2014 ONCJ 318
Ontario Court of Justice

R. v. Sathymoorthy

2014 CarswellOnt 9228, 2014 ONCJ 318, [2014] O.J. No. 3233, 114 W.C.B. (2d) 488

Her Majesty the Queen and Ratnam Sathymoorthy

L. Feldman J.

Heard: February 13, 2014
Judgment: July 2, 2014
Docket: None given.

Counsel: M. Mandel, for Crown
D. Midanik, for Accused

Subject: Constitutional; Criminal

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 — Life, liberty and security of person [s. 7] — Miscellaneous

Accused was convicted of impaired driving — Accused had urinated in police car and officers forced him to remain 10 hours in soiled clothing while laughing at him — Court found that accused's right to life, liberty and security of person under s. 7 of Canadian Charter of Rights and Freedoms had been infringed — Accused brought application for stay under s. 24(1) of Charter due to humiliating conditions police forced him to endure — Application granted — Court could not tolerate wilful indifference on part of persons in authority to state of accused's condition — Accused endured humiliation, discomfort and jeopardy to his composure during breathalyzer procedure and thereafter — His condition was avoidable and abuse of his personal dignity, aggravated by slight mocking to which he was subject, all of which egregious Charter violation and in process has diminished administration of justice.

Table of Authorities

Cases considered by *L. Feldman J.*:

R. v. Mok (2014), 2014 CarswellOnt 27, 2014 ONSC 64, 59 M.V.R. (6th) 234 (Ont. S.C.J.) — considered

R. v. Murphy (2001), 2001 CarswellSask 613, 29 M.V.R. (4th) 50 (Sask. Prov. Ct.) — considered

R. v. Nasogaluak (2010), [2010] 1 S.C.R. 206, 72 C.R. (6th) 1, [2010] 4 W.W.R. 1, 251 C.C.C. (3d) 293, 474 A.R. 88, 479 W.A.C. 88, 206 C.R.R. 100, 315 D.L.R. (4th) 193, 470 W.A.C. 395 (note), 469 A.R. 395 (note), 19 Alta. L.R. (5th) 1, 2010 SCC 6, 2010 CarswellAlta 268, 2010 CarswellAlta 269, 398 N.R. 107, 90 M.V.R. (5th) 1 (S.C.C.) — considered

R. v. Piccirilli (2014), 2014 SCC 16, 2014 CarswellQue 575, 2014 CarswellQue 576, 367 D.L.R. (4th) 575, *(*sub nom. *R. v. Babos)* 8 C.R. (7th) 1, *(*sub nom. *R. v. Babos)* 454 N.R. 86, 2014 CSC 16, 308 C.C.C. (3d) 445 (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

Generally — referred to

s. 7 — considered

s. 8 — considered

s. 9 — considered

s. 10(a) — considered

s. 10(b) — considered

s. 24(2) — considered

APPLICATION by accused for stay of proceedings after conviction for impaired driving.

***L. Feldman J.*:**

1 I found Ratnam Sathymoorthy guilty of Operation Impaired. The Crown chose not to proceed on a Blow Over 80 charge.

2 I found the evidence indicated that the accused drove his motor vehicle in a poor and barely controlled manner. He was seen to be swerving on the wrong side of the road in a construction zone and almost caused a head-on collision. Shortly thereafter, he drove into the back of a trailer attached to another vehicle that was stopped ahead of him at a red light.

3 Civilian witnesses noted the smell of alcohol on his breath, glazed eyes and an unfocused demeanour. The first officer on scene directed the accused towards his own police cruiser and then saw him trip on going forward and fall to the ground, then afterwards having trouble standing.

4 The officer placed him in the back of his cruiser, he said for safety reasons given the defendant's seemingly impaired state and concern that he might wander into traffic, while he attended to the nearby intersection where there was imminent danger from a blocked intersection with backed-up traffic travelling the wrong way in order to get through. He radioed police dispatch for additional officers to conduct an investigation of the accused.

5 I found the officer's testimony on the issues of whether he had reasonable grounds to believe the defendant was one of the drivers in the collision and whether he was detained by him to be disingenuous. I concluded that the officer breached the accused's *Charter* ss. 9, 10 (a) and (b) rights, but had exercised his judgment for public safety reasons in good faith in challenging circumstances.

6 Counsel submitted, in addition, that later on at the station the defendant was deprived of his right to counsel of choice when there was no police response to his request to speak to Mr. Midanik, a fact confirmed in a videotape of the breathalyser process. I found against the accused on this s. 10(b) complaint.

7 In this regard, I said, "Hearing the audio portion live, as I did, presents a different picture. Mr. Sathymoorthy garbled many words and mumbled often in response to questions about his contact with duty counsel. He spoke quickly and in a low tone. It was almost impossible to make out his reference to counsel's name without repeated, strained listening and knowing in advance that the name was used. It would inevitably, in my view, have been missed as mere incoherence in the circumstances at play here".

8 I concluded that the defendant was largely responsible, given his condition and flaccid speech, for the police being unable to make out a considerable number of his words, including the name of counsel. I accepted the evidence of the arresting officer that had she heard counsel's name, she would have facilitated contact with him. In the circumstances, I was not persuaded that the accused was deprived of a reasonable opportunity to exercise his right to speak to counsel of choice.

9 Of significance, however, I found that the police infringed the defendant's s. 7 security rights. He had urinated when placed in the back of the cruiser leaving the seat wet with urine, indicating extensive voiding.

10 During the parading process, the police were aware the accused was wet with urine from the waist down. The arresting officer conceded she gave no thought to having a family member bring dry clothing or providing some herself. I inferred little concern on the part of the authorities about the dignity and minimal comfort of their detainee who was made to provide breath samples while still wet, likely cold and in bare feet.

11 I was of the view that what occurred here was both unnecessary and unacceptable and that the inferred humiliation, discomfort and probable jeopardy to the composure of the defendant in the breathalyser process were avoidable. I held that the defendant was entitled to a clean-up procedure that would not have imposed an onerous burden on the police officers involved and that their failure in this regard infringed the accused's security interests. I found this violation to be serious and its impact significant.

12 Following an s. 24(2) analysis, I excluded evidence of police observations of the defendant's indicia of impairment while he was at the police station. However, I took into account such observations up to the point that he was placed in the police cruiser, prior to any *Charter* breaches, and in the result was persuaded that the essential elements of the charge were made out.

The Section 7 Application

13 Given the finding of guilt, the accused has brought an application to stay the proceedings in light of these *Charter* violations, in particular, because of what he asserts is an egregious breach of his security rights.

14 Mr. Sathymoorthy testified on the hearing of this application. He does not dispute that he was intoxicated at the time of these events.

15 At the scene of the collision, the defendant recalls urinating after being placed in the back seat of the police cruiser. He believes, but is not sure given his inebriated state, that he made effort to get the attention of the officer who placed him in the cruiser about his condition. He says he was left there for some considerable time before being driven to the police station. He claims to have been cold and uncomfortable.

16 The booking video provides objective evidence that all persons in authority at the station were aware the accused had wet himself. One booking officer is heard to say, at 9:14 p.m., "it looks like he urinated himself". The second booking officer said, "yes, he has". This officer also searched the accused's pockets and made reference to "urine soaked" money in his back pants pocket. The first officer, responded, "oh goodie". Then, as the second officer attempted to remove the defendant's ring, the first said, sarcastically, "I'm sure [it] got tighter with urine". Finally, when the second officer, wearing gloves, removed other items from the accused's pockets, the first booking officer refused to handle them, but instructed his colleague to "let the officer know it was saturated in urine".

17 Mr. Sathymoorthy testified that he felt embarrassed to be paraded in such a urinesoaked state. He said his legs, pants and hands were wet and that later on in the cell where he was lodged the air conditioning made him cold. He gave evidence that he let an officer know that he was wet and cold but says he was told, "What else do you expect in jail?"

18 It is apparent he was never offered a change of clothing or even a blanket to keep warm. Had he been offered a chance to be released earlier than the 10 hours he was detained, he said he had an uncle who could have driven him home. No evidence was called to explain the length of time for that detention.

19 In relation to the emotional impact on him of his treatment while in detention, he told the court that he had in the past been subject to arrest in Sri Lanka for political reasons and treated harshly by security forces there. He said he was surprised and ashamed that in this country the authorities were indifferent to his basic comfort and insensitive to his personal dignity. He found the experience difficult.

20 Mr. Sathymoorthy was polite and cooperative with the police. When released at 7:29 a.m., he was wearing the same clothing. It is clear that no effort had been made to have a family member bring in a change of clothing, nor is there evidence that consideration had been given to releasing him earlier to a friend or relative given his soiled state.

21 Mr. Sathymoorthy was not seriously challenged in cross-examination on the attitude of the police, his own discomfort and humiliation or the fact that nothing was done to assist him in minimizing his physical discomfort during the breathalyzer process or his detention. I found him to be a straightforward witness who was understated in his description of his experience in custody. I accept his evidence in relation to these facts in issue.

22 The evidence permits the reasonable inference that the first booking officer was at best indifferent to the basic comfort and dignity of his detainee who was about to undergo a self-incriminating process. He made light of the accused's condition to his colleagues. I infer that his words were intended to belittle the defendant, in my view, an insensitive attitude that could only serve to increase Mr. Sathymoorthy's humiliation and in the process diminish the professionalism expected of persons in authority. In demeaning the accused, the officer aggravated his indifference.

23 It is also open to be inferred on this evidence, given the absence of thought or effort here by any officer to minimize the defendant's discomfort, that what appears to be wilful indifference to the condition of detainees in soiled clothing, was inherent in the attitude of those involved. It would not have required much for at least one officer, for example, the supervisor of the cells, to take minimal steps to improve the accused's state. While the actions of drinking drivers need not be accorded respect, their treatment during investigation and while in custody must be handled responsibly and with reasonable consideration. That standard was not met here.

The Authorities

24 Justice Moldaver has recently reaffirmed the principles to be applied in considering a judicial stay of proceedings in *R. v. Piccirilli*, 2014 SCC 16 (S.C.C.) [hereinafter Babos]. It is considered the most drastic of remedies warranted only on rare occasions in "the clearest of cases". There are two categories: (1) where state conduct compromises the fairness of an accused's trial (the "main" category); and (2) where state conduct creates no threat to trial fairness but risks undermining the integrity of the judicial process (the "residual" category).

25 With regard to the residual category, as in this case, the test of whether a stay is warranted has three requirements, set out in para 32 of the judgment:

> (1) There need be prejudice to the integrity of the justice system. This contemplates that carrying forward the prosecution makes it appear more likely that the state misconduct will continue in the future and that it will offend society's sense of justice.
>
> (2) There must be no alternative remedy capable of redressing the prejudice, that is, does any such remedy fail to "adequately dissociate the justice system from the impugned conduct going forward".
>
> (3) If no remedy would suffice, the court would have to "engage in the balancing process and determine whether the integrity of the justice system would be better served by a stay of proceedings or a full trial on the merits".

26 An important question the court must answer is whether the state has engaged in conduct that is "offensive to societal notions of fair play and decency" and whether proceeding in the face of that conduct would leave the impression that the justice system condones it, in the process doing further harm to the integrity of the justice system (para. 35).

27 In balancing the competing interests the court is to consider the nature and seriousness of the impugned conduct, whether the conduct is isolated or reflects a systemic and ongoing problem, the circumstances of the accused, the charges he or she faces and the interests of society in having the charges disposed of on the merits (para. 41).

28 In *R. v. Mok*, 2014 ONSC 64 (Ont. S.C.J.), the defendant's use of a toilet while in custody was captured on video used for reasons of prisoner safety and preservation of evidence. Boswell J. found in this an s. 8 *Charter* breach that failed to respect the detainee's dignity and bodily integrity. However, the court found this violation to be a case of first instance that was not egregious and that a stay was not required to achieve a change in the way police monitored jail cells given the public interest in having a criminal charge resolved on its merits. Rather, the court suggested future use of a modesty screen to better protect the privacy interests of detainees in those circumstances.

29 It is apparent that the humiliation of the defendant in *Mok* was not experienced in real time, as in the case at bar, but only after the fact when the video surveillance was released as part of trial disclosure. The problem addressed was in finding a less invasive application of the lawful capture of videotaped evidence. It is implicit that Justice Boswell did not infer the difficulty to be one of an official attitude that was both inherent, as well as indifferent to the security interests of the detainee.

30 Such an attitude was found to be the case in *R. v. Murphy* (2001), 29 M.V.R. (4th) 50 (Sask. Prov. Ct.), where the intoxicated accused was not allowed to clean himself up after having lost control of his bowels. At one point, the accused asked to use an available shower but his request was denied and he was instead told that he was not in a 5-star hotel.

31 The trial judge found that requiring the defendant to remain seated in his own excrement for much longer than reasonable or necessary, denying him proper and available clean-up facilities in minimal privacy and subjecting him to demeaning remarks when permitted to carry out personal toilet functions humiliated and degraded him.

32 Of significance, the court concluded, in addition, that the accused's dignity and composure during the breathalyser process were fundamentally compromised to the degree that in the circumstances a stay of proceedings was warranted. Implicit in the result was that this egregious violation was rooted in an institutional attitude toward detainees that required drastic sanction.

33 Finally, the question of whether there is an alternative remedy to address the prejudice is made more complicated in offences, as here, subject to mandatory minimum sentences. Sentence reductions in light of state misconduct are an expression of respect for communal values. However, where an adjustment is contemplated in the event of a *Charter* breach, "as a general rule, a court cannot reduce a sentence below a mandatory minimum or order a reduced sentence that is not provided for by statute": *R. v. Nasogaluak*, 2010 SCC 6 (S.C.C.). It is only in exceptional circumstances of a *Charter* breach or state misconduct that a court "can derogate from the usual rules to which its decisions are subject". That is not this case.

Application to this Case

34 As described earlier, I found that the defendant was left in a soiled state for 10 hours because of wilful indifference on the part of persons in authority. I infer on the evidence that Mr. Sathymoorthy endured humiliation, discomfort and jeopardy to his composure during the breathalyser procedure and thereafter. I found this to be avoidable and an abuse of his personal dignity, aggravated by the slight mocking to which he was subject, all of which in my view has led to an egregious *Charter* violation and in the process has diminished the administration of justice.

35 Very little was required of the police to respect and accommodate the security interests of their detainee, which included, as noted earlier, providing him a change of clothing or at least a blanket to keep him warm, calling a family member to bring in dry clothes or releasing the accused earlier to a friend or relative. It is open to be inferred that in the casual opinion of the booker, the field officers and the cell supervisor this was for the accused part of the cost of drinking and driving, a mindset that in my view chips away at the integrity of the justice system and should be discouraged.

36 A more important inference available on this evidence is that the indifference to the security interests of the defendant exhibited by all those involved is endemic and that a polite signal from the court with little meaningful consequences would be ineffective in changing the institutional attitude on display here.

37 Put a different way, even a questionable reduction in sentence, below the mandatory minimum, as an alternative remedy in the face of this *Charter* violation that made no practical difference to the legal result for the accused would provide little incentive for the widespread change of attitude and behaviour that is necessary in such circumstances.

38 In the "balancing process" required in *Babos*, the importance of proceeding with a trial of this charge on the merits is high, but in my view less so than the clear need to sanction this behaviour and prospectively change institutional thinking about the security interests and treatment of those detained in similar circumstances, serving in this way to strengthen the integrity of the justice system.

39 The proceedings will be stayed.

Application granted.

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