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R. v. Juhal

Between
Her Majesty the Queen, respondent, and
Simon Singh Juhal, applicant

[2001] A.J. No. 632

2001 ABQB 403

Action No. 971348502Q1

Alberta Court of Queen's Bench
Judicial District of Edmonton

Bielby J.

Heard: May 3, 2001.
Judgment: May 9, 2001.

(38 paras.)

Counsel:

Maureen Harquail, for the respondent.
Brij Mohan, for the applicant.

REASONS FOR JUDGMENT

BIELBY J.:--

DECISION

1 The application for a stay of proceedings or for an order excluding the entry of 3.4 grams of cocaine, a Certificate of Analyst, and a Notice of Intention as exhibits at trial is dismissed. The

Applicant has failed to show that nine months pre-charge delay so prejudiced his ability to mount a full answer and defence that his Charter rights were breached. He similarly failed to show that a post-charge delay of 3.5 years resulted in a breach of his ss. 7 or 11(b) Charter rights where 2.5 years of that delay resulted from his voluntary absence from Canada, unaware that he had been charged.

FACTS

2 Simon Singh Juhal stands charged that he trafficked in cocaine on December 4, 1996. This application was heard by me as the trial judge, but before the commencement of the trial. The evidence before me consists of viva voce testimony from each of the accused and Staff Sergeant McDonald, who was the investigating officer.

3 Staff Sergeant McDonald testified that on December 4, 1996 he received information from a registered police agent to the effect that the accused could and would provide the agent with cocaine. The agent knew the accused through the accused's roommate. Staff Sergeant McDonald stated that the agent called the accused and made arrangements to have a package of cocaine delivered to his residence. While Detective Saunders and the agent waited inside that residence, Staff Sergeant McDonald maintained surveillance outside. Seven minutes after the telephone order was placed, he saw a light grey Plymouth drive to the rear of the building in which the agent resided. A dark-haired male exited it and entered the building. Three minutes later this same man exited the building, got into his vehicle and drove away southbound.

4 Staff Sergeant McDonald followed. Detective Saunders called him in the car to advise that the accused was on his way to pick up the cocaine at a certain location. Staff Sergeant McDonald followed the grey Plymouth into the parking lot of a pub, saw the dark-haired man enter the pub and then lost sight of him. Shortly after he noted the man's vehicle had left the pub parking lot. The Staff Sergeant drove back toward the agent's residence and located the grey Plymouth. He saw it park and saw the accused enter the agent's building. Detective Saunders called Staff Sergeant McDonald and told him the purchase had been made.

5 The following morning Staff Sergeant McDonald did a registration check on the grey Plymouth and found it registered in the accused's name. He searched utilities records and therein located the accused's address. On December 6, 1996 he visited that address to be advised by the building manager that the accused had moved sometime previously. Later he unsuccessfully attempted to have the agent contact the accused to make a second buy. The Staff Sergeant made various calls to attempt to locate the accused, with no success. He did not record the dates of those efforts.

6 In September 1997, some nine months post-offence, he searched motor vehicles records and found several alternate addresses for the accused. He visited one, and spoke to a woman who identified herself as the accused's sister-in-law. She advised that the accused was in England and was not expected to return until December 1999. Staff Sergeant McDonald then requested the issuance of a warrant for the accused's arrest; on September 29, 1997 the Information was sworn.

Staff Sergeant McDonald did nothing further to locate the accused. He testified that he assumed that immigration officials would locate the outstanding warrant and have the accused arrested should he attempt to re-enter Canada.

7 The Staff Sergeant testified that he did not arrest the accused on December 4, 1996 because he was hoping to arrange other purchases from the same accused, to establish a pattern of behaviour as well as other instances of trafficking. Further, he testified that a delay in charging an accused after the first incidence of trafficking is common practice in drug investigations. The delay affords investigators an opportunity to attempt to locate evidence of further trafficking by the same accused and possibly determine the identity of others who were further up the chain in the drug trafficking operation. He testified that a 9-month delay was not unusual in this type of circumstance.

8 There was no evidence as to when he last attempted to locate the accused before September 1997. He agreed that he did not arrange for surveillance on the original address he obtained for the accused, believing that he had permanently moved from that address. He made no efforts to determine if the accused had indeed returned to Canada after December 1999, which was the date given by his sister-in-law. He did not post any lookout notes or wanted posters, nor did he call immigration and ask it to take steps to detect the accused should he attempt to re-enter Canada at any airport or other entry point.

9 He noted that there are currently about 12,000 outstanding arrest warrants in Edmonton, albeit largely for traffic offences, and 600 police officers available to attempt to execute those warrants along with all other street-level policing duties. He testified that because of the volume of outstanding warrants the Edmonton Police Service cannot consistently follow up on all of them. The usual practice is to await the detection of an accused through his coming into contact with authorities as a result of other activities.

10 He confirmed that 3.4 grams of cocaine was purchased on December 4, 1996 for the sum of $240 with a further $40 given to the accused for his services.

11 He was not asked if he could in fact identify the accused as the person he observed leaving and entering the agent's residence, and entering the pub on December 4, 1996.

12 The accused testified that he first learned that he faced this charge when he went to the police station in May 2000 seeking a security clearance for his job as a security technician. He was arrested and forthwith released on a promise to appear.

13 He stated that he does not now recall what he was doing on the day or around the time of the alleged offence. He agreed that he did own the grey Plymouth with the license number Staff Sergeant McDonald saw and followed on December 4, 1996. However, he stated that he lived with two others around that time, that there were a lot of people coming and going from their residence and that he loaned his vehicle to different people during this period. He did not recall whether he was working or what exactly he was doing in December 1996. He agreed that he was working for at

least part of that year and that ultimately a tax return was filed which would contain employment records which might aid him in identifying any employer he might have had on December 4, 1996. He had made no attempt to determine what employer, if any, he had at that time to aid in possible reconstruction of his activities.

14 He left Canada on July 26, 1997 to travel to England to visit his ailing father, and remained there, but for a three-month visit to India, until September 20, 1999 when he returned to Canada. He was not stopped by any immigration official upon re-entry to Canada. He has worked for the same employer since the day after his return.

15 He testified that he had no contact with his family in Canada while he was in England and that he had no idea there were charges outstanding against him prior to May 2000. Staff Sergeant McDonald agreed that he had not told the sister-in-law that he was a police officer, or that he was investigating the accused in regard to possible cocaine trafficking with a view to respecting the accused's privacy.

16 The accused's first Court appearance was on June 7, 2000 which was adjourned until July 6, 2000 to allow him to apply for Legal Aid. On July 6, 2000 it was adjourned until July 20, 2000 to allow him to retain counsel. On July 20, 2000 he appeared with his current counsel to set the date for the preliminary inquiry on February 9, 2001. It was held as scheduled. He was arraigned March 14, 2001 and the dates of June 7 and 8, 2001 pre-booked for trial.

ISSUES

17 Has the accused been deprived of his right to a trial within a reasonable time and thus been deprived of the protections afforded by ss. 7 and 11(b) of the Canadian Charter of Rights and Freedoms ("the Charter")?

18 If so, what remedy should result?

ANALYSIS

19 The accused argues that he was prejudiced by the long delay because by the time he learned of the charge, he could not recall what he was doing on the evening of December 4, 1996, with the result that he had lost the benefit of any potential alibi. No other type of possible prejudice to his defence is suggested.

Pre-charge Delay

20 The accused conceded that pre-charge delay is not in and of itself sufficient to constitute a violation of his rights under ss. 7 and 11(b) of the Charter. The accused must establish that the delay has so prejudiced his ability to mount a full answer and defence that his rights have been breached to establish such a violation; see R. v. Stymiest (1993) 79 C.C.C. (3d) 408 (B.C.C.A.). However,

even if that test is not met, the length of the pre-charge delay may be considered in addressing the effect of post-charge delay. In R. v. Morin [1992] 1 S.C.R. 771 at para. 35 Sopinka, J. stated: "Pre-charge delay may in certain circumstances have an influence on the overall determination as to whether post-charge delay is unreasonable but of itself it is not counted in determining the length of the delay."

21 Has the accused shown that the nine-month pre-charge delay so prejudiced his ability to mount a full answer and defence that his rights have been breached? There is no suggestion that the police delayed in laying the charge in an attempt to prevent the accused from establishing an alibi. However, the accused criticizes the actions of the police in not laying the charge earlier. He left for England on July 26, 1997 so the police would have had to lay the charge and inform him of it within seven months of the alleged offence for him to have a timely opportunity to investigate the existence of an alibi.

22 Staff Sergeant McDonald explained the delay as typical in a drug investigation due to the overarching desire to gather more evidence, both of further actions by the accused and possible implications of other higher level drug dealers. Whether those reasons justify this delay must depend on whether the police reasonably expected to garner such further evidence in this case. The accused, who bears the burden of proof, led evidence via cross-examination which showed that Staff Sergeant McDonald knew within two days of the alleged offence that the address shown for the accused in utilities records was outdated but that he did not begin to check motor vehicles branch addresses for him until nine months later. Upon so doing, he forthwith located the sister-in-law's address and determined from her that the accused was out of the country.

23 No reason was given for this delay other than that during that time period Staff Sergeant McDonald was making other calls. The defence attempted to argue that his failure to keep records of the dates upon which he made those calls, and to whom, should lead to an adverse inference that no such calls were made. However, I am not prepared to make such an adverse credibility finding against a police officer only on the basis that he failed to make records of unsuccessful telephone searches. The accused is left with the evidence that the police were trying to locate him during the seven months he remained in Canada post-offence, and did in fact eventually locate a contact for him, but that he had left the country by that time.

24 In any case, if the accused had established that the police had made little attempt to locate him for nine months after the offence date (short of establishing that this was done with the intention of causing him prejudice rather than as a result of the application of limited resources to investigating a relatively minor crime in circumstances where delay in laying an immediate charge were justified) that alone would not prove the necessary degree of prejudice. While Sopinka, J. in R. v. Morin (supra) lists limits on institutional resources on one of the factors to be considered in analysing the pre-charge delay, any limitation on police resources as a contributing cause to that delay does not lead to an inference that a serious prejudice has been suffered by the accused. If the police had called upon his sister-in-law before September 1997 and thereby located him, determined that no

further evidence of other sales would be forthcoming and charged him with this offence before his departure from Canada, an inherent delay of several months would not be unexpected in any event.

25 The accused has not made any investigation to determine whether he has actually lost his ability to establish an alibi for the offence date, i.e. he has not determined that through examination of his income tax records he cannot find out whether he was employed and where at the time of the offence or to contact any employer so revealed to determine if records remain which evidence his activities on December 4, 1996. He has not attempted to locate or make inquiries of his roommates or the other people he testified came and went from his residence around the time of the offence to attempt to determine whether an alibi is available. His argument regarding the loss of a potential alibi must be assessed in this light; see R. v. Lasik [1999] N.J. No. 203, para. 31 (Nfld. S.C.T.D.).

26 Further, the only type of prejudice which the accused alleges he may have suffered is in regard to the ability to establish an alibi. This is not a case where the passage of time has resulted in the destruction of possible physical evidence, or the loss of transcripts or the failure of third party witness memory such as was established in R. v. L.J.S. [1996] A.J. No. 73 (Alta. Q.B.). Also, defence has not argued that whether or not the offence occurred at all is likely to be an issue in this case. In L.J.S. the complainant alleged sexual assault occurred over ten years earlier, which the accused denied. The case at bar is distinguishable because the accused does not argue the offence did not occur; the issue is whether he was the one who committed it. The issues are thus narrower than in L.J.S.

27 I therefore do not conclude that the accused has met the onus of proof upon him to show to the required standard of proof that his case falls within those exceptional cases where pre-charge delay should afford Charter relief.

Post-charge Delay

28 No suggestion is made that the accused waived any of the delays which have occurred in the prosecution of this case. Conversely, no argument is made that post-charge delay since the accused learned of the charges, in and of itself, would support this application. A total of 13 months will have passed between the date he learned of the charges, and the scheduled date for the trial.

29 The law relating to post-charge delay was comprehensively reviewed by Burrows, J. of this Court in R. v. Siemens [2000] A.J. No. 303 in deciding to stay 12 charges brought to trial eight years post-charge. At para. 6 he observed that the interests protected by s. 11(b) of the Charter are:

> - the accused's right to minimization of the anxiety, concern and stigma arising out of exposure to criminal proceedings.
>
> - the accused's right to minimization of exposure to restrictions on liberty which result from pre-trial incarceration and restrictive bail conditions.

> - the accused's and society's right to have proceedings take place while evidence is available and fresh.
>
> Against these interests, the court must balance society's interest in ensuring that those who transgress the law are brought to trial and dealt with according to law. This latter interest increases with the seriousness of the offence.

30 In this case the first two interests did not come into play until the accused learned of the existence of the charges, one year ago.

31 The stress and psychological prejudice of knowing he faces charges before the Courts would only have existed since the date he learned of the charge. None of his family or friends knew of the investigation and charge prior to that time, so that any stigma arising out of exposure to criminal proceedings would have been in place only for the last year or even less, depending upon when and if the accused told friends and family.

32 Similarly, he has not been required to meet conditions imposed by way of judicial interim release or been limited in his ability to travel abroad other than for the past year. In that way this accused has found himself in an even better position than the accused in R. v. Stewart [2000] B.C.J. No. 1333 who experienced four years of post-charge delay relating to events alleged to have occurred about thirty years prior to trial. Braidwood, J.A. noted, in confirming that the charges should not be stayed for delay that Stewart had experienced only "minimal" prejudice because he had not been subjected to bail conditions and had been able to travel on business throughout the province without limitation.

33 Burrows, J.'s third interest, the right to have the proceedings take place while evidence is available and fresh, is the one which comes to bear in this case. The accused's argument regarding the loss of an opportunity to attempt to determine an alibi is brought within its confines.

34 However, the accused has not shown that any such loss occurred after his return to Canada on September 20, 1999, over 2.5 years post-offence. His evidence was that he maintained no diaries or notes to show what he was doing on December 4, 1996. Therefore, as of September 20, 1999, he would not have had any materials he does not have now which would allow him to investigate the existence of an alibi. Similarly, there is relatively little difference that the effect of 2.5 years over 3.5 years would have on him or that of his roommates and friends in recalling his activities on December 4, 1996 by unaided memory.

35 The reason he did not learn of the charge earlier was because he was out of Canada for over two years, which was not the fault of any action taken by the police. The conduct of an accused, even innocent conduct which contributes to delay, has a bearing on determining the effect of that

delay; see R. v. Morin (supra).

36 Even had the police posted lookouts or taken active steps to have immigration officers detect his re-entry into Canada so that he could have been arrested at that time, he has not shown that his ability to secure alibi evidence was better then, 2.0 years post-charge, than it is now, 3.5 years post-charge. The accused has not shown that there were steps the police could have taken post-charge which would have informed him of the charge within such a time period as would allow him an opportunity now lost to research his whereabouts on the evening of December 4, 1996.

37 Further, he has not shown that any Crown evidence that was available earlier has since disappeared. For example, no witnesses have died or disappeared, as was the case in R. v. Siemens (supra).

38 In light of these conclusions the effect of the post-charge delay is not sufficient, even when considered in conjunction with the pre-charge delay, to yield a Charter breach.

BIELBY J.

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