Court of Queen's Bench of Alberta

Citation: R v Gray, 2020 ABQB 68

Date: 20200127
Docket: 161113907Q2
Registry: Edmonton

Between:

Her Majesty the Queen

- and -

Brett James Gray

Accused

Reasons for Judgment
of the
Honourable Mr. Justice B.R. Burrows

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[1] Brett James Gray applies for a stay of these proceedings on the basis that his *Charter* guaranteed right to trial within a reasonable time (s. 11(b)) has been breached.

[2] Mr. Gray is charged with three counts relating to child pornography and one count of voyeurism. The Information charging two of the offences was dated September 22, 2016. The other two offences were added by a second information dated December 20, 2016.

[3] Mr. Gray's four-day trial on these charges is scheduled to end on February 6, 2020. That will be over 40 months after the date of the original information and over 37 months after the date of the second information. Subject to the determination of whether Mr. Gray waived or caused any of the delay, that is ten months and seven months beyond the 30-month presumptive ceiling established by the Supreme Court in ***R v. Jordan*** 2016 SCC 27.

[4] The ***Jordan*** 30 months for this prosecution expired on March 22, 2019 for Counts 1 and 2 and June 20, 2019 for Counts 3 and 4.

[5] The facts are not in dispute. They are set out in an Agreed Statement of Facts.

[6] The election and plea steps were completed, and the preliminary inquiry was conducted, within what is generally considered to be a reasonable time – under 10 months. Mr. Gray was committed to stand trial and a Queen's Bench judge alone trial was scheduled for September 10 to 14, 2018. If the trial had occurred on those dates, Mr. Gray would have had his trial within 24 months of the commencement of the proceedings by the earlier information.

[7] However, on September 6, 2018, four days before the scheduled commencement of the trial, Mr. Gray applied for an adjournment of the trial. The reason for the application was that the Crown had not yet provided "data from seized devices to a defence expert" – there had been a delay in effecting an element of disclosure. There was at that point insufficient time remaining before the commencement of the trial, four days later, for the defence expert to complete his analysis even if the required disclosure was made immediately.

[8] Mr. Gray's Counsel had requested disclosure of a copy of the hard drive which had been seized from Mr. Gray on January 24, 2018, over 7 months before the scheduled trial dates. There is no dispute that the disclosure request was appropriate.

[9] The details of the processing of that request are set out in the Agreed Statement of Facts. I have included the relevant portion of the Agreed Statement of Fact in an Appendix to these Reasons.

[10] At the adjournment application, the Crown acknowledged that the requested disclosure had not been provided and advised that the Crown did not object to the adjournment so long as Mr. Gray waived his *Charter* s. 11(b) right. Mr. Gray declined to do so. He did not accept responsibility for the state of affairs that made the adjournment application necessary. It was recognized that the *Jordan* deadline would expire in early 2019.

[11] I ruled:

> . . . it seems to me that defence has to have an opportunity to have [the requested disclosure] reviewed by their expert. And the trial can't go ahead without that having happened. So, I don't think I'm going to require [Mr. Gray] to waive 11(b) in order to get the adjournment. I'm not going to say whose fault it is. If it becomes an issue, that will have to be determined.

[12] I adjourned the matter to QBAC (scheduling court) on September 14, 2018.

[13] Counsel's offices communicated with each other before the QBAC appearance as to available dates. On September 11, 2018, Mr. O'Keeffe's office advised Mr. Rowan's office of the dates between October 22, 2018 and November 12, 2019 that Mr. O'Keeffe was available. There were 143 days identified. They were in 15 "usable" blocks – that is periods long enough to accommodate a four or five-day trial. Only three of those blocks (1 and 2 – eight days - October 22 to 31, 2018; 3 – four days - November 26 to 30, 2018) were before the expiry of the *Jordan* deadline for Counts 1 and 2, on March 22, 2019. A further six of the blocks were before the expiry of the *Jordan* deadline for Counts 3 and 4.

[14] Correspondence between the Crown and the Court Coordinator identified three blocks, each of five days duration, when the Court could accommodate the trial prior to March 22, 2019. These were December 3 to 7, 2018, January 14 to 18, 2019, and February 11 to 15, 2019. None of these blocks matched blocks when Defence Counsel was available.

[15] The materials on this application do not indicate what dates Crown Counsel, Mr. Rowan, was available. It appears, however, that the messaging between Counsels' offices did not identify any dates when both Mr. O'Keeffe and Mr. Rowan were available prior to March 22, 2019. The materials indicate that there may have been dates in May 2019 when both Mr. Rowan and Mr. O'Keeffe were available, but court time was not available on those dates.

[16] At QBAC on September 14, 2018, Mr. O'Keeffe's agent advised the Court that her instructions were to set a four-day trial. She suggested February 3 to 6, 2020. Those dates had been determined to be available to all concerned – the Court, the Crown and the Defence – before QBAC opened. The Court Coordinator advised the Court that those were not the earliest dates the Court had available. Mr. O'Keeffe's agent advised that the dates she had suggested were not Mr. O'Keeffe's earliest dates either. "He did have a number of earlier dates, including in 2018 and 2019."

[17] Mr. Rowan's availability was not specifically mentioned but I expect this was because there was no point in mentioning his availability, whatever it was, when there was no date when Mr. O'Keeffe's and the court's availability matched. I take notice that, at least in September 2018, when scheduling difficulties such as those presented on this occasion arose, the Crown's availability was rarely the problem. The Crown, at least in September 2018, was usually able to change prosecutor assignments if necessary to accommodate defence and Court schedules.

[18] The Court set the trial for February 3 to 6, 2020. There was no mention of *Jordan* concerns at this appearance.

[19] The first issue to be decided is whether at least 10 months of the delay in excess of 30 months was waived or caused solely by Mr. Gray. If not, then the second issue is whether the Crown has shown that the delay beyond the *Jordan* ceiling results from exceptional circumstances.

[20] I summarize the Crown's position as follows:

1. Most of the seven months that passed between the Defence request for disclosure of a copy of the seized hard drive was reasonably required for the organization of this non-routine disclosure. "The facts make clear that extensive back and forth correspondence, and expert witnesses on both sides clarifying factual issues, was required, and that a trained specialist would have to actually create the end result." Just over one month of the seven months was the result of the Defence not returning the signed consent order because then Counsel for Mr. Gray had left the practice of law and no one else picked up the ball.
2. The entire 17-month period following the adjournment of the September 2018 trial dates (or at least the 12 months following the latest dates the Court was available prior to the *Jordan* deadline) should be subtracted from the overall delay because:
    a) It is a delay caused by the unavailability of Defence Counsel, or
    b) It was implicitly waived by the defence, or
    c) It is a discrete event beyond the Crown's control that should be subtracted from the *Jordan* delay calculation.

Delay of Requested Disclosure

[1] I do not agree with the Crown's first point. In my view, the description in the Agreed Statement of Facts of the back and forth between Crown and Defence from the date Defence requested the disclosure to the adjournment application, January 24 to September 6, 2018, a period in excess of seven months, (see the Appendix to this decision) demonstrates that neither Crown nor Defence focused on the disclosure request with any urgency or with reasonable

efficiency. The disclosure request may not have been routine, but neither was it difficult or incapable of being accomplished in very much less that seven months.

[2] I note that the Crown does not submit that the Defence disclosure request made on January 24, 2018 was in any sense illegitimate or a delaying tactic. Counsel indicated that the request was inspired by the Crown evidence at the Preliminary Inquiry. There is no suggestion that the Defence was unreasonably tardy in making the request, having made it seven months before the trial date.

[3] I do not agree that the 34 days that were lost while the Crown awaited the return of the signed Consent Order, not realizing that the lawyer to whom it had been sent had left the practise of law, should be labeled "defence delay". Such a delay apparently did not, at the time, concern the Crown sufficiently to generate a follow up inquiry. It should have.

[4] In my view, none of the delay that was encountered in the Crown making the disclosure which the Defence requested on January 28, 2018 is delay "solely caused by the conduct of the defence." (***Jordan*** para. 63). None of it should be subtracted from the overall delay.

Delay Resulting from Rescheduling the Trial

[5] I also disagree with the Crown's submission that the delay from the adjourned trial dates to the rescheduled trial dates, 17 months, was caused by the defence. The Crown's submission on this point, I expect, is founded on ***Jordan*** para. 64:

> As another example, 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.

[6] In my view, it is not accurate to describe the difficulty that arose on September 14, 2018, in finding four consecutive dates when the court, the Crown and the Defence would all be available in the six months following (that is, the six months before the *Jordan* deadline), as a situation where the court and Crown were ready to proceed, but the defence was not. The court and Defence were, in fact, each "ready to proceed" on three "blocks" in that six months. Presumably the Crown could have been "ready to proceed" on all six blocks if necessary. But neither the court nor the Defence was "ready to proceed" on the same block.

[7] On September 14, 2018, the three schedules that had to be coordinated simply could not be coordinated. There is no more basis for ascribing fault for that state of affairs to the Defence as there is for ascribing it to the court or the Crown. The resources of each are limited. If the situation involved "fault" at all, it is "fault" which lies as much on the court as on the Defence.

[8] It cannot be said that it is Defence Counsel's lack of availability that resulted in the matter being set further into the future than would be otherwise be the case. The court, the Crown and the Defence all had reasonable availability, albeit limited availability, before the *Jordan* deadline. But none of that reasonable availability was at the same time.

[9] In my view, the delay was not caused solely by the conduct of the defence.

[10] Neither, in my view is there any basis for finding that the delay necessitated by the adjournment and rescheduling of the trial was waived by Mr. Gray, implicitly or otherwise.

[11] I understand the Crown's "discrete incident" submission to be an attempt to overcome the presumption that the ten months delay beyond the *Jordan* ceiling is unreasonable. In *Jordan* the Supreme Court said that the presumption might be overcome where the Crown shows that the case involves "exceptional circumstances" which: (para. 69)

> . . . lie 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.

[12] The Supreme Court said further: (para. 70)

> It is not enough for the Crown, once the ceiling is breached, to point to a past difficulty. It must also show that it took reasonable available steps to avoid and address the problem *before* the delay exceeded the ceiling. This might include prompt resort to case management processes to seek the assistance of the court, or seeking assistance from the defence to streamline evidence or issues for trial or to coordinate pre-trial applications, or resorting to any other appropriate procedural means. The Crown, we emphasize, is not required to show that the steps it took were ultimately successful – rather, just that it took reasonable steps in an attempt to avoid the delay.

[13] It is clear from these passages that it is fundamental to a finding that exceptional circumstances render delay beyond the *Jordan* ceiling reasonable, that the Crown have taken reasonable steps when the problem arose to attempt to remedy it.

[14] Here, in my view, the problem – that it was difficult on September 14, 2018 to find four consecutive days when the Crown, the Defence and the court were all available for trial before March 22, 2019 – was reasonably unavoidable, but whether or not it could have been reasonably remedied is not known. The Crown made no request either in QBAC, or to the judge who had conducted the pretrial conference, or to the Chief Justice, either before the *Jordan* deadline or ever, for special attention to be given to the scheduling of this matter.

[15] Such a request would have been a reasonable thing to do – probably the only reasonable thing to do. But the Crown made no attempt whatsoever to remedy the problem. If it did not do so, as was suggested in the Crown's submissions, because it assumed that Mr. Gray had waived his *Charter* s. 11(b) rights, there was no basis whatsoever for that assumption.

[16] The Crown, not having made any attempt to find a solution to the problem within the six months that remained before the deadline, it cannot now show that this case involved exceptional circumstances which render the excessive delay reasonable.

Conclusion

[17] Mr. Gray's right to trial within a reasonable time, guaranteed by *Charter* s. 11(b) has been violated. I order that the proceedings against him be stayed.

Heard on the 22nd day of January, 2020.
Dated at the City of Edmonton, Alberta this 27th day of January, 2020.

B.R. Burrows
J.C.Q.B.A.

Appearances:

James Rowan
for the Crown

Eamon O'Keeffe
for the Accused

Appendix

Excerpt from the Agreed Statement of Facts:

The Process of Obtaining a Copy of the Hard Drive

15. Counsel for Mr. Gray first made a disclosure request for a copy of the hard drive from Mr. Gray's computer in a letter to the Crown dated January 24, 2018.

16. Counsel for Mr. Gray sent a second request for a copy of the hard drive on April 8, 2018. Crown responded that same day by email indicating no objection to providing the copy and seeking clarification as to what type of copy ("logical" or "block-by-block") would be required.

17. A pretrial conference was held on April 10, 2018. The issue of disclosure of the hard drive and the Charter issue upon which the examination of the hard drive depended were discussed at the pretrial conference. It was agreed that Crown would obtain an order under s. 490(15) to transfer a copy of the hard drive to the defence expert. The defence was to file its Charter Notice by June 15, 2018.

18. On May 29, 2018, counsel for Mr. Gray emailed Crown specifying the type of copy of the hard drive required by the defence expert.

19. On June 21, 2018, counsel for Mr. Gray emailed Crown requesting an update on obtaining a copy of the hard drive. On the same date, Crown replied by email and indicating he had sent the request to the forensic head (George Edwards) for comment but had not received a reply. Crown asked whether defence would be providing a blank hard drive for the copy.

20. On June 22, 2018, counsel for Mr. Gray responded that either the defence would provide a blank hard drive, in which case he would need to know what size hard drive would be required, or if the Crown supplied the hard drive it would be returned following the trial.

21. On July 9, 2018, counsel for Mr. Gray sought an update regarding the hard drive. On July 11, 2018, Crown emailed counsel for Mr. Gray asking for the name of the defence expert to put in the s. 490(15) order. Counsel for Mr. Gray responded with the name the same day.

22. On July 12, 2018, George Edwards, the Forensic Supervisor for the Northern Internet Child Exploitation Unit contacted the defence expert to confirm the type of files the defence expert required. The defence expert provided Mr. Edwards the requested information the same day.

23. On July 17, 2019, Crown sent counsel for Mr. Gray a s. 490(15) order for defence counsel's signature. Mr. Gray's lawyer handling the hard drive issue left the practice of law in the last week of July 2018. Other counsel for Mr. Gray signed and returned the s. 490(15) order on August 20, 2019. The order was filed with the Court August 21, 2018.

24. On August 27, 2018, the defence forensic expert emailed George Edwards requesting an update on obtaining a copy of the hard drive. Mr. Edwards responded by email on August 29, 2018 that, "[w]ith the holidays etc. and a very high volume of files coming in I have not been able to get to this yet." He advised he would make an effort to get it done as soon as possible.

25. Counsel for Mr. Gray emailed the Crown on August 30, 2018 advising that no Charter Notice could be properly defined until the defence expert has conducted an examination of the hard drive and reported his findings. Crown responded the same day agreeing to discuss the issue and suggesting notifying the Court of the timelines issues once Crown and defence had discussed it.

26. On September 4, 2018, counsel for Mr. Gray notified the Queen's Bench Trial Coordinator of the problem with the delay in getting the hard drive to the defence expert and that the Court would be updated after Crown and defence had decided what to do.

27. On September 5, counsel for Mr. Gray emailed the Crown that the defence expert still had not received a copy of the hard drive and that an adjournment of the trial would be necessary. Crown then consulted with George Edwards and was advised by Mr. Edwards that his understanding was that they were waiting to receive a blank hard drive on which they could copy the files. Crown relayed this information to defence.

28. On September 6, 2018, the trial was ordered adjourned. Section 11(b) of the Charter was discussed and not waived . . .

29. The Crown received a copy of the requested forensics from Mr. Edwards of the Northern Alberta Internet Child Exploitation Unit on September 13, 2018 and provided it to defence on September 14, 2018.