

CANADA / JUDGMENT

R. v. Sperling

2003 BCSC 840

COURT

Supreme Court of British Columbia

DECIDED

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2003 BCSC 840.err1.doc R. v. Sperling

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Sperling

2003 BCSC 840

Date: 20030530

Docket: 43496

Registry: Chilliwack

Between:

Regina

Respondent

And

Timothy Sperling

Appellant

Before: The Honourable Mr. Justice Joyce

Reasons for Judgment

Counsel for the appellant

W. Martin Finch

Counsel for the respondent

Marvin Braun

Date and Place of Trial/Hearing:

April 11, 2003

Chilliwack, B.C.

NATURE OF THE APPEAL

- [1] This is an appeal from a decision of a Judicial Justice of the Peace, who denied the appellant's application for a stay of proceedings on the ground of unreasonable delay. The Justice convicted the appellant of excessive speeding contrary to s.146(1) of the Motor Vehicle Act.

FACTS

- [2] On February 26, 2000 the appellant received a speeding ticket. He filed a dispute note within 30 days of receiving the ticket as required by the Act. A hearing date of June 27, 2001 was set. On that date, June 27, 2001, the defendant sought and obtained an adjournment of the hearing to September 24, 2001.
- [3] On September 24, 2001 an articulated student appeared on behalf of Mr. Sperling and sought to have the matter transferred to a Provincial Court Judge for hearing, on the ground that the Justice of the Peace did not enjoy judicial independence. That application was dismissed and no appeal is taken from that decision.
- [4] The articulated student then sought a judicial stay of proceedings on the ground that Mr. Sperling's right to a trial within a reasonable time, guaranteed by s.11(b) of the Charter of Rights and Freedoms, had been infringed. That application was dismissed. The police officer then gave evidence and was cross-examined. Mr. Sperling did not testify. The Justice convicted Mr. Sperling of the infraction charged and imposed a fine.

THE DECISION BELOW

- [5] The learned Justice correctly concluded that the amount of delay to be considered was 16 months (March 1, 2000 to June 27, 2001). The defendant conceded that he had waived the delay from the first trial date until the matter was heard. The learned Justice considered 16 months to be an unreasonable period of time for a matter such as this. By that, I understand the Justice to have meant that the amount of delay was such as to require a close examination of the reasons for the delay and of the prejudice, if any, flowing from it. In other words, the defendant made out a prima facie case.
- [6] The learned Justice concluded that the delay was entirely institutional delay. He said:
- It is just the way the system operates, in the sense of not enough facilities and staffing and resources to have these matters heard any more frequently, so it's a systemic delay. It's not really laid at the feet of anybody else.

- [7] The learned Justice then turned to the issue of prejudice. I will set out the essential part of his reasons concerning prejudice:

Now, in paragraph number 8 he has suggested that he has had to be subjected to the vexations and vicissitudes of a pending criminal accusation. Well, I have a little trouble with that, because, first of all it is not a criminal accusation. This is a regulatory offence. It certainly does not come anywhere close to being a criminal accusation.

He is also suggesting under paragraph 9 that as a result of the pending criminal accusation that he suffered anxiety, stress and stigmatization, and once again, this is not a criminal offence. It is a regulatory offence, and while there might be some minor stress experienced by lay people waiting for a hearing on a traffic matter, Mr. Sperling is a member of the bar. I kind of have a hard time expecting (sic) that appearing in traffic court would really cause him a lot of problems, just the fact of having to appear in a traffic court, and I realize that maybe that is only one of his reasons.

The second reason apart from sort of waiting for the trial, and I don't agree that that would amount to serious prejudice is that he has suggested in paragraph 10, "The points that it would incur against my driver's licence would cause a very real danger to me of losing my licence"

I am not going to accept that as a matter of prejudice, because basically what that refers to is what is likely to happen in the future, not about what has happened while he's waited for the trial to come about.

ERROR ALLEGED

- [8] The appellant submits the learned Justice erred in concluding the appellant did not suffer prejudice that warranted a stay of proceeding. More particularly, the appellant submits the learned Justice erred in law in refusing to consider as prejudice the effect that the continuing uncertainty of whether or not he would lose his driving privileges had on his ability to organize and schedule his professional activities.

LAW

- [9] The leading decision with respect to the right of an accused person to be tried within a reasonable time is *R. v. Morin* [1992] 1 S.C.R. 771. That case described the primary purpose of s.11(b) of the Charter as being the protection of the individual rights of the accused, namely: (1) the right to security of the person; (2) the right to liberty; and (3) the right to a fair trial. At paragraph 28, Mr. Justice Sopinka said:

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 the liberty which results 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.

- [10] In addition to the individual interests of the person charged with an offence, the Court must also be concerned with the interest of the state, which is adverse to that of the accused, to see that those who transgress the law are brought to trial and dealt with according to the law. In each case the court must find the correct balance between these interests.
- [11] In analyzing whether delay is excessive the court must consider the following factors:
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, and
 - (d) any other reasons;
 4. Prejudice to the accused.
- [12] In her minority judgment in *R. v. Morin*, McLachlin J. suggested the first task for the court is to determine whether a prima facie or threshold case for unreasonable delay has been made out. If the delay is reasonable having regard to similar cases the application will fail. If a prima facie or threshold case has been made out then court must give careful consideration to the right of the accused to a trial within a reasonable time and whether that right outweighs the conflicting societal interest in bringing a person charged with an offence to trial. Madam Justice McLachlin suggested that the interest of the accused will usually be measured by the prejudice to his rights to security of the person, liberty and a fair trial. Whether the prejudice in any particular case is sufficient to outweigh the public interest is a question of fact dependent on the circumstances of the case.
- [13] The importance of the element of prejudice was stressed in *R. v. Fagan* [1998] B.C.J. No. 2886 (C.A.). Esson J.A. opined that prejudice is "an issue of paramount importance" and that "successful s.11(b) challenges are unlikely to succeed unless the accused demonstrates serious prejudice".
- [14] It is important to keep in mind that prejudice is a question of fact, although it is a fact that can be inferred from lengthy delay in appropriate circumstances (*R. v. Morin*, supra, *R. v. SRC Law Corporation* [2003] B.C.J. No. 151 (S.C.)).

ANALYSIS

[15] In my view, the learned Justice was entirely correct in concluding that a delay of 16 months to bring a speeding ticket to hearing met the threshold test referred to by McLachlin J. in Morin. It called for a careful consideration of whether Mr. Sperling's right to a trial within a reasonable time outweighed the public interest in prosecuting alleged speeders.

[16] The delay in this case significantly exceeds the suggested guidelines discussed by Sopinka J. in Morin. Considering the nature of the offence, there is little if any preparation time required for the hearing. The only reason put forward by the prosecuting police officer for the delay was that:

"sixteen months in our jurisdiction is not uncommon and is not unheard of, due to the amount of traffic violations that we do have set out through our court systems."

[17] There was no evidence put before the Court why 16 months is not uncommon in this jurisdiction.

[18] As Sopinka J. said in Morin at paragraph 48:

While account must be taken of the fact that the state does not have unlimited funds and other government programs compete for the available resources, this consideration cannot be used to render s.11(b) meaningless. The Court cannot simply accede to the government's allocation of resources and tailor the period of permissible delay accordingly.

[19] This observation applies to infractions under the Motor Vehicle Act as well as to serious criminal offences, although both the public interest in prosecuting offences and the accused's person's right to have a trial within a reasonable time will be influenced by the nature of the charge. In my view the public interest in prosecuting the offence as well as the potential prejudice that may result from delay is less in the case of a speeding ticket than it is in the case of a serious criminal offence. However, the Court must still engage in the same weighing and balancing of the competing interests.

[20] In this case, the defendant did not suggest he suffered any prejudice relating to his right to liberty or his right to a fair trial. He relied on prejudice relating to his right to security of the person. The learned Justice did not accept Mr. Sperling's affidavit evidence that the "vexations and vicissitudes of a pending criminal investigation" created any real prejudice. Nor did he accept Mr. Sperling's evidence that he suffered anxiety, stress and stigmatization waiting for the hearing. He rejected that evidence on two grounds. First the matter was a regulatory offence, not a criminal offence. Second Mr. Sperling, a barrister, is familiar with court process and having to appear in traffic court would not create any undue stress.

[21] In my opinion, it was open to the learned justice to make those findings of fact and I can see no reversible error in that part of the decision.

- [22] The other aspect of prejudice relied on by the defendant, and the only one argued on this appeal, related to the possible loss of driving privileges. The articulated student who appeared on Mr. Sperling's behalf made no submissions with respect to this issue but the Justice considered Mr. Sperling's affidavit, particularly paragraphs 10-13, which read:
10. The points that I would incur against my drivers' licence would cause a very real danger to me of losing my licence.
 11. I need my drivers' licence for my employment as I am a partner with Baker Newby in Chilliwack, British Columbia. I am required to drive to and from courthouses all over British Columbia to get to work, including Kelowna, Hope, Vancouver and New Westminster. If I cannot attend work, I would lose my client base.
 12. I have two small children. As a parent, I need my drivers' licence in order to drive my children to school, to extra-curricular events, to attend any medical and dental visits and to and from their daycare facility. If I could not drive them to these places, they would have no other way to attend these places.
 13. The seriousness of these consequences are indeed a serious prejudice to me as per *Regina v. Fagan*.
- [23] The Justice concluded that Mr. Sperling's evidence related to future potential consequences, namely the points that would be assessed against his licence in the event of a conviction, the further possibility that the superintendent might suspend his licence and the difficulties that would cause in the future if it occurred. That, he held, was not prejudice resulting from the delay. I agree that the consequences of a conviction do not constitute prejudice resulting from the delay in having the matter tried.
- [24] However, counsel on appeal submitted the learned Justice erred in failing to recognize the "necessary prejudice" to Mr. Sperling of this threat during the time period preceding the trial because of the nature of the appellant's profession. He submits the uncertainty whether the appellant's driving privileges would continue made it difficult for the appellant to schedule his professional activities. That, counsel submits, is a prejudice that the appellant incurred prior to trial as a result of the delay.
- [25] The problem with the submission is that it lacks evidential support. Mr. Sperling's affidavit speaks of his concern about possibly losing his driving privileges and the effect that would have on his practice. It does not speak of any difficulties he encountered in his professional practice while awaiting trial.
- [26] Counsel submits the Justice ought to have recognized the "necessary" prejudice that operated on Mr. Sperling by virtue of the nature of his profession. In my opinion it does not necessarily follow from the fact that at some time in the future Mr. Sperling might have his driving privileges suspended that he suffered prejudice while awaiting trial. It is not a necessary inference, nor a matter of which I am prepared to take judicial notice. It is a fact that must be established by evidence. The evidence to establish that fact, if it existed, was

not provided.

[27] In my view, the learned Justice did not err in finding, as a fact, that there was no real prejudice.

[28] Is this a case where the court should infer prejudice from the mere fact of delay? I am not prepared to do so. There is no suggestion that the delay affected the right to a fair trial. There is no suggestion the delay affected Mr. Sperling's right to liberty. The only individual right affected by the delay is his right to security of the person. Given the nature of the offence, I am not satisfied there was any significant stigma or concern as a result of the exposure to this proceeding. Nor am I prepared to infer, in the absence of evidence, that the delay raised Mr. Sperling's anxiety to such a level that his right to a trial within a reasonable time outweighed the interest of the public in having this matter disposed of at a trial.

[29] I therefore dismiss the appeal.

"B.M. Joyce, J."

The Honourable Mr. Justice B.M. Joyce

August 10, 2004 - Revised Judgment

The passage on page 2, paragraph 2, line 4 should read:

"A hearing date of June 27, 2001 was set. On that date, June 27, 2001, the defendant sought and obtained an adjournment of the hearing to September 24, 2001."

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