
CANADA / JUDGMENT

R. v. Chan

2013 BCSC 2586

COURT

Supreme Court of British Columbia

DECIDED

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2013 BCSC 2586 R. v. Chan

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Chan,

2013 BCSC 2586

Date: 20131122

Docket: 26044

Registry: Vancouver

Regina

v.

Chun Siu Chan, Manraj Singh

and Parminderjit Singh

Before: The Honourable Madam Justice Gropper

In Chambers

Oral Ruling on Delay Application

Counsel for the Crown:

A. Chan

J. Whiting

Counsel for the Accused Chan:

P.E. Briggs

Counsel for the Accused Manraj Singh:

R.T. Gill

Place and Date of Trial/Hearing:

Vancouver, B.C.

October 29 and 31, 2013

November 1, 2013

Place and Date of Judgment:

Vancouver, B.C.

November 22, 2013

- [1] THE COURT: Chun Siu Chan and Manraj Singh, two of the three accused on a joint indictment, apply under s. 24(2) of the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, s. 15 (Charter) for a stay of proceedings on Indictment 26044-4 as a result of an infringement of their rights under s. 11(b) of the Charter to be tried within a reasonable time.
- [2] Mr. Chan, Mr. Singh, and Parminderjit Singh are charged with one count, and that is that between January 19, 2007, and February 27, 2007, at or near Vancouver and elsewhere in the Province of British Columbia, in the Cities of Toronto and Windsor, Ontario, and elsewhere in the Province of Ontario, and at or near the City of Los Angeles, California, Ontario, California, and elsewhere in the United States of America, did unlawfully conspire together, the one with the other or others of them, with Sandeep Singh Hans, Lachhman Chahal, Phuc Diep, and with a person or persons unknown, to commit the indictable offence of importing a controlled substance, to wit: cocaine, contrary to s. 6(1) of the Controlled Drugs and Substances Act, S.C. 1996, c. 19 and did thereby commit an offence contrary to s. 465(1)(c) of the Criminal Code of Canada, R.S.C. 1985, c. C-46.

Chronology

- [3] The offences giving rise to the charge occurred between January and April 2007. It was alleged that the accused were part of an organization that conspired to import cocaine into Canada. The charges arose from a year-long investigation into money laundering, importation, and trafficking of drugs by the Special Forces Enforcement Unit. The project was called "Project E-Paragon."
- [4] The first of seven wiretap authorizations was obtained in mid-December 2006. In February 2007, a seizure of 147 kilograms of cocaine from a commercial tractor-trailer in Windsor was subject to secondary inspection at the Canadian border.
- [5] The information was sworn on March 26, 2010.

- [6] In July 2010, Manraj Singh was arrested in Edmonton. He was transported to British Columbia. He retained Rishi Gill as counsel. He was released on consent by the Crown on a \$20,000 deposit. The conditions of his bail were to report to a bail supervisor, provide an address, deposit a passport and other documents, and only possess one cell phone. He was not to possess any firearms and to have no contact with the co-accused. One of these conditions was changed in May 2011 allowing Mr. Singh to possess an additional cell phone for employment, and after the preliminary hearing in March 2012, the bail was reduced to a \$15,000 deposit with the same conditions.
- [7] Also in July 2010, Mr. Chan was arrested in Toronto for unrelated matters. He was charged with conspiracy to kidnap, drug trafficking, and weapons offences. He was detained in relation to those charges. He was also arrested on this charge.
- [8] Mr. Chan made his first appearance in British Columbia on September 17, 2010. Having just retained counsel, he was remanded to January 25, 2011, to allow his new counsel, Paul Briggs, to review the disclosure materials before setting an arraignment hearing or a bail hearing date.
- [9] On November 26, 2010, Mr. Chan was ordered released by a Provincial Court judge on this charge on a \$300,000 surety with conditions that included reporting to a bail supervisor, providing an address, surrendering any passports or other travel documents, not being in possession of weapons or knives or any cell phone, and not having any contact with the co-accused. He was required to remain in British Columbia. Mr. Chan did not perfect his bail in relation to this charge.
- [10] The arraignment hearing was on January 25, 2011. Manraj Singh and Parminderjit Singh elected trial by Supreme Court judge and jury. Mr. Chan elected trial by Provincial Court judge. As the accused chose different modes of trial, it became a trial by Supreme Court and jury under s. 567 of the Code. All of the accused requested a preliminary hearing. The estimate for the length of the preliminary inquiry was eight days, and it was fixed for March 2012.
- [11] Four pre-trial conferences were held before the preliminary inquiry between March 15, 2011, and January 16, 2012. The preliminary inquiry commenced on March 12, 2012, and took two days rather than two weeks. There was a committal to Supreme Court by consent.
- [12] The first appearance in Supreme Court was April 4, 2012. Mr. Gill advised that he was leaving the file because of a change in his professional position and that Mr. Singh would have to retain new counsel. On April 18, 2012, new counsel for Mr. Singh appeared.
- [13] The fix date for the trial was on May 2, 2012. The dates were fixed as follows: the pre-trial motions would occur from March 4 to 8, 2013, and the trial would commence April 8, 2013, for four weeks.

- [14] Four pre-trial conferences were held between November 7, 2012, and February 15, 2013, in Supreme Court.
- [15] On March 1, 2013, Parminderjit Singh and Manraj Singh applied to adjourn the trial dates on the basis that they had each retained new counsel, both of whom sought to adjourn the trial. Mr. Chan and the Crown opposed the adjournment. The adjournment was granted. The Crown was prepared to proceed against Mr. Chan on the dates which had been set and applied for severance. That severance application was heard on March 6, 2013. I denied the Crown's application.
- [16] On April 25, 2013, new trial dates were set for July 3 to 12, 2013, for the delay application of Mr. Chan and Mr. Singh; January 13 to 31, 2014, for the challenges to the authorizations; and February 10 to March 7, 2014, for a trial by jury.
- [17] On June 7, 2013, counsel for Mr. Singh applied to adjourn the July 2013 dates for the hearing of the delay application. That adjournment was granted, and the delay argument was rescheduled for October 29, 2013, for two weeks.
- [18] On July 15, 2013, counsel for Mr. Chan applied to adjourn the trial dates. Mr. Chan was required in Toronto for trial on the Toronto charges at the same time. The Crown renewed its severance application, arguing that P. Singh and M. Singh could be tried on the date set. The adjournment was granted for Mr. Chan. The Crown severance application was put over to July 18, 2013. I heard the severance application and denied it following my earlier ruling. The trial was adjourned for all accused.
- [19] On August 9, 2013, trial dates were set: October 29, 2013, for two weeks for the delay argument; June 2, 2014, for three weeks for the voir dire; and September 3, 2014, for four weeks for trial. In all, three years, or 36 months, passed between the offence date to the laying of the charge. Fifty-four months will have passed from the laying of the charge to the start of the trial on September 4, 2014. It will likely be 55 months from the date the charge was laid to the conclusion of the jury trial.

Position of the Parties

Mr. Chan

- [20] Mr. Chan asserts that in respect of the chronology, that the intake period in the Provincial Court between September 2010 and January 2011 should be deducted from the total period from charge to the conclusion of trial. The period between January 25, 2011, and March 14, 2012, he asserts is institutional delay which Mr. Chan did not waive and ought not to be deducted. He makes the same submission in respect of the period between May 2, 2012, that is the fix date, and the trial date scheduled for April 2013.
- [21] In respect of M. Singh's change of counsel on March 1, 2013, Mr. Chan says that he was not required to agree to severance as severance was not available in this case in accordance with the Court's determination. The delay associated with this adjournment was not Mr. Chan's

fault. The period between March 2013 and May 25, 2013, Mr. Chan says reflects institutional delay which should not be deducted. On May 25, 2013, the trial was set for February 2014, although Mr. Chan was pushing for a date commencing in September 2013 but no earlier date was available to the Court.

- [22] Mr. Chan says that that period ought to be attributable to institutional delay except that Mr. Chan sought an adjournment of the February 2014 trial date in July of 2013. Mr. Chan says that seven months, that is, between February 2014 and September 2014, should be attributed to Mr. Chan's adjournment request, although he argued for trial dates earlier than September 2014, the month in which this trial is scheduled.
- [23] Mr. Chan asserts that there is a total period of 39 months for which he is not responsible. He says that period has breached his right to be tried within a reasonable period. In addition, he says the pre-charge period, because of its length, ought to be considered as part of the period of delay.
- [24] Mr. Chan asserts that he is prejudiced by his lack of ability to recall events which occurred in 2007, the offence dates. He was not arrested when the information was sworn in March 2010 but several months later. He says that the police knew where he was in March 2010 and he should have been arrested at that time.
- [25] Mr. Chan says he had no chance to review the hard disk of documents until February 2012, which was five years from the alleged offence. Mr. Chan says he received no notice that he was subject to a wiretap, and although the Crown provided a registered letter in April 2008 which was sent to his parents' address, there is some doubt whether Mr. Chan actually received it.
- [26] Mr. Chan says that he has had no access to his family because he has been in custody in Toronto on the Toronto charges and he has had problems mounting his defence.

Mr. Singh

- [27] Mr. Singh asserts that he has only waived an 11-month period reflecting his decision to change counsel in March 2013. That is the period from March 2013 to February 2014. He says the period, then, for institutional delay is three years and five months, which offends his s. 11(b) Charter rights. Mr. Singh says that the prejudice to him has been significant. Before the charges were laid, he was employed as a truck driver, but because of these charges, he has not been able to enter the United States, and he now has to work in construction, which is not as remunerative.
- [28] Mr. Singh asserts that his emotional, financial, and personal circumstances have been negatively affected by the delay in these proceedings. Mr. Singh says he is taking medication for anxiety and depression and has been hospitalized.

The Crown

- [29] The Crown says that there are several reasons for the delay: the inherent time requirements of setting a four-week jury trial, the complexity of the prosecution as it involves multi-accused and several wiretap authorizations in different languages. The charges were derived from part of a bigger project. The disclosure has been voluminous.
- [30] The Crown asserts that all three accused requested a preliminary inquiry. They could have elected hearing the evidence on a few issues or limiting the scope of the preliminary inquiry by making admissions.
- [31] The Crown says the 13-month period between the arraignment and the preliminary inquiry was not undue delay for a two-week preliminary inquiry on a complex conspiracy.
- [32] The Crown takes the same position in respect of the period between the fix date in Supreme Court in May 2012 and the March 2013 trial date. The Crown argues that the remaining periods from the March 2013 trial date are attributable to the actions of the accused. Mr. Chan did not consent to the Crown's application for severance in March 2013. If he had, the trial could have commenced in April 2013. On that basis, the Crown says Mr. Chan cannot rely on the delay from March 2013 onward.
- [33] The delays from March 2013 were because of the actions of the co-accused, P. and M. Singh, and are neutral. They do not count against any party in a delay argument.
- [34] The Crown says that when Mr. Chan sought an adjournment of the February 2014 dates in July 2013, he again opposed severance. If he had consented to severance, the Court's ruling on whether severance was available may have been different.
- [35] The Crown argues that Mr. Chan's second adjournment was because of his trial in Toronto and that cannot be counted against the Crown. It is delay for which Mr. Chan is responsible.
- [36] In respect of Mr. Singh, the Crown asserts that his changing counsel on the eve of trial in March 2013 is the main reason for delay. He did not apply for severance or to consent to the Crown's application for severance.
- [37] The Crown asserts that it is not responsible for any delay. It was ready to proceed at all times against one or all of the accused. It did not seek any adjournments. There has been no late disclosure. The Crown asserts that it has been flexible and responsive to earlier trial dates.
- [38] The Crown says that neither of the accused has been prejudiced as a result of any delay in this trial. Any prejudice to Mr. Chan is because he is in jail in Toronto on other charges, not because this trial is taking too long to be heard. Mr. Chan was granted bail in respect of these charges in November 2010, but has not perfected bail. His security and liberty, the Crown says, are affected by his being in jail, not by the delay of this trial. Mr. Chan's inability to review particulars of the offence until 2012 is not the fault of the Crown. Disclosure was made shortly after the indictment was sworn.

- [39] The Crown says that Mr. Singh has not shown prejudice due to this trial not proceeding earlier. He has relaxed bail conditions, no strict reporting requirements, no curfew, and no house arrest. His bail conditions in respect of having one cell phone have been modified, and the cash deposit required has been reduced. He has not demonstrated that he missed any job opportunities because of strict bail conditions.
- [40] In respect of his health problems, the Crown argues that Mr. Singh's assertions are very general, and he has not referred to any specific medical diagnosis. The Crown says while Mr. Singh has anxiety, he has many stresses, including a family to support and uncertain immigration status in Canada. Further, the Crown says, Mr. Singh has had to deal with a conviction of an impaired driving charge and a consequent deportation order.
- [41] The Crown asserts that Mr. Singh's actions do not support that he wanted a speedy trial. He chose a jury trial which necessarily results in a two-stage process, and he chose to change lawyers on the eve of the trial in Supreme Court, in spite of knowing that that would delay the trial. Mr. Singh, the Crown asserts, has not demonstrated that he cannot make full answer and defence.

Analysis

- [42] Madam Justice Smith summarized the legal framework to be applied in *R. v. Bains*, 2010 BCCA 178 at paras. 37 to 40:
- [37] Section 11(b) of the Charter guarantees that "any person charged with an offence has the right ... to be tried within a reasonable time". The relevant period for consideration of a claim of unreasonable delay is between the date of the charge (by information or indictment) and the completion of the trial. In this case, that period occurred between September 14, 2004 and June 26, 2008, and amounted to some 45 months.
- [38] As noted above, Morin set out the legal framework in which to consider a s. 11(b) application. There, Mr. Justice Sopinka summarized the general approach to be applied at page 787:

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.

- [39] This approach to a s. 11(b) issue was reiterated in *R. v. Godin*, 2009 SCC 26:
- [18] The legal framework for the appeal was set out by the Court in *Morin*, at pp. 786-89. Whether delay has been unreasonable is assessed by looking at the length of the delay, less any periods that have been waived by the defence, and then by taking into account the reasons for the delay, the prejudice to the accused, and the interests that s. 11(b) seeks to protect. This often and inevitably leads to minute examination of particular time periods and a host of factual questions concerning why certain delays occurred. It is important, however, not to

lose sight of the forest for the trees while engaging in this detailed analysis.

- [40] The final balancing of interests requires a weighing of the accused's right to liberty, security of the person and a fair trial, with society's interest in seeing that those who are charged are brought to trial. The objective of the balancing process is to determine if the extraordinary remedy of a judicial stay of proceedings is warranted in the circumstances.

Length of the Delay

- [43] The length of the delay from the laying of the charge to the conclusion of the trial, that is, from March 2010 to October 2014, is significant and invites an examination of whether it is reasonable in accordance with s. 11(b) of the Charter. This application concerns post-charge delay. Messrs. Chan and Singh assert that the pre-charge delay ought to be considered here, relying on *R. v. Morin*, [1992] 1 S.C.R. 771 at para. 35 where it is stated that pre-charge delay may, in certain circumstances, have an influence on the overall determination as to whether post-charge delay is reasonable but of itself is not counted in determining the length of the delay.
- [44] As I have said, the length of the delay invites the examination of whether it is reasonable.

Waiver

- [45] Mr. Singh has waived the 11-month period between March 2013 and February 2014 when he changed counsel. Mr. Chan waives the period from February 2014 to September 2014 when he sought an adjournment due to the conflict with the Toronto trial.

Reasons for the Delay

Inherent Time Requirements

- [46] Inherent time requirements were described in *R. v. Ghavami*, 2010 BCCA 126 at para. 45:
- [45] The inherent time requirements flow directly from the Crown's charging decision and include the complexity of the case, the time required for preparation, "intake requirements" . . . and, if necessary, a preliminary inquiry. Inherent time requirements are meant to recognize that "[s]ome delay is inevitable" in the administration of the criminal justice system (*Morin* at 791-92), and that such delay is not attributable to the Crown.
- [47] The parties disagree about whether this case is complex. The Crown argues that it is, and Messrs. Chan and Singh suggest it is not. In any event, there are three co-accused. A preliminary inquiry has been held. This delay application had to be scheduled along with a voir dire in respect of the admissibility of the wiretaps which must be heard and determined before the jury trial proceeds.
- [48] As noted in *R. v. Horner*, 2012 BCCA 7 at para. 79:

When all of these matters - more time for trial preparation, time for the trial judge to consider the applications to exclude evidence, and the planned interval between the voir dires and the trial proper - are considered, a more realistic assessment of the "inherent time requirements" of the trial would be 18 months.

- [49] I find that the inherent time requirements, which included the ability of the Provincial Court and this Court to accommodate lengthy and staged proceedings, were not unreasonable. As the parties anticipated a two-week preliminary inquiry, 11 months to schedule that was not, in my view, undue delay. Similarly, 11 months from the fix date in Supreme Court to a four-week jury trial, including the hearing of the voir dire, that is, from May 2012 to March 2013, I also find are not unreasonable.
- [50] I agree with the Crown that if the trial proceeded in March and April of 2013 as anticipated, the inherent time requirements would not support a conclusion that there was an inherent delay sufficient to justify a stay of the charges.

Actions of the Accused

- [51] Aside from the periods of waiver, there were no actions of each individual accused which contributed to delay beyond the periods of waiver that I have addressed. However, the trial did not proceed in March and April 2013 and is not now scheduled to proceed until September 2014, likely concluding in October 2014.
- [52] The adjournment of the March and April 2013 trial resulted in an 11-month delay to February 2014. Mr. Singh waives that period; Mr. Chan does not. However, I find that the 11-month period was caused by the action of Mr. Chan's co-accused. Delays caused by a co-accused are not to be considered as systemic delays. They are neutral delays that do not count against either party in a s. 11(b) reasonableness assessment: See *R. v. Farewell*, 2008 BCCA 9.
- [53] The delay from February 2014 to September 2014 was occasioned by Mr. Chan's conflict with his trial in Toronto. Mr. Chan waives the seven-month period, although Mr. Singh does not. Mr. Singh is governed by the same principle as Mr. Chan that delays caused by his co-accused are neutral delays.

Actions of the Crown

- [54] The Crown has not contributed to the length of the delay. When the adjournment applications were made by the accused, the Crown was ready to proceed against the other co-accused. It sought an order for severance. I rejected that application twice. I accept that the Crown's applications were an attempt to avoid an adjournment of the trial. At the same time, I do not fault either of the accused for not agreeing to the two severances. I reached the conclusion that severance was not available in the case by application of the relevant principles.

Limits on Institutional Resources

[55] I cannot find that there were limits on institutional resources giving rise to any delay in any period. Before this trial can proceed, two-staged and lengthy periods had to be set: for this delay argument, two weeks, and for the voir dire, three weeks. It is a jury trial that could not be scheduled during the summer months.

[56] In *R. v. Allen* (1996), 110 C.C.C. (3d) 331 (Ont. C.A.), which is referred to in Horner at para. 90, Doherty J.A. of the Ontario Court of Appeal addressed circumstances where a trial could not be completed in the time allotted, and dates for its continuation had to be found:

... The recognition and treatment of such inherent time requirements in the s. 11(b) jurisprudence is simply a reflection of the reality of the world in which the criminal justice system operates. No case is an island to be treated as if it were the only case with a legitimate demand on court resources. The system cannot revolve around any one case, but must try to accommodate the needs of all cases. When a case requires additional court resources the system cannot be expected to push other cases to the side and instantaneously provide those additional resources.

[57] The comment, I find, is equally apposite to the circumstances here where the trial date and pre-trial matters had to be moved due to adjournments sought by the accused.

[58] The Court in Horner continued, at para. 92:

There is no question that most of the delays in this case were initiated by the failure of defence counsel to properly estimate the time required for the voir dires. Once the time initially scheduled for the voir dires had been used up, counsel could have expected delays of several months before obtaining a continuation date owing the number of defence counsel involved and the busy court calendar. The fact is, however, that these delays were significantly compounded by the paucity of judicial resources.

[59] Horner goes on to address that paucity and specifically addresses the correspondence and discussion between the bench and counsel related to those difficulties.

[60] The evidence before me of institutional delay is not as it was in Horner and is minimal, at best. I am not convinced that the delays after March 2013 were because of scarce judicial resources. Once the adjournments were granted, the trial and its attendant hearings were rescheduled as soon as possible in consideration of all of the other criminal cases that were and had to be scheduled. Thus, I do not attribute any delay to the limits on institutional resources.

Other Reasons for the Delay

[61] The primary reason for the overall delay, I find, is the actions of the co-accused in seeking adjournments beyond March 2013. I was convinced when I granted the adjournments that the case had to be heard once with all co-accused present and that the unavailability of one or more meant that the trial could not proceed as scheduled. All of the accused have a constitutional right to a fair trial and have exercised that right, but I cannot find that that has caused delay.

Prejudice to the Accused

[62] Both Mr. Chan and Mr. Singh gave evidence of the prejudice that they say resulted from not being tried in a reasonable period. In *Godin*, Mr. Justice Cromwell described prejudice in the context of whether the delay was unreasonable. At para. 31, the Court stated:

[31] The question of prejudice cannot be considered separately from the length of the delay. As Sopinka J. wrote in *Morin*, at p. 801, even in the absence of specific evidence of prejudice, "prejudice may be inferred from the length of the delay. The longer the delay the more likely that such an inference will be drawn."

[63] I appreciate that there has been a lengthy period between the offence date and the charge date, and I acknowledge a lengthy delay between the charge date and the end of the trial, which will be in October 2014. I have addressed the delays already. I find that the accused have experienced prejudice which is inherent in every criminal trial and that the prejudice has not been compounded by any delay in this matter.

The Balance

[64] I must balance all of the factors to determine whether the delay is unreasonable. I find that the delay is not unreasonable. There are several months which Mr. Singh and Mr. Chan have waived. Each of them is affected by adjournments of the other, and this delay is neutral.

[65] I have found that there is no proof of a limitation of institutional resources that have caused a delay. I do not accept that either Mr. Chan or Mr. Singh is prejudiced by the length of the delay beyond what may be expected in every criminal charge. Each has had to deal with criminal charges apart from this charge concurrently.

[66] With regard to full answer and defence, I appreciate that a significant period has passed since the offence date, but having found that the post-charge delay is not unreasonable, it is not appropriate to consider the pre-charge delay at this time.

[67] In light of the above, I dismiss both applications.

"Gropper J."

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