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Indexed as:

R. v. Szymanski

Between
Her Majesty the Queen, appellant, and
Chester Szymanski, respondent

[1997] O.J. No. 5045
DRS 98-05656
Court File No. SCA(P) 44/97

Ontario Court of Justice (General Division)
Summary Conviction Appeal - Central West Region - Brampton, Ontario
Hill J.

Heard: December 12, 1997.
Judgment: December 15, 1997.
(14 pp.)

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

Appeal by the Crown from a stay of proceedings due to a breach of section 11(b) of the Canadian Charter of Rights and Freedoms. The defendant was charged with impaired operation of a motor vehicle and of having care and control of a motor vehicle having consumed excess alcohol. The trial of the matter was delayed a number of times, partly at the request of the defence and partly because of systemic issues. After a delay of more than a year at the request of the defence the trial proceeded. The Crown entered its entire case. The defence then requested an adjournment to consider its arguments as to some legal issues but stated it had no evidence to call. On the subsequent trial date the defence appeared by accident and explained that the trial coordinator had contacted his office to say that the judge would be unable to preside. Because of the trial judge's availability the defence case had to be further postponed until the next fiscal year. At the next court date the motion for a stay of proceedings was brought and granted. The trial judge found that there was prejudice to everyone and that it would be impossible to properly try the issues given the lapse of time. He found that the total amount of time other than the six months at defence's request, was systemic delay.

HELD: Appeal allowed, new trial ordered. On a proper analysis, there was an eight-month delay for which the defence was responsible, and a ten-month delay composed of systemic delay and administrative confusion. The trial judge's statements concerning the ability to accurately recall evidence amounted to a misapprehension of the circumstances given that the case had been completed pending final legal submissions. The trial judge ought to have made specific inquiries as to the defence to the charges before concluding that the evidence would be inadequate. In sum, the trial judge was obliged to inquire into the nature of the applicable defences or to defer the Charter argument until all legal submissions had been made as to the merits of the case. These approaches would permit assessment of the measure of actual prejudice.

Statutes, Regulations and Rules Cited:

Canada Evidence Act, s. 30.
Canadian Charter of Rights and Freedoms, 1982, ss. 7, 8, 9, 10(b), 11(b), 24(2).
Criminal Code of Canada, s. 822(2).

Counsel:

T. Shuster, for the Crown.
P. Burstein, for the respondent.

HILL J.:—

THE ISSUE

¶ 1 The Crown appeals a stay of proceedings entered by the trial judge on account of what he found to be a breach of s. 11(b) of the Charter arising from a nineteen (19)-month delay to trial. The concluding paragraph of the court's reasons reads:

> In any event, there is prejudice to everyone and in this particular case, and I am only saying in this particular case, the 11(b) applies. The trial is not completed within a reasonable time and therefore I am going to order the matter stayed.

¶ 2 As a result, charges of impaired operation of a motor vehicle and of having care or control of a motor vehicle having consumed excess alcohol were stayed.

¶ 3 The Attorney General of Ontario submits that the trial judge erred in his analysis of the unreasonable delay of trial issue and, in turn, in the result itself.

HISTORY OF THE LITIGATION

¶ 4 The following chronology and summary traces the history of the proceeding:

September 13, 1995 - date of alleged offences

September 21, 1995	- first appearance before Ontario Court - Provincial Division (the provincial court). - case adjourned to Oct. 18, 1995 to set a date.
October 18, 1995	- case set for trial on May 2, 1996. - counsel estimate trial to last 3 hr.
April 24, 1996	- defence counsel prepares, serves and files: (1) a Notice of Motion seeking to exclude evidence pursuant to s. 24(2) of the Charter on account of alleged breaches of ss. 7, 8, 9 and 10(b) of the Charter. (2) a s. 30 Canada Evidence Act notice to introduce business records (excerpts of 1994/1995 Bell Canada telephone pages).
April 25, 1996	- date of defence Application for Adjournment returnable April 30, 1996 to adjourn May 2, 1996 trial date.
April 30, 1996	- defence application to adjourn May 2, 1996 trial date - agent appearing for counsel.

- request based on fact that "defence has just been notified that two key defence witnesses are unable to attend trial ..."
- Crown counsel expressed concern regarding delay but was prepared to consent to an adjournment insofar as the 11(b) Charter right would be waived.
- trial date of May 2, 1996 adjourned and case remanded to that date for a new trial date to be set in presence of the respondent.

May 2, 1996 - the Crown elects to proceed summarily on the charges before the court.

- estimated trial length confirmed as 3 hours.
- in course of picking a new date the following exchange transpired:

THE COURT: Well, I take it, it's a defence application, so there's no issue around delay?

DEFENCE COUNSEL: No.

- court offered Nov. 28 or 29, 1996 as earliest dates and defence counsel expressed preference for December 2, 1996 and ultimately all parties agreed to adjourn trial to December 4, 1996, 9:30 a.m.

November 15, 1996 - date of defence s. 30 Canada Evidence Act notice to introduce excerpts of Bell Canada telephone book.

November 20, 1996 - date of defence Notice of Motion, returnable December 4, 1996, to exclude evidence pursuant to section 24(2) of the Charter on account of alleged breaches of ss. 7, 8 and 10(b) of the Charter.

December 4, 1996 - respondent pleaded not guilty to both charges and trial proceeded.

- no Charter motions argued or abandoned at outset of trial.
- by the luncheon recess the prosecution case was completed with the calling of three witnesses, the playing of a 35-minute videotape and the filing of 3 exhibits.
- when Crown counsel was about to play the video-tape, the following exchange occurred regarding the video:

DEFENCE COUNSEL: It's subject, of course, to any motions that I bring.

THE COURT: What kind of a motion could you ...

DEFENCE COUNSEL: Well there's a serious Section 8 problem, Your Honour. I'll wait for cross-examination.

- following the luncheon recess, at 2:05 p.m., defence counsel stated:

Your Honour, I don't propose to call any evidence and I think what I would like to do is to consider my position with respect to the law particularly on two issues. One of the question of care and control. The second is the service of the documents and, again, I recommend you look at those documents.

- Crown counsel requested that the trial be completed on this date.
- defence counsel requested an adjournment to January 29, 1997 and the further adjournment was granted with the parties agreeing to February 6, 1997, 9:30 a.m. for submissions and the completion of the trial.

February 6, 1997 - on this date, the trial judge and the Crown were present and prepared to have the case completed.

- defence counsel, who was only coincidentally in the courthouse, appeared and indicated that the provincial court trial co-ordinator had contacted his office a few weeks before (about December 5, 1996) to say the trial judge would be unable to preside on February 6, 1997.
- the trial judge spoke to an incorrect recall of more Crown evidence to be called and of defence evidence yet to be called and suggested he was going to strike the plea as he was not returning to Brampton.
- defence counsel thereupon stated that he did not think the trial judge could strike the plea without argument and further suggested "I'm prepared to go on".
- in due course, it appeared that defence counsel did not have available to him various materials necessary to closing submissions and, without any waiver of the s. 11(b) Charter right, it became apparent that a further date would be required to complete the trial.
- the trial judge expressed his view that the continuance would have to go to a day in April after the end of the fiscal year as that would be his first availability as he had "run out of time up until the end of the fiscal year".
- April 23, 1997 at 11:30 a.m. was set for the completion of trial.

April 15, 1997 - date of defence Notice of Motion, returnable April 23, 1997, seeking a stay of proceedings as a result of an alleged breach of s. 11(b) of the Charter.

April 23, 1997 - stay of proceedings - application argued - no affidavit material or oral evidence called.

- stay of proceedings entered.

THE EVIDENCE AT TRIAL

¶ 5 Ms. Goodwin testified that on September 13, 1995 at 6:00 to 6:30 p.m. she was in her residence when she heard a large crash or bang. She looked out her window and saw a van in a four-foot deep ditch with a person in the driver's seat. She immediately telephoned 9-1-1. It was light outside and road conditions were good.

¶ 6 Ms. Goodwin testified that she exited her home and saw, from a distance of ten to twelve car lengths, a person, who she identified as the respondent, walking around the van agitated, angry, cursing and swearing. Ms. Goodwin observed the respondent partially falling over and staggering and kicking the vehicle. Ms. Goodwin testified at trial, although she had not said so in her statement to the police, that the respondent was, in her view, impaired. She did testify that in her statement to the police she spoke of the appellant as drunk and looking wobbly.

¶ 7 The witness further testified to observing the respondent execute a number of throwing motions of what she thought were cans of beer over a nearby fence. On her evidence, Ms. Goodwin subsequently retrieved four to six cans of beer, three of which were full, and a plastic shopping bag containing a pair of track pants which had been full of urine.

¶ 8 Ms. Goodwin testified that the respondent closed his vehicle and began walking along the street away from his vehicle when he was stopped by a police officer having gone only four or five car lengths.

¶ 9 Mr. Goodwin also testified to hearing the crash outside his home. Mr. Goodwin related to the court that on looking outside, he saw the respondent exit the van and stagger a little bit. The witness further testified that he thought he saw the respondent throwing things into a field adjacent to his property.

¶ 10 Mr. Goodwin believed the respondent to be drunk.

¶ 11 The combined testimony of the Goodwins was that the police arrived on the scene within ten (10) to twenty (20) minutes.

¶ 12 Constable Greenwell testified that he was dispatched to an accident scene where witnesses suspected alcohol was involved and, on arrival at 6:38 p.m., encountered the respondent walking along about ten metres away from a van located in a ditch.

¶ 13 The officer testified that the respondent identified himself as the van's driver and claimed he had been run off the road. When asked, the respondent denied having consumed any alcohol. When the officer maintained that he smelled alcohol, the respondent stated: "Well, I've had a couple".

¶ 14 Constable Greenwell testified that he formed the opinion that the respondent's ability to operate a motor vehicle was impaired. The witness noted that the respondent's speech was slurred, his eyes were watery, a strong odour of alcohol was upon the accused's breath, his face was flushed and his actions were slow.

¶ 15 The respondent was arrested. The officer located an empty Budweiser beer can just outside the driver's side door of the van.

¶ 16 At the police station, the respondent consulted counsel and was then processed for the breathalyser test which procedure was videotaped. The breath-test results admitted at trial by way of certificate were, respectively, 160 and 150 milligrams of alcohol in one hundred millilitres of blood.

¶ 17 Constable Greenwell testified that he personally served the respondent on September 13, 1995 with a Notice of Intention to Produce Certificate (Exhibit #1) and a true copy of the original Certificate of a Qualified Technician (Exhibit #2).

THE REASONS OF THE TRIAL JUDGE

¶ 18 In describing the nineteen (19)-month delay in this case, the trial judge observed:

> Almost the total amount of the time other than the six months at defence request was systemic, which leaves a total of 13 months.

¶ 19 The trial judge stated that of the constituent parts of the overall delay that which was "extremely important" was the delay occasioned from February 6, 1997 to the date of April 23, 1997 on account of the court's error in failing to alert defence counsel that the communication suggesting the trial could not proceed on February 6th had been countermanded.

¶ 20 On this issue of prejudice, the trial judge stated:

> We talk about prejudice, there is, of course, prejudice to the accused in this case and I emphasize in this case. There is prejudice to the crowns, it was started by Mr. Raftery then Ms.

> Lee and now Mr. Quick, so there is a great deal of prejudice to the crowns because of the delay and there is prejudice to the judge in that it is absolutely impossible to do justice from notes made over a year ago. There is prejudice to everyone. I am not blaming anyone, especially the trial co-ordinator. Part of it is my fault because I forgot to inform Mr. Burke [defence counsel] that, in fact, I did have a court on February the 6th.

ANALYSIS

¶ 21 In my view, this appeal must succeed.

¶ 22 A nineteen (19)-month delay to trial in the instance of a run-of-the-mill drinking/driving case prosecuted in the provincial court requires judicial scrutiny of the reasonableness of the delay.

¶ 23 The reasonableness of the total period of time must be assessed in the light of the reasons that explain its constituent parts. In this regard, I note the observations of Doherty J.A. in Regina v. Allen (H.D.) (1996), 92 O.A.C. 345 (C.A.) at 345 (affirmed (1997), 119 C.C.C. (3d) 1 (S.C.C.)):

> I can see nothing in the language of s. 11(b) which suggests any right to have one's trial proceed according to a constitutionally mandated timetable. Section 11(b) creates one right - the right to be tried within a reasonable time. As long as the entire time period in issue cannot be said to be unreasonable when tested against the principles pronounced in R. v. Morin, [1992] 1 S.C.R. 771; 134 N.R. 321; 53 O.A.C. 241; 71 C.C.C. (3d) 1, there is no violation of s. 11(b). Justice L'Heureux-Dubé, writing for the majority in R. v. Conway, [1989] 1 S.C.R. 1659; 96 N.R. 241; 34 O.A.C. 165; 49 C.C.C. (3d) 289; 70 C.R. (3d) 209, at p. 397 C.C.C., put it this way:
>
> > In deciding a claim made under s. 11(b) of the Charter, the correct approach is in my view to evaluate the reasonableness of the overall lapse of time. A piecemeal analysis is generally not appropriate. In a case where each individual period, taken in isolation from the others, may constitute a reasonable delay, the total period may nevertheless be unreasonable for the purpose of s. 11(b). The case of Rahey illustrates the point. While each adjournment initiated by the judge was for a short period, the accumulation of all 19 adjournments over the span of 11 months was held to infringe s. 11(b). However, nothing prevents a court from focusing on specific time periods which may be significant in the over-all assessment, as going to the weight to give to specific delays, as opposed to their reasonableness. (Emphasis added [by Ont. C.A.])

¶ 24 The trial judge expressed the view that there was thirteen (13) months of systemic delay apart from the six (6) months of delay occasioned by the defence request for the adjournment of the trial date from May 2, 1996 to December 4, 1996. This is not entirely accurate.

¶ 25 The 1-month period of delay from September 13 to October 18, 1995 was a neutral intake period allowing for a first appearance, the retaining of counsel and the setting of a trial date. Respondent's counsel accepts this characterization of this time period.

¶ 26 The 2-month delay from December 4, 1996 to February 6, 1997 was specifically at the request of the defence. On December 4, 1996, the court had time, and the Crown was prepared, to complete the trial. Although the defence specifically declined to complete the trial on December 4, 1996, in April of 1997 respondent's counsel stated to the trial judge, in the course of the s. 11(b) Charter argument, that this two (2)-month delay was not the responsibility of the defence submitting that, excepting the delay of April 30, 1995 to December 4, 1996, "The balance is the responsibility of this matter not getting reached". Unfortunately, this erroneous analysis of what transpired on the December 4th date was compounded by its acceptance by the trial court.

¶ 27 On a proper analysis of the case, there was a neutral 1-month intake period, an 8-month delay for which the defence was responsible whether or not described in terms of waiver, and a ten-month delay composed of systemic delay and the actions of the court or court officials.

¶ 28 The February 6, 1997 court date ought not to have been lost. There was a mix-up. It should not have happened. This was not the responsibility of the respondent. However, the further delay of ten (10) weeks and six (6) days to April 23, 1997, necessitated by the scheduling miscommunication, in the absence of some particular prejudice to the defendant, while itself an unacceptable delay, cannot be said to have converted the overall lapse of time into an unreasonable delay to the completion of trial.

¶ 29 Section 11(b) protects the individual from impairment of the right to liberty, security of the person, and the ability to make full answer and defence resulting from unreasonable delay in bringing criminal trials to a conclusion.

¶ 30 Counsel for the respondent did not submit to the trial court that the delay to trial prejudicially interfered with his client's liberty interest. The respondent had been released from custody, hours after his arrest, by a promise to appear. Accordingly, the respondent was not in custody or subject to stringent judicial interim release conditions. He retained his driving privileges.

¶ 31 As to the security of the person interest, the respondent, at no time, submitted evidence or argument that the delay to trial created increased anxiety, concern, stress, or stigma in relation to ongoing exposure to the pending criminal proceedings. To the extent that delay may create prejudice through increased legal costs, respondent's counsel submitted to the trial judge:

> Of course, each time the accused suffers prejudice because of the fact that it costs him additional funds for lawyers. My client is in a business where he could not expand or do any work to make himself fully prepared.

In the absence of any evidence, the precise meaning to be attached to this submission is not entirely clear. As of February 6, 1997, the defence had not adopted a posture that prejudicial delay was being experienced by the respondent. Indeed, the actions of the defence were very much to the contrary. The cost of an additional appearance date, April 23, 1997, becomes a factor of insignificant import in the equation of legal costs when one considers that defence counsel did not prepare to complete the trial on February 6, 1997 and was present in court on that date merely by happenstance representing another client in the same courthouse.

¶ 32 In any event, a fair reading of the submissions and the trial judge's reasons suggests that the liberty and security of the person interests played little or no part in the prejudice analysis.

¶ 33 At trial, counsel for the respondent did not submit, by evidence or argument, that the delay to trial had prejudiced his client's fair trial interests.

¶ 34 The trial judge's conclusion of prejudice cannot be supported in the result or in light of the analysis conducted.

¶ 35 The s. 11(b) Charter right is the right of "any person charged with an offence". The trial court's reasoning included references to "prejudice to the crowns" and "prejudice to everyone". With respect, this approach misses the mark - what is important is the measure of prejudice to the respondent's fair trial rights.

¶ 36 In observing "... it is impossible to do justice from notes made over a year ago" and "... the crown had one more witness that they wanted to call", the trial judge demonstrated, in a significant fashion, a misapprehension of the circumstances of the case before him. The evidence had been heard less than five months earlier and the case had been completed pending final legal submissions.

¶ 37 Furthermore, and in any event, in the particular circumstances of this case, with the evidence completed, the trial judge ought to have made specific inquiries of trial counsel for the respondent as to the defence to the

charges before the court before concluding that the bench book notes and exhibits would be inadequate to the task of a fair deliberation as to the issues material to the resolution of the case.

¶ 38 For example, it is far from apparent from a review, limited to the record, that the credibility of witnesses would play any role, or any role of significant value, in the determination of guilt or innocence. On the December 4 date, respondent's trial counsel related to the court that he had under consideration his position on the law "particularly on two issues". From review of the transcript, these issues appear to have been in addition to the "serious section 8 [Charter] problem" to which the trial judge was generally alerted. I have some difficulty comprehending the context of this Charter issue considering the unparticularized notice of application to exclude evidence, the lack of a pre-trial motion and the mid-trial reference to a s. 8 Charter issue, all of which, on its face, appears to involve the procedural irregularity of an objection to the admissibility of evidence made after evidence is adduced in the trial itself: Regina v. Kutynec (1992), 70 C.C.C. (3d) 289 (Ont. C.A.) at 294-6 per Finlayson J.A.; Regina v. McNulty, [1991] O.J. No. 2074 (C.A.) at 2 per curiam.

¶ 39 Drinking/driving prosecutions, not infrequently, involve legitimate, but technical defences. In this case, apart from the witnesses' testimony, there was videotape and certificate evidence. Before deciding the unreasonable delay to trial issue, the trial court was obliged to inquire into the nature of the applicable defences or indeed to defer the s. 11(b) Charter argument until all legal submissions had been made as to the merits of the case. These approaches would permit assessment of the measure of actual prejudice, if any, as opposed to assumed prejudice.

¶ 40 While recognizing that deference to the trial court is generally appropriate respecting factual findings of prejudice in delay-to-trial cases, the accumulation of legal error in the trial court's analysis warrants appellate review of the trial court's conclusion as to prejudice. I am unable to see any prejudice established to the respondent on account of the nineteen (19)-month delay to trial. This conclusion, together with the court's conclusion that the trial judge mischaracterized the individual periods of delay, requires that a new trial be held.

CONCLUSION

¶ 41 The appeal is allowed.

¶ 42 The stays of proceedings are set aside.

¶ 43 A new trial is ordered on each charge consistent with the provisions of s. 822(2) of the Criminal Code.

HILL J.

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