
CANADA / JUDGMENT

R. v. Lefort

2005 BCSC 587

COURT

Supreme Court of British Columbia

DECIDED

19 April 2005

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2005 BCSC 587 R. v. Lefort

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Lefort,

2005 BCSC 587

Date: 20050419

Docket: No. 22865

Registry: Vancouver

Between:

Her Majesty the Queen

Respondent

And

Troy Anthony Lefort

Appellant

Before: The Honourable Madam Justice Allan

Reasons for Judgment

Counsel for the Appellant:

David N. Fai

Counsel for the Respondent:

Anita Ghatak

Date and Place of Appeal:

March 23, 2005

Vancouver, B.C.

- [1] On February 19, 2004, the appellant was convicted by a provincial court judge in Richmond B.C. of speeding against a highway sign on June 19, 2002, contrary to s. 146(3) of the Motor Vehicle Act, R.S.B.C. 1996, c. 318: 2004 BCPC 44.
- [2] The issue on this appeal is whether the learned provincial court judge erred in failing to grant a judicial stay under s. 24(1) of the Charter on the basis that the appellant's s. 11(b) right to be tried within a reasonable time was infringed.
- [3] The appellant filed a Notice of Dispute on July 11, 2002, well within the applicable 30 day period. On August 18, 2003, he was sent a Notice of Hearing for a trial date of October 23, 2003. On the latter date, his counsel filed a Charter notice and the trial was adjourned to January 14, 2004. Thus, there was a 19 month delay between the alleged offence and the trial.
- [4] The appellant testified before the provincial court judge that he did not remember receiving the ticket or why he filed the dispute or whether he had a defence at the time. He said filing the dispute "was just a reaction". He made no notes to preserve his recollection of the events. He had assumed the matter would go to trial "in about a year" and that he would have had a better recollection of events "closer to the offence date". The learned trial judge accepted his evidence as accurate.
- [5] The learned trial judge found no evidence of actual prejudice, either with respect to the impact on the appellant's person, or with his ability to make full answer and defence. She inferred from the testimony and evidence that he lacked any substantive defence and had no technical objection to the issuance of the ticket. She concluded: "I find he disputed the ticket merely to put the State to the proof thereof, as is his right" (at para. 7). She also found that he took no action to exercise his right to trial within a reasonable time.
- [6] The Crown called evidence to explain the delay, which had arisen primarily from a backlog in processing traffic violations in Richmond. That backlog was created by the closure of a number of provincial courts in the Lower Mainland.
- [7] The learned trial judge reserved judgment and subsequently issued a lengthy and carefully-reasoned written ruling considering the relevant jurisprudence. In particular, she considered *R. v. Morin*, [1992] 1 S.C.R. 771, 71 C.C.C. (3d) 1, *R. v. Grant*, 2001 BCSC 639, [2001] B.C.J. No. 1077 and *R. v. Fagan* (1998), 115 B.C.A.C. 106, 59 C.R.R. (2d) 110 (C.A.). She noted correctly that the onus of establishing unreasonable delay was on the applicant on a balance of probabilities and that the factors for consideration were the length of the delay, any waiver of time periods, the reasons for the delay and prejudice to the accused.

- [8] The trial judge found that, in this case, the "intake time" was 2.5 months and the rest of the delay was institutional and due to limitations on resources. The trial judge agreed that 19 months was prima facie an unreasonable delay but found no prejudice to the appellant or his right to make full answer and defence. She found his defence to be "pro forma and insincere" and characterized it as "a bald assertion of a failing memory, and therefore the loss of ability to make full answer and defence" (at para. 21).
- [9] The trial judge concluded that in all the circumstances, the 19 month delay was not so exceptional that any remedy should be granted to the accused.

The submissions of counsel

- [10] Mr. Fai submits that the learned trial judge made the following errors: (i) her findings of fact were not supported by the evidence; (ii) she reversed the balancing of societal concerns and the seriousness of the offence; and (iii) she ought to have inferred prejudice from the length of the delay.

- (i) The trial judge's findings of fact

- [11] Early in her judgment, the learned trial judge stated (at para. 10):

Delay in the prosecution of such matters, where the right to full answer and defence is not negatively impacted, results only in the potential deferment of payment of the fine. I observe, as well, although I am not considering nor giving weight to this factor as it was not argued before me, that delay will, in virtually all cases, result in the deferment of the imposition of penalty points by the Superintendent of Motor Vehicles. If the delay extends for one year, most accused will thereby enjoy a potential financial benefit and some may avoid administrative driving prohibitions.

- [12] However, Mr. Fai submits that the trial judge did in fact give weight to the motivation of the accused. Towards the end of her judgment, she stated (at para. 26):

The courts must be alert to those who would use the Charter of Rights as a sword rather than a shield. More repugnant are those who seek delay for their benefit, and thereafter ask the court to find their rights have been violated. Intentional manipulation of the system should not be rewarded.

- [13] Mr. Fai correctly points out that there was no evidence that the appellant had filed the dispute to cause delay or that he had attempted to manipulate the system.

- [14] The trial judge also considered it significant that the appellant did not actively attempt to get an earlier trial date. The Crown submits that action or inaction, inconsistent with the desire for a timely trial, is something that the court must consider in assessing the degree of prejudice, if any, suffered by an accused.

[15] However, as Mr. Fai notes, unlike criminal proceedings, where the defence has some control over the pace of the process, the regulatory scheme with respect to the prosecution of traffic violations does not permit an accused's involvement in determining the trial date. Dates are simply set administratively in the order that the Notices of Dispute are received. There was no evidence as to any proactive steps the appellant could have taken.

(ii) The trial judge's balancing of relevant factors

[16] In her reasons, the trial judge noted that society has a high interest in ensuring the safety of our highways and that speeding is a major contributing factor to fatal motor vehicle accidents. She stated (at para. 25):

The nature of this offence and the manner in which it is prosecuted results in no prejudice to the accused except where delay has an actual demonstrated impact on the ability to make full answer and defence. In contrast, criminal proceedings, by definition, allege a person has acted so against societal norms and interests that the State must take action against the individual and potentially deprive them of their liberty entirely, or effect [sic] their liberty by imposing enforceable controls over their present and future conduct. Even being accused of a crime is stigmatizing. Conviction results in a permanent record which may negatively impact a person for the balance of their lives. People face incarceration, restrictive bail conditions, ongoing stress and damage to their reputations, deterioration of relationships and their ability to pursue education or employment, and resulting increased financial burden. It is for these reasons the State's interest in bringing a person to trial are at times outweighed by the accused's and society's interest in a prompt trial.

[17] Mr. Fai notes that in *Morin*, the Court held that the interests of the accused must be balanced by the interests of society in law enforcement: "As the seriousness of the offence increases so does the societal demand that the accused be brought to trial" (at para. 25). Mr. Fai suggests that conversely, where the offence is not serious, the societal demand that the accused be brought to trial is less. Accordingly, he submits that delay is a more significant factor to consider where, as here, there is no strong societal interest in bringing the accused to trial.

[18] In *Morin*, Mr. Justice Sopinka for the majority discussed the fundamental purpose of s. 11(b) (at para. 23):

The right to security of the person is protected in s. 11(b) by seeking to minimize the anxiety, concern and stigma of exposure to criminal proceedings. The right to liberty is protected by seeking to minimize exposure to the restrictions on liberty which result from pre-trial incarceration and restrictive bail conditions. The right to a fair trial is protected by attempting to ensure that proceedings take place while evidence is available and fresh.

[19] The answer to the question "How long is too long?" involves an analysis of the following factors: the length of the delay, waiver of time periods, the reasons for the delay and prejudice to the accused. Sopinka J. noted (at para. 27):

The judicial process referred to as "balancing" requires an examination of the length of the delay and its evaluation in light of the other factors. A judicial determination is then made as to whether the period of delay is unreasonable. In coming to this conclusion, account must be taken of the interests which s. 11(b) is designed to protect.

[20] Madam Justice McLachlin (as she then was), concurring, noted that the trial judge must conduct a balancing process and, in the final analysis, "must be satisfied that the interest of the accused and society in a prompt trial outweighs the interest of society in bringing the accused to trial" (at para. 83). In her opinion, the degree of prejudice suffered as a consequence of a delay beyond the expected and normal is significant (at para. 87):

Where the accused suffers little or no prejudice, it is clear that the consistently important interest of bringing those charged with criminal offences to trial outweighs the accused's and society's interest in obtaining a stay of proceedings on account of delay, because the consequences of the delay are not great.

[21] Ms. Ghatak suggests that Charter rights should be interpreted more narrowly within the regulatory context of the Motor Vehicle Act than in a criminal context, where penal consequences are involved. She submits that the trial judge correctly considered the strong societal interest in maintaining the integrity of a regulatory scheme designed for the preservation of the public safety. Nevertheless, the Supreme Court of Canada has made it clear that the allowable time frame for bringing a regulatory offence to trial is not greater than in criminal cases: *R. v. CIP Inc.*, [1992] 1 S.C.R. 843, 71 C.C.C. (3d) 129.

[22] I accept the Crown's submission that it would be a dangerous precedent to say that because this is a "mere speeding ticket" case and there is little societal interest in bringing it to trial (as opposed to a serious criminal charge), the length of the delay somehow becomes a more important factor. In other words, it does not logically follow that the less serious the charge, the more serious an infringement of the accused's s. 11(b) rights becomes.

(iii) Whether prejudice should be inferred from the length of the delay

[23] The appellant submits that the learned trial judge should have found that prejudice could be inferred from a delay of 19 months on a traffic ticket. He cites a number of cases including *R. v. Pronovost*, [1994] B.C.J. No. 3123 (Prov. Ct.), *R. v. SRC Law Corp* (2003), 34 M.V.R. (4th) 110, 2003 BCSC 64 and *R. v. Fridleifson* (1999), 127 B.C.A.C. 252, 1999 BCCA 351, as well as a number of decisions of judicial justices of the peace.

[24] In *Pronovost*, the provincial court judge found no prejudice to an accused whose trial had taken place 14 months after she received a speeding ticket "other than the pending black cloud of a charge standing over [her] head" (at para. 12). Nevertheless, he concluded, in an oral decision, that "a twelve month systemic delay is unreasonable and that because the delay is unreasonable, the Crown has not satisfied the Court that it's justified and accordingly, Ms. Pronovost's rights under Section 11(b) of the Charter have been infringed" (at para. 13). On its face, that conclusion reverses the onus of proof on a delay application.

- [25] The facts in Fridleifson are wholly distinguishable. There, the appellant was charged with trafficking in heroin and possession of the proceeds of crime. His trial began 28 months after the charges were laid. The Court held that the appellant had been seriously prejudiced. In that case, the appellant had sold heroin to an undercover police officer who made notes of the transaction within three to four hours of its conclusion. The appellant was unaware that he would be charged until he learned of the charges through the media 7 or 8 months after the offence.
- [26] Similarly, in SRC Law Corp, the Court inferred that a delay of between 4 and 4 ½ months between the alleged speeding noted by a photo radar machine and notice of the offence could lead to an inference of prejudice from the delay.
- [27] Mr. Fai also referred to a number of judgments in which judicial justices of the peace entered judicial stays primarily on the basis of the length of the delay alone: R. v. Meyer, 2002 BCPC 175, [2002] B.C.J. No. 1127; R. v. Robinson, 2001 BCPC 38, [2001] B.C.J. No. 777; R. v. Williams, 2001 BCPC 39, [2001] B.C.J. No. 778; R. v. Rowan, 2004 ONCJ 153, [2004] O.J. No. 3504. Those decisions rely heavily on the suggestion made by Sopinka J. in Morin that 8 to 10 months should be the guideline when considering what length of institutional delay is unreasonable in Provincial Court (at para. 55). Without finding specific prejudice, the justices of the peace held either that prejudice could be inferred from the fact that the delay was longer than that guideline or that prejudice was not a necessary factor.
- [28] With respect, I consider it incorrect for a court to simply look to the suggested guideline to determine whether a delay is unreasonable in all cases. A more flexible approach is mandated by Morin. While Sopinka J. did suggest a period of institutional delay between 8 and 10 months as a guide to provincial courts, he also stressed the fact that such a guideline is not to be treated as a fixed limitation and it may yield to other factors.
- [29] For example, in Morin, rapidly changing conditions in the District of Durham had placed a sudden and temporary strain on resources which, he said, should not result in an amnesty for people charged in that region. While it would be improper to apply "a transitional period" during which unreasonable delay was tolerated, the unusual conditions should be treated as a factor in determining whether a particular delay was unreasonable. While Sopinka J. noted that the 14 ½ month delay in Morin "can hardly be described as a model of dispatch" (at para. 66), he also considered it to be a time period that could be excused in suitable circumstances. The accused had led no evidence of prejudice. In the circumstances, which included the strain on institutional resources and the absence of any significant prejudice, the Court, Lamer C.J.C. dissenting, concluded that the delay of 14 ½ months was not unreasonable.
- [30] In the case at bar, the effect upon the judicial caseload in Richmond of shutting down courthouses in Delta and Surrey could properly be considered as a factor, as well as fact that the appellant did not file a Charter notice until the first trial date set in October 2003, which created a further three month delay.

- [31] Sopinka J. also noted that deviations of several months in either direction from the guideline can be justified by the presence or absence of prejudice. He stressed the fact that prejudice may be inferred from the length of the delay in an individual case (at para. 61). He did not suggest that prejudice is to be inferred in every case, simply as a result of the delay.
- [32] Both Morin and Fagan make it clear that the question of whether an accused is prejudiced by the passage of time is of "paramount importance" in determining whether a s. 11(b) violation has occurred. Ms. Ghatak submits that while prejudice may be either proven or inferred, courts will rarely find a violation justifying a stay of proceedings unless the accused has demonstrated that he or she has suffered "serious prejudice".
- [33] In this case, the trial judge found, on the evidence, that the appellant had failed to establish actual prejudice to his right to make full answer and defence, and that he likely never had a defence to the charge. The Crown suggests that these facts are analogous to those in *R. v. Sigurdson* (2002), 27 M.V.R. (4th) 421, 2002 BCSC 392 where, at para. 22, Mr. Justice Joyce found that the appellant's evidence was no more than "a bald suggestion that delay might cause a fading of memories".
- [34] It is clear that although prejudice may be inferred from a lengthy delay in an individual case, there is no presumption of prejudice and it is not mandatory to infer prejudice from delay. In *Fagan, Esson J.A.* for the Court noted that Morin removed a "presumption of prejudice" and placed the onus back on the accused (at para. 13). In *Grant Romilly J.* stated (at para. 67): "The effect of Morin has been to greatly increase the significance of prejudice in a s. 11(b) analysis. While prejudice may be either proved or inferred, it is necessary for an accused to demonstrate that the prejudice was sufficiently serious." In *R. v. Drescher*, [1999] B.C.J. No. 1430 (S.C.), Hood J. stated (at para. 27):

In my view, a mere observation that witnesses' memories might be effected [sic] is not sufficient to establish prejudice to the Accused in the circumstances. In this case there is no evidence of prejudice to the Appellant which would warrant a stay of proceedings.

- [35] In this case, the trial judge correctly concluded that there was no evidence that the length of the delay prejudiced the appellant or his right or ability to make full answer and defence.

Conclusion

- [36] I would dismiss the appeal despite the fact that the trial judge erred in two respects: (1) finding that Mr. Lefort benefited from the delay in the absence of any evidentiary foundation; and (ii) finding that he should have taken steps to exercise his right to trial within a reasonable time. However, those findings were not critical to the trial judge's ruling that Mr. Lefort's s. 11(b) Charter rights were not breached.

- [37] The question of whether the appellant suffered prejudice as a result of the delay and the determination of whether a s. 11(b) Charter breach occurred are questions of fact. The law is clear that an appellate court should not interfere with a lower court's findings of fact or inferences of fact unless the trial judge has made a palpable and overriding error: *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33 and *R. v. Smorodin*, 2004 BCSC 1149, [2004] B.C.J. No. 1810. In this case, I find that the learned trial judge's ruling was correct.
- [38] In summary, the appellant failed to prove that he was prejudiced by any unreasonable delay. He did not establish on a balance of probabilities that he ever had a real defence or that any defence was prejudiced by the delay. He recalled that when he filed the Notice of Dispute, he anticipated that a trial of the matter would take 12 months. There is not a shred of evidence to suggest that he would have been in a better position in 12 months than 16 months when he filed a Charter notice or 19 months when the matter did come on for trial. The only inference to be drawn from the facts is that Mr. Lefort never had a legitimate defence.
- [39] In this case, the accused met the hurdle of establishing a prima facie case that the delay was unreasonable. However, he did not establish that the delay was of any consequence to him or his right to make full answer and defence. The public interest in regulatory matters involving public safety proceeding to trial was the paramount factor. The learned provincial court judge heard and assessed the evidence and properly dismissed his application for a judicial stay.
- [40] Accordingly, the appeal is dismissed.

"M.J. Allan, J."

The Honourable Madam Justice M.J. Allan

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Prepared on 28 October 2026 · Esheria