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COURT OF APPEAL FOR ONTARIO

CITATION: R. v. MacIsaac, 2018 ONCA 650

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Watt, Brown and Huscroft JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Gordon MacIsaac

Appellant

Frank Addario and James Foy, for the appellant

Katie Doherty, for the respondent

Heard: February 21, 2018

On appeal from the conviction entered on April 18, 2017 and the sentence imposed on May 19, 2017 by Justice Catherine A. Kehoe of the Ontario Court of Justice.

Huscroft J.A.:

OVERVIEW

[1] The appellant was charged with one count of aggravated assault arising out of a collision with the complainant during the final seconds of a recreational, non-contact hockey game in a senior men's league in Ottawa. The complainant suffered severe injuries including lacerations to his face, two missing front teeth, and a concussion. The Crown's theory at trial was that the appellant delivered a blindside, head-high hit on the complainant with intent to injure him, in retaliation for the complainant's having tripped the appellant's teammate earlier in the game. The appellant argued that his collision with the complainant was an unavoidable accident.

[2] The appellant was convicted of the offence, but this court concluded that he did not receive a fair trial because the trial judge engaged in impermissible speculative reasoning in reaching her verdict. His conviction was quashed and a new re-trial was ordered: *R. v. MacIsaac*, 2015 ONCA 587, 337 O.A.C. 190.

[3] The appellant's re-trial was not scheduled to take place for over 17 months following this court's order. The appellant brought an application for a stay under s. 11(b) of the *Canadian Charter of Rights and Freedoms*, but his application was dismissed by the trial judge and the re-trial proceeded as scheduled. Following the re-trial, the trial judge reserved her decision. She released a 206-page judgment two months later and the appellant was convicted of aggravated assault for a second time.

[4] The appellant returns to this court and argues that the charge against him should be dismissed for delay. In the alternative, he argues that the trial judge erred in convicting him and that a new trial should be ordered.

[5] For the reasons that follow, I conclude that the appeal must be allowed, the convictions quashed, and a stay entered. As a result, there is no need to consider the other grounds of appeal.

BACKGROUND

Timeline

[6] The appellant was charged with aggravated assault on July 11, 2012. He elected trial in the Ontario Court of Justice and was convicted on December 16, 2013, following an eight-day trial.

[7] On August 31, 2015, this court quashed the conviction and ordered a new trial. The appellant's counsel was served with a summons for the re-trial on November 30, 2015. On February 3, 2016 a ten-day re-trial was scheduled to run from February 6 to 17, 2017.

[8] On August 25, 2016, the appellant brought an application for a stay of proceedings under s. 11(b) of the *Charter*. That application was dismissed on October 26, 2016 and the re-trial went ahead as scheduled.

[9] The trial judge reserved her decision following the last day of trial, which was February 16, 2017, one day earlier than scheduled. On April 18, 2017, the trial judge released her judgment finding the appellant guilty of aggravated assault.

The trial judge's stay decision

[10] The trial judge dismissed the appellant's application for a stay of proceedings under s. 11(b) of the *Charter*. In her reasons she reviewed the entire proceedings, beginning with the first trial. She found that the net delay on the first trial was 17 months to the end of sentencing, thus below the presumptive ceiling of 18 months established by *Jordan*. Similarly, the re-trial also was expected to fall below *Jordan*'s presumptive 18-month ceiling.

[11] The trial judge made the following findings concerning the second trial:

· August 31, 2015 – re-trial ordered

· October 16, 2015 – Crown decides not to seek leave to appeal to Supreme Court

· November 6, 2015 – summons for re-trial issued

· November 6, 2015 to November 30, 2015 – defence delay of three weeks incurred because appellant could not be served due to invalid address

· December 1, 2015 – summons served on appellant's counsel

· December 2, 2015 to February 3, 2016 – defence delay of one month incurred for adjournment requests concerning the pre-trials and related issues; Crown delay of one month incurred to allow for consultation with complainant

· February 3, 2016 to February 6, 2017 – institutional delay

[12] The trial judge calculated delay from issuance of the summons for re-trial on November 6, 2015 until the last day scheduled for trial, February 17, 2017, a period of over 15 months. She did not take into account the time that would be required to write her judgment, which in the event took two months.

[13] The trial judge subtracted seven weeks of delay that she attributed to the defence, arriving at a net delay of 13 months and 1 week – well under the presumptive ceiling of 18 months. The trial judge concluded that the defence could not establish that the delay was in any event unreasonable, and so dismissed the appellant's s. 11(b) application.

THE ARGUMENTS ON APPEAL

The appellant

[14] The appellant contends that the delay in the re-trial was over 19 months, and so exceeds the presumptive 18-month ceiling established in *Jordan* for proceedings in the provincial court. The appellant submits that there are no exceptional circumstances and that a stay should be granted.

[15] The appellant argues that the trial judge erred in calculating the total and net delay in three ways:

1. by failing to consider the Crown's obligation to expedite a re-trial;

2. by discounting delay from the time this court ordered a re-trial until a summons was issued; and

3. by misclassifying essential steps in the trial process as defence delay.

[16] The appellant does not accept that either the period during which the Crown was considering appealing this court's first decision to the Supreme Court or the period during which the trial judge reserved her judgment are exceptional circumstances that should be deducted from the net delay.

[17] In addition, the appellant argues that the transitional framework for cases already in the system when *Jordan* was decided cannot save this case because the delay would have been unreasonable under the pre-*Jordan* case law. The *Morin* guidelines were that 8-10 months of institutional delay was tolerable: see *R. v. Morin*, [1992] 1 S.C.R. 771, at p. 799. In this case, the time between setting the second trial date and the start of the trial was 12 months. Moreover, the *Morin* guidelines had to be adjusted downward because this was a re-trial, and as a result should have taken place faster than a first trial. The appellant submits that the trial judge erred in looking for proof of prejudice rather than inferring prejudice from the total delay in this case.

[18] Finally, the appellant submits that the delay was unreasonable even if it fell under the presumptive ceiling of 18 months, because neither the courts nor the Crown fulfilled their obligation to schedule the re-trial as soon as possible.

The Crown

[19] The Crown submits that delay in completing the re-trial did not exceed the 18-month presumptive ceiling and that the delay was not unreasonable in any event.

[20] The Crown concedes that the trial judge should not have deducted seven weeks for defence delay. The Crown accepts that the total delay on the re-trial was 19 months, 2 weeks, but submits that resulting delay was only 15 months, 2 weeks, once the delay for two exceptional events is deducted. The first is the seven-week period during which the Crown was considering an appeal to the Supreme Court following this court's decision ordering a re-trial. The second is the two-month period during which the trial judge's decision was under reserve.

[21] The Crown submits, further, that even if the 18-month presumptive ceiling established by *Jordan* was exceeded, the presumption of unreasonableness is rebutted in the circumstances of this transitional case. The Crown contends that although the case was not among the most complex, it was a lengthy provincial court trial and required detailed consideration by the trial judge. The delay was not unreasonable under the *Morin* guidelines and the Crown took steps to minimize the delay in any event.

DISCUSSION

Overview

[22] The *Jordan* methodology has been canvassed by this court in several cases. See e.g., *R. v. Jurkus*, 2018 ONCA 489; *R. v Gopie*, 2017 ONCA 728, 356 C.C.C. (3d) 36; *R. v. Coulter*, 2016 ONCA 704, 133 O.R. (3d) 433; and *R. v. Manasseri*, 2016 ONCA 703, 132 O.R. (3d) 401. There is no need to rehearse it here. It suffices to say that, in the usual case, total delay is measured from the date the charge is laid to the end of the trial. Defence delay is then subtracted from this period to determine the net delay. If the net delay falls above the presumptive ceiling the delay is presumptively unreasonable, but the Crown may rebut this presumption by establishing that there are exceptional circumstances. Conversely, if the net delay falls below the presumptive ceiling, then the onus is on the defence to show that the delay is unreasonable. When charges pre-date *Jordan*, the framework must be applied flexibly and contextually, taking into account the parties' reliance on the previous state of the law.

[23] Unlike *Jordan*, however, this case concerns delay in the context of a re-trial rather than a first trial. This is no small difference. The *Jordan* principles must be applied in a manner consistent with the Crown's duty to re-try cases as soon as possible.

[24] This duty is not new. It was underscored by this court in *R. v. Yakymiw* (1993), 68 O.A.C. 237 (C.A.), at para. 4, in which the court referred to "an obligation to bring the matter to trial expeditiously" following a decision setting aside a stay; in *R. v. Satkunananthan* (2001), 152 C.C.C. (3d) 321 (Ont. C.A.), at para. 55, in which the court said that it was "incumbent on the Crown to take all necessary steps to ensure that [a] third trial commenced without further delay" following a mistrial at the first re-trial; and in *R. v. Brace*, 2010 ONCA 689, 104 O.R. (3d) 32, at para. 16, in which the court emphasized the need to be cognizant of an accused's s. 11(b) rights when setting a re-trial date following a mistrial.

[25] Of course, the Crown is not the only duty-bound actor in the process. As the Supreme Court has emphasized, every actor in the justice system has a responsibility to ensure that an accused is brought to trial within a reasonable time: see *Jordan*, at para. 137; *R. v. Cody*, 2017 SCC 31, [2017] 1 S.C.R. 659, at para. 1.

[26] This case was argued on the basis of the parties' agreement that the 18-month presumptive ceiling applies to the re-trial, and that the onus was on the appellant to establish that the delay was unreasonable if it did not exceed the presumptive ceiling.

[27] In my view, the 18-month presumptive ceiling established for a first trial is too long in the circumstances of a re-trial. Re-trials must receive priority in the system, and in the normal course re-trials in the Ontario Court of Justice should occur well before *Jordan*'s 18-month presumptive ceiling. It may be that a lower presumptive ceiling is appropriate for re-trials.

[28] We heard no argument on this point and it would not be appropriate to say anything more in the context of this case. This case was argued on the assumption that the 18-month presumptive ceiling applies, and I propose to deal with it on this basis. However, the *Jordan* criteria must be understood in the context of the Crown's duty to re-try cases as soon as possible.

[29] I begin by reviewing the considerations raised by the parties concerning the calculation of delay. I conclude that the delay in this case either exceeds the presumptive 18-month ceiling or is unreasonable in any event. In either case, the appeal must be allowed and a stay must be granted.

Calculation of delay

[30] *Jordan* provides that delay is measured from the date a charge was laid (para. 47). It does not address the date from which delay should be measured in the case of a re-trial.

[31] The trial judge concluded that the clock did not begin to run until the summons for re-trial was issued, November 6, 2015, rather than the date this court ordered a re-trial, some nine weeks earlier on August 31, 2015. She erred in doing so. The right to be tried within a reasonable time arises on being charged with an offence. This court's order quashing the appellant's conviction left him in the position of being a person charged with an offence: see *R. v. Potvin*, [1993] 2 S.C.R. 880, at p. 908. Accordingly, the clock should have run from the date of this court's decision.

[32] When did the clock stop running?

[33] In the case of a first trial, *Jordan* provides that the clock runs until "the actual or anticipated end of trial": at para. 47. In the case of a jury trial, the end of the trial is essentially contemporaneous with the rendering of the verdict. If the trial is by judge alone, whether in the Superior Court or the Ontario Court of Justice, there may be a more significant period between the end of the trial and the verdict, when the decision is under reserve.

[34] The appellant argued that the period during which a decision is under reserve should be counted in calculating total delay, while the Crown argued that it should not.

[35] Prior to *Jordan*, the time a judgment was under reserve was typically considered to be part of the inherent time requirements of a case: *R. v. Schertzer*, 2009 ONCA 742, 255 O.A.C. 45, at para. 114, leave to appeal refused [2010] S.C.C.A. No. 3; e.g. *R. v. Lamacchia*, 2012 ONSC 2583, at para. 7; *R. v. Ferguson* (2005), 24 M.V.R. (5th) 47 (Ont. S.C.), at para. 213, leave to appeal refused 2008 ONCA 764, 69 M.V.R. (5th) 18. However, some judicial delays in rendering a decision were considered unreasonable and warranted a stay. Most notably, in *R. v. Rahey*, [1987] 1 S.C.R. 588, the Supreme Court was unanimous that an 11-month delay to issue a decision on a motion for a directed verdict constituted an infringement of s. 11(b). See also *R. v. Milani*, 2014 ONCA 536, 120 O.R. (3d) 641, at para. 28, leave to appeal refused [2014] S.C.C.A. No. 426.

[36] The appellant's stay application was heard prior to commencement of the re-trial, and the trial judge used the final day scheduled for the re-trial – February 17, 2017 – as the end date for calculating total delay. As it happened, the trial ended one day earlier than expected and the appellant was not convicted until over two months later – April 18, 2017 – when the judgment was delivered.

[37] *Jordan* did not address whether the time a judgment is under reserve in included in the calculation of total delay and appears to have left the matter open. On the view I take it is not necessary to resolve the issue of reserve time for purposes of this case, and I would leave the issue for resolution in a future case, with a fuller evidentiary record and argument.

[38] If the time the decision was under reserve is included, the total delay runs from August 31, 2015 to April 18, 2017 – just over 19 months. If reserve time is not included, total delay is just over 17 months.

[39] On the *Jordan* approach, once total delay is known, any delay attributable to the defence must then be subtracted to calculate the net delay: *Jordan*, at para. 60.

[40] There is no such defence delay in this case. Although the trial judge attributed seven weeks of delay to the appellant, including three weeks of delay because of problems serving the summons for re-trial and four weeks because of adjournment requests concerning the pre-trials and related issues, the Crown fairly concedes that these attributions were in error. The appellant was not responsible for difficulties encountered in serving the summons for re-trial, nor did the defence take illegitimate actions in responding to the re-trial that caused delay.

[41] Accordingly, net delay is unaffected by defence delay. It is over 19 months, if reserve time is included; it is over 17 months if it is not. I will consider the matter under both scenarios. As I explain below, assuming the presumptive ceiling is 18 months, the net delay in the first scenario is above the ceiling while the net delay in the second scenario is not. However, the delay was unreasonable under either scenario and a stay must be granted.

The first scenario: if delay is above the presumptive ceiling, it is unreasonable

[42] *Jordan* dictates that net delay above the presumptive ceiling is unreasonable unless the Crown can establish the presence of exceptional circumstances that rebut the presumption (para. 47). Exceptional circumstances are events that are either reasonably unforeseen or reasonably unavoidable, and cannot reasonably be remedied by the Crown once they arise: *Jordan*, at para. 69. As the Crown points out in this case, exceptional circumstances need not be rare: *Jordan*, at para. 69. Nor did *Jordan* establish an exhaustive list of circumstances that might qualify as exceptional; on the contrary, the court left the determination of exceptionality to the trial judge's good sense and experience: at para. 71.

[43] Exceptional circumstances generally fall into two categories: discrete events and particularly complex cases: *Jordan*, at para. 71. In addition, a transitional exceptional circumstance may arise if, as here, a case was already in the system when *Jordan* was decided: *Jordan*, at paras. 94-98.

[44] A discrete exceptional event must be either reasonably unforeseen or reasonably unavoidable, and something that cannot reasonably be remedied by the Crown once it arises: see *Jordan*, at para. 69. Discrete exceptional events may include, but are not limited to, medical or family emergencies, the recantation of a witness requiring the Crown to change its case, or the appointment of the accused's counsel to the bench: *Jordan*, at paras. 72-73; *Cody*, at para. 49. The delay caused by such events is deducted from the net delay to the extent it cannot be reasonably mitigated by the Crown and the justice system: *Jordan*, at paras. 73, 75; *Cody*, at para. 48.

[45] The Crown submits that there are two discrete exceptional events in this case: the time taken while the decision was under reserve and the time taken to seek leave to appeal the decision of this court to the Supreme Court.

Delay while the judgment was under reserve

[46] The Crown submits that time the decision was under reserve was a discrete exceptional event because "[t]he extraordinary length and scope of the trial judge's reasons evidence that a reserve was unavoidable in this case."

[47] I would reject this submission.

[48] This was a vigorously contested, multi-day and witness trial. That time is required to provide the parties with reasonably intelligible reasons the trial judge considers sufficient to provide a basis for meaningful appellate review is to be expected. It is not, in itself, a discrete exceptional event, nor does it become such an event in this case by virtue of the length of the reasons provided or the issues involved.

Delay to consider seeking leave to appeal to the Supreme Court

[49] The Crown was entitled to seek leave to appeal the decision of this court ordering a re-trial and had 60 days in which to do so: *Supreme Court Act*, R.S.C., 1985, c. S-26, s. 58(1)(a). The Crown submits that the nine-week period during which it considered seeking leave to appeal to the Supreme Court was another discrete exceptional event.

[50] There is no merit to this submission.

[51] The decision whether to seek leave to appeal to the Supreme Court is not an unforeseeable or unavoidable event of the sort contemplated by *Jordan*. On the contrary, it is a routine matter that arises in every case in which an appeal from conviction succeeds. A decision allowing an appeal and ordering a re-trial may well be unexpected in particular circumstances by the Crown, but it is not an unforeseeable event on that account. It is always a possibility and the Crown must be prepared to consider its appeal option in every case.

[52] The duty to re-try a case as soon as possible imposes no great burden on the Crown, even assuming there may be good reason to consider seeking leave to appeal to the Supreme Court in a particular case. It would be a relatively simple matter to take the steps required to set a re-trial in train while a leave application is being considered.

The transitional exceptional circumstance

[53] The Crown further submits that if delay exceeds the presumptive ceiling, it was reasonable in the circumstances of this transitional case.

[54] I would reject this argument.

[55] In *Gopie*, at para. 178, this court outlined the relevant criteria informing the transitional exceptional circumstance analysis, namely: (i) the complexity of the case; (ii) the period of delay in excess of the *Morin* guidelines; (iii) the Crown's response, if any, to any institutional delay; (iv) the defence efforts, if any, to move the case along; and (v) prejudice to the accused.

[56] These considerations do not avail the Crown in this case. This was a relatively straightforward case, as I have noted, and the delay would not have been reasonable under the *Morin* guidelines. I accept that the Crown took some steps to minimize the re-trial delay, but ultimately it stuck with its request for 10 consecutive trial days, knowing from information provided by the trial co-ordinator that this meant pushing back the trial date one full year. This was simply inappropriate in the context of a re-trial involving a charge that had been laid in 2012 – over four years earlier.

[57] In summary, the delay in this case is not affected by either exceptional circumstances or transitional exceptional circumstances. If time under reserve is included in the calculation of delay, then the net delay is over 19 months and exceeds the presumptive ceiling. The Crown has not rebutted the presumption of unreasonableness. On the first scenario, the delay is unreasonable and a stay must be granted.

The second scenario: if delay is below the presumptive ceiling, it is unreasonable

[58] Under the second scenario, in which the time under reserve is not included in the calculation of delay, the net delay is over 17 months. In my view, even under this second scenario where the burden is on the defence to show that the delay is unreasonable, a stay is required.

[59] As a preliminary matter, I reiterate that re-trials must receive priority in the system, and that this should normally result in a delay well under the 18-month presumptive ceiling established in *Jordan*. However, as I indicated above, this appeal was argued on the basis of the parties' agreement that the 18-month presumptive ceiling applies and I will resolve it on this basis.

[60] When delay falls below the presumptive ceiling, the onus is on the defence to establish that the delay is unreasonable despite not exceeding the ceiling: *Jordan*, at para. 82. The defence must establish (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.

[61] The defence burden is met in the circumstances of this case. The record reveals that appellant's trial counsel sought the earliest possible dates for the re-trial. For its part, the Crown sought ten consecutive days for trial. That was a choice it was entitled to make, but it was a choice with consequences. Large blocks of time will often be unavailable when setting trial dates, and in this case ten consecutive days were not available, according to the trial co-ordinator, for one full year from the time the Crown sought to set the date.

[62] On August 9, 2016, after the appellant filed his application for a stay, Crown counsel informed the trial co-ordinator that the appellant had filed the stay application and inquired as to the availability of an earlier date. However, the trial co-ordinator informed Crown counsel that no earlier date was available for a ten-day trial, and the Crown took no further action.

[63] In these circumstances, it is no answer to the appellant's delay argument that the trial co-ordinator would not agree to provide earlier dates. The Crown cannot simply take "no" for an answer in the context of a re-trial. A greater sense of urgency is required, lest the culture of complacency the court warned of in *Jordan* be condoned.

[64] The Crown's duty to re-try the appellant as soon as possible meant that the Crown could not maintain its preference for consecutive trial dates. It had to make whatever arrangements were necessary to commence and complete the re-trial as soon as reasonably possible, even if that required accepting trial dates it considered suboptimal.

[65] The bottom line is this: this was re-trial on an aggravated assault charge that was over four-years old. The appellant was already put through one trial and faced another. His re-trial should have been prioritized, but it was not. The consequence is that the appellant's right to be tried within a reasonable time has been breached.

CONCLUSION

[66] I would allow the appeal, quash the conviction, and enter a stay.

Released:

"DW" "Grant Huscroft J.A."

"JUL 18 2018" "I agree David Watt J.A."

"I agree David Brown J.A."