

CANADA / JUDGMENT

R. v. Virk

2021 BCCA 58

COURT

British Columbia Court of Appeal

DECIDED

10 February 2021

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2021 BCCA 58 R. v. Virk

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Virk,

2021 BCCA 58

Date: 20210210

Docket: CA46201

Between:

Regina

Appellant

And

Manjit Singh Virk

Respondent

Before:

The Honourable Chief Justice Bauman

The Honourable Mr. Justice Frankel

The Honourable Madam Justice Fenlon

The Honourable Mr. Justice Fitch

The Honourable Madam Justice DeWitt-Van Oosten

On appeal from: An order of the Supreme Court of British Columbia, dated

June 10, 2019 (R. v. Virk, 2019 BCSC 1271, Williams Lake Docket 31366).

Counsel for the Appellant, appearing via videoconference:

G.D. McKinnon, Q.C.

Counsel for the Respondent, appearing via videoconference:

T.C. Paisana

C.V. van Wiltenburg

Place and Date of Hearing:

Vancouver, British Columbia

November 5, 2020

Place and Date of Judgment:

Vancouver, British Columbia

February 10, 2021

Written Reasons by:

The Honourable Madam Justice Fenlon

Concurred in by:

The Honourable Chief Justice Bauman

The Honourable Mr. Justice Frankel

The Honourable Mr. Justice Fitch

The Honourable Madam Justice DeWitt-Van Oosten

Summary:

The accused was charged with historical sexual offences in April 2011. After extensive delay, the accused was found guilty on four counts in December 2017. The accused applied for a stay of proceedings for breach of his right to be tried within a reasonable time. The trial judge granted the stay, finding the seven-year delay between charge and trial breached the accused's s. 11(b) right. The Crown appeals on the basis that the trial judge misallocated periods of delay and misapplied the Jordan framework for transitional cases. A five-judge division was convened to address apparently conflicting decisions on the standard of review of a trial judge's allocation of periods of delay.

Held: Appeal dismissed. There was no real conflict in this court's jurisprudence. Post-Jordan, the standard of review remains the same: underlying findings of fact and attribution of responsibility are reviewable on a deferential standard; allocation of periods of delay and the ultimate question of whether to impose a stay for unreasonable delay are reviewable on a correctness standard. The

judge did not misallocate most of the impugned periods of delay. The judge did misallocate 68 days that should have been deducted as an exceptional circumstance; however, that error had a negligible impact on the net delay. It was open to the judge to conclude the transitional exceptional circumstance did not apply, as, even under the Morin framework, the delay far exceeded the guidelines. The judge's decision to enter a stay for unreasonable delay was correct.

Reasons for Judgment of the Honourable Madam Justice Fenlon:

Introduction

- [1] The Crown appeals a stay of proceedings entered by the trial judge, who found that a seven-year delay between charge and the end of trial breached Mr. Virk's right to be tried within a reasonable time. The main issue on appeal is whether the judge misallocated periods of delay and misapplied the Jordan framework for transitional cases. A division of five judges was convened to address apparently conflicting decisions in this Court on the standard of review of a trial judge's allocation of delay.

Background

- [2] The respondent, Manjit Singh Virk, was charged in 2011 with sexual offences against four of his cousins between 1980 and 1985. Mr. Virk immigrated to Canada in 1980 at age 19. He was living with his aunt, uncle, and the complainants, who ranged in age from 11 to 17 when the events giving rise to the charges occurred. As is often the case in such circumstances, the complainants did not report the abuse for many years. Although they came forward in 2007, charges were not laid until April 2011, and Mr. Virk was arrested in September that year. His trial concluded in December 2017.
- [3] The events that unfolded between the laying of the information and the end of trial reflect the "culture of delay and complacency" in the justice system that the Supreme Court sought to address in *R. v. Jordan*, 2016 SCC 27 at paras. 4-5. Central to the Jordan framework is a 30-month ceiling for cases in the Superior Court beyond which delay is presumptively unreasonable. The ceiling applies to net delay: the time remaining after defence delay and delay attributable to exceptional circumstances are deducted from the period between the charge and the actual or anticipated end of trial. In general, exceptional circumstances fall into two categories: discrete events, such as the illness of counsel or the parties, and particularly complex cases: *Jordan* at para. 71.
- [4] In transitional cases, such as the case at bar, in which the proceedings were underway before *Jordan* was decided, a transitional exceptional circumstance exists whereby the delay may be justified on the basis of the parties' reasonable reliance on the previous framework set out in *R. v. Morin*, [1992] 1 S.C.R. 771. When *Jordan* was released on July 8, 2016, the proceedings against Mr. Virk had been underway for just over five years; the case concluded about two years later.

- [5] Mr. Virk applied for a stay of proceedings on the day set for delivery of judgment. The s. 11(b) application was heard after the judge delivered his reasons finding Mr. Virk guilty on four of the six counts charged. Applying the Jordan framework, the judge found a net delay of 61.2 months. That calculation included 3.4 months for the trial judge's decision time, which the Supreme Court of Canada has since determined is not to be included for the purpose of a Jordan analysis: *R. v. K.G.K.*, 2020 SCC 7 at para. 24. The net delay in issue is thus 57.8 months.

Issues on Appeal

- [6] The issues raised on appeal are as follows:

1. What is the standard of review of a judge's allocation of periods of delay?
2. Did the late filing of the s. 11(b) application amount to a waiver of delay?
3. Did the judge misallocate five periods of delay by finding that:
 - a. the time between the laying of the information and arrest constituted Crown delay;
 - b. the defence had not waived delay between the fix date and the hearing of the preliminary inquiry;
 - c. the defence had not waived delay between the fix date and trial;
 - d. the change of venue application did not amount to defence delay; and
 - e. the Rowbotham application was not a discrete event.
4. Did the judge err in concluding that the Crown did not establish the transitional exceptional circumstance of reliance on the law as it stood under the Morin framework?

- [7] I turn now to the first issue.

1. What is the standard of review of a judge's allocation of periods of delay?
- [8] Allocation of delay is the act of assigning delay to a particular category under the Jordan or Morin frameworks, for example, to defence delay or institutional delay. This step is also commonly referred to as "characterization of delay." In a majority of cases this Court has clearly and consistently stated that allocation or characterization of delay on a s. 11(b) application is a question of law reviewable on a correctness standard: *R. v. K.N.*, 2018 BCCA 246 at para. 13; *R. v. Millar*, 2019 BCCA 298 at para. 76; *R. v. Vega Ramirez*, 2019 BCCA 446 at para. 26; *R. v. Christhurajah*, 2019 BCCA 210 at paras. 110-113; *R. v. Rai*, 2019 BCCA 377 at para. 97; *R. v. Executive Flight Centre Fuel Services Ltd.*, 2019 BCCA 139 at para. 30; *R. v. Balogh*, 2020 BCCA 96 at para. 19. In contrast, underlying findings of fact have been held to be reviewable on a standard of palpable and overriding error: *R. v. Horner*, 2012 BCCA 7 at para. 70.

- [9] In these reasons for judgment, I will use "allocation" to describe the process of assigning delay to a particular category of delay under the Jordan framework, because "characterization" is also used to describe the designation of steps taken by counsel as either legitimate or illegitimate. As will become evident, the lack of precision in terminology used in s. 11(b) assessments has led to some confusion about the applicable standards of review.
- [10] Mr. Virk submits that this Court has departed from the correctness standard of review of a judge's allocation of delay in two recent cases. First, he points to *R. v. Pipping*, 2020 BCCA 104, in which the Court said:
- [92] The post-Jordan s. 11(b) framework invokes different standards of review at three different stages: (1) findings of fact relevant to defence conduct; (2) the characterization of delay and the attribution of responsibility; and (3) the determination of whether the total delay is unreasonable and the decision to impose a stay.
- [94] At the second stage, first instance judges are uniquely positioned to gauge responsibility for delay: *Jordan* at para. 65. The determination of whether defence conduct is legitimate or illegitimate is highly discretionary, and appellate courts must show a high level of deference on review: *Cody* at para. 31; *R. v. S.C.W.*, 2018 BCCA 346, leave ref'd (2019) SCC Docket 38403, at para. 38.
- [96] To the extent that recent cases of this court suggest that a correctness standard also applies to the second stage, they rely on jurisprudence that, in my view, has been overtaken by *Jordan* and *Cody*: see, for example, *K.N., Christhurajah*, and *R. v. Millar*, 2019 BCCA 298.
- [Emphasis added.]
- [11] Second, Mr. Virk raises *R. v. S.C.W.*, 2018 BCCA 346, leave to appeal ref'd (2019) SCC Docket 38403. In that case, writing for the court, I said:
- [38] I begin by noting that a judge's attribution of periods of delay is highly discretionary, and is to be afforded deference: *R. v. Cody*, 2017 SCC 31 at para. 31; see also *R. v. Brown*, 2018 NSCA 62 at paras. 45-46. Those findings will not be interfered with on appeal unless a palpable and overriding error is identified. In my view the judge considered all of the Crown's actions and inaction in detail, and appropriately attributed delay to the Crown.
- [Emphasis added.]
- [12] In my view, although there is admittedly some inconsistency in the terminology used, when read in context, *Pipping* and *S.C.W.* can be reconciled with the earlier jurisprudence of this Court. Reasons for judgment must be read in light of the issues before the court in the particular case. The standard of review to be applied to a judge's allocation of periods of delay was not a live issue in *Pipping* or *S.C.W.*--or, for that matter, in the other cases cited above. As a result, the standard of review was described in general terms with a focus on the nature of the particular error identified on appeal.

- [13] The errors identified in both *S.C.W.* and *Pipping* concerned attribution of delay, that is, what or who caused a period of delay. When a judge determines what caused a delay or whether steps were taken with the intention of delaying proceedings and was thus illegitimate, the judge is making a finding of fact or drawing an inference. This attribution of responsibility is therefore owed deference on appeal. Allocation is distinct from attribution. Allocation involves the application of legal principles to the facts found concerning the cause of delay, in order to categorize the period of delay within the *Jordan* or *Morin* framework. Attribution (deciding who or what caused a delay) will often effectively determine allocation (under *Jordan* whether that delay will be deducted), but that is not always so. They are distinct steps, and different standards of review apply to each step.
- [14] The distinction between attribution and allocation can be demonstrated by way of example. If a judge were to find that defence counsel caused a period of delay by not being available to set trial dates when both the Crown and court were, that is a finding of fact to which deference is owed. But if the judge were, at that point, to decide that the resulting delay should not be allocated to defence delay because defence counsel cannot be expected always to be available, that would be an error of law. There is an established principle that such delay is to be allocated to defence delay: *Jordan* at para. 64.
- [15] In *Pipping*, the issue before this Court was whether the judge erred in finding that adjournments obtained by the defence--to permit counsel to review late disclosure on one occasion and to review a *voir dire* ruling on two others--were legitimate. The adjournments had a cascading effect on trial dates, with the case continuing in fits and starts over the following year. The focus of this Court was not on the ultimate allocation of delay but the "characterization of the responsibility for certain discrete adjournments as legitimate or not" (emphasis added): *Pipping* at para. 97. *Jordan* and *R. v. Cody*, 2017 SCC 31, leave no doubt that gauging the legitimacy of defence conduct is highly discretionary and is owed appellate deference: *Jordan* at para. 65; *Cody* at para. 31. This Court in *Pipping* accordingly applied a deferential standard of review to the judge's finding that the adjournment applications were unnecessary and therefore not legitimate defence conduct.
- [16] The conclusion in *Pipping* that correctness review should not apply to a judge's finding of legitimate or illegitimate conduct does not conflict with this Court's earlier jurisprudence. In *Pipping*, the finding that the defence caused delay by asking for unnecessary adjournments effectively determined allocation: those delays were allocated as defence delay and deducted from total delay. But that allocation nonetheless had to be correct. If, for example, the judge had determined that the delay caused by the unnecessary adjournments should not be allocated to defence delay because defence counsel had been too busy to consider his position more carefully, that would have been an error in principle reviewable on a standard of correctness.
- [17] In *S.C.W.*, the issue was whether the judge erred in not attributing to the Crown more responsibility for delay between the guilty pleas and sentencing because the Crown had not prepared an agreed statement of facts more quickly and had not pressed hard enough to set

dates for sentencing. In attributing responsibility for the delay between the guilty pleas and sentencing, the judge made findings that the accused had caused the delay by failing to respond to the Crown's proposed statement of facts despite repeated requests and by failing to attend appointments with the psychologist assigned to prepare a pre-sentence report: S.C.W. at para. 17. The judge found the accused had caused the delay and therefore allocated it to defence delay. In S.C.W., as in Pipping, attribution and allocation were tightly linked, and the court did not expressly distinguish between the two steps.

- [18] R. v. Singh, 2016 BCCA 427 and R. v. Pauls, 2020 ONCA 220, provide further examples of the distinction between attribution and allocation. In Singh, one of the co-accused was not available for trial when his co-accused were because he had a scheduling conflict in Ontario proceedings. The trial judge had twice denied severance, and it was therefore reasonable for the Crown to proceed against the accused jointly. On appeal, this Court confirmed the decision of the trial judge to treat the period of delay caused by one accused's unavailability as a discrete event in relation to the co-accused, and therefore deductible from total delay. Again, the identification of who caused the delay, attribution, was a finding of fact that was not determinative of the allocation of delay.
- [19] Similarly, in Pauls, three accused were tried jointly. In calculating net delay, the judge deducted delay attributable to the unavailability of one defence counsel only from the total delay relating to his client. The Ontario Court of Appeal found the judge erred in failing to allocate this period as a discrete event in relation to the co-accused. The Supreme Court of Canada, in oral reasons delivered January 19, 2021, refrained from deciding whether that legal principle was correct but agreed that the process of allocating delay is a legal question reviewable on a standard of correctness: R. v. Yusuf, 2021 SCC 2.
- [20] The process a trial judge engages in to allocate periods of delay involves factual findings, the application of legal principles to the facts, and--sometimes--the exercise of discretion. Different standards of review apply depending on the particular component of the assessment that is being challenged: R. v. Bacon, 2020 BCCA 140 at paras. 39-43.
- [21] Outside of findings of fact and discretionary decisions, most allocations of delay involve the judge applying principles of law to the facts. In most cases, findings of fact about who caused a given delay will be tightly linked to allocation, but I repeat that they are distinct steps. Assessing the evidence based on a wrong legal principle (for example, applying the wrong burden of proof) or deciding the legal effect of findings of fact (such as how the delay of one accused is to be allocated in relation to co-accused) are questions of law reviewable on a correctness standard: Yusuf at 4-5; Bacon at para. 42; R. v. Chung, 2020 SCC 8 at para. 11; R. v. J.M.H., 2011 SCC 45 at paras. 25-30.
- [22] To the extent that Pipping suggests (at para. 96) that Jordan and Cody marked a departure from pre-Jordan standards of review, that question has since been settled by the Supreme Court in Yusuf. The Court expressly approved the standard of review applied by the Ontario Court of Appeal (cited as Pauls in that court) which said:

[40] The Yusuf respondents challenged the continuing applicability of the pre-Jordan standard of review in the post-Jordan world. However, several post-Jordan decisions of this court have held the standard of review on a s. 11(b) application is well-established. Deference is owed to a trial judge's underlying findings of fact. Characterizations of periods of delay and the ultimate decision concerning whether there has been unreasonable delay are reviewable on a standard of correctness: *R. v. Jurkus*, 2018 ONCA 489, 363 C.C.C. (3d) 246, at para. 25, leave to appeal refused, [2018] S.C.C.A. No. 325; *R. v. Albinowski*, 2018 ONCA 1084, 371 C.C.C. (3d) 190, at para. 27; *R. v. Bulhosen*, 2019 ONCA 600, 377 C.C.C. (3d) 309, at para. 73. Given these decisions, I decline the Yusuf respondents' invitation to revisit the standard of review.

[Emphasis added.]

[23] In summary on this issue, I conclude that neither *Pipping* nor *S.C.W.* marks a departure from this Court's established jurisprudence on the standard of review to be applied to s. 11(b) decisions. That standard will vary depending on the nature of the error identified, recognizing that there are different steps in the analysis:

1. Findings of underlying facts--who did what, when and the context surrounding those events;
2. Attribution of responsibility--who or what caused the delay, including discretionary decisions such as whether conduct was legitimate, whether a case was complex, or whether there was reasonable reliance on the law as it stood pre-Jordan; and
3. Allocation of periods of delay--categorizing periods of delay as either defence delay or as an exceptional circumstance; and
4. The ultimate decision of whether to impose a stay for unreasonable delay.

[24] Underlying findings of fact and attribution of responsibility are reviewed on a deferential standard of palpable and overriding error. Discretionary decisions are reviewed on a deferential standard and will be interfered with only if there has been a misdirection in law, a palpable or overriding error of fact, or a clearly wrong decision that resulted in an injustice: *R. v. Roberts*, 2020 BCCA 307 at paras. 82-84; *K.G.K.* at para. 81. The allocation of periods of delay is reviewed on a standard of correctness. The ultimate decision of a judge to impose a judicial stay for unreasonable delay is a question of law and is likewise subject to a correctness standard: *Yusuf approving Pauls* at para. 40; *Millar* at para. 88.

2. Did the late filing of the delay application amount to a waiver of delay?

[25] The Crown contends the judge should have found the timing of Mr. Virk's s. 11(b) application to be fatal to its success because it was not heard until after the verdict was delivered. The Crown submits that Mr. Virk, having failed to raise concerns about delay for nearly seven years, should not have been allowed to transform his s. 11(b) right "from a protective shield to an offensive weapon" contrary to *R. v. Askov*, [1990] 2 S.C.R. 1199 at 1222 and *Morin* at 802. The Crown argues that a failure to move for a stay of proceedings for unreasonable delay either before or at trial constitutes waiver of any claim under s. 11(b): *R. v. Rabba* (1991), 3

O.R. (3d) 238 (C.A.); S.C.W. at para. 27; R. v. Warring, 2017 ABCA 128 at paras. 9-13 and 27.

- [26] I would not accede to this ground of appeal for two reasons. First, I do not agree that defence counsel failed to raise concerns about delay for seven years. Mr. Virk's first counsel raised delay as a concern in pre-trial conferences in July 2014 and June 2015. His second counsel raised delay as a concern in November 2017.
- [27] Second, although the s. 11(b) application was filed on the day set for the delivery of the judge's reasons for judgment on April 6, 2018, and was not heard for another seven months, Mr. Virk notified the Crown and the court during closing submissions on December 20, 2017, of his intention to apply for a stay of proceedings. Although late in the day, the decision to move for a stay was thus made at trial. The cases relied on by the Crown are distinguishable from the present case. In S.C.W., the accused applied for a stay after entering a guilty plea, which amounted to waiver of delay preceding that plea. In Rabba, the accused raised s. 11(b) for the first time on appeal; in Warring, the application was first raised two months after conviction.
- [28] Here, Mr. Virk was prepared to argue the delay application before the trial concluded. It was Crown counsel's suggestion that, given the late stage of the proceedings, the judge should render his decision and only then hear the delay application. The judge agreed that was an appropriate way to proceed, in part to avoid the prospect of a retrial if he were found on appeal to have erred in ordering a stay and had not rendered a decision on whether the Crown had proved the charges. The advantages of proceeding in this way were canvassed in some detail by Justice Coady in R. v. Colpitts, 2017 NSSC 228.
- [29] Although s. 11(b) applications should be filed and heard before trial in order to avoid the unnecessary expenditure of resources, there is no general rule barring a late application. Prolonged and interrupted trials may give rise to s. 11(b) applications that would not otherwise have been appropriate before trial. Delay in bringing an application may be a factor in assessing whether delay has been waived, but it cannot be equated with waiver in all cases.
- [30] In summary on this ground of appeal, the timing of Mr. Virk's application did not amount to a waiver of delay precluding a stay of proceedings.
3. Did the judge err by failing to deduct 140 days from the laying of the information to arrest?
- [31] The judge included in net delay the 140 days between the laying of the information against Mr. Virk on April 13, 2011, and his arrest on September 1, 2011. The Crown submits that, because it does not have control over when the police execute process on an accused person, that period should have been deducted from total delay. I would not accede to this submission.
- [32] Section 11(b) guarantees a person "charged with an offence" the right to be tried within a reasonable time. The meaning of "charged" and the time from which the s. 11(b) clock begins to run were addressed and settled in R. v. Kalanj, [1989] 1 S.C.R. 1594. In that closely

reasoned decision, Justice McIntyre, writing for a majority of the Court, reviewed the various interpretations of "charged" that could be adopted, including the point at which an accused is served with process, as the Crown now contends. The Court squarely rejected that interpretation, saying at 1607:

A person is "charged with an offence" within the meaning of s. 11 of the Charter when an information is sworn alleging an offence against him, or where a direct indictment is laid against him when no information is sworn. It follows that the reckoning of time in considering whether a person has been accorded a trial within a reasonable time under s. 11(b) will commence with the information or indictment, where no information has been laid, and will continue until the completion of the trial.

[Emphasis added.]

[33] Nor would I accede to the Crown's submission that this Court in Millar accepted that the issue of when the clock starts to run remains unresolved. Responding to the views expressed by the trial judge in that case that the date of service of process accords better with the purpose of s. 11(b) of the Charter and her calling into question the soundness of the reasoning in Kalanj, Justice Fitch said nothing more than the following:

[79] If, as the trial judge suggested, Kalanj is not dispositive of this issue, I do not consider the matter to have been resolved by anything said in Jordan. Simply put, the issue was not before the Court in Jordan.

[Emphasis added.]

The court then proceeded on the assumption that the clock had started running when the information was sworn: Millar at para. 80. In short, the court in Millar did not find it necessary to grapple with the issue.

[34] In *R. v. Boima*, 2018 BCCA 297, this Court accepted as binding the definition of "charged" adopted in Kalanj, noting that the Supreme Court had not wavered in its approach: at para. 55. That unwavering approach continued more recently in *R. v. K.J.M.*, 2019 SCC 55, in which the Court described "the laying of the charges" as "the point at which the Jordan clock starts ticking": at para. 88.

[35] That is not to say that the time between the laying of the information and arrest could never be deducted from total delay as a discrete event--for example, where there is evidence that the police were diligent in their efforts to serve process but unable to locate the accused, the accused was evading service, or other matters in the public interest reasonably necessitated a delay in effecting an arrest. But that is not this case. The judge found the delay between the laying of the information and Mr. Virk's arrest "was not, on the evidence, explained or justified": at para. 89.

4. Did the judge err by not deducting 285 days from the fix date to the preliminary inquiry?

- [36] The Crown submits that when Mr. Virk consented to the preliminary inquiry date, he implicitly waived the 285 days between the fix date (April 25, 2012) and the preliminary inquiry (February 4, 2013). The Crown says there is a presumption that, when defence counsel consents to a hearing date, they have waived that period of delay. In order to displace the presumption, the Crown says the defence was required to prove that they objected to the date, sought earlier dates, or simply acquiesced to the inevitable because no other dates were available from the court and Crown.
- [37] Because the judge acknowledged there was no evidence about whether earlier dates were available (at para. 314), the Crown submits the judge should have concluded that the presumption applied. Instead, he concluded that the Crown bore the burden of proving other dates were available in order to establish waiver: at paras. 111-112.
- [38] In asserting this position, the Crown relies on *Morin* at 793; *R. v. Nuosci*, [1993] 4 S.C.R. 283; *R. v. Brassard*, [1993] 4 S.C.R. 287; and this Court's application of the presumption in pre-Jordan cases such as *R. v. Nguyen* (1998), 110 B.C.A.C. 185 at paras. 8-11, and *R. v. Kwok*, 2002 BCCA 177 at para. 20. The Crown contends the presumption of waiver when defence consents to a date remains the law post-Jordan, citing *Warring* at para. 17; *R. v. Schenkels*, 2017 MBCA 62 at paras. 24 and 52; *R. v. Mouchayleh*, 2017 NSCA 51 at paras. 20-25; *Béliveau c. R.*, 2016 QCCA 1549 at paras. 112-114; and *R. v. Chang*, 2019 ABCA 315 at para. 42.
- [39] It is not clear that consent to a date, without more, results in a presumption of waiver. In concurring reasons in *Jordan*, Justice Cromwell addressed this issue, saying:
- [189] [T]here is admittedly some lack of clarity in our jurisprudence as to whether the accused's consent to an adjournment sought by the Crown constitutes "waiver" of the resulting delay. In *Smith*, this Court created a rebuttable inference of waiver if defence consents to a future trial date. This proposition was qualified, however, by the point that "inaction or acquiescence on the part of the accused, short of waiver", does not result in a forfeiture of an accused's s. 11(b) rights: *Smith*, at p. 1136. In *Morin*, Sopinka J. explained that the accused's consent to a trial date "can give rise to an inference of waiver", but this is not the case "if consent to a date amounts to mere acquiescence in the inevitable": p. 790. This Court, albeit in very short decisions, upheld this approach in *R. v. Brassard*, [1993] 4 S.C.R. 287, at p. 287, and *R. v. Nuosci*, [1993] 4 S.C.R. 283, at p. 284, stating that consent to a future date will be characterized as waiver in the absence of evidence that it is acquiescence.
- [190] A rebuttable inference of waiver from the accused's consent to an adjournment does not sit well with the settled law that waiver must be clear, unequivocal and must be established by the Crown: see e.g. *Askov*, at p. 1232. As noted in *Morin*, the waiver must be done "with full knowledge of the rights the procedure was enacted to protect and of the effect that waiver will have on those rights", and such a test is "stringent": p. 790.

[191] I conclude that, when the accused consents to a date for trial offered by the court or to an adjournment sought by the Crown, that consent, without more, does not amount to waiver. The onus is on the Crown to demonstrate that this period is waived, that is, that the accused's conduct reveals something more than "mere acquiescence in the inevitable" and that it meets the high bar of being clear, unequivocal, and informed acceptance that the period of time will not count against the state.

[Underline emphasis added; italic emphasis in original.]

[40] Although the majority in *Jordan* did not squarely adopt Cromwell J.'s reasoning on this issue, they did not reject it and, consistent with that reasoning, emphasized that "waiver can be explicit or implicit, but in either case, it must be clear and unequivocal": at para. 6. Further, in rejecting an argument of defence waiver, the majority observed that the Crown had produced "no evidence" to show that the court was available for periods allocated to institutional delay: *Jordan* at paras. 121-122.

[41] In *Chang*, the Alberta Court of Appeal applied Justice Cromwell's reasoning, concluding that the onus of establishing implied waiver for a specified time period rests with the Crown: at para. 42.

[42] The issue need not be decided in the present case, however, because even if there is a presumption, the Crown conceded at trial that the period between the fix date and the preliminary inquiry should be allocated as institutional delay--that is, a period during which the parties are ready for trial but the court cannot accommodate them: *Morin* at 797-798. That concession is sufficient to rebut the presumption because it establishes that the defence was acquiescing to the inevitable. The concession also explains why there was no detailed evidence before the court about what dates were offered and whether defence counsel was available earlier--the Crown's concession made that evidence unnecessary. In my view, as a matter of trial fairness, the Crown should not be permitted to resile from that concession on appeal: *R. v. Sappier*; *R. v. Gray*, 2006 SCC 54 at para. 62.

[43] Accordingly, I would not accede to this ground of appeal.

5. Did the judge err by not deducting 283 days from the fix date to trial?

[44] The Crown submits that the delay between the fix date on April 10, 2014, and the first day of trial on January 19, 2015, should have been allocated as defence delay because the record shows defence counsel preferred to set dates in January due to her calendar. Unlike the appearance to fix a date for the preliminary inquiry, the appearance to fix the trial date was recorded, and the judge had the benefit of a transcript. Reviewing that transcript, he found that:

[151] In the exchanges between counsel and the court on April 10, there was no clarity or certainty when the trial could have been scheduled, if at all, before January 2015.

He therefore rejected the Crown's argument that the defence had waived this period of delay: at para. 152.

[45] In my view, the transcript supports the judge's conclusion. The exchange suggests the Crown was available for some dates in August but not otherwise available until after November. The assigned trial judge was not available except for some dates mid-September and mid-October when the Crown was not available. Nor was the judge available in January when defence counsel was available. The judge suggested setting the January dates even though it would result in a new trial judge being assigned. It is not surprising, then, that at trial the Crown conceded the period between the fix date and trial amounted to institutional delay.

[46] Again, even if defence counsel's consent to a date results in a presumption of waiver, there was ample evidence before the judge to rebut that presumption given the lack of Crown and court availability described in the transcript and the Crown's concession. Accordingly, I would not accede to this ground of appeal.

6. Did the judge err in not deducting 119 days for the change of venue application?

[47] Before the trial judge, the Crown argued that the change of venue application should be allocated as defence delay (as opposed to a discrete event), because of defence inaction. The judge did not deduct the 119 days consumed by the change of venue application because he found it was a legitimate effort by the defence to move the case along: at paras. 130-137. Finding dates in the Williams Lake registry had been challenging and counsel, the translator, and the majority of the witnesses resided in the Lower Mainland. In addition, it was easier for Mr. Virk to travel to the Lower Mainland than Williams Lake. I note that, although the Crown opposed the change of venue application, it eventually brought its own application to move the venue to Prince George to complete the trial more efficiently.

[48] The judge's conclusion that the change of venue application was legitimate is a discretionary one entitled to deference on appeal. I see no basis to interfere with it.

7. Did the judge err in not deducting 68 days for the Rowbotham application?

[49] The Rowbotham application was made necessary by Mr. Virk's change of counsel. Together, the two events accounted for 219 days of delay between April 8 and November 14, 2016. The judge deducted 151 days as attributable to the change of counsel per se but "left in" the 68 days that he found were strictly related to the Rowbotham application because he concluded the application was a legitimate step: at para. 186.

[50] In my view, the Rowbotham application should have been deducted as a discrete event: *R. v. Reinbrecht*, 2019 BCCA 28 at para. 58. However, that error is immaterial, as, given the length of the remaining delay in this case, removing 68 days from the net delay is of little consequence.

8. Did the judge err in finding that the transitional exceptional circumstance did not apply?

- [51] The judge found the Crown had not proved that the delay in this case was justified by the parties' reasonable reliance on the law as it existed before Jordan. He reviewed the proceedings up to Jordan's release in July 2016 in considerable detail, finding complacency on the part of all players even under the Morin framework. In this regard, he said, in part:
- [336] In this case, Mr. Virk's first defence counsel seems to have relied on the law as existed at the time of Morin. She said she preferred not to schedule continuous dates for conclusion of the trial because of her own circumstances. She was casual and dilatory in following the court's directions in 2015. This caused loss of some trial time. She spoke at trial conferences about Crown's failure to disclose certain information and her client's intention to apply for production of third party records but did not bring those applications as directed by the court, and in the second instance, only on the eve of the trial dates scheduled for July 2015.
- [338] Overall, I am satisfied that the defence was complacent and complicit in the ongoing failure of the parties to secure adequate trial dates earlier in the proceeding. Nevertheless, underscoring this analysis is the fact that it was the Crown's obligation to bring a person to trial.
- [365] The Crown asserts that it was always trying to move the case along and met with resistance from defence counsel. Although the Crown wrote letters concerning trial dates and raised the question of trial dates at pretrial conferences, there was a paucity of evidence about attempts by either party to actually fix specific dates to [sufficiently] bring this matter to an end. Mr. Zipp said that if, when he had become counsel, Crown had brought forward dates for the spring of 2017, the trial could have ended by May of that year. There was no effort to do this, in part because of the disparities in the time estimates for the trial.
- [366] The pretrial judges were not successful in pressing counsel to set trial dates. As an example, no dates were presented by counsel at the September 2015 conference. In my view, Crown's efforts at moving the prosecution along lacked the necessary efforts to obtain trial dates or to secure an earlier date that I would have expected in the circumstances. Obtaining dates from trial scheduling and proposing those dates to the defence by mid 2015 or when Mr. Zipp became counsel in 2016 might very well have allowed this trial to conclude in a more timely fashion.
- [Emphasis added.]
- [52] He summarized his conclusion by saying:
- [370] Following a period of almost seven years of this uncomplicated case, the accused was convicted. Analyzing the parties' decisions that were informed by the law in place before July 2016 in the context of this case, including the seriousness of the charges, the prejudice to the accused, and the more than 83 months after charges and balancing the Morin factors leads the conclusion that overall delay was unreasonable.

[Emphasis added.]

[53] I see no basis to interfere with that conclusion. As the judge found, this was a straightforward and uncomplicated case involving one accused, four complainants, one civilian witness, and a small number of police witnesses who were called to prove the accused's statement: at paras. 188, 209, and 370. Even under the old framework, the delay far exceeded the Morin guideline of 14 to 18 months for a Superior Court trial. As the Court noted in Cody, where the balancing of factors under the Morin analysis would have favoured a stay, the Crown will rarely, if ever, be successful in justifying the delay as a transitional exceptional circumstance under the Jordan framework: at para. 74.

Disposition

[54] This is a troubling case. The charges were serious, involving sexual abuse of vulnerable complainants. Mr. Virk was found to be guilty of most of the offences charged, but, due to the breach of his s. 11(b) right to trial within a reasonable time, the proceedings were stayed--effectively acquitting him. A stay of proceedings in these circumstances marks a failure of the justice system.

[55] This case is also troubling because a significant portion of the delay was due to the complacency and lack of urgency demonstrated by Mr. Virk's first counsel. But that failure on the part of the defence was compounded by the failure of the Crown and the court to take control of the prosecution and move it along effectively. This is precisely the kind of case that Jordan says cannot be tolerated if the s. 11(b) right to trial within a reasonable time is to be given effect. In my view, the judge correctly determined that the delay in this case was unreasonable and necessitated a stay of proceedings.

[56] I would dismiss the appeal.

"The Honourable Madam Justice Fenlon"

I AGREE:

"The Honourable Chief Justice Bauman"

I AGREE:

"The Honourable Mr. Justice Frankel"

I AGREE:

"The Honourable Mr. Justice Fitch"

I AGREE:

"The Honourable Madam Justice DeWitt-Van Oosten"

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/ca/21/00/2021BCCA0058.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/r-v-virk-2021>

Prepared on 29 October 2026 · Esheria