

File No: [REDACTED]
Registry: Western Communities

In the Provincial Court of British Columbia

REX

v.

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

REASONS FOR JUDGMENT
(RE THE ACCUSED [REDACTED] AND
[REDACTED] ON DELAY APPLICATION)
OF
THE HONOURABLE JUDGE M. MUNRO

COPY

Crown Counsel:

T. Corsi

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[REDACTED]

C. Massey

Place of Hearing:

Colwood, B.C.

Date of Judgment:

May 8, 2023

[1] THE COURT: [REDACTED] [REDACTED] [REDACTED] and Kirsten Jean [REDACTED] stand charged individually and variously on Information 22485 on separate counts of drug possession for the purpose of trafficking, and in Mr. [REDACTED] case, with a weapons offence as well, which does not apply to Ms. [REDACTED]. That information was sworn December 20, 2021. There was a first appearance February 24, 2022, and further subsequent appearances until an initial disclosure package was prepared and disclosed on April 14 of 2022.

[2] Ultimately, with further requests for disclosure and provision of same by mid-August of 2022, an election of Provincial Court judge was entered. Pleas of not-guilty on behalf of both accused were entered and the matter is presently set down for trial. The first of those trial dates is a voir dire commencing May 29, 2023, ultimately culminating in a three-day trial proper scheduled presently for September 12 to 14, 2023.

[3] Although there were four co-accused on the information, two have fallen off along the way for one reason or another, but at the end of the day, the presence of those two co-accused who have fallen away did not in any way affect the timeline as it presently stands.

[4] The delay in coming to trial and the completion of trial from December 20, 2021, to September 14, 2023 is just shy of 21 months. Given the Supreme Court of Canada decision in *Jordan* and the ceiling of 18 months for a Provincial Court election, this is a pretrial application on behalf of both accused pursuant to s. 11(b) of the *Charter* seeking a judicial stay of proceedings pursuant to s. 24(1) of the *Charter*. Under s. 11(b), these two accused have the right to be tried within a

reasonable time. As I have indicated, the Supreme Court of Canada in *Jordan* established a ceiling of 18 months to trial for a Provincial Court election. That ceiling will be exceeded by just short of three months by the end date of the presently set trial dates.

[5] Initially, the Crown, who bears the onus here to show exceptional circumstances, took issue with the length of delay in terms of setting the trial dates because of outstanding disclosure issues concerning the defence. *Jordan* at paragraph 65 sets out the following:

To be clear, defence actions legitimately taken to respond to the charges fall outside the ambit of defence delay. For example, the defence must be allowed preparation time, even where the court and the Crown are ready to proceed. In addition, defence applications and requests that are not frivolous will also generally not count against the defence. We have already accounted for procedural requirements in setting the ceiling. And such a deduction would run contrary to the accused's right to make full answer and defence. While this is by no means an exact science, first instance judges are uniquely positioned to gauge the legitimacy of defence actions.

[6] The disclosure that concerned the defence in this case once they received the initial disclosure package were source materials relating to the Information to Obtain. Those documents, for whatever reason, were not disclosed in the initial disclosure package. I have heard no evidence as to what the difficulty was in disclosing those particular documents in the first instance, never mind once requested. That was the cause of delay in terms of the election and arraignment of these accused and the setting of dates.

[7] That matter became an issue that was litigated before Judge Gouge of this court on three separate appearances. He seized himself of that issue and he

determined that this was a legitimate request on the part of the defence in terms of their ability to properly arraign their clients. The Crown properly conceded that point at the outset of this morning's submissions. That issue is no longer squarely before the court.

[8] What remains, then, in terms of the Crown onus is that this matter falls to be decided on whether the Crown has established exceptional circumstances arising out of a particularly complex prosecution. From *Jordan* at paragraph 47, the Supreme Court said the following:

If the total delay from the charge to the actual or anticipated end of trial (minus defence delay) ...

(of which it is conceded there is none in this particular case)

... exceeds the ceiling, then the delay is presumptively unreasonable. To rebut this presumption, the Crown must establish the presence of exceptional circumstances. If it cannot, the delay is unreasonable and a stay will follow.

[9] Further, at paragraph 77 of *Jordan*:

As indicated, exceptional circumstances also cover a second category, namely, cases that are particularly complex.

I note both the use of the terms "exceptional" circumstances and "particularly" complex.

[10] The court carries on:

This too requires elaboration. Particularly complex cases are cases that, because of the nature of the evidence or the nature of the issues, require an inordinate amount of trial or preparation time such that the delay is justified. As for the nature of the evidence, hallmarks of particularly complex cases include voluminous disclosure ...

I have very little evidence here that disclosure was of such of nature that it would potentially justify something beyond the 18-month ceiling.

... a large number of witnesses ...

I have the contrary here in terms of the submissions from Crown. The voir dieres that are set and the trial itself set for three days in September do not require a large number of witnesses.

... significant requirements for expert evidence ...

That is squarely not the case here. It is, I am told, a fairly straightforward possession for the purpose of trafficking charge against each. There is one expert involved in that process.

... and charges covering a long period of time.

The evidence I have before me by way of submission is that these were search warrants variously executed on a single day.

[11] "Particularly complex cases," the court goes on:

... arising from the nature of the issues may be characterized by, among other things, a large number of charges and pre-trial applications, novel or complicated legal issues, and a large number of significant issues in dispute.

In the present case, the charges are broken down as a result of different types of drugs seized. There is nothing in the result that says to me that this creates a particular complexity to the set of charges for either of these accused. For Mr.

[REDACTED] the additional charge of a weapons offence does not in any significant way change the complexity of the prosecution against him.

[12] There are pre-trial applications here, but in terms of a search warrant case, to have a voir dire at the outset to determine admissibility of the various issues surrounding search warrants is as common in a drug case as the issue of possession itself. I have not been made aware of any novel or complicated legal issues which have added to the complexity of this matter. I have no submission that there are a large number of significant issues in dispute, other than a potential challenge to the sufficiency or otherwise of the search warrants that were executed on a single day.

[13] The court carries on:

Proceeding jointly against multiple co-accused, so long as it is in the interest of justice to do so, may also impact the complexity of the case.

I note parenthetically that the conduct of Crown in terms of the other two co-accused who were joined with these two initially to remove them as co-accused was done in an efficient manner and assisted in reducing any potential complexity arising from a multiplicity of accused. In terms of the fixing of trial dates, however, I am told and I accept that the prior existence of these other two co-accused played no role in delaying the setting of trial dates, nor do I find that the presence of these two co-accused being tried together created any extra delay in terms of fixing the dates.

[14] It seems that the defences are *ad idem*, best I can tell, in terms of the nature of the arguments to be had at the voir dire and potentially at the three-day trial scheduled for September. I do not find in any way that the existence of co-accused created any particular complexity to this case.

[15] I have been referred to numerous authorities and I will quote from the *R. v.*

Roberts decision, 2020 BCCA 307. At paragraph 95 [sic 86], Justice Frankel reading for the court says the following in terms of the issue of complexity:

[86] While the *Jordan* majority used the expression “particularly complex” to describe cases for which additional time will be justified, it also used the expression “exceptionally complex”: at para. 127. This latter expression was also used by the majority in *R. v. Williamson* [citation enclosed] ... decided the same day as *Jordan*. The adverbs “particularly” and “exceptionally” reflect the fact that the complexity-exception bar is a high one and that the cases that reach it will be the exception, not the rule. This is further evinced by the fact that the presumptive ceilings were set taking into account the increase in the complexity of criminal trials that has occurred since the early 1990s, and the time the defence requires to prepare and present its case [further citations] ... Indeed, the minority judges in *Jordan* opined that “[f]or the vast majority of cases, the ceilings are so high that they risk being meaningless”: at para. 276.

[16] I note that the nature of the case in *Jordan* was itself found to not be a particularly complex prosecution. On its face, it would appear to be significantly more complex than the one I have before me. I can say that with respect to numerous other authorities that have been provided where “particularly complex” was not found to be applicable. I would be hard put in the circumstances of this case as they have been presented to me to find that this prosecution meets the high bar of “particularly complex.”

[17] I am told that once the source material was disclosed, which is conceded was fundamental to the defence being able to prepare and arraign their clients, that matters proceeded in a most expeditious, collegial, cooperative, and reasonable fashion. That is the evidence before me by way of submission from Crown counsel and it is echoed by both defence. Dates were obtained in this jurisdiction which were, in all of the circumstances, obtained in a most ready fashion. There is no

suggestion of anyone hiding in the weeds hoping things might just extend long enough to make such an argument as the one that is before me this morning. Those dates were obtained, as I say, in ready fashion with only a matter of a few weeks for the defence to absorb and consider the information that Judge Gouge said was fundamental to their ability to properly get instructions and arraign their clients.

[18] As I said along the way, the onus is on the Crown in this particular circumstance to establish that exceptional circumstances by way of a particularly complex prosecution exist and the evidence before me falls well short of what has been characterized by our Court of Appeal as that high bar. I note, before this information was even sworn, close to a year transpired allowing the authorities, presumably, the opportunity to put their disclosure tackle in order.

[19] It has not been suggested in any way to me that there was anything exceptional in terms of the nature of the disclosure in this particular case. These types of documents that were sought by the defence which caused the bulk of the delay that created the delay beyond 18 months were documents that are commonly disclosed in these types of cases and no issue with that is taken by the Crown and no issue was taken with that by the court before Judge Gouge when he determined that these were important documents for the defence to have in their possession in order to properly consider and arraign their clients.

[20] So, in all of the circumstances, I cannot find that the Crown has discharged its onus to show exceptional circumstances by way of a particularly complex prosecution in any of the manners suggested, of which there are many, by the Supreme Court of Canada in *Jordan*. In those circumstances, I find that there has

been a violation of these two individuals' right to be tried within a reasonable time contrary to s. 11(b) of the *Canadian Charter of Rights and Freedoms* and, as such, given the authority in *Jordan*, I have no choice, given the delay that is before me, to enter a judicial stay of proceedings pursuant to s. 24(1) of the *Charter*, and I do so.

(REASONS FOR JUDGMENT CONCLUDED)