ONTARIO COURT OF JUSTICE

DATE: 2018 08 01
COURT FILE No.: Brampton 15-6060

BETWEEN:

HER MAJESTY THE QUEEN

— AND —

Michele Doe

Before Justice I. JAFFE
Heard on June 27, 2018
Section 11(b) Ruling released on August 1, 2018

R. Levan. .... counsel for the Crown
D. Genis. .... counsel for the defendant Michele Doe

JAFFE J.:

Introduction

1. On May 15, 2015 Mr. Doe was charged at the roadside with refusing to provide a breath sample into an approved screening device. The information was sworn on May 20, 2015 and on September 10, 2018, almost 3 1/2 years later, Mr. Doe is scheduled to proceed to trial, for the fifth time.

2. Though Mr. Doe's first two trial dates were adjourned at his request, limitations on court resources led to the last two adjournments. Mr. Doe has applied for a stay of proceedings alleging that his s. 11(b) *Charter* rights were breached as a result of an unreasonable delay.

Relevant Legal Principles

3. The cases of *R. v. Jordan,* 2016 SCC 27, and *R. v. Cody,* 2017 SCC 31, provide the jurisprudential backdrop against which the facts, and the delay, in this case must be assessed. The Court of Appeal's decision in *Coulter,* 2016 ONCA 704, at paras. 34 to 40, provides a helpful summary of *Jordan's* simplified approach to calculating, and assessing, the delay in the 11(b) context. The new framework requires judges to approach their task of assessing delay in the following manner:

- Calculate the total delay from the laying of the charge to the actual or anticipated end of trial;
- Determine the "net" delay by subtracting defence delay from the total delay;
- Compare the net delay to the presumptive ceiling which in cases tried in provincial court, is eighteen months;
- If the net delay exceeds the ceiling, it is presumptively unreasonable and can only be rebutted by the Crown establishing the presence of exceptional circumstances;
- If the exceptional circumstance consisted of a discrete event, the delay caused by the event is deducted from the net delay;
- If the exceptional circumstance is due to the complexity of the case, determine whether, in light of the complexity, the time required to complete the case is justified and reasonable;
- If the net delay falls below the presumptive ceiling, the onus is on the defence to demonstrate that it is unreasonable.

4. Defence delay is subtracted from the total delay, and will be manifested in at least three distinct ways:

- Defence waiver of delay which can be explicit or implicit, but in either case, must be clear and unequivocal: *Jordan,* at para. 61;
- Delay caused solely by the defence by either acts which directly cause the delay, or by defence tactics calculated to cause delay (such as frivolous applications): *Jordan,* at para. 63; and
- Where the Crown and Court are ready to proceed, but the defence is not: *Jordan,* at para. 64; *R. v. Manasseri,* 2016 ONCA 703, at para. 304.

5. The above list is not exhaustive and other defence actions or conduct not enumerated abo\ie, may be characterized as "defence delay" in a particular case: *Jordan,* at para. 64. For instance, the Supreme Court made clear in *Cody,* at paras. 32 and 33, that defence action or inaction which displays a marked inefficiency or indifference towards delay, will be attributable to the defence in the 11(b) calculus.

6. In both the pre and post-Jordan eras, defence waiver has always been a relevant consideration in the calculation of delay. Though the waiver must be "clear and unequivocal", there are no specific words required to waive 11(b) rights: *Askov,* at p. 481.

7. A waiver can be explicit or inferred, however an accused's acquiescence to the inevitable will not constitute a waiver of 11(b) rights. Waiver can only be found where an accused makes an informed decision between available choices. In the following passage from *Askov,* at paras. 106-107, the Court made it clear that 'choice' is a crucial ingredient to a valid waiver:

> The term "waiver" indicates that a choice has been made between available options. When the entire record of the proceedings on the occasion when the last trial date was fixed is read, it becomes crystal

> clear that the appellants had no choice as to the date of the trial. The first available dates were given and allotted to these appellants. Unless some real option is available, there can be no choice exercised and as a result waiver is impossible.
>
> The silence of the appellants or their failure to raise an objection to a long delay is certainly not enough in the circumstances to infer waiver. Rather, the onus rests upon the Crown to demonstrate that the actions of the accused amounted to an agreement to the delay or waiver of their right.

8. Silence cannot constitute waiver, however defence counsel's agreement to a future date can, depending on the circumstances, give rise to an inference that the accused has waived his 11(b) rights: *Smith,* [1989] 2 S.C.R. 1120 at p. 109.

Timeline

9. A review of transcripts and the trial verification forms attached to the information reveals the following timeline of proceedings:

Date	What Occurred
May 15, 2015	Date of the alleged offence
May 20, 2015	Information Sworn
May 27, 2015	Mr. Doe requested adjournment to get lawyer.
July 8, 2015	Mr. Doe was not in court though he had been present earlier. Duty counsel requested adjournment and discretionary bench warrant was issued. The Crown indicated it had disclosure for Mr. Doe. The matter was adjourned to August 5th because the "rest of the month is full".
August 5, 2015	Mr. Doe requested disclosure and a "six week" adjournment to review it. Was given until September 2 and told by the Court to request any further disclosure from Crown "as soon as possible"
September 2, 2015	Mr. Doe requested additional disclosure just prior to attending in court. Court was "full" until October 7* and adjourned to that date.
October 7, 2015	Mr. Doe was provided with additional disclosure in court.

	Mr. Doe requested adjournment to November 19*^ because he has to be in court for something else in any event. Mr. Doe asked "can I wait for...can I wait for more disclosure and wait about seven weeks?" Was told by the Crown "there is no disclosure to come on this refuse, sir". He replied "I ordered more disclosure... I ordered like five or six different things". Mr. Doe wants "all" of his disclosure before deciding what to do. The Crown advised that the 911 call, police radio transmissions and CAD are outstanding but that the Mr. Doe's decision to plead or go to trial can be made without that disclosure.
November 19, 2015	Mr. Doe was provided with additional disclosure. Mr. Doe said he needs to review it and that he is "probably waiting" for more. Asked for 6-week adjournment. Crown replied that "everything has been provided".
December 24, 2015	Additional disclosure provided. Crown read note from assigned Crown: *" We* have *answered all legitimate disclosure requests. The most recent dated November 19 deals with third party records which we cannot and will not* disc/ose. *Our position is that at this stage either a judicial pre-trial should be* set *or we should consider having the matter come back in 207, again not necessarily for diversion but just to benefit from that stream."* Mr. Doe said he has requested the cell and booking videos but that the Crown is extorting him to get counsel because he can't get them without counsel. Crown suggested that a JPT date be scheduled and one is scheduled for February 12th–

February 12, 2016	In court self-rep JPT held for both sets of charges faced by the Mr. Doe (this one and a June 4t ^ offence for which he is jointly charged with his brother) Regarding his refuse charge, the Mr. Doe told Court that he is still missing the video of him in custody which he has been trying to get. He wanted the booking video which would show " a big amount of medications" the police took from him but did not include in the property list. The Crown replied that Mr. Doe was previously advised he could visit P.C. Chisolm badge number 3232 to make arrangements to view the video. Mr. Doe complained that Crown is refusing to release the video to him unless he has counsel. The Crown repeated that the Mr. Doe can see the video at any time but Mr. Doe refused to accept that invitation. Mr. Doe argued that he was being "extorted" to get counsel in order to physically obtain the video. With defence counsel Mr. Genis' availability in mind, a trial date was scheduled for July 20-22, 2016. According to the Trial Verification Form, the defence was **available** for **trial** a month earlier on May 16th but the Crown was not.
July 8, 2016	R. v. Jordan released
July 20, 2016	TRIAL DATE #1 Mr. Genis was ill and unable to proceed New trial dates set for March 20-22, 2017. According to defence counsel's correspondence, October 1, 2016 was first date available for Mr. Genis, but it was not available to the court.

	According to the Trial Verification Form, the court and defence were available for trial on February 8*^, but the Crown was not.
November 20, 2016	*Jordan's* 18-month Presumptive Ceiling
March 20. 2017	TRIAL DATE #2 The Crown was ready to proceed but Mr. Doe decided he wanted to retain an expert witness Mr. Genis suggested starting the trial and adjourning to accommodate the expert witness Court preferred adjourning the whole the matter. New trial dates of August 2-4 set and 11 (b) was expressly waived According to the **Trial Verification Form,** the Crown and the court were available on May 29, 2017 but the defence was not.
April 27, 2017	Defence application to adjourn the August 2"^ trial due toexpert's unavailability was granted and 11(b) expressly waived. According to the Trial Verification Form, the Crown and court were available October 25, 2017 but the defence was not.
May 1, 2017	Trial dates set for February 7-9, 2018
February 7, 2018	TRIAL DATE #3 Crown and defence were ready to proceed but the judge had a continuation which took priority By the time the court was ready, there was insufficient time to accommodate the three-day triat. New trial dates set for April 4 5 and 6, 2018 **According to the Trial Verification Form.** the Crown and court were available on March 7, 2018 but the defence was not.
April 4, 2018	TRIAL DATE #4 Crown and defence were ready toproceed but there but again it did not get reached in time.

	Over to April 6t ^ to set dates for an 11(bj motion and trial.
April 6, 2018	Dates set for 11(b) motion and trial. **According to the Trial Verification Form,** the Crown and court were available on May 8*^ and other dates in May, but defence was not.
September 10-12, 2018	TRIAL DATE #5

From the Date the Information was Sworn to the First Trial Date

10. Mr. Doe started off these proceedings as self-represented, and made his first appearance in court on May 27*h, 2015. His second court appearance was scheduled for JulyC th and while it would appear he had been in court earlier in the day, he was not present when his matter was called. A warrant with discretion was issued and, because the court was full the rest of the month, the matter was adjourned for one month.

11. On August St h 2015, Mr. Doe requested disclosure and a further six week adjournment to review the disclosure. On the next date, September 2"d, Mr. Doe requested further disclosure and, once again because the court was “full” the remainder of the month, Mr. Doe's matter was adjourned for another month.

12. *On* October 7, 2015, Mr. Doe was given additional disclosure and was advised by the Crown that there was “no disclosure to come”. Mr. Doe disputed that notion, saying that he had requested “five or six different things”. As it turned out, on the next two court appearances (November 19t^ and December 24t^, 2015), the Crown provided Mr. Doe with further disclosure.

13. On December 24, 2015 the Crown insisted that disclosure was now complete. Mr. Doe however, remained unsatisfied. Mr. Doe had requested the police booking and cell videos which he has claimed would reveal inconsistencies in the police reports concerning medications that were, or were not, seized from him. Mr. Doe felt (and still feels) that the videos captured important evidence that will enable his challenge of the police evidence at his trial. It was however the Crown’s position that the videos were not relevant and even if they were, such videos are only physically provided to defence counsel and not to self-represented accused persons.

14. Upon justifying the relevance of the requested videos, Mr. Doe was advised by the Crown both in a letter and at his February 12thA re-trial, that he could contact P.C. Chisolm at any time and arrange a viewing of the videos at the police station.

15. The Crown is afforded reviewable discretion in determining the manner and timing of disclosure: *R. v Stinchcombe,* at para. 22, *R. v. Mohammed,* [2007] O.J. No. 5806 (S C.J.), at para. 23. The Crown did not explain why self-represented accused are not giVen copies of cell and jail videos however, I accept that Mr. Doe could have

viewed the videos at any time, and multiple times, in preparation of his trial. Though not an ideal manner of disclosure from a self-represented accused's perspective, I am not prepared to conclude it was unreasonable.

16. Ultimately however, nothing turns on this because despite Mr. Doe's objections concerning the disclosure of the police videos, when on December 24*h, 2015 the Crown suggested a judicial pre-trial be scheduled, Mr. Doe agreed. And at his pre-trial, despite his ongoing objections to the manner by which the videos were being disclosed, Mr. Doe agreed to schedule a trial date. In other words, while Mr. Doe voiced his objections to the manner of disclosure, these objections did not delay the setting of the pre-trial or trial.

17. The Crown argued that Mr. Doe was not entitled to full disclosure before being required to set a date for trial. It is the Crown's position that Mr. Doe was in possession of sufficient disclosure to have set a date as early as September 2, 2015. It is true that an accused person is not entitled to every shred of Crown disclosure before being required to set a date for his trial. This point was made clear in *R. v. N.N.M.* 209 C.C.C. (3d) 436 (Ont. C.A.) at para. 33 and *R. v. Kovacs-Tatar* (2004), at para. 47 (C.A.).

18. While Mr. Doe was not entitled to full disclosure before setting a date for a pre-trial or trial, he was entitled to have sufficient disclosure to enable informed decisions concerning the nature and/or direction of his defence. I do not share the Crown's view expressed to Mr. Doe at the time of his disclosure request and again during oral argument in these proceedings, that the requested videos were not relevant. The mere nature of a charge does not necessarily inform the relevance of evidence. A police-generated video of a detainee, made close in time to his road-side arrest, might reasonably be relevant if not to the Crown then to a possible defence. In my view, such a video should be included in the Crown's disclosure without requiring the defence to articulate its relevance.

19. Whether Mr. Doe could have reasonably set a date for his trial on September 2, 2015 or whether the disclosure provided to Mr. Doe up until December 24*^ was required to make informed decisions, is difficult to determine because I do not know precisely what was provided to Mr. Doe, and when. It is clear however, that by December 24f h 2015, the Crown had provided to Mr. Doe all that it was prepared to disclose, and from its perspective, the disclosure was complete. From that day on, the matter proceeded directly to a judicial pre-trial and then directly to Mr. Doe's first trial date.

20. In the initial *Jordan* calculus, only delay expressly waived, or solely caused, by the defence should be deducted from the total delay. It is true that Mr. Doe repeatedly requested adjournments, however a review of the transcripts reveal that on two dates (July 8, 2015 and September 2, 2015), the Court adjourned the matter for one month each time due to the full court schedule. While Mr. Doe did not appear overly anxious to proceed expeditiously during the early phase of these proceedings, I do not characterize his actions or inactions as displaying a "marked inefficiency or indifference towards delay" nor did they amount to waivers.

21. According to the trial verification form, while defence was available for trial on May 16, 2016, July 20, 2016 was the first day offered that was available to the Crown. Under these circumstances, none of the delay leading up to the July 20, 2016 trial date will be deducted from the total delay.

From First Trial Date to the Third Trial Date

22. Mr. Doe’s first trial was set for July 20, 2016, four months under the *Jordan’s* 18-month presumptive ceiling. By then Mr. Doe had retained counsel, Mr. Genis who was however ill and unable to attend trial. The trial was adjourned and the trial co-ordinator offered new trial dates as early as August 2016. Defence counsel’s first available date was on February 8th, 2017 however the first available date for the Crown was April 20th 2017 which was set as Mr. Doe's second trial date.

23. The second trial was adjourned at defence’s request when Mr. Doe made the last-minute decision to retain an expert witness. Defence expressly waived 11(b) until the next trial date which was set for February 7, 2018. I find that the 18 months between Mr. Doe’s first trial and his third trial date was a mix of defence-caused delay and exceptional circumstances which should be deducted from the overall delay.

From the Third Trial date to the Anticipated End of Trial

24. Mr. Doe’s third and fourth trial dates were adjourned due to lack of court resources. On both dates, the defence and Crown were ready to proceed, however on both occasions, by the time the court could commence proceedings, there was no longer sufficient time to accommodate the three-day trial.

25. When the third trial date on February 7*^ was adjourned, the Crown and court were available as early as March 7th but defence was not available until April 4th When Mr. Doe's fourth trial date was adjourned on April 2nd and a new date was set on April 6th the Crown and court were available as early as May 8th but the defence was not.

26. It is now clear that in the post-Jordan era, delays caused by defence counsel’s unavailability will be considered as “defence delay” and subtracted from the total delay: *R. v. Mallozzi,* 2018 ONCA 312, at para. 3. I have calculated 5 months of defence delay occasioned by defence counsel’s unavailability for the trial dates offered to him when re-scheduling Mr. Doe's third and fourth trials.

Net Delay

27. The overall delay in this case, from the date the information was sworn on May 20, 2015, to the anticipated end of the trial on September 12, 2018, is 40 months. The total amount of defence delay as I have calculated it amounts to 23 months, which when deducted from the overall delay, results in a net delay of 16 months.

Delay below the Presumptive Ceiling

28. I have found that the net delay in this case is 16 1/2 months which falls below the *Jordan* ceiling. However, this finding does not inexorably lead to a dismissal of the 11(b) application. Where a delay falls below the ceiling, the onus is on the applicant to demonstrate that his 11(b) rights were nonetheless violated by a delay which is not presumptively unreasonable. This will be done by demonstrating that i) the defence took meaningful steps that demonstrate a sustained effort to expedite the proceedings, *and* ii) the case took markedly longer than it reasonably should have. The *Jordan* Court emphasized that stays will be rare where the delay falls below the presumptive ceiling: *Jordan,* at paras. 82 and 83.

29. Because this is a transitional case, an assessment of these factors must be undertaken having regard to the parties' reliance on the previous state of the law: *Jordan,* at para. 99; *R. v. Schenkels,* 2017 MBCA 61, [2017] 11 W.W.R. 683, at para. 57. However, the adjournment of all trial dates (and setting of new dates), took place after the release of *Jordan* when all parties would have felt *Jordan's* presumptive ceiling fast approaching.

30. Mr. Genis submitted that in setting trial dates on this matter, the defence demonstrated a tangible desire proceed expeditiously. Mr. Doe, having privately retained his expert witness, was ready to proceed with his trial on the last two occasions. And, once his trials were not reached due to lack of court space, he demonstrated a desire to set new trial dates as early as he was able. For instance, following the adjournment of the February, 2018 trial, Mr. Genis made himself available for a three-day trial a mere two months later. Similarly, when Mr. Doe's fourth trial date was adjourned in April 2018, again for lack of court resources, Mr. Genis while not available for the May dates that were available to the Crown, offered up dates as early as June and August, which unfortunately were not available to the court.

31. I agree that the defence has demonstrated a genuine interest to proceed to trial and that this interest was not confined to the last two aborted trial dates. When the first trial date was set following Mr. Doe's February 12, 2016 judicial pre-trial, defence and the court were available as early as May 16th but the Crown was not, and the date of July 20th was set. Similarly, when the July 20th trial was adjourned, Mr. Genis was available on February 8th but the Crown was not, and the March 20, 2017 was selected.

32. This effort was also illustrated on the March 20, 2017 date when Mr. Doe made the last-minute decision to retain an expert. In an effort to make use of the allotted time, defence counsel suggested the trial commence and the Crown's case completed. However, the judge who would have commenced the trial was soon to move to another jurisdiction and a continuation of the trial would haVe caused administrative complications beyond those usually associated with continuations. Accordingly, the judge declined to commence the trial and a third trial date was set.

33. The Crown was prepared to proceed on all four trial dates and in my view did its best to bring this matter to trial. The record also suggests that during the initial months of this case, Mr. Doe, while self-represented, sent numerous disclosure requests to the Crown, putting additional strain on an already exceptionally busy office. However, since Mr. Genis was retained, he has not simply made token efforts but has taken meaningful steps to expedite these proceedings: *Jordan,* at para 85. Unfortunately, on the last two occasions, despite its obvious age, the case was not prioritized. It is an unfortunate reality that in a busy jurisdiction such as Brampton, some matters will not be reached and adjournments will be granted. This case has fallen victim to that reality not once, but twice.

34. A tolerance for institutional delay and the increased complexity of most cases were factored into the setting of the 18-month presumptive ceiling: *Jordan,* at para. 83. However, there is nothing inherently complex about this case. Stepping back from the minutiae and adopting a bird's eye view as the *Jordan* Court urged trial judges to do, I find that this case has taking markedly longer than a straight forward roadside refuse case ought to take: *Jordan,* at para. 91. I find that this delay has breached Mr. Doe's s. 1 1 (b) right.

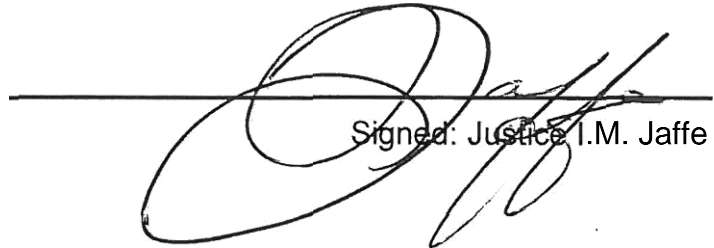
Remedy

35. The Crown argued that remedies short of a stay of proceedings could be appropriate in the new *Jordan* era. This argument picked up on a footnote in *Jordan* in which the majority of the Court declined to revisit the issue of remedy in the absence of an express invitation to do so. The Crown's argument hinges in part on the fact that stays of proceedings were the only appropriate means to remedy prejudice, which in the previous *Morin* era, was a discrete inquiry. The Crown argued that post-Jordan, a delay could in theory exceed the presumptive ceiling but result in no actual prejudice to the accused. In such a case, a stay of proceedings would be an extreme remedy.

36. I do not read *Jordan* as opening the door to other remedies in redress of unreasonable delay. In establishing the presumptive ceilings, the Court recognized that unreasonable delay does not solely prejudice the accused, but causes prejudice to victims, witnesses and justice system as a whole: *Jordan,* at para. 110. Moreover, introducing wide judicial discretion in crafting remedies could compromise clarity, predictability, and the proactive approach by justice participants which the *Jordan* framework was designed to motivate: *Jordan,* paras. 108 and 112.

37. However, I do not need to resolve the issue of other possible remedies because in this particular case, I have found that Mr. Doe has been prejudiced by the delay. In addition to exacerbating medical and psychological conditions for which Mr. Doe is on multiple medications, the delay resulted in monetary loss for Mr. Doe whose privately retained expert was ready to proceed on the last two trial dates. In my view, a stay of proceedings is the only means by which to appropriately remedy the s. 11(b) violation.

Released: August 1, 2018



Signed: Justice I.M. Jaffe