

Case Name:

R. v. F.

Between
Her Majesty the Queen, and
R. F.

[2010] O.J. No. 1977

2010 ONSC 2704

Court File No. 152/08

Ontario Superior Court of Justice

G. Trotter J.

Heard: January 7, 2010.

Judgment: May 10, 2010.

(15 paras.)

Criminal law -- Criminal Code offences -- Offences against person and reputation -- Motor vehicles -- Impaired driving or driving over the legal limit -- Appeal from a conviction for impaired driving allowed -- The motions' judge's reasons for dismissing the s. 11(b) Charter application were insufficient -- After noting the case was close to the line, he failed to explain why the motion failed and the court was unable to say whether the decision was correct or not -- The appellant had already served the sentence, so the conviction was aside, and a new trial ordered, but any future proceedings on the information were stayed -- Canadian Charter of Rights and Freedoms, s. 11(b).

Criminal law -- Appeals -- Grounds -- Insufficient reasons -- Appeal from a conviction for impaired driving allowed -- The motions' judge's reasons for dismissing the s. 11(b) Charter application were insufficient -- After noting the case was close to the line, he failed to explain why the motion failed and the court was unable to say whether the decision was correct or not -- The appellant had already served the sentence, so the conviction was aside, and a new trial ordered, but any future proceedings on the information were stayed -- Canadian Charter of Rights and Freedoms, s. 11(b).

Criminal law -- Constitutional issues -- Canadian Charter of Rights and Freedoms -- Legal rights -- Procedural rights -- Trial within a reasonable time -- Appeal from a conviction for impaired driving allowed -- The motions' judge's reasons for dismissing the s. 11(b) Charter application were insufficient -- After noting the case was close to the line, he failed to explain why the motion failed and the court was unable to say whether the decision was correct or not -- The appellant had already served the sentence, so the conviction was aside, and a new trial ordered, but any future proceedings on the information were stayed -- Canadian Charter of Rights and Freedoms, s. 11(b).

Appeal from a conviction for impaired driving. He was charged on Dec. 5, 2006. On April 23, 2008, the trial judge dismissed a pre-trial Charter motion seeking a stay of proceedings for unreasonable delay. On Sept. 24, 2008, the appellant

was found guilty of impaired driving and a conditional stay was entered on a charge of driving while over the legal limit. The appellant argued that the trial judge erred in dismissing his s. 11(b) motion.

HELD: Appeal allowed. The motions judge erred in the manner in which he dismissed the motion. The s. 11(b) claim was arguable. The case was close to the line, in view of the Morin guidelines, and the judge dealt with the issue only in a general manner. There was no analysis of the Morin factors, nor did he properly address the manner in which the various time periods should be allotted. He made no mention of the prejudice asserted by the appellant. In close cases, the presence or absence of prejudice was an influential factor in deciding whether s. 11(b) was infringed. The motions judge's reasons made appellate review very difficult. After noting the case was close to the line, he failed to explain why the motion failed. The court was unable to say whether the decision was correct or not. Although typically a new trial would be ordered, the appellant had already served his sentence. The conviction was to be set aside, a new trial was ordered, but any future proceedings on the information were to be stayed as per s. 686(8) and s. 822(1) of the Criminal Code.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, R.S.C. 1985, App. II, No. 44, Schedule B, s. 11(b)
Criminal Code, R.S.C. 1985, c. C-46, s. 686(8), s. 822(1)

Counsel:

Laurie Gonet for the Crown.
Kathryn Wells for Mr. F..

REASONS FOR JUDGMENT

G. TROTTER J.:--

INTRODUCTION

1 On December 5, 2006, Mr. F. was charged with impaired driving and driving while "over 80." On April 23, 2008, the Honourable Mr. Justice D. Hogg dismissed Mr. F.'s pre-trial motion to stay proceedings for unreasonable delay under s. 11(b) of the *Charter*. Later, on September 24, 2008, after a trial before the Honourable Mr. Justice S. Merenda, Mr. F. was found guilty of impaired driving and driving while "over 80." A conviction was entered on the impaired driving charge; a conditional stay was entered on the "over 80" charge.

2 Mr. F. now appeals his conviction, arguing that Hogg J. erred in dismissing his s. 11(b) motion. For the reasons set out below, the appeal is allowed.

FACTS

3 The relevant period of delay in this case was from the date of Mr. F.'s arrest (December 5, 2006) until his first trial date (March 13, 2008), which was 15 months and 7 days later. Mr. F. had intended to bring his s. 11(b) motion on the first trial date but, due to the unavailability of transcripts, the matter could not proceed on that day. The motion was argued before Hogg J. on April 17, 2008, who dismissed the motion on April 23, 2008.

4 The case was tried on its merits before a different judge, Merenda J., commencing on September 16, 2008, and finishing on September 24, 2008. Counsel advised, and as I glean from the record, that at this location of the Ontario Court of Justice, s. 11(b) motions are routinely brought before a judge prior to the date on which the trial is set to commence. The judge who hears these motions is not necessarily the trial judge. This procedure is apparently done for the sake of trial efficiency.

5 Returning to the facts of this case, it did not get off to a good start. On the first appearance, the DVD recording of what occurred with Mr. F. in the breathalyzer room had not yet been copied. The case was adjourned on a couple of occasions until March 27, 2007. It is not clear from the record, but it would appear that the DVD became available sometime between that appearance and the earlier one on March 6, 2007. The motion judge seemed to agree that there

was no good reason why the DVD was not available on the first appearance, which was about five weeks after the charges were laid. As it turned out, the DVD was not available for about three months.

6 On May 22, 2007, a trial date was set for March 13, 2008 (9 months and 22 days later), the earliest date offered by the trial coordinator. As noted above, the s. 11(b) motion could not be argued on that date because not all of the transcripts were available. Defence counsel at trial (not Ms. Wells) was partly responsible for this state of affairs.

7 Before analyzing the manner in which the motion judge addressed this motion, I note that Mr. F. swore an affidavit that was part of the motion record. In it, in a general way, he claimed to have suffered prejudice as a result of the 15 months he was required to wait for his first trial date.¹

ANALYSIS

8 In my view, the motion judge erred in the manner in which he dismissed this motion. This is a case in which the claim under s. 11(b) was arguable. The learned motion judge acknowledged that it was a close call. After giving a general outline of the case, and noting that this was "another application among hundreds that have come into this court for me to stay the proceedings in view of delay," he concluded his assessment of the issue before him in the following way:

As far as I'm concerned, there is not undue delay in this case. The matter has gone as it should. ***It is close to the line but however I cannot find it that it is undue delay.*** [Counsel] asked for a day long trial and he was given the first day long trial that was available in this busy court, as this whole city is encroached with trials galore.

9 The learned motion judge was correct -- this case was "close to the line" in view of the guidelines established in *Regina v. Morin* (1992), 71 C.C.C. (3d) 1 (S.C.C.). Therefore, the reasons for the delay required careful analysis. However, the learned motion judge only dealt with the issue in a general manner. There was no analysis of the factors to be considered in *Regina v. Morin*, *supra*, nor did he properly address the manner in which various periods of time should be allocated: see *Regina v. Schertzer* (2009), 248 C.C.C. (3d) 270 (Ont. C.A.). The motion judge made no reference to the prejudice asserted by Mr. F. in his affidavit (which was not the subject of cross-examination). In close cases, the presence or absence of prejudice is an influential factor in deciding whether s. 11(b) has been infringed.²

10 The Court of Appeal has held that the standard of appellate review on s. 11(b) motions is one of correctness, both with respect to the allocation of specific time periods, and the overall question of whether the delay is unreasonable: see *Regina v. Cranston* (2008), 244 O.A.C. 328 (C.A.), *Regina v. Quereshi* (2004), 190 C.C.C. (3d) 453 (Ont. C.A.) and *Regina v. Schertzer*, *supra*. In this case, the learned motion judge provided reasons that make appellate review very difficult. Having properly identified this case as being close to the line, he failed to explain why the motion failed. The motion judge's reason consisted largely of expressed frustration with the volume of s. 11(b) cases coming before the Court, as well as the manner in which trial counsel had conducted the case. It may be that perfunctory or conclusory reasons are acceptable in cases that are blatantly unmeritorious. However, this was not one of those cases. In the end, I am not sure why the motion was dismissed. In short, I am unable to say whether the decision was correct or not: see *Regina v. R.E.M.* (2008), 235 C.C.C. (3d) 290 (S.C.C.).

11 Before addressing the issue of the appropriate order, I wish to point out that I do share the motion judge's view about the delay involved in the disclosure of the DVD. This type of delay, which is caused by the police, is a common occurrence in the Ontario Court of Justice. In our digital world, in which data is so easily shared, there is no good reason why a copy cannot be produced in a very short period of time. In this case, it should have been available by the first appearance date (which was over a month following the arrest). Meaningless appearances are routinely made in the Ontario Court of Justice while everyone waits for the police to make copies of what transpired in the breathalyzer room. These needless appearances clog the already busy courtrooms in this province. This is unacceptable.

12 While I recognize that it is not always appropriate to wait for every last piece of disclosure to be made before setting a trial date, a recording of what takes place in the breathalyzer room can be of great value, to both the Crown and the defence. When this type of evidence is available for viewing, informed decisions may be made about whether the case will proceed to a trial on the merits, or whether it might be resolved by way of a plea or withdrawal. It is important that this evidence be available at the earliest opportunity.

13 Therefore, while I have decided that the motion judge's reasons were insufficient, he was right to isolate this aspect of the case for consideration. In my view, delay caused for these reasons should be afforded greater weight in the s. 11(b) calculus: see *Regina v. Brown*, [2005] O.J. No. 2395 (C.J.), at para. 52.

14 This leaves the question of the appropriate disposition in this case. Typically, given my reasons for setting aside the conviction, a new trial should be ordered. However, in this case, Mr. F. has already served his sentence. Mr. F. did not seek to stay his driving prohibition while his case was under appeal. With great fairness, Ms. Gonet for the Crown submitted that, should I allow the appeal, Mr. F. should be acquitted. I am not convinced that it is appropriate to enter an acquittal without a proper adjudication on the merits of Mr. F.'s constitutional argument. However, I can achieve the same result by setting aside the conviction, ordering a new trial and exercising my discretion to order that any future proceedings on the information be stayed against Mr. F.: see *Criminal Code*, ss. 686(8) and 822(1).

CONCLUSION

15 Mr. F.'s conviction for impaired driving is set aside and a new trial is ordered. Further proceedings are stayed on both the impaired driving charge, as well as on the "over 80" charge (that was conditionally stayed by the trial judge).

G. TROTTER J.

cp/e/qlrxg/qljxr

¹ I note that at least one sentence of Mr. F.'s affidavit tracks the exact language of an affidavit filed in *Regina v. Panko* (2007), 47 M.V.R. (5th) 33 (Ont. C.J.), which I found to be generic and unhelpful in establishing prejudice beyond that which could be inferred from the delay itself.

² As noted in the previous footnote, the affidavit in which Mr. F. makes his claim of prejudice is not very compelling. Still, this was a matter that the motion judge was required to assess and balance along with all other relevant factors.