

R. v. Zammit, [2016] O.J. No. 4212

Ontario Judgments

Ontario Superior Court of Justice

K.P. Wright J.

Heard: July 21, 2016.

Judgment: August 10, 2016.

Court File No.: CR-16-9227

[2016] O.J. No. 4212 | 2016 ONSC 5098

Between Her Majesty the Queen, Respondent, and Earl Zammit, Applicant

(34 paras.)

Case Summary

Criminal law — Constitutional issues — Canadian Charter of Rights and Freedoms — Legal rights — Procedural rights — Delay — Trial within a reasonable time — Remedies for denial of rights — Specific remedies — Stay of proceedings — Application by Zammit for stay of proceedings based on post-charge delay allowed — Zammit was charged on August 29, 2013 — Crown completed case at preliminary hearing on April 8, 2015 and matter was adjourned to December 3 to hear from police officers to be called by defence — Trial was set to complete on August 19, 2016 — There was violation of s. 11(b) of Charter — Fact that Crown completed case at preliminary hearing did not make 12-month delay after that attributable to defence — Canadian Charter of Rights and Freedoms, 1982, s. 11(b).

Application by Zammit for a stay of proceedings based on a post-charge delay. Zammit was charged on August 29, 2013. The Crown completed its case at the preliminary hearing on April 8, 2015 and the matter was adjourned to December 3, which was the first date offered to the defence, to hear from three police officers to be called by it. One of the officers was examined on that date and the matter was adjourned to March 30, 2016, when the other two were examined. The trial was set to complete on August 19, 2016. The Supreme Court decided *Jordan* after the charge.

HELD: Application allowed.

There was a violation of s. 11(b) of the Charter. The fact that the Crown completed its case at the preliminary hearing did not make the 12-month delay after that attributable to the defence. It could not be said, absent evidence of tactics designed to delay, that the examination of legitimate witnesses at a preliminary hearing created delay that weighed against the defence. The sole cause of the first eight months of the delay after the Crown completed its case was the court being overbooked. The court was not prepared to conclude that the four-month delay after the examination of the first officer was attributable to the defence without accurate information as to what dates were offered and the parties' availability. The 36-month delay was presumptively unreasonable. The transitional exception in *Jordan* did not apply. This

was a simple and straightforward case.

Statutes, Regulations and Rules Cited

Canadian Charter of Rights and Freedoms, 1982, s. 11(b)

Counsel

Arielle Elbaz, for the Respondent.

Cheryl A. Robb, for the Applicant.

REASONS FOR DECISION

K.P. WRIGHT J.

Introduction

1 Earl Zammit brings this application seeking a stay of proceedings on the grounds that his right to be tried within a reasonable time as guaranteed by s. 11(b) of the *Canadian Charter of Rights and Freedoms* has been infringed.

Law

2 The Supreme Court of Canada's recent case of *R. v. Jordan*, [2016 SCC 27](#), has seen fit to replace the *Morin* paradigm with a new framework.

3 The new 11(b) framework imposes ceilings of time in the court system which, if exceeded, will result in presumptions of unreasonableness. The ceilings are 18 months in the Provincial Court and 30 months in the Superior Court.

Jordan, para. 46

4 Any delay attributable to or waived by the defence is to be deducted from the total delay.

Jordan, at para. 66

5 If the presumptive ceiling is exceeded, the burden shifts to the Crown to rebut the presumption of unreasonableness on the basis of exceptional circumstances. If the Crown cannot do so then a stay will follow. Exceptional circumstances have been defined as those that lie outside the Crown's control in that: (1) they are reasonably unforeseen or reasonably unavoidable; and (2) the Crown could not reasonably remedy the delays emanating from those circumstances once they arose. If the exceptional circumstance relates to a discrete event, the delay attributable to that discrete event is subtracted from the total period of delay to determine if the ceiling has been exceeded.

Jordan, at paras. 68-80

6 The presence of exceptional circumstances is the only basis upon which the Crown can discharge its burden to justify a delay that exceeds the ceiling.

Jordan, at para. 81

7 If the delay falls below the presumptive ceiling, the defence still has an opportunity to demonstrate that the delay is unreasonable. To do so the defence must establish two things:

- (1) It took meaningful steps that demonstrate a sustained effort to expedite the proceedings; and
- (2) The case took markedly longer than it reasonably should have.

8 Absent these two factors, the application must fail.

Jordan, at para. 82

9 In designing this new framework the court has also made allowances for transitional cases, such as this one, where the charges were brought prior to the release of the decision in *Jordan*. Although the presumptive ceilings still apply, the framework is to be applied flexibly and contextually, with due sensitivity to the parties' reliance on the previous state of the law.

Jordan, at paras. 95 and 105

Analysis

10 This case is one of the first to be heard under the new regime. As this is a transitional case, I am instructed by and have closely followed the court's approach as set out in *R. v. Williamson*, [2016 SCC 28](#).

11 The first step in deciding an 11(b) application is to ascertain the total length of time between the charge and the actual or anticipated end of trial. Mr. Zammit was charged on August 29, 2013 and his trial is currently set to complete on August 19, 2016. The total delay is approximately 36 months. To be precise, it is 10 days short of 36 months. The first 32 months of this delay occurred in Provincial Court.

12 The next step is to determine whether any of this delay was waived by the defence or caused solely by the defence and to subtract any portion of that delay from the total.

13 There is no dispute, and I find, that Mr. Zammit did not waive any of the delay.

14 With respect to delay caused by defence, the Crown argues that the 12 months it took to complete the preliminary hearing was caused by and is attributable to the defence, and as such should be deducted from the total delay.

15 The undisputed facts leading up to and related to the preliminary hearing can be summarized as follows:

- * November 14, 2013: Counsel for the applicant completed the Crown pre-trial and was prepared to set a date for a Judicial Pre-Trial. Co-accused had not provided disclosure to his counsel so that date was not set.
- * February 5, 2014: Due to the passage of time and the co-accused delaying the matter, the Crown requested the matter be case-managed by a Judge.
- * June 5, 2015: Judicial Pre-Trial was held and it was agreed by all parties that the preliminary hearing would take two days. The applicant filed his notice of election and his statement of issues in which he included that he wanted to examine three police officers at the preliminary hearing. April 7 and 8, 2015 were the first dates offered for the preliminary hearing and were agreed upon by the applicant. This amounted to a delay of 10 months and 2 days.
- * April 7, 2015: The first day of the preliminary hearing. The court was overbooked and the preliminary hearing was adjourned to April 8, 2015.
- * April 8, 2015: The Crown completed their case and the preliminary hearing was adjourned to December 3, 2015 to hear from the police witnesses, to be called by the defence. This was the first available date offered to the applicant.
- * December 3, 2015: Only one of the three police officers was in attendance that morning. One of the officers was on a course and was available in the afternoon. The third officer was on vacation. It is important to note that this officer was notified of this court date prior to booking his vacation. Defence counsel examined the one officer and the preliminary hearing was adjourned to March 30, 2016 for the examination of the two remaining officers.
- * March 30, 2016: The officers were examined and the applicant was committed to trial with a return of date of April 27, 2016 in the Superior Court.

16 Crown counsel argued that because the Crown completed their case on April 8, 2015, the intervening delay of 12 months must be attributed to defence and deducted from the overall delay. They argued that the witnesses were defence witnesses and as such any delay flowing from those examinations must accrue to defence. In support of this argument counsel has referred me to *R. v. Lahiry*, [2011 ONSC 6780](#), [109 O.R. \(3d\) 187](#); *R. v. Morin*, [\[1992\] 1 S.C.R. 771](#); and *R. v. Tran*, [2012 ONCA 18](#), [288 C.C.C. \(3d\) 177](#). These cases speak to voluntary actions of the defence that by design or otherwise create unnecessary delay. That is not the case before me.

17 The right of the accused to examine witnesses at a preliminary hearing is a fundamental part of our criminal justice system: *R. v. O'Connor*, [\[1995\] 4 S.C.R. 411](#); and *R. v. Girimonte* [\(1997\), 121 C.C.C. \(3d\) 33](#) (Ont. C.A.). It cannot be said, absent some evidence of tactics designed to delay, that the examination of legitimate witnesses at a preliminary hearing creates delay that must weigh against the defence: *R. v. Gordon* [\(1998\), 130 C.C.C. \(3d\) 129](#) (Ont. Gen. Div.).

18 Crown counsel asserted that the three witnesses called by the defence were not material or relevant. Defence counsel argued that they were relevant, and submitted that if the trial was to continue, they would be called to testify.

19 I have read the transcripts of the evidence of these officers from the preliminary hearing. I am mindful that I do not have a complete understanding of the ultimate issues in this case. The transcripts, however, reflect an examination that covered a variety of legitimate topics including notebook entries and observations made in the course of the investigation. In my view, the examinations were focused and very much on point. I am not persuaded that they were frivolous, excessive or irrelevant. In fact, I find the opposite to be true.

20 It is also noteworthy that defence counsel completed her examination of these witnesses, cumulatively, in less than a day, in accordance with the original time estimate established at the Judicial Pre-Trial. There is absolutely no evidence on the record before me to conclude that the defence did anything to create or contribute to the delay of 12 months. The record reflects defence counsel's repeated efforts to expedite the proceedings and keep the matter moving forward.

21 I find the sole cause of the eight month delay from April 8, 2015 to December 3, 2015 was due to the court being overbooked, and accordingly it will not be counted as defence delay. The reality is, but for the lack of institutional resources, this matter would have completed on April 8, 2015.

22 The delay between December 3, 2015 and March 30, 2016 is less clear. Typically the availability of the parties and the court is recorded on a trial verification form, but that was not done in this case. There is very little in the way of discussion on the record as to exactly what dates were being offered by the court. Defence counsel did comment on the record, that they were not putting dates on the record because the court was so limited in availability. Without accurate information as to what dates offered and the availability of the parties, I am not prepared to conclude that this four month delay is attributable to the defence. Although the record indicates that defence counsel's availability was somewhat limited, I do not know how those limitations coincided with the dates being offered. As such, I am not prepared to deduct it from the total delay.

23 The delay of 12 months from April 8, 2015 to March 30, 2016 in my view was not caused by nor can it be attributed to the defence. It will not be deducted from the total delay. The delay therefore remains at 36 months, well above the 30 months ceiling, and is therefore presumptively unreasonable.

24 As such, the burden shifts to the Crown to demonstrate that the delay is reasonable having regard to the presence of exceptional circumstances. The record does not disclose, nor has Crown argued, that any of the delay was caused by discrete, exceptional circumstances. The record does not disclose, nor has the Crown argued, that this case is one that would qualify as exceptionally complex.

25 However, I am mindful that because Mr. Zammit was charged before the release of *Jordan* I must consider whether transitional exceptional circumstances apply. To rely on this exception the Crown must satisfy me that the time taken in this case was justified based on legal framework which was being relied upon at the time.

26 I find the transitional exceptional framework does not apply. And here is why.

27 First, this was a simple and straightforward case. The preliminary hearing took only two days to complete and the trial is expected to take no more than five days. There are no pre-trial motions attached to this matter, with the exception of this 11(b) application.

28 Mr. Zammit was ready to set his preliminary hearing date by December 5, 2013. The preliminary hearing completed some 28 months later. At least six months of that interim delay was due to the actions of the co-accused. It is not uncommon when multiple people are charged for one accused person to delay the progress of the other(s) for a whole host of reasons. I am mindful that under the *Morin* framework this delay would likely have been considered neutral: *R. v. Whyllie* (2005), 207 C.C.C. (3d) 97 (Ont. C.A.); and *R. v. L.G.*, 2007 ONCA 654, 228 C.C.C. (3d) 194. Under the *Jordan* regime the onus is on the Crown to satisfy the Court that this delay falls into the category of a transitional exceptional circumstance. The Crown has failed to make any argument or submissions on this point. Accordingly this delay will not be deducted from the total time.

29 The Crown argued that had they been aware of the *Jordan* guidelines this case would have been managed differently and more efforts would have been made to mitigate the delay. She submitted the Crown would have taken steps to have the case managed by a Judge to avoid a potential stay. The written record indicates that on February 5, 2014, the Crown did make arrangements to have the matter managed by a Judge. In my view the Crown was very much aware of the developing delay issues and that a stay was looming large regardless of which framework was in place.

30 The Crown argued that under the *Jordan* framework they would not have assisted the defence in procuring the police witnesses and put the case at risk of being stayed. I fail to appreciate the nexus between the *Jordan* framework and the Crown's conduct in relation to assisting in the securing of witnesses. I fail to appreciate how the Crown would have conducted themselves differently under the *Jordan* regime. In my view the Crown did what was expected and required of them as a Minister of Justice. The Crown is typically called upon to facilitate the attendance of witnesses for the defence. I do not accept that under the *Jordan* framework the Crown would have resisted facilitating the attendance of the officers in this case. I am mindful that it is not uncommon for the Crown in such circumstances to ask for an 11(b) waiver in the event the witness does not show up. No such waiver was sought or made in this case.

31 Let me be clear that the Crown has not been penalized due to the non-attendance of the police officers on December 3, 2015. As previously indicated, it was a lack of institutional resources that triggered the initial eight month delay during the preliminary hearing. The four

month delay that followed was triggered by the non-attendance of the police witness. Even if those four months are deducted from the total delay, the result is 32 months, which is still above the presumptive ceiling.

32 In total, Mr. Zammit spent 32 months in the Provincial Court before being committed to trial in the Superior Court. Even allowing for inherent time requirement as one must, the delay remains excessive. In my view, there is no justification on the record before me to justify the almost 36 months it took to bring Mr. Zammit to trial regardless of which framework is applied.

Summary

33 After a thorough review of the law, the materials, the submissions of counsel and the unique circumstances that attach to this case, I find that the 36 month delay in bringing Mr. Zammit to trial amounts to clear breach of his s. 11(b) rights.

34 Accordingly, the application is granted and the charges are stayed.

K.P. WRIGHT J.