) (1991), 63 C.C.C. (3d) 385, [1991] 1 S.C.R. 763, 4 C.R. (4th) 1, 123 N.R. 63, 12 W.C.B. (2d) 577

Statutes referred to:

Canadian Charter of Rights and Freedoms, s. 11(b) Criminal Code, R.S.C. 1970, c. C-34, ss. 118(a), 237(b), 239(2) -- now R.S.C. 1985, c. C-46, ss. 129(a), 253(b) [rep. & sub. R.S.C. 1985, c. 32 (4th Supp.), s. 59], 255(2) [rep. & sub. R.S.C. 1985, c. 27 (1st Supp.), s. 36]

Appeal by the accused from a judgment of the Ontario Court of Appeal allowing an appeal by the Crown from a stay of proceedings entered on charges of impaired driving causing bodily harm, "over 80" and obstructing a peace officer.

I. Koziebrocki and D.E. Buckman, for accused, appellant.

Murray D. Segal and K.L. Campbell, for the Crown, respon dent.

S.R. Fainstein, Q.C., and R.J. Frater, for intervener, Attorney-General of Canada.

Lamer C.J.C. (dissenting): I have read the reasons of my colleagues, Justices Sopinka and McLachlin. With respect, I ***[page187]*** cannot agree with their disposition of this case. I would allow the appeal and restore the stay entered by White Prov. Ct. J.

While I took the position in R. v. Morin, S.C.C., No. 21996, March 26, 1992 [since reported 71 C.C.C. (3d) 1, 15 W.C.B. (2d) 276], that the onus lay on the Crown to demonstrate that the delay caused no prejudice to the accused, I am now bound by the reasons of the majority which shifted that onus onto the accused. Here, however, even placing the onus on the accused, it is clear that actual prejudice has been established. The appellant's liberty interest was clearly prejudiced by the bail conditions to which he was subject for the entire 13-month period between the charge being laid and the matter being brought to trial. Those bail conditions included a complete prohibition on driving, a prohibition which would have been imposed as part of his sentence had he been found guilty following a prompt trial. Essentially, the appellant had already begun serving his sentence, a state of affairs which calls for haste in bringing a matter to trial.

In his reasons, Sopinka J. notes that the appellant agreed to that bail condition when it was originally imposed. I put no weight on this factor. First, it cannot be said that an individual exercises any real choice in agreeing to a bail condition when the only alternative is to be refused bail. Secondly, giving this factor some weight would be tantamount to suggesting that prejudice can be discounted if it is waived by the accused. This court has never taken that position.

In any event, only one week after the prohibition was imposed, the appellant inquired about having it lifted, indicating that his job was at stake. This is no small concern given that he is apparently the sole income-earner for a family including himself, his wife and two children. Sopinka J. minimizes the appellant's objection on two grounds. First, he notes that the driving prohibition was clearly justified by the accused's record. Secondly, he notes that, although the court provided the appellant with some information as to where he might inquire further about his bail conditions, the appellant did not attempt to have them removed through those avenues.

With respect, I cannot agree that either of these factors can be used to minimize the prejudice suffered by the appellant. As to the fact that the prohibition was justified, one would hope that the bail conditions imposed are always justified. The fact that they were justified does not mean that they were not prejudicial in the context of a s. 11(b) claim [see Canadian Charter of Rights and Freedoms]. No one would suggest that a justified refusal to

grant bail provides a basis for discounting the prejudice that stems from a lengthy stay in custody pending trial. As for the second factor, it ***[page188]*** goes further than shifting the onus to establish prejudice onto the accused. The implication is that not only must the accused establish prejudice, he or she must also indicate that he or she made an attempt to minimize that prejudice, essentially placing an onus on the accused to "mitigate". I cannot accept this implication.

In the result I would allow the appeal and restore the stay entered in Provincial Court, on the ground that the appellant suffered prejudice beyond the length of time that can be legitimately supported on the basis of limited institutional resources.

La Forest J. concurs with Sopinka J.

Sopinka J.: This appeal raises the same issue as that raised in the companion case of R. v. Morin, S.C.C., No. 21996 [since reported 71 C.C.C. (3d) 1, 15 W.C.B. (2d) 276], which is being released concurrently with these reasons. The issue is whether the accused has been tried within a reasonable time as is constitutionally required by s. 11(b) of the Canadian Charter of Rights and Freedoms. The general approach to the issue of unreasonable delay has been discussed in Morin and I do not propose to repeat that analysis. This decision will simply apply the approach discussed in Morin to the facts of this appeal.

The facts

On February 17, 1988, a car allegedly driven by the appellant went through a red traffic light and struck another vehicle. The driver of the other vehicle suffered serious injury to her neck and back and required immediate hospitalization. The injuries suffered by the victim will allegedly continue to trouble her for the foreseeable future. Upon arriving at the scene of the accident, the police observed that Mr. Sharma had all of the physical symptoms of intoxication. Mr. Sharma indicated at this time that he was not the driver of the vehicle involved in the accident, but was merely a passenger. Witnesses at the scene of the accident, however, allegedly identified Mr. Sharma as the driver of the vehicle. Mr. Sharma was subsequently charged with impaired driving causing bodily harm, contrary to s. 239(2) of the Criminal Code, R.S.C. 1970, c. C-34 (now s. 255(2)) and operating a motor vehicle while having a blood-alcohol content which exceeded the legal limit, contrary to s. 237(b) (now s. 253(b)) of the Code. Mr. Sharma was also charged with obstructing a peace officer, contrary to s. 118(a) (now s. 129(a)) of the Code, as a result of his attempt to falsify his involvement in the traffic accident in order to avoid arrest.

Mr. Sharma was incarcerated overnight and was brought forward for a bail hearing the day after his arrest. As a result of a ***[page189]*** substantial and varied record, the Crown objected to release and a bail hearing was held. Mr. Sharma was eventually released on a recognizance of $1,500, with sureties, and under the condition that he not operate a motor vehicle until the charges at issue in this appeal had been dealt with. At his bail hearing Mr. Sharma indicated that he would abide by any order to refrain from driving, actually indicating that such a situation "would be better for my wife" (C.O.A., at p. 34).

On February 25, 1988, the appellant appeared in court to set a date for trial. He requested a one-month adjournment upon instruction from counsel, having applied for legal aid only the previous day. Mr. Sharma attempted to inquire about getting his driving privileges reinstated but the presiding justice told him to speak with duty counsel if he had questions about his bail conditions.

On March 24, 1988, Mr. Sharma appeared in court with a letter from counsel indicating acceptable trial dates, the earliest of which was March 7, 1989. These dates were allegedly chosen after counsel had consulted with court staff and had been advised that trial dates were being set for March, 1989. Mr. Sharma elected trial by Provincial Court judge and the trial was set for March 8, 1989.

On March 8, 1989, prior to entering a plea, the appellant applied for a stay of proceedings on grounds of unreasonable delay. As the Crown had not been made aware of the delay motion until just prior to the motion and as no transcripts were provided by the accused in regard to his earlier court appearances, after brief introductory submissions argument on the motion was adjourned until March 15, 1989. The matter was put over another week

when Judge White, who had heard the original submissions on the motion, was not presiding on March 15th. The submissions on the motion were completed on March 22, 1989, at which time White Prov. Ct. J. stayed each of the charges against Mr. Sharma on the basis that his right to a trial within a reasonable time had been violated. The Crown appealed the stays to the Court of Appeal for Ontario which allowed the appeal, set aside the stays and ordered that the matter proceed to trial on an expedited basis. This appeal comes before the court as of right.

Judgments

A. Ontario Provincial Court

White Prov. Ct. J. began his reasons by distinguishing the present case from the Ontario Court of Appeal judgment in R. v. Askov (1987), 37 C.C.C. (3d) 289, 60 C.R. (3d) 277, 33 C.R.R. ***[page190]*** 319. He indicated that unlike Askov, the accused in this case had clearly suffered prejudice as a result of the delay in being brought to trial. One of the conditions of the bail order in this case was an undertaking not to drive and thus any delay in being brought to trial prolonged what was effectively a driving suspension. The motions judge found that a 13-month delay was simply too long. Having considered all of the factors suggested by counsel, Judge White found the delay to have been unreasonable. He therefore ordered that the proceedings be stayed.

B. Court of Appeal

Relying on its own judgment in R. v. Morin (1990), 55 C.C.C. (3d) 209, 76 C.R. (3d) 37, 38 O.A.C. 298, and having regard to the four factors specified by me in R. v. Smith (1989), 52 C.C.C. (3d) 97, [1989] 2 S.C.R. 1120, 73 C.R. (3d) 1, the Court of Appeal concluded that the s. 11(b) rights of the accused had not been violated. The appeal was therefore allowed, the stay set aside and the case sent back for an expedited trial.

Point in issue

The sole issue in this appeal is whether the appellant's right to be tried within a reasonable time, as guaranteed by s. 11(b) of the Charter, has been violated.

Analysis

In determining whether an accused has been denied his or her right to be tried within a reasonable time, a court must balance the interests to be protected by s. 11(b) against the factors that inevitably lead to delay. The factors to be considered are:

1. the length of the delay;
2. waiver of time periods;
3. the 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, and
(e) other reasons for delay, and

4. prejudice to the accused.

The balancing of these factors and their interaction with the interests sought to be protected by s. 11(b) are discussed in my reasons in Morin. I will proceed to consider these factors as they apply to this appeal.

[page191] 1. The length of the delay

The accused was charged on February 17, 1988, and he obtained a stay of proceedings in regard to the charges pending against him on March 22, 1989. The total time period between charge and the "disposition" of his

proceedings was therefore just over 13 months. For the reasons indicated below, a period of two weeks was waived by the accused during this time period and thus the total length of the delay was 12 1/2 months.

2. Waiver of time periods

At his scheduled trial on March 8, 1989, the accused made a motion that the proceedings against him be stayed due to unreasonable delay. At this time the Crown, who was prepared for trial, secured what became a two-week adjournment in order to prepare a response to the motion and allow time for the accused to obtain transcripts from his earlier court appearances. As the Crown was taken by surprise by the motion and the accused had failed to provide transcripts at the commencement of his motion, an adjournment was inevitable. Given that the accused was prepared to argue a s. 11(b) motion on March 8th and that he readily acceded to an adjournment caused by his lack of notice and preparation, it can be assumed that the accused was fully aware of his rights under s. 11(b) and that by agreeing to an adjournment he was waiving his right to complain about the subsequent two-week delay. In these circumstances, I am prepared to find that the stringent requirements of waiver required by Korponey v. A.-G. Can. (1982), 65 C.C.C. (2d) 65, 132 D.L.R. (3d) 354, [1982] 1 S.C.R. 41, and R. v. Clarkson (1986), 25 C.C.C. (3d) 207, 26 D.L.R. (4th) 493, [1986] 1 S.C.R. 383, have been satisfied. As I indicated in Morin, consent to adjournments may in certain circumstances amount to waiver. This is such a case.

The respondent argues that the entire period of time from March 24, 1988, until March 7, 1989, was waived by the accused. The respondent contends that the letter submitted by Mr. Sharma to the Crown at his set date on March 24, 1988, listing counsel availability amounts to waiver, as counsel listed no dates before March 7, 1989. Counsel for the accused indicated at the hearing of the motion that the list of trial dates had been set only after consultation with the applicable court office which had indicated that "they were giving dates commencing March of 1989" (C.O.A., at p. 71). It would have been preferable if this evidence had been presented by affidavit or otherwise, rather than by a statement by defence counsel. None the less, the courts below appear to have ***[page192]*** accepted the evidence in this form. Apparently, the practice referred to is not an uncommon manner of setting dates for court appearances. By providing a letter of available dates, counsel is saved the time, and the accused and legal aid are saved the expense, of wasted time in court waiting to set dates.

The respondent has attempted to counter this evidence by filing an affidavit from Suzanne Mactavish, the trial co-ordinator for the Ontario Court (Provincial Division) in Brampton, regarding the availability of trial dates at the set date of March 24, 1988. As this was not evidence either at the motion or before the Court of Appeal, and as it does not appear to satisfy the test for the admission of fresh evidence discussed in R. v. Palmer (1979), 50 C.C.C. (2d) 193 at p. 205, [1980] 1 S.C.R. 759, 14 C.R. (3d) 22, and most recently in R. v. C. (M.H.) (1991), 63 C.C.C. (3d) 385 at pp. 395-6, [1991] 1 S.C.R. 763, 4 C.R. (4th) 1, I am reluctant to consider the affidavit. Nevertheless, in view of the fact that counsel for the appellant takes no objection to its reception, I will treat it as being admissible. The statement of counsel for the accused is not directly questioned in the affidavit. The deponent does, however, assert that other cases in which dates were set on March 24, 1988, received dates prior to March, 1989. The circumstances relating to these cases are not referred to and the fact that some cases were given earlier dates is not inconsistent with the evidence tendered on behalf of the accused. At best, the affidavit simply casts some doubt on the statement made by defence counsel.

On the basis of the evidence discussed in the preceding paragraphs, I am unable to conclude that the accused has waived the time period in question. The test for waiver set in Korponey and Clarkson is stringent. As indicated in Morin, "waiver must be clear and unequivocal and with full knowledge of the right one is waiving". Taking into account the circumstances surrounding the letter from counsel, I am unable to conclude that the accused was aware of the right the respondent contends he was releasing or would have been willing to do so had he been aware of the implications of that release. I therefore find that the accused did not waive his right to complain of the delay resulting from the time period between March 24, 1988, and March 8, 1989. The time period was not explicitly waived and I am unable to infer from the letter and the circumstances surrounding the letter that the accused implicitly waived this time period.

[page193] 3. Reasons for the delay

(a) Inherent time requirements

The circumstances surrounding the charges before the court on this appeal concern a traffic accident which occurred on February 17, 1988. While based on a discrete event, this proceeding presents a more complicated case than that posed in the companion Morin appeal. This case involves a number of police, civilian and possibly expert witnesses. As there is a suggestion that the accused was not the driver of the vehicle involved in the accident, a number of civilian witnesses will be required, both to give evidence regarding the accident as well as identify the drivers of the vehicles involved in the accident. Police officers will also be required to give evidence, both in regard to the statements made by the accused to them at the scene of the accident and in regard to intoxication and the breathalyzer test results. Additionally, as there are allegations that the victim of the accident has been seriously injured, expert medical witnesses may be involved. While this case does not present an inordinately complex case, neither does it represent a particularly simple case. This complexity will be reflected in more time being necessary both for the prosecution to prepare its case and for the defence to prepare to meet that case.

Up until the set date appearance of March 24, 1988, the accused appears to have been in the process of obtaining and instructing counsel. On his first appearance in bail court, the accused had not yet spoken to counsel. By his February 25, 1988 set date appearance, Mr. Sharma had only just applied for legal aid and he requested a one-month adjournment, apparently to arrange for legal aid and to instruct counsel. Thus, until March 24, 1988, the accused was clearly involved in preparing his case for trial. As the accused at no time indicated that he was prepared for trial or that he wished the first available trial date, it is not possible to determine when he was ready for trial. Given the complexity of the case, it may not have been until some time in May, 1988, that the accused was ready for trial. In the absence of any evidence in the record, I am unable to determine any earlier date at which the accused would have been prepared for trial. By May, 1988, even assuming the complexity of the case, the prosecution would also have likely been ready for trial. The inherent time requirements are, therefore, approximately three months.

[page194] (b) Actions of the accused

The accused appeared in court on March 24, 1988, with a letter from counsel indicating dates upon which counsel was available for trial. As has been discussed previously, there is substantial conflict over whether the dates provided by counsel (which were all in March, 1989, or later) were in fact the earliest dates available for trial at that time. While I was unwilling to infer that this letter constituted waiver, it is clear that this action guaranteed that no date prior to March, 1989, could be set. There is conflicting material before the court as to whether a March, 1989 trial date was "inevitable". While I have concluded that the evidence as to the availability of earlier dates is insufficiently clear to establish waiver, I am not convinced that a date that far in the future was necessarily inevitable. If the accused was anxious to proceed, one would have expected something more in the form of protest or inquiry about other dates. While this is a matter which I will deal with in relation to prejudice, it is also pertinent to consider under this factor.

(c) Actions of the crown

From the time of setting the trial date until the scheduled trial date, the Crown did not take any actions, either to delay or expedite the trial. Counsel for the defence actually concedes that the Crown did not do anything to occasion any of the delays that were experienced in this case.

(d) Limits on institutional resources

This case originated in the Provincial Court in the District of Peel. The situation in Peel was fully canvassed by this court in Askov. While the situation has improved since the Askov decision, the district continues to experience institutional delays due to limited resources. Given the fact that Peel has experienced these delays for a longer period of time and, therefore, has had more time to address the problem, I would apply the lower range of the guidelines for institutional delay. In Morin I stated that this guideline should be in the range of eight to 10 months for Provincial Court, subject to deviations by reason of the presence or absence of prejudice. The period from the time the parties were ready for trial in May, 1988, until March, 1989, was institutional delay. This is a period of approximately nine months.

[page195] (e) Other reasons for delay

There do not appear to have been any other delays experienced in this case beyond those that have already been discussed in these reasons.

4. Prejudice to the accused

At the bail hearing of the accused, Mr. Sharma agreed to abide by any order that he not drive an automobile until the charges currently before the court were dealt with. Defence counsel asked:

> Q. Sir, do you need a car to drive back and forth to work, or is there some other means of transportation that you can use?

Mr. Sharma responded:

> A. I can take bus. I don't have car anymore.

The accused went on to volunteer that a prohibition from driving "[a]ctually ... would be better for my wife". The record also indicates that Mr. Sharma was in custody at various points during the time period in question on unrelated matters and thus had a reduced opportunity to drive.

Mr. Sharma raised the issue of his undertaking not to drive at his subsequent set date on February 25, 1988. The exchange between the appellant and the court took the following form:

> Mr. Sharma: I have a request to make, Your Honour. My job is at stake, if I can get my licence back.
>
> **The Court**: I believe, sir, at your bail hearing one of the conditions of your bail is that you not drive a motor vehicle until this matter is completed. If you have any inquiries regarding that, you can speak to a disclosure Crown, sir. He would be available on Monday, Wednesday and Friday in the office out there. You can ask them at the duty counsel office and they will assist you.

The relevance of this last exchange is that while Mr. Sharma may not have been a sophisticated participant in the justice system, the court provided substantial information regarding how the accused could attempt to vary his bail conditions. It is important to note that the bail condition was originally imposed for the reason that the record of the accused indicated that he had proven himself to be "a public menace on the road" and that it was in the public interest that he "not [be able] to get a hold of a car". The accused made no mention of the bail condition at his subsequent set date appearance on March 24, 1988, and it does not appear that he at any time attempted to have this bail condition removed despite receiving specific information from the court concerning how that might be accomplished.

[page196] The trial judge found that the appellant had suffered some prejudice as a result of the delay by reason of the bail conditions. This conclusion must have been derived from the circumstances that I have outlined above. While these circumstances are consistent with the appellant having suffered some prejudice, I conclude that it was minimal. If the appellant was being seriously prejudiced by the delay, he would either have pressed to have his case tried or made some effort to vary the bail conditions.

As for inferred prejudice, I am unwilling to infer more than nominal prejudice as a result of the mere passage of time. Mr. Sharma's inaction from his set date appearance to his scheduled trial date shows a noticeable lack of concern with the pace of litigation. Some account may also be taken of the fact that the appellant was not altogether unfamiliar with the criminal justice system. This may reduce the stress and anxiety of pending proceedings.

Disposition

Applying the factors discussed above, particularly the actions of the accused, the paucity of prejudice and the guideline concerning institutional delay and taking into account the interests designed to be protected, particularly the relative seriousness of the charge, I conclude that the delay herein was not unreasonable. Thus, the rights of the accused under s. 11(b) have not been violated and the appeal is therefore dismissed. As no trial has yet been held, the matter must proceed to trial. In view of the time that has elapsed since the initiation of the proceedings, the trial should proceed on an expedited basis.

Gonthier J. concurs with Sopinka J.

McLachlin J.: I would apply the same methodology in this case as I did in R. v. Morin, S.C.C., No. 21996 [since reported 71 C.C.C. (3d) 1, 15 W.C.B. (2d) 276], released concurrently. A prima facie case for excessive delay is made out. The remaining question is whether the prejudice to the accused outweighs society's interest in bringing him to trial. The appellant has suffered some prejudice; the bail condition suspending his licence to drive has curtailed his liberty to some extent. But on the other side of the scales the offence is serious and the societal interest in bringing this accused to trial is strong. These considerations outweigh such prejudice as the appellant has suffered.

I would dismiss the appeal.

Stevenson and Iacobucci JJ. concur with Sopinka J. Appeal dismissed. ***[page197]***