

Case Name:

R. v. B.

**Between
Her Majesty the Queen, and
M.B.**

[2008] O.J. No. 2336

Ontario Court of Justice
Newmarket, Ontario

H.I. Chisvin J.

Oral judgment: April 21, 2008.

(28 paras.)

*Criminal law -- Constitutional issues -- Canadian Charter of Rights and Freedoms -- Legal rights -- Procedural rights -
- Delay -- Prejudice -- Trial within a reasonable time -- Remedies for denial of rights -- Specific remedies -- Stay of
proceedings -- Application by B. for a stay of proceedings on the basis of a section 11(b) Charter violation allowed --
The total period of delay in the matter amounted to 10 months -- The matter was not complex and there was no legal
necessity for a delay of that length -- Furthermore, B. suffered significant prejudice in the sense that he experienced
diminished memory of the events over the passage of time -- Therefore, a stay of proceedings was appropriate -- Cana-
dian Charter of Rights and Freedoms, 1982, s. 11(b).*

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, R.S.C. 1985, App. II, No. 44, Schedule B, s. 11(b)

Counsel:

J. Fuller, Esq.: Counsel for the Crown.

J. Scarfe, Esq.: Counsel for the Defendant.

RULING

1 H.I. CHISVIN J. (orally):-- There is before the court an application to stay the charges for Mr. B. alleging his 11(b) Charter rights have been violated.

2 Mr. B. was charged on October 15th, 2006 with the offences of over 80 and possession of a controlled substance. For the purposes of this application the overall time to be considered was to be from the offence date until March 18th, 2008. There is no question that on the face of it this time is sufficient to warrant inquiry to determine if there has been a s. 11(b) violation.

3 I note as well that the offence of possession of a controlled substance with which Mr. B. was charged on the 15th of October, 2006 has been dealt with by way of means of diversion very early on in the timeline of this matter. It is not suggested that this offence in any way complicates this application. Indeed that offence had no impact at all on my overall consideration of this application as it has effectively been severed from the proceedings.

4 In analyzing the situation, needless to say, I have used the framework that has been established by the Supreme Court of Canada in *R. v. Morin*, [1992] 1 S.C.R. 771. There are essentially two major time periods to be assessed on this application, the first being from the offence date, October 15th, 2006, until the first trial date of November 6th, 2007. The second period of time is from November 6th, 2007 until the second trial date on March 18th, 2008. I propose to review the first time period, October 15th, 2006 until November 6th, 2007, a time of almost 13 months in some detail.

5 The period of time from November 6th, 2007 until March 18th, 2008, in my view, is a period that should not be considered at all for the purpose of this 11(b) application. That is the period of time that was clearly waived by counsel on behalf of Mr. B. and in my view does not constitute any delay to which Charter remedies may attach here.

6 Turning then to the consideration of October 15th, 2006 to November 6th, 2007 time period. Mr. B. was charged with the offences on October 15th, processed and released from the police station on a promise to appear and an undertaking to the officer in charge. The undertaking had certain conditions attached to it, specifically, 1) to abstain from the consumption of alcohol or intoxicating substances; and 2) to abstain from the consumption of drugs except in accordance with a medical prescription.

7 The promise to appear required that Mr. B. appear in the Newmarket court on November 16th, 2006, one month after the alleged offence occurred. There is no question that this was not a complex matter in the sense of preparation or investigation. Indeed, with respect to this offence the entire investigation was completed by the time Mr. B. left the police station. All that needed to be done was to prepare the disclosure and have the information sworn and confirmed.

8 It has been said numerous times by the courts in Newmarket that a period of one month from the release date at the police station until the accused appears in court for the first time is far too long. There is no legal necessity for delay of this length of time. The only reasons for such delay has to be as a result of a policy decision by the police. It is, in fact, an unnecessarily long administrative period that does nothing more than increase stress that an individual and delays the proceedings in being able to move forward. It hinders individuals who wish to resolve the charges early on. It also places restraints on some individual's liberties as they are released on conditions during this time period. For those who wish to retain counsel and review the disclosure in order to assess the matter and determine their course of action, this period of time results in unnecessary delay and the inability to move forward to a trial if that is what is desired. So while some period of time is appropriate and necessary to get a matter before the court, a four week period of time for the allegations that Mr. B. faced was far too long. While often this time may be considered to be a neutral period of time, given the unreasonable length until the matter appeared in court for the first time, it is my view that approximately half of this time should be classified as institutional delay and not as a neutral period of time.

9 On November 16th, 2006 Mr. B. had retained counsel who appeared in court. The initial package of disclosure was provided. As a result of a review of this material counsel realized other disclosure, including the parading or booking video and the 911 call relating to Mr. B., was missing. These tapes had to be specifically requested from the Crown's office, which counsel for Mr. B. did by means of a fax letter on November 20th, 2006. On November 22nd, 2006 the Crown's office replied to counsel's request for disclosure. Amongst other things counsel was advised that the parading video had to be requested or ordered from the police, which the Crown's office had done. Counsel was to be notified when that material was available.

10 The court date of November 16th, 2006 had been adjourned until November 23rd, 2006. Counsel for Mr. B. advised the court on November 23rd that further disclosure had been ordered and requested that the matter be adjourned to December 13th, 2006. The court was advised that this would allow the opportunity to hold a phone pre-trial with the Crown's office.

11 By the December 13th, 2006 the 911 tape was available to counsel, however the parading video was not. As a result the matter was adjourned to January 18th, 2007. The matter returned to court on January 18th. At this time counsel was made aware that the video he had requested was now ready. The matter was adjourned to allow counsel to obtain the video and to arrange a phone pre-trial. A return date was set for February 22nd, 2007.

12 It is now three months since the offence date. The issue with respect to these video tapes is a longstanding one in this region. This court has, since 1999, in a variety of different judgments by different judges been telling both the po-

lice and the Crown that the manner in which these videos are being disclosed, or more accurately not being disclosed, is totally inappropriate. Yet, until very recently, the Crown and the police have resisted any change to this procedure. By October 2006 the fact that this process had not been changed can only be described as appalling. For whatever reason there had been a complete disregard for the rights of accused individuals to get this disclosure and to get it expeditiously. There had been a complete disregard for the rulings of this court over a seven year period. This was not good faith conduct. Charges against individuals have been stayed regularly by the court for nondisclosure of videos and not disclosing them in a timely manner.

13 By October 2006 the video disclosure should have been available to Mr. B. on his very first appearance in court. He should not have required a specific request and it should not have taken so long.

14 Given the historical background to this issue any delay in obtaining these videos cannot be deemed as neutral. The time to obtain these videos must be placed at the feet of those who are responsible for not providing complete disclosure and not doing so expeditiously.

15 On February 22nd, 2007 counsel commented to the court about his concern with respect to the nature of the video that had been provided. The matter was then adjourned to March 16th, 2007 for the issue to be looked into.

16 On March 16th, 2007 the matter went over one further time. There was a waiver of s. 11(b) by counsel for this one month period of time.

17 The matter returned to court on April 10th, 2007 at which time a trial date of November 6th, 2007, some seven months later, was set, which brought the entire time period from the offence date until the trial date of approximately 13 months.

18 With the waiver of 11(b) by counsel for a period of one month the total time period to be considered with respect to this application is 12 months.

19 I am satisfied, based on the transcripts and the evidence of Ms. Khan, both in the form of her affidavit evidence and her oral evidence on this application that November 6th, 2007 was effectively the first date available for all parties, including the court, to accommodate this matter by way of trial.

20 Having considered the 13 month time period and recognizing the waiver of one month, and accepting that a certain neutral period of time was necessary, and given my comments with respect to the first appearance date and the length of time it took to provide the videos I'm left with the following: The period of April 10th to November 6th, 2007 is seven months of delay. Between October 15th, 2006 and March 16th, 2007, in my view neutral time should be assessed at no more than 60 days. Everything that needed to be done could easily have been done in that time period. That being the situation there was a period of three months that can be attributed entirely to institutional delay or delay as a result of the conduct of the Crown or the police. The total period of delay in this matter in my view is 10 months.

21 Was there prejudice to the accused? Mr. B. provided an affidavit which he was cross-examined on. He raised a number of concerns. There is no question that by simply being charged with a criminal offence there is an inherent prejudice that attaches. There is stress and a cost associated with the charges. Mr. B. was released on certain terms and conditions from the police station. Heavy restrictions on an individual's liberty is a factor to be considered, but frankly in the matter before me the constraints on his liberty were not of huge significance. Further, Mr. B. did nothing to change these terms and conditions which he believed he suffered so greatly from.

22 So I give the fact that he was released on terms and conditions little significance and little weight when considering any prejudice that Mr. B. may have suffered.

23 Mr. B. also expressed stress because of the extra financial burden this matter placed on him. Again this is a matter I cannot give much weight to. It appears that much of the increase in the financial cost was as a result of the matter not being dealt with on November 6th, 2007 and that's beyond the scope of this 11(b) application. So again I give that concern little or no weight.

24 Yet there is a cost. Having to have counsel or counsel's agent present to obtain disclosure that should have been made available at the outset is a prejudice to be considered. It is both economic and realistically emotional as an accused never knows if and when the matter may be able to move forward. It was unnecessary and should not have occurred but for the conduct of the Crown and the police.

25 Mr. B. suffered in his social circles as well. This might be referred to as the stigma of being charged with a criminal offence, but it might be more than that as well. It is difficult to quantify the stigma of being charged with a criminal offence, but it is clear that the significance of being charged with such an offence can be greater in some social contexts than in others. Here is resulted in Mr. B. losing his social network and as a result that constitutes prejudice to him.

26 The most significant prejudice to him, however, goes to Mr. B.'s diminished memory of the events. This is exceedingly important and exceedingly prejudicial. The passage of time only causes harm to one's ability to remember, and thus can only bring the administration of justice into disrepute.

27 Thus, in the circumstances I find that Mr. B. did suffer real prejudice to his detriment due to the passage of time that it took this matter to get moved on to trial.

28 That being said, considering all the factors which I have mentioned, including the public interest in having matters dealt with by trials, it is appropriate in the circumstances here in my view to enter a stay of proceedings as a result of a violation of Mr. B.'s s. 11(b) Charter rights and the information will be marked accordingly. Mr. Scarfe, thank you very much.

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