

CANADA / JUDGMENT

R. v. Kuntz-Angel

2020 BCSC 1777

COURT

Supreme Court of British Columbia

DECIDED

20 November 2020

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2020 BCSC 1777 R. v. Kuntz-Angel

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Kuntz-Angel,

2020 BCSC 1777

Date: 20201120

Docket: 66611

Registry: Chilliwack

Regina

v.

David Paul Kuntz-Angel

Restriction on Publication: A publication ban has been mandatorily imposed under s. 486.4 of the Criminal Code restricting the publication, broadcasting or transmission in any way of evidence that could identify a complainant or witness, referred to in this judgment by the initials J.K. This publication ban applies indefinitely unless otherwise ordered.

Corrected Judgment: The text of the judgment was corrected at paragraph 157 on December 7, 2020

Before: The Honourable Mr. Justice Schultes

Ruling on Section 11(b) Charter Application

Counsel for the Crown:

N.M.D. Reithmeier

Counsel for the Accused:

C. Paquette

S. Wright

Place and Dates of Hearing:

New Westminster, B.C.

October 13-14, 2020

Place and Date of Judgment:

New Westminster, B.C.

November 20, 2020

Introduction

- [1] On November 4, I advised counsel of my decision in this matter, with reasons to follow. These are the reasons.
- [2] This is an application by Mr. Angel (who prefers to be referred to by the second of his hyphenated surnames) for a judicial stay of proceedings, based on a violation of his right to be tried within a reasonable time, as guaranteed by s. 11(b) of the Charter.
- [3] He is charged with sexual and other offences, which are alleged to have been committed against J.K. His retrial on those charges, following the declaration of a mistrial, is scheduled to begin shortly.
- [4] The length of time from the swearing of the Information charging him to the expected end of the retrial exceeds the 30-month presumptive ceiling established by the Supreme Court of Canada in *R. v. Jordan*, [2016] 1 S.C.R. 631. This means that a judicial stay of proceedings must be imposed, unless the Crown can demonstrate that a sufficient amount of the elapsed time should be deducted that it falls below the ceiling, based on exceptions that were approved of in *Jordan*.
- [5] The Crown submits that once such approved periods are deducted, the case falls below the ceiling. The most significant period followed the reassignment of the case to a new judge to continue after Mr. Angel had been found guilty of some of the counts by the trial judge. The defence disputes the deduction of most of these periods, and says that to the extent that the mistrial might have justified any deduction, the Crown has disentitled itself from being able to rely on it by failing to give priority to the retrial.

Timeline of Relevant Events

Overview

[6] The first Information charging Mr. Angel was sworn on June 20, 2017. The retrial was scheduled to begin on November 9 and is set for 21 days. Due to counsel's unavailability on certain weeks and the intervening winter break, there will be several gaps during which it will not proceed. It is scheduled to conclude on January 19, 2021. The total delay to that expected conclusion will therefore be 1309 days, which exceeds the Jordan ceiling by just under 13 months.

[7] It is common ground that there are five periods of the elapsed time that need to be assessed, in order to determine whether they should be deducted:

- Mr. Angel's re-election to be tried in this Court and have a preliminary inquiry, after having originally elected to have a trial in Provincial Court;
- Adjournments in this Court after the Crown obtained a direct indictment;
- The original trial judge's deliberations before rendering his judgment;
- From the reassignment of the case to a new judge until that judge declared the mistrial; and
- The proceedings since the mistrial.

The Adjourned Provincial Court Trial

[8] In August 2017, Mr. Angel set dates for a trial in Provincial Court of May 10-11, 23-25 and 31, 2018. He was represented by a lawyer at that time.

[9] That lawyer withdrew as counsel on March 28, six weeks before the trial was scheduled to start. At the appearance in which she withdrew, Mr. Angel referred to the possibility of retaining a senior defence counsel from Vancouver, but said he would represent himself if that lawyer turned out to be unavailable on the existing trial dates.

[10] When he appeared on April 3 he confirmed that he would be representing himself. In light of Mr. Angel's self-represented status, Ms. Di Curzio, the assigned trial prosecutor, indicated her intention to apply for the appointment of counsel to cross-examine J.K. and her sister, who was also the subject of charges at that time.

[11] On April 5, four additional days in June were added to the forthcoming trial dates. The prosecutor who appeared on behalf of Ms. Di Curzio on that day advised the presiding judge that the Crown was proceeding on a new "C" Information. The change that it contained was a charge of assault causing bodily harm contrary to s. 267 of the Criminal Code in one of the counts, in substitution for a previous charge of assault contrary to s. 266.

- [12] With his usual fairness, Crown counsel on the present application points out, and Mr. Angel's counsel agrees, that as a result of this C Information, Mr. Angel was actually entitled to have a new election put to him on that date, pursuant to s. 536(2) of the Code. I took him to be relying on the general principle that an accused is entitled to a new election when an amendment to the Information has the effect of adding a new charge: see, for example, the summary of the law in *R. v. Harris*, 2014 BCSC 1091.
- [13] On April 23, Mr. Angel agreed to the Crown's application to appoint counsel to cross-examine J.K. and her sister. Ms. Di Curzio advised the presiding judge that Mr. Angel's application for legal aid was not complete. The judge advised him to provide all of the necessary information in support of his application as soon as possible, with particular emphasis on information that showed his financial status.
- [14] On May 1, Mr. Angel told the presiding judge that he was still waiting to hear about the outcome of his legal aid application. In light of the looming trial dates, the judge expressed skepticism that any lawyer who might be appointed would have sufficient time to prepare for them. Ms. Di Curzio confirmed that a lawyer had been appointed to conduct the cross-examination of the complainants.
- [15] On May 7 Mr. Schultz, the lawyer who received that appointment, appeared for the first time. He and Ms. Di Curzio discussed the order of Crown witnesses, to be sure that he would be available on the days that the complainants were scheduled to testify. He confirmed to the presiding judge that, other than dealing with those two witnesses, "anything else would be up to Mr. Kuntz-Angel". Mr. Angel in turn confirmed that he was intending to represent himself for the balance of the trial.
- [16] Ms. Di Curzio advised that she had received notice that Mr. Angel intended to seek Charter remedies at the trial, but was concerned that she did not have details of the sections that he would be relying on. After reviewing the notice document, Mr. Schultz was able to advise that it seemed like the majority of the relief being sought related to habeas corpus proceedings that Mr. Angel had ongoing in Supreme Court, and that there was nothing that would prevent the trial from beginning on May 10.
- [17] After the appearance was adjourned, the presiding judge had it recalled, and provided some instructions for self-represented litigants to Mr. Schultz, asking that he pass them on to Mr. Angel to review before the trial started. Mr. Angel, who had been appearing by video from the remand centre, was unavailable by the time that the matter was re-called for this purpose.
- [18] On May 10, the first day scheduled for trial, Mr. Schultz addressed the presiding judge on Mr. Angel's behalf. He had been providing Mr. Angel with some more general assistance, including reviewing with him the instructions for self-represented accused that the judge had given him on May 7.

- [19] Mr. Schultz informed the judge that Mr. Angel had "prevailed on" his previous counsel (by which I think he meant "requested") to have a preliminary inquiry, but was told by her that the matter was going "straight to trial". Mr. Schultz said that he had advised Mr. Angel that he would have to make an application for a preliminary inquiry, and that the Crown's consent was required for the change in his mode of trial to occur.
- [20] The judge said that before the start of the trial he was planning on confirming that Mr. Angel had made an informed decision to represent himself and emphasising to him the "distinct advantages" of having the assistance of counsel in a matter of this nature.
- [21] Before the case was stood down for Mr. Schultz to have further discussions with him, Mr. Angel advised the judge that he had not yet received confirmation that he had been approved for legal aid. He also told the judge that he was "hoping to make an application to change the re-elect from Provincial to Supreme with a judge alone". The judge responded that "it sounds like Mr. Schultz is going to have some discussions with you about that and maybe he's had some discussions with the Crown about that so we'll let that go on." He also asked Mr. Schultz to follow up on the status of the legal aid application.
- [22] After a break, Mr. Schultz reported that, based on his inquiries with the Legal Services Society, the matter may have "fallen through the cracks", and that his partial appointment to conduct the cross-examination may have played some role in that difficulty. He advised that it was expected that Mr. Angel would qualify for legal aid coverage, but he needed to seek the type of contract that provided for full representation.
- [23] He also indicated that he had spoken to Mr. Angel about representing him for the entire trial, but emphasized that he would not be able to prepare in time for the earlier trial dates that had been set, in view of the amount of material that would have to be reviewed. Instead he would "aim more towards" the June continuation dates.
- [24] Ms. Di Curzio emphasized that she was ready to proceed with the trial, and that the two complainants were present in the courthouse. She reviewed the previous appearances in which Mr. Angel had indicated that he was representing himself, or had not mentioned having counsel for the entire trial.
- [25] She suggested beginning with those complainants' evidence, since Mr. Schultz had been appointed to cross-examine them already, and had received all of the disclosure in relation to them. If the trial was to be adjourned, she asked that they try to preserve as many of the existing dates as possible.
- [26] The presiding judge stood the matter down again, so that if Mr. Angel wanted Mr. Schultz to represent him for the trial he could confirm that with legal aid. He suggested that a potential constructive use of the available time was to have Mr. Schultz conduct the cross-examination of the complainants in the context of a preliminary inquiry. Ms. Di Curzio said that she was not prepared to consent to a re-election to have a preliminary inquiry.

- [27] During that break, Mr. Schultz learned that another lawyer, Mr. Ferguson, had been appointed by the LSS to take on Mr. Angel's entire case. After speaking directly to him, Mr. Schultz informed the Court that Mr. Ferguson was not available on any of the currently scheduled trial dates, but would attend on May 15 to speak to the matter, in the hopes that some of the time that had been set aside could be utilized.
- [28] Mr. Schultz also confirmed that he himself was not prepared to assume Mr. Angel's entire defence if the matter proceeded as a trial rather than as a preliminary inquiry.
- [29] It appears that Mr. Ferguson was not available on May 15. He wrote to the Crown expressing the hope that he would be able to reschedule matters to be available on June 6 and 8. He also noted that he was unclear whether Mr. Angel had been given an election on the new Information.
- [30] On May 23, he appeared and sought an adjournment of the balance of the trial dates. Despite his hopes of salvaging some of those dates, he concluded that he could not be properly prepared in time. Ms. Di Curzio was not opposed to the adjournment in light of Mr. Ferguson's recent appointment, and the presiding judge granted it and struck the remaining trial dates.
- [31] Ms. Di Curzio wished to consider her position on whether to consent to what she characterized as a "re-election" by Mr. Angel. Mr. Ferguson pointed out that he had not yet actually raised the possibility of a re-election on the record. The judge offered the tentative view that the new Information might have entitled Mr. Angel to a new election, but that he did not have to resolve the issue at that point. The judge also suggested to Mr. Ferguson that trial dates might be available sooner in Supreme Court.
- [32] On May 29, Mr. Angel purported to "re-elect" to a trial by judge and jury and have a preliminary inquiry. At a subsequent appearance, preliminary inquiry dates were set for October 2-5, 2018.

After the Direct Indictment

- [33] The Crown then obtained approval for a direct indictment, which was preferred on August 22. It had the effect of immediately moving the proceedings to this Court.
- [34] Mr. Angel's first appearance on the direct indictment was on August 27 (through an oversight in the Crown office, he was not brought immediately to Supreme Court to appear on it on August 24, after the Provincial Court proceedings had been stayed).

- [35] At his first appearance, Mr. Ferguson asked to adjourn the fix date to September 4, to give him time to speak to Ms. Di Curzio about her estimate of 15 days for the trial, and also try to free up some time in his own calendar, which did not have space for a trial of that estimated length until the following July. Ms. Di Curzio advised the presiding judge of her understanding that the defence was waiving the intervening period until September 4, but no response from Mr. Ferguson was transcribed.
- [36] On September 4 Mr. Ferguson asked to adjourn a further week, to September 10, in order to obtain instructions "with regards to how scheduling is going to go on this matter." The prosecutor pointed out that the Crown had provided available dates for that coming November. The presiding judge expressed the expectation that Mr. Ferguson would be able to "move forward with the matter" on the next appearance.
- [37] On September 10 an agent appeared on behalf of Mr. Angel's current counsel, to advise the court that his counsel had taken the case over from Mr. Ferguson (because, as it turns out she had earlier available trial dates than he did and at that point Mr. Angel was in custody).
- [38] On September 17, trial dates were set to begin on March 4, 2019.

Deliberation Time

- [39] The trial proceeded and, after additional trial continuation dates in April and June, final arguments in the trial concluded on June 28, 2019. The trial judge reserved judgment and then delivered his oral reasons over two days on August 1 and 2, 2019. He convicted Mr. Angel of the counts on which he is facing that retrial and acquitted him of other counts on the indictment.

Reassignment of the Case

- [40] After two fix date appearances in September, a sentencing hearing was set for November 18.
- [41] On October 16, counsel appeared before Associate Chief Justice Holmes, who advised them that the trial judge was "unable to continue with this matter" and that she would be assigning a judge to replace him. The authority to do so is provided by s. 669.2 of the Code.
- [42] In response to Holmes A.C.J.'s question about whether counsel would find a transcript of the lengthy oral reasons for judgement useful, Mr. Angel's counsel expressed concerns about the lack of findings of fact in the reasons, and offered the view that a written version of them was going to be required at some point. She also advised that she and Ms. Di Curzio would have discussions to try and reach common ground about what those facts should be for sentencing.
- [43] In response to Ms. Di Curzio's suggestion that J.K.'s video statement might offer a useful summary of the underlying facts, Mr. Angel's counsel expressed the further concern, in light of the difficulties in the reasons, about how many of the facts from that statement were actually found by the trial judge.

- [44] On October 24, counsel made their first appearance before the replacement judge, Justice Dley. Among other issues, he raised with counsel the issue of the facts on which the sentencing hearing should be based. The issue of the lack of clarity in the reasons for judgment emerged again. Ms. Di Curzio offered the view that "both the Crown and the defence have very strong grounds for appeal."
- [45] She renewed her suggestion that J.K.'s video statement could provide the baseline of the offences for which convictions had resulted, but Mr. Angel's counsel pointed out the extent to which J.K. had been contradicted on the assertions in that statement by the trial evidence. Pronouncing the entire situation "confusing", Mr. Angel's counsel noted that there had also been acquittals on other counts, for which she had no reasons. She advised that she had requested a transcript of the actual oral reasons that had been provided in court by the trial judge, as opposed to the subsequent edited version that is usually produced by judges following oral judgments.
- [46] November 18 was left as the next appearance date, either for sentencing or to be used "in the event that another application or something else comes up", as Mr. Angel's counsel expressed it. On that date, she advised Dley J. that she had filed a notice of a mistrial application, which she intended to conduct "in due course". At that point however, she sought directions from Dley J. about how to obtain information about the circumstances that had led to the trial judge being replaced. She was taking this step, she explained, because her observations during the trial had led her to be concerned that the trial judge's "mental faculties may have been impaired, and may have impacted his ability to preside over the trial". She required this information in order to support the mistrial application. A mistrial was required, in her submission, because without sufficient findings of fact in the reasons for judgment the process would likely end up in a lengthy hearing (known colloquially as a "Gardiner hearing" because of the leading case governing it) to establish the facts for sentencing.
- [47] Ms. Wray, the prosecutor who had conduct of the post-conviction proceedings, said that the Crown did not share those concerns.
- [48] Dley J. responded that he would not consider the application for directions, including release of unedited transcript of the reasons, or the mistrial application itself, in the absence of full submissions. As he had previously, he urged counsel to try to find common ground on a resolution of the case, given Mr. Angel's custodial status and the inevitability of another trial, either as a result of a mistrial or an appeal.
- [49] On November 21, Mr. Angel's counsel advised the court that on December 6 she would make her application for the unedited transcript and for directions on obtaining information about the replacement of the trial judge. She indicated that she might have to make her application in two parts, because the unedited transcript would be relied on to show the need for the information. Despite this, Dley J. was not inclined to make the order for the transcript in advance.

- [50] Mr. Angel's counsel made both of those applications on December 6. Her request for the unedited reasons was based on the fact that the edited version, which had been edited by someone other than the trial judge, differed substantially from her notes of the judge's remarks in court, and she was prohibited from transcribing the DARS recording of the reasons by the undertaking that is required of counsel in order to obtain the recording.
- [51] When Dley J. asked her why she was following the "circuitous route" of applying for directions about obtaining the information about why the trial judge had been replaced, rather than simply applying for it, she explained that it was not clear, including based on the case authorities, whether Dley J. was the appropriate person to be applying for it - as opposed to counsel for the judiciary, for example.
- [52] Ms. Wray opposed the orders sought. She pointed out that the replacement judge had to determine, as threshold issue, that his jurisdiction pursuant to s. 669.2, to "impose the punishment or make the order that is required by law in the circumstances", permitted him to make the order to produce the unedited transcripts. On the merits, she submitted that there was no evidence suggesting that the strong presumption that the reasons had been edited properly had been displaced, and pointed out that their adequacy, or lack thereof, could form the basis of an appeal. As to the reason that the trial judge had been replaced, she stressed that the adequacy of the record, as captured in his reasons for judgment, was what would govern the outcome for appellate purposes, and that whatever his underlying personal situation might have been would not be relevant to that analysis.
- [53] Dley J. once again emphasized the need to move the matter forward, in light of Mr. Angel's custodial status. He described the options open to him as being to proceed with sentencing, to proceed with a mistrial application, or for counsel to try to arrive at a mutually acceptable resolution of the charges. When he asked Mr. Angel's counsel her position on those options, she responded that she was prepared to set a date for the mistrial application.
- [54] That application was heard on December 20. Mr. Angel's counsel based her submissions on the insufficiency of the reasons for judgment, which did not permit Mr. Angel to be properly sentenced, or to be accorded procedural fairness in the sentencing process. The reasons were also insufficient to provide assurance that the convictions were proper. She took the position that Dley J. was *functus officio* on the counts for which Mr. Angel had been acquitted and that the mistrial should be declared only on the "live counts" of which he had been convicted. A particular concern raised by the defence was the disadvantage that Dley J. would face in attempting to supplement the shortcomings of the reasons on issues of credibility without having seen and heard the witnesses in person.

- [55] Ms. Wray took the position that it was premature for Dley J. to consider a mistrial, and that the proper next step was to review the transcripts of the evidence at trial, to determine whether the necessary findings could be made to carry out the sentencing. She drew an analogy to the process of finding facts after a jury verdict, in which the judge is bound by the express and implied implications of that verdict. A Gardiner hearing could then take place with respect to proof by the Crown of any further aggravating factors that were in dispute.
- [56] Mr. Angel's counsel responded that the delay that would result from a review of the transcripts was not needed in order for Dley J. to be satisfied of the errors that she had identified in the judgment. She said that the defence wished to move on with the proceeding, and stressed how much shorter a retrial would be because of the number of counts on which there had been acquittals.
- [57] Dley J. concluded that he needed to review the trial transcripts in order to render a properly informed decision.
- [58] On January 22 of this year, he rendered his decision. In essence, he concluded that he was unable to discern the findings leading to conviction, and that it would be dangerous to make such findings on the basis of the transcripts of the evidence. Further, because all of the allegations were disputed, a Gardiner hearing would effectively require a repetition of the trial evidence. Noting the danger of a miscarriage of justice that would result from proceeding in any other manner, he declared a mistrial.
- [26] He also ordered that new trial dates be set that day. Mr. Angel's counsel offered a time estimate of 20 days. On that basis, the trial was set to begin on May 25. The issue of a bail hearing for Mr. Angel was adjourned to a fix date the following day.
- [59] Andrew MacDonald, the Regional Crown Counsel who appeared to receive the mistrial ruling, advised Dley J. that the Crown would "need a bit of time to asses our position on a number of issues". He suggested that a pretrial conference in March would be a useful "check in" advance of the scheduled trial dates. Accordingly, Dley J. directed that a pretrial conference should take place by March 20.

Proceedings since the Mistrial

- [60] With the consent of the Crown, Mr. Angel was released on bail on January 31.
- [61] On March 10, Mr. Angel's counsel and Wendy Dawson, Q.C., the current trial prosecutor, appeared for a pretrial conference. Ms. Dawson advised the presiding judge that she had been assigned to review the case to determine if the Crown would be proceeding with a retrial. Her preliminary conclusion was that they would be proceeding, but that was subject to meeting with J.K. She needed "another week or two" to complete her review, and it also needed to be determined who the assigned prosecutor would be (Ms. Di Curzio was on leave by that time and unable to continue with the case).

- [62] Mr. Angel's counsel informed the judge that there would be a number of pretrial applications by the defence, including a third party records application, which included time requirements for the records to be produced and vetted. To accommodate those applications she asked that a trial judge be assigned as soon as possible and in general observed that "we need to kind of get going on this essentially".
- [63] At the next pretrial conference on March 24, Ms. Dawson, who had by this point formally assumed conduct of the case for the Crown, advised the presiding judge that while she had not completed her review, based on what she had reviewed to that point the Crown had decided to proceed. She asked if the trial could start on June 1 instead of May 25 because she had another serious trial to complete in that first week. Courteously, Mr. Angel's counsel did not oppose that. She confirmed that the defence's third party records application would proceed. When the presiding judge asked the prosecutor whether anything else needed to be done before trial other than that application, Ms. Dawson responded, "No, not at this point" but "that could change if I finally finish reviewing everything".
- [64] As a result of the COVID-19 pandemic, regular operations of the Supreme Court of British Columbia were suspended in March, including criminal trials. In May the Court began to consider the resumption of trials in the second week of June, and also canvassed counsel in criminal trials about whether any pretrial hearings could be heard by telephone before trials resumed.
- [65] On May 20 a further pretrial conference was held. The Crown and defence had jointly requested it on an urgent basis. I was the presiding judge at this conference, although I had not yet been assigned to hear the trial. Ms. Dawson outlined that by that point there were "numerous pretrial issues in this case". With respect to the defence third party records application, she pointed out that it required 60 days' notice pursuant to s. 278.3 of the Code, which had not been provided, and J.K. and the other interested parties had not been served with that notice. In addition, she advised that there would be "several voir dires" with respect to evidence that the Crown wished to lead.
- [66] Both counsel were "quite concerned about scheduling" in view of the Court's recent announcement that no trials would be taking place in the first week of June. That was to have been the first week of the trial, leaving only two weeks for both the applications and the trial.
- [67] In response to my question about whether some of the applications could be done by phone during that first week, Mr. Angel's counsel made the following relevant comments:

My view with respect to the defence's s.278 application for third party records, my friend is correct that there is a 60-day notice period and I say that the notice period can be waived, and it's to the discretion of the judge. But we need a trial judge to be assigned at the outset, and I do want to provide that 60-day notice to all parties. I think it's an important notice, period [sic].

So that's our most concerning pretrial application.

So with respect to the Crown's application, yes, I do think some of them can be done over the phone, but--and I do think the third-party records application can be a combination of written submissions and oral submissions over the phone. But I think that it can't happen in the next 60 days in any event.

[Emphasis added.]

[68] After further discussions, Mr. Angel's counsel and I had the following exchange:

THE COURT: ...And I suppose the way we could approach it, implicit in what you've said about the 60-day notice for the other application is that this is a situation in which we're likely to be doing some of the applications in the first period of time available, and then having a further application further down the road. That seems obvious if you're going to give 60 days' notice. Is that--do I have that right?

MS. PAQUETTE: That's correct.

[Emphasis added]

[69] Ms. Dawson identified several of the Crown's pretrial applications that could potentially be dealt with by phone in the first week. Mr. Angel's counsel was receptive to that approach. As a result, I tentatively allocated seven to eight days, carrying over into the second week of trial time, for the Crown's pretrial applications. This was subject to a trial judge being appointed and being able to work out the details of these applications with counsel at a further pretrial conference.

[70] Mr. Angel's counsel suggested that it would be helpful for Supreme Court Scheduling to take counsels' calendars into account before assigning a trial judge. I agreed that this was an appropriate step, because Scheduling "will need to know when the next set of applications and then the trial proper can take place, having regard to your schedules."

[71] By the time of the next pre-trial conference on May 25, I had been appointed as the trial judge. At that hearing, Ms. Dawson outlined her proposed pre-trial applications, which were to admit evidence of (1) after the fact conduct by Mr. Angel, (2) evidence of inappropriate and sexualized touching of J.K. by him, outside of the conduct captured by the remaining counts on the indictment, and (3) evidence of their continuing relationship after the dates of those counts. The defence took the position that these applications should not proceed, and advised that they would be seeking screening hearings analogous to the procedure in *R. v. Vukelich*, (1996) 108 C.C.C. (3d) 193 (B.C.C.A.), to determine if there was any reasonable basis to hear them. A particular concern with the allegations of inappropriate touching, from the defence perspective, was that J.K. had testified at trial that the incidents in question had not involved any sexual activity. In addition, the evidence of the subsequent relationship included allegations of which Mr. Angel had been acquitted, raising concerns about issue estoppel.

- [72] Ultimately, the Vukelich applications were set to occupy most of the first two weeks of the allocated trial time, starting on June 1.
- [73] Mr. Angel's counsel then raised the issue of re-setting the actual trial dates. She agreed with me that we were likely looking at early September for the s. 278 hearing because of the required notice period. I expressed the tentative view that it would be better to set those dates after the outcome of the Vukelich hearings, so that we knew exactly which voir dires were going to be required, but I had no difficulty with counsel exploring potential dates with Scheduling.
- [74] During this pretrial conference Ms. Dawson also advised that J.K. had lapsed back into drug addiction, an ongoing struggle that I gather was explored in the evidence at the first trial. At that point the victim services workers had not been able to contact her.
- [75] The Vukelich hearing with respect to after the fact conduct was argued on June 1 and I reserved judgement. Counsel agreed that our next appearances should be during the following week of June 8-11, for the Vukelich hearing on the inappropriate touching and, if it was allowed to proceed, the voir dire on the after the fact conduct. Later that week I ruled that there was a sufficient basis for that voir dire to proceed.
- [76] On June 8, counsel advised that the witnesses available for that voir dire would be available to testify by video (in light of COVID-19 concerns) starting the following day. In addition, the defence had concluded that the inappropriate touching evidence met the threshold of relevance, so no voir dire would be needed in relation to it. Based on that scheduling, the plan was then to hold the voir dire on relationship evidence on the dates June 15-17.
- [77] The after-the-fact conduct voir dire ended up taking the entire period of June 8-11 and 15-17. This included unsuccessful defence applications to exclude evidence of Mr. Angel's arrest (based on it exceeding the scope of the facts admitted on his sentencing hearing following his guilty plea, to resisting the police officer who arrested him), and to prevent the Crown from calling an additional witness after it had effectively closed its case on the voir dire; and an application by the defence to have the court call a witness, which I resolved by permitting the defence to cross-examine her as though she had been called by the Crown. I reserved my ruling on that voir dire[1].
- [78] At the conclusion of submissions we also discussed scheduling two remaining applications - the Crown's attempt to lead relationship evidence and the defence's s. 278 applications. A difficulty with setting the s. 278 application was that J.K. had not been located yet, so it was uncertain when she would receive the required notice of it and have counsel appointed to represent her in it. The defence suggested adjourning to a fix date to allow counsel to discuss time estimates for the application. Ms. Dawson was agreeable to that approach, although she was also willing to try to arrange dates right away, given that court time was expected to be "at a premium" in the fall. I concluded that discussions between counsel would ultimately lead to a more efficient hearing process, so I adjourned the case to June 25 to fix those dates.

- [79] On June 25, the current application and trial dates were set.
- [80] There were some subsequent adjustments made to those dates. J.K. had not been served with notice by September 8, the first day set for the s. 278 application, so I appointed amicus curiae to represent her interests. That application was heard on October 18-19 instead. I gave an oral ruling, ordering the disclosure of some of the requested records on October 22. Shortly before that application, J.K. was located and agreed to testify on the new trial, so a portion of the booked time that had been allocated for a Crown application to rely on the transcripts of her evidence from the first trial was not needed.
- [81] In general, the time set aside for the trial remains in place, although following the delivery of some additional disclosure by the Crown the start of the trial was delayed by one week, and it is now expected to begin on November 16. Two applications remain to be dealt with in the booked time, in addition to the evidence on the trial itself.

Governing Principles

- [82] *R. v. Coulter*, 2016 ONCA 704, offers a concise and helpful summary of the framework for calculating delay provided by *Jordan*. Omitting the aspects of it that do not pertain to this case, it operates as follows:

A. The New Framework Summarized

34 Calculate the total delay, which is the period from the charge to the actual or anticipated end of trial (*Jordan*, at para. 47).

35 Subtract defence delay from the total delay, which results in the "Net Delay" (*Jordan*, at para. 66).

36 Compare the Net Delay to the presumptive ceiling (*Jordan*, at para. 66).

37 If the Net Delay exceeds the presumptive ceiling, it is presumptively unreasonable. To rebut the presumption, the Crown must establish the presence of exceptional circumstances (*Jordan*, para. 47). If it cannot rebut the presumption, a stay will follow (*Jordan*, para. 47). In general, exceptional circumstances fall under two categories: discrete events and particularly complex cases (*Jordan*, para. 71).

38 Subtract delay caused by discrete events from the Net Delay (leaving the "Remaining Delay") for the purpose of determining whether the presumptive ceiling has been reached (*Jordan*, para. 75).

39 If the Remaining Delay exceeds the presumptive ceiling, the court must consider whether the case was particularly complex such that the time the case has taken is justified and the delay is reasonable (*Jordan*, at para. 80).

40 If the Remaining Delay falls below the presumptive ceiling, the onus is on the defence to show that the delay is unreasonable (*Jordan*, para. 48).

B. Key Elements in the New Framework

(1) Defence Delay

42 Defence delay has two components: (1) that arising from defence waiver; and (2) delay caused solely by the conduct of the defence ("defence-caused delay") (Jordan, paras. 61 and 63).

43 Waiver can be explicit or implicit but, in either case, it must be clear and unequivocal. The accused must have full knowledge of his or her rights, as well as the effect waiver will have on those rights (Jordan, para. 61).

44 Defence-caused delay is comprised of situations where the acts of the defence either directly caused the delay or are shown to be a deliberate and calculated tactic employed to delay the trial. Frivolous applications and requests are the most straightforward examples of defence delay (Jordan, para. 63). Where the court and the Crown are ready to proceed but the defence is not, the defence will have directly caused the delay (Jordan, para. 64).

(2) Exceptional Circumstances

45 If the Net Delay exceeds the presumptive ceiling, the onus is on the Crown to rebut the presumption of unreasonableness based on the presence of exceptional circumstances.

46 Exceptional circumstances lie outside the Crown's control in that: (1) they are reasonably unforeseen or reasonably unavoidable; and (2) Crown counsel cannot reasonably remedy the delays emanating from the circumstances once they arise. Such circumstances need not be rare or entirely uncommon (Jordan, para. 69).

47 An exceptional circumstance is the only basis upon which the Crown can discharge its burden to justify a Net Delay that exceeds the ceiling. The seriousness or gravity of the offence cannot be relied on. Nor can chronic institutional delay or the absence of prejudice to the accused (Jordan, para. 81).

48 The list of exceptional circumstances is not closed but, in general, exceptional circumstances fall under two categories: discrete events and particularly complex cases (Jordan, para. 71).

(a) Discrete Events

49 An illustration of a discrete event that will generally qualify is a medical or family emergency on the part of the accused, important witnesses, counsel or the trial judge (Jordan, para. 72).

50 The period of delay caused by any discrete event must be subtracted from the Net Delay for the purpose of determining whether the presumptive ceiling has been reached. However, any portion of the delay caused by a discrete event that the Crown or system could reasonably have mitigated may not be subtracted (Jordan, para. 75).

(b) Particularly Complex Cases

51 Particularly complex cases are cases that, because of the nature of the evidence or issues (or both), require an inordinate amount of trial or preparation time such that the delay is justified (Jordan, para. 77). The seriousness or gravity of the offence cannot be relied on to establish that the case is particularly complex (Jordan, para. 81).

52 Where the trial judge finds that the case was particularly complex such that the time the case has taken is justified, the delay is reasonable and no stay will issue. No further analysis is required (Jordan, para. 80).

[Emphasis in the original]

[83] A significant issue in this case is how these general principles apply to the period of time that is required to carry out a retrial following a mistrial. Courts have generally treated mistrials as discrete exceptional circumstances that are deducted from the net delay, unless they were caused by the Crown (see R. v. J.H.T, 2016 BCSC 2382). However, it is not automatic that the entire resulting delay will be deducted, as Jordan explained:

75 The period of delay caused by any discrete exceptional events must be subtracted from the total period of delay for the purpose of determining whether the ceiling has been exceeded. Of course, the Crown must always be prepared to mitigate the delay resulting from a discrete exceptional circumstance. So too must the justice system. Within reason, the Crown and the justice system should be capable of prioritizing cases that have faltered due to unforeseen events (see R. v. Vassell, 2016 SCC 26). Thus, any portion of the delay that the Crown and the system could reasonably have mitigated may not be subtracted (i.e., it may not be appropriate to subtract the entire period of delay occasioned by discrete exceptional events).

[Emphasis added]

[84] Judges in this province have taken the approach of continuing to apply the 30-month ceiling to retrials following mistrials, but deducting the period from the declaration of the mistrial until either the start or the end of the new trial: R. v. Christhurajah, 2017 BCSC 820, at paras. 99-100; R. v. Beckett, 2017 BCSC 1116, at paras. 163-164; R. v. Wu, 2017 BCSC 2373, at paras. 89-93. In Wu Justice Watchuk considered whether the entire retrial period should be included in the deduction:

92 There is some inconsistency in the British Columbia law as to whether the actual dates of the second trial are included in the delay attributed to the exceptional circumstance. In Beckett, they were not, but in Christhurajah, they were. I find that as the mistrial created the need for a second trial, the re-trial dates should be included if those dates include the reasonable amount of time for the re-trial. If the trial dates are extended for reasons the Crown could have remedied, which did not occur here, then those delays would not be included.

[Emphasis added]

That reasoning is consistent with the excerpt from Jordan referred to above.

[85] A situation that has some similarities to what occurred here involves the attribution of delay arising from a defence re-election to a preliminary inquiry, after having previously elected a trial in provincial court, that is made very close to the scheduled trial dates. For the sake of convenience, I will refer to the summary of the cases dealing with this issue that I provided in *R. v. Lai*, 2018 BCSC 867:

63 A last-minute re-election from provincial court to a superior court trial should not result in the deduction of time as defence delay, even if it results in later trial dates that could otherwise have been obtained, if it was made necessary by the state of disclosure from the Crown and the need for the defence to explore relevant issues at a preliminary inquiry. In that situation, it is not delay solely caused by the defence, which is of course Jordan's definition of deductible defence delay. Only unexplained and unjustified re-elections will be characterized in that manner: *R. v. Lee*, 2017 ONSC 4862.

64 Even an unexplained re-election still did not lead to a wholesale deduction of the entire period until the superior court trial date in *R. v. J.H.T.*, 2016 BCSC 2382 and *R. v. Truong*, 2017 BCSC 736.

188 The fact of the re-election, in itself, is one of those legitimate procedural steps available to an accused that the Jordan framework explicitly does not characterize as defence delay.

189 In my view, however, it would be inconsistent with the values expressed in Jordan to attribute to the ceiling the effects of an accused's decision not to take advantage of an imminent scheduled trial in the court in which he has elected to be tried. That would place the Crown in a situation in which it becomes responsible for delay that it cannot prevent.

190 Leaving aside illegitimate defence conduct in relation to a re-election, which would be deducted as defence delay, or situations in which the Crown causes the need for the re-election by its conduct, or participates in the accused's decision to do so as part of a consensual trial plan, I think that a re-election that causes the loss of a scheduled trial date is a discrete exceptional circumstance that must lead to the deduction of the time between then and when the trial is rescheduled.

[See also *R. v. Herman*, 2017 BCSC 215 at paras. 83-88 and *R. v. R.K.K.*, 2020 BCSC 45 at para. 37.]

[86] Finally in terms of applicable principles, the Supreme Court of Canada in *R. v. K.G.K.*, 2020 SCC 7, clarified that judicial deliberation time following the conclusion of the evidence and argument does not form part of the Jordan framework, and will amount to a breach of s. 11(b) only when it takes markedly longer than it reasonably should have, in all of the circumstances.

Positions

Crown

- [87] Dealing first with the circumstances surrounding the adjournment of the Provincial Court trial, Crown counsel describes it as "chaos on a number of levels", and not the way proceedings involving significant legal jeopardy should be conducted.
- [88] While the situation does not lend itself neatly to the Jordan analysis, he submits that ultimately it amounted to an exceptional circumstance. Mr. Angel's "oscillating status" - from having no lawyer to having one who was not available for the existing trial dates - when it is combined with the failure of the court to put the new election to him that was required by the C Information, led to the case being unable to proceed in any manner, including as a preliminary inquiry, on the scheduled trial dates. While this was not the result of deliberate misconduct on Mr. Angel's part, it should still be deducted from the overall delay.
- [89] However, Crown counsel fairly acknowledges that this deduction should extend only to the date in August 2019 that the direct indictment was preferred, as the date that proceedings began in Supreme Court, not to the new preliminary inquiry dates in Provincial Court that October. His suggested approach would result in a deduction of 89 days.
- [90] He argues that the 21 days that resulted from defence adjournments in Supreme Court after the direct indictment, including the one required by the switch to Mr. Angel's counsel because she was available much sooner than Mr. Ferguson, constitutes defence delay and should be deducted as well.
- [91] There being no suggestion that the reserve period of 33 days before the judgement was given was markedly longer than it reasonably should have taken in the circumstances of the case, it should not form part of the overall delay, he submits.
- [92] The period following the replacement of the trial judge until the granting of the mistrial is said to be exactly the kind of exceptional circumstance that was contemplated in Jordan. It involved efforts to avoid all that had gone before in the trial "being for naught", before the replacement judge was forced to choose the "last resort" of granting a mistrial. In that regard, Crown counsel points out how unusual it was that the reasons for judgement would not have given Dley J. a basis on which to sentence Mr. Angel. The period thus removed from the calculation should therefore be 98 days.
- [93] Finally, in terms of relevant elements of the total delay, Crown counsel suggested that the approach taken by British Columbia courts to delay applications following mistrials that I have summarized previously should prevail[2]. Considering the time from the granting of the mistrial to either the anticipated start or end of the retrial, in accordance with decisions of this Court, would result in periods of 292 or 363 days respectively being deducted.
- [94] Dealing with the extent of the Crown's duty to prioritize the retrial in this case, he points out that scheduling a trial date within four months of the mistrial ruling is very quick in the scheme of things.

- [95] As to the manner in which the retrial is currently being conducted by the Crown, he emphasizes that giving the retrial priority does not require shortcuts by either side. That is, streamlining efforts should be made, but not at the expense of a fair hearing. Instead, each case must be analyzed individually, and consideration of the context, including the effect of the first trial on the evidence available on the retrial, is very important.
- [96] He argues that in a serious trial like this one, the Crown's ability to present its case cannot be reduced to simply calling the complainant and "seeing how she does". Issues have been raised that were not raised in the first trial and both the Crown and defence are making additional applications as a result. Their approaches cannot be sacrificed solely to fit within the ceiling.
- [97] It is also important to keep in mind, he submits, that the resources of the Crown to devote to the retrial were not unlimited, including the availability of experienced prosecutors to review the viability of the case and conduct a retrial. In addition, prosecutors are not completely interchangeable, and even if efforts to streamline the case are being made, their approaches to conducting the trial (in terms of the kinds of evidence to be led and the resulting applications, I took him to be saying) will not be identical.
- [98] Crown counsel further characterizes the initial retrial dates set by Dley J. as a "mirage", in light of the fact that further pretrial applications were going to be made and the shut-down of the justice system due to COVID-19. By the time of the pretrial conference on May 25, the Court was not even hearing evidence from in-person witnesses. Once it became apparent that the initial dates were not going to be for a trial, both sides made bona fide efforts to use the available time for applications.
- [99] Most importantly, he points out that the defence decision to make a s. 278 application, which was filed on April 27, created a de facto adjournment of any trial that might otherwise have begun on the original dates. The Crown is not permitted to waive the 60 day notice period required by that section and the defence did not apply to the Court to abridge it, as they might have done. The potential delay resulting from this application was compounded when the defence made a further application, this for records held by other police agencies, which was filed on August 31. While Mr. Angel certainly had a right to pursue these avenues as part of his full answer and defence, the obligation to streamline the case cannot rest only with the Crown in this situation, Crown counsel stresses.
- [100] Going forward, the Crown's case is likely to be completed by the December portion of the current trial dates, leaving ample time for the entire trial to complete within the currently booked time.

[101] While the outcome of this analysis makes it unnecessary to proceed further, Crown counsel also submits that "truly extraordinary state of affairs" brought about by such complicating factors as the multiple changes of defence counsel, the need for a new prosecutor, J.K.'s vulnerabilities, the post-judgment replacement of the seized judge and the necessary steps leading to the mistrial, and the almost complete closure of the court system caused by COVID-19, also meet the criteria for a particularly complex case as Jordan envisioned it.

Defence

[102] As an overview, Mr. Angel's counsel raises the concern that the Jordan analysis should not be reduced to a process of simply "nickel and diming" the various delays that have occurred, with the only goal being to reduce the overall delay period to one day below the ceiling. Such an approach fails to recognize the essential role played by s. 11(b) in safeguarding the accused's right to a fair trial and upholding the public's expectations about how the justice system should function.

[103] While she does not take issue with the Crown's characterization of some of the discrete events in the chronology, she maintains nevertheless that any exceptional circumstances that may have arisen do not excuse the overall delay. This is because the Crown failed to take any reasonable steps to prioritize the case once difficulties emerged with the original judgment, and after the mistrial was declared.

[104] Mr. Angel's counsel refers to decisions that have considered the circumstances in which the Crown met or failed to meet this responsibility. *R. v. Ali*, 2018 ABPC 272, summarizes a number of these decisions.

[105] That case dealt with the consequences of a mistrial declared by a provincial court judge after he had made some intemperate remarks about ordering transcripts for a continuation. That judge recused himself from hearing the case further and new trial dates were set. The mistrial was declared 37 days before the 18-month ceiling for trials in provincial court established by Jordan.

[106] In the ensuing s. 11(b) application, it was common ground that the mistrial was a discrete exceptional event, as contemplated by Jordan. The question posed by the application judge however, was "upon the occurrence of the discrete event, did the Crown take reasonable available steps to avoid and address the problem before the delay exceeded the ceiling?"(para. 7). This inquiry was based on the following paragraph from Jordan, which followed the paragraph that defined discrete exceptional events:

70 It is not enough for the Crown, once the ceiling is breached, to point to a past difficulty. It must also show that it took reasonable available steps to avoid and address the problem before the delay exceeded the ceiling. This might include prompt resort to case management processes to seek the assistance of the court, or seeking assistance from the defence to streamline evidence or issues for trial or to coordinate pre-trial applications, or resorting to any other appropriate procedural means. The Crown, we emphasize, is not required to show that the steps it took were

ultimately successful - rather, just that it took reasonable steps in an attempt to avoid the delay.

[107] The application judge referred to cases in which the Crown had taken steps to streamline its case to minimize delay, including withdrawing some of the charges against the accused (R. v. Bonsu, 2017 ONSC 2374 at para. 64); bringing the case forward to earlier dates in a court not usually used for prosecutions of that kind (Halton Hills (Regional Municipality) v. Sciberras, 2018 ONCJ 555 at para.131); or executing a "concrete plan" in cooperation with the defence and "the justice system" to "mitigate the potential for delay" (R. v. Gatt, 2017 ONSC 3563, at para. 217).

[108] In contrast, there were also cases in which the Crown had failed to take available steps, such as "suggesting that the matter be pre-tried with another judge, suggesting a meeting between defence and Crown to see what steps could be taken, or reconsidering what witnesses and evidence it [actually] required" (R. v. Bardsley, 2018 ONCJ 42 at paras. 48-49); working with trial schedulers to obtain an earlier date within the Jordan ceiling, despite having ensured that a new date was set on the day that the mistrial was declared (R. v. Lee, [2018] O.J. No.2479 (C.J.) at para. 22); or more generally had failed to show that it had taken any steps to expedite and prioritize the matter (R. v. Remilien, [2017] O.J. No. 473 (C.J.)).

[109] The application judge in Ali also recognized that there have to be steps available that can actually affect the delay:

20 [S]ome courts have allowed the Crown to rely on the discrete exceptional circumstance provision where no extra efforts would have made a difference. As the Nova Scotia Supreme Court noted in R. v. Melvin 2017 NSSC 149, "there was nothing realistically that the court or the Crown would have been able to do", and nothing "unreasonable or unduly protracted about the manner in which the parties responded to this development and proceeded to schedule the second trial" (paragraphs 87-88). The British Columbia Supreme Court echoed those comments in R. v. Wu, supra, at paragraphs 87-88. These cases indicate that extra efforts to streamline the progression of a case may not always be possible, and that when it is clearly evident that no such reasonable efforts would ameliorate the delay, then the failure by the Crown to take what would clearly be futile steps will not preclude the Crown from relying on the "discrete exceptional circumstance" provision in the Jordan analysis.

21 Ultimately, the case law suggests, and I respectfully agree, that when performing the discrete exceptional circumstance analysis, courts should consider both whether there were reasonable steps the Crown could have taken that could have realistically mitigated the delay, and whether the Crown took those steps. If there were no reasonable steps that might have mitigated the delay, the Crown may still be able to rely on the discrete exceptional circumstance provision even if it cannot point to special efforts to expedite and prioritize the matter.

[110] In the case before him, the application judge found that there were steps that the Crown could have taken to address the delay:

31 Before the mistrial was declared, witnesses had been heard in the first trial. The Crown could have used the evidence already called as a basis for a request for admissions by the accused. Concrete proposals to defence counsel could have been made with a view to either eliminating the calling of witnesses who had previously testified, or reducing the scope of their testimony. The Crown could have sought agreement from defence counsel about limiting the contested issues in the second trial.

32 It might be that if the Crown had undertaken those steps, it would have met with resolute and steadfast intransigence on the part of the accused. It might be that no delay would have avoided or reduced. However, those steps were not, on their face, doomed to failure, and should have been undertaken.

[111] As a result, a breach of the accused's s. 11(b) rights was found and the application for a judicial stay of proceedings was granted.

[112] Turning to the specific periods of delay, Mr. Angel's counsel argues that the one resulting from the unsuccessful May 2018 trial dates should not be deducted. The right to a new election was brought about by an aggressive prosecution strategy of upgrading the seriousness of the assault charge, and the situation was aggravated by the erroneous Crown position opposing what the prosecutor mistakenly characterized as a re-election. Further, if Mr. Schultz had been prepared to conduct the cross-examination of the complainants that he had been appointed to do, a preliminary inquiry could potentially have proceeded on those dates. His unwillingness to do so is a further unfortunate factor that contributed to the need for an adjournment.

[113] With respect to the 21-day period following the appearance on the direct indictment, she notes that there is no evidence of either an expressed or implied waiver of it by Mr. Angel. In fact, this short period of adjournments facilitated the involvement of Mr. Angel's counsel as new counsel, which in turn saved at least four months of delay by making a trial possible in the spring of 2019, rather than in the summer when Mr. Ferguson was available. This was a legitimate defence action that should not be the subject of any deduction. Further, the correspondence between counsel during this period shows that the Crown did not have a time estimate for the trial, so no opportunity to set the trial dates sooner was lost in any event.

[114] The trial judge's time on reserve also should not be deducted. Mr. Angel's counsel submits that Supreme Court's decision in *K.G.K.* is applicable only to a lengthy reserve period following a trial, a period that in itself is the cause of the delay and becomes the subject of the application. In this case the trial judge's reasons provided no finality in terms of the jeopardy to Mr. Angel's fair trial rights and the proceedings continued to be further protracted. It was certainly not a discrete event, she argues.

[115] The period after the delivery of the reasons for judgment, in the defence view, represents a failure by the Crown to take any reasonable steps to mitigate the effect of the trial judge's replacement and the deficiencies in the reasons for judgment, as the cases require. Faced

with those events, the Crown had several more constructive options, including consenting immediately to a mistrial or agreeing to a sentence of time served, and then proceeding immediately to the appeal; or having Mr. Angel sentenced based on the specific incidents of sexual touching that J.K. was able to describe (there were about eight of them apparently). Mr. Angel's counsel says that the defence was willing to forego its mistrial application if one of these sentencing alternatives had been pursued.

- [116] The Crown compounded the resulting delay, she argues, by insisting that the replacement judge would be able to find the necessary facts to conduct the sentencing if he reviewed all of the trial transcript.
- [117] As a result, this period should still form part of the overall delay.
- [118] The Crown's conduct of the case after the mistrial was declared is also said to reflect the same lack of any proactive steps. The prosecutor who received the mistrial decision for the Crown, did not know enough about the case to contribute to the time estimate for the retrial. The review to decide if it would be going ahead was assigned to Ms. Dawson, who had no previous knowledge of the case, and who was going to be away until March 2. Ms. Dawson was uncertain whether she would actually have conduct of the retrial, and was not able to complete her review until the end of April, for a trial that was scheduled for the end of May.
- [119] She erroneously advised the Court in the March pretrial conferences that the Crown would not have any pretrial applications. Instead, by the time the Crown finally filed its synopsis on May 4, it was clear that they were seeking to lead evidence that had been the subject of the counts on which Mr. Angel had been acquitted, as well as new evidence of after-the-fact conduct that had not been led at the first trial.
- [120] In addition, Ms. Dawson's conflicting trial commitments caused the loss of the first week that had been set aside for trial.
- [121] As a further factor contributing to the delay the Crown, as an institution, still has not fulfilled her ongoing requests for a counsel, or even an articulated student, to help her manage the conduct of the trial (although I note that Crown counsel was seconded to respond to the present application).
- [122] Most significantly in the defence's view, the Crown was not actually ready to proceed on the May trial dates. J.K. could not be located and no basis then existed for an application pursuant to s. 715 of the Code to rely on her evidence from the first trial. A "pessimistic" interpretation of the lengthy voir dices that the Crown ultimately chose to put forward at that time was that they were "buying time" in order to locate her and persuade her to testify. Had the defence's Vukelich hearing succeeded in screening out the after-the-fact conduct application, the Crown would have had no option but to confront the reality of J.K.'s unavailability.

- [123] An appropriately straightforward response to this situation would instead have been for the Crown to seek an adjournment and a material witness warrant for J.K., or simply to stay the proceedings.
- [124] Going forward, the defence says that the Crown's trial schedule is unrealistic, and it is unlikely that the Crown's case will be completed by the December dates, as Crown counsel projects.
- [125] Proceeding only on six of the original 11 counts that featured in the first trial should have led to a markedly shorter retrial than the 22 days needed originally. Yet because of the Crown's approach to the retrial, the 20 days that have been allocated to it will not be sufficient.
- [126] J.K.'s evidence is currently scheduled to take a third less time than it did in the first trial, even though the Crown is still seeking to lead evidence of the acquitted counts and the amount of cross-examination will actually increase, because of the availability of inconsistencies in her evidence from the first trial. Her direct evidence will also include incidents that J.K. herself previously testified were not sexual in nature. These will add at least three witnesses and necessitate two further voir dires.
- [127] In addition, Mr. Angel's counsel points out the Crown will now have to justify the admission of evidence of sexual activity involving J.K. that took place outside of the events captured by the current indictment, pursuant to the decision of the Supreme Court of Canada in *R. v. Barton* (2019 SCC 33), which will consume yet more trial time.
- [128] Finally, she submits that the extensive evidence of the relationship between J.K. and Mr. Angel after 2009 that the Crown proposes to lead is not required in order to understand the only two counts - assault and uttering threats - that are alleged to have taken place after that date. They are brief incidents that occupied only 10 pages of transcript in the original trial.
- [129] Put bluntly, Mr. Angel's counsel submits that the Crown's approach here amounts to prosecuting the case "to ensure it takes as long as possible and choosing to lead evidence just because they believe they can" - an approach that should not be encouraged. Although it was dealing with the specific issue of particularly complex cases, the Supreme Court's caution at para. 79 of *Jordan* that "Crown counsel must be alive to the fact that any delay resulting from their prosecutorial discretion must conform to the accused's s.11(b) right" is also apt in the present context. The Court has repeatedly encouraged the Crown to engage in a cost-benefit analysis of the offences it prosecutes and screen out marginal charges. Contrary to that encouragement, this is a case in which the Crown has, to adopt the conclusion in *R. v. Rice*, 2018 QCCA 198, unnecessarily made the case more complex.

[130] Lastly, to the extent that the Crown seeks to rely on the inherent complexity of this case to justify any of the delay that has resulted, the defence points out that none of the factors that Crown counsel identified fall within the hallmarks of complexity that were identified in Jordan. Properly conceived, this could have been essentially a one-witness case, but for the prosecutions' attempt to bolster J.K.'s testimony with additional evidence.

Discussion

[131] Dealing first with the overall framework to be applied here, I think that the sort of "nickel and diming" of the overall delay period that Mr. Angel's counsel warns against in her submission is inherent in the application of Jordan. To simplify the unwieldy Morin analysis that preceded it, Jordan instituted a hard cap after which proceedings must be judicially stayed, which can only be avoided by showing that certain events should not form part of that overall delay, or that they should be subtracted from because of their exceptional nature. This inevitably requires the relevant periods constituting the delay to be characterized to determine whether they legitimately fit within either category. The fact that some of those periods can end up being quite brief in no way trivializes the overall s. 11(b) right that Jordan seeks to protect, in my opinion.

[132] Dealing first with the loss of the Provincial Court trial date, I would characterize it as a discrete exceptional circumstance.

[133] Stripped to its essentials, this was a situation in which Mr. Angel, having had his previous counsel withdraw, expressed the intention to represent himself at his trial, while still maintaining an application for legal aid coverage for counsel. On the scheduled trial date, the counsel appointed to cross-examine the complainants was able to determine that the application had gone astray, likely due to his limited appointment, and then to advise that the appointment of counsel had taken place. When that new counsel turned out to be unavailable for any of the existing trial dates, he sought an adjournment, which the Crown could not reasonably oppose in the circumstances.

[134] It is difficult to see how the Crown could have foreseen or avoided this sequence of events. When faced with the reality that Mr. Angel was without his own counsel on the first scheduled day of trial, the prosecutor sought to have the matter go ahead with Mr. Schultz's assistance in cross-examining the complainants. Although her characterization of Mr. Angel's potential "re-election" was technically incorrect, her opposition to that possibility shows a determination to have the case resolved in the form of a trial as soon as possible.

[135] As to additional reasonable steps that could have been taken before the delay exceeded the 30-month ceiling, the Crown took what was likely the most effective step possible - obtaining a direct indictment to short-circuit the preliminary inquiry dates that had been set for October, and put the matter on track for a trial in Supreme Court.

- [136] On the current evidence, it would be speculative to give any weight in this analysis to the failure to provide Mr. Angel with a new election when the more serious assault count was added. There is no direct evidence that what Mr. Schultz reported to the Court on his behalf about always having wanted a preliminary inquiry actually represented his instructions to his former counsel, or that she summarily overrode those instructions in the manner that he described - a response by her that would have had serious ethical implications if it were true. He also did not mention the request in any of his appearances between her withdrawal and the trial date, despite the candid nature of his interactions with those judges, including confirming that he would be representing himself for the trial. And, although he made a request to re-elect on the trial date, once Mr. Ferguson's appointment was confirmed he was apparently content, sensibly in my view, to have full representation and work with Mr. Ferguson's availability. It is simply not possible to say what would have occurred if the election had been put to him earlier, especially given that he was without counsel at that point and Mr. Schultz was not yet appearing, and in any event it does not detract from the exceptional impact of what did occur - new counsel essentially being appointed on the trial date.
- [137] Accordingly, the period of 89 days from the adjournment of the trial in Provincial Court to the obtaining of the direct indictment must be deducted from the total delay.
- [138] With respect to the fix date period in Supreme Court, the period between the first appearance in Supreme Court on August 24 and the next one on September 4 should be deducted, as having been waived by the defence. When a prosecutor puts on the record their understanding that the defence is waiving a particular adjournment period, a defence counsel who does not correct that assertion surely must be found to have waived the period involved. To conclude otherwise would introduce even more uncertainty to the in-court dialogue on the attribution of delay for Jordan purposes arising from adjournments than already exists.
- [139] However, I would not deduct as defence delay the period between the appearance on September 4 and the one on September 17, when the trial dates in Supreme Court were set. Although the Crown was ready to proceed by September 4, in the sense of having arrived at a time estimate (15 days for a judge and jury trial and 10-12 days for judge alone, as revealed in Ms. Di Curzio's email to Mr. Angel's counsel on September 7), and had previously discussed trial dates for the late fall of that year with Mr. Ferguson in the context of the forthcoming direct indictment, it appears that Mr. Ferguson was engaging in efforts to consider the issue of scheduling in light of his own availability and then, as of September 7 according to the email chain, arranging for Mr. Angel's current counsel to replace him, to allow for earlier trial dates. His current counsel was in turn involved in correspondence with Ms. Di Curzio about potential admissions to shorten the amount of time required, and providing her own availability for trial. I think that these defence actions were legitimately directed at the trial proceeding in the most timely and efficient manner possible, and should form part of the elapsed time in the usual way.

- [140] The deducted period will therefore be eight days.
- [141] Despite resourceful submission by Mr. Angel's counsel, I do not think that the decision in K.G.K. can be distinguished in the manner she proposes. It unambiguously holds that deliberation time is not part of the 30-month Jordan calculation, and will not be part of the s. 11(b) analysis unless it was unreasonably protracted in the circumstances. The fact that in this case subsequent delays in the post-conviction period are appropriately considered under Jordan, due to the highly unusual occurrence of a post-conviction mistrial, does not detract from that essential reality. So, while we are obviously reviewing what went on at later stages under the Jordan framework, the 33 days that the trial judge took to reach his decision does not belong within it, and must be deducted.
- [142] Arguably the events from the delivery of the reasons to the mistrial are all part of the post-conviction period, which the Supreme Court of Canada has not yet definitively situated within the overall s. 11(b) analysis (although some appellate courts have concluded that it requires a separate approach from the basic Jordan framework, but that proceeding to sentence must itself occur within a reasonable period: for example, *R. v. Charley*, 2019 ONCA 726) and does not count towards the ceiling. Nevertheless, counsel have both treated it as being part of the overall proceedings against Mr. Angel and subject to the ceiling, and I will consider it on that basis.
- [143] There cannot be any real question that a judge being removed from a trial after rendering their reasons for judgment is an exceptional event. Even more exceptional, practically unheard of I would say, is a situation in which the reasons for judgment do not readily yield the findings of fact underlying the judge's decision to convict on certain counts, so as to characterize the offences for sentencing purposes. That was the situation that faced counsel here, and the context within which the Crown's responses must be assessed.
- [144] I am unable to agree with the defence that simply abandoning all that had occurred up to that point and immediately agreeing to a mistrial was a reasonable step for the Crown to have taken. Convictions had been imposed for serious offences and I think the Crown had a responsibility to determine whether those convictions could be properly supported.
- [145] The same is true for the option of conceding that the least aggravated set of allegations that could be attributed to Mr. Angel in light of J.K.'s statement - it would not have been responsible to abandon the more aggravated testimony that she gave at trial without a clear indication that it had been rejected.
- [146] In fact, as the transcripts reveal, the defence was just as perplexed by the reasons for judgment as the Crown was, and did not chart the immediate course to a mistrial that Mr. Angel's counsel describes in retrospect. In the early stages the focus was on obtaining an unedited version of the oral reasons, followed by the exploration of the reasons for the trial judge's removal, in light of infirmities displayed by him that Mr. Angel's counsel had noted, as a preliminary step in the mistrial application. These actions were interspersed with the resolution discussions that were repeatedly encouraged by Dley J. My point is not that any

of these actions were illegitimate, only that neither counsel really knew in the initial stages how best to approach this unique situation, and the Crown should not be faulted for not taking procedural steps that would have been rash and hasty in the circumstances.

- [147] The same is true of the Crown's insistence that Dley J. review the trial transcripts to see if the basis for the convictions could be gleaned from them. One should not conflate his ultimate finding that he was unable to find the necessary facts with the conclusion that it was unreasonable for the process to have been attempted. Indeed it was his own conclusion that he could not rule on the mistrial without engaging in that review.
- [148] Since this period occurred within the 30-month ceiling, which ended on January 17, 2020, just before the mistrial was granted, I conclude, in accordance with para. 70 of Jordan, that there were no reasonable steps that the Crown could have taken to remedy the effect of the replacement of the trial judge (which includes the shortcomings in his reasons) before the case reached the ceiling, and that therefore it qualifies as a discrete exceptional event and should be deducted. This period will be 98 days.
- [149] Finally, there is the period from the granting of the mistrial to the expected end of the trial. I agree that the approach in Christurajah and Wu of deducting the entire period from the date of the mistrial to the trial's conclusion is the preferable one, since the event led to that entire period of delay being created.
- [150] Again, there is no real question that the mistrial was an exceptional event - the defence concern is instead with the Crown's failure to mitigate the resulting delay or to prioritize its conduct of the case in any manner, as required by para. 75 of Jordan and applied specifically to the period following a mistrial in Wu. Going further, the defence says that Crown's manner of handling the retrial has created yet more delay.
- [151] Dealing with the first trial dates after the mistrial, despite Mr. Angel's counsel's able dissection of the Crown's internal responses, one has to keep in mind that those responses had absolutely no effect on the progress of the matter. The trial dates were set on the day that Dley J. declared a mistrial, and nothing in the Crown's intervening responses, including the evolving circumstances of the current prosecutor's involvement, served to alter them in any way.
- [152] I will say more about the Crown's approach to the trial when dealing with the current trial dates, but however one assesses the applications to lead additional evidence that the prosecutor has decided to make, they were not the reason that the original trial dates could not be used for a trial. It could not begin until the defence's s. 278 application had been concluded, and, as Mr. Angel's counsel advised during the pretrial conference on May 20, she considered the required 60-day notice to the affected parties to be an "important notice", as it unquestionably is, and she wished to provide it, rather than applying to abridge it. As she also confirmed, this meant that the application would likely proceed in early September instead.

- [153] Accordingly, I conclude the Crown's use of the initial trial dates did not represent any failure in its duty to mitigate delay and prioritize the case between the mistrial and the conclusion of the original trial period. The setting of those dates was not impacted by the Crown's conduct, and the trial proper could not have begun during them in any case. Jordan clearly does not hold the Crown accountable for acts or omissions that had no effect on the chronology of the matter and could not have shortened the time required for the steps that were taken.
- [154] That leaves for consideration the period from the conclusion of the first trial dates in June and the expected conclusion of the trial in January.
- [155] First, no one has suggested that the dates elected for the trial were not the earliest that the court and counsel could provide, or that any accommodation or flexibility was lacking in arriving at them.
- [156] What the defence argument on this period really boils down to is that the Crown is taking an excessively complicated approach to the prosecution, seeking to bring in evidence of marginal relevance and questionable admissibility, which is the antithesis of the prioritization that Jordan demands.
- [157] To date the Supreme Court of Canada has not addressed the relationship between the exercise of Crown discretion in presenting evidence and the duties imposed on the Crown by Jordan after an exceptional event has occurred, and in particular the circumstances in which such decisions might fail to reflect the Crown's duty to mitigate delay and prioritize the case. These are really the decisions that the defence is criticising in the present case.
- [158] The Court's comments thus far about the exercise of Crown discretion in relation to delay have focused on quantifiable actions by the Crown, such as charging multiple accused or laying multiple charges for the same conduct in the context of case complexity (see para. 79 of Jordan). More generally, the Court has spoken of the role of the Crown in ensuring trial efficiency, such as by not pursuing counts that are of marginal value in light of the evidence: see *R. v. Sciascia*, 2017 SCC 57 at para. 31 and *R. v. Rodgeron*, 2015 SCC 38 at para. 45.
- [159] At the end of the day I think the language of Jordan itself offers the best guidance here. The concepts of mitigating delay and prioritizing the case, as those terms are used in para. 75, do not appear to me to involve an analysis, much less a vetting, of the actual evidence by which the Crown seeks to prove its case. Those terms speak instead of the Crown taking all available steps to enable the case to be heard as soon as possible, and to be given as much priority within the available resources as possible.
- [160] Even the streamlining spoken of in para. 70, for cases still within the ceiling, involves a process of reaching out to the defence to discuss possible efficiencies, or utilizing case management and other procedural steps, not of requiring the Crown to call a specifically reduced amount of evidence in order to meet the definition of an exceptional event.

- [161] Obviously the Crown has to present its evidence efficiently in light of the fact that a delay-causing exceptional event has occurred, and an accused is not left without a remedy in the case of runaway trials that are caused or contributed to by a lack of sound prosecutorial judgment. The trial time wasted as a result of an excessive approach may well contribute to an overall delay period that cannot be excused, just as charging too many accused or counts might. The point however, is that the Crown's choices about the means of proof are not the focus when a court is deciding if delay has been adequately mitigated or the case adequately prioritized after an exceptional event, as an aspect of the Jordan analysis.
- [162] If I am incorrect in my understanding of the relationship between the Crown's means of proving its case and its duty following an exceptional event, I would say that on the current record I am unable to find that the proposed evidence is not of at least reasonably arguable relevance and admissibility, whatever the ultimate outcome, or that seeking to lead it reflects any lack of due regard by the Crown of the situation we find ourselves in after the mistrial.
- [163] More to the point, there is no evidence that the Crown has failed to take any available steps that could have led to the case being heard earlier than the current trial dates, disregarded any opportunities to cooperate with the defence, or failed to bring sufficient resources to bear to conduct the trial. On that last point, however challenging it may be for the prosecutor personally, there is no indication that the Crown's failure to provide her with co-counsel so far, which she has referred to several times, had any effect on the fulfillment of her duties in a timely way.
- [164] As a result, I conclude that the entire mistrial period is properly considered as a discrete exceptional event, and the 363 days until the anticipated end of the trial must be deducted.
- [165] When the various deductions I have identified are added together, the total is 591 days. Subtracted from the total delay of 1309 days, this yields a remaining period of 718 days, or about 24 months. As a result, the application must be dismissed.
- [166] I wish to express my appreciation to counsel for the level of organization and focus that they brought to this application, which made deciding it considerably more straightforward than it would otherwise have been.

"Schultes J."

- [1] On November 4, at the same time I communicated the outcome of this application, I advised that the evidence of after-the fact conduct was not admissible, again with reasons to follow.
- [2] As an alternative approach, he also reviewed the prevailing approach to the calculation of delay following a successful appeal order for a new trial - starting the calculation of delay from zero upon an order for a new trial being made, but with the requirement that the retrial be expedited and that it take considerably less time than the original ceiling: for example, *R. v. MacIsaac*, 2018 ONCA 650.

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