

ONTARIO COURT OF JUSTICE

B E T W E E N :

HER MAJESTY THE QUEEN

Respondent

— AND —

NINA EL-NASRALLAH

Appellant

Before Justice Mara Greene

Reasons for Judgment released on March 8, 2018

A. Queijo.....for the Respondent
C. Hurley..... for the Appellant

Greene, J:

[1] On July 22, 2016, the appellant was charged with driving a motor vehicle while using a hand held device contrary to section 28.1(1) of the *Highway Traffic Act*. Her trial was held on June 15, 2017. At trial, the Appellant argued that her 11(b) rights were violated because it took 10 months and 24 days for her matter to proceed to trial. The trial judge dismissed this application. The matter proceeded to trial and the Appellant was found guilty. The only issue on appeal is whether the trial judge erred in dismissing the 11(b) application.

Brief Summary of the facts

[2] On July 22, 2016 Ms. El-Nasrallah was charged with driving while using a hand held device. On July 29, 2016, Ms. El-Nasrallah filed her notice to have a trial with the clerk of the court. On October 26, 2016, the notice for trial was issued and a trial date of June 15, 2017 was set. The trial proceeded and concluded on June 15, 2017 some 10 months and 24 days after Ms. El-Nasrallah was charged.

The Issue

[3] The Appellant argued in her factum that the trial judge erred in finding that there was no 11(b) violation. The argument set out in the factum filed with the court references only the frame work from *R. v. Morin* (1992), 71 C.C.C. (3d) 1 (S.C.C.). In oral argument, the representative for Ms. El-Nasrallah argued that the framework from *R. v. Jordan* ought not be employed for provincial proceedings under Part I because the trial process for these types of quasi criminal proceedings is very different from criminal cases. The representative for Ms. El-Nasrallah further argued that any delay beyond 10 months for Part I offences should be found to be constitutionally intolerable.

[4] The respondent urged the court to follow the framework from *R. v. Jordan* and given that the delay is well below 18 months, the respondent argued that the trial judge's finding should be upheld.

Analysis

[5] In July 2016, around the same time that Ms. El-Nasrallah was charged, the Supreme Court of Canada in *R. v. Jordan*, [2016] 1 S.C.R. 631, provided a new framework for trial judges to follow when determining whether the delay in a matter proceeding to trial violated s. 11(b) of the *Charter*. The heart of the new frame work is the presumptive ceiling of 18 months for matters proceeding in the Ontario Court of Justice. Delay longer than 18 months is presumptively unreasonable. This 18 month ceiling takes into account the time from when information is laid until the end of the trial minus defence delay. Defence delay can come in two forms. Firstly, through a voluntary waiver and secondly when the delay is caused solely by the actions of the defendant.

[6] The Supreme Court of Canada in *R. v. Jordan* was silent on whether or not the 18 month ceiling should apply to provincial offences matters. The Appellant argues that it should not apply. Respectfully, I disagree, in my view there is no legal basis to conclude that the Supreme Court of Canada in *R. v. Jordan* was putting forward a new framework that would exclude provincial offences. In fact, there is a compelling argument that the Supreme Court of Canada intended the new framework to apply to all cases in the Ontario Court of Justice. In *Jordan*, the Supreme Court of Canada held that the new framework was necessary to address the culture of complacency in the Canadian Criminal Justice System and to address the “doctrinal shortcomings” of the *Morin* framework. Moldaver J. wrote at paragraph 38,

In sum, from a doctrinal perspective, the s.11(b) framework is too unpredictable, too confusing, and too complex. It has itself become a burden on already over-burdened trial courts.

[7] In light of this language, it is unreasonable to conclude that the *Morin* framework should still apply to Part I provincial prosecutions. While it is my view that

the Jordan framework of a presumptive ceiling must apply to Part I offences, it does not necessarily follow that the presumptive ceiling for Part I offences should be the same as the ceiling for criminal matters. As McInnis J. noted in *York (Regional Municipality) v. Tomovski*, [2017] O.J. No. 6073 (O.C.J.), while it is clear that the presumptive ceiling framework applies to Part I proceedings, it is less clear that the number chosen for the presumptive ceiling is equally applicable (*York v. Tomovski, supra*, at paragraph 137).

[8] There is a solid legal and principled basis to fix a lower presumptive ceiling for provincial offences Part I proceedings. As Libman J. noted in *R. v. Andrade*, 2011 ONCJ 470, provincial matters under Part I are less complex than criminal cases, do not have a significant intake period and should take place expeditiously. Libman J. stated at paragraph 64:

According to Justice Doherty, the Morin summary conviction guidelines govern, though not strictly, thereby mandating a period of 8 to 10 months for provincial offences trials to be heard in the Ontario Court of Justice. However, unlike trial matters for summary conviction criminal offences, provincial offences Part 1 proceedings require no court appearance before the matter is set down for trial, or other routine features involved in scheduling criminal trials, such as retaining counsel or applying for legal aid, preparing and providing disclosure, attending a pre-trial meeting with the Crown or judge, or consulting with the trial coordinator to arrange a trial date. In essence, once the defendant is given his/her traffic ticket, there is little further for either the defendant or police officer to do, other than file their respective paper work and wait for a trial date to be scheduled. Neither is there anything that must be done by the prosecutor in order for the process to proceed. As a result, the lengthiest portion of the time it takes for a Part 1 provincial offences proceeding to be heard will ordinarily consist of systemic or institutional delay.

[9] In light of the above findings of fact, Libman J. held that the intake time for provincial proceedings under Part I should be 45 to 60 days and that the subsequent tolerable institutional delay should be 8-10 months.

[10] McInnis J., focusing on the same factors identified in *Andrade*, held that under the Jordan framework, the presumptive ceiling should be less than the ceiling of 18 months permitted for criminal cases held in the Ontario Court of Justice. McInnis J. stated at paragraphs 144-145,

The “realities we currently face” in Part I process are different realities than the ones reflected in the ceilings set in *Jordan*. Had the Supreme Court used data derived exclusively from Part I and its analogues in the other provinces, its methodology would have generated a lower number of months than 18. Accordingly, I find the lower overall inherent time requirements of Part I

proceedings furnishes a valid legal basis to distinguish *Jordan* to the extent of allowing for a lower presumptive ceiling. A lower ceiling is required to ensure fidelity to the broader principles announced in *Jordan* in this very different procedural context”

[11] I agree with my colleagues that given the realities of provincial offences Part I proceedings, the fact that there are no significant intake proceedings and the matters tend to be relatively simple and not time consuming, the presumptive ceiling for these types of offences ought to be lower than the ceiling for criminal cases.

[12] The Appellant argued that the upper ceiling should be 10 months. He argued that 10 months is the logical number based on Libman J.’s reasoning in *Andrade*. Respectfully, I disagree. In *Andrade*, Libman J. did not find that in all cases the ceiling should be 10 months. Instead, he identified a set of guidelines for other courts to consider in assessing whether or not there has been an 11(b) violation. Moreover, in *Andrade*, while the overall delay for Part I matters was said to be less than for criminal matters, largely because of the absence of intake activity, the reduction was only a few months less than the acceptable delay in simple criminal trials as opposed the significant reduction being proposed by the Appellant.

[13] In *York v. Tomovski*, McInnis J. held that the presumptive ceiling for Part I offences should be in the 13-15 month range. In reaching this conclusion, McInnis J. relied upon the evidence presented at that hearing which included statistical data about the volume of provincial offences in the York Region, evidence around the process of setting trial dates in York Region for Part I offences, and explanations for the delay in setting trial dates. He also considered the need for speedy justice in Part I proceedings and the reduced intake time required for these matters.

[14] In the case at bar, I do not have the same wealth of evidence that McInnis J. had in the *Tomovski* case. It is therefore difficult to assign a number to the upper ceiling. While I am unable to identify a clear number for the upper ceiling for Part I proceedings, in my view, there is no basis to reduce the ceiling to 10 months. Reducing the upper ceiling by eight months places too much weight on the intake period and not enough weight on the administrative realities of setting trial dates. It is difficult to imagine an upper ceiling for Part I offences that is less than twelve months given the realities of busy courts. Since the delay in the case at bar was well under 12 months, I am satisfied that the trial judge did not err in finding that there was no 11(b) violation.

[15] Since no other grounds of appeal were raised and no other legal errors were identified by the Appellant, the appeal is dismissed.

March 8, 2018
Justice M. Greene