

ONTARIO COURT OF JUSTICE

CITATION: *R. v. Madill*, 2019 ONCJ 19

DATE: 2019 01 16

COURT FILE No.: Peterborough 3360-999-16-0252-03

IN THE MATTER OF an appeal under clause 116(2)(a) of the
Provincial Offences Act, R.S.O. 1990, c. P.33, as amended;

B E T W E E N :

HER MAJESTY THE QUEEN

Respondent

— AND —

GORD MADILL

Appellant

Before Justice J.L. Broderick
Heard on November 28th, 2018
Reasons for Judgment released on January 8, 2019
Amended Reasons released on January 16, 2019

Mr. Giuseppe Ferraro Counsel for the Prosecution
Mr. Daniel Lemaire.....Student-at-Law, Agent for the Appellant, Gord Madill

On appeal from convictions by Justice of the Peace P.J. Hiscox on May 14th, 2018.

BRODERICK, J.:

A. OVERVIEW

[1] In August, 2015, Gord Madill commenced construction of a single-storey bungalow on his property in Trent Hills, Ontario. He retained Barry Gummer, who was operating as Barry Gummer Renovations, to complete the framing and install windows in the home.

[2] On August 6th, 2015, Mr. Gummer's employee, Randy Morrow, was working on the home when he fell from a ladder and landed head-first on the ground. As a result, Mr. Morrow suffered injuries that resulted in him being permanently paralyzed from the chest down.

[3] On May 6th, 2016, Mr. Madill was charged with offences under s. 23(1)(a) and s. 23(1)(b) of the *Occupational Health and Safety Act*, R.S.O. 1990, c.O.1, as amended.

[4] The matter proceeded to trial on June 19th, 2017. On that day, the trial was adjourned to January 4th, 2018.

[5] On January 4th, 2018, Mr. Madill brought an application under s. 11(b) of the Charter alleging that his right to be tried within a reasonable time was violated.

[6] On May 14th, 2018, the application was dismissed and Mr. Madill was convicted of both offences.

[7] Mr. Madill appeals the convictions on the basis that the Justice of the Peace erred in his s. 11(b) analysis.

B. THE APPLICABLE LEGAL FRAMEWORK

[8] In *R. v. Jordan*, [2016] 1 S.C.R. 631, the Supreme Court of Canada sets out a framework for determining whether delay in a case gives rise to a violation of an accused's right under s. 11(b) of the Charter to be tried within a reasonable time.

[9] A presumptive ceiling of 18 months is set for cases proceeding in the Ontario Court of Justice.

[10] In determining whether the 18-month ceiling is exceeded, defence delay must be first be subtracted from the total delay, resulting in the "net delay", *R. v. Jurkus*, [2018] O.J. No. 2899¹, citing *R. v. Coulter*, 2016 ONCA 704 at para. 35 and *R. v. Gopie*, 2017 ONCA 728 at para. 113.

[11] Where the net delay exceeds the presumptive ceiling, the Crown bears the onus of establishing reasonableness. This onus can be met where exceptional circumstances are shown to exist. There are two types of exceptional circumstances- discrete events and particularly complex cases: *Jurkus* at para. 7, citing *Jordan* at para. 71.

[12] Delay occasioned by discrete events is subtracted from the net delay, leaving what is referred to as the "resulting delay", *Jurkus* at para. 8, citing *Gopie* at para. 117.

[13] Where the resulting delay exceeds the 18-month ceiling, the court will look to the complexities of the case to determine if the delay is nonetheless reasonable: *Jurkus* at para. 8, citing *Jordan* at paras. 75-80 and *Gopie* at para. 117.

¹ leave to appeal refused, [2018] S.C.C.A. No. 325.

[14] Finally, for cases where delay exceeding the ceiling is not explained by case complexity, a transitional exceptional circumstance may apply if the charges were laid prior to the release of *Jordan, Jurkus* at para. 9, citing *Jordan* at para. 9.

[15] In respect of the standard of review, it is well-established that while deference is owed to the trial judge's underlying findings of fact, the characterization of the periods of delay and the ultimate decision as to whether there has been unreasonable delay are reviewable on a standard of correctness: *Jurkus* at para. 25.

C. THE APPLICATION JUSTICE'S DECISION

[16] The Justice of the Peace concluded that the total delay was 19 months and 29 days from the date that the information was sworn to the date on which evidence and argument concluded. The Justice of the Peace then deducted 130 days for "exceptional circumstances" on account of two adjournments of the judicial pre-trial.²

[17] The Justice of the Peace then went on to consider the delay from June 19th, 2017 to January 4th, 2018. He characterized this time period as "defence delay" and deducted it from the total delay.

[18] The result was that the net delay of 15 months was below the presumptive ceiling. The Justice of the Peace found that given the seriousness of the matter, he was not persuaded that the delay was unreasonable and the application was dismissed.

[19] The Justice of the Peace then considered the evidence heard at trial and convicted the appellant of both charges.

D. ANALYSIS

(1) Issues

[20] This appeal raises the following issues:

- (i) did the Justice of the Peace err in calculating the total delay from the date that the information was sworn (May 6th, 2016) to the date that evidence and oral argument were completed (January 4th, 2018); and
- (ii) did the Justice of the Peace err in characterizing the delay from June 19th, 2017 to January 4th, 2018 as "defence delay" and accordingly, in deducting it from the total delay.³

(2) Calculating Total Delay

[21] In *Jordan*, the court states that total delay is to be calculated from "the charge" to the "actual or anticipated end of trial".

²This delay from September 20th, 2016 to December 19th, 2016 actually totals 90 days.

³ The error in calculating the delay arising from "exceptional circumstances" is not an issue that requires an evidentiary or legal analysis on appeal, but will nonetheless be addressed in these reasons.

[22] In *R. v. J.M.*, 2017 ONCJ 4, Justice Paciocco (as he then was of the Ontario Court of Justice) considered the meaning of the phrase “end of trial”.

[23] The phrase can be used to describe one of three phases of the criminal trial process: (i) the end of evidence and argument; (ii) the delivery of the verdict; or (iii) the imposition of the sentence where there has been a conviction, *J.M.* at para. 20.

[24] While *Jordan* does not define the expression, “actual or anticipated end of trial”, Justice Paciocco found it instructive that the Supreme Court of Canada calculated the total delay in that case from the date that the appellant was charged to *the date that a conviction was entered*, *J.M.* at para., 21; *Jordan*, para. 12.

[25] Given that in *J.M.* a verdict had not yet been rendered, Justice Paciocco calculated the total delay on the basis of the “anticipated end of the trial”, which was the date on which he intended on delivering his judgment on the trial.

[26] I am persuaded by the reasoning in *J.M.* that a court should calculate total delay to the date of the “actual or anticipated end of the trial”.

[27] This approach to calculating total delay is consistent with the Supreme Court of Canada’s decision in *R. v. Rahey*, [1987] 1 S.C.R. 588 at page 611, where Justice Lamer states, “the stigma of being an accused does not end when the person is brought to trial but rather when the trial is at an end and the decision is rendered”.

[28] More recently, in *R. v. Milani*, [2014] O.J. No. 3247, the Ontario Court of Appeal, relying on *Rahey*, held:

In cases where an accused proceeds to trial, s. 11(b) protects against delay until the trial is concluded. This is because, while the case is still pending, a determination of the accused’s guilt or innocence has not occurred, and the accused is therefore, subject to stress and anxiety. The stigma of being an accused ends when the saga of a trial is at an end and a decision is rendered.

[29] Further, an approach to calculating total delay that takes into account reserve time is consistent with the purpose of s. 11(b), that is to ensure that an accused person is tried within a reasonable time, recognizing that the security of a person is impacted because delay can prolonging the stress, anxiety and stigma an accused may suffer, *Jordan*, at para. 20.

[30] At the end of evidence and oral argument and while a matter is on reserve, there remains uncertainty for the accused person in terms of the outcome of the proceedings against him or her. For an accused person, the end of evidence and oral argument does not change their position in respect of the outstanding charge, as they continue to await a decision.

[31] On the other hand, the delivery of a verdict *does* change their position in respect of the outstanding charge. In other words, for an accused person, there is certainty in the delivery of a verdict of “not guilty” or “guilty” and the corresponding disposition of the charge by dismissal or conviction.

[32] I find that the Justice of the Peace erred in calculating the total delay from the date of the swearing of the information to the end of evidence and argument, rather than the “end of trial”.

[33] Properly calculated, the total delay from the date on which the information was sworn (May 6th, 2016) to the date on which judgment was delivered (May 24th, 2018) is 738 days, or 24 months, 8 days.

(3) The Net Delay

(i) Defence Delay

[34] The Justice of the Peace characterized the time period between June 19th, 2017 and January 4th, 2018 as “defence delay”, which was accordingly, deducted from the total delay.

[35] “Defence delay” has two components: (i) delay waived by the defence and (ii), delay caused solely by the defence, which includes acts by the accused that are directly responsible for delay and deliberate, calculated tactics aimed at causing delay, *Jordan*, paras 61-63.

(a) Proceedings on June 19th, 2017

[36] To provide context for the reasons that follow, I will set out the details of the events leading up to and the proceedings at trial on June 19th, 2017.

[37] On June 13th, 2017, the Crown (not Mr. Ferraro) sent Mr. Baker, counsel for Mr. Madill a copy of a Notice of Project [“NOP”]⁴, which was filed by Mr. Madill after the incident. Mr. Baker inquired whether the Crown intended on relying on the document at trial. The Crown advised Mr. Baker that she would file the NOP as evidence that Mr. Madill was the “constructor” of the project.⁵

[38] On June 19th, 2017, the trial commenced with the Crown’s first witness, the Ministry of Labour inspector, Jeff McColl. The Crown sought to introduce the NOP through Mr. McColl; and Mr. Baker objected, relying on *R. v. White*, [1999] 2 S.C.R. 417 and *R. v. Soules*, 2011 ONCA 429, that the NOP was a “compelled statement”.

[39] Mr. Baker explained that given the timing of disclosure of the NOP, he did not have sufficient time to file a *Charter* application seeking exclusion of the NOP.

[40] The Crown responded by insisting that a *Charter* application be filed, with notice as required under s. 109 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 [“CJA”].⁶

⁴ Appeal Book of the Crown, Tab 2, Exhibit C

⁵ Appeal Book of the Crown, Tab 2, Exhibit D

⁶ The Crown relied on the notice provisions in respect of a constitutional question, rather than a *Charter* application seeking relief under s. 24(2).

[41] Mr. Baker explained that it was impossible for him to comply with the notice requirement given that he was provided with disclosure and notice of the Crown's intention to lead the NOP in evidence six days before trial.

[42] The Crown then responded, "In the circumstances I think the appropriate remedy, if my friend is intent on proceeding with the Charter application, would be an adjournment of this trial", *Transcript*, June 19th, 2017 at page 17, lines 14-17).

[43] Mr. Baker took the position that he was content to proceed given the delay already in the case; and expressed that he was "very worried given the *Jordan* requirements", *Transcript*, June 19th, 2017 at page 17, lines 21-24.

[44] The Justice of the Peace then stated, "I think defence should be afforded a reasonable amount of time to decide what you would like to do with this. I'm loathe to do so, but I would grant an adjournment", *Transcript*, June 19th, 2017 at page 17, lines 28-30).

[45] The trial was adjourned from June 19th, 2017 to January 4th, 2018, a total of 199 days or 6 months, 18 days.

[46] The Crown submits that the characterization of the time period from June 19th, 2017 to January 4th, 2018 as "defence delay" is reasonably supported by the evidence; and relies on the following arguments:

[47] (i) there was an implied waiver of this time period by the defence; and/or

[48] (ii) the delay was solely or directly caused by the defence because counsel brought a "frivolous" Charter application that was ultimately dismissed.

(b) Defence Waiver

[49] A waiver by the defence may be explicit or implicit, but must be informed, clear and unequivocal, *Jordan* at para. 61.

[50] The Crown submits that defence counsel's failure to object (or acquiescence) to the adjournment granted by the Justice of the Peace amounts to a waiver.

[51] It should be noted that when the Crown insisted that an adjournment was the remedy in order to permit defence counsel to file a Charter application, defence counsel responded by stating that he was "content to proceed"; and that he was "very worried given the *Jordan* requirements...[and] given that this has been ongoing for a significant amount of time", *Transcript*, June 19th, 2017, page 17, lines 21-24.

[52] The Justice of the Peace then intervened and stated that he thought that defence should have time to decide what he intended to do with "this", which I took to mean whether or not he wished to bring a *Charter* application; and he adjourned the matter.

[53] The defence did not explicitly agree to the adjournment on June 9th, 2017 and there was no clear, unequivocal waiver of s. 11(b).

[54] Further, I am not prepared to find that there was an implicit waiver in light of the comments made by defence counsel that he was “content to proceed” and that he had concerns regarding delay.

[55] In my view, there is nothing in the transcript that can reasonably be interpreted as defence waiver of the delay from June 19th, 2017 to January 4th, 2018.

(c) Disclosure of the NOP and Notice of the Charter Application

[56] The Crown submits, on appeal, that an adjournment of the trial was not required in order for counsel to review the NOP and determine its position regarding admissibility.

[57] He relies on the fact that the appellant would have had a copy of the NOP because he was the one who filed it with the Ministry of Labour. Therefore, this was not “new disclosure” that necessitated an adjournment of the trial.

[58] While the appellant may have had a copy of the NOP, he was obviously not clear on the use to be made of it by the Crown. Counsel was not given notice of the Crown’s intention to file the NOP as proof that the appellant was a “constructor” until six days before the trial.

[59] The timing of the disclosure of the NOP, along with the Crown’s notice of its intention to file it at trial, impacted the ability of the counsel to comply with the notice requirements for filing a *Charter* application.

[60] Further, while the Crown on appeal now argues that a recess would have been sufficient to allow defence counsel to consider the admissibility of the NOP, that was *not* the position taken by the trial Crown.

[61] The trial Crown took the position that if defence counsel was going to challenge the admissibility of the NOP, he was *required* to file notice; and that an adjournment was the proper remedy in order to permit defence counsel to comply with s. 109 of the CJA.

[62] It can be argued that the Crown could have waived strict compliance with the notice requirements for filing a *Charter* application, suggested that NOP be marked as a lettered exhibit at trial; and argued admissibility at some later point. This approach would have resulted in the effective use of the remaining court time on June 9th; and potentially have avoided a lengthy adjournment.

[63] In circumstances where at trial, the Crown insisted on compliance with the notice provisions and took the position that an adjournment was the appropriate remedy, it would be unfair, on appeal, to find that defence counsel should have requested a recess to consider admissibility of the NOP.

(d) The Adjournment as a Solution

[64] In *Jordan*, the Supreme Court of Canada stated, “the new framework will help facilitate a much-needed shift in culture. In creating incentives for both sides, it seeks to enhance accountability by fostering proactive, preventative problem-solving”, *Jordan*, at para. 112.

[65] Further, in *R. v. Cody*, [2017] 1 S.C.R. 659 at paragraphs 36-37, the court reinforces the responsibility of all participants in the justice system to find solutions to minimize delay in stating:

[A] pro-active approach is required that prevents unnecessary delay by targeting its root causes. All participants in the justice system share this responsibility. We reiterate the important role trial judges play in curtailing unnecessary delay and “changing courtroom culture” [*Jordan*, at para. 114].

[66] The court then lists a number of ways, including during the conduct of the trial, where judges can minimize delay using their case management powers.

[67] In this case, the adjournment was requested and granted, with no consideration of other solutions which would have made effective use of court time and reduced delay.

[68] There were solutions that could have addressed the late disclosure of the NOP, the defence position regarding admissibility and the filing of a *Charter* application.

[69] For example, one potential solution could have been for the participants to agree that the NOP be marked as a lettered exhibit at trial. The admissibility of the NOP could be argued and decided on a *Charter* application filed later, after the conclusion of evidence on June 19th, 2017.

[70] This solution would have allowed the trial to continue and would have made effective use of the court time on June 19th, 2017.

[71] My expectation is that the evidence would have completed on June 19th, 2017 (based on the fact that the trial and argument were heard completed on one day); and a continuation date could then have been sought for the hearing of the *Charter* application and closing submissions.

[72] My expectation is that the Justice of the Peace, his attention having been brought to the fact that delay was an issue, would be in a position to exercise flexibility and schedule a date for hearing of the *Charter* application and argument much sooner than a full day of trial.

[73] In my view, the delay here cannot be properly characterized as “delay solely due to defence”. Indeed, defence counsel was the only participant who indicated a willingness to proceed with the trial and the only participant who expressed concern respecting delay.

(e) Merits of the Charter Application

[74] Next, the Crown submits that the delay was caused by the defence, who brought a “frivolous” *Charter* application that was ultimately dismissed because the NOP was found to be admissible in regulatory proceedings.

[75] Defence actions legitimately taken to respond to the charges, including applications that are not frivolous, fall outside the ambit of defence delay, *Jordan* at para. 65.

[76] During the course of a trial, the defence is entitled to raise issues respecting the admissibility of evidence, including documentary evidence. The admissibility of evidence is of course, to be decided on a case-by-case basis,

[77] There is no rule of evidence or provision in the *Occupational Health and Safety Act* that states that in all proceedings under that Act, the NOP is admissible.

[78] I put no weight on the fact that there have been no reported cases where the NOP has been found to be inadmissible under s. 7 of the *Charter*. It may be the case that the issue has simply not been litigated.

[79] Further, even if there were a case where the NOP was admitted in evidence or alternatively, excluded from evidence, following a *Charter* application, that decision would not be determinative of admissibility in this case.

[80] The law is clear that admissibility of a compelled statement is dependent on the context in which the information is given and the use to be made of it.

[81] As stated in *R. v. Fitzpatrick*, [1995] 4 SCR 154, “we must begin ‘on the ground’ as it were, with a concrete and contextual analysis of the circumstances...and the ways in which concerns about self-incrimination may or may not be legitimate...in this way, we will be able to determine whether or not the principle against self-incrimination is actually engaged in the present case”.

[82] Indeed, the court cautioned against an approach that would result in a blanket prohibition against the use of statutorily-compelled statements in regulatory proceedings, *Fitzpatrick* at para. 25.

[83] The factual circumstances under which the NOP was completed is something that the court was required to consider, along with the objectives of the *Occupational Health and Safety Act*, in determining admissibility of the NOP.

[84] In other words, the law in *Fitzpatrick* would not necessarily have been determinative of the issue of admissibility here (although it ultimately was), depending on the factual circumstances under which the NOP was completed by Mr. Madill.

[85] I find that the *Charter* application was a legitimate application to determine the admissibility of the NOP, which the appellant was entitled to litigate.

[86] In summary, the characterization of the delay from June 9th, 2017 to January 4th, 2018 as defence delay was not reasonably supported by the evidence.

(ii) Exceptional Circumstances

[87] The parties agree that the Justice of the Peace was correct in characterizing the adjournment of the first and second pre-trial as “exceptional circumstances”.

[88] The Justice of the Peace, however, erred in deducting *130 days* from the total delay to account for the two adjournments of the pre-trial.

[89] The Appellant submits that the delay from September 20th, 2016 to December 15th, 2016 totals 86 days.

[90] I note that the pre-trial was actually held on December 19th, 2017. This was the point at which all parties were ready to go to trial.

[91] Therefore, the delay from September 20th to December 15th, 2016, which is 90 days, should properly be deducted from the total delay.

4. Resulting Delay

[92] When the delay occasioned by “exceptional circumstances” (90 days) is deducted from the total delay (738 days), the net delay here is 648 days or 21 months, 16 days.

[93] The result is that the delay from the date of the charge to the end of the trial exceeds the 18-month presumptive ceiling in *Jordan*.

[94] The onus therefore, rests with the Crown to demonstrate that the delay was not unreasonable.

5. Case Complexity

[95] The Respondent reasonably concedes that the delay occasioned in this case cannot be justified on the basis of case complexity.

6. Transitional Exceptional Circumstance

[96] The transitional exceptional circumstance assessment recognizes “the fact that the parties’ behaviour cannot be judged strictly, against a standard of which they had no notice”, *Jordan* at paras 96-97.

[97] The Crown may rely on the transitional exception circumstance if it can show that “the time the case has taken is justified on the parties’ reasonable reliance on the law as it previously existed”, *Jordan* at para. 96.

[98] The transitional exception circumstances should be considered in cases that were in the system before *Jordan*, *Cody* at para. 69.

[99] The information here was sworn on May 6th, 2016 and *Jordan* was decided on October 7th, 2016.

[100] The delay at issue in this appeal (June 19th, 2017 to January 4th, 2018) took place nine months *after* the release of *Jordan*. The parties were therefore, cognizant of the new landscape created by *Jordan* on June 19th, 2017.

[101] Further, defence counsel brought the attention of the Crown and the court to the fact that he was concerned about “the *Jordan* requirement”, indicating that indeed, he was cognizant of the presumptive ceiling established in *Jordan*.

[102] There is no evidence that the parties operated under the law as it previously existed when the matter was adjourned on June 19th, 2017. Accordingly, the Crown cannot use the transitional exceptional circumstance to justify the unreasonable delay in this case.

E. CONCLUSION

[103] I conclude that the Justice of the Peace erred by (a) miscalculating the total delay; and (b) attributing the time period from June 19th, 2017 to January 4th, 2018 to defence delay.

[104] When these errors are properly accounted for, the net delay is 21 months and 16 days, which is above the presumptive ceiling for matters in the Ontario Court of Justice.

[105] The Crown has not discharged its onus of demonstrating that the delay is not unreasonable.

[106] Accordingly, the appeal is granted. The convictions are quashed and a stay is entered on both counts.

Released: January 8, 2019

Signed: Justice J.L. Broderick

Amended reasons: January 16, 2019 – a typographical errors corrected