

CANADA / JUDGMENT

R. v. Kuntz-Angel

2022 BCSC 630

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Supreme Court of British Columbia

DECIDED

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2022 BCSC 630 R. v. Kuntz-Angel

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Kuntz-Angel,

2022 BCSC 630

Date: 20220422

Docket: 66611

Registry: Chilliwack

Regina

v.

David Paul Kuntz-Angel

also known as David Paul Kuntz

Restriction on Publication: Pursuant to 486.4 of the Criminal Code, an Order has been made directing that no information that could identify the complainant in this matter, described in these reasons for judgment as J.K., shall be published in any document or broadcast or transmitted in any way.

Before: The Honourable Justice Schultes

Ruling re s. 11(b) Application #2

Counsel for the Crown:

W.E. Dawson, Q.C.

N. Reithmeier

Counsel for the Accused:

S. Wright

C. Paquette

Place and Dates of Hearing:

New Westminster, B.C.

February 28, and

March 4, 2022

Place and Date of Judgment:

New Westminster, B.C.

April 22, 2022

Introduction and Background

- [1] For the second time in this case, Mr. Angel is making an application 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. His first application was dismissed in November 2020[1].
- [2] He is charged with committing sexual offences against J.K. from 2006 to 2009, when she was between eight and 11 years old, and assaulting her in late 2016 and uttering threats to her in early 2017. His first trial on these charges took place in 2019. He was convicted of them, but acquitted of additional offences that were alleged to have been committed against her when she was a teenager.
- [3] After rendering his judgment in August 2019, the trial judge was unable to continue. The judge who replaced him for sentencing purposes was then unable to find the necessary facts from the reasons for judgment on which to impose sentence, so a mistrial was declared. The current application is being made in the course of the retrial on the charges of which Mr. Angel was convicted.
- [4] As of the first s.11(b) application in October 2020, the total delay to the estimated end of trial in January 2021 was 1309 days. After deducting various periods based on the framework for applying s.11(b) set out by the Supreme Court of Canada in *R. v. Jordan*, [2016] 1 S.C.R. 631, the total delay was 718 days, or about 24 months - six months below the presumptive ceiling for trial within a reasonable time in a superior court that *Jordan* established. As a result, the application was dismissed. In accordance with that ruling, the newly-calculated ceiling expired in on July 19, 2021.

- [5] As a result of various events, most notably the struggles of Ms. K. to remain in attendance to complete her evidence, the trial has not completed within that ceiling. Final submissions are now set to end on August 26 of this year, about 13.5 months after the ceiling was exceeded. The main issue on this application is whether the longest deduction that was made in my first ruling - the 363 days from the granting of the mistrial to the expected end of the trial - continues to apply, so that the additional time that has elapsed continues to be deducted.

The First Decision

- [6] The basic Jordan framework is not in issue. In the case of a superior court trial, if the net delay exceeds 30 months after deducting any periods that were waived or caused by the defence, it can only be justified if the Crown is able to demonstrate that there were exceptional circumstances, either as a result of discrete events or because the case was particularly complex. Such circumstances must have been reasonably unforeseen or unavoidable, and the Crown must not have been able to remedy them once they arose. The applicable modifier for the Crown's responsibility in relation to such situations is "reasonably": Jordan, at paras. 61, 63, and 69.
- [7] I discussed the application of these principles to mistrials in the first decision:
- [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 Christurajah, 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]

[8] I concluded that there was "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" (para. 163). Addressing the specific defence argument that Crown counsel had sought to present her case in an unnecessarily detailed and complicated manner, thus prolonging the time required, I concluded that the Supreme Court of Canada's requirement that prosecutors take all available steps to present their cases efficiently did not extend to court scrutiny of the specific evidence by which prosecutors chose to prove their cases (para. 161). If I was incorrect on that point, I was still 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" (para. 162). Thus, the entire period following the mistrial was to be deducted. Following the other decisions of this Court in Christurajah and Wu, that deduction would include the entire period to the completion of the new trial.

Crown Position

- [9] Crown counsel on this application submits that Watchuk J.'s comments in Wu form the question to be asked in relation to the additional delay since the anticipated end of the trial here: have the trial dates been extended for reasons that the Crown could have remedied? His position is that none of the factors that have intervened represent a failure on the Crown's part to move the case forward diligently.
- [10] To provide a factual foundation for his submissions he has provided an affidavit from the trial prosecutor. Wendy Dawson, Q.C., describing these intervening factors.

The loss of the trial dates scheduled for November 9-10, 12-13, 2020

- [11] Ms. Dawson deposes that at the request of the defence she contacted the RCMP to see if material deleted from Mr. Angel's cellphone could be recovered. It appears from her review of the Crown file that neither the Crown nor defence had made that request previously. Three days later, a RCMP technical expert advised her that the material, which consisted of photos, videos and audio files, had been recovered. This resulted in a joint Crown and defence application to adjourn the upcoming continuation dates, I infer so that all counsel

could consider the new material.

- [12] While conceding that this late discovery was regrettable, Crown counsel emphasizes that in light of the last-minute nature of the request that triggered it, and the legitimate need of everyone involved to review the new material once it had been provided, the loss of those dates is not something that the Crown could have prevented.

The loss of the trial dates scheduled for December 14-18, 2020

- [13] This occurred because the jury trial of a self-represented accused that Ms. Dawson was assigned to prosecute in the ten days immediately before these dates unexpectedly took much longer (ultimately 22 days) to complete. As the trial judge in that case noted in his reasons for sentencing, the trial proved to be "very challenging".
- [14] Crown counsel notes that putting the continuation dates for this case into that slot, which was done after the 10-day jury trial had already been set, was an example of the cooperative efforts that are necessary on behalf of counsel and the courts in order to achieve speedier trials. The opposite approach - turning down that slot because the jury trial might run longer than scheduled - would not have been consistent with Jordan principles.

Ms. K.'s difficulties

- [15] As I have mentioned, this is by far the longest period of disruption of the original schedule for completing the trial.
- [16] Ms. K. struggles with addiction and mental illness, and at times she appeared to be under the influence of a substance when she appeared in court. Most significantly, she was unable to remain in the witness box for any sustained period, requiring frequent breaks and in some cases being unable to return after the breaks were over. On other court days she failed to attend at all. Ms. Dawson advised us at various points that Ms. K. was undergoing additional difficulties outside of the courtroom, including conflict with her intimate partner, who attended with her on many court dates; being caught in possession of a controlled substance and drug paraphernalia by the sheriffs when entering the courthouse; and, as a broader issue, lacking stable housing. As a further complicating factor, she was pregnant during a good portion of her scheduled testimony, and was experiencing understandable stress about the impact of the addiction on her unborn child.
- [17] Ms. Dawson sets out the efforts made by the Crown to support Ms. K. in her court attendances in her affidavit, including:
- providing the ongoing support of a victim services worker, with whom Ms. K. had developed a positive relationship;
 - providing nearby hotel accommodation for her and her intimate partner, who had appeared to be a positive influence on her until their relationship became dysfunctional;

· arranging for her father and stepmother, who were positive figures in her life, to attend for part of her testimony; and

· Arranging or recommending various resources to support her recovery from addiction.

[18] It twice became necessary for the Crown to obtain material witness warrants for Ms. K. following her failure to attend. After the second application Ms. Dawson sought her detention, so that her evidence could be completed. I decided that she could be released on strict conditions to stay with her grandmother, another supportive person in her life.

[19] All in all, her attendance amounted to parts of 11 different court days, extending from January 12 to July 21, 2021.

[20] When she failed to attend on the afternoon of July 21, Ms. Dawson invited me to conclude that she was unable to complete her evidence because of her addiction and mental illness, which I did. This finding led to an application by the defence to strike her evidence because her cross-examination could not be completed[2].

[21] Crown counsel submits that Ms. Dawson did "yeoman's work" in attempting to present Ms. K.'s evidence in full, and it cannot be said that any other ways of remedying the situation remained untried. As a result, the deduction to the end of this trial arising from the mistrial should remain in effect.

[22] In the alternative, if I am not persuaded that these events form part of the ongoing time to the completion of this trial following the mistrial, the Crown submits that they also meet the test for being discrete exceptional events under the Jordan analysis.

[23] While he acknowledges that the investigative report indicating that an additional evidence might be available on Mr. Angel's phone was written in 2017, Crown counsel notes that the standard in foreseeing and avoiding exceptional events is not one of perfection, but rather of reasonableness. Further, it was the timing of the defence request relative to the continuation dates that caused the dates to be lost.

[24] Similarly, while setting a continuation in this matter to immediately follow a jury trial involving a self-represent accused might seem unwise in the abstract, the Crown, like the other participants in the criminal trial process, is responsible under the Jordan regime for completing trials in as timely and efficient away as possible, which requires all reasonably viable continuation dates to be utilized.

[25] Finally, Ms. K.'s inability to sustain or, ultimately, complete her testimony falls squarely into the category of events that the Crown could not remedy, despite extensive efforts to do so. Significantly, the effects of Ms. K.'s difficulties are ongoing, in that the application dealing with over the evidence that should be available to ameliorate the termination of her cross-examination has only recently been argued, and will continue to be felt to the expected end of the trial.

- [26] Less prominent in the Crown's analysis is the question of defence unavailability to set continuations of the trial for dates on which the Crown and the court were available, which Ms. Dawson has set out in detail in her affidavit. This is a category of defence delay described in *Jordan* (para. 64). With welcome candour, Crown counsel acknowledges the challenge of determining the true effect of the defence not being available on earlier dates (as well as of the trial not being able to sit on the lost dates in November-December), in light of the unpredictably disruptive effect of Ms. K.'s subsequent attendance problems.
- [27] A further issue for me to consider, (although acceptance of the preceding analysis would make it unnecessary to do so) is whether, when one considers the overall history of the case, especially in provincial court (where Mr. Angel changed counsel repeatedly, was self-represented for a period and was unable to proceed with his provincial court trial, because of difficulties in obtaining counsel) it can properly described as a particularly complex one, and therefore entitled to special consideration under the *Jordan* framework (para. 77).
- [28] In short, Crown counsel submits that while the situation we currently find ourselves in is far from ideal, it nonetheless remains compliant with *Jordan* principles.

Defence Position

- [29] As an overview, Mr. Angel's counsel submits that there was nothing unforeseeable or unavoidable about what has occurred here. After my initial s. 11(b) ruling, the Crown was presented with a new ceiling for the completion of the trial, but continued to conduct the case just as they had been doing before the ruling. In particular, Ms. K.'s challenges, which were well known to the Crown, played out exactly as one would have envisioned them. In analyzing what occurred, it is important, the defence says, to identify and assign responsibility for the choices that the Crown made in the course of these events.
- [30] With respect to the disclosure issue that led to the loss of the November dates, counsel points out that all that the defence had requested was a more readable copy of the text messages on the phone. They also had a procedural question that they wanted passed on to the RCMP's technical expert. Ms. Dawson took it upon herself to request the additional disclosure that ended up requiring more time to deal with. The defence were not interested in the photos despite previous clues about their existence, which is why they had not been requested. As a result, this period of delay should be attributable to the Crown.
- [31] The same outcome should follow from Ms. Dawson's decision to set the December continuation immediately after her jury trial. She would have been well aware of the risk of that trial spilling over, and the trial judge's general comment that it was a challenging one does not provide any information about the role that the Crown might have played in prolonging it. A good way to reality-test the Crown's position, counsel suggests, is to ask whether there is any doubt that the time lost would be excised from the total delay if a defence counsel had arranged their trial schedule in this manner. Contrary to the Crown's argument, the point is not whether this trial would have completed if that time had not been

lost. It is whether the Crown can avoid having it count against the delay, which in these circumstances it clearly cannot.

- [32] Turning to the main source of delay, Mr. Angel's counsel points out that in my reasons on the first s. 11(b) application I referred to the danger of "runaway trials that are caused or contributed to by a lack of sound prosecutorial judgment" and warned that "[t]he trial time wasted as a result of an excessive approach may well contribute to an overall delay period that cannot be excused " (para.161). She submits that these comments accurately predicted the situation that we now find ourselves in. Despite the looming ceiling and the fact that time for a defence to be called might still be required, and knowing that Ms. K.'s evidence was not getting any better, Ms. Dawson still explored that evidence in great detail, in what is described as complete disregard for Mr. Angel's s.11(b) rights. This included canvassing extremely sensitive incidents and videos with Ms. K., which could not have assisted her fragile mental state. More broadly, it is questionable whether an entirely new prosecution strategy from the one that was pursued at the first trial was actually needed.
- [33] The efforts that the Crown made to support and accommodate Ms. K. were not sufficient, counsel submits. What was really required here was a simplification of the Crown's case. A clear example is found in the video statement that Ms. K. provided pursuant to s. 715.1 of the Code, which would have provided ample evidence for a prosecution in itself.
- [34] Nor were these problems unforeseeable, it is argued. Ms. K.'s struggles were known to Ms. Dawson, from her conversations with Ms. K.'s family, well before this retrial began.
- [35] My decision not to detain Ms. K. on the second material witness warrant also played a part in the delay arising from her evidence, counsel submits. My concerns about her fragile condition were certainly valid, but they needed to be balanced against Mr. Angel's Charter rights at that point.
- [36] In contrast, any defence unavailability when scheduling continuation dates should not be deducted, in light of how proactively Mr. Angel's counsel sought out additional dates and accommodated themselves to them whenever possible. Notably, a second defence counsel was appointed to maximize their availability for the required applications, and the defence brought a Vukelich application in an attempt to narrow the scope of the Crown's applications. In reality, without the Crown actions that costs two sets of continuation dates and massively extended the time to complete Ms. K.'s evidence, it is questionable whether the defence's availability would even have been a concern.
- [37] Lastly, there is said to be no basis on which this case can be described as complex, as Jordan has defined that term. It is a straightforward matter, largely dependent on viva voce evidence, and requiring very few documents or extensive disclosure. Mr. Angel was only self-represented for a brief period and one of his changes of counsel was carried out so that he would be able to have his trial in this court sooner. It is quite unusual that a trial judge would be unable to continue after registering a conviction, or that their reasons for judgment would not provide a sufficient basis on which to carry out the sentencing before another

judge, but these events were not a reflection of anything inherently complex in the case itself.

Discussion

- [38] As a governing principle, I agree with the comments in Wu that if there are parts of the period from the mistrial to the completion of the retrial that the Crown could have remedied, they should not be deducted from the overall delay. To proceed otherwise would be to insulate the Crown's actions from review once a mistrial has been declared, which would thwart the intended all-encompassing nature of the Jordan principles.
- [39] Practically speaking, the outcome will be the same even if I were to follow other authorities (Beckett in B.C. and a more recent decision in R. v. Way, 2022 ABCA 1) and deduct only the period to the start of the retrial. In either case, the outcome turns on whether the Crown could have remedied any of the issues that delayed the retrial. If they could have, then those issues would not have met the definition of discrete exceptional events (reasonably unforeseeable, unavoidable and irremediable) during the period after the start of the retrial either.
- [40] On the first of the potential deductions, I am at a bit of a disadvantage in not having an affidavit from Mr. Angel's counsel to balance against the factual assertions in Ms. Dawson's affidavit. Nevertheless, I take his counsel's submissions completely at face value, and am prepared to assume for the purposes of deciding this issue that the defence did not originally request the material that ended up causing the adjournment, and had originally made a narrower request. Even if that is so however, the defence jointly requested an adjournment of the continuation dates to deal with the new disclosure, which I do not think they would have done if it had no potential impact on the conduct of the defence. I also do not have an evidentiary basis on which to conclude that this material should have been included in the Crown's initial Stinchcombe disclosure, as not being clearly irrelevant or subject to privilege. We simply do not know why the deleted material had not yet been extracted from the phone as of that late date. In such circumstances the inescapable conclusion is that the discovery of deleted material on the phone was not something that could have been foreseen or avoided, and its effect was mitigated in the most reasonable way possible, by seeking a short adjournment for all counsel to review it.
- [41] I come to the same conclusion with respect to the dates that were lost to the continuing jury trial. All things being equal, it is better to avoid setting a continuation for the week following a jury trial with a self-represented accused, because it is not unusual for jury trials to exceed their original time estimates, and self-represented parties add an additional element of unpredictability. But there is considerable force in Crown counsel's points that the continuation was set after the preceding trial had already been scheduled, and that if there was any optimism involved in trying to squeeze the continuation in, it was in keeping with the sense of urgency to complete trials that Jordan has imposed on all justice system participants. As to whether Ms. Dawson needed to handle both matters, she deposed that

she had been assigned the jury trial in 2019, and although an ideal world would involve a greater number of available prosecutors, on the current evidence I have no basis to question the reasonableness of the Crown's resource allocation decision, especially their preference for continuity in the conduct of the jury trial.

- [42] What this application really comes down to, in my opinion, is whether the Crown could have remedied the problems created by Ms. K.'s personal situation, so that the additional time, including the resulting applications, would not have been required.
- [43] The defence is certainly correct that Ms. Dawson was aware of Ms. K.'s problems from the outset of her conduct of the trial. I was told early on that she was living in the Downtown Eastside and the Crown was having difficulty contacting her. The defence does not suggest there was anything lacking in the level of witness support that was then provided to her based on that knowledge, which I think is a sensible concession, but rather argue that the case needed to be simplified in recognition of her recognized vulnerabilities, instead of being prosecuted at a level of detail that her capacity to attend could not sustain. As I have mentioned, an alternative approach was entering her s. 715.1 video statement, having her adopt it and then proceeding to cross-examination.
- [44] I am unable to accept this submission. Even if Ms. K.'s problems could have been foreseen, the level of vulnerability (and, ultimately, volatility) that she actually demonstrated in and around the courtroom was quite striking, and went well beyond what is normally encountered in a prosecution for sexual offences, in which many complainants demonstrate vulnerabilities. Coping with Ms. K.'s actual behaviour as a witness, as opposed to the broader personal challenges that were previously known to the Crown, clearly amounted to an exceptional circumstance.
- [45] Assuming, for the purposes of argument, that courts should evaluate the Crown's choices about how to prove the case when they are deciding whether an exceptional event could have been remedied (a point on which I expressed doubt in my first ruling), and that the correct approach to examining a vulnerable complainant is not to ask her about all of the incidents that she is potentially able to describe, the defence position that this unusual situation could have been remedied simplifying Ms. K.'s direct testimony still ignores the reality that Ms. K.'s response to cross-examination, in terms of her inability to remain in the witness box, was the same as it had been to direct examination (or perhaps even a bit worse, since there were periods at the start of her direct where she was able to put together continuous periods). Based on the questions that the defence were able to ask before cross-examination was terminated and their list of additional areas that were still to be covered, removing the additional incidents that the Crown was able to elicit from her by Ms. Dawson's approach would not have shortened it all that much. Her eventual inability to complete the cross-examination and the defence's need to pursue a remedy based on that (which we are still dealing with) would likely have been the same, I conclude, although I acknowledge that there would have been some reduction of the six days that were devoted to direct examination. I do not think we would have been much farther ahead, if at all, and we

certainly would not have met the July ceiling.

- [46] Probably the Crown's only realistic alternative would have been to concede sooner in the process that Ms. K. could not continue and try to enter her testimony from the first trial, which then would likely have led to the same defence application arising from the lack of cross-examination that we are currently facing.
- [47] Last of all, it is clear that judges' handling of the cases before them can cause or contribute to a Jordan problem, and my refusal to detain Ms. K. in the course of her cross-examination must also be considered in that light. The bail hearing in question was at an advanced stage of her attempts at attendance, shortly before the Crown conceded that she could not continue, so a great deal of the damage was already done, in terms of the passage of time. Making her available on an in-custody basis would not have put the case in a position to complete by the new ceiling. More significantly, the argument that detaining her would have shortened the subsequent delay presupposes that an addicted, mentally ill pregnant woman would then have been able to gather herself together in any more a coherent way than previously. I am not convinced of that. Custody would (I assume) have removed the availability of intoxicating substances to her, and ensured that she arrived at the courtroom at the scheduled time, but even with enforced sobriety and a restriction on the option of flight her mental illness and emotional vulnerability, which had been reflected in the need for extended breaks, would have remained, and resentment at being revictimized would likely have been added to the mix. Consequently, I am not persuaded that her evidence would have proceeded much more smoothly from in custody, if at all.
- [48] In short, I am unable to find that the Crown could have remedied Ms. K.'s problems as a witness. Thus, the deduction of time for the discrete exceptional event of the mistrial remains in place, and the application must be dismissed.
- [49] This conclusion makes it unnecessary to address the Crown's submissions on the allocation of delay based on the defence's unavailability for some continuation dates, or that this qualifies as a particularly complex case. I will say however, that I had serious doubts about the latter submission.

"Schultes J."

[1] 2020 BCSC 1777

[2] I did not grant that application. Instead I made an order allowing the defence to submit all of the remaining material that Ms. K. would have been confronted with to challenge her testimony and general credibility. This required a further application to clarify the scope of the permitted ameliorative evidence.

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