SUPREME COURT OF YUKON

Citation: *R v Amin*, 2023 YKSC 24

Date: 20230526
S.C. No. 20-01515
Registry: Whitehorse

BETWEEN:

HIS MAJESTY THE KING

RESPONDENT

AND

RUDRA PULASTYAKUMAR AMIN

APPLICANT

Before Chief Justice S.M. Duncan

Counsel for the applicant — Jennifer Budgell

Counsel for the respondent — Faiyaz Alibhai, by video

Publication, broadcast, or transmission of any information that could identify the complainant or a witness is prohibited pursuant to s. 486.4 of the *Criminal Code*. [This ban does not apply to Michelle Palardy]

REASONS FOR DECISION

Overview

[1] The applicant accused brings an application under ss. 11(b) and 24 of the *Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982* (the "*Charter*") for a stay of proceedings based on the untimely second trial scheduled after a mistrial. The length of proceedings from the laying of the Informations to the anticipated end of trial will be 35 months and 8 days, exceeding the presumptive ceiling of 30

months established by the Supreme Court of Canada in *R v Jordan*, 2016 SCC 27, ("*Jordan*") by 5 months and 8 days.

[2] This matter, in which the accused was charged with seven counts of sexual assault of three complainants, was commenced by Informations laid August 31, 2020. The first trial was held October 3-13, 2022. A mistrial was declared on October 14, 2022, after improper closing submissions by the Crown. This was 25.5 months after charges were laid. New trial dates were set for July 31-August 8, 2023.

[3] There are three main issues to be decided in this case: (1) was there defence delay, in particular between the end of the first trial and the second trial date; (2) was the adjournment of a first degree murder trial by the Court, requiring a new trial date for the first trial of the applicant, an exceptional circumstance; and (3) even if the presumptive ceiling was not exceeded, should a stay still be granted due to an unreasonable length of time to complete the trial of this matter?

[4] There is no issue that the mistrial was caused by the Crown and does not constitute an exceptional circumstance.

[5] I conclude that there will be no stay of proceedings based on an infringement of s. 11(b). There was defence delay after the mistrial, and the adjournment of the first trial from April 2022 to October 2022 was an exceptional circumstance. Subtracting these time periods brings the length of time below the presumptive ceiling of 30 months. Further, I find that this net and remaining delay under the ceiling was not unreasonable as defence did not make a sustained effort throughout to expedite the proceedings.

Background

[6] The applicant was charged with seven counts of sexual assault against three complainants. He was arrested on July 24, 2020 and three Informations were laid on August 31, 2020.

[7] On September 9, 2020, he appeared in the Territorial Court of Yukon. After eight further appearances in Territorial Court, generally related to disclosure issues, he elected trial by judge and jury on February 17, 2021.

[8] On March 9, 2021, he appeared for the first time in the Supreme Court of Yukon. After a pre-trial conference on March 10, 2021, the parties confirmed on March 23, 2021, the dates of July 14, 2021 for a s. 278 application, September 8, 2021 for a s. 276 application, and trial dates of April 25-29, 2022, 20 months after the Informations were laid. The ss. 278 and 276 applications were heard and decided by December 13, 2021.

[9] Meanwhile on November 30, 2021, a pre-trial conference was held in the matter of *R v Silverfox and Silverfox*, ("*Silverfox*") a first-degree murder trial with two co-accused, scheduled to be tried by judge and jury for five weeks starting January 10, 2022. Defence counsel for the applicant was also counsel for one of the co-accused in *Silverfox*. At a *Silverfox* pre-trial conference held on November 30, 2021, the Court proposed rescheduling the *Silverfox* trial as a result of the initiation of a number of pre-trial applications by both defence counsel. Attached to this decision is an excerpt from the transcript of the pre-trial conference summarizing the five outstanding applications or partial applications and decisions required before trial. On November 30, 2021, defence counsel raised the possibility of two new applications, and in fact they were scheduled at the next pre-trial conference on December 9, 2021 for February 15 and

March 7, 2022. The Court's proposed new dates for the *Silverfox* trial were March 28-April 29, 2022, overlapping with the applicant's trial, requiring it to be rescheduled.

[10] Between December 1 and 7, 2021, defence counsel spoke with the applicant, and was advised by the trial coordinator that the earliest dates for the applicant's trial were October 3-7, 2022.

[11] At the December 9, 2021 pre-trial conference in *Silverfox*, defence counsel spoke about the applicant's trial. She said she "did turn her mind to perhaps trying to seek new counsel who could represent him in this matter. If so, I'm wondering if we would be able to keep the week of April 25th for his trial." The Court advised that there were insufficient resources to conduct two jury trials simultaneously.

[12] That same day the trial coordinator responded to defence counsel's inquiry about trial dates earlier than October 2022 by saying that dates between mid-May and end of August could be accommodated by the Court if the trial proceeded by judge alone.

[13] On January 25, 2022, at a pre-trial conference on the record, the applicant's trial was adjourned due to the rescheduling of the *Silverfox* trial, to October 3-7, 2022.

[14] The applicant's trial proceeded on October 3-13, 2022 before judge and jury. It was longer than scheduled in part because defence gave notice of a new s. 278 application 2.5 weeks before trial, related to text messages that had been disclosed by the Crown months earlier. The only time to hear the application was the first day of trial. Further, on that first day of trial, defence counsel added another piece of evidence to the s. 278 application, of which the Crown and the complainant had no prior notice. The trial judge permitted the application, but noted in her reasons for decision:

> [21] The Supreme Court of Canada has noted that it is preferable to conduct s. 278.92 applications before the trial

> commences, as mid-trial applications can cause delays, scheduling difficulties, and unfairness to the accused and the complainant (*JJ* at paras. 85-86).
>
> [22] In order to complete applications before trial commences, defence should, as a general rule, file their applications well in advance of the trial date. The *Criminal Code* provides for a seven-day notice period before the first stage of the application takes place. After the first stage, counsel to the complainant may be appointed, the second stage hearing then occurs, and the court must provide its decision. Section 278 applications can be time-consuming. If defence does not file the application with sufficient time for the application to be completed before the start of the trial, the application may be denied outright or the trial may be adjourned. Alternatively, if the matter proceeds, the interests of the accused, the complainant, and the administration of justice may be poorly served because the application is not given the time and analysis required. It is therefore incumbent on defence counsel to file s. 278 applications in a timely manner.

[15] On October 14, 2022, after closing submissions, the Court declared a mistrial due to the Crown's improper closing submissions.

[16] On November 1, 2022, at Criminal Chambers, both Crown and defence asked for new trial dates. No dates were available from the Court on that date. The following day, November 2, 2022, email discussion began among the trial coordinator and counsel about available dates. The trial coordinator offered on November 2 the following dates: November 28-December 6, 2022, December 5-13, 2022, December 7-15, 2022, January 30-February 8, 2023, and February 9-17, 2023. Defence counsel advised she was unavailable on all of those dates and asked for dates in March or April 2023. The Crown did not reply about their availability on the offered dates from November to February. The Crown advised at a pre-trial conference on November 25, 2022 their new counsel would be able to practice in the Yukon by March 2023.

[17] The Court had no availability in March 2023, but offered dates of April 24-28, 2023, May 8-12, 2023, and September 25-29, 2023. Defence counsel was unavailable for the April and May dates but was available for the September dates. Defence counsel also again requested dates in March 2023, or in June and July.

[18] Crown indicated they were available for March 6-31, 2023, the entire month of April, all of May except for the last week, June 6-30, July 10-31, the entire month of August, all of October except the week of the 16th, all of November except the week of the 20th, and all of December. Crown was available on the April and May dates offered by the Court.

[19] The Court had no availability in June 2023.

[20] Both Crown and defence were advised by the trial coordinator that jury trials were not normally set in the summer in the Yukon for various reasons, but that she would speak to the Chief Justice about this case. The trial dates of July 31-August 8, 2023 were set and confirmed in court on November 29, 2022.

[21] Since setting those trial dates, defence has brought three new pre-trial applications, including this s. 11(b) application. The others are a new s. 278 application, and a re-litigation of the decision to exclude a piece of evidence from use at trial.

Law

[22] The Supreme Court of Canada in *Jordan* set out a new framework for applications under s. 11(b) of the *Charter*. The focus of the new framework is a presumptive ceiling on the time it should take to bring an accused person to trial: 18 months for cases in provincial/territorial court and 30 months for cases in superior court.

The framework still allows case-specific factors above and below the presumptive ceiling to be taken into account.

[23] The presumptive ceilings are not aspirational targets, but they represent the point where the delay is thought to be presumptively unreasonable. They "[mark] the point at which the burden shifts from the defence to prove that the delay was unreasonable, to the Crown to justify the length of time the case has taken" (*Jordan* at paras. 56-58).

[24] The Supreme Court of Canada in *R v JF,* 2022 SCC 17 ("*JF*") summarized their rationale for the new framework at para. 22:

> Timely justice is one of the characteristics of a free and democratic society, and the conduct of trials within a reasonable time is of central importance in the administration of Canada's criminal justice system. Section 11(b) of the *Charter* reflects the importance of this principle by guaranteeing any person charged with an offence the right "to be tried within a reasonable time." The purpose of this provision is to protect both the rights of accused persons and the interests of society as a whole. At the individual level, trials within a reasonable time are essential to protect the liberty, security and fair trial interests of any person charged with an offence, who, it should be remembered is presumed to be innocent. At the collective or societal level, timely trials encourage better participation by victims and witnesses, minimize the "worry and frustration [they experience] until they have given their testimony" and allow them to move on with their lives more quickly. Timely trials also help to maintain public confidence in the administration of justice [citations removed].

[25] Section 11(b) protects an accused while they have the status of a person charged with an offence, i.e. a person who is subject to criminal proceedings. A person is charged with an offence from the time the charge is laid to the end of the sentencing process (*JF* at para. 23). The framework established in *Jordan* however only applies

from the date the information is sworn until the end of trial – it does not include time to reach a verdict or the sentencing process.

[26] This temporal limit exists because, as the Supreme Court of Canada noted in *R v KGK*, 2020 SCC 7 at para. 34, “the ceilings represented a specific solution designed to address a specific problem: the culture of complacency towards excessive delay associated with “bringing those charged with criminal offences to trial” (*Jordan* at para. 2; see also paras. 4, 13, 117, 121, and 129)”. The Supreme Court of Canada, in finding that timely trials are constitutionally required, imposed obligations on all participants in the justice system, saying they “must work in concert to achieve speedier trials” (*Jordan* at para. 116).

[27] The *Jordan* framework encouraged a forward-looking, pro-active approach to be taken by all parties that allows the parties to know “*in advance*, the bounds of reasonableness so proactive measures can be taken to remedy any delay” [emphasis in original] (*Jordan* at para. 108). It is not enough to “pick up the pieces once the delay has transpired” (*Jordan* at para. 35). A proactive approach by all participants in the justice system is required in order to prevent unnecessary delay by targeting its root causes (*Jordan* at para. 137).

[28] The methodology set out in *Jordan* proceeds in three steps. First the total delay is measured from the date the charge is laid to the end of the trial. Second, any defence delay is subtracted from this to determine the net delay. Defence delay can be delay that is waived by the defence and/or delay caused solely by the conduct of the defence, such as frivolous applications or circumstances where the Crown and court are

available to proceed but defence is not. If this net delay is above the presumptive ceiling, the delay is presumptively unreasonable.

[29] The third step is the ability of the Crown to rebut the presumption by establishing there are exceptional circumstances. These are described as "lying outside the Crown's control in the sense that (1) they are reasonably unforeseen or reasonably unavoidable, and (2) Crown counsel cannot reasonably remedy the delays emanating from those circumstances once they arise." The delays need not meet a further hurdle of being rare or entirely uncommon (*Jordan* at para. 69).

[30] The Supreme Court of Canada was clear to say that the list of what is an exceptional circumstance "is not closed" and "will depend on the trial judge's good sense and experience" (*Jordan* at para. 71). In general, exceptional circumstances fall into two categories – discrete events or the existence of a particularly complex case. Discrete events include unforeseeable or unavoidable developments, such as medical or family emergencies, a requirement to extradite an accused from a foreign jurisdiction, or an unforeseen development at trial, such as the recanting of a material witness. The Crown and the justice system must be prepared to mitigate the delay and "[w]ithin reason, the Crown and the justice system should be capable of prioritizing cases that have faltered due to unforeseen events" (*Jordan* at para. 75). The period of delay caused by a discrete event is subtracted from the total period of delay. However, any part of the delay that the Crown and system could reasonably have mitigated may not be subtracted (*Jordan* at para. 75).

[31] The other category of exceptional circumstance, a particularly complex case, exists where the nature of the evidence or the issues require an inordinate amount of

trial or preparation time. Examples are voluminous disclosure, a large number of witnesses, significant expert evidence, charges over a long period of time, multiple charges or pre-trial applications, multiple co-accused, novel or complicated legal issues or a large number of disputed issues. The trial judge must consider the whether the Crown developed and implemented a plan to minimize the delay created by such complexity. This category is not relevant to this application.

[32] If the net delay or the remaining delay falls below the presumptive ceiling, then the onus is on the defence to show the delay is still unreasonable. However, if the delay continues to exceed the ceiling, then it is unreasonable, and a stay of proceedings must follow.

[33] An unreasonable delay may exist where the time is below the presumptive ceiling if the defence can establish that "(1) it took meaningful steps that demonstrate a sustained effort to expedite the proceedings *and* (2) the case took markedly longer than it reasonably should have" (*Jordan* at para. 48). In such a case a stay may issue. Such instances will be relatively rare and limited and require a clear case.

[34] The trial judge should consider "what the defence could have done, and what it actually did, to get the case heard as quickly as possible. Substance matters, not form…The defence is required to act reasonably, not perfectly" (*Jordan* at paras. 84-85). The trial judge must also consider the complexity of the case, local considerations, and whether the Crown took reasonable steps to expedite the proceedings, in determining whether the case took longer than it should have.

Application to this case

Issue #1: Defence delay

[35] There was no delay by the applicant from the date of the initial Informations to the date scheduled for the first trial – April 25-29, 2022. The defence counsel's actions in relation to the adjournment from April 2022 to October 2022 will be canvassed below under exceptional circumstances. The focus of the analysis is on the delay after the mistrial in setting a second trial date.

[36] Defence counsel states given the egregious misconduct of the Crown in causing the mistrial, none of the delay between the first and second trial should be attributable to the applicant. The second trial was only necessary because of the Crown's behaviour. Support for this position is found in the decision of *R v JHT*, 2016 BCSC 2382 at para. 188.

[37] In the alternative, defence counsel states the applicant should be responsible for only two weeks of delay – April 24-May 12, 2023, and not the whole period from April 24 to July 31, 2023.

[38] The Crown responds that the entire period between the two trials cannot be the responsibility of the Crown. They acknowledge that Crown error caused the mistrial, and do not argue in this case that it constitutes an exceptional circumstance. At the same time, the Crown argues that the court in *Jordan* did not intend that a mistake by one party absolves the other participants in the justice system from proceeding as expeditiously as possible.

[39] The Crown further argues that the three-month/99-day delay between April 24 and July 31 is attributable to the defence. Unlike the situation in *R v Boulanger*, 2022 SCC 2 ("*Boulanger*") there was no change in strategy by the prosecution.

[40] I agree with the applicant that the need for a second trial in this case must lie at the foot of the Crown, as their improper closing submissions that could not be mitigated by instructions to the jury caused the mistrial.

[41] However, I also agree with the Crown's argument that this fact does not mean that any of the justice system participants are relieved of their obligations under *Jordan* to ensure an expeditious second trial. With the accused still charged with an offence until his second trial is completed, it was incumbent on all participants to act consistently with an expeditious proceeding, including the applicant.

[42] Here, the Court acted promptly to find another trial date. The situation was not like that in *Boulanger* where in January, the court set a trial continuation date in September, after the parties advised that the earlier date of May was unavailable. The court in *Boulanger* commented unfavourably on the court's lack of initiative and cited institutional delay as a contributing factor (without attributing specific time to it). This factor along with the Crown's change in strategy led the court to attribute ½ the delay between June and September to defence.

[43] The defence counsel's unavailability for the five dates offered between November 2022 and February 2023 does not result in any attribution of delay to them. The Court in *Jordan* was clear that delay because of the unavailability of defence does not make them automatically responsible, unless both Crown and the court are available. The Crown did not indicate to the trial coordinator its availability for any of the

five sets of dates between November 2022 and February 2023 for a second trial when they were canvassed by email. Crown counsel asked the Court to find implicitly that the Crown was available during those five dates: their failure to answer the trial coordinator's emails or confirm their availability was because they knew that defence counsel was unavailable. In addition to an absence of specific responses from the Crown to these dates, the Crown at the November 25, 2022 pre-trial conference stated new counsel from outside the Yukon would be ready to proceed in March 2023. I cannot accept the Crown's argument that their failure to answer the trial coordinator's emails because they knew defence was unavailable is sufficient for me to infer that they were available. For such a significant finding as the attribution of delay to defence in the context of stay application under s. 11(b), it is not appropriate for the Court to draw this inference. The Crown needed to be clear that they were available for each of the five dates offered by the Court between November and February. This delay will not be attributed to defence and not subtracted from the total delay.

[44] The defence was also unavailable on the next dates provided by the trial co-ordinator, April 24-28 and May 8-12, 2023. The defence advised they were not available in May. The Crown was available on the April and May dates. The Crown was not available the last week of May. The next dates provided by the trial coordinator were the trial dates, July 31- August 8, 2023. The defence asked if there were any dates available from the Court in June, but there were none. The Crown advised they were available June 6-30 and July 10-31.

[45] In this case, the Court has made an exception to the usual practice of not holding jury trials in the summer months (understood as mid-June to mid-August). This practice

is due to an absence of court resources because of summer holidays – in a small northern jurisdiction where numbers of staff are limited and summers are short, accommodations for holidays for court staff are made in order to preserve mental health and employee retention. As well, there are challenges in obtaining sufficient jurors over the summer months in the Yukon. The Yukon is not the same as Nunavut, (see *R v Anugaa*, 2018 NUCJ 2) where the majority of the population are Nunavummiut and are on the land for most of the summer months, resulting in no scheduling of jury trials during that time. However, many Yukoners, including First Nations people who comprise approximately 22% of the population, are away from Whitehorse during the summer months. In addition, the offence of sexual assault traditionally has created challenges in the selection of suitable jurors due to personal experiences potentially affecting their impartiality.

[46] Despite these potential barriers and concerns, the importance of holding the second trial as soon as possible in this case led the Court to make an exception to its regular practice and provide trial dates in the summer.

[47] The inability of the Court to provide earlier dates in June or July, when both counsel said they were available (Crown June 6-30 and July 10-31 and defence available those same dates) means defence should not bear the responsibility of the delay until July 31, 2023. Further, the Crown was not available the last week of May.

[48] As a result, the delay from April 24, 2023 to May 26, 2023 shall be attributable to the applicant. This amounts to one month and 2 days, or 32 days – to be subtracted from the total delay as defence delay.

Issue #2: Exceptional circumstances – discrete event

[49] The applicant argues that the delay created by adjourning the applicant's first trial date from April 2022 to October 2022, due to the prioritization of the *Silverfox* first degree murder trial does not constitute a discrete event. The applicant says the inability of the Supreme Court of Yukon to conduct two jury trials simultaneously is an example of chronic institutional delay, similar to a lack of judicial resources identified in other cases, such as *R v Villanti*, 2020 ONCA 755 ("*Villanti*"). Courts have concluded that the lack of an appropriate complement of judges is not justifiable as an exceptional circumstance. Similarly, here defence counsel argues that the justice system in the Yukon, with a population of approximately 44,000 people, should be capable of conducting more than one jury trial in Whitehorse at any one time. Defence counsel also argues that it was reasonably foreseeable the adjournment of the *Silverfox* trial would require rescheduling of other matters. As a result of this foreseeability, it does not fall under the definition of exceptional circumstance.

[50] The Crown argues that the April 2022 adjournment of the first trial was a discrete event. It likens this case to *R v Belzil*, 2021 ONSC 781 ("*Belzil*"), where the court apportioned a three-month delay to exceptional circumstance because of the need to proceed with a continuation of a first-degree murder trial involving the same judge and Crown. The Crown distinguishes *Villanti*, noting in that case that the first trial date was set at 44 months and the second at 60.5 months, due to a lack of available judges. Both these dates were well outside the *Jordan* ceiling, unlike this case, where both the first and second trial dates, April 2022 (19 months after charges laid) and October 2022 (25 months after charges laid) were within the *Jordan* timelines. The Crown further notes

that in *Villanti* the scarcity of judges issue affected not only the accused's case, but was an institutional concern affecting many other cases. Here, the unanticipated continuation of a murder trial was not symptomatic of a general scarcity of resources, but a discrete event, unavoidable and unable to be remedied.

[51] I agree with the Crown that the adjournment of the applicant's trial because of the prioritization of the *Silverfox* murder trial is an exceptional circumstance for the following reasons:

a. Defence counsel in the *Silverfox* trial brought many new pre-trial applications requiring decisions before trial very close to the original trial date. By November 2021, it was clear to the Court that there was insufficient time to hear and decide all of these applications before January 10, 2022. In addition at that time defence counsel introduced more pre-trial applications. Several more weeks of court and judgment preparation time were required before trial in order to complete them. Although arguably the need for these applications could and should have been foreseen earlier by counsel, they were not. They were unforeseen by the Court as they had not all been identified at the time the trial dates were set.

b. The *Silverfox* co-accused were both in custody. Their charges were very serious. There is no question that this trial had to take priority. The justice system must take into account competing demands and priorities:

> … No case is an island to be treated as if it were the only case with a legitimate demand on court resources. The system cannot revolve around any one case, but must try to accommodate the needs of

> all cases …" (*R v Allen* (1996), 92 OAC 345 at para. 27– quoted in *Belzil* at para.83).

c. Defence counsel's argument that a jurisdiction the size of the Yukon should have the capability of holding two jury trials at once is unreasonable. First, there are good reasons why it is difficult for the Supreme Court of Yukon to hold two jury trials simultaneously: i) an insufficient number of sheriffs, especially if the jury is sequestered and require a guard 24/7; ii) the existence of only one courtroom to accommodate a jury and one jury room for retiring and deliberation; iii) the challenges in holding one jury trial on site and another off site at the same time, including locating an appropriate site at the appropriate time, and the additional resources – human, administrative, and financial – required for an off-site trial. Second, the need to hold two jury trials simultaneously does not exist in Whitehorse. While it is true that the number of jury trials has increased over the last several years, the Court has been able to schedule jury trials within the *Jordan* timelines even with the limitation of conducting one at a time. The required additional costs of renovations to the courthouse or of conducting off-site trials, and of increased human resources is not justified. I note from the decision in *R v Williamson*, 2016 SCC 28, the City of Kingston, with a population of 123,798 had only two courtrooms where jury trials could be conducted. In April 2022, the population of Whitehorse was 34,467, much less than Kingston. As noted in *Jordan*, quoting from *R v Omar*, 2007 ONCA 117 at para. 116:

> The judicial system, like all other public institutions, has limited resources at its disposal, as do the litigants and legal aid. … It is in the interest of all constituencies – those accused of crimes, the police, Crown counsel, defence counsel, and judges both at trial and on appeal – to make the most of the limited resources at our disposal.

d. This situation can be distinguished from that of a severe shortage of judicial resources on an ongoing basis, to the extent that *Jordan* timelines were being missed by many months on a regular basis (*Villanti*). This kind of chronic institutional delay does not exist in Whitehorse. The absence of judicial resources was not an issue here.

e. Finally, although there was not a direct causal effect between COVID-19 and the delay in this case, the inability to hold jury trials for approximately a year because of pandemic restrictions created a situation where jury trials had to be scheduled regularly in 2022 and 2023, in order to ensure compliance with *Jordan* timelines. This filled the court calendar quickly for 2022 and 2023, resulting in fewer available dates from the Court at certain times. The COVID-19 pandemic was an exceptional circumstance.

[52] The need to adjourn the applicant's trial because of the competing demand of the *Silverfox* murder trial resulted from the unforeseen situation of insufficient time before trial to hear and decide many pre-trial applications brought by defence in *Silverfox*. The number of new applications was the unforeseen circumstance, not the effect of the adjournment of the *Silverfox* trial on the applicant's trial. The inability of the Court to hold two jury trials simultaneously was not a chronic institutional delay problem comparable to a shortage of judges. It is neither reasonable nor necessary for a centre the size of

Whitehorse to have the capability at any given time to conduct two jury trials at once. The new date of October 3, 2022 provided for the applicant's trial was still well within the Jordan presumptive ceiling. The need to adjourn was a discrete event, an exceptional circumstance. The time between April 25 and October 3, 2022 of 5 months and 8 days or 161 days shall be subtracted from the total delay.

Issue #3 – Was delay unreasonable even though it was under the presumptive ceiling?

[53] The applicant argues that even if the delay is below the 30 months the length of time is still unreasonable. To succeed on this argument, the defence must show (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.

[54] While the defence counsel recognizes that stays below the ceiling will be rare and limited to clear cases, she also notes that the new framework "is not solely a function of time" (*Jordan* at para. 51) and specific case factors may be relevant.

[55] In this case, defence counsel said they ensured the case moved quickly through Territorial Court; sought earlier dates than those offered by the Supreme Court after the first trial date had to be adjourned; and requested summer dates for the second trial. Defence counsel further says the case took markedly longer than it should have because: it is not a complex case; the local "yardstick" for the hearing of a trial such as this is 19 months; and the Crown's actions in causing the mistrial and assigning three different Crowns from outside the jurisdiction did not contribute to it doing its part to ensure the matter proceeded expeditiously.

[56] Defence further relies on *R v Godin*, 2009 SCC 26, decided before *Jordan*, saying they are not expected to hold themselves in a state of perpetual availability especially after a trial is scheduled to conclude and a second trial is unexpected.

[57] The Crown argues that defence did not demonstrate a pro-active effort to expedite proceedings. They took no steps to find other counsel when their unavailability for the second trial on all the dates offered by the Court was clear. The Crown questions whether *Godin* still applies after *Jordan* and notes the law is not clear. The Crown further states that the case did not take markedly longer than it should have. Other than causing the mistrial, which was regrettable, the Crown says they have proceeded expeditiously by being available on the trial dates offered. The Crown notes that other cases involving mistrials have taken similar lengths of time to conclude – *R v Way*, 2022 ABCA 1 – 29 months and *R v Wu*, 2017 BCSC 2373 – 28 months – both of which were found reasonable by the Court.

[58] The Crown further notes the s. 278 application brought by the applicant on short notice and the additional evidence without notice took extra time at the first trial and risked an adjournment.

[59] I find the efforts of defence counsel at the first trial and after the mistrial did not demonstrate the sustained effort necessary. Unlike in December 2021, when defence stated she was “turning her mind” to perhaps finding another counsel to represent the applicant in order to preserve the April trial dates because of her participation in the *Silverfox* trial, no such suggestion was made by defence counsel after the first trial. While this is not required or expected, and the accused is entitled to his counsel of

choice, the fact that defence suggested this in December 2021 but did not after the mistrial contributes to a lack of sustained effort to expedite the proceedings.

[60] Further, defence counsel's late initiation of a s. 278 application, and adding a piece of evidence without notice at the outset of the first trial risked an adjournment of that trial, but for the flexibility of the Court and its determination that no prejudice ensued due to lack of notice. While defence counsel argued at the hearing that they would not have risked adjourning the trial if that seemed likely, the late applications do not demonstrate a sustained effort to expedite the proceedings.

[61] On the second factor, I agree that the case has taken longer than it should have. It was not overly complex and 19-20 months is a reasonable "yardstick" for a jury trial to proceed in Whitehorse. Aside from the mistrial, however, I find the Crown did take reasonable steps to expedite the proceeding. There were many reasons for the delay – the prioritization of the murder trial, the mistrial, the defence unavailability for a number of dates provided by the Court, and the Crown unavailability for some of the same dates.

[62] However, in all of the circumstances, this does not reach the level of a rare, limited, and very clear case that justifies a stay of proceedings due to delay that does not exceed the presumptive ceiling set out in *Jordan*.

Conclusion

[63] The total delay in this case is 1072 days. Defence delay is 32 days. Delay caused by an exceptional circumstance is 161 days. The delay after subtracting the defence delay and the exceptional circumstance delay is 879 days or 29.3 months from the laying of the initial Informations until the anticipated end of trial. When the situation

is viewed in totality from a bird's-eye perspective, it does not reveal a culture of complacency of the actors in the judicial process in this case that *Jordan* addresses.

[64] The applicant's application is dismissed.

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DUNCAN C.J.

Excerpt

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Proceedings Review
by the Court

Whitehorse, YT
November 30, 2021

(COMMENCED AT 1:43 P.M.)
(BOTH ACCUSED PRESENT BY VIDEOCONFERENCE)
(MR. LANE APPEARS BY VIDEOCONFERENCE)

THE CLERK: Order in court. Please all rise.
The Supreme Court stands open in the name of Her Majesty the Queen.
Your Honour, the matter before you is between Charabelle Silverfox and Lynzee Silverfox, and Crown Leo Lane appears by video.
Chief Justice Duncan presiding.
THE COURT: Good afternoon, counsel.
MR. McDIARMID: Good afternoon.
MS. BUDGELL: Good afternoon.
MS. CUNNINGHAM: Good afternoon, Your Honour.
THE COURT: Good afternoon, Mr. Lane. Can you hear me all right?
MR. LANE: Can, thank you.
THE COURT: Okay. So this is a pre-trial conference at my request. And I want to review first where this case is at and where we're going as a result. And I want to start with the February 15th case management or pre-trial conference of this year, because I think that's when the matter began to be case-managed more vigorously. And at that point, it was - there was acknowledgement of the *Jordan* date of November 2021.
So in February, the estimated time for trial was five weeks. And that included three weeks for Crown evidence, and defence, five to seven days. And combined with the time required for jury selection, especially if there's a challenge for cause, which I am told that there is QOing to be in this case, plus the charge, plus submissions, plus deliberation, five weeks is a reasonable estimate, and assuming that evidence time is correct, not a generous estimate.
In February, the dates offered by the Court for this trial were July, September, and October. None of those dates worked for counsel. So we put a hold on January 1O to February 11, 2022.
Also in February, defence raised seven potential applications: First, disclosure relating to Vance Cardinal; second, a *Rowbotham;* third, the production of Crown notes from meetings with witnesses; fourth, a *voir dire* of Sgt. Moranis' (ph) narrative; fifth, a *voir dire* around jailhouse informant witnesses: six, an application about admissibility of clothing seized; and seventh, admissibility of calls from Whitehorse Correctional Centre, WCC.
In February, the dates were set for applications. May 14, 2021, for disclosure and possibly search and seizure, although that's not clear if that was set for May 14th. And three other pre-trial applications were set for August 30 to September 3, 2021.
Also in February, an issue was raised about a potential conflict

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relating to the WCC calls application for counsel to consider and advise. And the conflict related to Justice Campbell and Judge Chisholm.

On April 20th, the May 14th date for the disclosure application was released.

On May 11th, there was a new application filed by defence for *certiorari.*

On May 18th, the trial dates were confirmed for January 10 to February 11, 2022. And Charabelle Silverfox waived her 11(b) rights from October 4th to January 10th.

On June 14th, it was confirmed that Justice Campbell may be conflicted for the applications. The *Rowbotham* matter was still outstanding. The four applications were confirmed for August 3oth to September 3rd. And filing deadlines were set for August 6 and response by August 20th.

On August 26th, the *certiorari* application was heard. That was denied by a decision rendered October 13th.

On August 30th, the s. 8 *Charter* application and the disclosure application were to be heard. On August 30th, the defence advised that their application on the *Charter* issues had expanded to include breaches of s. 9 ands. 10(b). Defence and Crown had not discussed what the Crown's response would be to this or what evidence would be required for the expanded application. So on August 30th, the matter was adjourned for a day for those discussions to occur.

On August 31st, the defence served its amended notice for the *Charter* applications now under s. 8, 9, and 10(b). The Crown advised that they were not ready to respond, and so the applications did not proceed.

We did discuss on that day the other applications.

First, the WCC calls. The Crown had not disclosed, according to defence, of what they intended to rely on with respect to those calls, so the application could not be brought.

The disclosure application, the Crown was not sure if the RCMP needed to be present.

The jailhouse informant application was still a possibility. And there was - because there was no decision by the Crown on whether those witnesses were being called, that was not scheduled.

The Court on August 31st did express concern about trial dates, but did set new dates for the application: September 23rd for the disclosure application and October 4th, 5th, and 8th for the *Charter* applications.

On September 8th at a check-in, the Crown confirmed that they would have the disclosure summary related to Vance Cardinal by the end of that week, and the defence said that there could be further applications for disclosure after receiving the summary.

On September 14th, at another chambers date, the counsel advised that September 23rd would be used for witnesses for the *Charter* application as well as for the disclosure application. And counsel confirmed that the October dates should be sufficient to hear the *Charter*

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applications.

The application with respect to calls from WCC was still not confirmed. It was still a possibility. Disclosure still had not been provided by the Crown about what calls they were going to be relying on.

On September 23rd, we heard the evidence of Cpl. Boone (ph) for the *Charter* application, and we heard the Cardinal disclosure application. That decision was reserved.

On October 4th, the Court gave an interim ruling on the disclosure application. We continued to hear evidence on the *Charter* application.

October 5th, continued to hear evidence on the *Charter* application

October 7th, the October 8th date was adjourned because of illness of defence counsel and also a request by Crown for more time to prepare for argument.

October 13th was the decision on the *certiorari* application.

October 26th, there was more evidence on the *Charter* application and new dates were set. Those new dates were November 22nd for arguments on the s. 8, 9, and 10 *Charter* applications. And a new application - actually two new applications were filed on October 25th by defence relating to the wee calls. The two applications were a *Garifoli-*type application and a *Kang-type* application. So the dates for that were set on October 26th for December 9th and 10th.

On November 22nd we could not proceed with the argument because of the Crown's being required in a jury trial. Written submissions from the defence were received November 25th on the *Charter* applications.

The Crown's written submissions were received this morning, November 30th. And so we are going to proceed to argument today on the 8, 9, and 1O applications.

So the outstanding issues as I understand them to be are:

- First, completing the argument and any outstanding evidentiary issues which was raised as a possibility on November 22nd for the 8, 9, and 10 applications.

- The applications to exclude the wee calls. There are two applications. One would include an application for leave to cross-examine Cpl. Danison, which will have to be adjudicated on. So one would be the *Garifoli-type* application. And the other one would be the *Kang* application. And I note that today I received an application from the Crown for a summary dismissal of the *Kang* application. So that will have to be dealt with before we decide whether to proceed with it or not. 43

- If I rule that some of the evidence from the Garifo/i-type application is admissible, then the defence advises there will be a third application with respect to the calls about whether the prejudicial effect of them are outweighed by their probative value.

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was advised - the Court was advised of this for the first time on November 22nd.

- Defence also advised for the first time on November 22nd that they intend to bring an alternate suspect application.

- The defence also advised that they - on November 22nd - that they were still waiting for Cardinal disclosure, which has been ordered, and foot impression, whether the Crown will be relying on that.

- A decision is needed on the 24(2) of the exclusion of evidence after the - assuming that a *Charter* breach is found under ss. 8, 9, and 10.

- A decision is needed on the search warrants for the wee calls. That is the *Garifoli-type* application.

- A decision is needed on the *Kang* application, either a summary dismissal or proceed.

- A potential decision is needed on the probative value versus prejudicial effect after a ruling on the WCC calls.

- And as I understand it, there will be a challenge for cause which needs to be sorted out before the jury trial.

Defence counsel suggested last time that the Court could just give a yes or no answer on the exclusion of evidence applications with reasons to follow. I'm not prepared to do that. I consider these applications to be too complex and too important to give just a yes or no answer. Reasons will have to be provided with my decision.

As a result of all this, it's my view that it's not realistic or reasonable for this trial to proceed on January 10th. There is not enough time to hear the applications that are outstanding as of this date and for the Court to render decisions on those applications, especially given that the timing, that we are going into the holiday break.

So I want to ask first if counsel have any comments on my review and my conclusion.

Ms. Budgell?

MS. BUDGELL: I have some comments on some additional applications that might be coming down the pipes, Your Honour.

THE COURT: Okay.

SUBMISSIONS FOR LYNZEE SILVERFOX DEFENCE:

MS. BUDGELL: Back when we first filled out the pre-trial form, this was in and