

CANADA / JUDGMENT

R. v. R.K.K.

2020 BCSC 45

COURT

Supreme Court of British Columbia

DECIDED

17 January 2020

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2020 BCSC 45 R. v. R.K.K.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. R.K.K.,

2020 BCSC 45

Date: 20200117

Docket: X80568

Registry: New Westminster

Regina

v.

R.K.K.

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Corrected Oral Reasons for Judgment: The content of the Oral Reasons for Judgment was corrected at paragraph 45 on February 6, 2020

Before: The Honourable Mr. Justice G.C. Weatherill

Oral Reasons for Judgment Re Jordan Application

Counsel for the Crown:

L. Ashton

Counsel for the Accused:

R. Dhanu

Place and Dates of Hearing:

New Westminster, B.C.

November 18, 2019

Place and Date of Judgment:

New Westminster, B.C.

January 17, 2020

introduction

[1] On February 8, 2019, the accused was convicted on the following two counts:

Count 1

On or about the 18th day of October, 2015, at or near Port Coquitlam, in the Province of British Columbia, did sexually assault J.K.R., contrary to s. 271 of the Criminal Code, R.S.C. 1985, c. C-46.

Count 2

On or about the 18th day of October, 2015, at or near Port Coquitlam, in the Province of British Columbia, did commit extortion of J.K.R., contrary to s. 346(1.1)(b) of the Criminal Code.

[2] The accused applies post-conviction for a stay on the basis that the delay between the indictment and the trial was unreasonable and contrary to the principles set out by the Supreme Court of Canada in *R. v. Jordan*, 2016 SCC 27 [Jordan].

Chronology

[3] The agreed chronology of the prosecution of this matter is as follows:

Initial indictment

October 18, 2015 Date of Offence.

October 19, 2015 Prov. Court Information 94671-1-K sworn. Accused was arrested, incarcerated overnight and released after a judicial interim release hearing on his undertaking to appear in court on November 16, 2015.

November 10, 2015 Information 94671-1-K stayed by Crown without any explanation.

Second indictment

April 8, 2016 A second information, Prov. Court Information 94671-2-KC, was sworn.

April 13, 2016 Accused arrested and released on his own recognizance in the amount of \$500 and with conditions.

May 9, 2016 Scheduled by scheduling ("SBS")-matter put over by trial scheduling.

May 18, 2016 Matter put over by trial scheduling.

May 25, 2016 Scheduled by defence ("SBD")-adjourned at request of accused.

June 8, 2016 Adjourned at request of accused.

June 20, 2016 Last disclosure package prior to arraignment sent to defence.

June 22, 2016 Letter from Defence to Crown asking for an adjournment to July 6, 2016 "for arraignment". SBD-adjourned at request of accused.

July 6, 2016 SBD-adjourned at request of accused.

July 12, 2016 Accused appears. Bail varied. Crown counsel assignment. Accused requests adjournment to August 10, 2016.

August 10, 2016 agent for accused's counsel request for matter to be put over to September 7.

September 7, 2016 SBD-adjourned to September 28 at request of accused.

September 28, 2016 SBD-adjourned to October 27 at request of accused.

October 27, 2016 SBD-adjourned to November 15 at request of accused.

November 15, 2016 Initiated by Defence ("IBD")-adjournment to December 6 at request of accused.

December 6, 2016 IBP-no appearance by accused but earlier had advised Crown that an adjournment to "any day in January" would be fine. Crown expresses concern about delay. Court directs that accused must appear and substantive step taken at next appearance, which is scheduled for January 4, 2017.

Arraignment & trial dates set

January 4, 2017 Not guilty plea entered and election made for trial in Provincial Court. A four day trial was requested but not scheduled due to scheduling difficulties.

January 9, 2017 Scheduling difficulties resolved. A trial date of October 10, 2017 was offered but defence counsel was unavailable. Trial is scheduled for November 7, 2017 for 4 days.

Re-election to Supreme Court & preliminary inquiry

October 30, 2017 Accused re-elects for trial in Supreme Court by judge alone. As re-election is less than 14 days before trial, it requires the consent of Crown. Crown consents.

November 7-8, 2017 Preliminary Inquiry. Accused ordered to stand trial. Adjourned by defence to December 7, 2017 to fix a date for trial in Supreme Court by judge alone.

December 7, 2017 Matter adjourned by court to January 18, 2018 as Supreme Court was not yet in receipt of file from Provincial Court.

Supreme Court indictment

January 5, 2018 Supreme Court indictment laid.

January 18, 2018 Accused not ready to fix a date for trial. Crown again expresses concern regarding delay. Articling student present for accused unable to agree to waiver. Matter put over to January 25, 2018.

January 25, 2018 Accused having to deal with retainer issues regarding his counsel and requests an adjournment. Articling student appearing for the accused expressly waives delay for two weeks. A trial date of April 9 for 5 days is held. Matter is adjourned to February 8, 2018.

February 8, 2018 Accused appears in person. Continuing issues regarding defence counsel retainer. Crown repeats concern about delay and advises that a 1 week trial is being held for April 9, 2018 in the event that accused was unable to resolve retainer issue. Matter is adjourned to February 15, 2018.

February 15, 2018 Defence counsel unavailable for trial on April 9. Crown advised of 6 other blocks of trial dates that were available commencing on September 10, 2018 and October 2018. Defence counsel not available for any of them and expressly waives delay from September 10 2018 to the ultimate date of trial, January 28, 2019.

Trial & conviction

January 28 - February 4, 2019 Trial.

February 8, 2019 Date of Conviction.

Legal principles - R. v. Jordan, 2016 SCC 27

[4] Section 11(b) of the Charter provides that

11. Any person charged with an offence has the right
- (b) to be tried within a reasonable time;

[5] In Jordan, the Supreme Court established a new framework for evaluating pre-trial delay. The Court in Jordan established a presumptive ceiling from the date charges are laid to the end of the trial of 18 months at the Provincial Court level and 30 months at the Superior Court level.

- [6] The analysis of whether the presumptive ceiling has been exceeded begins by calculating the total delay from the charge to the end of trial. Then, any delay in the proceedings attributable to the defence is subtracted, as is any delay attributable to exceptional circumstances including discrete events: *Jordan* at paras. 48 and 60.
- [7] As to calculating delay due to exceptional circumstances, the Court in *Jordan* held as follows:
- [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, [2016] 1 S.C.R. 625). 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).
- [8] Defence actions that are legitimately taken do not constitute defence delay. As the Court stated in *Jordan* at para. 65:

To be clear, defence actions legitimately taken to respond to the charges fall outside the ambit of defence delay. For example, the defence must be allowed preparation time, even where the court and the Crown are ready to proceed. In addition, defence applications and requests that are not frivolous will also generally not count against the defence. We have already accounted for procedural requirements in setting the ceiling. And such a deduction would run contrary to the accused's right to make full answer and defence.

- [9] If the resulting net delay exceeds the ceiling, the delay is deemed presumptively unreasonable. The Crown can rebut this presumption by establishing that the delay was nevertheless reasonable due to exceptional circumstances: *Jordan* at para 68.
- [10] If the delay falls below the ceiling, the onus is on the defence to show the delay is unreasonable. As stated in *Jordan*, the reasonableness of the delay is to be evaluated as follows:
- [48] If the total delay from the charge to the actual or anticipated end of trial (minus defence delay or a period of delay attributable to exceptional circumstances) falls below the presumptive ceiling, then the onus is on the defence to show that the delay is unreasonable. To do so, the defence must establish that (1) it took meaningful steps that demonstrate a sustained effort to expedite the proceedings, and (2) the case took markedly longer than it reasonably should have. We expect stays beneath the ceiling to be rare, and limited to clear cases.

Analysis

- [11] The period to be scrutinized under the Jordan analysis is the time between the charge and the end of the trial when the verdict was rendered. I am required to assess each period of delay for a determination of whether that period is an exceptional event, discrete event, or defence delay with or without a waiver.
- [12] In this case the Crown and the defence are in agreement that there are four distinct periods of delay requiring analysis:
- (1) the period between the laying of the two charges;
 - (2) the pre-arraignment period;
 - (3) the re-election and preliminary hearing stage;
 - (4) time to set trial in the Supreme Court.

I will deal with the first two periods separately, but have combined my analysis for the last two periods.

- (1) The "Gap Period" between the Laying of the Two Charges

- [13] As noted in the above chronology, the accused was formally charged with the offences on October 19, 2015. Those charges were stayed on November 10, 2015 without explanation. There is no evidence of any reason having been given to the accused for the stay. There is no evidence that, after the stay was entered, the accused's liberty or freedom was restricted in any way. There is no evidence that any investigation was ongoing.
- [14] However, 171 days later, on April 8, 2016, a new information was sworn against the accused in respect of the same charges that were the subject of the October 19, 2015 information. No explanation was proffered by the Crown for the new information being sworn, other than "prosecutorial discretion".
- [15] Counsel for the accused submits that this "Gap Period" must be included in the overall calculation of delay because, from and after the stay, the accused remained subject to the very real prospect of new charges being laid. He relies, inter alia, on the following passage from the decision of this court in *R. v. Executive Flight Centre Fuel Services Ltd.*, 2018 BCSC 2212 [Executive Flight Centre] at para. 97, where the court referenced the decision of the Ontario Court of Appeal in *R. v. Milani*, 2014 ONCA 536 [Milani]:
- [97] The Court of Appeal allowed the Crown appeal, finding that the trial judge had erred in including the gap period in the delay analysis. The Court concluded that an accused's s. 11(b) right is not engaged during the gap between a Crown stay and a new or revived charge and should therefore not be counted toward delay, unless the formal charge has been withdrawn with the intention of laying a new charge. Writing for the Court, van Rensburg J.A. held that a close examination of [*R. v. Kalanj*, [1989] 1 S.C.R. 1594] and [*R. v. Potvin*, [1993] 2 S.C.R. 880] supported the conclusion that the gap period, with one caveat, should not be included in the

s. 11(b) analysis. He held:

- [46] Accordingly, the reasoning of the court in *R. v. Potvin* suggests that the period that is relevant for a s. 11(b) analysis is the period when there is a proceeding "on foot"; that is, there must be active charges outstanding against the person. In the words of Sopinka J., "s. 11(b) does not apply unless the restriction of the interests which the subsection protects results from an actual charge" -- thus, "[c]ircumstances which produce the same consequences do not qualify for the protection of this provision unless those consequences proceed from a formal charge": at para. 62. *R. v. Potvin* therefore suggests that charges must be pending and not anticipated or spent in order to attract the protection of s. 11(b).
- [47] Section 11(b) serves to protect the charged person's right to freedom and to be dealt with fairly and without delay within the court system. The objective is to have an efficient system for dealing with accused persons. The ambit of s. 11(b) does not extend on a societal level to the speedy investigation of crime. Extending the protection of s. 11(b) to persons who are not actively charged with an offence would not advance the objectives of this protection.
- [48] There is a caveat however. There are circumstances in which unilateral state action may control whether or not charges are withdrawn or relaid. In such circumstances, where the formal charge has been withdrawn with the intention of laying a new charge, or an information has been quashed with a new information laid, it makes sense to consider the entire period from when the first charges were laid as part of the s. 11(b) analysis. In such circumstances, the person, although not formally charged during the "gap" period, remains subject to the judicial process, and his s. 11(b) interests will continue to be affected by the knowledge or expectation that further charges are imminent. It is reasonable to conclude that he remains subject to the process of the court. That is precisely what occurred in *R. v. Antoine*, [(1983), 41 O.R. (2d) 607 (C.A.)]
- [49] For all of these reasons, I would interpret s. 11(b) as being engaged during any period that an accused person is in fact subject to charges, or when a person no longer actively charged remains subject to the very real prospect of new charges.

[Emphasis in original.]

- [16] Defence counsel submits that, in the absence of an explanation from the Crown as to why the original indictment was stayed and a new indictment laid almost six months later, the accused must be presumed to have remained in jeopardy and the subject of ongoing investigation and therefore prejudice to him and his right to a speedy trial must be inferred.
- [17] The Crown refused to provide any explanation for either the stay or the laying of the new charges in April 2016, maintaining that it is not required to do so. Crown submitted that, in the absence of a claim of abuse of process, its prosecutorial discretion is immune from judicial oversight.

- [18] In the result, the court has no information regarding whether the first charges were stayed with the intention of laying a new charge or whether they were only re-laid after new information had come to light. There is no evidence, one way or the other, as to whether the accused understood or was reasonably led to believe he remained the subject of an ongoing investigation after the first charges were stayed. Accordingly, there is no basis upon which the court can conclude, one way or the other, whether the stay put an end to the "stress, anxiety and stigma" flowing from the first charges.
- [19] In each of the cases referred to by counsel on this topic, there was evidence before the court regarding the reason for a stay of the original charge(s): *Executive Flight Centre; Milani ; R. v. Curry*, 2016 BCSC 1435; *R. v. Keevik*, [1996] N.W.T.R. 335 (S.C.); *R. v. Lanteigne*, 2010 NBCA 91.
- [20] In my view, where the Crown stays a charge and thereafter lays an identical or substantially similar charge in respect of the same conduct, the question of which of the two charges starts the clock running for the purpose of a Jordan analysis depends upon the reason for the stay of the first charge. If the stay takes place in circumstances where the accused reasonably believes that the charge is at an end, then the Jordan clock does not begin to run until the second charge is laid. If, however, the circumstances are such that the accused reasonably understands that he or she remains subject to the very real prospect of new renewed charges, then it only makes sense that the clock begins to run at the time of the first charge.
- [21] In this case, given the Crown's position and the complete dearth of evidence regarding what if anything the accused was led to believe when the first charges were stayed, the court is in no position to assess whether this six month time period should or should not be considered as part of the Jordan delay analysis.
- [22] It is, however, clear that the unexplained stay of the first indictment was a unilateral decision taken by the Crown in which the accused played no part and could in no way have opposed. There is no question that the court is entitled to assume that the Crown exercised its discretion in this regard properly and without arbitrary motives. But the question here is not one of impropriety. Rather it is whether the resulting delay should be attributable to the Crown. With respect, I do not agree with the Crown's position that its prosecutorial discretion is not engaged in the Jordan analysis. Given the Crown's position that it is not prepared to explain its decisions, I find that the six month delay between the stay of the first charges and the swearing of the second information must be attributed to the Crown.
- [23] The Jordan clock began to run on October 19, 2015 when the first information was sworn. The total delay to be assessed in this case is 1208 days, or 39.7 months.

(2) The Pre-arraignment Stage

- [24] Counsel for the accused submits that the more than 19-month period between April 13, 2016 (when the second information was sworn) and Preliminary Inquiry on November 7, 2017 was a meandering, undisciplined, and unproductive process interspersed with no less than 17 pointless court appearances. He submits that the file was simply allowed to drift along by a laissez-faire Crown who showed little or no interest in driving the prosecution to conclusion, an example of the cultural complacencies endemic within the criminal justice system prior to the decision in Jordan. He submits that the time it took for the justice system to adapt to the exigencies mandated by Jordan, such as changing the practice adopted by the Provincial Court in late 2013 or early 2014 to discontinue audio recording of arraignment/fix date proceedings, has contributed to the lack of evidence available to explain the delays in scheduling a trial date. He submits that all of the foregoing factors contributed to the failure to resolve this case in a timely fashion. He submits that, in the result, the overall delay was beyond what Jordan mandated is reasonable: *R. v. Boehme*, 2017 BCSC 1474 at para. 34; *R. v. Troung*, 2017 BCSC 736 [Truong] at paras. 22, 28-29; *R. v. Chappell*, 2017 BCSC 1003 at paras. 17-18.
- [25] The Crown, on the other hand, submits that the evidence demonstrates the opposite - not that this prosecution was allowed to drift, but rather, that the Crown expressed early on its concerns regarding delay and persistently attempted to fix a trial date only to be repeatedly thwarted by issues raised by the accused, including defence counsel's unavailability and his unwillingness to represent the accused unless his retainer was refreshed.
- [26] The Record of Proceedings indicates that adjournments were made in first appearance court on each of May 9 and May 18, 2016 at the request of trial scheduling. The May 25 and June 8, 2016 adjournments were at the request of defence counsel. On June 22, 2016 at 8:55 am, defence counsel sent a facsimile to Crown Counsel as follows:
- I am unavailable to appear in Port Coquitlam Provincial Court this morning, June 22, 2016 at 9:00 am. As such Counsel James Dunne will be appearing as agent for the following matter:
- [R.K.K.] Court File No. 94671-2C
- Please adjourn the above noted matter to July 6, 2016 for arraignment. If you have any questions or concerns, please feel free to contact the office. Thank you.
- [27] The matter was adjourned to July 6, 2016. The Record of Proceedings indicates that it was adjourned to July 12, 2016 at the request of the defence.
- [28] On July 12, 2016, the accused appeared in person and requested a variation of his bail conditions in order to allow him to travel to India. There is a transcript of the proceeding. The request was granted. Crown advised the court that "the return date that Mr. Dhanu [defence counsel] wanted was August 10". The adjournment was initiated by the defence.

- [29] Each of the next five appearances (August 10, September 7, September 28, October 27 and November 15, 2016) resulted in adjournments initiated by the defence due to counsel's unavailability. The matter was put over to December 6, 2016.
- [30] Neither the accused nor his counsel appeared for the December 6, 2016 hearing. The transcript indicates that an agent for Mr. Dhanu had previously advised Crown Counsel that the matter could be adjourned to "any day in January". The Crown expressed concern about the lack of any substantive progress in the matter, sought direction from the Court in that regard and asked that the matter be set for a very early January date. The Court stated that it "expect[ed] something of substance to be accomplished on that next appearance".
- [31] The matter next came before the court on January 4, 2017. Mr. Dhanu was ill and a Mr. Bozic appeared on his behalf. The case was arraigned for a four day trial. On January 9, 2017, after some scheduling difficulties had been resolved and after a trial date of October 10, 2017 was rejected by the defence due to defence counsel's unavailability, a four-day trial commencing November 7, 2017 was fixed.
- [32] On October 30, 2017, eight days before the trial was to begin, the accused re-elected from a Provincial Court trial to a trial in Supreme Court. Were it not for this re-election, the trial would have proceeded as scheduled on November 7 in Provincial Court.
- [33] The record is clear that from June 8, 2016 until January 9, 2017, the repeated efforts on the part of the Crown to move the prosecution of the case to conclusion were frustrated by defence counsel's unavailability. The delay of a trial date from October 10, 2017 to November 7, 2017 was also the result of his unavailability.
- [34] In my view, the entirety of the delay between June 22, 2016 (when defence counsel requested an adjournment for arraignment) and January 9, 2017 (when the November 7, 2017 trial date was fixed) is attributable to the defence. Moreover the time period between October 10, 2017 (the trial date offered by the Crown and rejected by defence counsel) and November 7, 2017 is also attributable to the defence. This combined defence delay totals 229 days or 7.5 months.
- (3) Re-election and Preliminary Hearing Stage
- [35] The Crown submits that the delay from the date of re-election (October 30, 2017) to the date that a Supreme Court trial was available (September 10, 2018) was either a defence delay or a discrete exceptional event such that the delay during that entire period ought to be deducted from the overall delay.
- [36] I will deal with the re-election issue and the time to set a trial in Supreme Court separately in my analysis.
- [37] A re-election is a legitimate procedural step available to an accused. However, it would be inconsistent with the values expressed in *Jordan* to include in delay calculation the effect of an accused's decision not to take advantage of an imminently scheduled trial date in the

court in which he had originally elected to be tried. Doing so would place responsibility upon the Crown for a delay that it could not have prevented. Re-election that causes the loss of a scheduled trial date is not to be used to "buttress" the defence case for unreasonable delay (*R. v. Herman*, 2017 BCSC 215 at para. 86 [*Herman*]). Rather, it ought to be considered as a discrete event, or exceptional circumstance, and therefore results in the deduction of the time period between the re-election and when the trial is rescheduled: *R. v. Lai*, 2018 BCSC 867 at paras. 188-190 (see also: *Truong* at paras. 60-62 and *Herman*, at paras. 83-88).

- [38] I find that the defence re-election in this case was a discrete event to be taken into consideration in the Jordan analysis. In determining what that portion of the resulting delay should be subtracted, there are additional events that contributed to delays between the re-election and the rescheduled trial date in the Supreme Court that also bear consideration.
- (4) Time to Set Trial in Supreme Court
- [39] The preliminary inquiry took place on November 7 to 8, 2017. On November 8, 2017, the accused was ordered to stand trial in Supreme Court.
- [40] The preliminary inquiry transcript indicates that defence counsel requested December 7, 2017 to fix a date for trial. On that date, an agent for defence counsel appeared and requested an adjournment to January 18, 2018. On January 18, 2018, an agent for defence counsel again appeared and requested a further adjournment to February 15, 2018. The court declined to grant an adjournment of that length and the matter was put over to January 25, 2018.
- [41] On January 25, 2018, Crown advised that a four-day trial commencing April 9, 2018 was being held. The defence requested an adjournment to February 8 and expressly waived the two-week delay between January 25 and February 8, 2018. On February 8, 2018, the accused appeared in person and advised the court that defence counsel had not yet been retained. The accused was advised of the April 9, 2018 trial date. The matter was put over to February 15, 2018.
- [42] On February 15, 2018, the court was advised that defence counsel was not available for an April 9, 2018 trial date. Several alternative trial dates were provided by Crown counsel commencing on September 10, 2018. Defence counsel was not available on any of the dates and the defence expressly waived the delay from September 10, 2018 to January 28, 2019, the ultimate trial date of January 28, 2019.
- [43] I accept that there are cases where delay is the result of the acquiescence of both the Crown and the defence, but this is not one of them. In my view the evidence is overwhelming that much of the delay in moving this case to a trial from and after November 7, 2017 to September 10, 2018 was attributable to the defence.
- [44] The total delay from November 7, 2017 to the end of trial is 458 days or 15 months. Of that, I attribute the period between November 7, 2017 and January 25, 2018 (79 days or 2.6 months) to the defence re-election, and hence, to a discrete event. By January 25, 2018, the Crown

had taken steps to secure potential trial dates, in order to mitigate further delays. It secured April 9, 2018. However, the defence sought and obtained adjournments, was unavailable or was otherwise unwilling or unable to proceed and trial dates were not finalized until mid-February 2018. Despite Crown availability in September 2018, the Defence was unavailable to do the trial for close to a year. Therefore, the delay between April 9, 2018 and September 10, 2018 (154 days or 5 months) is attributable the defence. The defence expressly waived the delay from September 10, 2018 to the start of trial on January 28, 2019 (140 days or 4.6 months).

Conclusion

- [45] The total time that elapsed between the date on which the first information was sworn (October 19, 2015) and the end of the trial (February 8, 2019) was 1,208 days or 39.7 months. Of that time, I attribute 602 days or 19.7 months to either defence delay or exceptional circumstances from a discrete event. The resulting delay subtractions bring this case well below the 30-month ceiling beyond which a breach of s. 11(b) is presumed.
- [46] Having established that the delay falls below the presumptive ceiling set by the Supreme Court of Canada in *Jordan*, the onus shifts to the defence to demonstrate that the delay is nonetheless unreasonable. In this case, they have failed to persuade the court that the remaining delay was unreasonable.
- [47] Accordingly, the application for a stay of proceedings is dismissed.

"G.C. Weatherill J."

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