

CITATION: R. v. Fotiou, 2018 ONSC 4958
COURT FILE NO.: AP-18-06
DATE: 2018-09-07

ONTARIO
SUPERIOR COURT OF JUSTICE
SUMMARY CONVICTION APPEAL COURT

B E T W E E N:

Her Majesty the Queen

Appellant

- and -

Theophilos Fotiou

Respondent

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) F. McCracken, for the Appellant
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) J. Smythe Browne, for the Respondent
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) **HEARD:** August 17, 2018
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REASONS FOR JUDGMENT
[On appeal from the judgment of Zivolak J., dated November 15, 2017]

P. R. SWEENEY J.

Introduction

[1] This is a summary conviction appeal by the Crown from a stay of this proceeding for breach of the respondent's section 11(b) *Charter* rights granted by the trial judge.

[2] The information in this case was filed on September 14, 2015, for offences which are alleged to have occurred on September 13, 2015. The trial in this matter initially commenced on February 14, 2017, but was not completed in the one-day time estimate. On July 7, 2017, the trial judge passed away. The matter was scheduled for a new trial on November 14, 15, 27, and 30, 2017.

[3] The respondent's first 11(b) *Charter* application was rejected by the first trial judge on April 28, 2017. The respondent brought a second 11(b) *Charter* application before the second trial judge who granted the stay of proceedings on November 15, 2017.

[4] The appellant asserts that the learned trial judge erred in failing to appropriately allocate certain periods of delay in bringing this matter to trial to the defence's conduct and in failing to appropriately take into account the delay caused by the exceptional circumstances in this case, particularly focusing on the death of the first trial judge. The respondent asserts the trial judge appropriately exercised her discretion in granting a stay as a result of the breach of the respondent's section 11(b) *Charter* rights.

[5] For the reasons that follow, I respectfully find the learned trial judge erred in her characterization of the periods of delay, in particular, the delay caused by defence, and that she failed to adequately account for the delay caused by the exceptional circumstances in this case. Accordingly, the stay will be set aside and the matter remitted back to a differently constituted summary conviction court for trial.

Standard of Review

[6] The parties agree on the standard of review. The trial judge's characterization of various periods of time making up the overall delay in a case is reviewed against the standard of correctness. So too is the ultimate decision as to whether there has been an unreasonable delay. However, the underlying factual findings are reviewed on the standard of palpable and overriding error: see *R. v. Schertzer*, 2009 ONCA 742, at para. 71, 248 C.C.C. (3d) 270.

Overview of Proceedings

[7] On September 14, 2015, the respondent was charged with two counts of knowingly uttering a threat to cause death, one count of assaulting a peace officer, and two counts of assaulting a peace officer with the intent to resist arrest. From September 14 through to August 5, 2016, when the trial date was set, there were numerous appearances. After a period of initial intake, retaining counsel, and release on bail, it is clear from a review of the record that the respondent was gathering information with a view to seeking potential resolution.

[8] On December 1, 2015, respondent's counsel indicated that he was getting more information together and was seeking to have a preliminary Crown pretrial prior to the matter returning on December 29, 2015. On the return date of December 29, 2015, the Crown pretrial had not yet been held but was scheduled for the middle of February. The respondent's counsel required time to get documentation together. He requested the matter be adjourned to February 2, 2016. Counsel noted on the record "at that point we will be able to know if there is going to, if we are going to be able to resolve or not."

[9] On February 2, 2016, the matter was further adjourned, respondent's counsel advised the court that he had had discussions with the Crown and was waiting for documentation. In the course of submissions, the respondent asserted that this documentation was further Crown disclosure. In response, the Crown asserted that the term documentation is not used for disclosure. I was asked to infer that the respondent was gathering information relevant to the proposed resolution. There is a prior mention in the transcripts that a mental health services worker was involved in the case. In reviewing the transcripts, I am satisfied that there was no additional outstanding Crown disclosure that the respondent was awaiting.

[10] On March 8, 2016, respondent's counsel advised the matter was set down for a judicial pretrial on May 4 and the return date was May 11. The matter was spoken to on May 10, 2016, at which time the respondent's counsel was not present. However, counsel spoke on his behalf and advised that a plea date had been set for June 17, 2016. At that appearance, there was no specific request made that Justice Gage (who conducted the pretrial) hear the matter on June 17. On June 17, the matter came before Justice Campling. The respondent did not enter a plea, but instead, the matter was adjourned to July 19 to be heard by Justice Gage.

[11] On July 19, Justice Gage was not presiding. However, on that day, the respondent's counsel advised that there would be no plea and the Crown and the respondent were seeking a trial date. There was an issue with respect to the trial time estimate. It appears that Justice Gage in his judicial pretrial ("JPT") note did not clarify the time for trial. At that appearance, both the Crown and respondent's counsel indicated their belief that one day would be required for the trial.

[12] On August 5, a trial date was set for February 14, 2017. Defence counsel specifically stated in response to a direct question from the judge that he was satisfied that only one day was necessary.

[13] On February 14, 2017, the trial commenced before Justice Culver. The Crown completed its case. The matter ran late that day, and on the next day the matter was in court to schedule a continuation of the trial. The court and Crown were available February 21, March 20, March 30, and April 3. However, respondent's counsel was not available, and the matter was adjourned to April 11, 2017.

[14] On March 10, 2017, the respondent filed six *Charter* applications, including a section 11(b) application. The respondent sought a directed verdict on two counts on the indictment. The Crown consented to the directed verdict.

[15] Although the full transcript of the April 11, 2017, hearing is not available, I am advised the trial judge did not summarily dismiss the *Charter* applications, although he was requested to do so by the Crown. On April 28, 2017, the trial judge ruled on the 11(b) application. The trial judge noted the delay in this case was 18 months and 28 days and it was a transitional case that commenced before the ruling from the Supreme Court of Canada in *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631 was released on July 8, 2016. The trial judge dismissed the 11(b) application. After dismissing the application, there was a discussion on the record as to how to address the remaining *Charter* applications. At that time, the Crown reserved its right to call

evidence to address the *Charter* issues, including recalling any witnesses. At this point, it was clear the case would take longer than one day to complete. On May 5, 2017, the case came back to set a trial date. The date of June 12 was suggested. However, there were still issues about how much longer the case would take. The trial judge recommended another pretrial before Justice Gage and on the record he specifically noted that June 12 now becomes a “target date.”

[16] On May 8, the matter came before a Justice of the Peace and July 11 and 13 were set for further trial dates. In her reasons, the trial judge said she could not determine what happened to the June 12 date. On my review of the transcript, it seems that the June 12 date was only a target date and was superseded by the July 11 and 13 dates that were chosen.

[17] On June 5, 2017, Justice Culver became ill. On July 5, 2017, the matter was brought back before Justice Campling at the request of the Crown, because of Justice Culver’s illness and that he was not presiding at the time. A determination was made, with the approval of Justice Campling, that the Crown need not have their witnesses available for July 11 (these are the witnesses the Crown might recall in response to the respondent’s *Charter* applications).

[18] On July 7, 2017, Justice Culver passed away. Crown advised defence counsel immediately upon receiving that information. The matter was before Justice Campling on July 11, 2017 to schedule a new trial trial before a new judge. The Crown and court were available on October 12 and 13, 2017, but defence was not available until November 14 and 15, and the trial date was set for that time. In addition, a JPT was scheduled for July 19. Before the November 14 trial date, the respondent filed a second section 11(b) application and supplementary notices of application with respect to the *Charter* applications under sections 7, 8, 9, 10, 12, and 15.

[19] Given the new application, the matter was brought before the second trial judge on November 7, to obtain additional days for the trial, and November 27 and 30 were secured.

The Jordan Framework

[20] The Supreme Court of Canada decision in *Jordan* represents significant change in the law in deciding whether the accused’s right to be tried within a reasonable time has been violated. An 18-month presumptive ceiling applies to matters tried in the Provincial Court.

[21] The *Jordan* framework begins with a determination of the period of time from the commencement of the proceeding to the ultimate conclusion of the trial. If that time exceeds the presumptive ceiling, there may be a deduction for defence caused delay, which leads to a net delay.

[22] On the issue of defence delay, the *Jordan* framework considers two types of delay: waiver and delay caused solely by the conduct of the defence. There is no issue of waiver in this case. Delay caused solely by the conduct of the defence has two forms: (1) situations where the accused’s acts directly caused the delay, or (2) the acts of the accused are shown to be a deliberate tactic employed to delay the trial. The first type of defence delay caused solely by the defence includes when the court and the Crown are ready to proceed but the defence is not: see

R. v. Mallozzi, 2018 ONCA 312. There is no element of moral blameworthiness on this aspect of delay. It need not be intentional or deliberate. It is simply that the matter cannot proceed only as a result of the unavailability of counsel chosen by the accused.

[23] If the net delay in the case is above the 18-month ceiling, it is presumptively unreasonable. To rebut this presumption, the Crown may argue there are exceptional circumstances. On the issue of exceptional circumstances, the Court in *Jordan* specifically stated at paragraph 69:

Exceptional circumstances lie outside the Crown’s control in the sense that (1) they are reasonably unforeseen or reasonably unavoidable, and (2) Crown counsel cannot reasonably remedy the delays emanating from those circumstances once they arise. So long as they meet this definition, they will be considered exceptional. They need not meet a further hurdle of being rare or entirely uncommon.

[24] The Court noted that, in general, exceptional circumstances fall under two categories: discrete events and particularly complex cases. The court is to subtract the delay caused by the discrete events from the net delay leaving a remaining delay. If the remaining delay exceeds the ceiling, then it would be unreasonable.

[25] In *Jordan*, the Court held that the new framework, including the presumptive ceiling applies to cases currently in the system subject to two qualifications. In cases where the delay exceeds the ceiling, a transitional exceptional circumstance may arise where the charges were brought prior to the release of the decision. The transitional exceptional circumstance will apply when the Crown satisfies the court the time the case has taken is justified based on the parties’ reasonable reliance on the law as it previously existed. This requires a contextual assessment, sensitive to the manner in which the previous framework was applied and affected the parties and the fact that the parties’ behaviours cannot be judged strictly against a standard of which they had no notice: see *Jordan*, paras. 95–96.

The Trial Judge’s Ruling

[26] The trial judge began her analysis by noting that the total amount of delay was 26.5 months on the basis the trial would be completed by November 30, 2017, referred to the Supreme Court of Canada decision in *Jordan*, and noted this was a transitional case. The trial judge addressed the first trial judge’s 11(b) ruling, commenting that the basis for the ruling was found in one paragraph and it was difficult to determine the basis upon which the ruling was given. While she wrote that it had an element of persuasiveness to it, she did not accept the result that there was a 10 month delay which was “either neutral due to the intake period and/or attributable to the defence delay in attempting to arrive at an advantageous resolution.” She did her own analysis without regard to the earlier ruling. She characterized the period from September 14, 2015, to February 2, 2016, as fairly standard intake process and attributed 4.5 months under the transitional provisions for that time.

[27] For the period from February 2, 2016, to August 5, 2016, she noted there was some potential the matter was going to be resolved by way of a guilty plea; however, the adjournments were requested by the defence, but the Crown agreed. No section 11(b) waiver was obtained. In the circumstances, she determined that those adjournments would not be defence caused. The Crown's failure to object to the adjournments was a factor influencing her decision. The trial judge noted that on August 5, when February 14, 2017, was the date set for the trial, there was no mention of *Jordan* in the transcript. She did acknowledge that February 14 was 17 months from the time of the information filing and it was within the *Jordan* guidelines even without taking into consideration any transitional changes or deductions.

[28] On February 14, 2017, the Crown's case was complete. It was adjourned to the following day. The next day, the trial continuation date of April 11 was given. A series of various forms of *Charter* relief were requested including an 11(b) application. The 11(b) application was heard on April 11, and on April 28 there was a ruling. The trial judge deducted no amount for the delay from February 14, 2017 to July 11 and 13 as defence caused.

[29] Justice Culver became ill. The trial judge in her reasons held that from July 11, 2017, four months was the response available with respect to rescheduling the matter. (This does not take into consideration the availability of the Crown and court on October 12 and 13). The trial judge allowed six weeks for the unexpected event: the death of the trial judge. She found there was no delay specifically attributable to the defence. The trial judge noted that after deduction of the transitional 4.5 months and the 1.5 months for the unexpected event, there were 20.5 months left. The Crown was not able to discharge its burden and a stay was granted.

Analysis: Application of the *Jordan* Framework

Total Delay

[30] The total delay in this case is 26.5 months assuming the trial would be completed on November 30, 2017.

Defence Caused Delay

[31] On the issue of defence caused delay, in my view, this would include the period of time from May 10, 2016, to July 19, 2016, when the matter was being adjourned for the purposes of a guilty plea. During this time, the Crown justifiably anticipates the matter will resolve. There is no need to push for a trial date. The time is lost as a result of the change of instructions communicated on July 19, 2016. The time from May 10 to July 19 was a delay in bringing the action to trial that occurred through no fault of the Crown. The Crown was complicit in the adjournments but only on the understanding that the matter would be resolved. Contrary to the reasons of the trial judge, I would not expect nor was the Crown required, at law, to object or obtain an 11(b) waiver when the matter is being adjourned for a plea. This 69 day period is

correctly characterized as defence caused delay that the trial judge did not attribute to the defence.

[32] The delay from February 14, 2017, to the notional last day of trial November 30, 2017, is as a result of a combination of factors.

[33] The Crown was available for continuation of the trial on February 21, March 20, March 30, and April 3. Defence counsel was unavailable until April 11. This 48 day delay rests solely on the defence and was not considered defence caused delay by the trial judge.

[34] From the untimely death of Justice Culver to the trial dates of November 14 and 15 is four months. The record reveals that the court and the Crown were prepared to proceed on October 12 and 13 but defence was unavailable. Therefore, the defence caused a one-month delay which was not considered defence caused delay by the trial judge.

[35] The appellant argues that the changed nature of the case, the *Charter* applications, and the additional time needed are all defence caused delays, and this should be deducted to lead to a net delay. In *Jordan*, the Court wrote: “To be clear, defence actions legitimately taken to respond to the charges fall outside of the ambit of defence delay” (para. 65). In this case, the *Charter* applications were not summarily dismissed. In my view, it is unnecessary to challenge the conduct of the defence in this case. It is clear that the nature of the case significantly changed from the defence perspective following the completion of the Crown’s case; a change over which the Crown had no control. These events will be addressed under exceptional circumstances.

[36] In the result, the defence-caused delay is 4.9 months. Therefore, the net delay is 21.6 months.

Exceptional Circumstances

[37] At the close of the day on February 14, the Crown’s case was complete and the court anticipated the only issue would be whether the accused would lead evidence. The effect of the defence being unavailable on the earlier dates took the case outside the 18-month *Jordan* ceiling.

[38] The estimate of one day for trial was agreed to by the respondent. The respondent has control over the defence and while it may be anticipated that trials take longer than expected, in this case, I am satisfied there was nothing the Crown could have done to remedy the situation short of setting two days for trial initially, which was unnecessary according to the defendant. I find the delay from February 14 to April 11 fits within the characterization of exceptional circumstances as outlined in *Jordan*. This is consistent with the decision of Conlan J. in *R. v. Gonzalez*, 2018 ONSC 936, at para. 88. It is 56 days.

[39] On April 28, in his 11(b) ruling the first trial judge held that the delay from the first appearance of September 14, 2015 to July 19, 2017 to be “either neutral due to intake period and/or attributable to the defence in attempting to arrive at an advantageous resolution.” This left a delay of only 9 months and the 11(b) application was dismissed. While the reasons may not be

as thorough as one might like, I would characterise the ruling as applying the transitional exception as outlined in *Jordan* to the case. There was a normal intake period and then there were two attendances for the purposes of a guilty plea which would fall to the defence under the *Morin* framework. I note parenthetically that with this ruling, the crown and court were operating with a nine-month time frame within which to complete the matter, which would mean that the trial would have to be completed by January 28, 2018 (April 28, 2017 plus 9 months).

[40] When faced with the *Charter* applications in the context of the trial having commenced before an assigned trial judge, steps were taken to arrange for a continuation of the trial in a timely fashion. Trial dates of July 11 and 13 were obtained which are less than three the months after the 11(b) application was dismissed. With all due respect to the trial judge, I find that the period of time from April 28 to July 11 is correctly deducted as arising out of exceptional circumstances beyond the Crown's control, that is, it arises out of the need for an additional 2 days and was necessary because of the Charter applications including the 11(b). This is a delay of 72 days.

[41] The trial judge did find that the death of the first trial judge was an exceptional circumstance but found that a six-week timeframe was reasonable for the case to have been completed. This is not a simple driving while under the influence case. It is not a case of a mistrial. The unfortunate death of a trial judge impacts the entire system because there are fewer judges to hear cases. The trial judge provided no real analysis as to the determination that it would be reasonable to have the trial completed within six weeks. In my view, this is not correct.

[42] I have reviewed the cases provided by the respondent. The court has been critical of delays of seven months in obtaining a new trial date after a mistrial: see *R. v. Satkunanathan* (2001), 143 O.A.C. 1 (C.A.). In *R. v. Brace*, 2010 ONCA 689, 104 O.R. (3d) 32, a mistrial occurred on January 30, 2006, and a new trial date was set for November 6, 2006. However, that trial date became unavailable when an educational conference for the court was scheduled for that week. The Crown then sought to adjourn the trial to February 12, 2007. The defence indicated they were available earlier than February 12 and indicated their intention to bring an 11(b) application at that time. The Court of Appeal held that the delay was unreasonable. In *R. v. Meisner* (2004), 190 O.A.C. 24 (C.A.), the Court of Appeal held that a three-month delay in rescheduling a trial as a result of a potential conflict of interest on the part of the judge was a reasonable accommodation. In *R. v. Allen* (1996), 110 C.C.C. (3d) 331 (Ont. C.A.), the time estimate for the completion of the trial was inadequate largely because of evidentiary concessions that the defence would not make. As a result, it was adjourned for six months. The trial judge granted a stay before the trial's conclusion of the trial. The Court of Appeal set aside the stay.

[43] I refer to these cases to illustrate that delays significantly greater than the delay in this case have been held to be reasonable. In all the cases cited, the mistrial did not occur as a result of the death of the trial judge.

[44] In my view, the delay from July 11 to October 12 (the date the Crown and court were available) is due to exceptional circumstances and must be deducted from the net delay. This delay is 92 days.

Conclusion

[45] After considering the exceptional circumstances and allowing 220 days or 7.3 months as a result of the exceptional circumstances, the remaining delay is 21.6 months less 7.3 months, totalling 14.3 months. This is below the 18-month sealing set out in *Jordan*. The defence has not asserted any prejudice. Therefore, there is no unreasonable delay under *Jordan*.

[46] Because there is no unreasonable delay under *Jordan*, it is not necessary to consider the transitional exceptional circumstance.

[47] With the greatest respect, I find the trial judge erred in law. The delay is not unreasonable. The stay shall be lifted, and the matter remitted to a differently constituted summary conviction court for trial.

Sweeny J.

Released: September 7, 2018

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