

CANADA / JUDGMENT

R. v. Balogh

2020 BCCA 96

COURT

British Columbia Court of Appeal

DECIDED

20 March 2020

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2020 BCCA 96 R. v. Balogh

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Balogh,

2020 BCCA 96

Date: 20200320

Docket: CA45145

Between:

Regina

Respondent

And

Peter Balogh

Appellant

Before:

The Honourable Mr. Justice Willcock

The Honourable Madam Justice Fenlon

The Honourable Mr. Justice Fitch

On appeal from: An order of the Supreme Court of British Columbia, dated February 7, 2018 (R. v. Balogh, 2018 BCSC 180, Vancouver Docket 27170).

Counsel for the Appellant:

K.R. Beatch

R. Thirkell

Counsel for the Respondent:

M. Loda

Place and Date of Hearing:

Vancouver, British Columbia

December 13, 2019

Place and Date of Judgment:

Vancouver, British Columbia

March 20, 2020

Written Reasons by:

The Honourable Madam Justice Fenlon

Concurred in by:

The Honourable Mr. Justice Willcock

The Honourable Mr. Justice Fitch

Summary:

The appellant successfully applied for a stay of proceedings in Provincial Court based on a violation of his s. 11(b) Charter right to be tried within a reasonable time. The stay was overturned on appeal to the Supreme Court. He appeals the reversal arguing the appeal judge erred (1) by mischaracterizing a seven-month period as defence delay and (2) in not applying pre-Jordan law to this transitional case. Held: Appeal dismissed. First, although the adjournment of the third trial date was due to the trial judge's unavailability, defence counsel's schedule caused an additional seven months of delay. Defence unavailability should be characterized as defence delay from the first day that the Court and Crown are ready to proceed and the defence is not. Second, the Jordan framework is to be applied to all cases, even those already in the system. Characterization of delay is determined by Jordan, not by the Morin analysis. The "right" to rely on pre-Jordan law in transitional cases only falls to the party that finds itself on the wrong side of the presumptive ceiling.

Reasons for Judgment of the Honourable Madam Justice Fenlon:

- [1] This appeal concerns attribution of delay under the Jordan framework, in particular whether defence counsel's unavailability should be characterized as defence delay even when the adjournment is not caused by the defence.

Background

Proceedings in Provincial Court

- [2] The appellant, Peter Balogh, is a practising dentist. He was an adherent of the Paradigm Group which espouses the pseudo-legal notion that a person can self-classify as a "natural person" and thereby be exempt from the payment of income tax.
- [3] In May 2012 Mr. Balogh was charged with six counts relating to the evasion of income taxes between 2005 and 2009. The trial in Provincial Court was adjourned three times, finally proceeding on the fourth trial date and ending on May 20, 2016. Mr. Balogh brought an application for a stay of proceedings during the trial. He contended that his right to be tried within a reasonable time under s. 11(b) of the Canadian Charter of Rights and Freedoms had been breached given that four and a half years had elapsed between charge and trial. The judge reserved his decision until August 9, 2016.
- [4] On July 8, 2016, the Supreme Court of Canada released *R. v. Jordan*, 2016 SCC 27, and *R. v. Williamson*, 2016 SCC 28, which established a new s. 11(b) delay framework to be applied to cases currently in the system as well as to all future proceedings. Under the new framework, delay for trials in Provincial Court is presumptively unreasonable beyond 18 months, unless the Crown can establish that certain exceptional circumstances apply.
- [5] On August 9, 2016, after finding Mr. Balogh guilty on all counts, the trial judge heard further submissions on the delay application in light of *Jordan*. He determined that a delay of four and a half years amounted to unreasonable delay under the new framework and entered a stay of proceedings.
- [6] In reaching that conclusion the judge attributed 21.8 of the 51.5 months of total delay to the defence, bringing the net delay to 29.7 months--significantly beyond the 18-month presumptive ceiling. Since this was a transitional case, the judge noted that it was open to the Crown to show that the time taken to conclude the trial was justified based on the parties' reasonable reliance on the law as it stood pre-*Jordan*. He concluded that the Crown had not met that burden, and observed that, even if he were applying the law as it existed before *Jordan*, he would have found the delay of 29.7 months to be unreasonable.

Appeal to the BCSC

- [7] The Crown appealed to the British Columbia Supreme Court, raising two main grounds of appeal. The first related to the judge's attribution of defence delay, and the second to his application of *Jordan*'s transitional provisions.
- [8] The summary conviction appeal judge ("SCAJ") found the trial judge made a minor mathematical error in calculating one period of defence delay as 4.8 months when it should have been 5.6 months. But the main issue before her on the first ground of appeal was whether the trial judge erred in not attributing an additional seven-month period between

October 2015 and April 2016 to defence delay. In order to understand the trial judge's assessment of this period of delay, a closer look at the Provincial Court proceedings is necessary. The SCAJ created a detailed summary of periods of delay, but for the purposes of this appeal, the following suffices.

- [9] Mr. Balogh was charged on May 17, 2012. After a number of appearances on his own, he retained counsel who first appeared on his behalf in October 2012. By January 2013, dates had been set for a four-day voir dire to be heard October 8-11, 2013, and for a trial in January 2014, which would have put the total time between charge and end of trial at 20.75 months. That was not to be. On September 5, 2013, defence counsel withdrew. On October 3, Mr. Balogh applied to adjourn the voir dire and trial dates to allow him to obtain new counsel. Crown opposed the adjournment but the voir dire was adjourned to January 28, 2014, the first date set for trial. New counsel for Mr. Balogh then successfully applied to adjourn the trial. He agreed to waive the time between the adjournment and the second trial date which was eventually set for June 2015, with the voir dire to occur in March of that year.
- [10] Seven months later, in September 2014, defence counsel applied to adjourn the March voir dire dates because he was double-booked. That application was granted. The voir dire was moved to the June 2015 trial date and the trial set for July 7, 2015.
- [11] On February 6, 2015, defence counsel again applied to adjourn the June 2015 voir dire dates because he was unavailable. That application was granted. The third trial date was also vacated at a pre-trial conference on February 23, 2015, because it had become apparent that, due to a scheduling oversight, the seized trial judge was unavailable. The trial judge described what happened next:
- [33] When the July dates were vacated, it was noted that there were trial dates available in October 2015. Counsel for the accused, however, was not available for those dates as he had scheduled other lengthy matters such that he was not available until the spring of 2016.

The trial judge found it would be unreasonable to attribute the delay between October 2015 and the fourth trial date in April 2016 to the defence because counsel had been available for the July 2015 trial dates but had booked other matters thereafter. Nor did he think it reasonable to expect Mr. Balogh to find new counsel.

- [12] The SCAJ took a different view of the matter, saying:
- [47] The trial judge found that it would be unreasonable to expect the accused to change counsel at that stage of the proceeding. With respect, I disagree with the trial judge in this regard (but acknowledge that this, in and of itself, does not provide a basis for appellate intervention). All of the parties were aware in April 2015 that second counsel was not available until 2016. At that point, it would have been reasonable to require the accused to find new counsel. In April 2015, disclosure had been provided to the defence (by October 2013) and the many appearances in court addressed scheduling matters only. A 7-month period to retain new counsel in those circumstances, where two lengthy adjournments had

already been provided to the defence, was reasonable. The first trial dates and the second trial dates were both adjourned at the request of the respondent. The first trial dates were adjourned at the respondent's request because first counsel withdrew from the record and second counsel applied to adjourn the first trial dates in January 2014. The second trial dates were adjourned at the respondent's request in September 2014 due to second counsel's unavailability.

[48] At the time that the third trial dates were being adjourned on April 10, 2015, defence was already responsible for the first two trial adjournments. This necessitates more urgency on the part of the respondent and his counsel to bring the matter to trial.

[Emphasis added.]

[13] The SCAJ noted that Jordan clearly directs that delay resulting from defence unavailability is to be characterized as defence delay and deducted from total delay. Defence unavailability is defined as time when the Crown and court are ready to proceed and the defence is not: Jordan at para. 64. The SCAJ therefore concluded that the seven months of delay between October 2015 and the end of April 2016 when the trial began was attributable to Mr. Balogh and that the trial judge had erred in not ascribing this period to defence delay: paras. 58-59.

[14] The SCAJ found that when the seven months' delay and the additional period due to the mathematical error were deducted from total delay, the remaining or net delay was reduced to 21.9 months, exceeding the 18-month presumptive ceiling by 3.9 months.

[15] She then turned to the question of whether the Crown had established that the time the case had taken to come to trial was justified based on its reasonable reliance on the law as it stood prior to Jordan. She noted that the proceeding had taken place almost entirely under the pre-existing framework--with the trial finished--but for delivery of the judge's decision, which was under reserve at the time Jordan was released. She reviewed *R. v. Morin*, [1992] 1 S.C.R. 771 at 787-788, which summarized the factors to be considered in assessing delay prior to Jordan:

1. the length of the delay;
2. waiver of time periods;
3. the reasons for the delay, including
 - (a) inherent time requirements of the case,
 - (b) actions of the accused,
 - (c) actions of the Crown,
 - (d) limits on institutional resources, and
 - (e) other reasons for delay; and

4. prejudice to the accused.

[16] The SCAJ observed that almost the entirety of the delay rested at the feet of either the defence or so-called "institutional" delay, and that the actions and attitude of the defence showed that Mr. Balogh did not take any steps to ensure a speedy trial. She then set out examples of that attitude: Mr. Balogh had not appeared in court during his first summons even though he acknowledged that he knew of the court date, he refused to respond to his name in court, refused to be fingerprinted on September 6, 2012, and had taken more than three months to obtain new counsel after his first counsel withdrew. In contrast, the trial judge found the Crown had "for the most part been ready to move this case to trial": para. 79. The SCAJ recognized that under the Morin framework, prejudice and seriousness of the offence "often played a decisive role in whether delay was unreasonable": para. 81. She then said:

[83] I accept that there was prejudice to [Mr. Balogh] in the circumstances of having first counsel withdraw from the record and the adjournment of the third trial dates. However, the prejudice is mitigated in this case by his release from custody following his charges. The prejudice was further mitigated by the nature of the charges themselves: unlike other charges that could involve major restrictions on liberty, reputational damage, or non-contact conditions with those close to you, these charges arose out of accounting practices allegedly instigated by [Mr. Balogh], contrary to the advice of his company's chartered accountant. The only person involved was [Mr. Balogh] himself. The "victim" was the whole of the citizens of the country, in a sense.

[17] The SCAJ found the Crown had demonstrated reasonable reliance on the law as it stood prior to Jordan and that the judge had erred in finding otherwise. In fairness to the trial judge, she noted that he had conducted his assessment on the basis of a net delay of 29.7 months rather than the 21.9 months she found to be correct (at para. 66).

[18] Mr. Balogh was granted leave to appeal the order of the SCAJ pursuant to s. 839(1) of the Criminal Code, R.S.C. 1985, c. C-46 which provides for appeal on a question of law alone.

Analysis

[19] Characterization of delay on a s. 11(b) application is a question of law and is reviewable on a correctness standard: *R. v. Horner*, 2012 BCCA 7 at para. 70.

[20] Mr. Balogh contends the SCAJ erred in two ways:

(i) by mischaracterizing delay because she did not follow *R. v. Godin*, 2009 SCC 26; and

(ii) by not allowing him to rely on pre-Jordan law to establish unreasonable delay in a transitional case.

1. Did the SCAJ err in failing to apply *Godin* to the seven-month period of delay in issue?

- [21] Mr. Balogh submits the SCAJ erred by not applying *Godin*--a mistake resulting from her erroneous view that *Godin* had been overruled by *Jordan*. He submits that if the SCAJ had applied *Godin*, she would have been compelled to characterize the seven-month period in issue as Crown delay, not defence delay.
- [22] I would not accede to this ground of appeal for three reasons.
- [23] First, in my view *Godin* does not stand for the proposition contended for by Mr. Balogh. In *Godin*, the Crown gave the accused in a sexual assault case an important forensic DNA report only four days before trial. In response to this new evidence, the Crown and defence agreed to adjourn the trial and that the Crown would re-elect to proceed by indictment so that the defence could explore the complainant's evidence and the forensic report at a preliminary inquiry. The earliest available date for the preliminary inquiry was seven months later, in September 2006. Defence counsel wrote to the court and the Crown proposing 31 alternative dates on which he would be available. He received no response to this request and the Crown did not explain why defence's request to expedite the matter was ignored. As it turned out, the September date had to be adjourned for lack of court time. The preliminary inquiry was then rescheduled to February 5, 2007, because defence counsel was unavailable on the December date first proposed by the Crown.
- [24] The trial finally occurred in November 2007, 30 months after the charges were laid. The trial judge stayed the proceedings as a breach of s. 11(b). A majority in the Ontario Court of Appeal set aside the stay, but the Supreme Court of Canada reinstated it. They agreed with the trial judge that the defence could not be held responsible for the month and a half of delay between the first date offered for the rescheduled preliminary inquiry and the one ultimately set, saying:
- [23] Here, there is no suggestion that defence counsel was unreasonable in rejecting the earlier date. Indeed, his prior conduct in seeking earlier dates for the preliminary inquiry -- efforts which were ignored -- suggests that he wished to proceed expeditiously. I respectfully agree with Glithero R.S.J., dissenting in the Court of Appeal, at para. 53, that: "To hold that the delay clock stops as soon as a single available date is offered to the defence and not accepted, in circumstances where the Crown is responsible for the case having to be rescheduled, is not reasonable."
- [Emphasis added.]
- [25] I do not read *Godin* as standing for the categorical proposition that when the Crown is the cause of an adjournment, all delay until defence counsel has availability to reset the matter must be attributed to the Crown. Rather, *Godin* does nothing more than counsel the use of common sense in the allocation of responsibility for delay. It must be remembered that defence counsel in *Godin* was not available on the first date the Crown and court were able to proceed. Although it is not entirely clear from the decision, it appears to have been understood that he had other dates readily available. Furthermore, the *Morin* analysis required a weighting of a number of factors, and in *Godin* the court gave considerable

weight to defence counsel's earlier efforts to move the proceeding along.

[26] Second, the facts of the present case are so different from those in *Godin* that it could not in any event be determinative of the characterization of the delay in issue. Mr. Balogh was responsible for the loss of the first two trial dates, had not demonstrated any desire to move things along, and his counsel was not free for any period during a seven-month stretch, while the Crown was ready to proceed to trial throughout. In contrast, defence counsel in *Godin* had made significant efforts to expedite the proceeding and was not available on the first date offered by the Crown, which had been responsible for extensive and unexplained periods of delay.

[27] Third, I do not read the SCAJ's reasons as a determination that *Godin* has been overruled by *Jordan*. It is noteworthy that she makes no reference to the case at all. Mr. Balogh relies on the following passage:

[57] As noted, *Jordan*'s comment on the culture of complacency was critical of all parties in the criminal justice system. While defence counsel could previously expect that trial dates would be moved to accommodate his or her future trial commitments, *Jordan* and *Warring* make it clear that that is [no] longer the case in a post-*Jordan* world, particularly where the Crown and the court are ready to proceed, especially so where there have already been two adjournments at the request of the defence.

[Emphasis added.]

[28] As I read this passage, the SCAJ is saying nothing more than that defence counsel's unavailability may no longer be enough to justify granting an adjournment. The comments must be read in context--the SCAJ had begun by noting that Mr. Balogh could have retained new counsel given his lawyer's repeated lack of availability and the length of time before the new trial date (at para. 47). I note parenthetically that it is not necessary on this appeal to consider whether that view is correct.

[29] As to the continued relevance of *Godin*, I would not say that a trial judge could never be justified in allocating or refusing to allocate some part of delay to a party based on the reasoning in *Godin*, but under *Jordan* the general rule is strong and clear: defence unavailability should be characterized as defence delay from the first day that the court and Crown are ready to proceed and the defence is not.

[30] In summary on this ground of appeal, in my view the SCAJ did not err in approaching defence unavailability in a manner different from the approach taken in *Godin*.

[31] I turn now to the second ground of appeal.

2. Did the judge err in her characterization of the seven-month period because she did not apply pre-*Jordan* law to this transitional case?

- [32] Mr. Balogh contends the judge erred in her transitional analysis by not allowing him to rely on pre-Jordan law. He asserts that since this is a transitional case, the transitional exceptional circumstances established in Jordan require the assessment of delay under the old framework, giving the defence the benefit of periods that would previously have supported unreasonable delay. Under the Morin framework, Mr. Balogh says, the seven months due to counsel's schedule would have been allocated, if not to Crown delay under Godin, then as neutral delay not to be attributed to the defence.
- [33] This approach is, in my respectful view, fundamentally flawed for two reasons. First, the Supreme Court of Canada made it abundantly clear in Jordan that the new framework is to be applied to all cases, even those already in the system. Characterization of delay is thus determined by Jordan, not by the Morin analysis. As the Ontario Court of Appeal put it in *R. v. Albinowski*, 2018 ONCA 1084 at para. 51; the defence "cannot insist on the strict application of the Jordan ceiling, and at the same time, excuse the delay they caused because they were relying on pre-Jordan conditions".
- [34] Second, the "right" to rely on pre-Jordan law in transitional cases only falls to the party that finds itself on the wrong side of the presumptive ceiling: *R. v. Cody*, 2017 SCC 31 at para. 69; Jordan at para. 96. It is thus the Crown which can rely on the previous state of the law to try to justify the time Mr. Balogh's case took beyond the presumptive ceiling of 18 months for a trial in Provincial Court. It is open to the defence to rely on the pre-Jordan framework only when delay falls below the presumptive ceiling: Jordan at para. 99.
- [35] The approach contended for by Mr. Balogh is, in my view, contrary to both the letter and the spirit of Jordan. It is contrary to the letter because Jordan applies to all cases in the system subject to the two transitional exceptional circumstances described above. It is contrary to the spirit of Jordan because the case calls on all participants in the justice system to work in concert to achieve speedier trials: para. 116. Each side is to be held accountable for the circumstances within their control. The defence is not to be allowed to benefit from its own delay-causing conduct (Jordan at para. 60), and the Crown will not be held accountable for circumstances that cause the ceiling to be breached that are genuinely outside of its control: Jordan at para. 112.
- [36] It is in this light that the busy trial calendar of Mr. Balogh's counsel must be considered. Defence counsel, of course, cannot be faulted for not always being available when the court and the Crown are ready to set a date. But under Jordan, attribution of delay is not about blame--it is about creating "incentives for both sides to enhance accountability by fostering proactive, preventative problem solving": Jordan at para. 112. In the present case, neither the Crown nor the court before whom Mr. Balogh was tried had an ability to mitigate delay caused by Mr. Balogh's choice of counsel or that counsel's schedule.

- [37] A judge's task on a s. 11(b) application is to determine whether the state has failed to provide an accused with a trial within a reasonable time as guaranteed by the Charter. A stay of proceedings under s. 11(b) is a rebuke to state action, and the state should not be rebuked because defence counsel is unavailable: *R. v. Pelletier*, 2016 BCSC 2496.
- [38] It is convenient to address here Mr. Balogh's argument that the determining factor, even under the Jordan analysis, is the cause of the adjournment, with the party causing the adjournment to be responsible for all delay until a new date is set. In my view, the premise is unsound because it fails to distinguish between the cause of the adjournment and the cause of the delay, which will not always coincide. Although it was the unavailability of the judge which caused the adjournment of the third trial date, the state was prepared to set a date within a few months and should only be held responsible for the delay between the third trial date and October 2015, when the court and Crown were ready to proceed to trial but defence counsel was not. Thereafter it was only the unavailability of defence counsel that precluded the trial from proceeding.
- [39] Mr. Balogh was entitled to retain the counsel of his choice, but he cannot use his counsel's unavailability to argue that the state has breached his right to be tried within a reasonable time.
- [40] In summary on this ground of appeal, I see no error in the SCAJ's decision. In my view, she correctly characterized the seven-month period between October 2015 and April 2016 as defence delay, and did not err in finding that the Crown's reliance on the law as it stood pre-Jordan justified the 3.9 months beyond the presumptive ceiling of 18 months that it took to get this case to trial.

Disposition

[41] I would accordingly dismiss the appeal.

"The Honourable Madam Justice Fenlon"

"The Honourable Mr. Justice Willcock"

"The Honourable Mr. Justice Fitch"

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