Court of Queen's Bench of Alberta

Citation: R v Demetroff, 2022 ABQB 380

Date: 20220606
Docket: 200466381Q2
Registry: Wetaskiwin

Between:

Her Majesty the Queen

Respondent/Crown

- and -

Kardon Demetroff and Celeste Saddleback

Applicants/Accused

Reasons for Judgment
of the
Honourable Madam Justice J. A. Fagnan

I. Introduction

[1] Kardon Demetroff and Celeste Saddleback are jointly charged with kidnapping, robbery in relation to the victim's motor vehicle, and first-degree murder on April 12, 2020, near Maskwacis, Alberta. They have been in custody since early May 2020. Their joint trial is scheduled for November 7 to 25, 2022. Each accused seeks a stay based on breach of their s. 11(b) *Charter* right to a trial within a reasonable time.

[2] For the following reasons, the s. 11(b) applications are dismissed.

II. Chronology

[3] Although these are two separate s. 11(b) applications, I will review the joint chronology to provide a coherent context for counsel's arguments:

April 12, 2020 –date of alleged offences

May 5, 2020 – one count of second-degree murder laid against Mr. Demetroff

May 5, 2020 –Mr. Demetroff's first appearance before a justice of the peace, Mr. Collard acting as defence counsel for that day only; adjourned to May 7, 2020

May 6, 2020 - one count of first-degree murder laid against Ms. Saddleback

May 7, 2020 –first appearance for Mr. Demetroff in Provincial Court, Mr. Powell appearing as duty counsel; adjourned to retain counsel

May 7, 2020 – Ms. Saddleback's appearance before a Justice of the Peace; remanded into custody

May 12, 2020 – Ms. Saddleback's first appearance in Provincial Court, duty counsel appearing; matter adjourned to May 21, 2020, to retain counsel

May 21, 2020 – Mr. Collard noted as counsel of record for Mr. Demetroff; adjournment to receive and review disclosure; Mr. Scrase, on record for Ms. Saddleback, reserved election and plea

June 23, 2020 – Mr. Collard for Mr. Demetroff had not received disclosure; requested an adjournment

July 6, 2020 – Crown provided disclosure to both accused

July 7, 2020 – Mr. Collard for Mr. Demetroff sought disclosure; adjourned; Ms. Saddleback applied for release, denied bail on tertiary ground

July 21, 2020 –Mr. Collard for Mr. Demetroff requested Early Case Resolution from the Crown

July 28, 2020 – Ms. Saddleback's election of Queen's Bench jury trial was entered; adjourned for pre-trial conference (PTC), to coordinate dates

July 2020 – counsel for Mr. Demetroff filed Form A under s. 563.3

August 4, 2020 – Mr. Collard for Mr. Demetroff indicated that Form A was filed in July and that the parties were attempting to secure a date for a preliminary inquiry through the Case Management Office; pre-preliminary conference was scheduled, and matter adjourned to August 24, 2020

August 11, 2020 – PTC for Ms. Saddleback

August 18, 2020 – Mr. McBeath, agent for Mr. Collard for Mr. Demetroff, confirmed that a pre-preliminary conference had been scheduled for August 24, 2020; adjourned to that date

August 18, 2020 –Crown preferred separate direct indictments against each accused alleging first degree murder, kidnapping and robbery with a firearm

August 19, 2020 – Mr. Demetroff's pre-preliminary conference cancelled due to the direct indictment

September 3, 2020 - Ms. Saddleback's process transferred to Queen's Bench; matter adjourned to coordinate trial dates

September 8, 2020 –first appearance by Mr. Collard for Mr. Demetroff in Queen's Bench; process transferred; adjourned for scheduling, to receive instructions and for discussions with assigned Crown

September 15, 2020 – Queen's Bench jury trial dates of January 31 to February 18, 2022 held for Ms. Saddleback; defence could accommodate court offering of November 29 to December 17, 2021; Crown directed to confirm whether those dates worked with assigned prosecutor's schedule

September 22, 2020 – Mr. Demetroff's jury trial confirmed for March 7 to 25, 2022 by Ms. McBeath, student-at-law, agent for Mr. Collard; Crown indicated these were the "earliest dates"

September 29, 2020 - trial dates for Ms. Saddleback of January 31 to February 18, 2022 confirmed; note on endorsement: "no earlier trial dates"

November 6, 2020 – Mr. Scrase withdrew as counsel of record for Ms. Saddleback and Mr. King retained; trial dates maintained

November 17, 2020 – Mr. King confirmed as counsel for Ms. Saddleback

December 2, 2020 - Mr. Demetroff's PTC pre-booked for February 26, 2021

December 15, 2020 –Mr. Collard withdrew as counsel of record for Mr. Demetroff, Mr. Phypers goes on the record; trial dates of March 8 to 25, 2022 preserved

February 5, 2021 – PTC for Mr. Demetroff; he wished to re-elect to judge alone; DNA results had been received by police, but Crown had not yet received the report

March 17, 2021 - Crown received final disclosure and provided it to both accused, including witness transcripts, autopsy reports, DNA and Forensic lab reports, CODIS hit notification, FIS continuation report, Text App Tech Dump results, remaining officer notes, and ERC call information

June 18, 2021 – separate PTCs for Mr. Demetroff and Ms. Saddleback; Crown indicated intention to apply for joinder; Mr. Phypers agreed that the test for joinder was made out and would put that on the record at the next arraignment court appearance on June 29, 2021; Mr. King was not available for the March 7 to 25, 2022 trial dates, which were to be vacated, but could accommodate an extra week after the January 31 to February 18, 2022 trial dates, depending on Mr. Phypers' availability; Mr. Phypers had a *Jordan* application to be heard on July 16, 2021 for a matter scheduled during the Saddleback trial dates; if that matter would not be proceeding, he would be available

June 24, 2021 –replacement Indictment dated June 21, 2021 filed, joining the Demetroff and Saddleback matters

June 29, 2021 – counsel for Mr. Demetroff and Ms. Saddleback appeared; Ms. Saddleback's trial dates were January 31 to February 18, 2022; Mr. Demetroff's were March 7 to 25, 2022; Crown applied for joinder; Mr. Phypers indicated they "conceded that the test for joinder was made out" but stated that "any delay that

arises as a result of this joinder… I would put in the hands of the… Crown prosecution"; Mr. King, counsel for Ms. Saddleback, was not available for the Demetroff trial dates and those dates were vacated; Mr. Phypers had a scheduling conflict with the Saddleback trial dates but was awaiting the disposition of an unrelated application which would have freed him up for those dates; he indicated that he hoped to know within approximately two weeks whether he could be free on those dates; Mr. Phypers indicated his intention to re-elect to judge alone to assist with scheduling; Saddleback trial dates held pending confirmation Mr. Phypers was available; matter adjourned to July 20, 2021 to await the disposition of Mr. Phypers' unrelated matter

July 20, 2021 - Mr. Phypers was still awaiting news of his unrelated matter to determine whether he was available for the Saddleback trial dates and requested adjournment to August 10, 2021; Saddleback trial dates continued to be held

August 6, 2022 – parties exchanged correspondence: Mr. Phypers had indicated he was not available between January and June 2022 with the exception of May 2022 but the Court did not have any availability in May 2022; next available dates after June 2022 were November 7 to 25, 2022; J. Wegener for Ms. Saddleback indicated that he and Mr. King could accommodate those dates and would be available for earlier dates as well

August 10, 2021 – Queen's Bench jury trial re-scheduled to November 7 to 25, 2022; S. King and Crown counsel were still available for Saddleback trial dates January 31 to February 18, 2022; Crown was seeking an indication as to whether Mr. Phypers was available on those dates; Mr. Tootoosis, agent for Mr. Phypers, reported that according to his calendar he was still booked for a *Charter* argument for those dates; Crown asked to set the trial for November 7 to 25, 2022; Ms. Bullerkist, agent for Mr. King, said he had earlier availability and could make the January dates work; Crown indicated the parties had been trying to get earlier dates; Saddleback trial dates were preserved in case disposition in Mr. Phyper's unrelated matter gave him availability for January 31 to February 18, 2022.

September 10, 2021 - PTC was held; Mr. Phypers advised he was unavailable for the Saddleback trial dates; trial dates of January 31, 2022, to February 18, 2022, released

November 9, 2021 – Larry Hobden, Senior Court Leader of Wetaskiwin Court of Queen's Bench, emailed all parties advising that the Court now had three weeks available from March 28 to April 14, 2022; Crown responded it was available for those dates; Mr. King, counsel for Ms. Saddleback, advised he was not available for those dates; Mr. Phypers, counsel for Mr. Demetroff, did not respond to the email

December 6, 2021 – bail application for Mr. Demetroff denied on secondary and tertiary grounds

December 17, 2021- Krista Bremness, paralegal for Crown Prosecutor's Office, asked Larry Hobden to canvas a summer sitting for either Wetaskiwin or Edmonton; Mr. Hobden emailed the trial coordinator requesting consideration for

a summer trial; Mr. Hobden subsequently advised in a phone conversation that he was unable to secure a summer sitting

March 15, 2022 –matter was brought forward as Mr. Demetroff had retained new counsel; Mr. Phypers withdrew as counsel, Mr. Craig and Ms. Shiskin went on the record; they indicated they wished to preserve the scheduled trial dates and June 2 and 3, 2022 for this *Jordan* application; Ms. Bullerkist, agent for Mr. King, also instructed to maintain both sets of dates

III. Analysis

[4] Section 11(b) of the *Charter* entitles any person charged with an offence the right to be tried within a reasonable time. The Supreme Court in *R v Jordan*, 2016 SCC 27 and *R v Cody*, 2017 SCC 31 established a ceiling of 30 months for cases going to trial in superior courts, beyond which the delay is presumptively unreasonable. The presumptive ceiling accounts for acceptable institutional and inherent delays and includes reasonable time for defence preparation, requests, and motions, even when the court and the prosecution are ready to proceed.

[5] In *R v Mamouni*, 2017 ABCA 347 at para 57, leave denied [2018] SCCA No 176, the Court of Appeal endorsed the summary of the *Jordan* analytical framework set out in *R v Coulter*, 2016 ONCA 704 at paras 34 to 59.

A. Step 1: Calculate Net Delay

1. Total Delay

[6] The total delay from the date of the charges to the actual or anticipated end of trial is 30 months and 21 days for Mr. Demetroff, and 30 months and 19 days for Ms. Saddleback.

2. Defence Delay

[7] Net delay is determined by subtracting defence delay from the total delay. Defence Delay may result from:

a. Waiver

[8] Neither accused clearly and unequivocally waived their s. 11(b) rights in this case.

b. Delay caused solely by the conduct of the defence

[9] Both accused submit that no period of delay was caused solely by the conduct of the defence.

[10] Crown submits that there is total defence delay of 5 months and 23 days in the Demetroff matter, and of 1 month and 14 days in the Saddleback matter.

i) Adjournment Requests by Mr. Demetroff's counsel

[11] Mr. Phypers asked for adjournments from June 29 to August 10, 2021 pending the outcome of an application in an unrelated matter.

[12] Mr. Demetroff's counsel argues this is inherent or intake delay, which was not occasioned solely or directly by defence, but rather by the Crown's late joinder application. Counsel submits that the Crown was on notice that defence would take the position that any

delay caused by joinder would fall to the Crown. Had the Crown joined the parties when it preferred an indictment against Mr. Demetroff, this delay would not have been necessary as the scheduling issue would not have arisen. Counsel submits the decision to await a resolution in another matter that could free up counsel's schedule was an active good faith step to reduce delay by attempting to preserve the Saddleback trial dates. Moreover, during that adjournment, the parties began to canvass alternative dates.

[13] Crown argues that these requested adjournments to await disposition of an application in an unrelated matter resulted in delays solely caused by Mr. Demetroff's counsel and amounted to defence action that was not taken to respond to the charges in this case. Crown submits that Mr. Demetroff cannot request adjournments and then use them to argue that he has not been tried within a reasonable time.

[14] The initial adjournment request on the record on June 29, 2021, was due to an application in another matter scheduled for July 16, 2021. Mr. Phyper indicated that he hoped to know within approximately two weeks whether he could be free on the January/February 2022 dates. The matter was adjourned for three weeks - to July 20, 2021 - for that purpose. On July 20, 2021, Mr. Phypers was still awaiting news of the resolution of his other matter. Mr. Phypers requested a further adjournment to August 10, 2021. On August 10, 2021, Mr. King and Crown counsel were still available for the Saddleback trial dates in January/February 2022. Crown was seeking an indication as to whether Mr. Phypers was available on those dates. Mr. Tootoosis appeared as agent for Mr. Phypers, checked Mr. Phypers' calendar and reported he was unavailable, and the Crown asked to set the trial for November 7 to 25, 2022.

[15] Although counsel for Mr. Demetroff submits these adjournment requests were positive active steps in this case, they were, in fact, adjournments granted at his request due to an unrelated matter which delayed scheduling of the trial dates in this matter. They were caused solely and directly by Mr. Phypers. The initial adjournment was not unreasonable as he expected to know within two weeks whether he would be available for the Saddleback trial dates. However, three weeks later he did not have an answer and there was no indication as to when he could then reasonably expect that the decision in the unrelated matter would be rendered. Mr. Phypers did not appear on August 10, 2021. The agent who appeared for Mr. Phypers on that date did not give any further information about when that decision would reasonably be expected, and the Crown requested to set dates without further awaiting Mr. Phypers' news on the outcome in relation to his other matter.

[16] In the result, the initial adjournment of 21 days reflected a non-frivolous step by defence counsel to seek a short adjournment to determine availability for the Saddleback trial dates based on a time estimate for an expected decision in the other matter. However, there was no similar rationale for the subsequent adjournment of 20 days from July 20, 2021, to August 10, 2021, other than an expectation that a decision would be rendered at some unknown point in the future. As such, it became a frivolous adjournment request. Nor was it an action legitimately taken to respond to these charges. Therefore, this 20-day second adjournment constitutes defence delay in relation to Mr. Demetroff.

ii) Unavailability

Mr. Demetroff

[17] Crown notes that three sets of trial dates were provided where the Court and Crown were ready to proceed with the joint trial but at least one of the Applicant's counsel was not: January 31 to February 18, 2022; March 7 to March 25, 2022; and March 28 to April 14, 2022.

[18] The trial dates of March 7 to March 25, 2022 were originally accepted on September 21, 2020, but were released on June 29, 2021 after co-counsel for Ms. Saddleback indicated he was unavailable.

[19] Mr. Phypers was unavailable for the Saddleback trial dates in January/February 2022 which were provided to him no later than June 18, 2021, during a PTC when joinder was discussed, approximately seven months prior to the start date.

[20] The trial dates of March 28 to April 14, 2022, were provided to Mr. Phypers on November 9, 2021, by email, approximately four months prior to the start date. Mr. Phypers did not respond. In subsequent scheduling discussions, it was communicated that he had indicated he was unavailable until after June 1, 2022, except for May. The trial dates of November 7 to 25, 2022 were the Court's first available trial dates after June 1, 2022.

Ms. Saddleback

[21] Ms. Saddleback's original trial dates were released in September 2021 after Mr. Phypers did not confirm his availability. The other two sets of trial dates were rejected by Ms. Saddleback's counsel due to Mr. King's unavailability.

[22] Mr. King was aware of the March 2021 Demetroff trial dates in at least June 2021, approximately seven months prior to the start date. He was unavailable to proceed when the Crown, Court and co-counsel were available to proceed.

[23] Mr. King was advised of new March trial dates on November 9, 2021, by email, approximately four months prior to the start date. He was unavailable to proceed when the Crown and Court were available to proceed.

Characterization of Delay due to Unavailability

[24] The parties disagree on how to properly characterize delay due to defence unavailability for trial with these jointly charged accused. Crown submits that each defence counsel's unavailability is delay in relation to that counsel's client. Counsel for the Applicants submit that Crown caused all of the delay by the timing of the joinder of the accused and no related delay should be attributed to them.

[25] The majority in *Jordan* stated:

> 64 ... the defence will have directly caused the delay if the court and the Crown are ready to proceed, but the defence is not. The period of delay resulting from that unavailability will be attributed to the defence. However, periods of time during which the court and the Crown are unavailable will not constitute defence delay, even if defence counsel is also unavailable.

[26] Counsel noted that there is some uncertainty in the case law in relation to a number of issues relating to delay in cases of jointly charged accused.

[27] The majority in *R v Gopie*, 2017 ONCA 728 took an individualized approach to the attribution of defence-caused delay in cases of jointly charged accused. In *Gopie*, the Court of Appeal held at para 142 that provided it is in the best interests of justice to proceed jointly against co-accused, delays resulting from the fact that there are jointly charged accused are considered under the exceptional circumstances analysis in *Jordan*.

[28] The Supreme Court in *R v Yusuf*, 2021 SCC 2 declined to address the issue of whether and in what circumstances multiple accused should be treated communally as opposed to individually when assessing defence delay under s. 11(b). The Court of Appeal in that case (*R v Pauls*, 2020 ONCA 220) had cited *R v Albinowski*, 2018 ONCA 1084, *R v Brissett*, 2019 ONCA 11 and *R v Singh*, 2016 BCCA 427 in which the Courts held that an individualized approach to calculating delay may not be appropriate where accused persons are proceeding through the system as a collective and scheduling challenges arise "directly and inevitably" from their joint situation: *Albinowski* at para 37. See also *R v Chung*, 2021 ONCA 188 at para 195, leave denied on other grounds [2021] SCCA No 320.

[29] The Court of Appeal in *Pauls/Yusuf* concluded that certain delays resulting from one counsel's unavailability were the direct result of scheduling challenges arising from the joint prosecution and were neither predictable nor within the control of the Crown. Therefore, such delays were deducted as defence delay in relation to the accused whose counsel was unavailable and as delay arising from a discrete event in relation to the other accused. Where all counsel, including the Crown, were unavailable for some periods during a span of time, the trial judge allocated some of the delay jointly to the defence and the remaining delay to the Crown. The Court of Appeal commented at para 53 that where appropriate, this form of communal allocation may avoid microscopic assessments of delay periods, a practice of which the Supreme Court disapproved in *Jordan*.

[30] In *R v Jeha*, 2019 ABQB 44, aff'd 2020 ABCA 453, leave denied [2021] SCCA No 48, the Court reviewed Ontario jurisprudence including *Gopie*, and the Alberta cases of *Mamouni* and *R v Mullen*, 2018 ABQB 831, concluding that *Jordan/Cody* established and intended to establish a nearly bright line rule ascribing unavailability of defence counsel as defence delay.

[31] The Applicants' counsel distinguish these "bright-line" decisions as they did not deal with rescheduling, citing *R v Pugh*, 2021 BCCA 293 at para 73, *R v Nazarek*, 2017 BCSC 2340 at para 135 and *R v Baron*, 2017 ONCA 772 at para 50 regarding the need to assess the effect of relatively small timing delays that have a cascading effect. Defence says the proximate and dominant cause of delay in this case was the Crown's decision to wait to join the two accused's matters. The Crown decided to do so even though it was on notice that defence counsel for Mr. Demetroff was booked for the dates scheduled for the Saddleback trial, and there was a real risk of a presumptive breach. The Applicants' counsel rely on the pre-*Jordan* case of *R v Godin*, 2009 SCC 26 for the proposition that defence counsel are not required to hold themselves in a state of perpetual availability - they are only required to be reasonably available.

[32] Crown in this case does not attempt to attribute periods of one counsel's unavailability to the other accused. Crown argues that an accused cannot use their own counsel's unavailability for trial as both a sword for bringing a delay application, and a shield against deductions of defence delay or exceptional circumstances in the application: *R v Wu*, 2017 BCSC 2373 at para 64, cited in *Jeha* at para 42.

[33] Further, Crown cites *R v Balogh*, 2020 BCCA 96 at para 25 in which the Court stated that *Godin* does not stand for the categorical proposition that when the Crown is the cause of an adjournment, all delay until defence counsel has availability to reset the matter must be attributed to the Crown; rather, common sense must be used in the allocation of responsibility for delay.

[34] In *R v Grant*, 2022 ONCA 337, although the trial judge had applied the individualized approach espoused by the majority in *Gopie*, she had noted that neither co-accused had applied for severance and, in any event, there could never have been a legally justifiable severance in the circumstances as the interests of justice required a joint trial. The Court of Appeal stated that while counsel may not be required to hold themselves in a perpetual state of availability, a court is entitled to take into account the reasonableness of the length of time a holder of the s. 11(b) right wishes to delay the start of a trial in order to have counsel of his choice.

[35] At the time Crown applied for joinder in this case, defence counsel acknowledged that joinder was appropriate in the circumstances. There was no objection to the joinder application. There was no application to sever at any point in time, in particular when it appeared scheduling might become an issue. Defence was made aware of the joinder and scheduling issue at least seven months prior to the Saddleback trial dates. This was not on the eve of trial. To put it in context, Mr. Phypers went off the record as Mr. Demetroff's counsel and current counsel came on in March 2022, less than eight months before the current trial dates and two and a half months before the two days scheduled for this application. It is difficult to square that information with the argument that the timing of the Crown's joinder decision did not reasonably allow for scheduling by defence counsel.

[36] Three sets of trial dates were proposed and rejected for the period from January to June 2022. The Court and Crown were available for all of the dates proposed. The Crown inquired as to the possibility of summer sittings, which were not available from the Court. The next earliest dates were the current trial dates.

[37] While I am mindful of the Applicants' argument that the Crown should have applied for joinder earlier and that defence is not required to remain perpetually available, I am not persuaded that the circumstances of this case justify departing from the principle that each accused bears the delay relating to periods when Crown and Court are available, but the accused's own counsel is not.

c) Calculation: Mr. Demetroff

[38] Mr. Demetroff's counsel was not available for the January/February 2022 dates and did not respond with respect to the proposed dates of March 28 to April 14, 2022. The Court, Crown and Ms. Saddleback were available to proceed on the earlier dates; the Court and Crown were available to proceed on the later dates. This amounts to additional defence delay of 37 days attributable to Mr. Demetroff.

d) Calculation: Ms. Saddleback

[39] Ms. Saddleback's counsel was not available for the March 7 to March 25, 2022, dates or for the March 28 to April 14, 2022, dates. Court and Crown were available to proceed on those dates. Mr. Demetroff was available to proceed on the earlier dates. This amounts to defence delay totalling 35 days attributable to Ms. Saddleback.

B. Step 2: Determine the Presumptive Ceiling

[40] The presumptive ceiling is 30 months for cases in superior courts.

C. Step 3: Calculate Net and Remaining Delay

[41] Deducting the defence delay of 20 days in Mr. Demetroff's case for the second requested adjournment and the unavailability of counsel for two sets of trial dates totalling 37 days results in a deduction of 57 days for Mr. Demetroff.

[42] Deducting defence delay in relation to unavailability of counsel for two sets of trial dates results in a deduction of 35 days for Ms. Saddleback.

[43] As a result, the net delay for each Applicant is below the presumptive ceiling and therefore presumptively reasonable.

1. COVID-19 Adjournments as a Discrete Event

[44] Although the net delay falls below the presumptive ceiling, I will address Crown's submission that the imposition of COVID-19 measures by the court administration constituted an exceptional circumstance as a discrete event which was reasonably unforeseen and unavoidable, and not able to be reasonably remedied once it arose. Crown reasons that some time should be deducted in recognition of the impact on scheduling.

[45] The Court's Master Orders 3, 4 and 5 resulted in adjournments of criminal proceedings and trials for multiple week periods from May 5, 2020, to June 8, 2021. Resulting adjournments have been taken into account on other s. 11(b) applications where the proceedings were in fact adjourned as a direct result: see, for example, *R v Kalashnikoff*, 2021 ABQB 327 at paras 13-34; *R v Pettitt*, 2021 ABQB 84.

[46] In *R v Ghraizi*, 2022 ABCA 96, Crown made arguments similar to those raised here. The Court of Appeal restored the trial judge's decision which included a determination that no delay after the rescheduled date due to a COVID-19 adjournment was occasioned by the pandemic reduction of services.

[47] As the Master Order adjournments do not appear to have directly resulted in adjournment of any trial dates or relevant proceedings in these matters, their impact on the delays relating to these Applicants cannot be quantified as an exceptional discrete event.

D. Step 4: Remaining Delay is Greater than the Presumptive Ceiling

[48] The remaining delay is not greater than the presumptive ceiling.

E. Step 5: Net Delay or Remaining Delay is Less than the Presumptive Ceiling

[49] The Applicants submit that even if the net or remaining delay is less than the presumptive ceiling, the delay is unreasonable as it should have taken much less than 30 months to bring this matter to trial.

[50] The *Jordan* framework at paras 48, 82-91, 105, allows for a finding of a breach of s. 11(b) even where the presumptive ceiling has not been reached. The onus is on defence. A stay may issue in such a case where the defence establishes that:

a) it took meaningful steps to demonstrate a sustained effort to expedite the proceedings, and

b) the case took markedly longer than it reasonably should have. The reasonable time requirement will depend on factors including Crown efforts to expedite the proceedings, local considerations and the complexity of the case.

2. Meaningful Steps by Defence to Expedite Proceedings

[51] The Court in *Jordan* at para 137 and *Cody* at para 36 emphasized that a proactive approach is required to prevent unnecessary delay by targeting its root causes, and that all participants in the criminal justice system share this responsibility.

[52] With respect to the duty on defence, the majority in *Jordan* held:

> 85 To satisfy this criterion, it is not enough for the defence to make token efforts such as to simply put on the record that it wanted an earlier trial date. Since the defence benefits from a strong presumption in favour of a stay once the ceiling is exceeded, it is incumbent on the defence, in order to justify a stay below the ceiling, to demonstrate having taken meaningful and sustained steps to be tried quickly. While the defence might not be able to resolve the Crown's or the trial court's challenges, it falls to the defence to show 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. At the same time, trial judges should not take this opportunity, with the benefit of hindsight, to question every decision made by the defence. The defence is required to act reasonably, not perfectly.

[53] In a recent comment on defence's duty to act, the majority in ***R v JF***, 2022 SCC 17 noted at para 36 that by the time the trial dates are set, the parties are generally in a position to know whether the trial delay will exceed the applicable presumptive ceiling, and the defence can raise any concerns it may have.

[54] Crown submits that defence counsel have made no efforts to reduce trial time despite multiple PTCs. Crown notes that no progress has been made which would enable the Crown to reduce the 20 anticipated Crown witnesses and the total trial time.

[55] The Applicants submit their counsel discharged the onus to take meaningful steps to expedite proceedings, noting that defence is expected to act reasonably, not perfectly.

[56] Mr. Demetroff's counsel did put on the record that he would take the position that delay resulting from the Crown's joinder of the accused should be attributed to the Crown. However, according to *Jordan*, this was simply a "token" step.

[57] Mr. Demetroff's counsel submits that the adjournment requests awaiting the decision in the unrelated matter were aimed at preserving trial dates. I have found that the first adjournment was not frivolous. However, once it was clear a decision would not be forthcoming when anticipated, the further adjournment was unjustified and unproductive.

[58] Both Applicants take the position that the timing of the Crown's joinder decision essentially sealed their fate in terms of a s. 11(b) breach due to delay, characterizing it as a "ripple" that led to a cascading delay. However, no defence counsel opposed the Crown's joinder

application for any reason, including on the basis that it was late and would result in breach of their s. 11(b) rights. Nor was there any application to sever once it became apparent that scheduling of the trial in a timely fashion would be an issue. The November 2022 trial dates were set in August of 2021. Therefore, defence counsel were aware of the s. 11(b) implications of the new trial dates for well over a year.

[59] While defence counsel did participate in scheduling discussions (except for Mr. Phypers' failure to respond to the November 9, 2021, email), these discussions, initiated by the Crown, do not amount to proactive steps by defence to expedite the trial.

Did the Case take markedly longer than it reasonably should have?

a. Crown Efforts to Expedite the Proceedings

[60] The Applicants acknowledge that the Crown took steps to expedite the proceedings. For example, Crown assisted in coordinating PTCs, actively took steps to accommodate scheduling, and preferred a direct indictment in each case approximately four months after the initial charges were laid.

[61] While there were two sets of trial dates for defence to consider following joinder, the Crown also canvassed alternative dates throughout July and August of 2021 and was able to obtain and offer in November 2021 alternative trial dates of March 28 to April 14, 2022. When those dates were rejected by counsel, the Crown canvassed alternative trial dates at both Wetaskiwin and Edmonton courthouses during the summer months. Unfortunately, the Court had no summer availability for a three-week jury trial.

[62] In all of the circumstances of this case, the Crown's conduct does not reflect the culture of complacency towards delay which the Court in *Jordan* sought to address.

[63] However, the Applicants say that the Crown's timing of its decision to join the accused overshadows its efforts to expedite the matter. That brings me to consideration of the complexity of the case.

b. Complexity of the Case

[64] The Crown submits that this matter is complex. In addition to the fact that the interests of justice strongly favour proceeding jointly, there is disclosure of approximately 4,700 pages and 49 hours of audio recordings, and it is anticipated Crown will call numerous lay witnesses and experts including DNA experts, firearms experts, and a medical examiner. Crown notes that no significant admissions have been made to date by either accused which would justify reducing the 20 anticipated Crown witnesses and the total trial time.

[65] The Applicants argue that this matter is not complex. They note there are only three charges, all stemming from the same date and series of events. The central issue is identity. *Voir dires* are likely to be held on evidentiary matters including hearsay statements and similar fact evidence. There may be an ancillary issue as to whether, if identity is established, advanced intoxication is sufficient to negate the *mens rea* required for murder. The Applicants say that these issues and the evidence are not particularly complex. There are only two co-accused. The only genuinely novel issue is a constitutional challenge to s. 231(5)(e) of the *Criminal Code*.

[66] The Applicants cite *R v Klassen*, 2018 ABCA 258 at para 102 in which the Court explains that while the Crown need not prove a strict causal connection between complexity and

delay, there must be some connection or link. They submit that even if this Court is satisfied that this case is exceptionally complex, such complexity did not contribute to delay.

[67] The Applicants again argue that the Crown was tardy in applying for joinder. They argue that the Crown should have anticipated the need for joinder as both files were in court on May 21, 2020, both files then proceeded in a similar fashion and the Crown preferred separate direct indictments against each Applicant around the same time in August 2020. Nevertheless, Crown joined the indictments many months later.

[68] The Crown received final disclosure in March 2021, including witness transcripts, autopsy reports, DNA and Forensic lab reports, CODIS hit notification, FIS continuation report, Text App Tech Dump results, remaining officer notes, and ERC call information. The Crown subsequently provided notice of its intention to apply for joinder on June 18, 2021, filed a replacement Indictment on June 24, 2021, and applied for joinder on June 29, 2021, roughly 15 weeks after receiving final disclosure. Crown does not take the position that the final disclosure contained surprising elements that led to joinder, simply that the Crown has an obligation to continually re-assess each case in the interests of justice. In doing so, it came to the conclusion that it was no longer justified to proceed separately and risk inconsistent verdicts, and therefore joinder of the accused was ultimately necessary in this case in the interests of justice.

[69] There is nothing in the material before the Court to suggest that the joinder decision or the timing of that decision was abusive, improper or unreasonable as an exercise of the Crown's discretion. Nor have the Applicants argued that to be the case. Defence counsel were aware of the joinder seven months before the first scheduled set of trial dates. The joinder inevitably resulted in the need to coordinate two defence schedules, rather than one.

[70] The majority in *Jordan* at para 77 observed that proceeding jointly against multiple co-accused, so long as it is in the interest of justice to do so, may impact the complexity of the case.

[71] In *Gopie* at para 142, the majority of the Court of Appeal held that provided it is in the best interests of justice to proceed jointly against co-accused, delays resulting from the fact that there are jointly charged accused are considered under the exceptional circumstances analysis in *Jordan*.

[72] In *R v Fitzpatrick*, 2021 ONSC 647, the Court in considering delay in the context of a severance application held that some degree of accommodation is necessary to give weight to the strong preference for joint trials, noting that in both *Jordan* and *Gopie* it was held that on the grounds of complexity, multi-accused trials may justify a departure from the *Jordan* ceiling. The Court in *Fitzpatrick* noted:

> 13 This only makes sense. A multiple accused trial will almost inevitably require extra time to schedule and to conduct. The situation in the instant case of one lawyer being available for a proposed trial date but not the other is common. To say that in every case, the 30-month delay limit from *Jordan* must inevitably pre-empt the powerful public interest in joint trials would be unsound...

[73] The Applicants argue that this case was straightforward, pointing to *R v Belle*, 2018 ONSC 7728 for the proposition that the time required to obtain earlier trial dates was a "ready-made yardstick of the reasonable time requirements". They conclude that this trial could have been completed within 19 months.

[74] In *R v Campbell*, 2022 ONCA 223 at paras 24-28, the Court considered *Belle* and observed that the first trial date does not necessarily provide a marker for the reasonable time requirements of a case, for example, where there are issues with co-accused. The Court commented that there is a difference between when a trial might be completed and when it should be completed, citing the statement in *R v KJM*, 2019 SCC 55 at para 107 to the effect that the issue is not whether the case should reasonably have been completed in less time, rather it is whether the case took "markedly longer" than it reasonably should have. The Court in *Campbell* at para 31 further stated that it will be self-evident that cases in which there are more than one accused will likely take longer to get to trial because of the need to accommodate the schedules and demands of more parties and more counsel, citing *Jordan* at para 77.

[75] In *R v Arthur*, 2021 ONSC 6982 at paras 112-114, the Court accepted that the applicant could have obtained earlier trial dates if the Crown had agreed to sever him from the joint information, however the Crown's position was not arbitrary, and the Court considered it to be reasonable noting that the applicant chose not to apply for severance.

[76] Crown submits that although the decision occurred 13 months into the 30-month presumptive ceiling, the decision to join accused did not, on its own, cause unreasonable delay. While the matters were joined, the Court and Crown were available for three separate sets of long trial dates in the spring of 2022. Had both co-counsel been available for any of these three sets of trial dates, this matter could have been completed well within the 30-month presumptive ceiling.

[77] The onus is on the Applicants to establish that this case will have taken markedly longer than it should have. Given all of the features of this matter, a certain level of complexity in this case arose from the fact that there are jointly charged accused which resulted in the case taking longer than it would have if the matters had proceeded separately.

[78] The Applicants invite the Court to speculate that the joint trial could have been scheduled for the first trial dates if the Crown had decided to apply for joinder earlier. This would require the Court not only to determine that the Crown should have exercised its discretion to join the accused at some undetermined earlier point in time, but also that scheduling issues would not have arisen at that time if the Crown had done so. There is no basis for the Court to reach either of these conclusions.

c. Local Considerations

[79] I have opined that the COVID-19 adjournments do not amount to a quantifiable discrete event in this case as defined in the *Jordan* case law.

[80] However, in determining whether this case will have taken markedly longer than it should have in relation to what is reasonable, the stress on our system of justice in Alberta resulting from the pandemic cannot be ignored.

[81] Although speaking in terms of exceptional circumstance, the Court in *Fitzpatrick* at para 19 remarked: "if a once in a century pandemic with the impact we have seen upon every aspect of human life is not an exceptional circumstance, then what is?"

[82] Further, courts have observed that "the criminal justice system is not a tap that can be turned off, then turned on and pick up where everything left off": *R v Boyko*, 2022 ABPC 27 at para 39, 25-47, *R v Moeketsi*, 2021 ABPC 99 at para 60.

[83] The impact of COVID-19 on scheduling in the justice system was entirely outside the control of the Crown. The pandemic necessitated establishment of offsite jury trial facilities with sufficient space to safely conduct jury selection and jury trials. These facilities were not up and running until the fall of 2020. Jury trials were paused throughout the province from March 15, 2020 until September 2020. The first jury selection in Wetaskiwin did not occur until October 2020. This was a relatively short pause in comparison with some other Canadian jurisdictions thanks in very large part to phenomenal effort on the part of the Queen's Bench judicial administration. Despite considerable work by justice system participants to anticipate and address the backlog of cases that has resulted from the initial and subsequent adjournments, there is no doubt that since the charges were initially laid against these Applicants, lead times to trial have been affected by the COVID-19 pandemic itself and related measures. Wetaskiwin is a smaller judicial centre which can only accommodate one jury trial at a time and does not overbook for that reason. In considering what constituted reasonable delay in the circumstances, it is a testament to the diligent work of court coordinators and other justice system participants that it was possible to make available long trial dates in this matter throughout the spring of 2022. Again, unsuccessful inquiries were made to attempt to create availability during the summer of 2022.

[84] Despite the challenge posed by the pandemic, Crown and the Court worked diligently toward offering reasonably early trial dates.

d) Prejudice

[85] Finally, the Applicants submit that prejudice to the accused is relevant to the analysis where the ceiling has not been surpassed, citing *R v Lai*, 2018 BCSC 867 at para 236, aff'd 2021 BCCA 105, aff'd 2021 SCC 52, *R v Patrois*, 2018 ONSC 934 at para 61 and *R v Mitchell*, 2017 ABQB 717. The Applicants note that the co-accused, presumptively innocent, youthful Indigenous offenders, will have been in pre-trial custody subject to COVID-19 conditions, for over 2½ years by the date of trial.

[86] Crown notes that both of the Applicants had bail reviews in Queen's Bench and were denied release, and that neither one took any steps to oppose joinder or seek severance.

[87] As for any undue prejudice resulting from the conditions of the Applicants' pre-trial custody, nothing herein precludes a *Charter* application for an appropriate remedy if warranted.

e) Conclusion

[88] Charges will only be stayed where the delay falls below the presumptive ceiling in rare and clear cases. The majority in *Jordan* held:

> 91 Determining whether the time the case has taken markedly exceeds what was reasonably required is not a matter of precise calculation. Trial judges should not parse each day or month, as has been the common practice since *Morin*, to determine whether each step was reasonably required. Instead, trial judges should step back from the minutiae and adopt a bird's-eye view of the case. All this said, this determination is a question of fact falling well within the expertise of the trial judge.

[89] In all of the circumstances of this case, the Applicants have not established that the case took markedly longer than it reasonably should have.

IV. Conclusion

[90] The delay with respect to each Applicant is presumptively reasonable. Neither Applicant has established that the case will have taken markedly longer than it reasonably should have.

[91] It follows that neither Applicant has established a breach of their s. 11(b) right and therefore both applications to stay the prosecution of the charges against the Applicants based on breaches of s. 11(b) are dismissed.

Heard on the 2nd and 3rd days of June, 2022.
Delivered orally in Wetaskiwin, Alberta on the 3rd day of May, 2022.
Dated at the City of Wetaskiwin, Alberta this 6th day of May, 2022.

J. A. Fagnan
J.C.Q.B.A.

Appearances:

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