

**ONTARIO COURT OF Justice  
Central West Region**

**Regina**

**-and-**

**Ahmed Fahmy**

**Hearing re: Motion to Adjourn 27 June, 2019**

2019 ONCJ 464 (CanLII)

**Appearances:**

Zenko, C.

for the prosecution

Bendgi, Y.

P1 Licensee for the defence

**Statutes Considered or Cited:**

*Highway Traffic Act, R.S.O. 1990, c. H.8, as amended (“HTA”)*

*R.R.O. 1990, Reg. 200: RULES OF THE ONTARIO COURT (PROVINCIAL DIVISION) IN PROVINCIAL OFFENCES PROCEEDINGS*

**Cases Considered or Cited**

*Mississauga (City) v. Malik*, 2010 ONSC 2334

*R. v. Jordan*, 2016 SCC 27

**Decision**

1. For the reasons set out below, I am declining to grant the Prosecution motion for adjournment, made orally today.

***Background and “Evidence”***

2. The matter is before the Court today for a trial. The history is relevant.
3. The defendant is charged with careless driving pursuant to s.130 of the *HTA*, and pursuant to Part III of the *POA*. The offence date alleged is 15 March, 2018, however, the Information setting out the charge was sworn on 12 September, 2018, just a few days short of the six month limitation set out in the *POA*<sup>1</sup>. There is no information before me as to why the matter took that long to produce a charge, however comments on the record suggest that the incident giving rise to the charges involved a major motor vehicle collision involving four motor vehicles, and multiple witnesses. I have no information as to whether there were injuries or the extent of any, nor of any fatality.

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<sup>1</sup> S.76(1)

4. After the Information was sworn, a judicial summons was issued, returnable on 16 October, 2018, and the defendant appeared through a retained licensee of the Law Society of Ontario who received disclosure on his behalf.
5. There was a further appearance in November and again in December, and information suggests that there was an outstanding request for transcription of at least part of the disclosure. That remained in issue and two judicial pre-trials were held in March and May, 2019. The day following the March pre-trial, the disclosure issue was apparently resolved.
6. That said, the defence indicates that the defendant had a discussion with the OIC about a video that may have been captured by the Ministry of Transportation of Ontario. The Prosecution holds that if this exists (the Prosecutor has no knowledge as to whether it does or does not), it would constitute a third party record and is not produceable by the Prosecution.
7. The matter was set for trial on May 10, 2019, for essentially a full day, for today's date.
8. The defence asserts and the Prosecution does not contest that they were told the Prosecution would be calling four witnesses, two police officers and two civilians.
9. At the outset of proceedings today, the Prosecution advanced its motion for adjournment. They asserted that it would only be relying on one police witness – the Officer in Charge ("OIC") who was present and one civilian witness, who has not been served with a summons to attend.
10. During evidence, the investigating officer advised that he was notified about three weeks prior to today's date of the trial date and to contact the civilian witness. He made several attempts to contact that witness at the phone number he had for that witness but connected to a response that advised that no voice mail messages could be left. There is no evidence regarding other efforts to contact the witness in any other fashion, nor of any request for the issuance of a summons to witness, and, accordingly, no information about any efforts to serve such a summons if one had been judicially authorized.
11. The Prosecutor confirms he is recently assigned to the local Prosecution team and took over carriage of the file upon joining the office. Shortly after being installed in his position, he reviewed the file and advised the local OPP co-ordinator of the trial date and the need for the witness. While there is no evidence directly on this point, it appears that this is what triggered the information to the OIC and his subsequent efforts to contact the witness.
12. The Prosecutor further advised, and the OIC gave evidence that they discussed the matter while both were in court yesterday, and the OIC followed up with the witness yesterday, but did not make contact.
13. The decision to call only two witnesses was not communicated to the defence prior to the defence arriving in court this morning.
14. It would appear that the Prosecutor may not have been apprised of the prior representation that the Prosecution would be calling four witnesses, and, this may explain why he saw no need to advise the defence, however, the Prosecution further takes the position that it has no obligation to call or produce any witness at trial.
15. The Prosecution made his initial submissions based on materials in a "prosecutor's Manual". The Court invited submissions on the factors enunciated in *Mississauga (City) v. Malik* and he did so.

16. Specifically, he points out:

- a. This is the first trial date.
- b. Although the matter has taken some time to get to this stage, a new trial date is available. Dates were offered in July and October (as an aside, the defence acknowledged it would be available on the available dates). The October dates would be later than eighteen months from the alleged offence date but only some nine and a half months from the date the Information was sworn, and there is little likelihood of a delay issue arising.
- c. It is clear that there have been multiple appearances prior to today's date, given that this matter proceeded by way of Part III of the *POA*, and the need for pre-trials. He highlights that even at this stage, the defence holds out the potential of a disclosure issue and there is no application for production of third party records if they exist.
- d. Is this request *bona fide*? In the prosecution view, and having particular regard to the recent appointment of a local Prosecutor, reasonable efforts were made to produce the witness for trial. In this regard, the request is not for any improper purpose. In any event, the Prosecution concedes that an order that the matter be peremptory on the Prosecution on any later date will address any concerns as to why this adjournment request is arising at this late hour.
- e. The defence will not only avoid prejudice with the grant of an adjournment but may be advantaged, now that it is aware of the Prosecution intent in terms of witnesses and now being able to decide whether to seek to compel the attendance of any additional witnesses for the defence.
- f. Clearly, if the requested adjournment is not granted, the Prosecution case will, in effect, collapse. In the Prosecution view, this is a significant allegation (the circumstances giving rise to the charge described above), and warrants adjudication on the merits.

17. The defence opposes the adjournment. Defence submissions may be summarized as follows:

- a. The defence is ready to proceed and has made itself available for a full day trial today. The inference to be born is that there is prejudice to the defendant in terms of both time and cost, although this was not advanced in the defence submissions.
- b. The failure of the Prosecution to produce its witness is not in any way in the hands of the defence. The Prosecution knew of the trial date and failed to take reasonable steps to ensure the attendance of that witness.
- c. The defence relied on the Prosecution representation when the trial was set that it would be calling four witnesses, and this is further evidence of unfair behaviour on the part of the Prosecution.

## Outcome

18. The starting point for my analysis is the decision of Ricchetti, J, of the Superior Court in *Mississauga (City) v. Malik*.

19. In that decision, His Honour set out a series of considerations for these courts to consider when ruling on motions for adjournments. He said

Where the request for an adjournment is made, the judicial officer is bound to demonstrate that the request was fairly listened to and the judicial officer considered all relevant factors in deciding whether to grant the adjournment. This would include such factors as:

- a. The length of time between the date of the offence(s) and the court date the adjournment is being sought. The longer the period of time, the greater the likelihood the adjournment should not be granted as the likelihood of prejudice to the defence increases.
- b. The amount of time before the matter can be scheduled. Again, the longer the period of time before a new return date, the greater the likelihood the adjournment should not be granted.
- c. Whether this is the first time the matter has come up. If the matter has come before the court on several or numerous occasions before, it is more likely an adjournment should not be granted because of the increasing delay by one party or the other.
- d. What is the reason for the adjournment request? Is it bona fide? Is it because of an administrative error? Is it an attempt to delay the matter? Bona fide requests or administrative errors may strongly favour granting the adjournment. On the other hand, if it appears the party seeking the adjournment is attempting to delay the matter or is due to a systemic problem within the administration, this may strongly favour denying the adjournment.
- e. Will the party who has not sought the adjournment be prejudiced if the adjournment is granted? If so, are there any other ways in which the matter can be dealt with expeditiously or the prejudice lessened?
- f. What is the impact of not granting the adjournment? In this case, it was clear to the Justice of the Peace in both cases that the result would be the dismissal or stay of the charges. The impact on society's interest in having public safety charges heard on the merits is a factor to be considered as well.

20. As set out above, in my view, the Prosecution motion for an adjournment must fail.

21. To start, the Prosecution has failed to satisfy me that reasonable efforts were made to compel the attendance of the witness. It appears that the first effort to do so may have started with the Prosecutor's review of the brief upon taking on this role. While this particular prosecutor may not be liable to be blamed for the matter not being flagged earlier, given the timing, it is clear that the Prosecution office knew of the need for the witness upon the date for trial being set, on the 10<sup>th</sup> of May, some six weeks ago. There is nothing before me to suggest that any steps were taken to ensure the attendance of that witness until the file was review afresh.

22. While it is true that today's proceeding is the first trial date, that does not respect the burden on the defence prior to today's date. Defence appeared on the first appearance date by retained representative, and promptly signalled the need for clarification of the notes. Those notes were not produced until the day following the first judicial pre-trial in the matter. Clearly, the defence has invested heavily in preparing for today's trial.

23. As a further note, I am mindful that the decision in *Mississauga (City) v. Malik*<sup>2</sup> dealt with matters under Part I of the *POA*. In that regard, the factors may be distinguishable. That case pre-dates *R. v. Jordan*, and all the efforts this court has invested in enhanced case

<sup>2</sup> I was the justice whose decision was the subject of the companion matter addressed by Justice Ricchetti's decision.

management and ensuring trial readiness. Although an alternative trial date may be on the close horizon, accepting the notion that a first trial date – particularly when the matter is set exceptionally for a full day trial – disrespects the resources necessarily committed to trials.

24. While it may well be that the matter is important to be determined on its merits (multiple involved vehicle, etc), the prosecution has not signalled any injuries or fatalities. The corollary to the Prosecution argument regarding the importance of this matter would, in my view, reasonably be matched by efforts to ensure the trial can proceed as directed by the Court on the consent of the parties. The failure to satisfy me that even rudimentary steps such as summoning a witness was taken belies the proposition that the matter is that important.
25. It is generally accepted that the Prosecutor serves as the “local Minister of Justice”. As such, the role of the Prosecutor is to ensure that the matters are properly put before the Court to allow the Court to make sound decisions. Respectfully, once the Prosecutor signals an intent to call witnesses, to then rely on a subject uncommunicated decision to reduce the number of witnesses to be called and then to rely on the possibility that the defence may need to summons any such witness(es) as an offset against prejudice is not in keeping with the high and honourable standards to which the Prosecution is held.
26. Finally, I note that this matter is by way of oral motion on the trial date and not in the normal fashion anticipated by what is commonly referred to as Rule 200 under the *Courts of Justice Act*. I understand the Prosecution position that it only learned of status of the witness either yesterday or this morning, however, that again belies the absence of focus on preparing for this matter. Respectfully, that Rule is honoured more in its breach than compliance, much to the detriment of orderly operation of court proceedings. Even in the event that a proper motion could not be prepared and served, courtesy would have suggested notice by phone at the earliest opportunity. Given that the Prosecutor had knowledge of the efforts to contact the witness – and that only by phone and not by summons – it would have been prudent to contact the defence to advise them by phone, and perhaps avoid the prolonged proceedings this morning.

Issued at City of Burlington, Ontario, June 27, 2019

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His Worship Donald Dudar  
Justice of the Peace