

CANADA / JUDGMENT

R. v. Basran

2023 BCSC 415

COURT

Supreme Court of British Columbia

DECIDED

17 March 2023

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2023 BCSC 415 R. v. Basran

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Basran,

2023 BCSC 415

Date: 20230317

Docket: X083239

Registry: New Westminster

Rex

v.

Jasman Singh Basran

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Before: The Honourable Madam Justice Devlin

Reasons for Judgment - Re: Section 11(b) Charter Application

Counsel for Crown:

K. Boland

Counsel for the Accused Basran:

A.J. Robinson

Place and Dates of Hearing:

New Westminster, B.C.

March 9, 2023

Place and Date of Judgment:

New Westminster, B.C.

March 17, 2023

Introduction

- [1] The accused, Jasman Singh Basran, is charged on Indictment 83239-1 with being an accessory after the fact to the murder of Andrew Baldwin, between November 11 and 12, 2019, in Surrey, BC, contrary to s. 240 of the Criminal Code, R.S.C. 1985, c. C-46 [Code]. His co-accused, Mr. Hayer, Mr. Hothi, and Mr. Bottomley, are charged with the first-degree murder of Andrew Baldwin on or about November 11, 2019, in Surrey, BC.
- [2] On this application, Mr. Basran seeks a stay of proceedings, alleging an infringement of his right to be tried within a reasonable time as guaranteed by s. 11(b) of the Canadian Charter of Rights and Freedoms [Charter]. The trial of the four accused is scheduled to begin on May 1, 2023, with jury selection scheduled for March 30, 2023. The trial is estimated to take ten weeks, assuming there are admissions. Thus, it is estimated that the trial will be completed approximately 37 months from the time Mr. Basran was initially charged. To that end, Mr. Basran submits that the Crown has failed to take reasonable steps to protect his s. 11(b) Charter right. Specifically, he says the Crown unreasonably decided to jointly charge Mr. Basran together with his co-accused--who are charged with a different offence--and then to decline to sever him from the others when it was evident the trial would exceed the presumptive ceiling of reasonable delay.
- [3] The Crown submits that this case presents exceptional circumstances. Namely, the Crown says this is a particularly complex case whose complexity justifies delay above the applicable presumptive ceiling identified by the Supreme Court of Canada in *R. v. Jordan*, 2016 SCC 27 [Jordan]. In addition, the Crown takes the position that all counsel--both Crown and defence--have been vigilant in their efforts to advance the case forward in an expedient manner.
- [4] The parties agree that the anticipated length of delay in this matter exceeds the relevant 30-month limit established in *Jordan*. Further, the parties agree that Mr. Basran never waived delay nor that any of his conduct constituted defence delay. Indeed, the sole issue to be determined on this application is whether the Crown can establish that exceptional circumstances warranted the delay. In addition to *Jordan*, the parties have referred me to a number of decisions dealing with the application of the *Jordan* framework. I have read and considered those decisions, but will not canvass all of them in these reasons.

Background Facts

- [5] Andrew Baldwin was stabbed to death inside the residence of his friend, A.B..
- [6] According to A.B., an eyewitness, a masked man kicked in his door, moved towards Mr. Baldwin, and immediately began stabbing him to death before fleeing. The Crown's theory is that the co-accused Mr. Bottomley was the attacker, who acted on the direction of Mr. Hayer to whom he owed a drug debt. The co-accused Mr. Hothi is alleged to have coordinated the attack on behalf of Mr. Hayer.
- [7] Mr. Basran is alleged to have driven a car, in which Mr. Hothi and Mr. Bottomley were passengers, to and from the vicinity of A.B.'s residence. In addition to his role in driving Mr. Bottomley away from the crime scene, Mr. Basran is alleged to have destroyed evidence related to the killing. As Mr. Basran was together with Mr. Hothi and Mr. Bottomley both immediately before and after the homicide, the Crown argues that much of the proposed evidence relating to Mr. Basran overlaps with the evidence to be called regarding both Mr. Bottomley and Mr. Hothi.

Procedural History

- [8] I have relied on the history of proceedings contained in both parties' written submissions in order to set out the procedural history, which is not in dispute.
- [9] On January 25, 2020, Mr. Bottomley and Mr. Hothi were charged with the murder of Mr. Baldwin. On May 20, 2020, a second count was added to the Information charging Mr. Basran as an accessory after the fact to the murder of Mr. Baldwin.
- [10] On September 1, 2020, a six-day preliminary inquiry was scheduled for the period of April 26 to May 3, 2021.
- [11] On November 20, 2020, Mr. Hayer was charged with the murder of Mr. Baldwin and was added to the charge on the existing Information.
- [12] On February 11, 2021, the Crown proceeded on a Direct Indictment against all four accused. On February 18, 2021, counsel were advised that the Associate Chief Justice had determined the matter was considered a complex criminal case and thus subject to the Criminal Practice Direction - Complex Criminal Cases (the "CPD-3"). The general purpose of the CPD-3 is to enable the court to more comprehensively manage large or complex criminal cases.
- [13] On March 11, 2021, the first of many Case Management Conferences ("CMC") was held. At that hearing, both counsel for Mr. Basran and the Crown raised the issue of a possible severance application. Counsel for Mr. Basran stated that while he was continuing to review the disclosure, he intended to bring a severance application.

- [14] On May 4, 2011, another CMC was held at which time the Court asked counsel for Mr. Basran whether he was intending to pursue a severance application. Counsel advised that he was completing his review of the disclosure and "was satisfied that we will be bringing the application". Counsel advised he would file the necessary application in the next three to four weeks.
- [15] At the CMC held on June 15, 2021, counsel for Mr. Basran advised the Court that the Crown was opposed to severance and that Mr. Basran had decided to direct his resources to his Charter applications, confirming there would be no severance application.
- [16] On August 31, 2021, Mr. Basran filed his Charter application related to the search of his cell phone. An amended notice was filed on November 16, 2021. The hearing of the application was originally scheduled for November 2021, but was then re-scheduled at the request of the Court for February 2022.
- [17] On February 23-25, 2022, a voir dire was held regarding Mr. Basran's challenge to the search of his cell phone. Reasons for judgment finding a breach of Mr. Basran's s. 8 Charter rights were issued on March 4, 2022, indexed as *R. v. Basran*, 2022 BCSC 337. On May 30 and 31, 2022, submissions on Mr. Basran's s. 24(2) application were heard. On June 15, 2022, I issued my decision dismissing the application, indexed as *R. v. Basran*, 2022 BCSC 1010.
- [18] In addition to Mr. Basran's Charter application, his co-accused have filed approximately 22 pre-trial applications. Since hearing Mr. Basran's application in February 2022, there have been, to date, 15 contested applications heard and decided. Although some of the applications took longer than anticipated, additional court time was secured without impacting on the master hearing schedule. Indeed, since the hearing of Mr. Basran's application in February 2022, the applications have proceeded every month except for June and July 2022. In addition, there have been several applications that have been abandoned or resolved before the scheduled hearing date. Both counsel for the Crown and defence have demonstrated a sustained effort to expedite these proceedings by ensuring that they were available to deal with matters on the scheduled dates. Accordingly, there were no delays caused by the unavailability of either Crown or defence counsel.
- [19] Between March 11, 2021, and January 20, 2023, there were approximately 35 CMCs. At the CMC held on February 18, 2022, counsel were directed to reserve March 2023 for the commencement of the trial of this matter. Due to the unavailability of Mr. Hayer's counsel, the trial date was adjusted to April 2023. On January 20, 2023, the Court advised that jury selection would begin on March 30, 2023, and that the commencement of the trial would be April 24, 2023. At the request of counsel, the trial will now commence on May 1, 2023.
- [20] With respect to Mr. Basran, on July 28, 2022, Crown counsel spoke to counsel for Mr. Basran about revisiting the possibility of severance. On August 5, 2022, counsel for Mr. Basran wrote to the Crown stating:

As we have indicated from the outset, Mr. Basran is in favour of severance. In the circumstances, we expect we would be able to finalize an agreed statement of facts that would support the Crown's position for severance. We encourage the Crown to proceed on that basis.

- [21] There was no further communication between the parties on the topic of severance. The Crown maintains its decision not to sever Mr. Basran is reasonable and was in the interests of justice.
- [22] On September 12, 2022, the Crown wrote a letter to all counsel inviting all parties intending to bring a s. 11(b) delay application to do so promptly, so that the matter may be heard prior to the start date of the trial in April 2023. Mr. Basran is the only party to pursue such an application.
- [23] As mentioned above, the Crown's position is that with admissions, the trial could be completed in approximately ten weeks, as opposed to the 18-21 weeks estimated in the original trial plan. Even without admissions, it is estimated the trial would be completed approximately 37 months from the time Mr. Basran was initially charged (i.e., May 20, 2020).

The Governing Legal Principles

- [24] Section 11(b) of the Charter guarantees that "[a]ny person charged with an offence has the right to be tried within a reasonable time". This protection recognizes that timely trials serve the interests of the accused and of society, in part because "[s]wift, predictable justice" is "the most powerful deterrent of crime": Jordan at para. 28.
- [25] The contemporary approach to s. 11(b) of the Charter, which governs the present application, was articulated by the Supreme Court of Canada in Jordan. The defining feature of the Jordan framework is its recognition of "ceilings" above which trial delay becomes presumptively unreasonable. This prospective approach ensures that participants in criminal proceedings "know, from the outset of the proceedings, the temporal limits within which the trial must take place". Further, the decision in Jordan served to deliver a "clear message to all participants in the criminal justice system" that "everyone must take proactive measures to prevent delay and to uphold the right to be tried within a reasonable time". See R. v. J.F., 2022 SCC 17 at para. 1 [J.F.], describing Jordan.
- [26] For cases going to trial in a superior court, as the present case, the presumptive ceiling of reasonable delay is 30 months from the charge to the actual or anticipated end of trial: Jordan at para. 49. Proceedings that take longer than 30 months (after subtracting delay attributable to the defence) are presumptively unreasonable. As will be discussed below, to rebut this presumptive unreasonableness, the Crown must establish exceptional circumstances beyond its control.

- [27] However, as already mentioned, any delay attributable to the defence must be subtracted from the total calculated delay. The defence should not be allowed to benefit from its own delaying conduct. Accounting for defence delay reflects the obligations of all participants in the criminal justice system to ensure the timely resolution of proceedings. See *Jordan* at para. 60.
- [28] Thus, the analysis under *Jordan* conforms to the following structure. First, the court must ascertain the total delay, being the length of time between the charge and actual or anticipated end of trial: *R. v. Williamson*, 2016 SCC 28 at para. 19 [*Williamson*].
- [29] Next, from the total calculated delay the court must subtract any delay waived or solely caused by the defence: *Williamson* at para. 20. In this case, the parties agree there is no delay waived or caused solely by the defence.
- [30] Third, if the resulting net delay falls below the ceiling, the defence bears the onus to show that the delay is unreasonable by establishing that: (a) it took meaningful steps demonstrating a sustained effort to expedite the proceedings; and (b) the case took markedly longer than it reasonably should have: *Jordan* at para. 82.
- [31] Where the net delay exceeds the applicable ceiling, the delay is presumptively unreasonable and the Crown bears the onus of showing the delay is reasonable, having regard to the presence of exceptional circumstances: *Jordan* at para. 47; *Williamson* at para. 23. Doing so is the only basis upon which the Crown can discharge its burden to justify delay exceeding the relevant ceiling: *Jordan* at para. 81.
- [32] Exceptional circumstances must lie outside the control of the Crown, in the sense that (*Jordan* at para. 69):
- (1) They are reasonably unforeseen or reasonably unavoidable; and
 - (2) Crown counsel cannot reasonably remedy the delays emanating from those circumstances once they arise.
- [33] The Court in *R. v. Cody*, 2017 SCC 31 [*Cody*], expanded on this definition as follows (at para. 58):

The first prong of the test for exceptional circumstances requires only that the event at issue be reasonably unforeseeable or reasonably unavoidable. It does not impose a standard of perfection upon the Crown. As this Court observed in *Jordan*, "[t]rials are not well-oiled machines" (para. 73). Mistakes happen. Indeed, they are an inevitable reality of a human criminal justice system and can lead to exceptional and reasonably unavoidable delay that should be deducted for the purpose of s. 11(b).

- [34] Once the circumstances in a particular case meet the definition of "exceptional" as set out above, there is no burden on the Crown to meet a further hurdle of demonstrating that the circumstances are rare or entirely uncommon: *Jordan* at para. 69.

- [35] That said, the Crown is required to demonstrate that it took reasonable steps to avoid and address delay before it exceeded the relevant ceiling. Such steps can include: prompt resort to case management processes; requests of the defence to streamline evidence or trial issues; coordination of pre-trial applications; and the invocation of other appropriate procedural mechanisms. In assessing the Crown's conduct, what counts is its effort and initiative, not its success. See *R. v. Manasseri*, 2016 ONCA 703 at para. 308, leave to appeal to SCC ref'd, 37322 (13 April 2017) [Manasseri].
- [36] It is impossible to identify in advance all circumstances qualifying as exceptional. It ultimately falls on the trial judge to use their good sense and experience in determining whether circumstances are exceptional. However, exceptional circumstances will generally fall into two categories. The first concerns discrete events (such as illness or an unexpected event at trial). The second concerns the complexity of the case at issue. See *Jordan* at paras. 71 and 81.
- [37] Thus, the analysis at this stage first involves deducting from the net delay any delay caused by discrete events. If, following those deductions, the delay remains above the relevant ceiling, the court considers whether the case is particularly complex such that the time it has taken is justified and the delay is reasonable. See *R. v. Rai*, 2019 BCCA 377 at para. 94 [Rai], quoting from *R. v. Coulter*, 2016 ONCA 704 at paras. 38-39.
- [38] The Crown and Mr. Basran agree that discrete events, as defined in *Jordan*, have not played a role in the delay of this matter. Therefore, I will proceed to discuss the considerations that govern the determination of whether a case is particularly complex.
- [39] I note at the outset that the presumptive ceilings in *Jordan* already recognize the increasing complexity of criminal cases, engendered in part by the advent of new offences, procedures, and legal tests: *Jordan* at paras. 42 and 53. However, as affirmed in *Cody*, "particularly complex cases may still justifiably exceed the presumptive ceilings": at para. 63. The use in *Jordan* of the adverbs "particularly" and "exceptionally" makes clear that the bar for demonstrating that a case is particularly complex will be high: *R. v. Roberts*, 2020 BCCA 307 at para. 86 [Roberts].
- [40] The assessment of a case's complexity is qualitative, not quantitative, and does not result in the deduction of specific periods of delay. Instead, where a case remains above the applicable ceiling following quantitative deductions for defence delay and discrete events, its complexity as a whole may justify the time it has taken and rebut its presumptive unreasonableness. See *Cody* at para. 64.
- [41] A case for the purposes of *Jordan* will be particularly complex where the nature of its evidence and issues requires an inordinate amount of time of trial or preparation, such that delay is justified. Per *Jordan* (at para. 77):

As for the nature of the evidence, hallmarks of particularly complex cases include voluminous disclosure, a large number of witnesses, significant requirements for expert evidence, and charges covering a long period of time. Particularly complex cases 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. 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.

[42] None of the "hallmarks" identified in *Jordan* should be seen as necessarily determinative of complexity. This includes voluminous disclosure, whose presence does not automatically demonstrate complexity. See *Cody* at para. 65.

[43] Moreover, complexity concerns the proceedings as a whole, not merely how the case has or will present at trial: *R. v. Picard*, 2017 ONCA 692 at para. 57, leave to appeal to SCC ref'd, 37802 (9 August 2018) [Picard]. *Rouleau J.A.* described the rationale for this proposition in *Picard* (at para. 62):

A case can be complex in the earlier stages and require extensive disclosure, the compiling of expert evidence and numerous witness statements, only to be made simpler and more straightforward when it comes time for trial. This can be the result of factors such as concessions made by the defence, the negotiation of a comprehensive agreed statement of facts, changes in the charges or number of accused, or even, as here, the preparation of charts or summaries that distill extensive and complex data so as to assist in the presentation of the case. These kinds of complexity in the early stages may result in inevitable delays due to extensive disclosure, a lengthy preliminary inquiry and so on, although the case is simple by the time of trial.

[44] The seriousness or gravity of an offence, on its own, cannot be invoked as an exceptional circumstance: *Manasseri* at para. 315. To that end, the Court in *Jordan* specifically discussed the concept of particularly complex cases with reference to murder trials, writing that:

[78] A typical murder trial will not usually be sufficiently complex to comprise an exceptional circumstance. However, if an inordinate amount of trial or preparation time is needed as a result of the nature of the evidence or the issues such that the time the case has taken is justified, the complexity of the case will qualify as presenting an exceptional circumstance.

[45] The Court in *Jordan* concluded its discussion of complexity by reiterating, among other things, that the assessment of a case's complexity falls well within the trial judge's expertise: at para. 79.

[46] Finally, a relevant consideration in respect of case complexity, as in the assessment of exceptional circumstances generally, is the conduct of the Crown. As *Watt J.A.* observed in *Manasseri*, "a trial judge should also consider whether the architect of what could reasonably be expected to be a complex prosecution - the Crown - has developed and followed a concrete plan to minimize the delay caused by the complexity that is of the Crown's doing": at para. 314.

Cases of Multiple Accused

- [47] A prominent issue arising on this application is the assessment of delay occasioned by the presence of multiple accused, and in particular the Crown's decision to proceed against Mr. Basran jointly with his co-accused.
- [48] I note that the Supreme Court of Canada has expressly left for another day particular issues arising from Jordan with respect to delay in cases of multiple co-accused: see *R. v. Yusuf*, 2021 SCC 2 at para. 4.
- [49] However, the Court's pre-Jordan decision in *R. v. Vassell*, 2016 SCC 26 [Vassell], remains instructive on this issue. Vassell was released one week before Jordan. Two clear messages emerge from the decision. First, delay caused by an applicant's co-accused cannot be ignored in the s. 11(b) assessment: at para. 4. Second, although the Crown is entitled to prosecute accused jointly, when it does so it must remain vigilant that its decision does not compromise the s. 11(b) rights of the accused: at para. 5. The Court discussed and applied these point as follows:
- [3] Turning to the s. 11(b) issue, when a violation is raised, courts must be careful not to miss the forest for the trees (*R. v. Godin*, 2009 SCC 26, [2009] 2 S.C.R. 3, at para. 18). The forest in this case is plain as day. At every opportunity, Mr. Vassell attempted to move his case to trial. But in the end, as O'Ferrall J.A. observed, he "waited three years for a three-day trial" (para. 54). Looking at this forest -- that is, the overall delay in a case of moderate complexity -- I am satisfied that the delay was unreasonable.
- [6] In many cases, delay caused by proceeding against multiple co-accused must be accepted as a fact of life and must be considered in deciding what constitutes a reasonable time for trial. But here, it was clear from the outset that the delay caused by the various co-accused not only prevented the Crown's case from moving forward, it also prevented Mr. Vassell from proceeding expeditiously, as he wanted. Importantly, this is not a case where Mr. Vassell simply did not cause any of the delay; rather, it is one in which he took proactive steps throughout, from start to finish, to have his case tried as soon as possible. In this regard, his counsel reviewed disclosure promptly, pushed for a pre-trial conference or case management, worked with the Crown to streamline the issues at trial, agreed to admit an expert report, made the Crown and the court aware of s. 11(b) problems, and at all times sought early dates.
- [50] Moreover, the presumptive ceilings in Jordan account for the complexity of joint trials. As discussed in Roberts:
- [96] While it is no doubt true that cases involving more than one accused will often require additional time, the possibility that such time may be required was taken into account by the Supreme Court of Canada in setting the presumptive ceilings. That the Supreme Court expects trials in most multiple-accused cases to be completed within the presumptive ceilings is evinced by Jordan itself.

[Emphasis added.]

- [51] Accordingly, while the Crown may proceed jointly, the fact of a joint trial is not a "magic wand" waved by the Crown to make an accused's s. 11(b) rights disappear: Manasseri at para. 373; see also *R. v. Daye*, 2022 ONCA 675 at para. 26. Indeed, "[i]n some circumstances, severing the accused from a co-accused who is causing delay is a reasonable step the Crown must take to remedy delay": Rai at para. 152, citing Vassell at para. 7 and Manasseri at paras. 323, 372-376.
- [52] That said, proceeding jointly against multiple accused can legitimately impact on the complexity of the case for the purposes of *Jordan*, so long as it was in the interests of justice for the Crown to proceed jointly: *R. v. Eheler*, 2021 BCCA 316 at para. 71; see also *R. v. Jurkus*, 2018 ONCA 489 at paras. 67-72, leave to appeal to SCC ref'd, 38255 (6 December 2018).
- [53] Indeed, there are well-recognized societal interests engaged by the Crown's decision to either sever or proceed jointly. In turn, these interests can impact on the s. 11(b) analysis. Fairburn J. (as she then was) reviewed this issue extensively in *R. v. Ny*, 2016 ONSC 8031 [Ny]. The following comments in *Ny* are particularly instructive:
- [42] The jurisprudence is replete with sound policy reasons for conducting joint trials. It is a well-recognized principle of law that the interests of justice are most often best served by having people who are alleged to have committed crimes together, tried together and their guilt or innocence determined together. As Laskin J.A. held in *R. v. Whyllie* (2006), 2006 CanLII 9037 (ON CA), 207 C.C.C. (3d) 97 (Ont. C.A.), at para. 24: "A single trial for two or more accuseds generally conserves judicial resources, avoids inconsistent verdicts, and avoids witnesses having to testify more than once." See also: *R. v. L.G.*, 2007 ONCA 654, at paras. 62-62.
- [43] The presumption of a joint trial, particularly where individuals are said to have worked in concert, will only be displaced where the interests of justice require separation, as per s. 591(3) of the Criminal Code. As Doherty J.A. held in *Savoury*, at para. 22: "The interests of justice encompass those of the accused, the co-accused, and the community as represented by the prosecution."
- [44] The new s. 11(b) framework accounts for joint trials and absorbs the policy rationale embedded in the jurisprudence pertaining to them, specifically as it relates to the interests of justice being served. As noted by the majority in *Jordan*, "[p]roceeding 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 [emphasis added]": *Jordan*, at para. 77. See also: Manasseri, at para. 311.
- [45] The important policy rationales for keeping joint trials intact must not be lost in the increasing shadow of an approaching ceiling. As the British Columbia Court of Appeal recently held, severance is not a "panacea" when delay arises in a multiple accused trial: *R. v. Singh*, 2016 BCCA 427, at para. 83.

[46] The implications of proceeding too quickly to sever accused, simply because the ceiling is approaching, are obvious and striking. The implications of conducting virtually the same trial more than once would be profound and potentially add to delay in the system: *R. v. Koruz*, 1992 ABCA 144, at para. 83, *aff'd R. v. Schiewe*, [1992] S.C.C.A. No. 299.

[Emphasis added.]

[54] With these legal principles in mind, I turn to my analysis.

Analysis

Was this case particularly complex such that the time it has taken is justified and the delay is reasonable?

[55] Mr. Basran submits that the nature of the evidence against him is not complex. While he acknowledges the disclosure in this case is voluminous, he submits that only a small portion of the disclosure actually pertains to him. He says the evidence against him generally establishes that: he drove Mr. Hothi and Mr. Bottomley to and from the scene of the homicide; kicked Mr. Bottomley out of his vehicle not long after leaving the scene; and then took steps to clean blood out of his vehicle, including taking it to be cleaned the next day. Evidence retrieved from his phone further establishes he accessed two news articles about a homicide in Surrey. Finally, his post-arrest statements provide additional evidence regarding what he did on the relevant dates.

[56] In light of this evidentiary record, Mr. Basran submits that the only triable issue is whether he knew a homicide occurred when he drove Mr. Bottomley away from the scene and proceeded to clean his vehicle. Mr. Basran also says that his one pre-trial application challenging the facial validity of the search warrant for his phone was not complicated, and that it was brought, argued, and adjudicated without delay.

[57] Essentially, Mr. Basran takes the position that it was reasonably foreseeable that the proceedings against his three co-accused, who are charged with first-degree murder, would require a substantial amount of court time to deal with a large number of pre-trial applications before the trial could proceed. He submits the Crown could have ensured Mr. Basran's constitutional right to be tried within a reasonable time was protected by exercising their discretion to either not charge him jointly, or by subsequently agreeing to sever him.

[58] The difficulty I have with Mr. Basran's position is that he invites this Court to determine whether the case is particularly complex on a limited assessment of the charge against him only, in isolation from the rest of the case. In my view, that approach is not supported in law. Indeed, as stated in *Cody*, "[c]omplexity is an exceptional circumstance only where the case as a whole is particularly complex": at para. 64 (emphasis added). Thus, in determining whether exceptional circumstances arise in this matter due to complexity, the question is whether the case is sufficiently complex, and not whether the case against Mr. Basran on its own is particularly complex. See also *Jordan* at para. 77.

[59] I am satisfied that the case as a whole properly qualifies as particularly complex, as discussed in Jordan. There are several factors specific to this case that support my finding. In addition to voluminous disclosure, this case has involved or is anticipated to involve:

- A large amount of digital evidence engaging various admissibility issues;
- Numerous civilian witnesses and corresponding statements;
- Numerous Charter challenges to the validity of a large number of search warrants and production orders;
- An appropriately-brought Crown application concerning the admissibility of ante mortem statements attributed to the victim, his deceased brother, and a deceased witness; and
- A similarly appropriate Crown application concerning the admissibility of evidence of discreditable and after-the-fact conduct.

[60] Moreover, throughout these proceedings and beginning at the first CMC, the Crown has taken proactive steps to advance the case. Indeed, both Crown counsel and counsel for the various co-accused have been diligent in adhering to a rigorous schedule to ensure that the numerous pre-trial applications proceed in an efficient and timely fashion. Together, counsel developed a schedule for the filing of materials in advance of each application and, where appropriate, relied on admissions of fact to eliminate the need for viva voce testimony. Further, despite the demanding schedule for the hearing of the pre-trial applications, there were no adjournments. Rather, in order to adhere to the schedule, both Crown and defence counsel were proactive in recruiting other counsel to assist with the hearings. Although some hearings took longer than estimated, counsel worked cooperatively to ensure that additional time was acquired without impacting on the master schedule. Similarly, counsel have indicated that they intend to rely on admissions of fact at trial which will streamline the proceedings. In my view, the efforts by the Crown should be commended rather than criticized. To reiterate, the initiative and effort demonstrated by both the Crown and defence counsel has been admirable. Given the demands brought on by the rigorous schedule for the hearing of pre-trials applications, it is difficult to envision how this matter could have possibly proceeded in a more expeditious manner.

[61] Further, as I discuss in detail below, having chosen to prosecute all four accused jointly, I find the Crown remained vigilant that its decision would not compromise the s. 11(b) rights of the accused, including Mr. Basran: Vassell at para. 5. Recalling the principles canvassed above, while delays caused when proceeding against multiple accused must, to some extent, "be accepted as a fact of life" (Ny at para. 112; Vassell at para. 6), that does not mean an accused can be held "hostage" by the actions of his co-accused (Manasseri at para. 323).

[62] To that end, in Vassell it was clear from the outset that delay caused by the various co-accused prevented the case from proceeding. The Crown nonetheless failed to take any proactive steps to mitigate the delay. By contrast, as discussed above, I have found that in this case the Crown has taken proactive steps whenever necessary to advance the case

forward, mindful of their obligation to ensure that the trial proceeded within a reasonable time. There is nothing in the record to suggest that the Crown was complacent about delay. Indeed, as directed in *Jordan*, all parties in this case have worked cooperatively and demonstrated a sincere commitment to ensure the matter proceeded expeditiously, with a view to advancing the case to trial and adhering to s. 11(b)'s important objectives: see *Jordan* at paras. 5, 45, 50; *Ny* at para. 15.

- [63] In sum, I find that exceptional circumstances arise in this matter from the complexity of the case as a whole. Commendably, the Crown and defence have all demonstrated a concerted and successful effort to proceed expeditiously in this case. Their conduct does not in the least reflect the culture of complacency and tolerance towards excessive delay that the Court in *Jordan* criticized and sought to remedy: at paras. 4-5. In establishing the presence of exceptional circumstances, the Crown has met its burden to rebut the presumptive unreasonableness of delay in this case.
- [64] However, Mr. Basran made extensive submissions on the failure of the Crown to take reasonable steps to remedy the delay for Mr. Basran before it exceeded the applicable ceiling. Because he did so, I will turn to a consideration of that issue.

Did the Crown fail to take reasonable steps to remedy the delay for Mr. Basran?

- [65] Counsel for Mr. Basran submits that the Crown failed to take reasonable steps to avoid and address delay before it exceeded the presumptive ceiling. As I have discussed, Mr. Basran maintains that the case against him is straightforward and uncontentious. He therefore argues that the Crown could have easily avoided delay by not charging Mr. Basran jointly, or by agreeing to severance.
- [66] In particular, Mr. Basran argues that had he been charged separately and after the conclusion of the trial against Mr. Bottomley, the Crown could have relied on s. 657.2(2) of the Code to file a certificate of conviction regarding Mr. Bottomley and to dispense with the need to establish that a murder had taken place.
- [67] However, the results in *R. v. Steadman*, 2010 BCCA 301 [Steadman], illustrate the unpredictability that accompanies such a proposal. In *Steadman*, the accused was charged with being an accessory after the fact to murder and with obstructing a police officer. Although the offences took place in 1996, Mr. Steadman was only charged in 2003, and his trial was not set to start until 2008. Much of the post-charge delay was attributed to the Crown's decision to sever the counts against Mr. Steadman, as suggested by his counsel, from the murder charge against the victim's wife, and to try the victim's wife first. The Crown made this decision after counsel for Mr. Steadman agreed to make substantial admissions. There were also significant delays in Mr. Steadman's preliminary inquiry, in part because he instructed his counsel to call the victim's wife to testify. In this Court, further delays occurred with respect to the wife's matter. The overall delay was five years. On appeal, the Court upheld the trial decision dismissing the stay application. While *Steadman* was a pre-*Jordan* decision, it serves to illustrate the immense practical difficulties that may

arise in circumstances where the route suggested by counsel for Mr. Basran is pursued. I do not consider this a viable option in the case before me.

- [68] Alternatively, Mr. Basran argues that the Crown could have severed Mr. Basran from his co-accused once it became apparent that the trial would be delayed by the numerous applications brought by counsel for his co-accused. With an agreement to sever, Mr. Basran could have agreed to waive delay until such time as the murder trial completed. Despite the fact that counsel for Mr. Basran indicated he would be prepared to make substantial admissions, thus reducing the amount of evidence to be called and time required for his trial, the Crown never pursued this option. In my view, given the circumstances that arose in Steadman, this was a prudent decision.
- [69] Finally, in support of his position that the Crown failed to take necessary steps to protect his s. 11(b) rights, Mr. Basran relies on the cases of Vassell and Manasseri. However, the circumstances in Vassell and Manasseri are easily distinguishable from those of Mr. Basran. As discussed earlier, in Vassell the Crown clearly failed to remain vigilant that its decision to proceed jointly against all accused not compromise the s. 11(b) rights of the accused: see para. 5. Similarly, in Manasseri the Crown also failed to remain vigilant of and generally displayed a lack of initiative in respecting the co-accused's s. 11(b) rights.
- [70] A review of the facts in Manasseri will help illustrate the stark differences between the circumstances of that case and those at bar. Mr. Fudge died after two violent altercations. Mr. Manasseri assaulted the victim inside a bar, while Mr. Kenny assaulted him outside the bar. Several days after the victim died, Mr. Kenny was charged with assault. The Crown initially elected to proceed summarily. However, three weeks before Mr. Kenny's summary trial was set to begin, the Crown upgraded his charge to manslaughter. They advised Mr. Kenny's counsel that he would be joined in a new information with Mr. Manasseri, who was charged separately with second-degree murder. The Crown upgraded the charge after receiving a pathologist's report indicating Mr. Kenny's blow may have contributed to the victim's brain damage.
- [71] The Crown and defence agreed they would require a preliminary inquiry. Mr. Manasseri's counsel insisted they would not be ready for 11 months. Mr. Kenny's counsel was available throughout this period. The preliminary inquiry concluded more than three years after Mr. Kenny's arrest. After a lengthy appeal process, Mr. Kenny was committed for trial. This was more than five years after his arrest. Mr. Kenny and the Crown were prepared to start the trial several months earlier than the date for which it was set. The delay arose from Mr. Manasseri's change in counsel. In the interim, Mr. Kenny brought unsuccessful applications for a stay on the basis of unreasonable delay and for severance. Mr. Kenny was ultimately convicted of manslaughter and sentenced almost 7.5 years after his arrest.
- [72] On appeal, Watt J.A., writing for the court, held that the delay in Mr. Kenny's case was unreasonable, and that a stay of proceedings should be entered. In doing so, Watt J.A. made clear the complacency and lack of vigilance displayed by the Crown in the circumstances:

- [359] Finally, the trial Crown's conduct of this case is a poster child for the culture of complacency towards delay so rightly condemned in Jordan. A leisurely approach to disclosure. Letting the schedule of Manasseri's then counsel control setting the date for a preliminary inquiry more than two years after the accused were charged. Failure to pay any real heed to the s. 11(b) interests of Kenny whose counsel had been advancing them from the outset.
- [373] I do not for a moment suggest that the Crown was disentitled to proceed jointly against Manasseri and Kenny. But what it was required to do, but failed to do as later events confirmed, was to remain vigilant that its decision not compromise Kenny's s. 11(b) rights. A joint trial is not some magic wand the Crown can wave to make a co-accused's s. 11(b) rights disappear. The "right" to a joint trial only prevails to the extent that such a proceeding is in the interests of justice both pre and post-Jordan
- [374] It soon became apparent that an expeditious preliminary inquiry was not in the cards. Manasseri's counsel said he was not available for 11 months and requested a preliminary inquiry commencing in April, 2007. The Crown agreed. Kenny objected.
- [375] At the very least, two procedural options were available to the Crown when the date for the preliminary inquiry was set. Severance of Kenny was one. Preferment of a direct indictment under s. 577 of the Criminal Code was another. Severance would have uncoupled Kenny from Manasseri, who seemed to lack any appetite for an expeditious trial.
- [376] A direct indictment, which the prosecutor mentioned without elaboration on one occasion as not forthcoming from the Attorney General, might at least have resulted in a trial date in 11 months, rather than a preliminary inquiry.[5] Instead of exercising the vigilance required to respect Kenny's s. 11(b) rights, the Crown appeared to be content to let Manasseri's counsel dictate the pace of the litigation.
- [Emphasis added.]
- [73] These circumstances simply do not arise in this case. As reviewed in detail above, it cannot be said that the Crown's attitude or conduct in this matter represents or resembles the culture of complacency animating the Court's concerns in Jordan. Similarly, it is apparent that in this case, Mr. Basran's co-accused do have an appropriate appetite for an expeditious trial.
- [74] With this vigilance in mind, it is also clear in the circumstances that it was open to the Crown, in the interests of justice, to try Mr. Basran jointly with his co-accused. The fact that Mr. Basran indicated he was prepared to make substantial admissions does not mean the Crown was compelled to agree to severance.
- [75] Indeed, I view the evidence pertaining to Mr. Basran as being inextricably entwined with the unfolding of critical events prior to, during, and after the homicide. The Crown alleges that it was Mr. Basran who drove the truck to meet Mr. Hothi at a strip mall in Surrey. They allege that it was Mr. Basran who then drove with Mr. Hothi to pick up Mr. Bottomley outside

his residence, before driving both individuals directly to the vicinity of the scene. The Crown says that while Mr. Bottomley attended at the scene and attacked Mr. Baldwin, Mr. Basran remained in the truck waiting for him to return. Once the bloody and injured Mr. Bottomley returned to the truck, the Crown alleges Mr. Basran drove them all away from the scene, and that at some point shortly after they left the vicinity, Mr. Bottomley was dropped off. Finally, the Crown alleges that later that evening and into the next day, Mr. Basran took steps to try to remove and destroy evidence of the murder, including from inside the truck. While the events were unfolding, the digital evidence establishes that Mr. Hothi, while in the company of Mr. Basran, was in contact with Mr. Hayer and Mr. Bottomley.

- [76] In my view, the movements and contact amongst the parties are critical to the overall assessment the trier of fact will be required to undertake to make the necessary findings of fact at trial. While I accept that the issue pertaining to Mr. Basran may be focused on what he knew when he drove away from the crime scene, it is predicated on whether Mr. Bottomley committed a murder. I further agree with the Crown that Mr. Basran's liability is based on his actions both before and after the death of Mr. Baldwin. The evidence the Crown intends to rely on to prove the identity and culpability of the various co-actors at the time of the offence is interwoven with evidence implicating Mr. Basran. As such, the evidence against Mr. Basran cannot be compartmentalized, as suggested by his counsel. Instead, the evidence against Mr. Basran clearly overlaps significantly with that against Mr. Hothi and Mr. Bottomley, and that evidence necessarily impacts on the assessment of the evidence against Mr. Hayer.
- [77] In light of the above, I agree with the Crown that it was reasonable to jointly try Mr. Basran with the others to avoid, among other things, inconsistent verdicts. As Justice Winteringham noted in *R. v. Creighton*, 2022 BCSC 1728, "severance exacts a cost both to the prosecution and the public, as it may result in inconsistent verdicts": at para. 69. Further, as noted by our Court of Appeal in *R. v. Singh*, 2016 BCCA 427, "[s]everance is not a panacea when delay issues arise in a multi-party indictment": at para. 81. To that end, I find the following passage from *Rai* is particularly instructive:
- [153] However, as noted by this Court in *Singh* at para. 81, severance is not necessarily a solution to a delay issue. The Crown is required to reasonably remedy delay (*Jordan* at para. 69). The real question is whether proceeding jointly is in the interests of justice (*Jordan* at para. 77; *Singh* at para. 81; *Manasseri* at paras. 372-376).
- [154] Where proceeding against multiple accused makes practical sense because of the nature of the charges and the overlap in the evidence, there can be additional delays and costs to the fair administration of justice in prosecuting separate actions. These delays and costs must be considered alongside the accused's right to trial within a reasonable time to determine whether it is in the interests of justice to sever. This Court in *Singh* rejected the argument that the Crown should have preferred separate new indictments once it became clear that the co-accused would cause delay.

[78] I am satisfied that once it had made the decision to proceed jointly, as was in the interests of justice in this case, the Crown remained appropriately vigilant of Mr. Basran's s. 11(b) rights, including by taking the various proactive steps reviewed previously in these reasons to advance the case forward in an expedient manner.

Conclusion

[79] I have found that exceptional circumstances arise from the complexity of this case. It is estimated that the total delay from the date of Mr. Basran's arrest on May 20, 2020, to the completion of the trial will be 37 months. Having found that it was in the interests of justice to proceed jointly, I am satisfied the Crown remained vigilant of Mr. Basran's s. 11(b) rights, and that ultimately the seven-month delay above the Jordan ceiling reflects the realities of a joint trial. In all of the circumstances of this case, I do not consider a seven-month delay above the presumptive ceiling to be unreasonable.

[80] Accordingly, Mr. Basran's application for a stay of proceedings on the basis of unreasonable delay is dismissed.

"Devlin J."

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Prepared on 28 October 2026 · Esheria