Court of Queen's Bench of Alberta

Citation: R v Forsyth, 2020 ABQB 86

Date: 20200204
Docket: 180299786Q1
Registry: Edmonton

Between:

Her Majesty the Queen

Crown

- and -

Graeme Patrick Forsyth

Applicant/Accused

Restriction on Publication

Identification Ban – See the *Criminal Code*, section 486.4.

By Court Order, information that may identify the victim or complainant must not be published, broadcast, or transmitted in any way.

NOTE: This judgment is intended to comply with the identification ban.

Reasons for Judgment
of the
Honourable Madam Justice D.A. Sulyma

I. Background

[1] The Applicant/Accused applies for a stay of proceedings pursuant to section 24.1 of the *Charter* on the basis that his right to a trial within a reasonable time pursuant to section 11(b) has been breached.

[2] His trial is currently scheduled to be heard February 24 to 28, 2020 with jury selection to take place on February 20, 2020. The total anticipated delay to the end of trial is 31 months, 10

days. He submits that this 31 months' delay is presumptively unreasonable as being over the ceiling of 30 months established in ***R v Jordan***, [2016] SCJ No. 27 (SCC).

[3] He was originally arrested and charged on July 19, 2017, with offences under s. 151, 152, 153(1)(a) and 271 of the *Criminal Code*. Certain of these charges pertain to a circumstance where the complainant is under the age of 16. In this case, the complainant was in fact not under the age of 16 as at the dates of the alleged offences. Accused was released on a recognizance and the October 25, 2017, Information 170818702P1 was withdrawn and replaced with Information 170999957P1 and the process was transferred to that Information.

[4] A two-day preliminary inquiry was scheduled to be held November 15, 2017. Three months and two days later on February 22, 2018, the Crown elected to file a Direct Indictment 180299786Q1.

[5] At QBAC on March 16, 2018, the matter was adjourned to April 6, 2018, to allow for scheduling of trial dates and for Defence to file QB Designation. On April 6, 2018, the trial was scheduled for September 30 to October 11, 2019, with jury selection to take place on September 26, 2019.

[6] On August 20, 2019, the Defence applied for an adjournment of the September 30, 2019, trial. I will explain further that the adjournment application was granted due to the Defence receiving a large volume of disclosure on the eve of trial.

[7] The matter was returned to QBAC on September 20, 2019, and on that date trial was scheduled for February 24 to 28, 2020. It was set for four days of trial ending February 28, 2020.

[8] Significant events leading up to scheduled trial dates include the fact that the RCMP obtained two cell phones from the complainant on September 5, 2017, which purportedly contained text messages between the complainant and the accused. The police seized one of those two cell phones (the Green IPhone), sent it to NAICEU for forensic examination on March 21, 2018, and on June 1, 2019, made available to the Defence a CD marked ESP 00064.

[9] On June 27, 2019, the matter was before the Court for the purpose of a Crown application for a witness to appear for trial by CCTV. At that time, the Defence became aware that the Crown had inadvertently failed to provide proper disclosure for ESP 000064. That resulted in replacement disclosure on July 16, 2019. This disclosure was over 5,000 text messages and also contained a 51-page extraction report. The latter contained text messages forensically extracted from the Green IPhone.

[10] At the same time, there was still significant outstanding disclosure in relation to the forensic analysis performed on the Green IPhone.

[11] It was not until August 2, 2019, that the Defence received the forensic report, which contained 12 pages and was marked "main report" as well as CD disc affixed to the inside back page of the bound report. That disc contained:

a. A folder marked "iMessage Chat History", which contains:

    i. Extraction Report created May 25, 2019 - this contains over 260 pages of text messages between Complainant and third party

    ii. 88 images

b. Extraction Report created May 20, 2019 - contains 4 pages of call log extraction information

c. Extraction Report created May 20, 2019 - contains 2 pages of “contacts" extraction information

d. Extraction Report created May 25, 2019 - contains 2 pages of technical information relating to wireless networks and SSID (location)

e. A GPS map (presumably created by the forensic analyst) which shows the locations of 7 images which (we assume) were extracted from the Green IPhone

f. A GPS/Google Earth Extraction Report [date created not known] – contains technical and GPS locational information in relation to 9 images

g. A “heatmap” which shows a pin Edmonton Area on a google earth picture.

[12] On August 19, 2019, an additional package of disclosure ESP 000066 to ESP 0000121 was made available to the Defence and picked up by the Defence counsel August 26, 2019. That disclosure consisted of 65 pages which were not organized and contained some of the following:

a. Disclosure of email correspondence between RCMP and National Forensic Services Vancouver where the police are seeking private labs for DNA testing. These emails appear to have been created in November 2017.

b. Forensic submission documents for private DNA labs.

c. Receipt of forensic material by Maxim Labs with information provided by the lab contained in the sheets.

d. Correspondence dated August 29, 2017 from Forensic Service and Identification Services.

e. CV of Mr. Dabbour (Maxim Labs).

f. Report from Maxim Labs which appears to show negative results of tests.

g. ALERT forensic assistance request.

h. ALERT document, re: consent to search Green IPhone.

i. Report from National Forensic Laboratory Services to the RCMP.

j. ITO for Production Order for Telus telephone records dated October 31, 2017.

k. Production Order for Rogers dated October 31, 2017.

l. Information to Obtain Production Order re: tower sites, dated October 31, 2017.

m. Rogers cell phone records - 5 pages of call records.

[13] Defence applied to adjourn the trial on the basis of late disclosure and to allow him to make full answer and defence in light of the volume, nature and importance of that disclosure received between July 16 and August 19, 2019.

[14] The original trial date was adjourned by Justice Belzil from August 28, 2019, to September 20, 2019, in QBAC in order to set new dates. The present trial date was set and this application precedes the booked date.

II. The Law

[15] The law relating to delay has been recently defined by the decision of ***Jordan*** in the Supreme Court of Canada: ***R v Jordan***, 2016 SCC 27, [2016] 1 S.C.R. 631. The matter was further dealt with in an Alberta Court of Appeal case of ***R v Chang*** 2019 ABCA 315. By the ***Jordan*** decision, the Supreme Court set new guidelines concerning how all actors in the judicial process should handle and process criminal cases. A presumptive ceiling was established for cases proceeding in superior courts at 30 months. That is when the delay becomes presumptively unreasonable.

[16] The Crown bears the onus of establishing that a delay over the ***Jordan*** ceiling is reasonable based on exceptional circumstances. The Court also described circumstances of delay that would be attributable to the Defence. That is (1) delay that is explicitly or implicitly waived; and (2) delay caused solely by the conduct of the Defence. The onus is on the Crown to prove that any portion of delay is solely caused by the accused (***R v Askov***, [1990] 2 SCR 1199, at paragraph 63).

III. Framework for Section 11(b) Applications

A. Timeline of events leading to the setting of trial dates and progress of disclosure

[17] Clearly, the Court must start with the date of the original charges on July 19, 2017, and end with the trial date now anticipated to be concluded on February 28, 2020. That results in a calculation of 31 months and 10 days, which is over the 30 month presumptively unreasonable delay, established by ***Jordan***.

B. Calculation of Defence delay

[18] The Crown submits that the time of delay must begin to be counted from the date the second Information was laid which second Indictment included charges of online luring of a child and making child pornography that had not been charged in the previous Indictment. The Crown submits that the ***Jordan*** time of delay as counted from the second Information results in 29 months of delay and not 31.

[19] The Defence submits that it is self-evident that a replacement Information in relation to the same set of allegations does not restart the ***Jordan*** clock. The Defence notes numerous cases where replacement Informations are laid and where total delay is still calculated from the time of the original Information.

[20] The Defence states that in this case, the original Information was replaced due to Crown-police negligence in the laying of the charges (i.e. incorrectly ascertaining the age of the complainant). The Crown's decision to then lay additional charges in relation to the child pornography on the replacement Information does not restart the ***Jordan*** clock.

[21] It is correct that the new Information added charges in relation to child pornography so it can be argued that, in this case, the changes go beyond technical corrections. I am of the view that although the replacement charges did add a significant replacement charge, that the complainant remained the same complainant and acts as alleged initially remained the same, that the prejudice to the accused remained or reflected the same prejudice as followed from the first Indictment and as the process was transferred, I note he remained under the same conditions of release.

[22] I conclude, as did the Ontario Court of Appeal in ***Milani (R v Milani*** 2014 ONCA 536), that for all practical purposes, this was a single proceeding and therefore the ***Jordan*** clock remains as beginning at the date of the first Indictment, not the second. Accordingly, the elapsed time to consider as the ***Jordan*** time runs from the swearing of the first Information to the current end of trial date equals 31 months.

*C. Commencement of **Jordan** clock*

[23] The next step is for the court to determine Defence delay from the total delay to calculate net delay. Defence delay is defined and comprises of delays waived by the Defence and delays caused solely or directly by the Defence's conduct. Defence actions legitimately taken to respond to the charges do not constitute defence delay.

[24] In this case, the Crown concedes the delay as a result of the Crown's late disclosure and that that delay continues to be ***Jordan*** delay. However, the Crown questions whether the Defence actions were legitimately taken to respond to the charges and in accordance with the accused's right to make full answer and defence. In this case, the Crown's position is that the original dates that could have been available for trial were earlier than September 30 of 2019 and also that the disclosure was not of forensically complex material.

[25] During oral submissions, Mr. Krieger, on behalf of the Crown, submitted that the disclosure that occurred was not forensically complex as much of it contained ordinary or mundane text material. In my view, it is dangerous to ask the Court to opine on complexity of materials as has been requested by the Crown. Rather, I accept the Defence submission that disclosure was tardy including delay, as we now know, in the Crown forwarding material for forensic analysis and further delay in providing the result of such analysis to the accused. That provision did not occur until August of 2019.

[26] The major instances of systemic delay arises as the Crown had the Green IPhone in its possession since September 5, 2017, but failed to send it for forensic examination until March 21, 2018, and it was not until July 31, 2019, that the Crown had completed providing disclosure with respect to the forensic analysis of the Green IPhone.

[27] Then, the other examples of delays attributed to defence actions must be either delays waived by the Defence and delays caused solely or directly the Defence's conduct. Defence action legitimately taken to respond to the charges do not constitute defence delay.

D. Defence delay in obtaining initial trial dates

[28] The Crown submits that Defence delay must include a period of 10 months from April 29, 2019, to February 24, 2020, due to the Defence rejecting an offer of an earlier trial date. The Crown submits that the first appearance in Queen's Bench was on March 16, 2018, and on March 27, 2018, the Crown advised Defence that the Trial Co-ordinator was offering 5 days of trial time in all of May and June, 2019, except for the last week of June. The Crown submits that instead the trial was booked to start on September 30, 2019, and submits that the Defence had rejected earlier trial dates when offered. The accused responds that during this process the parties secured a booking for the first available trial date and that was booked. Further, that the timeline was not altered given that the disclosure ultimately did not occur until August 1, 2019.

[29] The parties at this stage in their cases have differing views of the onus on the Crown to prove that any portion of the delay is solely caused by the accused and that the Crown bears the onus of proof to prove any period of waiver and defence-caused delay.

[30] I find that this onus is on the Crown despite there being an ultimate onus on the Defence to establish a breach of s. 11(b) rights on a balance of probabilities.

[31] This is stated in ***R v Chang*** at paragraphs 40 to 48 which deal with the practical and conceptual difficulties with calling upon the Defence to prove its own delay or waiver. The statement of the Alberta Court of Appeal at the end of paragraph 48 states:

> Once defence-caused delay becomes a live issue, the onus lies on the defence to show whether the delay was in fact caused by the defence and if so, what effect it should have on the total timeline.

[32] As explained above, any period of waiver must be proved by the Crown. Realistically, it will fall to the Crown to allege defence-caused delay and to adduce proof thereof.

[33] In this case, I have been provided with emails regarding setting of trial dates between the Crown and Defence. The Crown had put forth a list of trial dates in April of 2018 and Mr. Kurie, on behalf of the accused, chose the later date. That is not proof that the Crown or the Court was indeed available on the earlier dates and the Defence was not. I do not approach this argument as one of the Defence bearing the onus. Rather, I approach it as the Crown having the initial onus of proving this was a defence-caused delay and has not done so.

[34] I further note that during the whole period of the setting of initial trial dates there was still significant outstanding disclosure including in relation to the forensic analysis performed on the Green IPhone. It was not until August 2, 2019, that the Defence received the forensic report marked as ESP-000065. This report contained a main report as well as a CD disc containing the information I have outlined in this decision above.

[35] In addition, there was additional disclosure on August 19, 2019, containing a further 65 pages. Accordingly, the issue of whether the Defence could have set earlier dates becomes moot by this later fact. That is, that during the whole of the period which included what the Crown states would have been available trial dates, disclosure had not occurred and indeed did not occur until just before the chosen trial date of September 30. I find it is clear that disclosure necessitated an adjournment that clearly would have precluded the Crown proceeding on any of the earlier dates.

[36] I decline to find the alleged 10-month delay due to what the Crown states is the Defence rejecting an offer of earlier trial dates to be a delay solely attributable to conduct of the Defence. That argument is overtaken and extinguished by the later reality of lack of disclosure.

E. Adjournment

[37] I have already stated that I find the adjournment was caused by the initial failure and then late disclosure of the Crown. I accept that the disclosure was central to the ability of the Defence to make full answer and defence and do not accept an argument that a competent defence counsel would have been able to master the material contained in the disclosure and form a defence properly around the case that had to be met at any earlier date.

F. Time between September 30, 2019 to February 28, 2020

[38] The Crown again seeks to subtract this delay from the ***Jordan*** delay of 31 months again on the position that Defence rejected earlier trial dates than that of February 24th. The emails between counsel indicate that the Crown was of the view it was too late for the Court to take extraordinary measures to get an early date and that the earlier dates had been offered by the

Court given the understanding that ***Jordan*** may be in play. In my view, the choice of trial date ultimately became a joint one between Crown and Defence. During the course of the correspondence, there was discussion that there had been no waiver of ***Jordan*** deadlines at the time of the adjournment in September 2019 in QBAC and clearly the issue of ***Jordan*** deadlines and waiver was within the mind of both counsel as they agreed to the February 24 date.

[39] I do not find this delay to be solely attributable to the acts of Defence and decline to subtract it from the delay calculated as 31 months, 10 days as the ***Jordan*** delay. In providing dates from the Crown to the Defence, there was no indication that the Crown was available at any or all of the earlier dates or that it had chosen to be available at any of those dates.

G. Exceptional circumstances or transitional exceptional circumstances

[40] Given that total delay exceeds the 30-month ceiling, the Crown must establish a "transitional exception" or an "exceptional circumstance" in order to satisfy the Court that a period of delay should be subtracted so that the total time falls within the ***Jordan*** guidelines.

[41] Delay that exceeds the presumptive ceiling will only be justified in the presence of "exceptional circumstances" or where "transitional exceptional circumstances apply" (***Jordan***, para 37). The onus is on the Crown to prove the existence of exceptional circumstances or transitional exceptional circumstances that justify the delay (***Jordan***, para 37).

[42] Exceptional circumstances "is the only basis upon which the Crown can discharge its burden to justify a delay that exceeds the ceiling" (***Jordan***, para 81). Exceptional circumstances arise when the Crown can demonstrate that a matter is particularly complex or that "discrete events" have occurred that are reasonably unforeseeable (***Jordan***, para 71).

[43] It is clear that this case does not meet that standard that was contemplated by the Supreme Court of Canada as "particularly complex". In ***Jordan***, (at para 77) complex cases are described as:

> "Particularly complex cases are cases that, because of the nature of the evidence or the nature of the issues, require an inordinate amount of trial or preparation time such that the delay is justified. As for the nature of the evidence, hallmarks of particularly complex cases include voluminous disclosure, a large number of witnesses, significant requirements for expert evidence, and charges covering a long period of time. Particularly complex cases arising from the nature of the issues may be characterized by, among other things, a large number of charges and pre-trial applications, novel or complicated legal issues, and a large number of significant issues in dispute. Proceeding jointly against multiple co-accused, so long as it is in the interest of justice to do so, may also impact the complexity of the case".

[44] I note that the first trial was set for a 5-day jury trial and the only change in the circumstances surrounding this case was the Crown failing to provide disclosure in a timely manner. Therefore, this is not a case were the volume of disclosure, number of witnesses, or any other factor could be said to make this a particularly complex case. Indeed, the Crown now states that the trial never ought to have been set for two weeks.

[45] As the delay in this case cannot be attributed to complexity, the Crown must point to a "discrete event" to bring this matter below the 30-month ***Jordan*** ceiling. The test that is to be applied to exceptional circumstances is:

> 1) An event that lies outside of the Crown's control that is reasonably unforeseen or reasonably unavoidable and
>
> 2) Crown counsel cannot reasonably remedy the delays emanating from those circumstances once they arise (***Jordan***, at para 69).

[46] ***Jordan*** (para 73) elaborates upon the meaning of an exceptional circumstance that is categorized as a "discrete event" as follows:

> "Discrete, exceptional events that arise at trial may also qualify and require some elaboration. Trials are not well-oiled machines. Unforeseeable or unavoidable developments can cause cases to quickly go awry, leading to delay. For example, a complainant might unexpectedly recant while testifying, requiring the Crown to change its case. In addition, if the trial goes longer than reasonably expected - even where the parties have made a good faith effort to establish realistic time estimates - then it is likely the delay was unavoidable and may therefore amount to an exceptional circumstance".

[47] The excessive delay in this case is attributed to the adjournment of the trial due to late disclosure. The Applicant submits that the adjournment of the first trial date cannot be properly categorized as the "discrete events" contemplated in ***Jordan***.

[48] Further, the Crown has expressly indicated during the last PTC of this matter that it would not be arguing that the creation of the late disclosure by way of the forensic analysis constitutes a discrete event or exceptional circumstances. Accordingly, the Applicant will not address this issue further and I find that no such discrete event has been proved.

H. Systemic delay

[49] Crown counsel have a duty to advance their prosecution in a timely manner. The delay in the case at bar is the direct result of the Crown's failure to advance Mr. Forsyth's case. It is not enough for the Crown to remain silent on the record during proceedings as to its earlier availability and concerns about the ***Jordan*** limitations. It is not enough for the Crown to advise the Defence and the Court after a trial has been rescheduled as to their earlier availability and willingness to proceed to trial at those earlier times.

[50] This is clear systemic delay and a failing of the Crown. Mr. Forsyth continues to be held under the supervision of the Court, awaiting the outcome of his second scheduled trial date.

[51] The police/Crown had the Green IPhone in their possession since September 5, 2017. It was not until March 21, 2018, that the Green IPhone was sent to NAICEU for forensic examination. And it was not until July 31, 2019, that the Crown had completed providing disclosure with respect to the forensic analysis of the Green IPhone.

[52] The failure of the Crown in handling this case has led to a violation of Mr. Forsyth's ss. 7 and 11 (b) *Charter* rights. In this case, the constituent parts of the Crown have each failed in their respective duties to bring Mr. Forsyth to trial within a reasonable time. Collectively, these failures resulted in a delay of over 31 months.

[53] This case is an example of the Crown's failure to mitigate the delay, especially in regards to handling of evidence in its possession. The Crown simply cannot discharge its onus in this case.

Heard on the 27th day of January, 2020.
Dated at the City of Edmonton, Alberta this 4th day of February, 2020.

D.A. Sulyma
J.C.Q.B.A.

Appearances:

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