
CANADA / JUDGMENT

R. v. Gill

2018 BCSC 661

COURT

Supreme Court of British Columbia

DECIDED

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2018 BCSC 661 R. v. Gill

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Gill,

2018 BCSC 661

Date: 20180112

Docket: X079543

Registry: New Westminster

Regina

v.

Amanpreet Singh Gill

Corrected Judgment: The text of the judgment was corrected at

para. 31 on April 26, 2018

Before: The Honourable Mr. Justice Schultes

Ruling on Vukelich Hearing

Counsel for the Crown:

J.R. Lawn

J.A. Billingsley

Counsel for the Accused:

T.B. Doust

Place and Date of Hearing:

Vancouver, B.C.

December 18, 2017

Place and Date of Judgment:

New Westminster, B.C.

January 12, 2018

1. BACKGROUND

[1] On May 30, 2017, Justice Arnold-Bailey found Mr. Gill guilty of possession of cocaine for the purpose of trafficking. She gave oral reasons for judgment and, because she was to be retiring from the court shortly, ordered a transcript of the reasons so that the sentencing could be conducted by another judge pursuant to s. 669.2(2) of the Criminal Code. The case was adjourned to July 28 for that purpose.

[2] The final edited transcript of the reasons was not yet available by that date, so the sentencing was adjourned to October 16.

[3] I was the judge on October 16. The reasons were released shortly before court began that morning. Crown counsel felt able to proceed with their sentencing submissions despite the recent arrival of the reasons, but Mr. Gill's counsel wished to have some additional time to review them, which I granted. The hearing was adjourned to December 18 for defence submissions and any reply by the Crown.

2. THE CURRENT ISSUE

[4] The defence then concluded that it would be appropriate to make a Charter application on December 18, seeking a judicial stay of proceedings on the basis that Mr. Gill's s. 7 and 11(b) rights have been violated by various periods of delay. His counsel filed the necessary notice to proceed with that application.

[5] Crown counsel takes the position that the application does not meet the necessary threshold for embarking on a hearing, as set out in the well-known decision of *R. v. Vukelich*, (1996), 108 C.C.C. (3d) 193 (B.C.C.A.), leave to appeal ref'd, [1996] S.C.C.A. No. 461.

[6] The Charter notice in this case is quite detailed and the submissions of Mr. Gill's counsel about the anticipated evidence track the facts that the notice alleges closely. Based on those facts, counsel alleges unacceptable delay both before and after the charges were laid. The respective Charter protections and remedies for those two types of delay are of course different ones - under ss. 7 and 11(b), respectively.

- [7] The pre-charge delay is said to arise from the eight-month gap between Mr. Gill's arrest for the offence on December 3, 2014, and the laying of the Information on August 18, 2015. The defence is unaware of any reason why a period of this length was necessary.
- [8] Mr. Gill was originally arrested at his family home, in what his counsel described as the full view of the neighbours and with a dispute developing between his parents and the arresting officers. He was given a promise to appear by the police for April 28, 2015, but it lapsed without an Information being sworn. A search warrant on his home was executed the day after the arrest. Items seized included his passport, which has not been returned despite requests on his behalf to do so. A sample of the cocaine involved was not forwarded for testing until February 5, although the results were available shortly afterwards. Mr. Gill was arrested again at his home once the Information was finally sworn.
- [9] On the question of pre-charge delay, Crown counsel points out that for a remedy to be appropriate, such delay must have (1) been of such a nature as to jeopardize the accused's right to a fair trial, or (2) resulted from actions by the Crown or police that could give rise to a finding of abuse of process (which arises only in the clearest of cases): *R. v. Hunt*, 2017 SCC 25, affirming the dissenting reasons of Justice Hoegg at 2016 NLCA 61. According to the Crown, nothing of that sort arises on the facts alleged.
- [10] The post-charge delay aspect is based on the passage of time between Mr. Gill being convicted and the anticipated completion of his sentencing hearing on December 18. The notice describes this period as six-and-a-half months, but my count is five months and 20 days. The key feature relied on by the defence is the period of time needed for the transcript of the reasons for judgment to be produced, which led to a further adjournment for the defence to review them before the sentencing hearing could proceed. Mr. Gill, who is described as being "on the precipice of incarceration" because of the quantity of drugs involved, is said to have suffered from anxiety as a result of this delay, because he was unable to know the basis of his conviction and consider the viability of an appeal.
- [11] On the issue of Mr. Gill's attempts to expedite the proceedings, his counsel urges me to place no weight on the fact that he was the one who technically initiated the July adjournment, since it was inevitable that the sentencing could not proceed without the reasons, a position the Crown agreed with. More relevant, he suggests, are the initial request by previous counsel for disclosure following the laying of the Information and his own efforts within the trial to cooperate to ensure that it could be completed before Arnold-Bailey J. retired. This cooperation included making appropriate admissions of otherwise time-consuming matters, such as the expert evidence. Counsel has requested transcripts of those proceedings in time for the actual delay application, in order to demonstrate his efforts.
- [12] According to the Crown, the July adjournment was actually characterized in communications between counsel as a defence request, as part of which Mr. Gill waived the resulting delay because he wanted to take some treatment steps before being sentenced. In those circumstances, the Crown would not have been pushing for early new sentencing

dates. Crown counsel emphasizes that they also wanted the reasons, but if they had known that delay was an issue, there were other steps that could have been taken to have the sentencing go ahead earlier without it, such as proceeding on the basis of counsel listening to the DARS recording. In fact, Crown counsel would have applied for access to DARS if the reasons had not been provided by the October date. The original target for the reasons being released was eight to 10 weeks and, when it was not available within that time, the Crown proceeded on the basis of a waiver of delay as communicated by Mr. Gill's counsel. (In an effort to put this issue into perspective, Crown counsel points out that both counsel heard the reasons read out by Arnold-Bailey J. in court.)

- [13] Mr. Gill's counsel asserts that, contrary to the Crown's position, he did not unequivocally waive the resulting delay in this case. He sought to explain the nuances of his position with respect to any waiver before the presiding judge when he spoke to the adjournment in July, but was told by the judge that the explanation was unnecessary. Crown counsel had changed their initial position that the reasons were needed and Mr. Gill's counsel felt that it was necessary to speak to the matter in advance, so that the court was not put in a position of having nothing to do the next day. (I took him to mean the court being unable to proceed with the sentencing because of the lack of reasons.)
- [14] Because this case falls well below the presumptive 30-month ceiling from charge to conviction, the onus is on the defence, Crown reminds me, to establish that (1) the case took markedly longer than it should have and (2) that the defence took meaningful sustained steps to expedite the proceedings: *R. v. Jordan*, 2016 SCC 27, at para. 84. In the Crown's submission, nothing in the facts that have been presented in support of the application shows that Mr. Gill can meet that onus.
- [15] According to the Crown, the transcripts that have been ordered by the defence so far will not be sufficient, because they do not include the progress of this case through Provincial Court, where clear steps had to have been taken by the defence to move the case forward in order to meet the onus. Such a finding will require careful analysis of each stage of the proceeding. Mr. Gill's counsel says he has ordered all the transcripts that are available, bearing in mind that some of the proceedings in Provincial Court before a judicial justice of the peace are not routinely recorded.
- [16] The Crown points out that in fact this case likely finished faster than it might otherwise have because both counsel went "all out" to complete the evidence and submissions before Arnold-Bailey J.'s retirement date, an effort that would not have been necessary if a judge who was continuing to sit had been hearing the trial.
- [17] In short, on the issue of trial delay under the *Jordan* analysis, the Crown submits that there are no facts alleged that could give rise to a s. 11(b) remedy based on the 21-and-a-half-month overall delay period we are dealing with.

- [18] The Crown also emphasizes that the Jordan analysis expressly excluded application to post-conviction delay. In footnote 2 to para. 49 the majority wrote:

The issue of delay in sentencing, however, is not before us and we make no comment about how this ceiling should apply to s. 11(b) applications brought after a conviction is entered, or whether additional time should be added to the ceiling in such cases.

- [19] Crown counsel cites a recent British Columbia decision in which Justice Pearlman declined to apply the Jordan framework to the post-sentencing period, in that case the time required for dangerous offender proceedings: *R. v. Dadmand*, 2017 BCSC 1644.
- [20] The Crown also points out that at least one decision, *R. v. Patel*, 2017 ONSC 5827, has held that in the absence of application of Jordan, post-conviction delay should be dealt with under the analysis previously provided by the Supreme Court of Canada in *R. v. MacDougall*, [1998] 3 S.C.R. 45. That analysis involves the pre-Jordan question of whether the delay was unreasonable considering the length of the delay, the reasons for the delay, the effect of any waivers, and the prejudice suffered by the accused. In *Patel*, a nine-month delay in sentencing caused by the illness of the trial judge, in the context of an overall period of 22 months from charge to sentencing, was found not to violate the accused's s. 11(b) rights.

3. DISCUSSION

- [21] The nature of a so-called Vukelich hearing was helpfully explained by Justice Fitch, then a member of this Court, in *R. v. McDonald*, 2013 BCSC 314, at paras. 17-21:
- [17] A Vukelich hearing serves an important trial management goal - it filters out proposed pre-trial applications where the circumstances, as disclosed by the submissions of counsel and references to supporting materials, are such that the remedy sought could not reasonably be granted.
- [18] The threshold test contemplated by the Vukelich line of authority has been expressed in different ways at different times. In *R. v. Malik*, 2002 BCSC 484, Josephson J. held that, "The threshold for embarking on an evidentiary hearing into an alleged Charter breach is low". He concluded that an applicant for relief "need only demonstrate a reasonable basis upon which the Court can find a breach of the Charter."
- [19] In *R. v. Pires*, 2005 SCC 66, [2005] 3 S.C.R. 343, the Court held that in controlling the course of proceedings before them, trial judges have the power to "decline to embark upon an evidentiary hearing at the request of one of the parties when that party is unable to show a reasonable likelihood that the hearing can assist in determining the issues before the court."
- [20] In *R. v. Tse*, 2008 BCSC 867, Davies J. held that "the Vukelich hearing was never intended as a tool...to prevent legitimate investigation of alleged Charter breaches when an appropriate foundation for that alleged breach can be demonstrated" nor is it intended to be used for the "protracted pre-hearing examination of the minutiae of the accused's [proposed] application."

- [21] The rigour with which Vukelich is applied and the way in which a trial judge exercises his or her discretion in relation to such an application is case-specific and highly contextual. Among the factors that will shape the exercise of that discretion are: the extent to which the facts or anticipated evidence underlying the alleged Charter breach are in legitimate dispute; the state and clarity of the law on the issue sought to be litigated; and the infinite variety of pragmatic considerations that will arise in a given case and suggest resolution of the application in one way or another. What underlies the inquiry is the need to balance an accused's fair trial interests with the public interest in the management of criminal proceedings by foreclosing lengthy and unnecessary pre-trial applications in circumstances where the remedy sought could not reasonably be granted.
- [22] Although the cases usually deal with Vukelich hearings in the context of pre-trial applications, I see no reason why the same analysis should not apply to a Charter application that the defence wishes to make after a finding of guilt.
- [23] A trial judge should generally be able to decide whether to embark on a Charter application based on the submissions of counsel: Vukelich at paras. 17 and 26.
- [24] One thing the court must be careful not to do when deciding a Vukelich hearing is to inadvertently decide the actual merits of the proposed application. The only question for me at this stage is whether there are facts alleged, either in the notice or counsel's submissions, that if found in the defence's favour could support one of the remedies being sought. If there are such facts, the application should proceed to the next stage of a full hearing.
- [25] The Crown has correctly drawn a distinction among the different kinds of delay that are actually being alleged here. The pre-charge delay will be decided on a separate analysis from the Jordan framework, as will the post-conviction delay.
- [26] No facts have been alleged, either in the notice or counsel's submissions, that would enable me to find that pre-charge delay has impaired Mr. Gill's right to a fair trial or was the product of actions by the police or the Crown that could potentially amount to an abuse of process. Nor does the amount of pre-charge delay (which is substantially lower than many cases in which a stay was rejected on that basis) have any significance standing alone. The threshold for hearing an application with respect to that aspect of this case has not been met and I would not allow an application based on it.
- [27] As to the Jordan period, neither the notice nor counsel's submissions put forward facts from which it would be open to me to find that this case took markedly longer than it reasonably should have and that the defence took sustained steps to expedite it. The commendable contribution made by the defence to the specific goal of completing the trial before Arnold-Bailey J. retired cannot be characterized as the kind of "sustained effort" by the defence that Jordan contemplated for cases below the 30-month ceiling. And while I am not being critical about the timing with which the transcripts of the earlier stages of the case have been ordered by the defence, the possibility that they will contain something additional that tends to show that such sustained effort actually was made is completely speculative at this point.

- [28] Finally, there is the alleged post-conviction delay. In the absence of the Jordan framework, the traditional pre-Jordan s. 11(b) factors of the length and reasons for the delay and the existence of any waivers and prejudice as applied to the sentencing proceedings in MacDougall seem to be the most appropriate ones to apply. I keep in mind the comments in that decision that following conviction the presumption of innocence has been displaced and the concerns that previously arose about delay will be somewhat attenuated.
- [29] At this stage, I cannot resolve the factual dispute between counsel about the extent to which there may have been a defence waiver of the delay resulting from the unavailability of the transcript on the July sentencing date, in view of the accused's wish to pursue treatment options. I will instead assume for the purposes of the Vukelich analysis that the defence can establish that the entire period until the intended sentencing date should be included in the calculation, including the period between July and October.
- [30] But taking this period and the reasons for it at their highest, I am hard put to identify any reasonable analysis that could find that the period between the conviction and the scheduled completion of the sentence could violate Mr. Gill's s. 11(b) rights. The period itself is not so long as to call for any particular inquiry by the court about its reasonableness. It is half of what the Supreme Court of Canada characterized as unreasonable and unjustified judicial delay in the seminal case of *R. v. Rahey*, [1987] 1 S.C.R. 588, which involved only a summary conviction offence. Counsel has not drawn my attention to any case involving a shorter period that led to such a finding and the remedy of a stay.
- [31] Further, the reason for the delay here was not a lack of timeliness in any respect by Arnold-Bailey J. in rendering her substantive decision, as in *Rahey*. She gave comprehensive oral reasons on the date of conviction, which were heard in court by counsel and the accused. The only delay that occurred was in finalizing the transcribed version, which was mainly for the assistance of her judicial successor on the case and counsel.
- [32] The prejudice pointed to by the accused is only of the most tepid variety. While having the actual written reasons for conviction might well be important for the defence, it is not clear to me why counsel could not have identified the main grounds for the conviction from hearing them read in court and formulated at least tentative thoughts about whether any errors and resulting grounds of appeal existed. While he is not legally trained and is not expected to understand the reasons from a technical perspective, I am also not clear on why Mr. Gill would not have understood at least the basic factual underpinnings of his conviction from hearing them read.
- [33] Certainly no prejudice to his ability to mount effective sentencing submissions as a result of this delay has been identified, which is really what matters at this point. If Mr. Gill wanted to be sentenced sooner, which seems counterintuitive given the type of sentence he is likely facing, his counsel certainly did not bring that fact to the Crown or the Court's attention before filing this application.

- [34] The only reason this became an issue in the first place is that the judge proactively ordered the reasons transcribed to facilitate another judge taking over following her retirement, and even if the transcript could have been edited and finalized for release more quickly in a perfect world, it was an approach on her part that speaks of conscientiousness rather than lassitude, which is usually the underpinning of judicial delay. Again, counsel has not pointed to any process of analysis by which I could find that to be analogous to the unacceptable judicial delay that is seen in other cases.
- [35] And if I am incorrect that we revert to a MacDougall analysis in this situation, and instead a further presumptive ceiling is eventually crafted by the appellate courts to apply to sentencing proceedings, I would be astonished if it was as low as five-and-a-half months, or that judicial attempts to facilitate the transfer of a case following retirement did not constitute special circumstances exempting it from the usual ceiling in any event.
- [36] In short, having given Mr. Gill's position every benefit of the doubt, the aspect of his application that deals with post-conviction delay is also not grounded in any facts that have a reasonable likelihood of ultimately supporting a remedy. It is doomed to failure and in furtherance of a sensible use of court time need not be the subject of a hearing.
- [37] We will proceed with the sentencing on a date convenient to counsel, which we should now arrange.

The Honourable Mr. Justice T.A. Schultes

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