

2009 CarswellOnt 9728  
Ontario Court of Justice

R. v. Rambharose

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## **Her Majesty the Queen v. Michael Rambharose**

T. Lipson J.

Heard: April 2, 2009

Judgment: April 2, 2009

Docket: None given.

Counsel: Mr. R. Fried, for Crown  
Mr. D. Midanik, for Accused

Subject: Criminal; Constitutional

### **Related Abridgment Classifications**

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

### **Headnote**

#### **Criminal law --- Charter of Rights and Freedoms — Right to be tried within reasonable time [s. 11(b)] — Pre-trial delay**

Accused was charged in December 2007 with driving with excessive alcohol — Trial date was set for June 2009 — Accused applied for stay of proceedings on basis that his right to be tried within reasonable time under s. 11(b) of Canadian Charter of Rights and Freedoms had been breached — Application granted — Decision as to whether s. 11(b) has been breached is made by judicial determination balancing interest which section is designed to protect against factors which either inevitably lead to delay, or otherwise cause delay — Length of delay was approximately 18 months — Accused had not waived any of his s. 11(b) rights — Reasonable intake period for disclosure to be made was between two to three months — Crown conceded that remaining two months it took for DVD of accused's attendance in breath room to be disclosed was delay attributable to prosecution — Accused did not contribute to delay — Total institutional delay was over 13 months, which was well beyond eight to 10-month guidelines suggested by Supreme Court of Canada — Operative delay of 15 months in this case was not reasonable — Accused's s. 11(b) Charter right to be tried within reasonable time had been breached — Stay of proceedings was only appropriate remedy.

#### **Criminal law --- Charter of Rights and Freedoms — Charter remedies [s. 24] — Stay of proceedings**

Accused was charged in December 2007 with driving with excessive alcohol — Trial date was set for June 2009 — Accused applied for stay of proceedings pursuant to s. 24(1) of Canadian Charter of Rights and Freedoms on basis that his s. 11(b) right to be tried within reasonable time had been breached — Application granted — Total institutional delay was over 13 months, which was well beyond eight to 10-month guidelines suggested by Supreme Court of Canada — Institutional delay was compounded by inexplicable delay it took for Crown to provide essential disclosure in form of DVD of accused's attendance in breath room — While there is strong societal interest in ensuring that accused person is tried on merits, public interest is no greater or lesser than accused's right to be tried within reasonable time — Operative delay of 15 months in this case was not reasonable — There was no evidence that accused's fair trial or liberty interests had been compromised by delay, or had it affected his ability to obtain employment — However, accused had demonstrated some prejudice — Longer accused person must wait for trial, greater likelihood that prejudice will be inferred and shape

use of administrative guidelines — Accused's s. 11(b) Charter right to be tried within reasonable time had been breached  
— Stay of proceedings was only appropriate remedy.

## Table of Authorities

### Cases considered by *T. Lipson J.*:

*R. v. Morin* (1992), 12 C.R. (4th) 1, 71 C.C.C. (3d) 1, 134 N.R. 321, 8 C.R.R. (2d) 193, 53 O.A.C. 241, [1992] 1 S.C.R. 771, 1992 CarswellOnt 984, 1992 CarswellOnt 75 (S.C.C.) — followed

### Statutes considered:

*Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

s. 11(b) — considered

s. 24(1) — pursuant to

*Criminal Code*, R.S.C. 1985, c. C-46

Generally — referred to

APPLICATION by accused for stay of proceedings pursuant to s. 24(1) of *Canadian Charter of Rights and Freedoms* on basis that his s. 11(b) *Charter* right to be tried within reasonable time had been breached.

### *T. Lipson J.*:

1 Mr. Michael Rambharose, the applicant, has brought an application for an order to stay the proceedings pursuant to s. 24(1) of the *Canadian Charter of Rights and Freedoms* on the basis that his s. 11(b) *Charter* right to be tried within a reasonable time has been breached.

2 Mr. Rambharose is charged with impaired operation and over 80 milligrams, contrary to the *Criminal Code*. The information was sworn to on December 10<sup>th</sup>, 2007. The trial date for Mr. Rambharose is set for June 18<sup>th</sup>, 2009 and June 19<sup>th</sup> as well.

3 By way of preliminary observations I would state the following:

4 Section 11(b) of the *Charter* provides that any person charged with an offence has the right to be charged within a reasonable time.

In *R. v. Morin* (1992) Supreme Court judgments number 25, the majority of the Supreme Court of Canada held that the primary purpose of the provision is the protection of the rights of the accused to security of the person, liberty and a fair trial.

5 Speaking for the majority Justice Sopinka at paragraph 28 stated:

The right to security of the person is protected in s. 11(b) by seeking to minimize the anxiety, concern and stigma of exposure to criminal proceedings. The right to liberty is protected by seeking to minimize exposure to the restrictions on liberty which result from pre-trial incarceration and restrictive bail conditions. The right to a fair trial is protected by attempting to ensure that proceedings take place while evidence is available and fresh.

6 Justice Sopinka recognized the secondary societal interest that is protected by s. 11(b), namely:

that those accused of crimes be brought to trial and dealt with according to law.

7 The decision as to whether s. 11(b) has been infringed is not to be made by the application of a mathematical, or administrative formula, but rather by a judicial determination balancing the interest which the section is designed to protect against the factors which either inevitably lead to delay, or are otherwise the cause of delay. Some delay is inevitable, the question is, when is it unreasonable? That question ought to be answered in light of the following criteria:

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

8 In this case the length of delay is approximately 18 months. This includes of course the period between the time the information was sworn to December 10<sup>th</sup>, 2007 and the anticipated trial date of June 18<sup>th</sup> and 19<sup>th</sup>, 2009.

9 The Crown concedes that the applicant has not waived any of his s. 11(b) rights.

10 Turning to the reasons for the delay I am required to look at the inherent time requirements of the case. This is an impaired operation case involving, I am told, two to three civilian witnesses and some police evidence. None of the parties argue that this is a particularly complex matter. I am of the view, which I believe is shared by all of the parties, that a reasonable intake period for disclosure to be made in a case such as this is between two to three months. The DVD of the applicants attendance in the booking area and Breath Room following his arrest is essential disclosure. The Crown does not argue otherwise. I believe that the Crown's position in its factum, that the three month period between December 10<sup>th</sup>, 2007 to March 13<sup>th</sup>, 2008 is reasonable in that, that period should be considered neutral intake period. I am also of the view that the Crown has reasonably conceded that the remaining two month period it took for the DVD to be disclosed is not neutral intake time, but delay that should be attributable to the prosecution.

11 Looking at the actions of the accused, the Crown concedes in its *factum* argument that the applicant did not contribute to the delay in this case. The Crown, as I mentioned a moment ago, reasonably concedes that two months is properly attributed to delay as a result of the very tardy disclosure of the DVD in this case.

12 When one looks at the limits on institutional resources, one month less three days for the delay in obtaining an in-court judicial pretrial is considered institutional delay as well as the time, the delay between the set date for trial and the anticipated trial date of 12 months and one week. We have in this case a total institutional delay of a period slightly exceeding 13 months. This is well beyond the eight to ten month guidelines suggested by the Supreme Court of Canada in *R. v. Morin* [1992 CarswellOnt 75 (S.C.C.)]. When one adds the two month delay in the Crown providing disclosure of the DVD as well as the one month delay it took to get a judicial pre-trial, the operative delay in this case becomes 15 months.

13 I have to also consider the issue of prejudice to the accused. Having read the applicant's affidavit and observed him in the witness stand and considered the cross-examination conducted by the Crown, I think it is fair to say that almost all the prejudice alleged by the applicant arises from the fact of being charged as opposed to the delay in this case. There is no evidence that

his fair trial or liberty interests have been compromised in any respect by the delay, nor has the delay effected his ability to obtain employment.

14 I am however satisfied the applicant has demonstrated some prejudice. The longer an accused must wait for trial the greater likelihood of prejudice will be inferred and shape the use of the administrative guidelines. As I say, most of the applicant's anxiety is due to being charged with this offences, but I do accept that some of the anxiety and concerns are associated with facing criminal charges over a protracted period of time, which this has been.

15 The institutional delay in this case is well beyond the *Morin* guidelines and this institutional delay is compounded by the inexplicable delay it took for the Crown to provide essential disclosure in the form of the DVD of the applicant's attendance in the Breath Room. When such a delay occurs the whole process is delayed. Counsel is unable to fairly review important disclosure. The absence of the DVD prevents the Crown and defence from making a proper estimate of the trial time and some of the most important issues that may arise in drinking and driving cases result from an examination and consideration of the DVD of an accused's presence in the Breath Room and the manner in which he was tested and the state of his sobriety in the police station.

16 In balancing the *Morin* factors, I am of course mindful that there is a strong societal interest in ensuring that an accused person is tried on the merits. This is a drinking and driving case where it is alleged that an accident occurred and the applicant had high Intoxilyzer readings. In my view, the serious nature of this case should have been an impetus for the Crown to make timely disclosure. It is not a reason for excusing the delay that occurred in this case. It is also true, I believe, to observe that the public interest is no greater nor lesser than an applicant's right to be tried within a reasonable time.

17 In my respectful view, the operative delay of 15 months in this case is not reasonable. The applicant's 11(b) *Charter* right to be tried within a reasonable time has been breached a stay of proceedings is the only appropriate remedy. The charges are stayed.

*Application granted.*