SUPREME COURT OF YUKON

Citation: *R v Reeves*, 2023 YKSC 61

Date: 20231110
S.C. No. 22-AP014
Registry: Whitehorse

BETWEEN:

REX

RESPONDENT

AND

JOHN MICHAEL JOSEPH REEVES

APPELLANT

Before Justice K. Wenckebach

Counsel for the Respondent — Sarah Bailey

Counsel for the Appellant — Gregory Johannson-Koptyev

REASONS FOR DECISION

INTRODUCTION

[1] The appellant, John Reeves, was convicted of the offences of driving with a blood alcohol concentration of 80 mg% or higher, driving while prohibited, and breaching the terms of a release order. He is now appealing the conviction. He argues that the trial judge erred in allowing the Crown's request to re-open a *voir dire* conducted during the trial and in denying Mr. Reeves' application for a stay of proceedings because of unreasonable delay, pursuant to s. 11(b) of the *Charter*. He also argues that there was a reasonable apprehension of bias. The Crown opposes the appeal.

[2] The timeline for the trial proceedings is:

- November 6, 2020: police officers arrest Mr. Reeves;

- December 8, 2020: Mr. Reeves is charged;
- January 7, 2021: the matter is set for trial on June 17, 2021;
- June 17, 2021: the trial is adjourned because of lack of court time;
- June 24, 2021: the trial is scheduled for November 10, 2021;
- November 9, 2021: the trial is adjourned because the Crown with conduct of the case has fallen ill;
- November 18, 2021: the trial is scheduled for April 7, 2022;
- April 7, 2022: the trial commences. The Crown seeks to introduce the Certificate of Qualified Technician (the "Certificate") and the Designation of Qualified Technician (the "Designation"). The defence raises an issue with the certification of the technician, so the court declares a *voir dire*. After closing the *voir dire*, the Crown seeks an adjournment to research Mr. Reeves' objection to the certification of the technician, and the court asks the accused's counsel to provide written submissions as well. The trial is adjourned;
- April 29, 2022: Crown successfully applies to re-open the *voir dire*;
- May 12, 2022: the trial continuation date is set for June 13, 2022;
- May 24, 2022: defence files an application alleging undue delay pursuant to s. 11(b) of the *Charter;*
- June 8, 2022: 18 months have passed since the charges were laid;
- June 13, 2022: the trial is adjourned because Mr. Reeves has COVID-19. Defence counsel advises the court that Mr. Reeves no longer has issues with the certification. The trial is set to continue July 8, 2022;

- July 8, 2022: at the beginning of the proceedings Mr. Reeves is not present because his daughter has COVID-19 and he is caring for her. During discussions on this issue, the trial judge comments about the viability of the s. 11(b) *Charter* application and states that defence counsel was reluctant to set trial dates at the beginning of the process.
  Mr. Reeves does then attend in person. The trial is completed. The trial judge convicts Mr. Reeves on all charges; and
- January 20, 2023: the court hears the s. 11(b) *Charter* application and sentencing submissions. The trial judge denies the s. 11(b) *Charter* application and sentences Mr. Reeves.

RESULT

[3] For the reasons provided below, I dismiss the appeal.

ISSUES

A. Did the trial judge err in allowing the Crown to re-open the *voir dire*?

B. Was there a reasonable apprehension of bias?

C. Did the trial judge err in denying the s. 11(b) application?

ANALYSIS

A. Did the trial judge err in allowing the Crown to re-open the *voir dire*?

[4] I conclude that the trial judge did not err when he permitted the Crown to re-open the *voir dire*.

Proceedings at Trial

[5] During the trial on April 7, 2022, the Crown sought to introduce as evidence the Certificate and the Designation. Defence counsel challenged the qualifications of the technician, so the judge called a *voir dire*. At the conclusion of the *voir dire*, during

argument, defence counsel submitted that the person who signed the Designation was not authorized to do so. The court asked defence counsel for written submissions, and the Crown asked for time to respond. The proceedings were therefore adjourned. At the time of the adjournment, Crown had not yet finished calling all its evidence at trial.

[6] The Crown subsequently brought an application to re-open the *voir dire*, which was heard on April 29. In his decision on the application, the trial judge determined that he had broad discretion to re-open the *voir dire*. He assessed the inherent possible prejudice to the accused, and whether the fairness of the process would be affected if the Crown were permitted to reopen the *voir dire* (2022 YKTC 51 at para. 6). The court concluded that re-opening the *voir dire* would not prejudice Mr. Reeves and ordered that it be re-opened.

Appellant's Submissions

[7] Mr. Reeves submits that the trial judge had very limited discretion to permit the Crown to re-open the *voir dire*. He argues that, when trial counsel made his argument that the signatory of the Designation was not validly delegated, he revealed his own case to the Crown and court. He had therefore begun to meet the case against him. In accordance with *R v P(MB)*, [1994] 1 SCR 555, once the defence has begun to meet the case against them, the Crown may only re-open its case in very limited circumstances. Mr. Reeves submits that the requirements for re-opening were not met here, and the trial judge should not have allowed the Crown to re-open the *voir dire*.

[8] Mr. Reeves' argument concerns not only the judge's ultimate conclusion, but also his determination that he had broad discretion to permit the Crown to re-open its case. I will therefore examine the extent of the trial judge's discretion, and then determine whether the judge erred in ordering that the *voir dire* be re-opened.

Legal Principles

[9] The extent of the court's discretion to permit the Crown to re-open its case changes during the course of the trial. In the first phase of the trial, before the Crown closes its case, the trial judge has significant latitude in permitting the Crown to recall a witness, or to call an additional witness (*P(MB)* at 569).

[10] The second phase occurs after the Crown has closed its case but before the accused elects whether to call evidence. At that point, the court's discretion to permit the Crown to re-open its case is narrowed. The Crown will then be permitted to re-open its case "to correct some oversight or inadvertent omission by the Crown in its presentation of its case" (at 570) so long as there is no prejudice to the defence and justice requires it.

[11] The third phase starts after the Crown has closed its case and the defence has begun to answer the case against it. In the third phase, the Crown is permitted to re-open its case only in "the narrowest or most exceptional circumstances" (at 582). This includes, for instance, where conduct of the defence has contributed to the Crown's omission, or where the issue concerns one of form rather than substance (at 581).

[12] The key principle in determining whether to allow the Crown to re-open its case is whether the accused will suffer legal prejudice (at 568).

Trial Judge's Discretion

[13] I conclude that the trial judge was correct when he determined that he had broad discretion to order that the *voir dire* be re-opened.

[14] Defence counsel on appeal relies on *P(MB)* in support of his submission that the trial judge's discretion to permit the Crown to re-open its case was narrow. In my

opinion, however, defence counsel misconstrues *P(MB)*. The principle from *P(MB)* is not that the grounds upon which the Crown may re-open its case narrows at the point the defence reveals its case. Rather, *P(MB)* stands for the proposition that it is only once the Crown has closed its case and the defence has determined whether to call evidence, that Crown has a very limited ability to re-open its case.

[15] This interpretation of *P(MB)* is consistent with the Supreme Court of Canada's reading of the case, as found in *R v JJ*, 2022 SCC 28. In *JJ*, the accused submitted that defendants should not be required to provide evidence in pre-trial applications. In making this submission, the accused cited *P(MB)* and advanced similar arguments to those in the case at bar. The Supreme Court of Canada found that *P(MB)* was not applicable, stating at para. 166: "[i]n our view, [the appellant and intervener] have taken *P(MB)* out of context. The Court in that case discussed the specific concerns arising from the Crown reopening its case <u>after the defence had started to give evidence at trial</u>." (emphasis added).

[16] Another case that addresses the different phases of the trial is *R v Fleetham*, 2009 BCCA 379. There, the Crown had closed its case and the defence had indicated that it would not call evidence but would rely on the weaknesses in the Crown's case. The Court of Appeal for British Columbia upheld the trial judge's decision to permit the Crown to re-open its case. It noted that a rigid analysis of the stage of trial was not particularly important but stated that "[u]ntil the Crown has formally closed its case, and the defence elected, it cannot be said that the defence has begun to meet the Crown's case" (at para. 55).

[17] Here, the Crown had not yet closed its case and had further evidence to call. Unlike in *Fleetham*, the trial was unquestionably within the first phase of the trial. The

defence, had, therefore, not begun to meet the Crown's case. The trial judge had considerable discretion in determining whether to permit the Crown to re-open the *voir dire*.

[18] He took the appropriate factors into consideration and concluded that Mr. Reeves would not suffer any legal prejudice from permitting the Crown to re-open the case. The trial judge committed no error. I dismiss this ground of the appeal.

B. Was there a reasonable apprehension of bias?

[19] Counsel on appeal submits that the trial judge's conduct demonstrated reasonable apprehension of bias. He also argues that the trial judge considered whether there was a reasonable apprehension of bias, erroneously concluding that there was not.

[20] There is no merit to this argument.

[21] Counsel on appeal submits that the reasonable apprehension of bias arose during an appearance in which the trial judge stated that he "fully expect[ed]" the s. 11(b) *Charter* application to be withdrawn. He then indicated that he had done some calculations and had "difficulty seeing any argument", that a s. 11(b) argument would succeed, particularly because, having reviewed the record, he believed that Mr. Reeves' trial counsel had been reluctant to set trial dates at the beginning of the process. In the end, however, it emerged that the trial judge was mistaken in this belief.

[22] Although neither trial counsel nor the trial judge referred at any time to a recusal application or reasonable apprehension of bias, counsel on appeal submits that the trial judge believed that trial counsel alleged that there was a reasonable apprehension of bias. The trial judge therefore considered the issue and determined that there was no reasonable apprehension of bias.

[23] Appeal counsel argues that the implicit argument of reasonable apprehension of bias was in trial counsel's written arguments on unreasonable delay when he stated:

> It should be noted that on July 8, 2022, when counsel for the Accused broached the Jordan issue, the Court advised that the Court was not well-disposed to the Jordan application because the initial counsel for the Accused had 'displayed reluctance to set dates at the outset.' [Memorandum of Argument of the Accused, para. 29]

[24] Counsel submits that the trial judge interpreted this paragraph to be an argument about reasonable apprehension of bias, and responded by stating, in his decision (2023 YKTC 7 at para. 23):

> I note, as well, in considering this application that, during the initial discussion of the *Jordan* application with counsel on July 8, 2022, Mr. Drolet [trial counsel at the time] indicated that he would be reconsidering the application for *Jordan* relief based on the Court's invitation. Reference was made by the Court in that hearing to delays by Mr. Campbell [previous trial counsel] in setting the matter for trial, which could impact the *Jordan* dates. Having now had the benefit of transcripts from that time period, it is very clear that Mr. Campbell did not present any bar to setting early trial dates. The Court was incorrect in making those assumptions based on a review of the record of the proceedings. Mr. Campbell has the Court's apologies for that error.

[25] The only reasonable interpretation is that trial counsel, having set out the timelines, was pointing out that the trial judge misapprehended the facts, and the court, in turn, apologized. Nothing else can be read into these paragraphs. I dismiss this ground of appeal.

C. Did the trial judge err in denying the s.11(b) application?

[26] At trial, Mr. Reeves brought an application for stay of proceedings on the basis that there was unreasonable delay to get to trial. The trial judge rejected Mr. Reeves' application. Mr. Reeves submits that the trial judge erred in his decision.

[27] I conclude that the trial judge did not err.

Legal Principles

[28] In the Territorial Court of Yukon, unreasonable delay presumptively arises when a proceeding takes more than 18 months to go to trial. The 18-month period is calculated from the date of the charge to the end of trial, minus delay that is caused by defence's calculated or illegitimate actions. When the 18-month ceiling is reached, the Crown must establish the presence of exceptional circumstances, or a stay is warranted (*R v Jordan*, 2016 SCC 27 ("*Jordan*") at paras. 46-47).

[29] As this proceeding is an appeal, the standard of review must also be considered. The standard of review is two-fold: the review of the trial judge's attribution of delay is deferential, while the review of the trial judge's allocation of delay is on a standard of correctness (*R v Virk*, 2021 BCCA 58 at para. 13).

[30] Attribution of delay is "what or who caused a period of delay" (at para. 13). This includes, for instance, the conclusion that the Crown caused a period of delay because they were unavailable for trial dates or that the defence's actions were illegitimate. Allocation of delay is the application of legal principles to the facts, so as to categorize the period of the delay within the *Jordan* framework. Allocation is usually tied to attribution, but that is not always the case.

[31] A further example can show how these two concepts combine. A trial judge's finding that the Crown caused a period of delay because they were not prepared to set trial dates is attribution of delay and entitled to deference. If, however, the court then allocated the delay to the defence because the defence was also unavailable for trial dates, that would be an error of law and the standard of review on that issue would be correctness (at para. 14).

Appellant's Argument

[32] Mr. Reeves submits that the period for calculating delay should be calculated from the date of his arrest, rather than from the date the Information was laid. He also argues that the trial judge erred when he determined that the defence waived the delay between June 17 and November 9, 2021; when the trial was adjourned because it had been double-booked; and when he attributed to defence the delay between April 8-June 13, 2022, when the Crown sought an adjournment to respond to defence's challenge of the Certificate.

[33] In my analysis, I will first determine the correct date from which the *Jordan* period should be calculated; I will then calculate the period of delay in Mr. Reeves' matter; and finally, I will examine whether the trial judge erred in attributing and allocating delay to the defence.

Date upon which the Jordan Period Should Start Running

[34] Defence counsel submits that the *Jordan* period should not be calculated from the date the Information was laid, but from the date of the arrest of the accused. This argument was not raised at trial. Generally, courts do not entertain issues raised for the first time on appeal. However, as no prejudice is caused by deciding the question, and Crown did not object, I will consider the matter.

[35] It is settled law that the *Jordan* clock begins running when an Information is sworn against an accused or an indictment is laid against them (*R v Boima*, 2018 BCCA 297 at paras. 54-55). The *Jordan* period for Mr. Reeves therefore started running on the date he was charged.

Calculation of Delay in Mr. Reeves' Trial Proceedings

[36] Mr. Reeves was charged on December 8, 2020, and was convicted on July 8, 2022[1]. The *Jordan* threshold was reached on June 8, 2022, and total delay was 19 months. Mr. Reeves accepts that the period between June 13-July 8, 2022, is defence delay. Subtracting that period of delay, the *Jordan* threshold was surpassed by 6 days.

Allocation and Attribution of Delay: April 8-June 13 Adjournment for Crown to Respond to Defence Counsel's Challenge to the Certificate

[37] Defence counsel on appeal argues that the trial judge erred when he decided that trial counsel's objection to the Certificate constituted illegitimate tactics. I do not find this argument persuasive.

[38] First, defence counsel on appeal argues that the court was wrong when, in considering this issue, it stated at para. 12 of its decision: "[a] further defence delay arose as a result of an application without notice brought on April 7, 2022, challenging the authority of an official to designate an officer with certain powers" (2023 YKTC 7).

[39] Mr. Reeves' counsel submits that the trial judge did not correctly describe the legal issue. He states that the issue the trial judge raised was not about whether an official had the power to designate an officer with powers. Rather, it was about the identity of the person who signed the designation.

[40] Contrary to appeal counsel's submission, the issue was exactly as the trial judge described it. When raising the objection, counsel at trial for Mr. Reeves stated:

> And my position is that, pursuant to the Code, a lawful designation has to be either signed by the attorney general as set out in the relevant provision, but the attorney general

[1] The trial judge calculated the *Jordan* period from the date of charge to the date of sentencing. It is uncontroverted that the trial judge mistakenly included the period between conviction and sentencing in his calculation. However, this error does not have an impact on the analysis.

> is defined in s. 2 of the Code as including the deputy attorney general.
>
> Now, Nathalie Drouin is the deputy or at least was at the time the deputy attorney general, but she's not the person who signed that document. You can see that that document has been signed by somebody else because it says beneath it "per Nathalie Drouin", and in my submission, Nathalie Drouin cannot delegate – if she in fact did delegate – she is not able to delegate that authority to someone else to that, to designate someone. [Transcript of proceedings at trial at 15, l. 25]

[41] Trial counsel's argument was that only the Attorney General and the Deputy Attorney General have the authority to sign the Designation. The person who did sign it was neither and was therefore improperly delegated to sign the document.

[42] Counsel also argues that trial counsel did not, as the trial judge stated, bring an application. Instead, he simply objected to the admissibility of evidence. While true, this error is immaterial. There is a presumption of regularity with regards to a Certificate. Thus, upon the Crown filing the Certificate, it is taken to be true, unless there is probative evidence presented that it is not valid. In his decision the trial judge was simply stating that Mr. Reeves' counsel had not indicated before trial that he was challenging that presumption.

[43] Defence counsel on appeal also submits defence lawyers have an ethical duty to advance every reasonable argument on behalf of their client, including by taking advantage of the right to silence. When trial counsel raised the issue of the Designation for the first time at the trial, he was therefore acting both legitimately and ethically.

[44] A trial judge's decision about whether defence counsel's actions were legitimate are findings of fact and entitled to considerable deference. Appeal counsel has not

pointed to any errors in the trial judge's decision but simply seeks that I re-examine the issue. That is not my role.

[45] I therefore conclude that the trial judge did not err in concluding that the delay between April 8-June 13, 2022, was defence delay.

[46] As noted above, the period of delay for Mr. Reeves' charges to reach trial extended over the *Jordan* threshold by 6 days. The delay between April 8-June 13 was over 60 days. Subtracting this period from the total delay brings the delay to less than 18 months. As the delay is below the *Jordan* threshold, I do not need to consider whether the trial judge erred in deciding that Mr. Reeves waived the delay period from June 17-November 9, 2021. The trial judge's decision on the s. 11(b) *Charter* application is upheld.

CONCLUSION

[47] I dismiss Mr. Reeves' appeal.

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WENCKEBACH J.