

WARNING

The President of the panel hearing this appeal directs that the following should be attached to the file:

An order restricting publication in this proceeding under ss. 486.4(1), (2), (2.1), (2.2), (3) or (4) or 486.6(1) or (2) of the *Criminal Code* shall continue. These sections of the *Criminal Code* provide:

486.4(1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences;

(i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 210, 211, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or

(ii) any offence under this Act, as it read at any time before the day on which this subparagraph comes into force, if the conduct alleged involves a violation of the complainant's sexual integrity and that conduct would be an offence referred to in subparagraph (i) if it occurred on or after that day; or

(iii) REPEALED: S.C. 2014, c. 25, s. 22(2), effective December 6, 2014 (Act, s. 49).

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).

(2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall

(a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the victim of the right to make an application for the order; and

(b) on application made by the victim, the prosecutor or any such witness, make the order.

(2.1) Subject to subsection (2.2), in proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.

(2.2) In proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice shall

(a) as soon as feasible, inform the victim of their right to make an application for the order; and

(b) on application of the victim or the prosecutor, make the order.

(3) In proceedings in respect of an offence under section 163.1, a judge or justice shall make an order directing that any information that could identify a witness who is under the age of eighteen years, or any person who is the subject of a representation, written material or a recording that constitutes child pornography within the meaning of that section, shall not be published in any document or broadcast or transmitted in any way.

(4) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice when it is not the purpose of the disclosure to make the information known in the community. 2005, c. 32, s. 15; 2005, c. 43, s. 8(3)(b); 2010, c. 3, s. 5; 2012, c. 1, s. 29; 2014, c. 25, ss. 22, 48; 2015, c. 13, s. 18.

486.6(1) Every person who fails to comply with an order made under subsection 486.4(1), (2) or (3) or 486.5(1) or (2) is guilty of an offence punishable on summary conviction.

(2) For greater certainty, an order referred to in subsection (1) applies to prohibit, in relation to proceedings taken against any person who fails to comply with the order, the publication in any document or the broadcasting or transmission in any way of information that could identify a victim, witness or justice system participant whose identity is protected by the order. 2005, c. 32, s. 15.

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. L.L., 2023 ONCA 52

DATE: 20230126

DOCKET: C70176

Huscroft, Trotter and Harvison Young JJ.A.

BETWEEN

His Majesty the King

Appellant

and

L.L.

Respondent

Christopher Webb, for the Crown

Adam Weisberg and Maya Sengupta-Murray, for the respondent

Heard: January 19, 2023

On appeal from the order of Justice Rebecca Rutherford of the Ontario Court of Justice, dated December 8, 2021.

REASONS FOR DECISION

Introduction

[1] The Crown appeals an order staying proceedings against the respondent based on a breach of his right to a trial within a reasonable time as guaranteed by s. 11(b) of the *Charter*.

[2] The respondent was charged with two counts of sexual assault against his intimate partner. The case ultimately proceeded in the Ontario Court of Justice, triggering a presumptive ceiling of 18 months: *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631, at para. 5. Both parties agreed that the total delay was 22 months and 11 days.

[3] There were two main issues before the application judge: (1) did the respondent act reasonably in refusing to elect his mode of trial until he received disclosure of four occurrence reports and related documents?; and (2) did the COVID-19 pandemic have any impact on the scheduling of this trial?

[4] The application judge found: (1) the respondent's delayed election was not unreasonable and any consequent delay was not defence delay; and (2) COVID-19 did not contribute to the delay in getting to trial and ought not to be classified as an exceptional circumstance in the *Jordan* framework. She found that s. 11(b) had been infringed and imposed a stay of proceedings under s. 24(1) of the *Charter*.

[5] On appeal, the Crown attacks both findings. The following reasons explain why we do not agree.

Background

[6] This prosecution did not get off to a good start. The respondent was charged on August 13, 2020.¹ He made his first appearance on September 18, 2020. It took another three months (roughly four in total), and seven written requests by defence counsel, before the Crown provided basic disclosure to the respondent's counsel on December 8, 2020. The complainant's video-taped statement was disclosed on December 9, 2020. There was no explanation of this delay.

[7] The disputed period of delay was between December 9, 2020 (when basic disclosure was made) and May 7, 2021 (when the respondent made his election). When basic disclosure was provided, defence counsel responded by requesting further disclosure of four occurrence reports and other documents relating to incidents between his client and the complainant. The respondent's position was that this material was relevant to his election as to the mode of trial and he would not elect until receiving the documents.

[8] The Crown was not initially responsive to the requests for the additional disclosure. Moreover, it did not advise the defence for over two months that it was taking the position that the state-created occurrence reports and related

¹ The Information was not sworn until August 24, 2020.

documents, prepared by the Toronto Police Service, were third party records. This would turn out to be wrong.

[9] When the Crown's position finally crystallized, the respondent made a disclosure motion in the Superior Court. Justice Akhtar ruled that the requested documents were first party records and primary disclosure: *R. v. L.L.*, 2021 ONSC 3337. But he expressed disapproval of the manner in which defence counsel proceeded. After referring to *Jordan*, he said, at para. 13:

Here, the defence could and should have made its election without the disclosure it now seeks to obtain. There was no reason to delay matters pending the outcome of this application. Accordingly, in my view, that election should be made by or on the next appearance date.

[10] The Crown provided the disclosure as directed and the respondent made his election on May 7, 2021 to be tried in the Ontario Court of Justice. Trial dates were ultimately set for June 20-24, 2022. The application to stay proceedings was heard on November 25, 2021.

The Fresh Evidence Application

[11] On appeal, the Crown challenges the application judge's decision on both issues framed at the outset of these reasons. It also applies to introduce fresh evidence. This includes a statistical report prepared by Diana Grech, an employee of the Ministry of the Attorney General's Analytics and Evidence Branch, which the

Crown claims speaks to the impact of the pandemic on trial scheduling. As well, the Crown seeks to tender some email correspondence between counsel and the trial coordinator.

[12] Applying the principles that govern the admission of fresh evidence set out in *Palmer v. The Queen*, [1980] 1 S.C.R. 759, at p. 775, we dismiss the application insofar as it relates to the statistical report (and the cross-examination of the author of the report). Importantly, the cross-examination confirmed that this data would have been available to the Crown when the s. 11(b) application was argued.

[13] Although problems with the diligence requirement of *Palmer* are often forgiven, we are not persuaded that we should do so in this case. No explanation has been offered as to why this information was not obtained at the time of the application. It is not in the interests of justice for a factual issue such as this one to be addressed for the first time on appeal, especially an appeal concerning s. 11(b) of the *Charter*, when the same evidence was available at trial with reasonable diligence. This manner of proceeding perpetuates the very problems that *Jordan* sought to address.

[14] However, we would admit the additional email correspondence as fresh evidence. These emails should have been included in the respondent's materials on the original application. They appear to have been missed by both parties. That

said, although we would admit this evidence to preserve the integrity of the record, it makes no difference to the outcome of this case.

Analysis

[15] Turning to the first ground of appeal, given the application judge's factual findings, she was correct in finding that the period of delay prior to the election was not attributable to the defence. As she said:

I agree with Mr. Linds that the Crown is not obliged to disclose every piece of disclosure before a trial date is set, before a pre-trial is held or before an election is made. However, here the Applicant was not insisting on every piece of disclosure before making an election. It is clear from Mr. Weisberg's correspondence that once he had the complainant's video-taped statement, the only other disclosure required to move to a meaningful pre-trial were the occurrence reports. Numerous other items of disclosure were listed in Mr. Weisberg's correspondence, however he did not insist on receiving them before holding a meaningful discussion with his client about mode of trial and pre-trials. At no time did the defence hold out for all disclosure.

The requested occurrence reports, in my view, were not trivial in nature. They were not dated. ...The investigative records contained information about the interactions of the complainant and the Applicant in the days and weeks leading up to the complainant's allegations of sexual assault. They also included a statement by the Applicant in relation to these interactions. [Emphasis added.]

[16] The application judge classified the requested materials as, "important first party essential disclosure. They could assist the Applicant to make strategic decisions about the conduct of the trial."

[17] The Crown draws our attention to the recommendation of the judicial pre-trial judge who recommended that, given the impasse between counsel, the most expeditious manner of proceeding was for the respondent to elect to have a trial in the Superior Court. Although this was a constructive suggestion, it could not guarantee the respondent his choice as to mode of trial if he wished to re-elect. In many circumstances, the consent of the Crown is required: see ss. 561 to 563.1 of the *Criminal Code*, R.S.C. 1985, c. C-46.

[18] The Crown also submits that the observation of Akhtar J. on the disclosure motion about the late election should have been given more weight by the application judge, and that it should carry weight in this court. We do not agree. The application judge was not bound by these comments. As she pointed out, Akhtar J. was tasked with determining whether the impugned records should be disclosed. While all players in the criminal justice system must do their part to avoid delay, the question of whether the election should have already been made was not his to decide; it was the application judge's. We see no error in how she handled this issue. She was correct in finding that this period of delay was not attributable to the defence.

[19] We dismiss this ground of appeal.

[20] On the second ground, the appellant submits that the application judge erred in finding that the pandemic had no role to play in the delay in securing trial dates.

As already noted, we dismiss the Crown's application to adduce statistical evidence on appeal.

[21] At the hearing of the application, the Crown chose to convey his own state of knowledge about the impact of the pandemic on the scheduling of trials at that location. He made the vague submission about the “trickle down” effect of the pandemic on trial scheduling. The application judge drew upon her own knowledge of the culture at the court location where she sits. We see no error in her conclusion that the pandemic had no impact on the scheduling of this case.

[22] The application judge gave careful consideration to this issue. She noted:

Nobody doubts the pandemic has wreaked havoc on the criminal justice system. At College Park many trials had to be adjourned only to be re-scheduled.

However, this is not one of those cases. The case entered the justice system when courts had re-opened. The realities of the pandemic were very clear. Trial coordination was evolving and coping.

. . .

In all of the circumstances I am of the view the pandemic played no role in the delay of setting this case down for trial. [Emphasis added.]

[23] In the absence of evidence suggesting otherwise, there is no basis on which to disturb this finding. The application judge did not err in refusing to find that the impact of the pandemic was an exceptional circumstance as understood in *Jordan*. We dismiss this ground of appeal.

Conclusion

[24] The appeal is dismissed.

“Grant Huscroft J.A.”
“Gary Trotter J.A.”
“A. Harvison Young J.A.”