

CANADA

File no: 19435301

IN THE PROVINCIAL COURT OF NEW BRUNSWICK

JUDICIAL DISTRICT OF MONCTON

BETWEEN:

HER MAJESTY THE QUEEN

- and -

JAMES ALDERICE GAUVIN

BEFORE: Brigitte Sivret, Judge of the Provincial Court

HELD AT: Bathurst, New Brunswick

DATE OF TRIAL: June 18, 2009

DATE OF DECISION: July 13, 2009

APPEARANCES: Marc Savoie, Esq., for Her Majesty the Queen  
Maurice Bastarache, Esq., for the defendant

1. The defendant, James Gauvin, is charged with two counts of uttering threats to kill a dog contrary to s. 264.1(1)(c), two counts of killing an animal, to wit: a German Shepherd dog and a black Labrador Retriever dog contrary to s. 445(1)(a) and one count of assault on Tina Gauvin, contrary to s. 266(b) of the *Criminal Code* of Canada.

2. The matters were set for trial for June 18, 2009. At the outset of the trial, the defendant brought an application seeking a stay of proceedings pursuant to s. 24(1) of the *Charter* alleging a violation of his guaranteed right to be tried within a reasonable time as protected by s. 11(b) of the *Charter*.

## **THE FACTS**

3. The defendant filed an affidavit in support of his application. Constable Kathleen Doyle, a member of the RCMP filed an affidavit in support of the Crown's position. The following relevant facts are not in dispute.

4. The dates of the alleged offences are April 28, May 25, May 28, June 5 and June 10, 2008.

5. On June 10, 2008, the District 11 RCMP office received a complaint of a spousal abuse, where allegations of possible assaults, threats and killing of animals were raised by the complainant. The defendant, James Gauvin, was identified as the prime suspect.

6. On June 11, 2008, the defendant was arrested and held for Court. He appeared before the Moncton Provincial Court, Domestic Violence Court Division, on June 12, 2008. At the time, the defendant was facing two charges of assaulting Tina Gauvin on April 28 and May 28, 2008 contrary to s. 266(b), one count of uttering threat to Tina Gauvin contrary to s. 264.1(1)(a) and one count of uttering threat to Trista Gauvin contrary to s. 264.1(1)(a) of the *Criminal Code* of Canada. The Crown objected to the defendant's release and he was remanded until bail hearing.

7. On June 16, 2008, a bail hearing was held and the defendant was remanded by the presiding judge. The facts surrounding the new charges of uttering threats to kill and the killing of the dogs were extensively referred to during the bail hearing.
8. On June 19, 2008, the defendant pled not guilty to all charges and requested a speedy trial.
9. On June 23, 2008, the trial date was set for July 18, 2008 on the four counts for which the defendant had pled not guilty.
10. On July 18, 2008, the defendant was present at the Moncton Provincial Court with his counsel, ready to proceed to trial. On that day, the Crown withdrew the two counts of uttering threats and requested an adjournment of the trial on the two counts of assault. It appeared from the court record that the Crown was simply not ready to proceed on the remaining two assault counts. The presiding judge granted the adjournment, released the defendant on an undertaking to the Court and rescheduled the trial to September 19, 2008. The accused had been detained for 38 days up to that point.
11. At the end of August, 2008, the RCMP officer in charge of the investigation received a report from a veterinary pathologist. The RCMP had been waiting for this report in order to determine the cause of death of Tina Gauvin's two dogs found on June 10, 2008, at the time the police responded to the complaint received that same day and for which the defendant was identified as the primary suspect.
12. On September 16, 2008, a new information containing five counts was laid in the Moncton Provincial Court, Domestic Violence Division against the defendant. This new information contained two counts of uttering threats to kill an animal contrary to s. 264.1(1)(c), two counts of killing an animal contrary to s. 445(1) and one combined count of assaulting Tina Gauvin between April 28 and May 28, 2008, contrary to s. 266(b) of the *Criminal Code* of

Canada.

13. On September 19, 2008, the defendant was present at the Moncton Provincial Court with his counsel, once again ready to proceed to trial. On that day, the Crown withdrew the two remaining counts of assault contained in the information laid on June 12, 2008 and the defendant was informed of the new information laid on September 16, 2008. He was asked to answer to the new information containing the five counts all relating to the same incidents reported to the RCMP on June 10, 2008.

14. The defendant's counsel was obviously not prepared to proceed on these new charges. As a result, the Court was not able to proceed with the defendant's trial. The presiding judge then adjourned the matter to October 10, 2008 in order to allow the Crown to provide the defendant with new disclosure relating to the new charges.

15. On October 10, 2008, a new trial date was set for March 12, 2009.

16. On March 12, 2009, the defendant was present in the Provincial Court in Moncton with his counsel ready for trial. This time, the assigned judge was not available to hear the case against the defendant and the Provincial Court was not able to find another available judge for that day. Therefore, the matter was adjourned again, this time to June 18, 2009.

17. On June 18, 2009, the defendant brought an application alleging violation of his right to be tried within a reasonable time as guaranteed under s. 11(b) of the *Charter*. The application was heard on that day and the Court reserved its decision until July 13, 2009.

## **THE PRINCIPLES AND ANALYSIS**

18. Section 11(b) of the *Charter* provides that "Any person charged with an offence has the right to be tried within a reasonable time." The principles of law to be considered in determining whether the accused's right to be tried within a reasonable time has been infringed are set in **R. v.**

*Askov* [1990] 2 R.C.S. 1199 and refined in *R. v. Morin* [1992] 1 R.C.S. 771 and in *R. c. Maillet (M.J.)* (1997), 190 N.B.R. (2e) 216. Basically, the Court must consider the following factors:

- (1) the length of the delay;
- (2) the 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 delays; and
- (4) prejudice to the accused.

#### **1. The length of the delay**

19. In this case, the defendant argues that even though the information containing five counts against him was laid in Court on September 16, 2008, the Court should calculate the delay from June 12, 2008. According to the defendant's position, all facts relevant to the new charges of threatening and killing of the dogs were known by the prosecution at the time the first charges were laid in Court. In fact, the defendant argues that he was arrested by the police on June 11, 2008 and remanded by the Court on June 16<sup>th</sup> based on those facts and circumstances known and extensively referred to during the bail hearing held on June 16, 2008. Therefore, the defendant suggests that the delay to be considered is of 12 months and one week.

20. The Crown's position is that the delay to be considered by the Court is of 9 months starting from September 16, 2008, date of the laying of the second information. The Crown explained that on June 12<sup>th</sup> the investigation was incomplete and the investigator was awaiting the results of the veterinary pathologist's report in order to ascertain the cause of death of the two dogs in order to decide whether charges would be laid concerning the dogs.

21. According to the Crown, since the prosecution has a valid explanation as to why the

charges relating to the threatening and the killing of the dogs were not laid earlier, the Court should not include this pre-charge delay into its calculation.

22. Generally, the delay to be considered in the determination of whether the delay is an unreasonable delay in the circumstances of a particular case would be calculated from the time charges were laid in Court and the day the defendant presented his application under the *Charter*. However, a pre-charge delay may, in certain circumstances, have an influence on the overall determination of whether or not the delay was reasonable. (See **R. v. Morin** [1992] 1 S.C.R. 771)

23. In order to properly address the arguments presented by both counsel, I find it necessary to separate the count of assaulting Tina Gauvin from the four counts of the threatening and the killing of the dogs.

24. Dealing first with the count of assault, it seems obvious to me that the charge is a combination of the two counts of assaults contained in the first information laid against the defendant on June 12, 2008. The prosecution simply withdrew the first information and re-laid the assault charges by filing a new information containing a combined charge for the alleged same incidents together with new charges relating to the dogs. This approach is not, in itself, problematic.

25. However, in the circumstances of this case, it became problematic for two major reasons. First, the defendant was ready to proceed to trial on the assault charges very soon after the first information was laid against him on June 12, 2008. In fact, he asked for a speedy trial and was ready to proceed at two previous occasions, July 18 and September 19, 2008. Secondly, I cannot overlook the fact that the defendant was remanded for a period of 38 days on the first information containing the assault charges. In fact, the principal charges of that first information appear to me to be the assault charges. It would be unacceptable, in my opinion, to conclude that the delay should be calculated from the date that the second information was laid. Otherwise, the prosecution would be able to avoid considerable delay attributable to the Crown by simply

withdrawing charges and laying new ones. This cannot be condoned. Therefore, I reject the Crown's position on this and I conclude that, in the circumstances of this case, the delay for the assault charge starts from the laying of the first information on June 12, 2008.

26. The delay to bring this charge of assault to trial is 12 months and one week. This warrants further examination.

### **OTHER FACTORS**

27. In this Province, our Court is still using the suggested period of a range between six to eight months as the appropriate guide for this type of offence. I must now weigh the other factors to determine whether the defendant, on a balance of probabilities, has established a case of unreasonable delay.

28. The Court records do not reveal that the defendant had waived his right to raise any period in calculation of the delay. In fact, in his affidavit, the defendant states that at no time since the charges were laid did he waive his right to be tried within a reasonable time.

29. From the 12 months and one week period, only one week is attributable to the defendant. The trial on the assault charge had been first adjourned because the Crown was simply not ready to proceed. The second adjournment is due to the Crown's decision to withdraw the first information and lay a new information containing new charges without notice to the defendant. Finally, the third adjournment is due to the lack of judicial resource which is also attributable to the state.

30. Therefore, I find that the 12 months delay attributable to the Crown is in excess of the suggested period of six to eight months for these type of offences. As stated by the defendant at paragraph 26 of his affidavit, the three adjournments caused him to spend 38 days in remand custody. Since his arrest, he is suffering from anxiety and depression. He has been taken off work by his family doctor since his release from jail on July 18, 2008. The defendant is also concerned about the effect the passing of time has on his memory of the events surrounding the

alleged offences.

31. It is well settled law that long delay triggers a “. . . virtually irrefutable presumption of prejudice to the accused resulting from the passage of time.” (See *R. v. Askov* (supra) and *R. v. Godin* [2009] S.C.J. no. 26).

32. I find that the institutional delay of 12 months to bring the assault charge to trial violates the defendant’s right under s. 11(b) of the *Charter*.

33. Dealing now with the two charges of uttering threats and the two charges of killing dogs, I find that the delay is of nine months starting September 16, 2008.

34. This delay is also in excess of the suggested period of six to eight months. The delay is composed of a first period of 43 days during which that matter was adjourned to allow the Crown to provide proper disclosure to the defendant on the new charges relating to the dogs.

35. Since the alleged incidents took place on or before June 10, 2008 and that the pathologist’s report had been made available to the RCMP by the end of August 2008, I find difficult to accept that relevant documents were not disclosed or at least ready to be disclosed to the defendant before September 19, 2008. The defendant was informed for the first time on September 19, 2008 that charges concerning the dogs had been laid. He had no other choice but to request time to obtain and review the new disclosure. This period of 43 days is, in my opinion, attributable in large part to the prosecution. The Crown could have shortened the time necessary for the defendant to review the new information if disclosure would have been ready and provided earlier. This delay could certainly not be considered a model of dispatch in getting the case to trial in a timely fashion. The defendant has a right to be presumed innocent until proven guilty and he also has a right to be informed of the charges he will be asked to face within a reasonable delay after his arrest. It took over three months for the defendant to be informed that he will be charged with offences specifically relating to the dogs. During that period, he spent 38 days in custody on charges involving the same incidents. It seems to me that the

prosecution should have laid the new charges earlier.

36. However, on October 31, 2008, trial was scheduled for March 12, 2009. Then the trial was adjourned to June 18, 2009 because no judges were available to hear the trial. This seven and a half months delay is attributable to the Crown. This period combined with most of the first 43 days brings me to conclude that the nine months delay is practically all attributable to the Crown.

37. Even though the prosecution provides me with an explanation as to why charges regarding the dogs were not laid earlier, I find that the explanation is not reasonable in the circumstances of this case. The pathologist's report does not seem to be evidence needed to prove any of the essential elements of the alleged offences. In fact, no notice of expert evidence has been given to the defence concerning that report and the Crown confirmed that the pathologist is not a witness intended to be called at trial.

38. In addition, as I already mentioned, facts and circumstances surrounding the killing of the dogs were known and referred to by the Crown during the bail hearing which led the Court to remand the defendant on June 16, 2008. Because of the circumstances of this case, pre-charge delay is an important factor to be considered and is having an influence on the overall determination of whether or not the delay was reasonable.

39. Therefore, in this particular case, I find the delay of 9 months to bring the two charges of uttering threats and the two charges of killing dogs to trial to be unreasonable and in violation of the defendant's right under s. 11(b) of the *Charter*.

## **REMEDY**

40. The defendant is seeking a stay of proceedings pursuant to s. 24(1) of the *Charter*.

41. The Crown argues that a stay of proceedings should only be used as a remedy of last

resort. The Crown submitted the case of *R. v. Taillefer; R. v. Duguay*, 2003 S.C.C. 70 (Can LII).

42. I agree with the principle that a stay of proceedings should be a remedy of last resort especially when, as in the *Taillefer* and the *Duguay* cases the issue was in relation to disclosure or lack thereof by the Crown. In such cases or others, an adjournment may resolve the issue and ensure that the defendant is able to make full answer and defence.

43. However, in the types of cases before the Court, when dealing with an unreasonable delay to proceed to trial, the only remedy, in my view, is a stay of proceedings because a breach under s. 11(b) in these circumstances is an infringement of the defendant's rights under the *Charter* and as such is irreparable otherwise.

44. Therefore, I am of the view that the stay of proceedings is the only appropriate remedy. I order a stay of proceedings on all charges against the defendant.

**DATED at Moncton, N.B., this 13<sup>th</sup> day of July, 2009.**

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**Brigitte Sivret**  
**Judge of the Provincial Court**