



Criminal Law News

Robert Gee

R. v. Jevons - Political Trickle Down

It's been about two months since I last wrote one of these articles. If you read my last article, you may not remember but I was worrying that I was becoming, or maybe more accurately, had already become, too critical. In a lot of my articles it seemed to me that I was only criticizing the decisions of various courts. In preparing for that article, I had told myself to go out and find something I liked, and write about it. Alas, I fell into my old routine and ended up taking the easy way out and finding a decision to criticize.

Well dear reader friend, if you care, you'll be happy to know I'm starting 2009 off with a case I actually like. This case is, as you may have gathered from the title, *R. v. Jevons*, 2008 ONCJ 559, [2008] O.J. No. 4397, 2008 CarswellOnt 6598, which is a decision out of the Ontario Court of Justice in Whitby by Justice De Filippis, dated November 5, 2008. On a cautionary note, before you read any further, I ought to make clear that any conclusions I reach or opinions I express on the state of our justice system or the way it operates or even why it operates as it does, are mine alone, arrived at without any empirical research or study and are based exclusively on my own observations as a lowly, bread and butter defence counsel and filtered through my own biases. So having said that, you

would be wise to do what judges often tell me they'll do with my submissions, or arguments, or points of view, that is give it the weight you feel it deserves.

Now if what happened to Mr. Jevons in this case had happened to him not where it did in Whitby, Ontario, but instead had happened while he was vacationing say in Mexico, I dare say there would have been a minor international incident and right-thinking people in this country would have been outraged. But alas, it didn't happen in Mexico, it happened in Whitby, and as such nary an eyebrow was raised when it did.

You see, what happened was that Mr. Jevons had the misfortune of getting himself arrested for unlawful entry, possession of burglary tools, assault and criminal harassment on Wednesday August, 1, 2007. The charges were domestic related and were fairly serious but not earth-shatteringly so. At the time of trial, Mr. Jevons was 59 years old. He did not have a criminal record or any other outstanding criminal charges, and at the time worked for a large public company.

On Thursday, August 2, 2007, he was taken to bail court. The Crown was opposed to his release. He asked that his case be adjourned to August 3, 2007 in order to arrange for sureties to attend. On Friday, August 3, 2007

three of Mr. Jevons' family members were present in court and were prepared to act as sureties for him. He was represented by duty counsel and everyone waited all day at court for his bail hearing to be reached. It was not. By the end of the court day, Mr. Jevons' matter as well as approximately 20 other bail matters were not able to be accommodated by the court and as a result had to be adjourned to Tuesday, August 7, 2007. It was adjourned to the Tuesday as opposed to Monday because that happened to be the long weekend.

By Tuesday, August 7, 2007, Mr. Jevons was represented by privately retained counsel. His sureties attended again. The Crown continued to oppose his release. Again the lists were so long and resources so lacking that his matter was not able to be reached. At the end of the day his counsel commented, as did the Crown, that not one contested bail hearing was conducted in any bail court in Whitby that day. Mr. Jevons' matter was adjourned to Wednesday, August 8, 2007 and marked "with priority."

A lot of good that did. You guessed it, after waiting the entire day again, Mr. Jevons' bail hearing couldn't be reached. At the end of the day, his matter was transferred to a court presided over by Justice Mulligan for the purpose of another adjournment. This is what defence counsel had to say about Mr. Jevons' predicament to that point (par. 11):

Mr. Jevons...was arrested last Wednesday, first brought to court on Thursday. His sureties waited all day on Friday. They waited all day yesterday. I was present all day yesterday...Not one con-

tested adult matter was heard in all of the bail courts yesterday. There were two other courts offering assistance, however they dealt...with consent releases and adjournments...We returned today, again with sureties waiting all day, myself waiting all day. Mr. Jevons is going to pay yet again for me to attend court for a bail hearing.

Defence counsel then advised that he intended to bring an application for habeas corpus the next day but was advised by the trial coordinator that there wasn't a Superior Court Judge available in either Whitby or Newmarket the next day to hear the matter. Doesn't this give you a warm and fuzzy feeling about our justice system? A guy without any criminal record is arrested. He can't get a bail hearing for more than a week and now is being told he can't have an application for an extraordinary remedy to have someone try to justify to a court why he's being detained. Remember this is the Canadian version of the story, not the Mexican version.

In light of this refusal to accommodate his habeas corpus request in either Whitby or Newmarket, defence counsel asked Justice Mulligan to transfer his matter to the Toronto Superior Court for such an application the next day. She refused this request and adjourned his bail hearing to the next day, but ordered that it be heard first by the Justice of the Peace in bail court and that if this did not happen, then the matter was to be brought back before her that day.

The next day, now being Thursday, August 9, 2007, for those of you who have lost track, the Crown of the day in bail court, having been advised what had transpired the previous day,

reviewed the matter and reassessed the release plan put forward by Mr. Jevons and consented to his release.

At the commencement of trial, an application was brought on Mr. Jevons' behalf to have the charges stayed. It was alleged that the inability to accommodate his bail hearing in a timely fashion violated his Charter s. 7 right to life, liberty and security of the person and s. 11(e) right not to be denied reasonable bail without just cause.

Amongst other things, the court found as follows:

[35] In this case, a 59 year-old man, with no criminal record, and a productive member of the community was arrested because of serious allegations made by another person. He spent eight days in custody, partly under lockdown, without access to his daily medication, at much inconvenience to family and sureties, and the expense of counsel, because the Court was unable to hear his case. What occurred to the Defendant was not an aberration but the result of long standing systemic problems. The Defendant feared he might never be released before trial. That fear was reasonable. What is not reasonable are the resources allocated for bail hearings in Durham Region.

Evidence was lead that what had happened to Mr. Jevons was not an aberration, but pretty close to the norm for Durham Region. The defence also alleged that the Crown's office in Durham didn't properly exercise

their discretion and opposed the release of too many persons. The court recognized the Crown's duties and the difficult decisions they have to make but declined to express any opinion on whether their approach, especially on domestic violence cases, was right or wrong.

The court found that whatever the reason for it, the resources allocated to the bail court were inadequate for the task and as a result in this case Mr. Jevons' s. 7 and 11(e) Charter rights had been violated. In this regard the court stated at par. 31, "However, I do say this; where local practices or Ministry guidelines adversely affect available resources, reasonable efforts must be made to ensure resources meet constitutional requirements."

In turning to whether a stay was an appropriate remedy, the court recognized that a stay is a drastic remedy that ought to be used only as a last resort in the clearest of cases. Upon review, the court found this was one of those clearest of cases. It found that to allow the prosecution to proceed would undermine public confidence in the judiciary. A stay was granted but the court did order Mr. Jevons to enter into a peace bond to stay away from the complainant.

In the past decade and a half that I have been doing criminal law in this area there has been a real swing in the pendulum towards a more harsher approach to the prosecution of those accused of crimes. Whether or not you feel this approach is right or wrong or justified or not is a debate for a different day. However, when you have successive governments consistently ratcheting up their tough on crime rhetoric and policies, when you continually hire more and more police officers, when you consistently direct prosecutors to oppose more

releases on bail, prosecute matters to the fullest extent and seek higher sentences, primarily because you think it will win you votes, it doesn't take a rocket scientist to figure out that this approach will put considerably more strain on the system.

If this approach is going to be taken then the less sexy, less vote-rich parts of the system have to be enhanced as well. Legal Aid has to be enhanced, more Judges and Justices of the Peace are needed, more court clerks and court reporters are all needed so more courts can be running on a daily basis. The infrastructure of the system has to be enhanced or else the system itself will continue to fail to meet its constitutional obligations. If it's not, then more and more cases like Mr. Jevons' will start appearing. My faith that the government would actually address these shortcomings in the system, like an underfunded legal aid

or a lack of court or judicial resources, simply because it's the right thing to do has long since been shattered. Hopefully then, if enough cases like this one start getting stayed because of the failure to act, change may eventually be forced upon them. ■

Robert Gee is the Past-President of the Hamilton Criminal Lawyers' Association. He can be contacted at:

*120 Jackson Street East
Hamilton, ON L8N 1L3
905-777-1141
rgee@on.aibn.com*