Citation: *R. v. M.I.*, 2022 YKTC 7

Date: 20220224
Docket: 19-03526
Registry: Whitehorse

YOUTH JUSTICE COURT OF YUKON
Before His Honour Judge Chisholm

REGINA

v.

M.I.

Publication of information identifying the young person(s) charged under the *Youth Criminal Justice Act* is prohibited by section 110(1) of that *Act*.

Publication of information that could identify the complainant or a witness is prohibited by s. 111(1) of the *Youth Criminal Justice Act*.

Publication of information that could identify the complainant or a witness is prohibited pursuant to ss. 486.4 of the *Criminal Code*.

Appearances:
Kevin Gillespie — Counsel for the Crown
Gregory Johannson — Counsel for the Defence

RULING ON *CHARTER* APPLICATION

[1] CHISHOLM T.C.J. (Oral): M.I. has applied to have his sexual assault and theft charges stayed on the basis that his s. 11(b) *Charter* right to have a trial within a reasonable time has been infringed. The defence contends that this case exceeds the presumptive 18-month ceiling to bring a matter to trial, as determined in ***R.*** v. ***Jordan***, 2016 SCC 27. Alternatively, the defence asserts that case-specific factors warrant a stay of proceedings, even if the overall time to trial falls below the presumptive ceiling.

[2] After hearing the application, I advised counsel that I would be reserving my decision. I also ordered that new trial dates be set, to ensure that no further delay would be incurred in the event that M.I.'s delay application was unsuccessful.

Evidence on the Application

[3] The following materials were filed on the hearing of this application:

1. Exhibit 1 – Affidavit of Kailey Irwin dated September 2, 2021;
2. Exhibit 2 – Affidavit of Kailey Irwin dated September 10, 2021;
3. Exhibit 3 – Affidavit of Kelsey McNab dated September 17, 2021; and
4. Exhibit 4 – Affidavit of Meagan Clark dated September 17, 2021.

Cst. C. MacEachen also testified on the application.

Background

[4] M.I. is alleged to have committed these offences, on August 4, 2019, in Whitehorse. The RCMP arrested M.I. on February 1, 2020, and laid charges on February 10, 2020. The trial was scheduled to take place between September 21 to 23, 2021, over 19 months after the charges were laid.

[5] M.I. was just shy of 17 years of age at the time of the alleged incident. He made his first appearance in court on February 27, 2020, at which time the Crown elected to proceed by indictment. M.I. had retained counsel by March 19, 2020, at which time the Court adjourned youth docket matters to June 4, 2020, due to the COVID-19 pandemic.

[6] In the meantime, the RCMP Forensic Laboratory Services produced a DNA report on April 2, 2020, and another on May 22, 2020. The latter report concluded that a forensic specialist had extracted a DNA typing profile, of an unknown male, from the vaginal swab of the complainant taken at the time of the alleged offence. The investigating officer forwarded the DNA reports to the Crown on June 7, 2020. The defence received these reports from the Crown on June 25, 2020 (Exhibit 1, p. 34).

[7] On July 17, 2020, the Crown advised the defence that it was in possession of various police records regarding a potential witness in this matter.

[8] On August 11, 2020, the Crown advised the defence of the name of the witness whose police records it held, the name of counsel for that witness, and the fact that the witness had chosen to not waive his privacy interests in those records.

[9] The investigating officer obtained a DNA warrant for M.I. on September 14, 2020. The warrant was executed on September 24, 2020, at which time the officer obtained a DNA sample from M.I.

[10] At a case management conference on October 6, 2020, the Court held that pleas should be entered, but that trial dates would not be set until a timeline was known regarding the receipt of the outstanding forensic evidence. The case management judge and counsel next considered the mechanics for a possible s. 278.3 *Criminal Code* application (commonly referred to as a *"**Mills*** application": ***R.*** v. ***Mills***, [1999] 3 S.C.R. 668). Since this application involved a 60-day notice period to the person to whom the record pertained, it was agreed that, at the following appearance (October 8, 2020), the file would be adjourned to a date in November 2020 for a check-in.

[11] Not guilty pleas were formally entered on October 8, 2020. The Crown advised the presiding judge that the police had sent the DNA sample of M.I. to the RCMP laboratory for analysis, with results expected within 65 days.

[12] On October 20, 2020, the defence filed a ***Mills*** application, and served the relevant parties. On November 16, 2020, Kelly Labine, counsel for the youth whose record was the subject of the ***Mills*** application, was present in court. Ms. Labine took the position, endorsed by the Crown and defence, that there should be an initial application pursuant to s. 123(1) of the *Youth Criminal Justice Act*, S.C. 2002, c. 1, (the "*YCJA*") to request access to the youth records. If the *YCJA* application were successful, the ***Mills*** application would follow. On November 19, 2020, the Court fixed the *YCJA* application for hearing on April 14, 2021.

[13] On January 12, 2021, the Crown disclosed the forensic report regarding the DNA sample of M.I. The defence received this report on January 14, 2021.

[14] On April 14, 2021, just prior to the scheduled *YCJA* application, the Crown exercised its discretion under the *YCJA* to disclose the youth records, obviating the need for a hearing. Additionally, Ms. Labine waived her client's privacy rights with respect to both the *YCJA* application and the ***Mills*** application.

[15] On April 29, 2021, the parties agreed to trial dates of September 21 to 23, 2021. In early August 2021, defence counsel attempted to schedule a delay application, however, the assigned Crown prosecutor was unavailable until mid-September. Ultimately, the defence filed the delay application on September 2, 2021. The application was heard on September 21 and 22, 2021.

The *Jordan* Framework

[16] Section 11(b) of the *Charter* prescribes that a person charged with a criminal offence has the right "to be tried within a reasonable time". In ***Jordan***, the Supreme Court of Canada set guidelines for timely trials in furtherance of the interests of justice. The Court highlighted that in order to have a more efficient criminal justice system and one that maintains public confidence, all participants must work to overcome a culture of complacency.

[17] Regarding matters in this Court, the ***Jordan*** framework sets a ceiling of 18 months "…from the charge to the actual or anticipated end of trial…" (para. 49). In order to determine whether a person's s. 11(b) right has been infringed, a court must first calculate total delay. Next, any defence delay must be subtracted from total delay. If the net delay exceeds the 18-month ceiling, prejudice is presumed, and the delay is presumptively unreasonable (***Jordan***, at paras. 47 to 49 and 54).

[18] The Crown may rebut the presumption of unreasonable delay by demonstrating exceptional circumstances. These are circumstances outside of the Crown's control, in that they are "…reasonably unforeseen *or* reasonably avoidable…" and the Crown "…cannot reasonably remedy the delays emanating from those circumstances…" (***Jordan***, para. 69). The Crown must demonstrate its reasonable efforts to address the problem before the delay breached the ceiling (***Jordan***, para. 70).

[19] Generally, exceptional circumstances come under two categories: discrete events and particularly complex cases (***Jordan***, para. 71).

[20] The period of delay caused by any discrete exceptional event is to be subtracted from the net delay to determine whether the ceiling has been exceeded. The Crown and the justice system must, nevertheless, be prepared to mitigate the delay resulting from a discrete exceptional event (***Jordan***, para. 75).

[21] Even if the remaining delay is below the presumptive ceiling, a delay may be unreasonable. In that situation, the defence bears the onus of demonstrating that the delay is unreasonable (***Jordan***, para. 82).

[22] In ***R***. v. ***Pipping***, 2018 BCPC 73 (aff'd 2020 BCCA 104; leave to appeal dismissed [2020] S.C.C.A. No. 179) at para. 31, the Court outlined the specific steps to follow in calculating delay:

> 1. Determine total elapsed time from swearing of the information until the actual or anticipated end of the trial;
>
> 2. Determine and deduct any periods of delay implicitly or explicitly waived by the defence;
>
> 3. Determine and deduct any periods of delay found to have been solely or directly caused by the defence;
>
> 4. If the remaining net delay is still more than 18 months, it is presumptively unreasonable and a stay of proceedings will be entered unless the Crown is able to establish unavoidable and irremediable exceptional circumstances. Any such established delay will be deducted from the total delay.
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> 5. If the remaining net delay is less than 18 months, there is no presumption of unreasonable delay and the onus rests on the defence to establish meaningful steps sustaining an effort to expedite the proceedings and that the trial should have concluded earlier.

[23] In ***R.*** v. ***K.J.M.***, 2019 SCC 55, the Court confirmed that the enhanced need for timeliness in youth cases is encompassed within the existing ***Jordan*** framework. The

Court acknowledged that the right to be tried within a reasonable time has "special significance" for youth. At paras. 51 to 56, the Court outlined five reasons for this conclusion: 1) the need to reinforce the connection between actions and consequences; 2) the fact that delay may have a greater psychological impact on young persons; 3) the need to preserve the right to make full answer and defence for young persons, whose memory tends to fade faster than adults; 4) avoiding potential unfairness in punishing young persons for "who they used to be"; 5) advancing societal interests by rehabilitating and reintegrating young persons into society as quickly as possible.

[24] Also, as highlighted in ***K.J.M.***, sections 3(1)(b)(iv) and (v) of the *YCJA*, part of the declaration of principles, emphasize timely intervention in the youth criminal justice system (para. 4).

Applying the *Jordan* Principles

Calculating Delay

[25] The Crown submits that delay began with the laying of the Information on February 10, 2020, whereas the defence contends that the starting point in this matter is calculated from the date of arrest, namely, February 1, 2020.

[26] As indicated, in ***Jordan*** the Court stated that the delay runs "from the charge to the actual or anticipated end of trial". In ***R.*** v. ***Gandhi***, 2016 ONSC 5612, the police arrested and released the accused on a promise to appear one month prior to the swearing of the Information. At para. 4, the Court in referring to ***Jordan***, stated:

> …Although the majority changed fundamental aspects of the prior s. 11(b) framework, there was no indication that the Court wished to alter the longstanding principle that s. 11(b) delay begins to run from the swearing of the Information. See: *R. v. Kalanj* (1989), 48 C.C.C. (3d) 459 (S.C.C.); *R. v. Edan*, [2016] O.J. No. 4279 at para. 20 (Ont. C.J.).

[27] Although the Court in ***R.*** v. ***Millar***, 2019 BCCA 298, held that the time clock for the purposes of delay began to run from the date the Information was sworn (a starting point which in that case was most favourable to the accused), the Court commented at para. 79 that:

> …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*.

[28] Interestingly, there are cases in which courts have held that the delay clock commences at the time of arrest. This has occurred, for example, where an Information was laid well before the accused was arrested – see, for example, ***R.*** v. ***Lagimodiere***, 2021 SKQB 58, in which the Court thoroughly canvasses the case law in this area. A number of courts have concluded that the liberty interests of an accused are not engaged until the accused has knowledge of the charge, and that an accused should not be able to benefit from delay that the accused has caused, for example, by avoiding arrest.

[29] Nonetheless, the Supreme Court of Canada has not revisited its decision in ***Kalanj***. In that case, the accused were arrested and released without charge. Over eight and one-half months later, an Information was sworn. The majority of the Court held that s. 11 of the *Charter* is limited to the special group of persons “charged with an

offence", and that s. 11(b) "…is concerned with the period between the laying of the charge and the conclusion of the trial…".

[30] I would be inclined to consider that since M.I.'s liberty was subject to restraint at the time of his arrest and release on conditions on February 1, 2020, that moment would trigger the delay clock. However, in my view, I am bound by the finding of the Court in ***Kalanj***. Therefore, I find that the delay period started on the date the Information was sworn (February 10, 2020), and ended on the date on which the trial would have concluded, specifically September 23, 2021.

[31] I conclude that the total delay is 590 days, or 19 months and 12 days.

Defence Delay

[32] The Crown submits that there was defence delay in this matter, comprised of defence waiver and discrete defence actions.

[33] First, in terms of waiver, the law is clear. As stated by the Court in ***Gandhi***, at para. 20:

> In terms of the first form of defence delay, namely, "delay waived by the defence," the law has not changed. It is apparent from the above passage in *R. v. Jordan, supra* at para. 61, that the majority was simply reiterating the well-established principle that a waiver can be "explicit or implicit" but it must be "clear and unequivocal." In addition, it has always been accepted that any waiver must be made with "full knowledge of the rights the procedure was enacted to protect" and that any implied waiver must involve a choice "between available options" and not "mere acquiescence in the inevitable." See: *R. v. Askov, supra* at pp. 481-2 and 494-5; *R. v. Morin, supra* at pp. 13-15.

[34] The Crown contends that the defence misapprehended the direction of the case management judge as to when trial dates could be sought, by taking the position that trial dates could not be scheduled until receipt of the DNA results. The Crown contends that an earlier trial date could have been secured by the defence, if counsel had taken steps to do so. On November 19, 2020, the Court set a date for the *YCJA* application. The defence takes the position on this delay application, as it did in fix-date court on November 19, 2020, that the case management judge directed that the trial not be set down until DNA results were received, but that "…[i]n the interests of moving the matter along, it was decided that both applications would proceed even before the trial was set down…". At that fix-date court, the Crown did not take issue with the defence's summary of the case management judge's direction.

[35] Nonetheless, in my view, the case management judge on October 6, 2020, advised counsel that trial dates would not be set until there was a timeline as to the anticipated receipt of the DNA results. She stated:

> So I can say to defence, "Enter your plea", but I'm not going to – particularly not when trial time is at such a premium at this moment, I'm not going to say we're fixing dates until we know when that DNA's coming because then…we're just wasting court time. (Exhibit 2, Tab 2, p. 17, lines 31-33)

[36] Significantly, the Crown possessed a timeline of the anticipated receipt of the DNA results by the October 8, 2021 appearance, only two days after the case management conference, yet neither counsel raised the issue of setting a trial date.

[37] Due to the erroneous understanding of the defence and the Crown that trial dates could not be scheduled before the return of the DNA results, on November 19, 2020,

based on the agreement of counsel, the Court only scheduled the *YCJA* application date for hearing.

[38] Therefore, I am unable to find that the defence implicitly waived delay at that time.

[39] Additionally, the defence did not implicitly waive any delay by not bringing the matter forward to speak to trial dates after receiving the DNA report in mid-January 2021. Again, neither party put its mind to this issue.

[40] Second, I turn to the argument that discrete defence actions caused delay. The Crown argues that the defence solely caused delay by consenting to adjournments in the fall of 2020, and by not requesting trial dates in October or November 2020, or in January 2021. I reject the Crown's submissions. When the defence requested adjournments regarding disclosure, the Crown never opposed the requests. The only time that the Crown suggested that pleas should be entered was on October 6, 2020, and the defence entered not guilty pleas two days later. Regarding the argument that the defence solely caused delay because it did not request trial dates, again, it is apparent that both the Crown and defence had an erroneous understanding as to the directions of the case management judge. Accordingly, neither side sought trial dates in the above-noted time period. As such, I am unable to hold the defence solely accountable for this delay.

[41] Additionally, the Crown argues that when the trial dates were ultimately set on April 29, 2021, the defence did not object to the September 21 to 23, 2021 dates, thus waiving any delay. However, there is no evidence before me regarding discussions

between counsel and the trial coordinator that led to those trial dates being selected. That being said, the defence raised the fact that "***Jordan***" was an issue in this matter in April 21, 2021 correspondence with the trial coordinator about potential trial dates (Exhibit 1, p. 19). Defence counsel also raised the possibility of reworking parts of his calendar to get this file to trial as soon as possible (Exhibit 1, p. 18). In any event, considering the continuing backlog of files due to the COVID-19 pandemic, securing three days of trial time within five months, for an accused who was not in custody, appears to have been a reasonable turn around time.

[42] Finally, the Crown argues that the defence is responsible for delay by not seeking a date for a delay application until August 2021. As I understand the Crown's argument, it says that had the defence sought an application date earlier, the delay application could have been heard prior to the September 2021 trial dates. However, the defence's argument is that the ***Jordan*** ceiling was breached with the September 2021 trial dates. Even if the delay application had been heard prior to the scheduled trial, the substance of the delay argument would have been the same.

[43] In any event, I am of the view that it is highly unlikely that an earlier application could have been completed before the trial date. I say this because, generally, trial time is scarce during the summer months, and counsel's schedules are difficult to coordinate due to vacations. Second, although counsel were initially seeking a half-day for this application, it ultimately consumed almost two full days of court time. Even if the defence had filed an earlier application, in my view, it is unlikely that two days of court time could have been secured before the trial dates.

Net Delay

[44] I conclude that there was no defence delay in this matter. Therefore, the net delay is 590 days, or 19 months and 12 days.

Exceptional Circumstances

i) *YCJA* and ***Mills*** Applications

[45] The Crown asserts that the *YCJA* and ***Mills*** applications created an exceptional circumstance that was outside of the control of the Crown, as the young person whose records were at issue, refused to provide a waiver, and maintained this position until the eve of the *YCJA* application. The Crown points to para. 69 of the ***Jordan*** decision, which explains that exceptional circumstances "lie outside of the Crown's control in the sense that (1) they are reasonably unforeseen *or* reasonably avoidable, *and* (2) Crown counsel cannot reasonably remedy the delays emanating from those circumstances once they arise." However, as stated by the Court in ***R.*** v. ***Lai***, 2021 BCCA 105, at para. 85:

> In my opinion, the simple fact that a circumstance lies outside the Crown's control does not make the circumstance exceptional. That fact is a necessary but not sufficient condition. If it were sufficient, all legitimate defence actions that are outside the Crown's control would be regarded as exceptional. Many legitimate defence actions that cause delay are part of the trial process, must have been considered in setting the ceiling, and should not be characterized as exceptional.

[46] In my view, the *YCJA* and ***Mills*** applications were not of an unusual or complicated nature to justify delay above the presumptive ceiling (see, for example, ***R.*** v. ***J.P.*** 2020 ONCJ 27, at paras. 108 to 109).

ii) COVID-19 Pandemic

[47] On March 17, 2020, the Territorial Court issued a Notice to the Profession and the Public implementing measures to contain the spread of the COVID-19 virus. Two days later, all files in the Youth Justice Court were adjourned to the youth docket on June 4, 2020, including that of M.I.

[48] Additionally, as a result of the pandemic, no trials occurred between March 17, 2020 and July 6, 2020. In the Territorial Court's Notice to the Profession and the Public dated June 19, 2020, it was noted that "[t]he reopening of the court will take place on an incremental basis" [My emphasis].

[49] The defence does not dispute that the COVID-19 pandemic is a discrete or exceptional event under the ***Jordan*** framework, but asserts that the Crown has not demonstrated that COVID-19 caused a delay in this matter. The defence relies on the decision of ***R.*** v. ***Matthew***, 2021 ONCJ 60, at para. 122, which held that the Crown must demonstrate on a balance of probabilities that the delay in a given case was actually caused by the pandemic. In that case, the Court concluded that 52 days was properly characterized as delay caused by the pandemic because of the impact it had on court operations. The defence in the case at bar argues that not only was there outstanding substantive disclosure that was not received until after June 4, 2020, there is no evidence that the police's delay in producing that disclosure was caused by the pandemic.

[50] I am unable to accept the submission of defence counsel on this point. During the time that trials were suspended, the police continued to investigate crime and

charge people. Due to drastically reduced court operations, the new matters coming before the Court were layered on top of files adjourned because of the pandemic, resulting in an unusually high number of matters being set for trial in the months following.

[51] The Territorial Court did implement a number of procedures to respond to this situation, including: providing regular Notices to the Profession and the Public for status updates as to the operations of the Court, and the expectations of counsel; working with Court Services and Environmental Health Officers to ensure that in-person hearings could resume in a timely and safe fashion, and in accordance with public health protection orders; employing technology for virtual and quasi-virtual hearings to expedite matters; coordinating with Justice system stakeholders to fine tune issues; and, scheduling assize weeks in attempt to reduce the backlog of less complex files.

[52] However, in reacting to an unprecedented situation, the justice system had to attempt to turn on a dime. As described by the Court in ***R. v. Gharibi***, 2021 ONCJ 63, paras. 50 to 54, the response did not unfold seamlessly:

> 50 In addition, the Court had to move from an ages-old system founded on in- person hearings and primarily reliant on paper, to a virtual, electronic, technology- dependent Court - in the colloquial - 'over night'.
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> 51 As efficient as technology may appear, it is not always as secure and reliable as required to operate a criminal justice system. From security to sound quality to bandwidth to any number of other technology problems, operating virtually is to operate with frequent challenges, even when all parties are adept with the technology.
>
> 52 Moreover, accommodations must be designed and implemented so that those with limited technological ability and access are not further marginalized in their participation in the criminal justice system.

> 53 It is frequently said that 'we are all in this together', but the impact of this pandemic is not the same on all of us. It has exposed and amplified vulnerability and systemic inequity for vulnerable populations that interact with, and are subject to, the criminal justice system: homeless people; victims of violence, particularly women; people with mental challenges; those who struggle with substance addiction; and racialized people who bear the weight of racism, to name a few.
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> 54 These wide-spread changes are taking time. They have presented and continue to present challenges in terms of accessibility, consistency and availability to justice participants, particularly self represented accused persons, victims, witnesses, support workers of all types and support resources of all kinds.

[53] In ***R.*** v. ***Simmons***, 2020 ONSC 7209, at para. 70, the Court aptly stated:

> …the impact of the COVID-19 pandemic on the criminal justice system is not limited to those periods of time when the court had to adjourn scheduled cases or when jury trials were suspended. It has had numerous and far-reaching impacts upon how we do things, and, on the people, who do them. Not the least has been the necessity to take measures to protect the health and safety of justice participants and the public. The way trials are conducted needed to be transformed. Physical courtrooms had to be changed. Some trials are now conducted virtually. This in turn, has had a significant impact on scheduling. Scheduling new trials and rescheduling existing trials have become more complex and difficult. A backlog of cases has ensued. A lack of resources was not the cause. Rather, COVID-19 was. It has had a system-wide impact of unprecedented proportions, never seen before in our lifetime.

[54] In this jurisdiction, the Crown and the defence bar, especially Legal Aid, participated in efforts to mitigate the delay occasioned by the pandemic. That being said, the backlog of files in this jurisdiction took a significant period of time to reduce, especially for multi-day matters. As the case management judge stated at the October 6, 2020 appearance in this matter, trial time was at “a premium”. Although assize weeks were implemented, the first one did not occur until November 2020.

[55] In the case at bar, the RCMP forensic laboratory analyzed DNA from the sexual assault kit despite the onset of the pandemic, and provided it to the Crown in April and May 2020. The defence received this disclosure in late June 2020. Although there was subsequent delay by the investigating officer in completing a warrant to obtain a DNA sample from M.I., the results of which were received by defence in early 2021, as pointed out by the case management judge on October 6, 2020, the defence, nonetheless, had sufficient disclosure to enter pleas.

[56] At the end of the day, I find that the Crown and the justice system did take sufficient steps to mitigate delay occasioned by the pandemic.

[57] In this case, in my opinion, a conservative estimate of the delay in this matter caused by the pandemic is three months. I come to this conclusion based on the backlog of files resulting from the three-and-one-half-month period from March 19 to July 6, 2020, during which no trials were heard, and the fact that once trials recommenced on July 6, 2020, court operations were not at full operational capacity. Despite efforts to mitigate the effects of the pandemic, in the first half of 2021, trial time for multi-day matters was, nonetheless, lacking.

Remaining Delay

[58] The remaining delay is calculated by subtracting three months from 19 months and 12 days of net delay, equalling 16 months and 12 days.

The Delay Falls Below the Presumptive Ceiling

[59] As the remaining delay is less than 18 months, there is no presumption of unreasonableness, and the burden shifts to the defence to demonstrate that the delay is unreasonable. To meet this burden, the defence must satisfy the following criteria: (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 (***Jordan***, para. 82).

[60] When the delay is beneath the ceiling, a stay of proceedings is expected to be "…rare, and limited to clear cases" (***Jordan***, para. 48). The defence must demonstrate that "…it attempted to set the earliest possible hearing dates, was cooperative with and responsive to the Crown and the court, put the Crown on timely notice when delay was becoming a problem, and conducted all applications (including the s. 11(b) application) reasonably and expeditiously…" (***Jordan***, para 85). However, a court hearing a delay application should not second-guess every decision made by the defence.

i) Meaningful and Sustained Steps

[61] In the case at bar, the defence clearly put the Crown on notice that delay was becoming an issue (e.g. September 20, 2020 e-mail, Exhibit 1, Tab A p. 1). At the same time, as already mentioned, the defence had received a substantial body of disclosure, including DNA reports, by June 25, 2020. Even though the Crown and the defence agreed at a July 23, 2020 court appearance that an adjournment into September was appropriate, defence counsel had sufficient disclosure to enter not

guilty pleas. If the DNA results ultimately led to a change of plea, there would be a strong argument that the Court not consider it as a late guilty plea.

[62] It is important to remember that ***R.*** v. ***Stinchcombe***, [1991] 3 S.C.R. 326, held that Crown disclosure need not be complete prior to an accused's election and plea. The accused should be aware from initial disclosure of the "strengths and weaknesses" of the Crown's case before entering a plea (para. 28). The Court in ***R.*** v. ***Elite Farm Services Ltd.***, 2021 BCSC 1996, at para. 50, endorsed the view of the Court in ***Gandhi***, at paras. 34 to 35, that the Crown is not expected to have disclosed "every last bit of evidence" before trial dates are set.

[63] In the matter before me, despite the Crown's ill-advised agreement to adjourn the matter from July 23 to September 10, 2020 without plea, in my view, the defence should have been in a position to enter pleas to the charges at the July 23, 2020 appearance (approximately four weeks after receiving the initial DNA reports).

[64] Additionally, the defence had sufficient information by mid-August 2020 to file a ***Mills*** application. If this had occurred, the ***Mills*** and *YCJA* applications could have been scheduled in a more timely fashion.

[65] In the result, I find that the defence has not satisfied the first criterion. Nonetheless, I will also consider the second factor.

ii) Time Markedly Exceeded Reasonable Time Requirements

[66] The reasonable time requirements of a case are made up of a number of factors, including the complexity of the case, local considerations and whether the Crown took

reasonable steps to expedite the proceedings (***Jordan***, para. 87). The defence contends that the time to trial in this matter is well beyond what it should have been. It points to the fact that this a youth matter in which there is an increased need for timeliness. The defence also argues that the police investigation was lackadaisical from the outset, and that there were delays, even pre-trial delays, that have not been explained.

[67] For example, the defence submits that the sexual assault kit was in the possession of the police soon after the alleged offence, and that it could have been sent for analysis. However, Cst. MacEachen testified that she did not do so because the complainant did not wish to proceed with the matter initially. Cst. MacEachen only learned in late November 2019, that the complainant had changed her mind. Cst. MacEachen did not believe that sending the samples for analysis in the intervening period, in those circumstances, was a good use of resources. In my view, it is hard to find fault with this decision. She then sought, and received, authorization to send those samples for analysis, and subsequently arrested M.I.

[68] However, I agree with the defence that the investigation lagged, at times, including the preparation of the DNA warrant for M.I. In files involving youth, the police must make sustained efforts to complete investigations with dispatch.

[69] At the same time, as indicated above, it is my view that the defence had sufficient disclosure before the results of the DNA warrant were known to enter pleas. Although the Crown should have been alive to this issue earlier in the process, the Crown otherwise acted appropriately to advance the case.

[70] It is also of significance that the ***Mills*** and *YCJA* applications, although not overly complex, extended the timeframe for bringing this matter to trial.

[71] I find that this file was of medium complexity. The Crown indicated in correspondence to the defence that it would be calling one expert witness in the area of DNA matching, a doctor, and two police witnesses (p. 23, Exhibit 1). I also understood that in addition to the complainant, one other civilian witness would testify. Considering the normal time to trial in this jurisdiction for multi-day trials with pre-trial applications, I would expect that this type of file to normally be completed within 13 to 15 months. I have found that the delay in this matter was 16 months and 12 days.

[72] In my view, this timeframe does not markedly exceed the reasonable time requirements of this case.

Conclusion

[73] The total delay in this case was approximately 19 and one-half months, and therefore above the presumptive ceiling. However, I have concluded that three months should be deducted from the total delay, leaving a remanet of 16 months and 12 days.

[74] Finally, I have found that the defence has not met its burden of showing that the delay under the presumptive ceiling is unreasonable.

[75] Accordingly, the s. 11(b) application to stay the proceedings based on unreasonable delay is dismissed.

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CHISHOLM T.C.J.