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R. v. Djevdet

Between
Her Majesty the Queen, respondent, and
Djevdet Djevdet, applicant

[1998] O.J. No. 3983

76 O.T.C. 193

40 W.C.B. (2d) 7

Court File No. 2063/98

Ontario Court of Justice (General Division)
Brampton, Ontario

Hill J.

Heard: September 29, 1998.
Judgment: September 30, 1998.

(10 pp.)

Criminal law -- Procedure -- Procedural formalities, compliance with -- Trial, motions -- Requirement that motions be timely -- Civil rights -- Canadian Charter of Rights and Freedoms -- Practice -- Time for raising Charter issues.

Motion by the accused, Djevdet, to extend the time for filing an application. Djevdet was charged with criminal negligence causing death. The trial was set for September 28. On September 24, Djevdet served the Attorney General with a notice of application alleging a breach of the Canadian Charter of Rights and Freedoms and requesting a stay of the proceedings. Djevdet filed the application record with the court and served it on the Crown on September 25, which was less than the requisite 15 days before the hearing. As a result, the Crown was unprepared to respond and could not file its responding materials within the requisite time.

HELD: Motion allowed. The time for filing the application was extended. The argument of the

application was adjourned to October 9 to give the Crown the opportunity to respond. The Crown was prejudiced by the lack of preparation time due to Djevdet's non-compliance with the time limits. However, there were no extraordinary circumstances justifying a refusal to hear the application at all.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, ss. 7, 11(b), 24(1).

Ontario Rules of Criminal Procedure, Rules 1.04, 2.02, 3.02(1), 27.01, 27.05(3), 27.05(4).

Counsel:

A. Cornelius, for the Crown.
R. Allman, for the applicant.

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1 **HILL J.**:-- The applicant, Mr. Djevdet, is indicted with his co-accused, James Ciccolini, on charges of criminal negligence causing death and failure to remain at the scene of an accident.

2 A little over five months ago, trial was set for the jury sittings commencing September 28th, 1998.

3 On September 4th, 1998, the applicant served the Attorney General of Ontario with a Notice of Application in Form 1 asserting a breach of s. 11(b) of the Charter and requesting a stay of proceedings pursuant to s. 24(1) of the Charter.

4 The justice presiding at the pre-trial in this court on June 25th, 1998 was not informed that a s. 11(b)/s. 24(1) Charter application would be made in advance of trial.

5 On Friday, September 25th, 1998, counsel for the applicant served the Crown, and filed with the court, an Application Record including the applicant's affidavit, an applicant's factum and eleven volumes of transcripts of proceedings in support of the Rule 27.01(c) application. The Rule 27.01(c) materials were to be filed at least fifteen days prior to the date of hearing (Rule 27.05(4)). No notice of application to abridge the time for filing, with supporting material, was filed with the court.

6 Crown counsel is unprepared to respond to the application and, because of the late receipt of the applicant's materials, has been unable to comply with any of the filing requirements of a respondent as described in Rule 27.05(3)(5).

7 Rules of court do not exist simply for the sake of having rules.

8 The Rules Respecting Criminal Proceedings in the Ontario Court of Justice (General Division) serve a critical function in enhancing the quality of the administration of justice in criminal cases. The requirements of the rules serve to focus proceedings and to secure a minimally adequate record upon which to adjudicate.

9 Integral to the effective operation of the regulatory regime are time limits for serving and filing relevant materials. The court has a discretion to dispense with compliance with the rules only where, and as necessary, in the interests of justice (Rule 2.02). The rules are intended to provide for the just determination of every criminal proceeding and are to be liberally construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay (Rule 1.04(1)). It is in the spirit of these organizing principles that a court may exercise its discretion to abridge any time limit prescribed by the rules (Rule 3.02(1)).

10 Where an applicant's materials are filed on the eve of trial or of a hearing date, other than in compliance with established time limits, the responding party is generally disadvantaged. The Crown is inevitably unfairly pressed for time to investigate the applicant's affidavit evidence, to prepare its own responding affidavits, to decide whether to cross-examine on affidavit evidence before an examiner, if so advised to conduct the cross-examination, and, to prepare and serve and file a respondent's record and factum.

11 The extent of prejudice to the Crown is likely to be directly proportional to the degree of non-compliance with the temporal requirements of the rules. The less the preparation time afforded a respondent, the greater the danger that something akin to an ex parte proceeding will be conducted. This result diminishes the repute of the administration of justice. The adversary system requires the participation of two informed parties. As well, it miscasts the role of the court, and impairs the appearance of fairly administered justice, to require the presiding judicial officer to in effect, factually and legally "top up" one litigant's case.

12 Cory J. observed in R.(D.S.) v. The Queen (1997), 118 C.C.C. (3d) 353 (S.C.C.) at 385:

> Even in the absence of explicit constitutional protection, it is an important principle of our legal system that a trial must be fair to all parties -- to the Crown as well as to the accused.

13 In Regina v. Loveman (1992), 71 C.C.C. (3d) 123 (Ont. C.A.) at 126-7 Doherty J.A. observed, in regard to untimely notice of a Charter argument:

> In deciding how to proceed when faced with the Crown's objection, the trial judge had to balance various interests. He had to bear in mind an accused's right to raise constitutional objections to the admissibility of evidence and the Crown's right to have an adequate opportunity to meet Charter arguments made on behalf

> of an accused. In addition, the trial judge had to be concerned with the effective use of court resources and the expeditious determination of criminal matters.

14 I agree with the statement of McIsaac J. in Regina v. Emsley, [1993] O.J. No. 2765 (Gen. Div.) (affirmed on other bases [1996], O.J. No. 939 (C.A.)) at para. 5 and 6:

> The considerations that the new Rules are intended to serve are the effective use of court resources, the expeditious determination of criminal matters and the avoidance of prejudice to the opposing party in the sense of providing an adequate opportunity to defend an allegation of Charter violation. Put in cruder terms, the Rules are there to prevent "litigation by ambush".
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> Any legal submissions would be spontaneous and ill-prepared. In a nutshell, the quality of justice would be greatly diminished because the Crown was forced to respond from a completely inadequate position. This is specifically the type of situation that the rules were intended to avoid.

15 In Regina v. Loewen (1998), 122 C.C.C. (3d) 198 (Man. C.A.), Helper J.A. stated at 206, 207:

> Ideally, an Askov application should be made to the trial judge well in advance of the scheduled trial. The early hearing of the application will allow reserve time for the decision, if required, and will also allow valuable trial time to be used efficiently in the event of a decision in the accused's favour. That is precisely why the Queen's Bench Rules require notice of pending Charter applications at the first possible opportunity and preferably at the pre-trial conference, prior to trial dates being set. However, the Rules are not rigid and must remain capable of dealing with issues as they arise.
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> Osborne J.A., in R. v. M.(G.C.) (1991), 65 C.C.C. (3d) 232 (Ont. C.A.), and Griffiths J.A., in R. v. Franklin (1991), 3 O.R. (3d) 597, 66 C.C.C. (3d) 114 (C.A.), express the view that an accused who intends to raise a Charter challenge at trial should give the Crown reasonable notice of such a proceeding, together with affidavit and other material in support of the application. The Rules of the Court of Queen's Bench are consistent with that view.
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> Reasonable notice of Askov applications is recommended by the jurisprudence and required by the Rules. Notice operates in the best interests of all concerned for the management of trial schedules and the hearing of appeals.

In the same case, and to like effect, Kroft J.A. stated at 210:

> The Manitoba Queen's Bench Rules, s.7 of the Constitutional Questions Act, S.J. 1986-87, C.31 (C.C.S.M. c. C.180), and the authorities which have been mentioned make it abundantly clear that as a matter of policy, notice of applications of the kind here contemplated ought to be given in writing well before the hearing of the application so that the decision can be made before the commencement of the trial.
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> When exceptions to the timely notice policy are made, the trial judge will have to respond by making pragmatic adjustments to the preferred and proper procedure. They may be in the form of an adjournment or a reorganization of a previously planned trial schedule. Such changes may be inconvenient to counsel and to witnesses, may be costly and may result in even further delay.

16 In the Central West Region, once a trial date is scheduled, s. 11(b)/s. 24(1) Charter applications are frequently held in criminal motions court before a member of the trial court as opposed to the trial judge. This approach appears to have received the imprimatur of appellate authority: Mills v. The Queen (1986), 26 C.C.C. (3d) 481 (S.C.C.) at 494-5 per McIntyre J. and at 517-9 per Lamer J. (as he then was) in dissent; Regina v. Allen (1997), 110 C.C.C. (3d) 331 (Ont. C.A.) at 343-4 per Doherty J.A. (affirmed (1998), 104 O.A.C. 237 (S.C.C.) at 237 per Sopinka J.).

17 With early determination of the delay-to-trial application, the greater is the certainty for witnesses and trial lists.

18 In some instances, particularly those cases where an applicant pleads actual prejudice to fair trial interests, a motions court judge may well exercise his or her discretion to have the s. 11(b)/s. 24(1) Charter application dealt with by the assigned trial judge who can best acquire the measure of the alleged prejudice in the context of the unfolding of the trial itself (see for example the comments relating to s. 7 of the Charter and prejudice alleged to have occurred as a result of pre-charge delay: Regina v. Morgan, [1997] O.J. No. 2224 (C.A.) at para. 1 per Finlayson J.A.; Regina v. Francois (L.) (1994), 65 O.A.C. 306 (C.A.) at 307-8 per Finlayson J.A.).

19 In this case, the applicant was rightly concerned to file transcripts of earlier proceedings which could prove material to a determination of the constitutional issue: Rule 27.05(1)(b); Regina v. Allen, supra, at 344; Regina v. Hill (1996), 36 C.R.R. (2d) 119 (Ont. C.A.) at 121 per curiam; Regina v. Franklin (1991), 66 C.C.C. (3d) 114 (Ont. C.A.) at 121-2 per Griffiths J.A.

20 Two of the relevant transcripts were not ordered by the applicant until mid-August of 1998 with receipt on September 17, 1998. A further transcript was ordered September 17 and received September 18. A transcript of the February 7th, 1997 proceedings only ordered September 17th,

1998, was available September 18th and received September 21st. The untimely ordering of these transcripts resulted in an inability to the file the applicant's record and factum in compliance with the fifteen-day rule.

21 A further transcript of proceedings relating to the January 21st, 1998 court appearance, was ordered on March 9th, 1998 with follow-up reminders on August 17th and September 17th, 1998. This transcript was finally received September 21st.

22 Delay in ordering relevant transcripts, and the consequent delay in their availability, generally marks a lack of diligence and counts against an exercise of discretion to abridge time limits. In extraordinary cases, having regard to the totality of circumstances and a balancing of the factors canvassed in Loveman, the court may refuse to entertain the application at all. The impact of a further delay upon the trial of a co-accused, in order to complete perfection of a s.11(b)/s.24(1) Charter application and to allow an informed response by the Crown, must be considered. While a joint trial of persons alleged to have acted in concert is generally in the public interest (Regina v. Olah and Ruston (1997), 115 C.C.C. (3d) 389 (Ont. C.A.) at 402 per Osborne J.A.), in the absence of waiver or positive signs of acquiescence by the co-accused, the co-accused is not obliged to apply for a separate trial to protect his or her s.11(b) Charter right (Regina v. Cohen, [1995] A.Q. no. 146 (C.A.)).

23 In some instances of non-compliance with procedural guidelines, where an adjournment of a trial date is ordered to accommodate informed argument of a s. 11(b)/s. 24(1) argument, upon a fully perfected application, there may be costs implications to the applicant(s) arising from the prejudice to Crown witness interests.

24 In the unusual circumstances where a transcript has been ordered in a timely fashion, and further inquiries and reminder of the court reporter have failed to produce the transcript within a reasonable time, the applicant has a range of options including:

(1) produce an affidavit of trial counsel summarizing the events and positions of the parties,
(2) attempt to settle an agreed statement of facts with the Crown respecting the material aspects of the day's proceedings,
(3) apply to the court for directions or an order compelling production of the transcript.

25 The applicant's motion to abridge the time for filing is allowed. However, the argument of the application is adjourned to October 9th, 1998 to permit the Crown the opportunity to respond. The unfortunate consequence of these events is the loss of the September 28, 1998 sittings scheduled for trial.

HILL J.

qp/d/mii