

CANADA / JUDGMENT

R. v. M.E.

2025 ONCA 729

COURT

Court of Appeal for Ontario

DECIDED

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R. v. M.E.

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COA-23-CR-0892

Judges

Gillese, Eileen E.; Zarnett, Benjamin; Thorburn, Julie

Subject

Criminal

Decision Content

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. M.E., 2025 ONCA 729[1]

DATE: 20251024

DOCKET: COA-23-CR-0892

Gillese, Zarnett and Thorburn JJ.A.

BETWEEN

His Majesty the King

Respondent

and

M.E.

Appellant

M.E., acting in person

Megan Stephens, appearing as duty counsel

Kevin Rawluk, for the respondent

Heard: October 8, 2025

On appeal from the conviction entered by Justice Marlyse Dumel of the Ontario Court of Justice, on November 18, 2022.

REASONS FOR DECISION

A. OVERVIEW [1] The appellant, Mr. E., was convicted of three counts of distributing, transmitting, and/or making available intimate images without consent, one count of criminal harassment, and one count of sexual assault. After the conclusion of his trial, he applied for a stay of proceedings on the ground that his right to a trial within a reasonable time was infringed contrary to s. 11(b) of the Charter.

[2] The trial judge dismissed the s. 11(b) Charter application, finding that the net delay did not exceed the 18-month Jordan[2] threshold for a provincial court trial. Mr. E. was sentenced to 2190 days in custody less 726 days credit for pre-sentence custody, along with other ancillary orders.

[3] Mr. E. appeals his conviction on the basis that the trial judge erred by refusing to stay his conviction for delay in accordance with s. 11(b) of the Charter.[3]

[4] The total delay from the date the information was sworn on December 15, 2020, to the end of the trial on November 18, 2022, was 702 days or 23 months and two days. This exceeded the 18-month presumptive ceiling set out in Jordan, at para. 5.

[5] The issue on the s. 11(b) Charter application was whether the net delay exceeded the presumptive ceiling.

[6] The parties agreed on the characterization of all but three periods of delay. The trial judge found that all three disputed periods as set out below, were entirely attributable to defence delay:

- January 12, 2021 – January 26, 2021 (14 days): The Crown claimed that the defence waived this period. The defence disagreed. There was no audio recording of the January 12 court appearance although the court reporter made a note that the defence waived this period. The issue was whether the court reporter's notes were reliable;
- February 2 – April 19, 2022 (76 days): The court offered dates in January, February and March of 2022 for the five and a half day trial. Defence counsel was not available for some early dates when the Crown and court were available, while the Crown was unavailable for later dates when the defence and court were available within the 76-day period; and
- August 16 – November 16, 2022 (92 days): The Crown provided some late disclosure and thereafter, defence counsel's health issues were such that the defence was unavailable for continuation of the trial in August. The trial continued in November.

[7] There was another period attributable to defence delay and a discrete event that together amounted to 89 days. Those periods are not disputed.

[8] The trial judge found that the total defence delay amounted to 196 days (or 6 months and 13 days), which took the net delay under the presumptive ceiling of 18 months as it amounted to 506 days (or 16 months and 19 days).

[9] Mr. E. appeals the trial judge's decision to attribute the three disputed periods of delay to defence delay such that the net delay did not breach the 18-month presumptive ceiling contrary to s. 11(b) of the Charter. We address each of the periods of delay below.

B. ANALYSIS OF THE TRIAL JUDGE'S FINDINGS AND CONCLUSION 1. The First Disputed Period: January 12, 2021 – January 26, 2021 [10] Mr. E. claims that the first period should not have been attributed to defence delay as there is no clear evidence that the defence waived this 14-day period.

[11] In attributing the 14-day period between January 12 and 26, 2021, to defence delay, the trial judge relied on the court reporter's annotation as the audio recording for this period was not available.. She held that:

Mr. Radcliffe, on behalf of the Crown, relies on the Court Reporter's annotations in support of the submission that this 14-day period was explicitly waived. Mr. Howard, on behalf of M.E., argues that we do not know why the recording failed and the annotations by the Court Reporter are not a verbatim recording of what was said in court.

I am satisfied that there are sufficient indicia of reliability to rely on the Court Reporter's annotations. For example, the Reporter's notes mirror what can be heard on the audio before and after the audio failed. The 2-week waiver of 11(b) is consistent with what occurred at the next appearance where 11(b) was waived again. The Reporter's notes come from the Recording Management Coordinator, the supervisor of the court reporters. The Reporter is a public official responsible and entrusted to make accurate notes of what is said in court. I am satisfied that there are indicia of reliability such that the Court Reporter's notes can be relied on to find that

defence counsel, not Mr. Howard, explicitly waived 11(b) for the 2-week period to the next appearance on January 26th, 2021. [Emphasis added.]

[12] The conclusion that defence counsel expressly waived this period was a finding of fact that the trial judge was entitled to make. We see no palpable and overriding error in her treatment of the annotations for this period as reliable evidence of what occurred given both the court reporter's responsibilities and the correctness of her other annotations. . As such, we dismiss this ground of appeal. This reduces the net delay to 688 days.

2. Two Ensuing Periods Not in Dispute [13] Immediately after this period, the defence explicitly waived another 14-day period of delay between January 26 and February 9, 2021. Thereafter, a further 75-day delay between April 22 and July 6, 2022 was attributed to a discrete event, namely accommodating the trial judge's schedule after the first judge scheduled to hear the trial became unavailable due to illness. This reduces the net delay to 599 days.

3. The Second Disputed Period: February 2 to April 19, 2022 [14] Mr. E. claims that some of this second disputed period should not have been attributed to defence delay. The Crown now agrees.

[15] The trial judge attributed the 76-day period from February 2 to April 19, 2022 to defence delay as:

This [first period of delay as outlined above] was followed by a second explicit 14-day waiver from January 26th to February 9th. The trial could have been scheduled and completed early in 2022. Dates of January 27th to 28th, February 2nd to 3rd and February 8th to 11th were offered and [counsel for the defence] Mr. Howard was not available.

The Supreme Court of Canada in *Jordan* makes clear that the defence will have directly caused the delay if the Court and the Crown are ready to proceed but the defence is not, and that the period of unavailability will be attributed to the defence.

Therefore, the 76-day period between the February 2nd date and April 19th are found to be defence delay.

[16] Defence counsel acknowledged that during this period, they were unavailable for 12 early dates when the Crown and the court were both available. The Crown was not available for four later dates when the court and defence were ready.

[17] The Supreme Court decision in *R. v. Hanan* 2023 SCC 12, 436 C.C.C. (3d) 1, rendered after this case was heard, articulated the test as follows:

[W]e reject the Crown's proposed "bright-line" rule according to which all of the delay until the next available date following defence counsel's rejection of a date offered by the court must be characterized as defence delay.

...

Defence delay comprises “delays caused solely or directly by the defence’s conduct” or “delays waived by the defence” Furthermore, “periods of time during which the court and the Crown are unavailable will not constitute defence delay, even if defence counsel is also unavailable”. All relevant circumstances should be considered to determine how delay should be apportioned among the participants. [Citations omitted.][4]

[18] All relevant circumstances, including the fact that on some proposed dates the defence was not available and on others, the Crown was not available, should be considered.

[19] For this reason, the parties now agree that only 38 of the 76-day period should be attributed to defence delay. This is consistent with the new approach in Hanan. This reduces the net delay to 561 days.

4. The Third Disputed Period: August 16 to November 16, 2022 [20] Mr. E. also claims that the third disputed period should not be attributed to defence delay.

[21] In July 2022, the Crown provided new disclosure, which necessitated an adjournment so that the defence could review the material. Thereafter, the defence was offered two sets of trial dates: the first from August 16 to 19, 2022 and the second from August 23 to 25, 2022. Crown counsel was available on these dates but defence counsel was not. The next set of dates offered were November 16 to 18, 2022, which is when the trial eventually concluded as both parties were available.

[22] The trial judge held that:

[T]he circumstances of this case are particular and do not require apportioning of the time because I find that defence counsel was not available to continue the trial during this period.

...

Although Mr. Howard [for the defence] argues that he would have been able to conduct a trial, and while I’m sympathetic to his position and his plight [regarding his health concerns], on the record before me, I find that defence counsel was not available in this time period for health reasons and this is defence delay.

...

Had I not found that this period of time was defence delay, I would turn my mind then to the discrete events analysis and I find that the period of time between August 16th and November 16th can be characterized as exceptional circumstances or a discrete event, again, due to Mr. Howard’s health.

It is clear that Mr. Howard could not have reasonably foreseen or avoided these personal health issues and he could not necessarily have mitigated them. This, however, results in a deduction of the delay as a discrete event.

- [23] In *R. v. K.D.*, 2025 ONCA 639, at paras. 43-48, also rendered after the trial judge made her decision, this court attributed only 30 of the contested 49 day-delay to the defence. While the defence refused trial dates, there was no availability between the period during which the defence refused dates and the date the trial took place.
- [24] As this court held at para. 45 of *K.D.*: “[T]he defence cannot fairly and reasonably be held wholly responsible for a span of time largely comprising a period where the court was unavailable”. This is so even if the period of delay began because the defence was not available on the first date offered.
- [25] In this case, the parties were aware of the potential s. 11(b) issues as early as July 7, 2022, when defence counsel raised the issue with the court in the presence of Crown counsel. While defence counsel was not available on the earlier dates up to and including August 25 due to health reasons, neither party took steps to seek dates from the court between August 26 and before November 16, 2022 when the trial began.
- [26] We do not, however, accept Mr. E’s submission about what portion of this period should be attributed to defence delay. A 50/50 allocation accords with the decision in *Hanan* that all relevant circumstances be considered in determining defence delay, while remaining faithful to the principle outlined in *Jordan* that periods during which the court and the Crown are unavailable will not constitute defence delay, even if defence counsel is also unavailable.
- [27] As such, 46 of the 92 days should be attributed to defence delay. This reduces the net delay to 515 days.

C. CONCLUSION [28] Based on the above, the defence delay is 112 days. Considering the undisputed 75-day discrete event, the net delay is 515 days or 16 months 28 days. This is within the reasonable time for a provincial court trial set out in *Jordan*.

- [29] For these reasons, the appeal is dismissed.

“E.E. Gillese J.A.”

“B. Zarnett J.A.”

“Thorburn J.A.”

- [1] This appeal is subject to a publication ban pursuant to s. 486.4 of the Criminal Code, R.S.C. 1985, c. C-46. This appeal is also subject to an order prohibiting the disclosure of the identity of a witness pursuant to s. 486.31 of the Criminal Code.
- [2] *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631.

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- [3] While other issues were listed in the Notice of Appeal such as (1) characterizing certain business records as originals instead of copies, and admitting them without correctly applying the statutory requirements for their admission; and (2) not giving proper consideration to the principles of totality and restraint in sentencing, only the issue of delay was raised at the hearing. In any event we would give no effect to those other two grounds of appeal.
- [4] See also *R. v. Shaparov*, 2025 ONCA 281, 176 O.R. (3d) 721, at paras. 30-36.
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