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Should unreasonable delay in an accused being tried, in and of itself, be sufficient to warrant a permanent stay of criminal proceedings?

By Adrian Kayne

In England and Wales, the answer to this question is no. However, in Canada, a more robust approach is taken to procedural delay in certain circumstances. This article discusses delay to the criminal trial process, once it has begun. This is to be distinguished from the timely prosecution of certain categories of offence which come to light or are reported many years after they were committed, as occurred e.g., in *Sawoniuk* who was tried and convicted some 50 odd years after his war crimes.

England and Wales

Article 6(1) of the European Convention on Human Rights provides that every person charged with a criminal offence has the right to a fair trial by an independent and impartial tribunal within a reasonable time. The reasonable time right is not unqualified, but it has been held to be both independent of and separate to the co-existing rights in article 6 to a fair trial by an independent and impartial tribunal. It has been given effect in the domestic laws of England and Wales by the Human Rights Act 1998 which requires public authorities to act in a convention compliant manner. Therefore, as far as an individual charged with a criminal offence is concerned, and in very broad terms, this means that their convention rights not only trump the common law where there may be conflict between the two, but that prosecuting authorities and criminal courts must act in a manner which is compatible with their convention rights.

In most cases, time starts to run from the moment a person is charged or summonsed and it continues until the conclusion of any appeals, including appeals against confiscation orders. In order to establish a breach of the reasonable time requirement, an accused is not required to demonstrate prejudice; once a breach has been established, however, the concept of prejudice looms large when the criminal court comes to consider the appropriate remedy for the breach. Typically, this is because an accused whose reasonable time right has been breached, will apply for a stay of the proceedings as an abuse of the process of the court, thereby bringing into play ordinary and well-settled abuse of process principles.

The established cases in England and Wales which deal with the appropriate remedy for a breach of the reasonable time requirement are: Attorney General's Reference (No.1 of 1990) [1992] 95 Cr. App. R. 296, Attorney General's Reference (No.2 of 2001) [2004] 2 A.C. 72, R v S. (S.P.) [2006] 2 Cr. App. R. 23 and R v F. (S.) [2011] 2 Cr. App. R. 28. Taken together, the following principles emerge:

(i) a permanent stay is the exception rather than the rule;

(ii) there should be no stay in the absence of serious prejudice to the defendant being tried;

(iii) the court is under a duty to regulate and control its proceedings to ensure that the defendant receives a fair trial, notwithstanding the delay.

(iv) a permanent stay of proceedings should only ever be ordered in circumstances where the defendant cannot receive a fair trial or where, for a compelling reason, it is no longer fair for the defendant to be tried;

(v) in the latter case, a permanent stay will never be warranted in circumstances where a lesser remedy to mark the breach will suffice.

Canada

Section 11(b) of the Canadian Charter of Rights and Freedoms, contained in Part 1 of the Constitution Act 1982, provides that, "any person charged with an offence has the right to be tried within a reasonable time." Section 11(d) provides for the co-existing rights to a fair trial by an independent and impartial tribunal.

Prior to 2016 and the Supreme Court of Canada's decision in R v Jordan, [2016] SCC 27 (CanLii), violations of the section 11(b) charter right were determined according to the "the Morin framework", following the Court's earlier decision in R v Morin, [1992] CanLii 89 (SCC).

The Morin Framework

Morin was a straightforward drink-driving case from the state of Ontario which enjoyed a delay of 14.5 months between the defendant being charged and her trial taking place. Her counsel had requested the earliest possible trial date. On the day of trial, counsel applied to stay the proceedings alleging a violation of the defendant's section 11(b) constitutional right to be tried within a reasonable time. This application was dismissed and the defendant was convicted. Her case progressed all the way up the Supreme Court of Canada ("SCC").

The Court held that in determining an alleged section 11(b) violation, it was not apposite to apply a mechanistic or mathematical formula. Instead, a judge was required to balance the protection afforded to the individual by section 11(b) against other factors which inevitably lead to delay. These other factors were:

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

The majority stated that unreasonable delay should only be investigated if the period was long enough to raise an issue as to its reasonableness. Short periods of delay would only be capable of raising an issue if a defendant could demonstrate prejudice.

With respect to limitations on institutional resources in particular, the Court suggested guidelines of 8 to 10 months for provincial courts to determine matters and 6 to 8 months, post-committal, for trial in the higher courts. It made clear, however, that these were guidelines only, not intended to operate as a limitation period and that they were to be weighed in the scales with the other factors which they had identified. The Court recognised that the practical application of these guidelines would be influenced by the extent to which an accused might suffer prejudice. The Court noted that the guidelines would require adjustment by regional courts to reflect local conditions and that they would also need to be adjusted from time to time to reflect changing circumstances.

The Court observed that prejudice might be inferred from the length of the delay: the longer the delay, the more likely an inference of prejudice. However, if prejudice could not be inferred by the court or proved by an accused, any suggestion of an alleged violation would be seriously undermined. The protection afforded by section 11(b) was to ensure that trials were brought on swiftly and to minimise prejudice, not to avoid trials on their merits from ever taking place. A defendant's attitude to securing a timely trial was an important consideration to be weighed in the scales. A balance had to be struck between the public interest, which demands that persons charged with offences should be brought to trial, and the accused's interest in the prompt and efficient determination of criminal proceedings.

Prior to the SCC's decision in Morin, an extreme example of a section 11(b) violation which resulted in a stay is to be found in *R v Rahey [1987] CanLii 52 (SCC).*

The provincial court judge presiding over the matter caused an 11-month delay after the prosecution had closed its case and the defendant had asked for a directed verdict of acquittal.

Initially, the accused did not object to the delay. After 9 months, he wrote to the Crown requesting that it should press the judge for a decision. He then alleged that his constitutional rights were being violated and requested a withdrawal of the charges. These requests were refused.

Instead, the Crown made an application to the superior court for mandamus to compel the provincial judge to deliver a ruling. The day before the provincial judge was due to give the ruling, the defendant made an application to the superior court for an order dismissing the charges on the basis that his section 11(b) constitutional right had been violated by the provincial court.

The superior court judge granted the defendant's application and held that the trial judge's delay had caused him serious prejudice by frustrating his ability to (i) conduct his defence, and (ii) carry on business while under a financial restraint order. The superior court judge concluded that the only appropriate remedy for the breach was a dismissal of the charges. The Court of Appeal reversed this decision and directed that the trial in the provincial court should continue. It found that the evidence of prejudice was "insubstantial and entirely speculative." The SCC allowed the accused's appeal and ordered a stay of the provincial court proceedings. It is of some note that 6 of the 9 SCC Justices empaneled to hear this appeal were of the view that a stay of proceedings was the minimum remedy because the provincial court had lost its jurisdiction to continue trying the accused when it became the author of the section 11(b) violation.

R v Jordan [2016] SCC 27 - The New Framework

Jordan was charged in December 2008 with offences relating to the supply of controlled drugs. His trial ended in February 2013. He made an application under section 11(b) for a stay of the proceedings on account of the delay. The trial judge applied the Morin framework, dismissed the application and the defendant was convicted. He appealed to the Court of Appeal which dismissed his appeal. The SCC allowed his appeal, set aside his conviction, and ordered a permanent stay of proceedings.

The SCC introduced a new concept of presumptive ceilings beyond which any delay is presumed to be unreasonable unless there are exceptional circumstances justifying it. Once a presumptive ceiling has been exceeded, a permanent stay will follow unless the crown can justify the delay. There is no longer a need for an accused to demonstrate prejudice. Unlike the position in England and Wales, accused persons do not have to invoke abuse of process principles and prove on balance of probabilities that they cannot have a fair trial or that it is no longer fair for them to tried.

Unless there are exceptional circumstances to justify it, exceeding the presumptive ceiling, in and of itself, leads to a permanent stay and the burden is on the Crown to justify any delay under the exceptional circumstances exception.

The majority of the SCC opted for a new framework stating that the Morin framework,

"…had given rise to both doctrinal and practical problems, contributing to a culture of delay and complacency towards it. Doctrinally, the Morin framework is too unpredictable, too confusing, and too complex. It has itself become a burden on already over-burdened trial courts. From a practical perspective, the Morin framework's after-the-fact rationalization of delay does not encourage participants in the justice system to take preventative measures to address inefficient practices and resourcing problems."

"A new framework is therefore required for applying s. 11(b)… At the heart of this new framework is a presumptive ceiling beyond which delay — from the charge to the actual or anticipated end of trial — is presumed to be unreasonable unless exceptional circumstances justify it. The presumptive ceiling is 18 months for cases tried in the provincial court, and 30 months for cases in the superior court (or cases tried in the provincial court after a preliminary inquiry)."

The new framework is applied as follows:

(i) Defence delay (caused or waived) does not count towards the presumptive ceiling.
(ii) Once the applicable presumptive ceiling has been exceeded, the Crown bears the burden of rebutting the presumption of unreasonableness on the basis of exceptional circumstances.
(iii) If the Crown cannot do this, **a stay will follow**.
(iv) "Exceptional circumstances" are circumstances which lie outside the Crown's control. They must be reasonably unforeseen or reasonably unavoidable, and not reasonably capable of remedy.
(v) Whether circumstances are exceptional will depend on the trial judge's good sense and experience.
(vi) In general, exceptional circumstances will fall under two categories: discrete events and particularly complex cases.

(vii) If the exceptional circumstance relates to a discrete event (such as an illness or unexpected event at trial), the delay reasonably attributable to that event is subtracted from the total delay.

(viii) If the exceptional circumstance arises from case complexity, the delay is reasonable and no further analysis is required.

(ix) An exceptional circumstance is the only basis upon which the Crown can justify a delay that exceeds the presumptive ceiling.

(x) **The seriousness or gravity of the offence cannot be relied on, nor can chronic institutional delay**.

(xi) **The absence of prejudice to an accused person cannot be used to justify delays after the presumptive ceiling has been breached**.

(xii) Only circumstances that are genuinely outside the Crown's control and ability to remedy may excuse prolonged delay.

(xiii) Below the presumptive ceiling, the burden is on the defence to show that the delay is unreasonable. To do so, the defence must establish that: (1) it took meaningful steps that demonstrate a sustained effort to expedite the proceedings, and (2) the case took markedly longer than it reasonably should have. Absent these two factors, the s. 11(b) application must fail. Stays beneath the presumptive ceiling should only be granted in clear cases.

Turning to Jordan's appeal, the total delay from the date on which he was charged to the end of his trial was 49.5 months. From this, the Court deducted a 4-month adjournment period for a delay which had been caused by the defendant changing his counsel shortly before his trial was due to begin. A further 6 weeks was deducted on account of a further delay occasioned when the defendant's counsel was unavailable. This left a delay of 44 months which the Court found "vastly exceeded" the 30-month presumptive ceiling for superior court cases under its new framework. While there were some complexities to the defendant's case, they were not of a kind that could reasonably justify this level of delay. Accordingly, as the Crown was unable to demonstrate that the delay was reasonable, the only remedy for the breach was a stay of the proceedings.

Discussion

On any view, the Canadian presumptive ceilings are very generous for most criminal cases being tried in the higher and lower courts. They amount to this: superior court cases must conclude within 2.5 years from the date on which a suspect is charged and provincial court cases must finish within 18 months. These are significant time periods for the vast majority of criminal cases. They were set with a view to tackling chronic delays and a culture of complacency to delay which had become embedded in some parts of the Canadian system. The SCC spoke of the need for everyone involved in the Canadian criminal justice system to address inefficient working practices and adequacy of resource problems.

In considering the potential utility, therefore, of the Canadian model to practice in England and Wales, one probably needs to consider, first, whether there are, in fact, any Crown Court cases presently taking longer than 2.5 years from charge to conclusion? And in Magistrates and Youth Courts, whether there are any cases that are not being disposed of within 18 months? There may not be that many. Judges and list officers in England and Wales have consistently shown a determination to have trials warned or fixed in the court calendar as soon as possible. Most trials, including those requiring High Court or specialist ticketed judges, used to be warned or fixed for trial within no more than 6 to 9 months of the PCMH; many within less time than this depending on the court centre. Cases were not infrequently moved between different court centres, both on and off circuit, to ensure that they could be tried as quickly as possible, regardless of counsel's convenience and often to the chagrin of busy counsel. So, in a sense, the Canadian model may not be a good fit to the system in England and Wales.

However, should the criminal justice system in England and Wales ever find itself overwhelmed or close to breaking point, to the extent that criminal cases are no longer capable of being listed and disposed of within the reasonable time frames that judges and list officers applied historically and did their best to adhere to, a brave counsel somewhere might wish to take a stab at presenting the Canadian model, with the ceilings suitably adjusted to reflect our own historic standards of efficiency and expedition. Who knows, it might just find favour with some Judges in some cases without the need to demonstrate prejudice and unfairness.

In relation to substantial complex fraud cases which in some instances can conceivably take longer than 2.5 years to reach a conclusion, under the Canadian model the complexity of these cases is deemed capable of amounting to an exceptional circumstance justifying the reasonableness of the delay such that no further inquiry is required. Having said this, it is probably fair to observe that there must come a point at which even complex cases should not be allowed to drift on if they cannot be made ready for trial and accommodated by a crown court centre within a reasonable time.

Rahey and Morin were considered by the House of Lords in Attorney General's Reference (No.2 of 2001) [2004] 2 A.C. 72, as indeed was the New Zealand Court of Appeal case, Martin v Tauranga District Court [1995] 2 NZLR 419, in which an approach similar to that in Canada was taken.

Lord Bingham described the argument in favour of a permanent stay as a powerful one and opined that it was not at all surprising that such a powerful argument had been accepted by highly respected Courts around the world. However, in addition to the compelling public interest in the determination of criminal charges, he provided four reasons why it should not be accepted in England and Wales:

(i) the right which a defendant has is to a hearing which should have certain characteristics; he said it would be anomalous if a breach of the reasonable time requirement had more far-reaching consequences than a breach of a defendant's other section 6(1) rights e.g., the right to a fair trial. Lord Bingham cited the example of a defendant being convicted after an unfair trial, the Court of Appeal quashing the conviction because of the unfairness but nevertheless ordering a re-trial if a fair trial is still possible.

(ii) automatic termination of proceedings cannot sensibly be applied in civil proceedings;

(iii) in practice, automatic termination of proceedings has been shown to weaken the requirement. Citing the Judicial Committee of the Privy Council in the Scottish case of Dyer v Watson [2004] 1 A.C. 379, Lord Bingham pointed out that the convention is directed to breaches of basic human rights, not to departures from an ideal, and that the threshold of proving a breach of the reasonable time requirement is a high one, not easily crossed. Lord Bingham expressed a concern that should a breach result in an automatic stay, judges might set the threshold at an unacceptably high level because the idea of setting free dangerous criminals or those who are guilty of serious crime on account of delay has always been repugnant;

(iv) finally, a close analysis of the ECHR jurisprudence did not support the contention that a breach of the reasonable time requirement should lead to an automatic stay of the proceedings.

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