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COURT OF APPEAL FOR ONTARIO

LASKIN, ROSENBERG JJ.A. and AITKEN J. (*ad hoc*)

B E T W E E N :	)	
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HER MAJESTY THE QUEEN	)	**Scott C. Hutchison**
	)	**for the appellant**
	)	
(Appellant)	)	
	)	
- and -	)	
	)	
FARAZ QURESHI, FERHAN KHAN and NICK GIAVROPOULOS	)	**Joseph Di Luca**
	)	**for the respondents**
	)	
(Respondents)	)	
	)	
	)	**Heard: March 16, 2004**

On appeal from the order of Justice Nicholson D. McRae of the Superior Court of Justice dated October 8, 2002.

LASKIN J.A.:

I. Overview

[1] On July 12, 1998, at about 3:00 a.m., the respondents Qureshi, Khan and Giavropoulos brutally attacked two young men – S and C – outside a Toronto nightclub. Qureshi punched S; Khan pulled out a knife and stabbed him in the chest. When C tried to help his friend the respondents also attacked him. Qureshi pinned C; Khan stabbed him five times in the chest and back. The three respondents ran toward Giavropoulos's car but were stopped by the police and arrested.

[2] The police laid charges the next day. Khan was charged with two counts of attempted murder and possession of a weapon for a purpose dangerous to the public peace. Each respondent was charged with two counts of aggravated assault.

[3] Fifty-one months later – on October 8, 2002 – the trial judge stayed the charges. He concluded that the lengthy delay from the time charges were laid to the time of trial violated the respondents' constitutional right under s. 11(b) of the *Canadian Charter of Rights and Freedoms* to be tried within a reasonable time.

[4] The Crown appeals. In oral argument it submits that, in granting the stay, the trial judge committed three errors:

> (i) He failed to properly assess the inherent time requirements of the case;
>
> (ii) He failed to take into account both the minimal prejudice to the respondents from the delay and the societal interest in having a trial on the merits; and
>
> (iii) He erred in equating this case to this court's judgment in *R. v. Satkunananthan* (2001), 152 C.C.C. (3d) 321 (Ont. C.A.).

[5] This case is difficult and close. I have decided, however, to accept the Crown's submission. Although the prosecution of this case does not stand as a model of timeliness and strayed far from the ideal, I am not persuaded that the delay contravened the respondents' s. 11(b) rights.

II. The Timeline: Arrest to Stay

[6] The respondents were arrested on July 12, 1998, charged on July 13, 1998, and committed for trial on February 9, 2001. The trial was scheduled to proceed in the Superior Court on April 29, 2002, but was adjourned to October 7, 2002, to permit the respondents to bring their s. 11(b) application.

[7] I have divided the fifty-one month period from arrest to stay into several blocks of time in both the Provincial Court and the Superior Court. The following chart shows these blocks of time. I have added explanatory comments to each block.

A. Time in Provincial Court

Events	Time Period	Number of Months	Waiver	Comments
From arrest to set date for preliminary inquiry	July 12, 1998 – April 16, 1999	9	No	• Two respondents immediately released on bail; Khan released two days later. • January 29, 1999: Crown disclosure given. • Early February: all defence counsel formally retained. • March 2: judicial pre-trial set for March 19.

				• April 16: Crown discloses DNA evidence. • All counsel estimate ¾ of day for preliminary inquiry. • Agree on date of September 9.
From set date to beginning of preliminary inquiry	April 16, 1999 – September 9, 1999	5	No	N/A
From beginning of preliminary inquiry to key Crown witness's recantation	September 9, 1999 – February 17, 2000	5 ¼	No	• September 9: preliminary inquiry begins. • October 27: preliminary inquiry continues. • One defence counsel not available in January 2000 so preliminary inquiry adjourned to February 17 and 18, 2000. • February 17: key Crown witness (eye witness to the incident) recants previous statement.
From KGB *voir dire* for recanting witness to KGB ruling	February 17, 2000 to August 23, 2000	6 ¼	No	• February 17, February 18, March 17, May 10 and August 16 and 17: KGB *voir dire*. • August 23: KGB ruling – adjourned to November 14.
From KGB ruling to committal	August 23, 2000 – February 9, 2001	5 ½	2 mo.	• November 14: Giavropoulos fails to attend – counsel waives s. 11(b). • December 19: counsel for Qureshi ill – counsel waives s. 11(b). • January 15 and 22, 2001: submissions on committal. • February 9: reasons on committal.
TOTAL		**31**	**2**	

B. Time in Superior Court

Events	Time Period	Number of Months	Waiver	Comments
From committal to trial set date	February 9, 2001 – September 5, 2001	7	No	• March 28: first appearance in Superior Court. • May 10 and June 21: judicial pre-trials. • June 13, July 16, July 26, August 8 and August 21: a respondent or his counsel fails to appear. • September 5, 2001: trial date fixed for April 29, 2002 for a 3-4 week trial.
Set date to scheduled trial date	September 5, 2001 – April 29, 2002	7 ¾	No	N/A
Scheduled trial date to stay motion	April 29, 2002 – October 7, 2002	5 ¼	5 mo.	• April 29: defence requests adjournment to bring s. 11(b) application. • Transcripts unavailable.
Total		**20**	**5**	
Overall total		**51**	**7**	

III. The Legal Framework

[8] Section 11(b) aims to protect both the individual rights of the accused and the rights of society. It protects three individual rights: it protects the accused's right to security of the person by minimizing the anxiety and stigma of criminal proceedings; it protects the accused's right to liberty by minimizing the effect of pre-trial custody or restrictive bail conditions; and it protects the accused's right to a fair trial by ensuring that the proceedings occur while evidence is fresh and available. See *R. v. Morin* (1992), 71 C.C.C. (3d) 1 (S.C.C.) at p. 12.

[9] Section 11(b) also seeks to protect two societal rights. First, it protects the public's interest in having our laws enforced by having those who break the law tried quickly. Promptly held trials increase public confidence. Second, s. 11(b) seeks to protect the public's interest in having those accused of crime dealt with fairly. See *R. v. MacDougall* (1998), 128 C.C.C. (3d) 483 (S.C.C.) at p. 496.

[10] To decide whether s. 11(b) has been infringed, the court must balance these individual and societal goals with the length and causes of the delay. In *Morin*, the Supreme Court of Canada set out the framework for this judicial balancing. Four factors must be considered.

(i) *The length of the delay*

[11] If the period between the date charges were laid and the date the trial ends is unexceptional, the court need not inquire further. If, however, the amount of time warrants inquiry, then the other three factors must be considered.

(ii) *Waiver of the time periods*

[12] If the accused has unequivocally waived any of the delay, that portion will be subtracted from the overall period before assessing whether s. 11(b) has been violated.

(iii) *Reasons for the delay*

[13] If the accused's waiver does not resolve the application the court must consider the reasons for the delay. These reasons have been grouped into five categories.

(a) Inherent time requirements: These requirements recognize that some delay is inevitable. They cover the period required to prepare and process a case assuming the availability of adequate institutional resources. The inherent time requirements of a case are neutral in the s. 11(b) reasonableness assessment. They do not count against the Crown or the accused. These time requirements include intake procedures – for example, bail applications, retention of counsel and disclosure. Greater time is required if the case is complex or if the proceedings include both a preliminary inquiry in the Provincial Court and a trial in the Superior Court.

(b) Actions of the accused: Actions of the accused falling short of waiver must nonetheless be taken into account in deciding whether the delay is unreasonable.

(c) Actions of the Crown: Similarly, the Crown's actions may delay the trial. Even if not blameworthy, the prosecution cannot rely on its own actions to justify a delay that is otherwise unreasonable.

(d) Limits on institutional resources: Inadequate resources may cause institutional or systemic delay. This delay begins when the parties are ready for trial but the system cannot give them a speedy trial date. The Supreme Court has put forward administrative guidelines for acceptable institutional delay: eight to ten months in the Provincial Court and six to eight months in the Superior Court. These guidelines do not serve as limitation periods and may yield to other considerations. Where they are exceeded, however, the overall delay risks being labelled unreasonable.

(e) Other reasons for the delay: In deciding on a s. 11(b) application, the court must take account of all the reasons for the delay. This category catches reasons for delay that do not fit into the other four categories.

(iv) *Prejudice to the accused*

[14] Two kinds of prejudice are relevant here. First, the court may infer prejudice from the delay itself and is more likely to do so the longer the delay. On the other hand, an accused's action or inaction that shows a desire to avoid a trial on the merits may negate any inference of prejudice from the delay itself. Second, the accused or the Crown may lead evidence to show either prejudice or an absence of prejudice.

[15] This is the legal framework. I turn now to its application to this case.

IV. The Trial Judge's Reasons

[16] The trial judge took into account the first three factors required by *Morin*. On the first factor, he concluded that the length of the delay warranted further inquiry. On the second factor, he found that the three respondents explicitly waived seven months of the overall delay: two months (December 14, 2000 – January 15, 2001) to schedule the argument on committal; and five months (April 29, 2002 – October 7, 2002) to prepare their s. 11(b) application.

[17] The trial judge also found that "counsel for the defence were responsible for more delay than the seven months explicitly waived". Although he concluded that these "time periods" (along with reasonable intake times) had to be subtracted from the overall delay, he did not quantify their length.

[18] The trial judge's finding of a s. 11(b) violation turned on his assessment of the third *Morin* factor, the reasons for the delay. As I read his reasons, he made three key findings. First, he found that the delay in beginning the preliminary inquiry – fourteen months after charges were laid – was excessive, and much of it was caused by the Crown's late disclosure. Second, he found that the protracted delay in completing the preliminary inquiry – seventeen months – was caused by counsels' "gross underestimate" of the number of hearing days needed and by "the practice of allowing only one or two days for hearing" and then adjourning for a month or more. Third, he found a striking similarity between the facts in this case and the facts in *Satkunananthan*, where this court found a s. 11(b) violation.

[19] The trial judge, therefore, concluded that the three respondents had established a violation of their s. 11(b) rights. In so concluding, he made no mention of the fourth factor in *Morin*: whether the delay prejudiced the respondents. Nor did he take into

account society's always important interest in bringing people charged with criminal offences to trial.

V. Analysis

[20] I agree with the trial judge that the fifty-one month delay from the time of arrest to the time of trial warranted further inquiry. I also accept the trial judge's finding that the respondents waived seven of the fifty-one months. In assessing whether s. 11(b) has been violated the waived time must be deducted. Therefore, the general question the court must answer is whether a forty-four month delay violated the respondents' right to be tried within a reasonable time.

[21] Even after deducting the waived time, as the trial judge properly recognized, further inquiry was warranted. Therefore, whether the forty-four month delay violated the respondents' s. 11(b) rights turns on assessing and balancing the reasons for the delay, the prejudice to the respondents, and society's interest in having a trial.

[22] This assessment must be driven by the facts of the case. Section 11(b) does not prescribe a constitutionally mandated timetable. Some cases considering a shorter delay have run afoul of s. 11(b). Other cases considering a longer delay found the delay to be reasonable.

First issue: Reasons for the delay – Did the trial judge err in assessing the inherent time requirements of the case?

[23] In addressing the overall delay, the trial judge focused on the delay in the Provincial Court. He cannot be faulted for doing so. Proceedings in the Provincial Court from the date charges were laid until the date the respondents were committed for trial took thirty-one months. Two of those months were waived by the respondents, leaving twenty-nine months to explain.

[24] Although a s. 11(b) application requires the court to assess the reasonableness of the overall period of delay, that assessment can only be done in the light of the reasons that explain the constituent parts of the delay. See *R. v. Allen* (1996), 110 C.C.C. (3d) 331 (Ont. C.A.) at p. 347.

[25] Here, the time in the Provincial Court accounted for the major share of the delay. Twenty-nine months was obviously cause for concern. From the date the charges were laid, nine months elapsed before a preliminary inquiry was scheduled. Five more months passed before the preliminary began. And the preliminary itself took seventeen months (including the two months that were waived). During those seventeen months, only fourteen court days were scheduled: six days for the hearing of evidence, three days for submissions of counsel, two days for court rulings, and three other days on which either a

respondent or defence counsel did not appear. The respondents fairly contend that instead of making greater efforts to move the case along, the court system and the Crown acquiesced to conducting the Provincial Court proceedings piecemeal.

[26] Although twenty-nine months seems unduly long, in my view the trial judge failed to properly account for the inherent time requirements of the proceedings in the Provincial Court. When the inherent time requirements are fairly accounted for, the twenty-nine months, though far from ideal, becomes more acceptable.

[27] The trial judge failed to account for the inherent time requirements of the case in four ways. His failure to do so is reviewable on a standard of correctness. See *R. v. Chatwell* (1998), 122 C.C.C. (3d) 162 at para. 10 (Ont.C.A.).

(i) The first error relates to the intake period. Counsel were ready to set a preliminary hearing date on April 16, 1999, about nine months after the respondents were charged. Although the trial judge recognized "a reasonable intake period is expected and neutral" he attributed much of the delay during this period to the conduct of the Crown in making "late disclosure". He was wrong to do so.

Even accepting that disclosure took longer than it should have, earlier disclosure would not have appreciably accelerated the preliminary hearing. The Crown's disclosure came in two stages: the police's disclosure in late January 1999 and the Centre of Forensic Science's disclosure of the DNA evidence in mid-April 1999. The transcripts of the proceedings show that all defence counsel were not formally retained until early February 1999, after the Crown's initial disclosure and approximately six and three-quarter months after their clients were charged. Once they were retained, they requested and were granted a further five weeks to review the Crown's disclosure. Therefore, although the intake period was long, eight months of it should be attributed to the inherent time requirements of the case and characterized as neutral. Only one month of the nine can be attributed to the Crown's late disclosure of the DNA evidence.

(ii) The second error relates to counsels' time estimate for the preliminary inquiry. The Crown first estimated the preliminary would last three days, but later revised his estimate downward to accord with that of defence counsel. When the lawyers appeared on April 16, 1999, to set a hearing date, they all agreed the preliminary would take three-quarters of a day. They fixed September 9, 1999.

As the trial judge recognized, three-quarters of a day proved to be a "gross underestimate". However, the trial judge did not properly characterize the consequences of the underestimate. Here, the judgment of Doherty J.A. in *Allen* at p. 348 is controlling. There, my colleague makes two points relevant to this appeal: the inherent time requirements can include adjournments required to find additional court time when the initial time estimates proved inaccurate and these inherent time requirements are

considered neutral. In making these points, Doherty J.A. emphasized that when a case is not completed within the time estimated, its continuation must recognize the legitimate demands of other cases in the system on both counsel and the court:

> When addressing s. 11(*b*), one must consider the inherent time requirements needed to get a case into the system and to complete that case: *R. v. Morin*, *supra*, at p. 16. Those time requirements can include adjournments necessitated by the need to find additional court time when initial time estimates prove inaccurate: *R. v. Hawkins* (1991), 6 O.R. (3d) 724 (Ont. C.A.) at 728, affirmed (1992), 11 O.R. (3d) 64*n* (S.C.C.); *R. v. Philip* (1993), 80 C.C.C. (3d) 167 (Ont. C.A.) at 172-73. The inherent time requirements needed to complete a case are considered to be neutral in the s. 11(*b*) calculus. The recognition and treatment of such inherent time requirements in the s. 11(*b*) jurisprudence is simply a reflection of the reality of the world in which the criminal justice system operates. No case is an island to be treated as if it were the only case with a legitimate demand on court resources. The system cannot revolve around any one case, but must try to accommodate the needs of all cases. When a case requires additional court resources the system cannot be expected to push other cases to the side and instantaneously provide those additional resources.

When the preliminary hearing did not finish on September 9, 1999, it was adjourned to October 27, 1999, then further adjourned for two more hearing days on February 17 and 18, 2000, – to this point a total period for the preliminary of five and one-quarter months. Ideally, as this court said in *Satkunananthan*, once a preliminary hearing goes beyond its estimated time all participants should try to schedule its completion as soon as possible, preferably on consecutive days. That did not happen here. Thus, part of the five and one-quarter months should be assigned to institutional delay.

Consistent with *Allen,* however, part of the period should also be characterized as neutral, part of the inherent time requirements of the case. I would assign two months to institutional delay and three and one-quarter months to the inherent time requirements of the case.

(iii) The third error relates to the trial judge's failure to address what occurred on February 17, 2000, the third day of the preliminary. On that day, a key Crown witness, an eye witness to the incident, recanted his previous statement. The recantation radically

changed the case and increased the complexity of an already reasonably complex proceeding.

The recantation took everyone by surprise. No evidence was led to suggest that the Crown could have anticipated the change in the witness's story. The recantation meant that the court had to embark on a KGB *voir dire*. Had the recantation not occurred, the preliminary inquiry would have finished on February 18, 2000. The period between the set date of April 16, 1999 and February 18, 2000 amounted to ten months. Even attributing all of this time to institutional delay instead of partly to the inherent time requirements resulting from counsels' inaccurate time estimate, ten months is within the administrative guideline for institutional delay suggested in *Morin.*

(iv) The fourth error relates to the trial judge's failure to properly characterize the additional delay the recantation caused. Because of the KGB *voir dire*, further hearing days had to be scheduled and the preliminary inquiry was again conducted piecemeal: evidence on the KGB *voir dire* on March 17 and May 10, 2000, submissions on August 16 to 17, 2000; a ruling on August 23, 2000; then submissions on committal on January 15 and 22, 2001; and a ruling on committal on February 9, 2001, – in all, eight court dates spread throughout eleven and three-quarter months before the preliminary inquiry finished on February 9, 2001.

[28] Three reasons for this additional nearly one-year period of delay stand out. One reason was the inherent time requirements caused by the recanting witness. Inevitably the KGB *voir dire* had to be conducted piecemeal because the police officers who took the statement and would not otherwise have testified at the preliminary hearing had to be called as witnesses. The KGB ruling was given on August 23, 2000, six and one-quarter months after the recantation. A good part of this period should be considered neutral.

[29] A second reason for the additional delay was undoubtedly institutional delay. But a third and important reason for the delay were the adjournments obtained by the respondents' counsel. The adjournments were reasonable and, in some cases, necessary, but they prolonged the hearing. The delay resulting from these adjournments may be attributed either to the inherent time requirements of the case or to the actions of the respondents or their counsel falling short of waiver. The trial judge recognized the delay caused by these adjournments but failed to quantify it. But for the various adjournments, the preliminary inquiry would very likely have concluded in September 2000 instead of February 2001. Only two months of this approximately five-month period was expressly waived. In my view, the remaining three months should be attributed to the inherent time requirements of the case or to the actions of the accused. Here are the details.

[30] The preliminary inquiry judge gave her KGB ruling on August 23, 2000. Both the court and the Crown were available and ready to argue the question of committal less than four weeks later on September 18, 2000. However, because of another court

commitment, Khan's counsel was not available until November 13. The hearing was adjourned to November 14. But the respondent Giavropoulos did not come to court on that day. Defence counsel asked for an adjournment and waived their client's s. 11(b) rights. The hearing was adjourned to December 19. Unfortunately, Qureshi's counsel was ill and could not appear. The Crown asked to make submissions on committal for Khan and Giavropoulos but the defence preferred to adjourn. Again they agreed to waive the respondents' s. 11(b) rights. The hearing was thus adjourned to January 15, 2001. On that day, Qureshi did not attend. Submissions on committal were made for the other two respondents. Submissions on committal for Qureshi were made the following week, on January 22, 2001. The preliminary inquiry judge gave a ruling committing all respondents for trial on February 9, 2001.

[31] Of this further eleven and three-quarter months to complete the preliminary hearing, two months were waived. For the remaining nine and three-quarter months I would assign three months to institutional delay and six and three-quarter months to the inherent time requirements of the case. Alternatively, the six and three-quarter months could be divided between the inherent time requirements of the case (three and three-quarter months) and the actions of the respondents (three months). Even that allocation is generous to the respondents because over this period they showed little interest in moving the case along.

[32] I would summarize the proceedings in the Provincial Court – both the time taken and the explanations for it – in the following chart (the times are in months).

Period	**Time (mo.)**	**Waiver**	**Reasons for the delay**			
			Inherent Time requirements	**Actions of Crown**	**Actions of Respondents**	**Institutional Delay**
Intake	9	No	8 (Retention of counsel and review of initial Crown disclosure)	1 (Delayed DNA disclosure)		
From set date to beginning of preliminary hearing	5	No				5
Preliminary hearing	17	2	10 [7] (Counsels'		[3] Adjournments	5

			inaccurate time estimate (3 ¼), Crown witness's recantation (3 ¾), and adjournments requested by the respondents (3))		may also be attributed to actions of the respondents	
TOTALS	**31**	**2**	**18 [15]**	**1**	**[3]**	**10**

[33] I admit to a measure of arbitrariness in this chart, especially in assigning time to the various reasons why the preliminary hearing took seventeen months. But my overall conclusion remains unaffected. The length of the delay – twenty-nine months after deducting the waived time – was far from ideal. However, most of this delay is attributable to the inherent time requirements of the case and is therefore neutral. These inherent time requirements include time for defence counsel to be retained and review the Crown's initial disclosure, time for additional hearing days because of counsels' inaccurate time estimate, time for additional hearing days because of a key Crown witness's unexpected recantation, and additional time because of adjournments reasonably sought by defence counsel. The time attributable to institutional delay and the actions of the Crown did not excessively contribute to the overall delay in the Provincial Court.

[34] I turn now to the proceedings in the Superior Court. In his reasons, the trial judge did not expressly consider the time taken in the Superior Court. Likely, he did not do so because on its own the time seems acceptable. As illustrated in my chart at para. 7, the time in the Superior Court may be divided into three segments: seven months for intake, seven and three-quarter months to obtain a trial date, and five and one-quarter months until the stay application was heard.

[35] I consider these times in reverse order. Virtually all of the five and one-quarter months was expressly waived by the respondents and therefore does not count in the s. 11(b) assessment. I attribute one-quarter month of this segment to institutional delay.

[36] The seven and three-quarter months to obtain a trial date was institutional delay. This delay, however, was within the administrative guideline of six to eight months for proceedings in the Superior Court after a committal for trial. Moreover, it seems a reasonable delay to list a three to four week trial in a reasonably complex case in which the schedules of four counsel and the court had to be accommodated.

[37] That leaves the initial intake period of seven months. This is a relatively lengthy period for intake. Here again, however, the actions of the respondents or their counsel

were largely responsible for the time taken before setting a trial date. During the seven months between February 9, 2001, (when the respondents were committed for trial) and September 5, 2001, (when counsel set a trial date) eight more court days were scheduled. On two of the days the court held judicial pre-trials requested by the defence. On the other six days, the court had to adjourn the proceedings because either a respondent or counsel for a respondent did not appear. Of the seven months I would attribute three months to normal intake time and four months to the actions of the respondents. Therefore, I conclude that neither the intake period nor the overall unwaived period of fifteen months can be considered excessive.

[38] Combining the delay and reasons for it both in the Provincial Court and the Superior Court yields the following chart:

Court	Time (mo.)	Waiver	Reason for Delay			
			Inherent Time Requirements	Actions of Crown	Actions of Respondents	Institutional Delay
Provincial Court	31	2	18	1	0	10
Superior Court	20	5	3	0	4	8
Total	**51**	**7**	**21**	**1**	**4**	**18**

[39] A forty-four month unwaived period from charge date to trial date is not desirable. But nearly half of this period is fairly explained by the inherent time requirements of the case. Although long, the eighteen months of institutional delay is within the guidelines for a two-stage proceeding. In view of the increasing complexity of the case, this systemic delay is tolerable.

Second Issue: Prejudice to the respondents and society's interest in a trial

(a) Prejudice to the respondents

[40] An assessment of prejudice is an important component of a s. 11(b) analysis. The trial judge, however, did not consider whether the respondents were prejudiced by the delay. Significantly, therefore, he made no finding of actual prejudice. Still, because he found a s. 11(b) violation, he likely concluded, implicitly if not expressly, that extensive prejudice could be inferred from the delay itself. If that was his conclusion I respectfully disagree with it. The following considerations show that, at most, the respondents suffered minimal prejudice from the delay:

- None of the respondents led any evidence of actual prejudice.

- The respondents' liberty interests were marginally prejudiced by the delay. On being charged, Qureshi and Giavropoulos were immediately released on bail. Two days later Khan was released on bail, and later, the Crown agreed to vary his bail terms to accommodate his schooling.

- The respondents do not claim that their bail terms were onerous or restrictive other than their curfews: 8:00 p.m. to 6:30 a.m. for Khan and 11:00 p.m. (or midnight) to 7:00 a.m. for Giavropoulos and Qureshi. No respondent sought to vary or do away with these curfew restrictions.

- The respondents did not contend that the delay prejudiced their fair trial rights.

- Any inference that the delay seriously prejudiced the respondents' security of the person interests is contradicted by the record. As the Supreme Court said in *MacDougall,* action or inaction by an accused inconsistent with a desire for a timely trial is relevant to the assessment of prejudice. Here, the evidence strongly suggests that the respondents did not want a speedy trial. Five times the proceedings had to be adjourned because one of the respondents failed to appear in court. Five more times the proceedings had to be adjourned because one or more of the respondents' counsel did not appear. There are innocent explanations for a few of these adjournments. However, throughout the many court appearances in this case, defence counsel and their clients never inquired about earlier dates and did not seek to expedite the proceedings. Overall, the record shows that the respondents demonstrated little concern about the slow pace of the litigation.

(b) Society's interest

[41] The marginal prejudice to the respondents caused by the delay must be weighed against the considerable prejudice to society's interest caused by a stay. The trial judge did not consider society's interest. Yet the charges are serious – attempted murder and aggravated assault – which heightens society's interest in having a trial on the merits.

Third issue: Did the trial judge err in finding the facts in this case and those in *Satkunananthan* to be strikingly similar?

[42] In finding a s. 11(b) violation the trial judge relied on what he considered to be the "striking" similarity between the facts in this case and the facts in *Satkunananthan*, where the court granted a stay for a s. 11(b) violation. I do not see much similarity in the two cases.

[43] Admittedly, in both, the time from the charge date to the trial date was about the same: forty-four and a half months in *Satkunananthan* (with no waived time) and forty-four months in this case (after subtracting the waived time). In both cases there was more than one accused: seven in *Satkunananthan* and three in this case. And in both cases counsel underestimated the time required for the preliminary inquiry. There, however, the similarities end. Instead, in my view, the two cases have these salient differences:

- In *Satkunananthan* this court commented that the delay in completing the preliminary inquiry (sixteen months) could not be justified by any factors inherent in the case. The court expressly noted that there were no recanting witnesses. Here, the inherent time requirements of the case – especially the recanting witness and, to a lesser extent, counsels' inaccurate time estimate for the preliminary – significantly prolonged the completion of the hearing. I recognize that my characterization of the delay resulting from counsels' inaccurate time estimate differs from that of the *Satkunananthan* panel. On the record in *Satkunananthan*, including the accused's desire for an early hearing, the panel characterized the entire delay as institutional because the preliminary inquiry did not continue on the next available court date. I, too, am critical of the system for not completing this preliminary inquiry sooner. However, the record before us shows that the respondents did not want an early hearing and that after the KGB ruling both the Crown and the court were prepared to proceed on an earlier date than were defence counsel. On the record, I think it fair to characterize a good portion of the delay resulting from counsels' inaccurate time estimates as neutral. This characterization is justifiable on the facts and consistent with *Allen.*

- In *Satkunananthan* the trial judge found, and this court agreed (at p. 330), that apart from having multiple accuseds "this was not a complex prosecution" and, for example, did not have any significant evidentiary issues. This case, in contrast, was reasonably complex: DNA evidence, hospital records and injuries to the victims, as well as the recanting witness would have to be addressed.

- In *Satkunananthan* substantial delay – over a year – resulted from the Crown's failure to provide an interpreter (seven months) and from the failure to obtain a new trial date immediately after a mistrial was declared (a further seven months). In this case, the Crown did not cause any similar delay.

- In *Satkunananthan* the court found the accuseds were significantly prejudiced by the delay. They had been in custody before satisfying the terms of their bail, and their bail conditions were restrictive, including reporting requirements and mobility and non-association restrictions. In this case the prejudice to the respondents from the delay was minimal. They were not detained in custody (other than the respondent, Khan, for two days) and their bail conditions were not

onerous. Moreover, the record showed that they were not interested in a speedy trial. Prejudice, thus, is more difficult to infer.

[44] Because of these differences I conclude that this court's judgment in *Satkunananthan* does not assist the respondents.

VI. Conclusion

[45] The unwaived delay of forty-four months from charge date to trial date was not ideal, even for a two-stage proceeding. The Crown did not move this case forward as aggressively as it might have. However, much of the delay was caused by the inherent time requirements of the case, which are neutral in the s. 11(b) assessment. The systemic delay was not outside the administrative guidelines suggested in *Morin*. The prejudice the respondents suffered from the delay was minimal. The charges are serious. In the light of these considerations, a stay was not appropriate.

[46] I would set aside the stay and order a trial. The court coordinator should schedule an early trial date.

RELEASED: November 18, 2004

"JL"

"John Laskin J.A."
"I agree M. Rosenberg J.A."
"I agree C. Aitken J."