

DATE: 20181224

SUPERIOR COURT OF JUSTICE

HEARD: December 3, 2018

SECTION 11(b) RULING

D. E. HARRIS J.

[1] This Section 11(b) unreasonable delay application highlights the potentially dire consequences of a major disclosure failure by the Crown in a jurisdiction beset with chronic institutional delay. When mistakes do happen in Central West Region, immediate steps to contain the damage must be taken. That did not happen in this instance.

[2] The applicant is charged with importing 7 kilos of cocaine into Canada on October 2, 2016 through Toronto Pearson Airport. The case got up to the Superior Court in relatively expeditious fashion. It took 9 months, only halfway to the Ontario Court of Justice ceiling (information laid October 3, 2016, committal to trial July 5, 2017).

[3] However, on the eve of trial in Superior Court, the Crown disclosed a mountain of information extracted from the applicant's cell phone, 12,000 pages in all. This could have and should have been provided many months before. No explanation of any kind has been provided. Nor is any extenuating circumstance imaginable. As a result, the trial had to be rescheduled eight full months down the road. It is now set for February 4, 2019. What ought to have been a 20-month delay grew to 28 months and 10 days. Despite the net delay falling below the 30-month *Jordan* ceiling, the applicant's right to be tried with a reasonable time protected by Section 11(b) of the *Charter of Rights and Freedoms* has been violated. The charge must be stayed under Section 24(1) of the *Charter*.

[4] The Supreme Court in *Jordan* considered several different delay permutations which can lead to a violation of the right to be tried within a reasonable time. The one at issue on this application is a delay below the presumptive 30-month Superior Court

ceiling. In these cases, the Supreme Court has set out two signposts to determine whether the right to trial within a reasonable time has been violated: 1. Does the delay markedly exceed what it ought to have been?; and, 2. Did the defence take proactive steps to move the case along throughout?: see *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631, at paras. 82-91.

[5] The onus is on the defence in a below the ceiling case. In addition, the Supreme Court stated in *Jordan* that stays should only be imposed in “clear cases” when the delay falls under the ceiling (para. 83).

THE MARKEDLY EXCESSIVE DELAY ISSUE

[6] The majority in *Jordan* elaborated on the markedly excessive delay issue in the context of cases under the presumptive ceiling, saying:

87 ... the defence must show that the time the case has taken markedly exceeds the reasonable time requirements of the case. The reasonable time requirements of a case derive from a variety of factors, including the complexity of the case, local considerations, and whether the Crown took reasonable steps to expedite the proceedings.

...

89 In considering the reasonable time requirements of the case, trial judges should also employ the knowledge they have of their own jurisdiction, including how long a case of that nature typically takes to get to trial in light of the relevant local and systemic circumstances.

...

91 ... trial judges should step back from the minutiae and adopt a bird's-eye view of the case. All this said, this determination is a question of fact falling well within the expertise of the trial judge (*Morin*, per Sopinka J., at pp. 791-92).

[7] The inquiry has two related components: 1. Is the delay for the case at hand markedly excessive? This is the primary issue; and 2. What is a typical delay for a case of the same general nature in the local jurisdiction? This will inform the question of whether the delay in the particular case at hand is markedly excessive.

[8] Dealing with the first issue, in a case with a missed first trial date like this one, we have a ready-made yardstick of the reasonable time requirements of the case: the delay to the first trial date. This is when the trial should have been heard and completed. In this case, the time period in this court is from the first appearance—July 28, 2017—to the aborted trial date of June 4, 2018. This delay is 10 months and one week.

[9] The disclosure problem resulting in the loss of the first trial date added 8 months, bringing the total delay to 28 months. The 8 months caused by the disclosure delay constitutes almost 30 percent of the total. A delay of this magnitude appears on its face to qualify as markedly excessive.

[10] To look at it from a slightly different angle, *Jordan* allows 12 months for the Superior Court portion of two-part proceedings (see *Jordan*, para. 49). This is not a ceiling as such. It does not mark an automatic presumptive termination point. But delay above it may well qualify as a delay markedly exceeding the time necessary to complete the matter.

[11] This case took 18 months. It is a routine importing case, a staple in this courthouse by virtue of Brampton's jurisdiction over offences committed at Toronto Pearson Airport. The simple nature of the case is demonstrated by the fact it is now set for a relatively compact six-day jury trial.

[12] In terms of the usual delay to get a trial of this kind heard in Brampton Superior Court, it is in the range of 10-12 months. The first scheduled trial date fell within this parameter. The second fell well outside of it. By this measure as well, the delay of 18 months—50% higher than the norm—was markedly excessive.

[13] We do not know too much about the details of the cell phone extraction, the cause of the critical delay. At no time did the Crown give any type of explanation. The cell phone was seized upon arrest of the applicant on October 2, 2016. An information to obtain a warrant to gather the contents of the cell phone was sworn and granted in late June 2017, about 9 months later. There was no explanation given for this 9 month lapse.

[14] The first the defence heard about the extraction was on May 24, 2018, two weeks before the June 4, 2018 trial and almost 20 months after the charge was laid. Crown counsel alerted defence counsel that day of the existence of the warrant and imminent disclosure of a cell phone "data dump." On May 28, 2018 defence counsel advised the Crown they would be asking for an adjournment of the June 4 trial and asked for disclosure of the Information to Obtain (ITO) the warrant. It was disclosed the next day.

[15] On June 1, 2018, defence counsel brought an application to adjourn the trial date. The Crown was not opposed and the adjournment was granted. On June 8, 2018 a new trial date of February 4, 2019 was set. Neither lawyer asked for an earlier date nor raised any concern about delay.

[16] It was not until June 22, 2018 that the USB with the extraction contents was made available to the defence. This was well after the first trial date had passed and after the second trial date had been set.

[17] Crown counsel on this hearing made it a major feature of his argument that the evidence from the cell phone was not evidence at the heart of the charge. It was not like drugs constituting the fruits of a search warrant. It did not go to the gravamen of the offence. Therefore, the argument appeared to go, the failure to disclose was not serious.

[18] This argument is misconceived. If the evidence was relevant, it had to be disclosed to the defence under *R. v. Stinchcombe*, [1991] 3 S.C.R. 326. Disclosure had to be made in a timely way to afford the defence an opportunity to defend against it or to make use of it for their own purposes. The Crown clearly failed in its fair trial obligations by disclosing the evidence at the 11th hour.

[19] The Court of Appeal recently rejected an argument like the one made by the Crown in this hearing. Justice Paciocco in *R. v. D.A.*, 2018 ONCA 96, at para. 13 considered delays occasioned by defence counsel requiring time to review late disclosure:

The Crown suggested before us that its consent to adjourn the April 2, 2015 pretrial because of its own last minute disclosure is unimportant in assessing unreasonable delay unless, by its nature, the information disclosed is shown to have been essential to the case. I do not agree. The accused is entitled to review disclosure they have received to determine its importance, before moving a case forward. Where, as here, that disclosure is made so late that it cannot be reviewed before a scheduled appearance, the Crown cannot fairly assert that the accused should go ahead and set a date at that scheduled appearance.

[20] Also see *R. v. Osei* 2007 CarswellOnt 1167, [2007] O.J. No. 768, 152 C.R.R. (2d) 15 (S.C.), at paras. 23-24

[21] The standard of conduct expected of the Crown in criminal proceedings was commented on by the majority in *Jordan* in the course of the markedly excessive delay discussion for under the ceiling cases,

90 Where the Crown has done its part to ensure that the matter proceeds expeditiously—including genuinely responding to defence efforts, seeking opportunities to streamline the issues and evidence, and adapting to evolving circumstances as the case progresses—it is unlikely that the reasonable time requirements of the case will have been markedly exceeded. As with assessing the conduct of the defence, trial judges should not hold the Crown to a standard of perfection.

[22] In this proceeding, unlike the model of conduct cited in the above paragraph, the Crown has not proceeded expeditiously. Drug couriers, like almost everyone else in our society, carry cell phones. A standard investigative step in an importing case is to seize the cell phone and examine its contents. Frequently discovered is circumstantial evidence which may assist in proving the accused's knowledge of the drugs. A warrant for extraction is easily obtained. Why it took 9 months just to get the warrant in this case is disconcerting. But not disclosing the existence of the cell phone extraction until the eve

of trial over a year and a half after the seizure, and the actual contents until even later, is obviously unacceptable.

[23] Even if the Crown had disavowed any reliance on the cell phone material, the defence would have had the right to review it and use it in their defence. It may well be that the Crown ought to have carefully considered whether delving into the cell phone evidence in the first place was necessary. Once the decision was made to obtain a warrant and perform an extraction, the results had to be disclosed to the defence, even if the Crown was not going to use the evidence for their case. The Crown and police should have decided before they obtained the warrant whether the potential delays were worth it.

[24] Defence counsel called the performance of the police in these two aspects negligent. The Crown did not make a counter argument, nor could one realistically be made. Examining the long delay in obtaining the warrant together with the casual, delayed disclosure of the extraction, clearly something went badly awry. It is tempting to suggest that there may well be systemic management dysfunction at the R.C.M.P. or insufficient dedication of resources to the preparation of the Crown's case. However, the paucity of this record does not permit any firm conclusions to be made.

[25] What can be said with certainty is that the investigative task was not difficult or complex. The warrant and the extraction should have been virtually automatic. The police could easily develop a template for an ITO and in virtually every case do the extraction promptly after the seizure of the cell phone.

[26] The Crown also argued that the defence was at fault for not requesting the cell phone records. This submission rests on both factual and legal misconceptions. First, the defence did not know and could not have known that the Crown intended to extract the contents of the cellphone. Second, it was solely the Crown's obligation to disclose the cell information. While there may be a due diligence obligation on the defence in some circumstances, clearly there is no such obligation where it is not even known that the evidence is going to be gathered. The Crown mistakes this situation for one in which the defence is complaining about disclosure timeliness and is required to show an exercise of due diligence: *R. v. Dixon* [N.S.S.C. sub nom *R. v. McQuaid*], [1998] 1 S.C.R. 244, [1998] S.C.J. No. 17, at para. 37. Third, it may be that defence counsel, based on instructions from the client, did not want the cell phone records and was content to let sleeping dogs lie. That was entirely their prerogative.

[27] The fact remains, disclosure was solely the Crown's obligation. Disclosure problems are a notorious cause of delay issues: *R. v. Morin*, [1992] 1 S.C.R. 771, [1992] S.C.J. No. 25, at para. 46, *R. v. Boronka*, 2012 ONSC 4952, at para. 74, *R. v. McNeilly*, [2005] O.J. No. 1438 (S.C.), at para. 72.

DEFENCE STEPS TO EXPEDITE THE PROCEEDINGS

[28] The majority in *Jordan* explained that the defence must take steps to move the case along in under the ceiling stay applications:

84 To discharge its onus where delay falls below the ceiling, the defence must demonstrate that it took meaningful, sustained steps to expedite the proceedings.

"Action or non-action by the accused which is inconsistent with a desire for a timely trial is something that the court must consider" (*Morin*, at p. 802). Here, the trial judge should consider what the defence could have done, and what it actually did, to get the case heard as quickly as possible. Substance matters, not form.

85 To satisfy this criterion, it is not enough for the defence to make token efforts such as to simply put on the record that it wanted an earlier trial date. Since the defence benefits from a strong presumption in favour of a stay once the ceiling is exceeded, it is incumbent on the defence, in order to justify a stay below the ceiling, to demonstrate having taken meaningful and sustained steps to be tried quickly. While the defence might not be able to resolve the Crown's or the trial court's challenges, it falls to the defence to show that it attempted to set the earliest possible hearing dates, was cooperative with and responsive to the Crown and the court, put the Crown on timely notice when delay was becoming a problem, and conducted all applications (including the s. 11(b) application) reasonably and expeditiously. At the same time, trial judges should not take this opportunity, with the benefit of hindsight, to question every decision made by the defence. The defence is required to act reasonably, not perfectly.

[29] The progress of this matter demonstrates that defence counsel was anxious to move the case along and did so. The one exception, and an important one, occurred after the first trial date had been vacated and the matter was up to set a second trial date. This will be discussed in detail below.

[30] The case moved particularly quickly in the Ontario Court. Counsel was retained by the second appearance after the show cause, within two months of the charge. A Crown pre-trial was scheduled by defence counsel and conducted on December 1, 2016, only about six days after the initial disclosure was received. At the Crown pre-trial, defence counsel advised that he would concede committal and proceed by way of discovery. He identified 4 officers to be called at the hearing. Three sets of officer notes remained outstanding. Defence counsel said he may also require the attendance of the three officers at discovery, depending what was in the notes. A follow-up email was sent to the Crown on December 7, 2016 naming the four officers he wanted to hear from on

the discovery and requesting the notes from the three other officers. An affidavit from the Crown filed on this hearing states that the three officers were peripheral and were not called at the discovery.

[31] All this happened in very short order thanks to defence counsel. Unfortunately, the follow-up email was sent to the wrong address and Crown counsel never received it. At the appearances on December 23, 2016, January 6, 2017, January 20, 2017, February 10, 2017, and March 10, 2017, agent for defence counsel appeared and noted that the follow-up email had been sent but there had been no response. Finally, on the March 10, 2017 date, the Crown suggested that a judicial pre-trial be scheduled despite the missing notes. The defence agreed and April 26, 2017 was set. On May 5, 2017, the case was remanded for the discovery set for July 5, 2017. The defence had many dates available before that time but the Crown and the court were not available until June 26, 2017, a date which the defence was evidently not available. Discovery and committal occurred on July 5, 2017, 9 months after the charge.

[32] The Crown argues that because the date of July 4, 2017, the day before, was offered by the trial co-ordinator, one day should be categorized as defence delay. I need not deal with this argument as one day would make no difference one way or the other.

[33] The first available date for the initial appearance in Superior Court was selected. On this July 28, 2017 first appearance, the defence asked for August 8, 2017 for a pre-trial but the Crown was not available. The defence then asked for July 31, 2017 but the

Crown thought the three day turn around was too short. August 3, 2017 was set. The Crown was in a position to set a trial date but the defence wanted the judicial pre-trial to be held first.

[34] After the August 3, 2017 judicial pre-trial, the trial dates of June 4, 11 or 18, 2018 were offered. Counsel chose June 4 for a two-week trial. From the set date to the trial date was a period of 10 months.

[35] The Crown argues that because the Crown was ready to set a date on July 28, 2017 but the defence was not ready until August 3, 2017, this period of time, a matter of one week, should be subtracted from the delay. It is arguable that this one-week period falls within the category of “defence actions legitimately taken to respond to the charges” and ought not to be subtracted: see *Jordan* at para. 65. The characterization of this period depends on whether the pre-trial is seen as a necessary step before the trial date was set. Not much turns on this question as it is only one week at stake. I am prepared to assume for the purpose of argument that it ought not to form part of the total delay, thus reducing the total net delay to 28 months, rounding down a few days.

[36] The matter came up to select a new trial date on June 8, 2018 before Justice Durno. The defence explained that the first trial had been adjourned because there had been late Crown disclosure. On May 24, the Crown had advised that they would be disclosing a “data dump” from the client’s cell phone. Counsel did not yet have the new disclosure. When Justice Durno asked whether the estimate had changed since the 7-8

day estimate, defence counsel agreed that 6 days was now appropriate because they were abandoning issues with respect to the accused's statements. The court then offered February 4, 2019 as the new trial date. This was 8 months away. Curiously, neither the Crown nor defence counsel spoke up to confirm that the date offered was the earliest date available nor did they inform Justice Durno that there were potential delay problems hanging over the case.

[37] Up to the critical point of the hearing at which the second trial date was set--to be dealt with below--the defence acted to effectively and steadily move the matter along. Realistically, the defence could not have done much more than they did. They acted diligently. The defence conduct of the case is on par with other instances in the case law, many out of this jurisdiction, in which it is concluded that meaningful steps were taken: see *R. v. McLiquham*, [2018] O.J. No. 4226 (C.J.), at paras. 54-75, *R. v. Ashraf*, 2016 ONCJ 584, [2016] O.J. No. 5079, at paras. 78-86, *R. v. Reynolds*, 2016 ONCJ 606, [2016] O.J. No. 5300, at paras. 39-40, *R. v. Santhanam*, [2016] O.J. No. 6691 (C.J.), at para. 45.

[38] The Crown argues as his central theme on this aspect of the delay that the over two months which were lost by reason of the errant email prevents the defence from bringing itself within the reasonable steps category. I disagree. The intention to move the case along quickly is evident in this email sent just days after the Crown pre-trial. It was a simple mistake that the email did not get to where it was intended to be sent. In the

several appearances which followed, the defence maintained the letter had been sent while the Crown maintained that they had not received it. It should, with the benefit of hindsight, have been cleared up more quickly. There can be no question, however, that there was an intention to move the case along swiftly.

[39] More importantly, it is very puzzling that at the crucial set date for the second trial on June 8, 2018 neither the Crown nor the defence voiced any concern about delay or asked for an earlier date. This is all the more troubling in view of Justice Durno's announcement at the beginning of all assignment courts, including this one on June 8, 2018, that if there were prior delay concerns or delay issues as a result of the dates that were being set, it was the responsibility of counsel or the accused to let the court know.

[40] Even if this warning had not been given, but particularly because it was, the obligation fell squarely on both the Crown and the defence as participants in our badly backlogged jurisdiction to make known the problem. At least the defence pointed out that the first trial date was lost due to the Crown's late disclosure. The Crown said and did nothing.

[41] The rationale behind the requirement for the defence to take steps to hasten the case through the system is that because cases over the threshold benefit from a presumption, cases under the ceiling exhibiting delay should be strictly proven: *Jordan*, at para. 85. Slightly restated, the purpose is to ensure that the defence does not reap a windfall in a case in which they have not been eager to minimize delay. The purpose may

also be to ensure that underlying prejudice, the motivating force under Section 11(b), is actually being incurred. However, the full context demonstrates that the defence failure in this case to ask for an earlier date or to complain about the delay was not a tactic to earn an advantage for the accused nor was it a sign that there was no ongoing prejudice to the applicant.

[42] The misstep by the defence is not enough in full context to demonstrate a failure to take reasonable, sustained, meaningful steps to have this trial heard promptly. It does not outweigh or cancel out the continuous course of conduct and co-operation evident throughout the proceedings. At the crucial set date, they could have pressed for an earlier date. However, when counsel said that the delay had been a result of late disclosure, it was abundantly clear that he was not lying in the weeds waiting to pounce on a Section 11(b) application to benefit the client. The defence did not act perfectly but they did act reasonably.

[43] Taking a birds-eye view as *Jordan* asks us to do, it must be remembered that the delay was caused by Crown negligence. It was a problem they created; it made sense for them to be the primary actor in formulating a solution.

[44] The 30-month ceiling above them may have lured the Crown and defence into a false sense of security. It is perhaps understandable that there would be a fixation on the bright-line cut-off date when a prosecution must presumptively be stayed. They may have assumed that delays below the ceiling were not a serious problem. But the delay was only

a little more than a month and a half under the ceiling. And the “below the ceiling” line of authority is a well-known part of the *Jordan* jurisprudence. Counsel should have recognized the problem. The culture of complacency was likely partially responsible for counsel’s lackadaisical attitude.

[45] The majority in *Jordan* was clear in saying that the system should do better than the 30-month ceiling,

57 There is little reason to be satisfied with a presumptive ceiling on trial delay set at 18 months for cases going to trial in the provincial court, and 30 months for cases going to trial in the superior court. This is a long time to wait for justice. But the ceiling reflects the realities we currently face. We may have to revisit these numbers and the considerations that inform them in the future.

[46] That is the attitude counsel ought to have carried into the crucial appearance to set a second trial. Notwithstanding that they did not, in my opinion, this a clear case. It is ultimately the Crown’s obligation to bring the accused to trial. The defence were not dragging their feet or frustrating the Crown efforts. Their actions facilitated the progress of this prosecution until this final set date. The Crown caused the markedly excessive delay and then, having an opportunity to rectify their error, failed to act.

[47] The applicant’s Section 11(b) right has been violated. The indictment is stayed under Section 24(1) of the *Charter*.

D. E. HARRIS J.

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ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

HER MAJESTY THE QUEEN

Respondent

- and -

CHANELLE BELLE

Applicant

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