

Case Name:
R. v. V.K.

Between
Her Majesty the Queen, and
D. V.K.

[2007] O.J. No. 5480

67 M.V.R. (5th) 54

2007 CarswellOnt 9310

Information No. 06-7253

Ontario Court of Justice
Brampton, Ontario

S.F. Clements J.

Heard: November 16, 2007.
Oral judgment: November 16, 2007.

(37 paras.)

Counsel:

S. DiMartino: Counsel for the Crown.

J. Scarfe: Counsel for D. V.K..

REASONS FOR RULING

1 S.F. CLEMENTS J. (orally):-- This is further to counsels submissions and my comments during submissions. This is my ruling on Mr. V.K.'s application to stay the proceedings against him on the grounds of unreasonable trial delay pursuant to Section 11(b) of the Canadian Charter of Rights and Freedoms.

2 You were arraigned before me today on charges of impaired driving and operation of a motor vehicle having consumed alcohol in excess of the prescribed limits contrary to the Criminal Code of Canada.

3 The following summary outlines the case history before the Ontario Court of Justice. The offence date alleged was May 11th, 2006. The information was sworn on May 29th, 2006. The first trial date was set on December the 8th, 2006 and was scheduled for June 13th, 2007. The trial date was vacated on May the 3rd, 2007 and a new trial date of November the 16th, 2007 was set. The overall delay to today's date is one year six months and five days and warrants an inquiry.

4 Mr. Scarfe was retained and an agent appeared with you on your first court appearance on May 29th, 2006. No disclosure was available and the matter was remanded to June the 13th when the Crown disclosed the synopsis of the alleged offence. This included a Crown folder checklist for criminal matters, a record of arrest, CPIC information, release information, and a witness list consisting of two police officers and two civilian witnesses. The two 9-1-1 tapes relative to the civilian witnesses were not disclosed nor was the breath room video disclosed. The case was remanded to July the 7th for further disclosure. On that date the case was further adjourned to July 24th pending disclosure of the 9-1-1 tapes and the breath room video.

5 On July 24th, one of the 9-1-1 tapes was disclosed. on August the 11th Mr. Scarfe misspoke himself when he advised the Court he'd received all the outstanding disclosure. The case was then remanded to September the 1st, 2006 for Mr. Scarfe to meet with his client to finalize his instructions for setting a trial date.

6 On September the 1st, 2007 the matter was further adjourned due to the client's absence from the jurisdiction. The notes of a police officer were at this time also disclosed to the defence.

7 On September 29th, Mr. Scarfe advised the court that he'd requested further disclosure for which he was still waiting. He advised the court that he would send another request to the Crown. Indeed, the applicant's record indicated that Mr. Scarfe wrote to the Crown on September 18th, in regard to the outstanding 9-1-1 tape, and on September the 20th in regard to the breath room video.

8 On October the 2nd, Mr. Scarfe, again, sent the Crown a disclosure request for the 9-1-1 tape and breath room video. On October the 20th Mr. Scarfe advised the Court he was still waiting for disclosure, although it appears the breath room video had been disclosed in the interim and the remaining outstanding disclosure consisted of the second 9-1-1 tape. The case went over to November the 2nd, 2006. On that date the Crown was still not in a position to disclose the second 9-1-1 tape. Mr. Scarfe was unable to arrange a Crown pre-trial that day but decided he would do so by telephone. In the meantime the case was remanded to November the 17th.

9 On November the 6th, going back two weeks, Mr. Scarfe had written to the Crown yet again, seeking disclosure of the second 9-1-1 tape. It is to be noted that he did not receive the courtesy of a simple acknowledge that any of his letters had been received, let alone, a response from the Crown's office that they were dealing with his disclosure request. If nothing else, professional courtesy required some form of acknowledgement.

10 On November the 17th, counsel advised the Court that he was still waiting for the disclosure of the 9-1-1 tape, the second one, and that his efforts to arrange a telephone pre-trial had been in vain. He was advised he should be able to arrange a telephone pretrial before December the 8th, 2006. Indeed, he conducted such a pre-trial on December the 7th, at which time he raised the issue of the Crown's toxicological report. He was obviously concerned about hiring a defence toxicologist and wanted to see the Crown's report to determine if it was necessary to obtain his own expert. The client's financial circumstances were a consideration in his decision to hold off retaining a defence toxicologist until he received the report. However, he had no undertaking that the Crown report would be forthcoming in the near future. He took a calculated risk that he could set a trial date on December the 8th and put off the retention of a toxicologist for a couple of months, by which time he reasonably expected disclosure of the Crown's expert's report in sufficient time to retain his own expert should that become necessary.

11 On December the 8th, the trial date of June 13th, was set. One earlier date of June the 8th was offered but the defence was not available. A confirmation date hearing was set for April the 25th, 2007. Mr. Scarfe also received disclosure of the second 9-1-1 audiotape on December 8th, 2007, although, he maintains it was a further copy of the first 9-1-1 tape he had received on an earlier occasion.

12 On April the 11th, 2007, Mr. Scarfe received by fax a copy of the Crown's toxicology report. The report itself was dated April the 11th and it had obviously just been prepared. The date of this disclosure complied with the provisions of Section 657.3 of the Criminal Code.

13 I agree with counsel for the defence that the Crown did not reasonably comply with its disclosure obligations. It was known or ought to have been known from the time of arrest and the time of the taking of the applicant's breath sample that a toxicologist would be required by the Crown to establish the test results at the time of driving. It is not uncommon in this jurisdiction for the Crown to use a toxicologist when the breath tests are taken outside the two-hour limitation period. It has become the usual practice to disclose the toxicologist report as part of the initial Crown disclosure obligations. There is sound reason for doing so, not the least of which is that the defence cannot then complain they had no idea they needed their own expert or did not have sufficient time to retain one. There was no explanation pro-

vided in this case why the toxicologist report was not requested and provided for by way of disclosure at a reasonably early stage in these proceedings.

14 On the confirmation date of April the 25th, an agent for Mr. Scarfe advised the Court that Mr. Scarfe had just received the additional disclosure, and required the services of a toxicologist. The Court was advised that he was making efforts to retain one who would be available for the trial date of June the 13th and then he would be in a position to confirm or not confirm the June 13th, trial date on May the 3rd. On that date the trial date was vacated and today's trial date was set.

15 The issue of whether a case is uncomplicated or straightforward is an issue which impacts on the 11(b) analysis. Justice Durno in *R. v. Reid* [2005] O.J. No. 5618, concluded that this determination ought to be made at the outset without regard to the Section 11(b) analysis or application. Re observed that Section 8 or 9 Charter applications in and of themselves do not take a case outside the categorization of being straightforward. The experience in the Region of Peel has been that most disclosure will be in existence and available shortly after arrest in a straightforward or routine prosecution.

16 Impaired driving and over 80 charges are routine and commonplace in this jurisdiction. In particular there is no reason, except limitations on resources, which ought to prevent the timely disclosure of breath room videos and 9-1-1 calls. The technologies to record and copy this kind of evidence is readily available. The disclosure of the breath room video sometime in October is not timely nor is the disclosure of the 9-1-1 tapes on September the 1st and December the 8th timely.

17 Notwithstanding the existence of civilian witnesses, as well as the evidence of a toxicologist, I find that this was a relatively straightforward case in the sense articulated in *Regina v. Sharma* (1993), 79 C.C.C. (3d) 142, which informs my consideration of how to characterize this case.

18 It is interesting to note that Justice Sopinka found in the case of *Morin*, [1992] 1 S.C.R. 771, where there were more complicated facts than in *Sharma* because it involved a number of police civilian witnesses and possible expert witnesses that the guidelines of eight to ten months was appropriate for an uncomplicated matter. Justice Sopinka ruled that in the Region of Peel it should be at the lower end of that range and applied the guidelines adopted in *Sharma*, and in fact, Justice Hill, in *Meisner*, [2003] O.J. No. 1948, which was affirmed by the Ontario Court of Appeal, [2004] O.J. No. 3812, on this point, concluded that such cases should be tried within eight to nine months. As I say, I find this a relatively straightforward case.

19 Having come to that conclusion, I now turn to the 11(b) analysis. The criteria to be applied on 11(b) applications is set out in the Supreme Court of Canada decision in *Sharma*. They are:

- (1) the length of the delay;
- (2) waiver of time periods;
- (3) reasons for the delay including the inherent time requirements to the case, actions of accused, actions of the Crown, limits on institutional resources and other reasons for the delay; and
- (4) prejudice to the accused.

20 Some delay is inevitable so the focus of the analysis under Section 11(b) is the reasonableness of the delay and not the desirable length of the delay. Justice Sopinka cautioned in *Morin* that the analysis does not consist of the application of a mathematical formula. Rather the Court must balance the interest, which the section is designed to protect, against the factors which either inevitably lead to delay or other otherwise caused the delay.

21 The primary purpose of the Section (b) is the protection of the individual rights of the accused. There is, of course, a secondary societal interest in seeing that citizens who are accused of crimes are treated humanely and fairly. As Justice Sopinka noted in *Morin*, trials held properly enjoy the confidence of a public. He also observed that the secondary societal interest, which is to be protected, is by its very nature adverse to the interest of the accused. And accordingly, the more serious the crime the greater the need for the case to be tried on its own merits. The interest of the accused must be balanced against society's interest and law enforcement.

22 The individual rights, which the section seeks to protect, are the right to the security of the person, the right to liberty and the right to a fair trial. The right to the security of the person is as jealously guarded as the liberty of the person's interest according to Justice Hill, in *Regina v. Pusic*. The systematic delay clock runs from the time the parties are ready for trial to the completion of the trial, see *Reid per Durno J.* at paragraph 70. The assessment is ultimately driven

by the facts and the guidelines may yield to other considerations, in some of the cases shorter delays would be intolerable while in others a delay beyond the guidelines may be justified.

23 The entire time period between the laying of the charge and the completion of the trial must be examined. The reasonableness of the overall delay can only be assessed in light of the reasons that explain the delays constituent parts, see *Regina v. Allen* (1996), 110 C.C.C (3d) 331 (Ont. C.A.) page 347. There were no clear unequivocal waiver of any of the time periods by the applicant in this case. Inherent time requirements are neutral in an 11(b) analysis and are not included in the systemic delay or Crown delay. Under the heading of inherent time requirements there are several areas to consider. The first of these is the intake period, which commences when the information is sworn. During this period police and administrative paperwork is completed, bail hearings are conducted, accused persons retain counsel and disclosure is made. A greater intake time may be required if the case is complex. The intake period starts when the information is sworn and it ends when the parties are ready for the trial and the system cannot accommodate them. The intake period is not included in the guidelines as it is not part of systemic or Crown delay. The intake period does not decrease systemic delay nor do they in themselves justify periods in excess of the guidelines.

24 In this case the time required to complete the disclosure obligation of the Crown was not timely and well outside the normal intake period for a case that was not complex. Apart from the very untimely disclosure of the toxicologist report, the disclosure of common place evidence such as breath room videos and 9-1-1 tapes was inexcusable. It was well outside the normal intake period of two to three months for a case of this kind and no explanation has been proffered to explain or justify the inordinate delay.

25 Leaving aside the issue of the toxicologist report, the disclosure of the video and the 9-1-1 tapes ought to have been completed by the end of August. A period in excess of three months for setting a trial date was caused by inadequate and untimely disclosure.

26 Another component of inherent time requirements is the time required to conduct the trial. Mr. Scarfe was alive to the issue when he set the first trial date without the benefit of the Crown's expert's report. In the context of impaired driving cases, I view the Crown's expert report as part of their timely disclosure obligation. It cannot be lost on a prosecution authorities that timely disclosure of this document may have an impact on trial time estimates because the defence may feel obliged to respond with an expert of their own. It is not sufficient in the context of impaired driving cases that the Crown rely upon the notice provisions on the Code knowing that such a vital piece of evidence is part of their ongoing disclosure obligations. It is just as vital that the defence have disclosure of this information in a timely fashion as it is to have disclosure of officers' notes, breath room videos and 9-1-1 tapes. It is not for the defence to determine how the prosecution intends to proceed, but rather it is the obligations of the prosecution to disclose the evidence upon which they intend to rely to establish their case.

27 A further component of inherent time requirements is the complexity of the case, I have already concluded this is a relatively straightforward and uncomplexed case. When considering the actions of the accused in relation to the reasons for delay, all voluntary actions taken by the accused, short of a waiver, which may have caused delay, are examined. For example, change of venue motions, attacks on wire tap packets, adjournments not amounting to waiver or attacks on search warrants.

28 This analysis is not about attributing blame, or indeed about seeking to impute improper motives to the accused. Had Mr. Scarfe refused to set a date on December 8th until he had received the toxicologist report, there may have been a trial provided that was ultimately earlier than today's date. Justice MacDonnell suggested that the defence ought to have retained their own expert notwithstanding there was no Crown report. I have some sympathy for the defence position. This was impractical and inappropriate having regard to the fact that the accused had limited resources and an expert might not be required. This was a judgment call made by the defence. But for the failure of the Crown to disclose their report at a very early stage in the proceeding, it was a judgment call they ought not to have been put in a position to make.

29 Under the headings of the actions of the Crown, the examination involves delay caused by the prosecution not just the actions of the Crown. It can include the actions of the police. As with the accused this examination is not for the purposes of determining blame. Rather the consideration is for actions of the Crown, which resulted in the trial being delayed such as adjournment requests, failure or delays in disclosure and changes of venue applications. The time periods are considered in addition to the period of systemic delay. As I already noted I found the delayed disclosure contributed to the delay in actually setting a trial date well before December the 8th. Moreover, the failure to disclose the toxicology report in a timely fashion set this matter on a course that inevitably pushed it off the rails.

30 Justice Sopinka wrote in *Morin*, an institutional delay is the most common source of delay and the most difficult to reconcile with the dictates of Section 11(b) of the Charter. When the parties are ready for trial and the system cannot accommodate them inadequate resources may cause systemic delay. The defence was ready to proceed on the second date offered for trial, which was five days after the June 8th date. This is a systemic delay period of six and a half months. Taking into account when this matter should have been ready to be set down for trial, I conclude the systemic delay and delay due to untimely disclosure is nine and a half months. To some extent the delay caused by vacating the first trial date was contributed to by both the defence and the Crown and I propose to apportion the delay between June the 13th and November 16th, a period of five months, equally between them with the result that the overall delay due to the conduct of the Crown and the limitations on institutional resources is 12 months.

31 When considering the issue of prejudice in the context of an 11(b) application, it is important to bear in mind that it is the duty of the prosecution to bring an accused person to trial. In other words, the state and the prosecution apparatus is required to minimize the prejudice inherent in delay in the disposition of criminal litigation, see *Regina v. Pusic*. Bearing that in mind, the issue of prejudice must be considered in two aspects when determining its impact on delay. There is, first of all, the prejudice which occurs from the fact of being charged and prejudice caused by delay in bringing a case to trial. Everyone suffers prejudice as a result of being charged, it is inherent in the process. However, absent delay beyond the guidelines, this is not the type of prejudice that is of concern. The focus is on prejudice arising from prolonged delay.

32 In addition, there are two kinds of prejudice that may be caused by delay. First, inherent prejudice suffered by all accused persons awaiting their trial. This is prejudice that is inferred and no evidence is required to enable a judge to consider it. The longer the wait for trial the more serious the inferred prejudice. What was initially prejudice from being charged such as shame and anxiety may become prejudice caused by institutional delay due to delays beyond the guidelines. As well, there is another kind of prejudice that has been described as actual enhanced, real or specific prejudice. It is suffered by an accused as a result of the delay, not as a result of being charged. There must be evidence to establish enhanced prejudice above that which is inferred in the absence of an agreement by the Crown regarding the alleged specific prejudice.

33 The Crown, of course, is entitled to lead evidence about the absence of prejudice. The degree of prejudice is an important factor in determining the length of institutional delay that will be tolerated. As Justice Hill noted in *Pusic* the inference of prejudice from a very long delay becomes nearly irrefutable. An unreasonable delay is adversely synonymous with prejudice to security interests. Those security interests involve the need to minimize anxiety, concern and stigma inherent in the exposure to pending criminal proceedings. Moreover, the security of the person is as important as the liberty interest which is also protected by Section 11(b), and accordingly it provides protection against over long subjection to the vexations and vicissitudes of pending criminal accusation which includes stigmatization of the accused, loss of privacy, stress and anxiety resulting from a multitude of factors including possible disruption of family, social life and work, legal costs, uncertainty as to the outcome and sanction. These forms of prejudice cannot be disregarded nor minimized when assessing the reasonableness of the delay.

34 I find in this case that there is inferred prejudice. The inferred prejudice is occasioned by the prolonged delay beyond the guidelines suggested for a case of this kind. The initial prejudice normally associated with being charged has become prejudice due to prolonged delay. Given the overall systemic delay found to exist, I find that the inferred prejudices are irrefutable to use the words of Justice Hill.

35 In addition, I find you experienced actual or real prejudice due to the prolonged delays. Your uncontradicted affidavit set out in some detail the consequences of your behaviour on your business partners, employees and your health. You, unlike the vast majority of persons charged with a criminal offence, face mandatory minimum sentences upon conviction both in terms of the fine to be imposed in the Highway Traffic Act requirement that your driving licence be suspended for a minimum period. Apart from the stress and anxiety caused by being charged with a criminal offence, there is the added component that if convicted you face mandatory minimum sanctions, moreover, the requirement for obtaining a licence and motor vehicle insurance having completed your court imposed sentence and administrative sanctions are onerous. This cannot fail to add additional stress and anxiety particularly where the trial continues well beyond the time period originally set for the matter to proceed. As a result, not only has your level of stress and anxiety been exasperated but you've incurred additional legal fees not to mention increased uncertainty about the outcome and the sanctions.

36 When I balance the interest the section is designed to protect, and in particular, your security interests and the actual prejudice to you that I find to exist against the limits on institutional resources which obliged to accept the trial and

then in fact a continuation date for a relatively uncomplicated matter well outside the guidelines suggested by Sharma and Meisner, I am compelled to conclude the delay in this matter was unreasonable, and I am directing that proceedings against you be stayed pursuant to Section 24(1) of the Charter of Rights and Freedoms for a violation of your right under Section 11(b). The matter will be stayed.

37 MR. SCARFE: Thank you, very much, Your Honour.

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