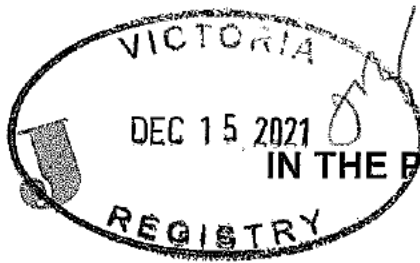


Citation: ☼

Date:
File No:
Registry:

☼
[REDACTED]
Victoria



IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

REGINA

v.
[REDACTED]

**REASONS FOR JUDGMENT
OF THE
HONOURABLE JUDGE M. MCKIMM**

Counsel for the Crown:
Counsel for the Accused:
Place of Hearing:
Date of Hearing:
Date of Judgment:

C. Fisher
R. Neary
Victoria, B.C.
December 14, 2021
December 14, 2021

[1] Mr. [REDACTED] brings an application for a stay of proceedings. He argues that his right to be tried within a reasonable time as guaranteed by section 11(b) of the *Charter* has been infringed. For the reasons that follow, the application is granted and a judicial stay of proceedings is ordered.

[2] Mr. [REDACTED] is charged with assaulting his partner between May 1, 2019 and August 21, 2019. The information was laid on September 4, 2019, the matter first appeared in Court on September 6, 2019, and following two additional appearances to facilitate disclosure, on November 1, 2019, Mr. [REDACTED] was arraigned, pled not guilty, and the matter was set for trial September 1 and 2, 2020.

[3] Counsel on behalf of Mr. [REDACTED] declined earlier trial dates ranging from June 1, 2020, to September 1, 2020, because of his other commitments. It is agreed that the period from September 4, 2019 – the date the information was laid – to June 1, 2020, the first available date for trial, is delay inherent in the judicial process. It is equally agreed between counsel that the delay between June 1, 2020 and September 1, 2020, is delay necessary to convenience Mr. [REDACTED] counsel's calendar, and that delay falls at Mr. [REDACTED] feet.

[4] On June 10, 2020, Mr. [REDACTED] together with a co-accused, is arrested on one charge of mischief and one charge of harassment, both of which offences were alleged to have occurred prior to the separation of the complainant and the accused. These allegations involved, among other things, the accused placing a tracking device on the complainant's motor vehicle. On these charges, he is released on a police undertaking.

[5] In July 2020, counsel for Mr. [REDACTED] became aware that he had a scheduling conflict for the initial trial dates of September 1 and 2, 2020. Mr. [REDACTED] instructed his counsel to adjourn the trial date, to accommodate his counsel's calendar.

[6] On July 31, 2020, Mr. [REDACTED] was arrested for allegedly breaching his release order as a result of attending at the complainant's house. On that same date, he appeared before a judge and was released on a release order by consent. At the conclusion of that judicial interim release hearing, counsel for Mr. [REDACTED] applied for and was granted

an adjournment of the September 1 and 2 trial dates by consent. When the adjournment was granted, counsel for the Crown and counsel for the defence agreed that rather than fix a new trial date, the matter should be adjourned to September 30, 2020, for the purpose of conducting resolution discussions. Counsel for the accused in his submissions said to the Court, "And my friend and I are both in agreement that it's prudent given the -- the number of files and it's prudent for resolution discussions to adjourn the trial date." Tran., July 31, 2020, p. 7, ll. 35 to 36.

[7] In summary then, at the time the September 1 and 2, 2020, trial date was adjourned by the defence, Mr. [REDACTED] was facing three outstanding charges:

1. Information one, a simple assault on the complainant;
2. Information two, an allegation of installing the GPS tracker on the complainant's vehicle; and
3. Information three, an allegation of breach of a release order by having contact with the complainant.

[8] As early as July 6, 2020, counsel for Mr. [REDACTED] expressly communicated to counsel for the Crown Mr. [REDACTED] clear and unequivocal denial of the assault charge; but offered to discuss resolution of all matters, by considering the new charges in information number two. On July 31, 2020, when counsel for Mr. [REDACTED] agreed to adjourn for plea resolutions, both counsel had at hand all three informations, but no disclosure had yet to be made on informations two or three. On July 31, 2020, counsel for the Crown writes counsel for the accused, "... If he behaves himself for the remainder of the year, more or less, that by that time, we will have this assault file, the tracking file and [the] breach file -- I will be able to propose something to you globally, that potentially does not involve a custodial sentence -- even with his troubling history..." Affidavit of Cheryl Dawson #1, p. 25.

[9] By September 6, 2020, there had still been no disclosure on information number two. At that time, all matters were adjourned at the Crown's request to November 18, 2020, to allow the bulk of the disclosure to take place. On September 25, 2020, counsel for the accused was advised that an entirely new information, information number four, had been received by Crown and was undergoing the Crown charge approval process.

Late in November, disclosure was delivered to Mr. [REDACTED] on information number two, numbering well in excess of 1000 pages. As a result, the Crown asked again that the matter be adjourned over to December 9, 2020, also indicating that a new file, information four, was still under review. Affidavit of Cheryl Dawson # 1, p. 35.

[10] On December 3, 2020, counsel for the accused specifically requested an update on the potential global resolution, as well as information regarding the new charges [Information number 4]. No progress is made before the next appearance on December 9, 2020, and the matter is adjourned again to January 27, 2021, at the request of the Crown and the consent of the accused. On January 25, 2021, counsel for the accused again asks the Crown to discuss the outstanding files. Those discussions did not appear to occur, informations one, two, and three were adjourned again at the Crown's request to February 24, 2021. This occurred again in February and the matter was adjourned once more to March 31, 2021.

[11] By March 26, 2021, a proposed global resolution had still not been issued. The Crown writes to the accused, "I have not provided either of you with a proposal to resolve because this file [Information number 4] remains outstanding." Affidavit of Cheryl Dawson #1, p. 48. Finally, on March 26, 2021, the Crown appeared to concede that she would not be able to provide meaningful resolution proposals in the near future and suggested that trial dates now need to be set. That does not occur. The matter continues to be adjourned over. On May 10, 2021, the new information number four is sworn, alleging for serious counts of sexual assault with weapons and uttering threats. The Crown continued to promise a global sentencing position, which appears now to include information number four. All matters are adjourned again, by consent, to June 2 2021, for election, plea, and fixing dates as necessary. Further adjournments thereafter are required, as the Crown created their global resolution proposal. This finally arrived on June 4, 2021.

[12] While matters have now been adjourned for nine months to put together a "noncustodial plea offer", the plea offer that is advanced requires a plea to all informations except the breach allegation, and a jail sentence of between 18 months

and two years in custody. Plea discussions ensue briefly until June 23, 2021. At this time, a new trial Crown is assigned, the length of all trials have been agreed to, and the trial on information one is set for trial January 4 and 5, 2022.

[13] Information one was sworn September 4, 2019 and the trial is expected to be completed now, on January 7, 2022. This is a period of 28 months. Counsel agree that the period June 1, 2020 to September 1, 2020 (three months), is attributable to the defence, because those are dates that are available for trial, but defence counsel is not. Similarly, counsel agree that the period from June 23, 2021 to January 7, 2022 (six months and two weeks), is also attributable to the defence, because they are necessitated by the defence adjournment of the September 1 and 2, 2021 trial dates. Both counsel agree that a period of approximately nine and a half months is defence delay.

[14] In issue is the characterization of the remaining 19 months. Nineteen months, of course, is one month longer than the presumptive maximum allowable time to trial, pursuant to the decision of the Supreme Court of Canada in *R. v. Jordan*, 2016 SCC 27 (*Jordan*). The essential issue for the Court is the correct allocation of this period of time between the date of the first trial of September 1, 2020 and the next "fix date" of June 23, 2021. If that time or even a relatively small portion of that time is properly ascribed as delay attributable to the defence, then there is no breach of the *Jordan* guidelines. To the contrary, if that delay falls at the feet of the Crown or might be classified as inherent time requirements, then the delay involved in the matter is in breach, albeit minimally, of the accused **Charter** protected right to trial within a reasonable time. If that is the case, it is common ground that the appropriate order is a judicial stay of proceedings.

Analysis

[15] In *Jordan*, the Supreme Court of Canada placed a hard presumptive ceiling on what is a constitutionally acceptable length of time to trial. The reason for imposing that ceiling was to both put real meaning to the constitutional right to have a trial within a reasonable time, but also to address the culture of delay in all parts of the justice system.

[40] As we have observed, a culture of complacency towards delay has emerged in the criminal justice system (see, e.g., Alberta Justice and Solicitor General, Criminal Justice Division, "Injecting a Sense of Urgency: A new approach to delivering justice in serious and violent criminal cases", report by G. Lepp (April 2013) (online), at p. 17; Cowper, at p. 4; P. J. LeSage and M. Code, *Report of the Review of Large and Complex Criminal Case Procedures* (2008), at p. 15; Canada, Department of Justice, "The Final Report on Early Case Consideration of the Steering Committee on Justice Efficiencies and Access to the Justice System" (2006) (online), at pp. 5-6). Unnecessary procedures and adjournments, inefficient practices, and inadequate institutional resources are accepted as the norm and give rise to ever-increasing delay. This culture of delay "causes great harm to public confidence in the justice system" (LeSage and Code, at p. 16). It "rewards the wrong behaviour, frustrates the well-intentioned, makes frequent users of the system cynical and disillusioned, and frustrates the rehabilitative goals of the system" (Cowper, at p. 48).

[16] So too did the Court eschew the previous practice, consistent with the decision of *R. v. Morin*, [1992] 1 SCR. 771, of quibbling over the rationalizations of each of the separate periods of delay. Prior to *Jordan*, courts were called upon to inspect and categorize each and every moment of delay as being inherent delay, waived delay, Crown delay or defence delay. *Jordan*, paragraphs 36-37.

[17] Under the *Jordan* analysis, a presumptive ceiling is now established of 18 months for summary conviction proceedings, and 30 months for matters proceeding by indictment. Once the ceiling has been reached, the Crown bears the onus of justifying the delay past that ceiling. Crown may justify the delay if it is delay that is waived by the defence. This waiver may be explicit or implicit but must always be informed, clear, and unequivocal. *Jordan*, at paragraph 63, similarly states the delay may be justified if it is properly understood as being caused solely by the defence.

[63] The second component of defence delay is delay caused solely by the conduct of the defence. This kind of defence delay comprises "those situations where the accused's acts either directly caused the delay . . . or the acts of the accused are shown to be a deliberate and calculated tactic employed to delay the trial" (*Askov*, at pp. 1227-28). Deliberate and calculated defence tactics aimed at causing delay, which include frivolous applications and requests,

are the most straightforward examples of defence delay. Trial judges should generally dismiss such applications and requests the moment it becomes apparent they are frivolous.

- [64] As another example, the defence will have directly caused the delay if the court and the Crown are ready to proceed, but the defence is not. The period of delay resulting from that unavailability will be attributed to the defence. However, periods of time during which the court and the Crown are unavailable will not constitute defence delay, even if defence counsel is also unavailable. This should discourage unnecessary inquiries into defence counsel availability at each appearance. Beyond defence unavailability, it will of course be open to trial judges to find that other defence actions or conduct have caused delay (see, e.g., *R. v. Elliott* (2003), 2003 CanLII 24447 (ON CA), 114 C.R.R. (2d) 1 (Ont. C.A.), at paras. 175-82).

Jordan, paragraphs 63-64

[18] Obviously, that will include any tactics or processes employed by the accused, calculated to deliberately delay the process.

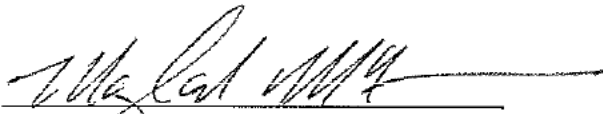
[19] I am not satisfied that any of the delay in bringing this matter to trial are caused solely by the conduct of the defence. Counsel for the Crown specifically requested that the accused not fix trial dates until a global sentencing position was offered. Counsel for the accused complied with that request. The global position was not offered to the accused for the period between September 2, 2020 and June 4, 2021. Furthermore, it was impossible for the accused to properly consider any offer made by the Crown until at least the vast majority of the disclosure had been made to allow him to understand the jeopardy that he faced. This was certainly not the case prior to June 23, 2021, when the matter was once again set for trial.

[20] It is not reasonable for the accused to be expected to review or consider a global plea offer until they have received virtually complete disclosure on all of the informations to which they are expected to plea. The accused is entitled to know the details of the case they are to meet, before being called upon to waive their right to a trial and enter a plea of guilty. In the result, it cannot be said that the delay was solely as a result of the conduct of the defence.

[21] I am equally persuaded that the actions taken by the defence are all "legitimately taken to respond to the charge." *Jordan*, paragraph 65. Throughout the entire period during which the accused waited for the global resolution proposal, they were also awaiting disclosure. The accused is most certainly entitled to await completion of disclosure prior to responding to any plea offer. To do anything less is irresponsible.

[22] The Crown has the burden of proof at the delay in excess of the presumptive ceiling, is delay either waived by or caused solely by the defence. Both counsel agreed that there are no exceptional circumstances which would suggest that this matter ought to enjoy an extension of the *Jordan* timelines. In the result, the appropriate relief is that the matter be the subject of a judicial stay.

[23] I order that information 178275-4 be stayed.

A handwritten signature in black ink, appearing to read 'M. McKimm', with a long horizontal line extending to the right.

The Honourable Judge M. McKimm
Provincial Court of British Columbia