2012 CarswellOnt 7684, 103 W.C.B. (2d) 259

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R. v. Zine

Her Majesty the Queen and Usama Zine

Ontario Court of Justice

Lucia Favret J.

Heard: August 10-12, 2011
Judgment: May 19, 2012
Docket: 4813-998-08-313655-00

Counsel: B. Olesko, for Crown

S. Pieters, for Accused

Subject: Criminal; Constitutional

Criminal law --- Charter of Rights and Freedoms — Right to be tried within reasonable time [s. 11(b)] — Pre-trial delay

Accused, charged with assault with a weapon (pepper spray) upon two complainants, applied for a stay of proceedings — Total delay was 21 months and four days — Original trial did not proceed because it involved guards at the Courthouse in question and it was determined that it would have been inappropriate for the judge assinged to the matter to preside — There was no waiver of any period by the accused — Application dismissed — Court found that requiring a judicial pretrial in the matter was not institutional delay as the transcript revealed that the accused considered a further meeting assisted in his preparation for trial — Some delay was occassioned because the ac-

cused had not decided how much time was required for his delay application when setting the initial trial dates — All parties inadvertently missed the issue that an out of court jurist was required and the circumstances created a reasonable basis for an adjournment of the trial — Case was inherently complex — Accused did not loose his job because of delay and quickly obtained alternate employment — There was no evidence that the accused suffered any hardship, prejudice or difficulty because he was prohibited from going to a specific mall — Stress accused experienced had no impact on the his ability to pursue his studies or find a part-time job — Delay was reasonable.

Cases considered by *Lucia Favret J.*:

R. v. Cranston (2008), 2008 ONCA 751, 2008 CarswellOnt 6659, 244 O.A.C. 328 (Ont. C.A.) — considered

R. v. Généreux (1992), [1992] 1 S.C.R. 259, 70 C.C.C. (3d) 1, 88 D.L.R. (4th) 110, 8 C.R.R. (2d) 89, 133 N.R. 241, 1992 CarswellNat 668, 1992 CarswellNat 668F (S.C.C.) — referred to

R. v. Godin (2009), 192 C.R.R. (2d) 184, 67 C.R. (6th) 95, 389 N.R. 1, 245 C.C.C. (3d) 271, [2009] 2 S.C.R. 3, 2009 CarswellOnt 3100, 2009 CarswellOnt 3101, 2009 SCC 26, 309 D.L.R. (4th) 149, 252 O.A.C. 377 (S.C.C.) — considered

R. v. Kalanj (1989), 1989 CarswellBC 629, 1989 CarswellBC 709, [1989] 1 S.C.R. 1594, [1989] 6 W.W.R. 577, 96 N.R. 191, 70 C.R. (3d) 260, 40 C.R.R. 50, 48 C.C.C. (3d) 459 (S.C.C.) — referred to

R. v. MacDougall (1998), 128 C.C.C. (3d) 483, 165 D.L.R. (4th) 193, [1998] 3 S.C.R. 45, 1998 CarswellPEI 88, 1998 CarswellPEI 87, 19 C.R. (5th) 275, 231 N.R. 147, 168 Nfld. & P.E.I.R. 83, 517 A.P.R. 83, 56 C.R.R. (2d) 189 (S.C.C.) — considered

R. v. Meisner (2004), 2004 CarswellOnt 3791, 190 O.A.C. 24, 7 M.V.R. (5th) 1 (Ont. C.A.) — followed

R. v. Morin (1992), 12 C.R. (4th) 1, 71 C.C.C. (3d) 1, 134 N.R. 321, 8 C.R.R. (2d) 193, 53 O.A.C. 241, [1992] 1 S.C.R. 771, 1992 CarswellOnt 984, 1992 CarswellOnt 75 (S.C.C.) — considered

R. v. Rahey (1987), 75 N.R. 81, [1987] 1 S.C.R. 588, 39 D.L.R. (4th) 481, 78 N.S.R. (2d) 183,

33 C.C.C. (3d) 289, 57 C.R. (3d) 289, 33 C.R.R. 275, 1987 CarswellNS 340, 1987 CarswellNS 38, 193 A.P.R. 183 (S.C.C.) — considered

R. v. Shah (2004), 2004 ONCJ 263, 2004 CarswellOnt 4558, 123 C.R.R. (2d) 347 (Ont. C.J.) — distinguished

Statutes considered:

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

Generally — referred to

s. 11(b) — considered

Criminal Code, R.S.C. 1985, c. C-46

s. 267 — referred to

***Lucia Favret J.*:**

1 Usama Zine is charged that on November 6, 2008 he assaulted Daud Wafaq and Roger Dee with a weapon, pepper spray, contrary to s.267 of the Criminal Code, On this application, he seeks an order staying the charges because his s. 11(b) Charter right to a trial within a reasonable time has been breached. The crown opposes the application. In support of the application, Mr. Zine relies on an Application Record filed which includes his affidavit sworn July 4, 2010 (Exhibit 1) and transcripts of proceedings. The crown cross-examined Mr. Zine and presented no evidence.

2 The parties agree that the total length of delay, 21 months 4 days, requires inquiry by this court. The defendant submits the institutional delay is 18 months 6 days. The crown disagrees and submits it is 10 months 17 days. The defendant was arrested November 6, 2008 and the information was sworn November 7, 2008. He received bail and was released November 10,2008. While on a recognizance, Mr. Zine was subject to a curfew. He lost the job he had at the time of the arrest and thereafter obtained new employment. After a judicial pre-trial on March 4, 2009, 3 days were set for trial commencing January 21, 2010[FN1] . Thereafter there were continued judicial pre-trial/management meetings during which issues regarding the trial including the estimate of

time required were discussed. Ultimately on November 17, 2009, 6 days were set aside for trial[FN2] . On January 21, 2010, the trial did not proceed. Although Justice Dobney had been assigned, as the trial involved guards at the Scarborough Courthouse, it was agreed Justice Dobney should not preside. The trial was scheduled for 5 days commencing August 10, 2010. The applicant submits the adjournment from January 21 to August 10 is institutional delay and or that that period should be attributed to the crown. The crown disagrees stating this period is inherent time delay and therefore neutral The crown submits when assessing this matter it is important to consider that if the trial had proceeded on January 21, 2010 it would not have ended until June 8, 2010. As a result of the adjournment in January the trial started approximately 2 months after June 8, 2010. The parties do not agree on the nature of the prejudice occasioned by Mr. Zine. For the following reasons the application was dismissed.

Legislative Framework

3 S. 11(b) of the Charter provides "Any person charged with an offence has the right to be tried within a reasonable time." The primary purpose of s. 11(b) is the "protection of the individual rights of the accused".[FN3] These rights are, (1) the right to security of the person, (2) the right to liberty, and (3) the right to a fair trial[FN4] . These rights respectively are protected by minimizing: (1) the anxiety, concern and stigma of exposure to criminal proceedings; (2) exposure to the restrictions on liberty which result from pretrial incarceration and restrictive bail conditions; and, (3) attempting to ensure that proceedings take place while evidence is available and fresh.

4 The section also concerns a secondary societal interest in seeing "that the least fortunate of its citizens who are accused of crimes are treated humanely and fairly"[FN5] . Trials held promptly will have the confidence of the public. This interest parallels the interest of the accused, There is a societal interest adverse to that of the defendant to have criminal matters dealt with on the merits. "As the seriousness of the offence increases so do the societal demand that the accused be brought to trial.[FN6] "

5 In *Morin*, supra, the Supreme Court stated that the general approach to a determination of whether s. 11 (b) right has been denied is not by application of a mathematical or administrative formula but by a judicial determination balancing the interests which the section is designed to protect against factors which lead or otherwise cause delay[FN7] . The factors to be considered are;

1. Length of delay;

2. Waiver of time periods;

3. The reasons for 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[FN8] .

6 The balancing referred to requires an examination of the length of the delay and its evaluation in light of the other factors. The period to be scrutinized is the time from the date of the charge to the end of the trial[FN9] . The length of the period may be shortened by subtracting any period that have been waived. "It must be determined whether this period is unreasonable having regard to the interests s. 11(b) seeks to protect, the explanation for the delay and the prejudice to the accused,[FN10] " The burden of proof is on the applicant.

Preliminary Issue-Transcripts Required for the Application

7 The crown initially stated that its ability to respond to the application was limited because all of the transcripts were not available. This issue was resolved at the commencement of this application.

1. Length of Delay

8 The length of delay here from the date the information was sworn, November 7, 2008, to the date of trial August 10, 2010, is 21 months 4 days. The parties agree that period requires inquiry. I concur.

2. Waiver of Time Periods

9 There was no waiver by the applicant.

3. Reasons for the Delay

a. Inherent Time Requirements. Actions of the Accused and Crown

10 In *Morin*, the Court stated that all offences have inherent time requirements which inevitably lead to delay. The complexity of the trial is such a requirement. The more complicated the case the longer required for counsel to prepare for trial and for the trial to be conducted. The circumstances of each case must be evaluated. Counsel cannot be expected to devote all of their time to one case.

11 There are inherent time requirements common to all cases. These includes activities such as bail hearings, retaining counsel and providing disclosure. The period of time required to complete these activities is referred to as intake. The length of intake will vary with each case depending on such things as the complexity of the case. In *Morin*, the court stated that length of intake will be influenced by local practices and conditions[FN11] .

12 The intake period here commenced November 7 and ended December 8, 2008, one month 1 day. During this period, the applicant retained counsel and had a bail hearing where he was released on consent[FN12] . On November 7th, duty counsel noted the applicant's injuries. The hearing on November 10th was not contested.

13 The crown provided a Charge Screening Form dated November 24, 2008 indicating it intended to proceed summarily[FN13] .

14 On December 8th, counsel filed a designation. Some disclosure was provided[FN14] . The intake period is neutral. In this case, the intake period was speedy.

15 As of December 8th, the applicant had received some disclosure and indicated he would set a crown pretrial meeting if he had received sufficient disclosure. On that day, the matter was adjourned to January 7, 2009. The applicant asked for an adjournment in order to meet schedule the pre-trial and discuss some issues with the crown, That day he requested to return February 4, 2009. This was an action of the applicant. It was not unreasonable for the defendant to request this time

to review the disclosure provided.

16 On February 4, 2009, the crown provided further disclosure. A judicial pre-trial was schedule for March 4, 2009. On February 5, 2009, the applicant wrote to the crown requesting disclosure[FN15] . This letter included a request for documentation following the applicant's arrest as well as witness interview notes, 911 recordings, surveillance tape of the Scarborough Town Centre and records relating to the complainants including their criminal record if any.

17 The applicant submitted that requiring a judicial pretrial in this matter should be considered institutional delay. For the reasons that follow, I disagree. The pre-trials held assisted counsel in estimating the time required for trial. In any event, these proceedings were held after a date for trial was set on March 4, 2009 and did not delay setting a trial date. They were held during the period March 4 to January 21 2010, which the applicant and crown agree is a period of institutional delay.

18 On March 4 following the judicial pre-trial, three days were set for trial January 21, 22, and 25, 2010[FN16] . A half-day was set to proceed before Justice Dobney on October 16, 2009 for an anticipated third party records motion. As disclosure was outstanding, Justice Wong required the parties return before her so she could manage that issue[FN17] . I find that as of March 4, 2009 the applicant and crown knew that Justice Dobney would be the trial judge. A continuing management/judicial pre-trial was scheduled for April 8, 2010.

19 On April 8th Justice Wong indicated she wanted to ensure that the disclosure requested was made available to the applicant so that "the matter moves forward smoothly"[FN18] . Counsel for the applicant requested April 20th as a further date for the continued management by Justice Wong. He said he received "some medical evidence from the jail and some photographs from the jail, so I'm going to need some time with yourself and the Crown and the officer in charge[FN19] ." I infer from this transcript that the applicant considered a further meeting would assist in his preparation for the trial. The Court stated "I'm pretty much in charge of my calendar in any event. So see what you can get between now and the 20th, if you need to have another judicial pre-trial everybody will open their calendars up and see whether or not we can choose an agreeable date."[FN20]

20 On April 20th, the applicant received further disclosure. The court said "Mr. Pieters you were going to indicate to the Crown at least 90 days in advance of the trial which witnesses you wanted to hear from... because at this stage, the Crown may be calling only civilian witnesses if...". Justice Wong asked if the applicant wanted to return once he reviewed the material he received. He agreed. As the crown stated, he may not be present on the further day Justice Wong said "And it

may very well be because of the complexity of this case, perhaps someone from your office will be assigned." She directed the applicant return to determine what if any further disclosure was outstanding, "And then you can put your mind to the issue of what witnesses you want to have available and perhaps a Crown will be assigned.[FN21] " As counsel for the applicant was returning to the courthouse on April 30th, the court agreed to adjourn the matter to that day. Counsel for the applicant agreed during the period prior to that day he would be able to vet the material received and turn his mind to the issue of witnesses[FN22] . The matter was adjourned to April 30th for continuing case management.

21 On April 23, 2009, the applicant sent a further letter detailing the outstanding disclosure and indicating he would require all officers with the exception of one[FN23] . He advised his client would bring a motion requesting the proceedings be stayed because the police assaulted him. As well, counsel for the applicant confirmed he would proceed with the third party record application to obtain information concerning the officers that arrested the defendant, He requested additional information in support of the anticipated application for Charter relief[FN24] .

22 Following the case management meeting on April 30th, Justice Wong stated that since the pre-trial on March 4, 2009 "One of the things we have been discussing is disclosure and it is getting more complicated.[FN25] " Justice Wong suggested that the applicant combine the third party record motion with a production motion. When asked how many officers were required for the motion counsel for the applicant indicated he had not drafted the motion as of yet and that he may not require all of '8' of them. He stated that he did not think the time would be lengthened by the number of officers. Justice Wong disagreed. She said "it is starting to sound like it is a trial by disclosure and that would be unfortunate as opposed to getting into a trial of the merits. So at this point we have estimated 3 days for the trial.... Now there is a lengthy voir dire. So, I think you have to add on at least two more days to that[FN26] ." The crown suggested 7 days were required in total for the trial and pretrial motion. Counsel for the applicant agreed extra time was required[FN27] . As well, he stated he believed the time required for the records application was one day not ½ a day as previously estimated ultimately stating only ½ day was required[FN28] . Counsel for the applicant indicated the only outstanding disclosure related to policy documents. Two more trial dates were set March 3 and March 4, 2010 and ½ day November 17, 2009 was set for the records application, On that day, the matter was adjourned to October 17, 2009 the date set for the records application.

23 Based on the above, I conclude that although some disclosure concerning the trial was outstanding when the 3 day trial was set in March, during the period March 4 to and including

April 30, counsel re-evaluated the case and determined the motions that would be required. This information I conclude was not available when the trial dates were initially selected, During these pre-trial/management meetings, I conclude based on the records and evidence I have referred to herein that disclosure was one of the main issues discussed including the potential that the defense may require additional witnesses for the purpose of the proposed Charter application. It was not until April 30th that consideration had been given to how much time was required for the pre-trial Charter application the applicant intended to make. This occurred after the trial dates had been set. The institutional delay clock had begun to tick. Counsel did not make any submissions regarding how the time from January 25 to March 4,2010 the continued trial date should be characterized in the circumstances. Although 1 have concluded the period between January 21 to August 10 is neutral time inherent to this case and not institutional delay, I consider that the period January 25 to March 4, 2010, just over one month was attributable to the applicant's actions. He had not decided how much time was required for this application when setting the initial trial dates. I refer to this period again below and explain why ultimately I have concluded it is not attributable to the applicant but neutral inherent time.

24 On October 3rd, the applicant indicated the third party record application would not proceed given the information in the McNeil checklist disclosed. During submissions on this application, counsel agreed that the date for hearing this application was not a factor in selecting the trial dates. I agree. It is not relevant to the assessment of delay. The motion was vacated October 7th. The matter was adjourned to November 17 at the request of the applicant.

25 On November 17, 2009, the parties appeared before Justice Dobney. The applicant confirmed that although a s. 11 (b) application had been filed, it was not an issue[FN29] . Later in that transcript, he said that 'at the present' s. 11(b) was not an issue. During submissions, counsel confirmed that as of January 21, 2010, s. 11(b) was not an issue. On November 17th, the court stated that such a motion should be brought before the trial date. The parties concluded the pretrial motions and trial evidence would be blended[FN30] . As well, the admissibility of some exhibits and whether continuity would be an issue at trial was discussed[FN31] . The crown confirmed the number of witnesses that would be called, 6 officers, not 4, and 4 civilians[FN32] . The applicant indicated he would be calling a medical expert and at least one more civilian witness[FN33] . The court said there were 'up to 10 witnesses' on the Charter application[FN34] . Counsel for the applicant agreed that if witnesses were required for the medical records more time was required[FN35] . The court stated the estimate of time for the Charter application requires the applicant provide an estimate as the crown's substantive case would not 'take much time'[FN36] . Based on the discussion, the Court said "Some things have narrowed down, some things have

expanded"[FN37] . Having reviewed all of the transcripts and considered the submissions of counsel, I agree with Justice Dobney's comments, As a result of this court appearance, counsel for the applicant agreed to provide a summary to the crown to determine if they could agree on some facts in relation to the pretrial Charter motion.[FN38] Having reviewed the transcript of November 17th and considered the discussions of counsel, I conclude on that day counsel and the court discussed the procedural and readiness issues related to this trial not the merits of the substantive charges.

26 On January 21, 2010, the parties appeared before Justice Bigelow who advised that while reviewing the material Justice Dobney the assigned judge noticed some allegations with respect to incidents, which were alleged to have occurred in the cells at this Court involving security officers at this Court. She was concerned about whether it was appropriate for a judge who sits on a daily basis in these courts and has the security officers providing in fact her security hearing matter where it may well be that the credibility of those officers is going to be placed an issue, and expressed a concern about whether it was appropriate or not for her to hear it. ... and the word 1 have received was that both counsel I think are of the view that it is a concern for a judge who sits in this building on regular basis to hear this trial.[FN39] " Both counsel agreed when he asked if he stated their position correctly.

27 Justice Bigelow explained efforts had been made on one day's notice to get another judge from outside the jurisdiction but it was not possible. He said based on the position taken by both counsel the trial could not proceed. Based on the estimate of 6 days, Justice Bigelow said the trial coordinator offered dates commencing August 9 continuing August 10, 12, 13, 19, 20 or September 21 - 24, 27 and 28. Counsel for the applicant indicated the dates suggested were available. Justice Bigelow indicated he could not sit on the trial given his responsibilities and explained why in his view an out of town jurist not a judge sitting in Toronto should hear the matter. Neither counsel asked the court to proceed on the three days cumulatively set in March and June.

28 I have reviewed the above proceedings in detail to demonstrate my conclusion that this case was complex. At the outset, it was clear that the applicant was considering a Charter application although he had explicitly said so. No consideration was given to the amount of time such a motion would require in March when the initial trial dates were set. I have considered the applicant's suggestion that 9 months 20 days should be attributed to actions of the crown because disclosure was delayed. I cannot agree that the disclosure required prohibited an estimate to be made concern the trial on the merits. I infer this in part because a judicial pretrial concerning the trial on the merits was held on March 4 when the 3 day trial period was set. I have looked at the letters

counsel sent to the crown and considered his submissions here. He did not identity any disclosure that impacted on the delay. Indeed he agreed that the disclosure did not have an impact on selecting the trial dates. The estimate of time expanded in large measure because of the time required to advance the anticipated pre-trial Charter application. The issues related to that, involving both the disclosure requested and the number of witnesses required, continued to develop during case management up to and including the lengthy proceeding before Justice Dobney where counsel discussed how the trial before her would proceed. I agree with her comments that although some concessions were made by counsel, at the end of that proceeding, the parties had not sorted out all of the pre trial charter application issues.

29 Up to and including November 17th, I find neither counsel nor the court considered the concern identified on January 21, 2010 that an out of court jurist was required. Up to that point during management/judicial pre-trials disclosure and the way in which the proceeding would unfold was the focus of attention. Certainly counsel had a more intimate understanding of the facts of the case including who the witnesses would be than the court. The witnesses here that were the focus of the concern were witness on the pre-trial Charter application not the trial proper. Based on the record here, I conclude all parties inadvertently missed this issue. Knowing who the witnesses are is important in assessing the time requirements of the case and in identifying potential 'mine fields'.

30 I find the ongoing discussions with the judiciary were important in moving this trial forward and in ensuring that sufficient time was set aside. These meetings occurred during the period of institutional delay. These proceedings were inherent to the case, I find the period of December 8 to and including March 4 as time inherently required in this case to prepare the case.

31 I do not agree with the view of Justice Spence in *R. v. Shah*, 2004 ONCJ 263 (Ont. C.J.) at paragraph 19 that "mandatory judicial pre-trials flow not from inherent time requirements but, rather from the limited availability of institutional resources." In this jurisdiction, the local practice requires for cases of the length proposed herein that a pre-trial will be held. This practice is inherent to all cases of this proposed length. I conclude the purpose is to ensure sufficient resources are made available and that mine fields are identified to assist applicants in getting their proceeding to trial effectively. Having reviewed the transcripts here, I find that is the only conclusion that is available. The court was interested in ensuring that the trial proceed in a timely way.

32 In *R. v. Cranston*, 2008 ONCA 751 (Ont. C.A.), the court held;

> [46] The respondents submit that the second half of this period should be attributed to institutional delay because a judicial pre-trial was being completed. In support of this position they cite *R. v. G. (C.R.)* 2005, CanLII 32192 (ON CA), (2005), 77 O.R. (3d) 308 (C.A.), and *R. v. Rego*, 2005 CanLII 40718 (ONCA), (2005), 204 O.A.C. 281. I do not agree. While this court has recognised that the delay needed to schedule a judicial pretrial is properly considered institutional delay, the time the parties require to prepare for and conduct the pre-trial may be an inherent time requirement; see *R. v. M. (N.N.)* at para. 33.

Given the practice in this jurisdiction and the complexity of this case, including that it continued to develop well beyond March 4, I conclude in this case the entire period December 8 to and including March 4 is inherent time and therefore neutral.

b. Institutional Delay

33 On March 4th, trial dates were set for January 21, 22 and 25, 2010. The parties agree this period 10 months 17 days is institutional delay. 1 agree. Institutional resources were not available for this trial prior to January 21, 2010.

c. Adjournment January 21 to August 10, 2010: Inherent to case and neutral

34 The crown submitted that the concern was unforeseen and therefore should be treated as inherent time required by the case. The defense disagrees and submitted it institutional delay.

35 In *R. v. MacDougall*, [1998] 3 S.C.R. 45 (S.C.C.), the court said the inherent time requirements of a case may include delay due to extraordinary and unforeseeable events. In that case, the court considered how time caused by the illness of a judge should be attributed. In *R. v. Meisner*, [2004] O.J. No. 3812 (Ont. C.A.) at para 3, the court considered how an adjournment where a judge had a potential conflict of interest should be characterized. It held;

> The adjournment of the appellant's trial is an example of one of those things that happens from time to time in the criminal process for which no one can be faulted and which almost inevitably requires an adjournment and rescheduling. ... It is inherent in the process that some time must be allowed to rescheduled mattes that are adjourned for reasonable and unforeseeable reason for which no one can be faulted.

The above reasoning applies here. Whether a judge has a potential conflict or not may not be an

issue that arises until some detail about the case is available. Conflicts of this nature are not usual. It is not therefore an issue which ordinarily counsel consider when assessing their case unless it is obvious, Here I conclude the issue was missed. The transcripts demonstrate that counsel were working toward identifying the procedural issues and factual issues in the case. No one I find considered the concern raised by the Court until January 21, 2010. As such, I find the circumstances created a reasonable basis for an adjournment of the trial.

36 I reject the submission of the applicant that a Toronto judge could have proceeded or that Justice Dobney could have proceeded. I have read the cases provided by the applicant concerning an apprehension of bias and impartiality[FN40] . Counsel did not take that position that day although given an opportunity to do so. I am not persuaded that the cases provided are probative of the issue here because the parties both agreed Justice Dobney should not sit on the trial.

37 I have also considered the submission that it was not necessary to get an out of town judge and that it would have been easier and possible to have another jurist from the same jurisdiction hear the trial. I accept the explanation offered by Justice Bigelow as to why this was not possible. It was reasonable. See the transcript of January 21, 2010.

38 As well when the dates for trial in August and September were proposed counsel did not inquire whether the dates already scheduled for March (2 days) and June (1 day) could be secured. This I infer was inadvertent. 1 reject the submission that it was not available to counsel to do so. The transcripts here demonstrate amply that counsel may propose dates to the court for proceedings and that when they do so those dates will be considered.

39 I have considered the submission that here the applicant acquiesced to the date proposed by Justice Bigelow and reject it. I have considered *R. v. Rahey*, [1987] 1 S.C.R. 588 (S.C.C.). The record does not satisfy me that parties acquiesced to a delay suggested. This was not a case where the fate of the case turned on Justice Bigelow's decision to remand the trial to a particular date/s provided to him by the trial coordinator. Justice Bigelow was not deciding the issues to be litigated.

40 I have explained why the delay from January 21 to August 10 is not attributable to the Crown. The Charter motion requiring the security officers be called were not part of the crown's case. I conclude the crown did not consider the appropriateness of those witnesses appearing before Justice Dobney until January 21, 2010. I accept that the applicant had not either. This is a case where the issue was missed by counsel. It is a not a situation where the conduct can be attributed to

either the crown or applicant. It is neutral

4. Prejudice

41 The applicant is a young man, 20, who had studied at the Scarborough Centre for Alternative Studies at Centennial College. On the date of the hearing of this application, he said he had finished the program and planned to attend the University of Toronto in September. He had been accepted into a bridging program based on a letter he wrote explaining why he wished to further his studies.

42 He had no prior involvement with the administration of justice before being charged with the offences herein on November 6, 2008. At the time he was working at Hollister's working shifts stocking inventory. He explained that as a result of his arrest and the timing of his release on consent from custody he did not contact his employer to inform them he would not be able to go to work, He lost his job. In cross-examination, the applicant acknowledged that he then obtained a job, within a month or so, at Sunnybrook Hospital as a dietary aid worker where he continued for some time. He chose to leave the job for a short time while he focused on his studies. He had a plan to work with his father during the summer and return to work at the hospital in September.

43 I find he lost his job at Hollister's because of the initial arrest not because of the delay. He has been able to find other employment and did so quickly. There is no evidence of any financial prejudice resulting from lost employment at Hollister's.

44 When he was arrested, he lived with his mother who is a professor. He received bail and was released on Monday, November 10th. His mother could not attend court on Friday. The bail included a condition restricting his liberty by imposing a curfew he be in his residence from midnight to 6 am unless he was with his surety. This bail would have continued until June 8th if the trial commenced January 21. This is a factor I take into account in assessing the prejudice experienced from the delay herein. He was required to comply with the curfew for an additional two months.

45 The applicant was not sure how many times he attended court. He knew a designation had been filed. From my review of the transcripts and the information, the applicant did not appear with his counsel as of December 8th, Thereafter, his counsel appeared for him.

46 The applicant said in cross-examination that the liberty restriction he referred in his affi-

davit included not being able to go to Scarborough Town Centre where he socialized and went to with his family. He acknowledged there were other malls where he could shop, socialize and go to with his family, There is no evidence that he suffered any hardship, prejudice or difficulty because he was prohibited from going to that address.

47 The applicant said in his affidavit and testified that the charges caused his family stress which continued throughout the months of delay, He agreed his family was upset because he was charged. Although I accept that the stress on the applicant's family was present and infer that caused the applicant some stress. I accept that his mother had to travel back and forth for court appearances but as I noted above, it appears the applicant did not attend court after December 8th, That the applicant's mother met with his counsel was not as a result of the order of recognizance, There is no evidence that such meetings were a result of the delay. There is no detail here indicating how many meetings flowed from the delay as opposed to her interest in understanding the proceedings resulting from the charge. There is no direct evidence how the stress impacted on the applicant's mother. Although I accept she experienced some stress, on this record I cannot assess how that prejudiced the applicant in any way other than minor. I conclude based on the record here that the stress experienced had no impact on the applicant's ability to pursue his studies or find a part-time job.

48 I have considered *R. v. Godin*, [2009] S.C.J. No. 26 (S.C.C.). There is no evidence persuading me that the applicant's ability to make full answer and defense was diminished by the delay. I have already commented on the applicant's liberty interest. Although there is some prejudice from the delay I find it is a period of a further 2 months.

49 I accept there is some inferred prejudice here but am not persuaded that has any impact on the rights of the accused protected here.

Conclusions

50 The charges are serious. There are civilian witnesses. There is a strong societal interest in the trial being completed on its merits. The institutional delay here I find is 10 months 17 days. Although clearly beyond the guideline, given the complexity of this case and how it unfolded, taking into the account the minimal inferred and actual prejudice, I conclude the delay is within the bounds of reasonableness. The application is dismissed.

FN1 Verification of Trial Date Provided by Trial Coordinator's Office, Tab E, Exhibit 1 January

21, 22 and 25, 2010 set for trial.

FN2 Verification of Trial Date Provided by Trial Coordinator's Office, Tab I Exhibit 1. January 21, 22, 25, March 3,4 and June 8, 2010 set for trial.

FN3 *R. v. Morin*, [1992] 1 S.C.R. 771 (S.C.C.) at para. 26.

FN4 *Morin*, supra, para.27.

FN5 *Morin* supra, para. 28

FN6 *Morin*, supra, para 30.

FN7 Supra at para 31.

FN8 Supra at para. 31.

FN9 *R. v. Kalanj*, [1989] 1 S.C.R. 1594 (S.C.C.).

FN10 *Morin*. supra, para 32.

FN11 Supra, para 42.

FN12 Tab A Application Record. The conditions included a curfew not to be away from his residence between midnight and 6 am except if in the continuous company of his surety. As well he was not to enter 300 Borough Drive.

FN13 Tab B Application Record.

FN14 Transcripts of November 7, 10 and December 8, 2008.

FN15 Tab D, Application Record.

FN16 Tab E supra

FN17 Transcript March 4, 2009.

FN18 Transcript April 8, 2009 p.3.

FN19 supra, p. 4.

FN20 supra

FN21 Transcript April 20, 2009 p.4.

FN22 supra, p.5

FN23 The letter attached a list of 11 officers. I infer of these 10 were required for the application.

FN24 Tab F Application Record.

FN25 Transcript April 30 2009 p. 1

FN26 supra p.5.

FN27 supra p.6.

FN28 supra, p. 7.

FN29 Transcript November 17, 2009 p. 10.

FN30 Supra, p. 13, 14.

FN31 Supra, p.20.

FN32 Supra, p. 21.

FN33 Supra, p.23, 24.

FN34 Supra, p.26.

FN35 Supra, p.30, 31.

FN36 Supra, p. 43

FN37 Supra. p.44.

FN38 Supra, p. 45.

FN39 Transcript January 21, 2010 p. 2.

FN40 See *R. v. Généreux* [1992 CarswellNat 668 (S.C.C.)], 1992 CanLII 117. At paragraph 14 of the supplementary factum filed the applicant stated: "Having regard to the jurisprudence, the defense agrees that as a matter of principle and law, where there are allegations of wrongdoing on the part of Court Special Constables at a courthouse in which those specific involved officials provide security for judges, for the purpose of trial fairness, judges who frequently preside at that particular courthouse should not preside where credibility is an issue." This would have been a consideration when seeking a judge to preside if the judge was from the same jurisdiction. The risk to trial fairness is eliminated when a trial judge from a different jurisdiction is available.

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