NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. X.J.*, 2023 NSCA 52

Date: 20230726
Docket: CA 518780
Registry: Halifax

Between:

X.J.

Appellant

v.

His Majesty the King

Respondent

Judge:	The Honourable Justice Anne S. Derrick
Appeal Heard:	June 14, 2023, in Halifax, Nova Scotia
Subject:	*Youth Criminal Justice Act*, S.C. 2002, c. 1 as amended; *R. v. Jordan*, 2016 SCC 27; sufficiency of reasons; judicial stay of proceedings.
Summary:	The appellant was convicted in the Youth Justice Court of sexual interference contrary to s. 151 of the *Criminal Code*, R.S.C. 1985, c. C-46. In brief oral reasons, the trial judge dismissed the appellant's application for a stay of proceedings which had been brought on the basis of unconstitutional delay. The judge indicated he would be providing more detailed reasons. These never materialized. The appellant appealed the dismissal of his stay motion and his sentence.
Issue:	(1) Did the trial judge err in dismissing the appellant's s. 11(b) *Charter* motion for a judicial stay?
Result:	The trial judge's brief oral reasons were not sufficient. They did not adequately explain the basis for his decision. They did not indicate which Crown argument he had accepted: that there had been implicit waiver by the appellant of over a

year's worth of delay or that, in the alternative, the delay was justified by the exceptional discrete circumstance of the Covid pandemic. This required a fresh delay analysis on appeal. An assessment of the total delay led to the conclusion it was presumptively unreasonable. It was unnecessary to address whether there had been implied waiver by the appellant. There was delay that has been conceded as Crown delay with the result the appellant's trial fell afoul of *Jordan*, even taking into account pauses in the proceedings caused by Covid. The appropriate remedy is a stay of proceedings. This made it unnecessary to address the appellant's sentence appeal.

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Restriction on Publication: Section 110 of the *Youth Criminal Justice Act;* and Section 486.4 of the *Criminal Code of Canada*

Judges:	Farrar, Derrick, and Beaton, JJ.A.
Appeal Heard:	June 14, 2023, in Halifax, Nova Scotia
Held:	Appeal allowed, per reasons for judgment of Derrick, J.A.; Farrar and Beaton, JJ.A. concurring.
Counsel:	David Mahoney, for the appellant Timothy O'Leary, for the respondent

<u>PUBLISHERS OF THIS CASE PLEASE TAKE NOTE</u> THAT s. 110 (1) and s. 111(1) OF THE *YOUTH CRIMINAL JUSTICE ACT*, S.C. 2002, c. 1 APPLIES AND MAY REQUIRE EDITING OF THIS JUDGMENT OR ITS HEADING BEFORE PUBLICATION.

110. (1) – Identity of offender not to be published – Subject to this section, no person shall publish the name of a young person, or any other information related to a young person, if it would identify the young person as a young person dealt with under this Act.

Order restricting publication — sexual offences

486.4 (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

> **(a)** any of the following offences:
>
> > **(i)** an offence under section 151, 152, 153, 153.1, 155, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or
> >
> > **(ii)** any offence under this Act, as it read from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day; or
>
> **(b)** two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).

Mandatory order on application

(2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall

> **(a)** at the first reasonable opportunity, inform any witness under the age of eighteen years and the victim of the right to make an application for the order; and
>
> **(b)** on application made by the victim, the prosecutor or any such witness, make the order.

[…]

Reasons for judgment:

Introduction

[1] On November 15, 2021, X.J., a young person within the meaning of the *Youth Criminal Justice Act*, S.C. 2002, c. 1 as amended (*YCJA*), was convicted by Judge Alain Bégin, presiding as a judge of the Youth Justice Court, of sexual interference contrary to s. 151 of the *Criminal Code*, R.S.C. 1985, c. C-46. The sexual interference occurred when the victim, K.R., was between 5.5 and 7.5 years old. The trial judge found X.J. perpetrated the sexual acts while he was between 15 and 16.5 years old. In his sentencing decision, the judge identified the nature of X.J.'s offence:

> **[3]** It is important to point out that the sexual contact covers a broad spectrum of illegal behaviour that is sexual in nature that took place over an extended period of time. The illegal sexual activity included various and repeated forms of sexual touching, and also sexual activity at the highest end of the spectrum, sexual intercourse. This was a very violent offense, that took place over an extended period of time.[1]

[2] On July 25, 2022 Judge Bégin sentenced X.J. to a 24 month Custody and Supervision Order (CSO) and ancillary orders. On that same date, he dismissed the appellant's application for a stay of proceedings which had been brought on the basis of unconstitutional delay. He provided very brief oral reasons indicating a "more formal *Jordan*[2] decision" would be provided. None was forthcoming.

[3] The appellant is appealing the dismissal of his application for a stay and his sentence. He says the trial judge's denial of the stay is marred by error. Should that ground of appeal fail, he argues the judge's errors in relation to his sentence requires this Court to sentence him afresh.

[4] As these reasons explain, I am satisfied the appellant has made out a violation of his constitutional right to be tried within a reasonable time. I find the trial judge's reasons to be insufficient, and having undertaken a fresh analysis of the delay issue, I am persuaded this case exceeded the 18 month ceiling, established in *Jordan*, beyond which delay is presumptively unreasonable.

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[1] *R. v. X.J.*, 2022 NSPC 27.
[2] *R. v. Jordan*, 2016 SCC 27 [*Jordan*]

[5] I would enter a stay of proceedings on the basis of unreasonable delay.

[6] In the circumstances it is unnecessary for us to address the sentence appeal. This should not be taken to mean we are in agreement with the trial judge's approach to X.J.'s sentencing.

The Unreasonable Delay Issue

[7] The s. 11(b) unreasonable delay issue is set out in the appellant's factum:

> 1) Did the trial judge err in law or fact when he dismissed the appellant's s. 11(b) *Charter* motion by:
>
> a. Failing to provide reasons for his decision;
>
> b. Allocating delay to the defence for implicit or express waiver;
>
> c. Allocating delay to exceptional circumstances.

[8] I will restate the issue as follows: Did the trial judge err in dismissing the appellant's s. 11(b) *Charter* motion for a judicial stay?

The Applicable *Jordan* Presumptive Ceiling

[9] The *Jordan* decision of the Supreme Court of Canada established firm timelines within which trials must be completed. The Court's focus was on an "efficient criminal justice system" with "[t]he ability to provide fair trials within a reasonable time…" This was held to be "an indicator of the health and proper functioning of the system itself".[3] The Court criticized a culture of tolerance and complacency within the system towards delay and established a new framework for applying the constitutional right to trial within a reasonable time, guaranteed by s. 11(b) of the *Charter of Rights and Freedoms*:

> **[5]** …At the centre of this new framework is a presumptive ceiling on the time it should take to bring an accused to trial: 18 months for cases going to trial in the provincial court, and 30 months for cases going to trial in the superior court. Of course, given the contextual nature of reasonableness, the framework accounts for case-specific factors both above and below the presumptive ceiling.

[3] *Ibid*, at para. 3.

> This framework is intended to focus the s. 11(b) analysis on the issues that matter and encourage all participants in the criminal justice system to cooperate in achieving reasonably prompt justice, with a view to fulfilling s. 11(b)'s important objectives.

[10] The Supreme Court of Canada has held that the *Jordan* presumptive ceilings apply to youth matters. In *R. v. K.J.M.*, writing for a bare majority, Justice Moldaver held:

> **[4]** …But unless and until it can be shown that *Jordan* is failing to adequately serve Canada's youth and society's broader interest in seeing youth matters tried expeditiously, there is in my view no need to consider, much less implement, a lower constitutional ceiling for youth matters.[4]

The Trial Judge's Decision

[11] Submissions by Crown and defence on the stay motion were made in writing. The judge began his reasons by indicating he had read the submissions and formulated his position but was unable "to provide a written decision at this time". He had only just received the briefs and did not want to delay the matter further.

[12] The judge correctly identified the timeframe to be assessed for unconstitutional delay: the date of the charge and the "end of the evidence and argument when parties' involvement in the trial was complete and the case was turned over to the trier of fact".[5] Referring to the Supreme Court of Canada's decision in *R. v. K.G.K.*, he noted the *Jordan* clock did not run during the judge's deliberation time. In *K.G.K.* the Supreme Court held:

> **[3]** …the ceilings in *Jordan*, beyond which delay is presumed to be unreasonable under s. 11(b) apply to the end of the evidence and argument at trial, and no further. They do not include verdict deliberation time.[6]

[13] After dispensing with the *K.G.K.* aspect, the trial judge took a minimalist approach to his reasons:

> Suffice it to say I reject the application for a stay by the defence based primarily on the court accepting the position outlined by the Crown in their brief. A more formal *Jordan* decision will be provided to counsel in due course…[7]

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[4] 2019 SCC 55. [*K.J.M.*]
[5] Trial judge's unreported decision.
[6] 2020 SCC 7.
[7] Trial judge's unreported decision.

Standard of Review – Insufficient Reasons

[14] An allegation of insufficient reasons is to be reviewed on appeal by applying a functional and contextual analysis. Reasons are to be assessed with reference to the trial record and must be both factually and legally sufficient. Reasons are required to explain "what the trial judge decided and why, and enabling a meaningful exercise of the right of appeal…"[8]

[15] As discussed by the Supreme Court of Canada in *R. v. R.E.M.*, reasons are essential to the proper functioning of the judicial process. They,

> **[12]** …help ensure fair and accurate decision making the task of articulating the reasons directs the judge's attention to the salient issues and lessens the possibility of overlooking or under-emphasizing important points of fact or law…reasons instantiate the rule of law and support the legitimacy of the judicial system.[9]

[16] Reasons will not withstand appellate scrutiny if they are "both inadequate and inscrutable…"[10]

Sufficiency of the Trial Judge's Reasons

[17] The trial judge's reasons for dismissing the s. 11(b) stay motion were not sufficient. The requirements for sufficient reasons established by the Supreme Court of Canada in *R. v. Sheppard* [11] and *R. v. Braich*[12] were not satisfied: the reasons did not inform the defence of the basis for the dismissal of the motion nor do they enable this Court to understand the judge's rationale.

[18] The judge's reasons do not explain the basis for his decision, especially in light of trial Crown advancing two arguments to counter the defence motion: implicit waiver by the defence of over a year's worth of delay and, in the alternative, the exceptional discrete circumstance of the Covid pandemic. For exceptional circumstances to be in play there has to be a determination the delay has exceeded the *Jordan* ceiling. A finding of implied waiver, on the other hand, grounds a finding that the ceiling was not reached.

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[8] *R. v. Preston*, 2022 NSCA 66, at para. 65; *R. v. Kitch*, 2023 NSCA 33, at para. 11.
[9] 2008 SCC 51.
[10] *R. v. J.M.S.*, 2020 NSCA 71, at para. 42, citing *R. v. Gagnon*, 2006 SCC 17, at para. 13.
[11] 2002 SCC 26.
[12] 2002 SCC 27.

[19] The trial judge's reasons do not explain which argument he accepted. Accepting both sidestepped the analysis he was obligated to undertake.

[20] It was not enough for the judge to simply adopt the Crown's arguments, especially as those arguments engaged quite distinct legal principles and facts. What were the facts on which the judge relied to determine the defence had impliedly waived significant delay? And if the judge's reason for dismissing the motion was based on accepting that an exceptional circumstance—the Covid pandemic—applied, what had he concluded about the various periods of delay?

[21] The typical analysis required to decide a delay motion was not conducted by the trial judge. There was no categorization (or attribution), based on the facts before him, of who caused the delay and why it was caused. Had the trial judge made such determinations, they would have been subject on appeal to a deferential standard of review.[13] The judge also had to characterize (or allocate) who should "wear" the delay and what constituted the net delay and whether it exceeded 18 months. This would have been assessed on a correctness standard.[14]

[22] The trial judge did not undertake the analytical process required of him. As a consequence we have to assess the issue of delay.

Assessing the Delay

[23] As I will explain, I have concluded that a stay of proceedings for unreasonable delay has been made out on the facts of this case. In conducting a fresh delay analysis, I undertake the approach the trial judge should have followed.

[24] My task is to categorize who caused the delay and why it was caused. This will involve making findings of fact or drawing inferences. Then I allocate the delay to the party who should "wear" it. This will enable me to determine the net delay. In undertaking this exercise I will be taking into account the submissions of counsel at the appeal.

What Happened Between September 9, 2019 and September 21, 2021

[25] The *Jordan* clock started on the date the appellant was charged—September 9, 2019—and was running on March 20, 2020 when the Covid pandemic threw the

[13] *R. v. Pearce*; *R. v. Howe*, 2021 NSCA 37, at para. 59.
[14] *Ibid*.

court proceedings into abeyance. It was stopped by trial counsels' final submissions on September 21, 2021.

[26] The trial judge convicted the appellant on November 15, 2021. He rendered his decision on delay on July 25, 2022.

[27] The appellant was arraigned at his first court appearance on September 30, 2019. The Crown elected to proceed by indictment. On November 18, 2019 the trial judge scheduled the appellant's trial for the full day of April 28, 2020. Delay prior to the trial being set down was due to the Crown's tardiness in vetting medical disclosure received at the prosecution offices on September 11, 2019.

[28] On March 20, 2020 the trial judge, a prosecutor and defence counsel (not the same counsel as on appeal) discussed the disruption in court proceedings on account of the pandemic which meant the trial could not proceed as scheduled. The matter was put over to August 5, 2020. At that appearance, counsel were advised the next available full days were not until the new year. Crown counsel indicated he would be filing a s. 715.1 application[15] in relation to K.R.'s statement and would require a half-day *voir dire* in advance of the trial for this to be heard.

[29] The court clerk informed counsel the first full day in the court's docket was April 6, 2021. Defence counsel spoke up: "It's almost a year after…" obviously referring to the fact that April 6, 2021 would be almost a year after the original trial date of April 28, 2020. He said nothing about delay or the appellant's s. 11(b) rights.

[30] As I will explain, on appeal the appellant's counsel said defence counsel did not need to raise a delay alarm on August 5, 2020.

[31] The trial judge focused on finding a date for the Crown's s. 715.1 application in advance of the April 6, 2021 trial date. After a discussion about the state of the docket for certain dates in the fall, the judge set November 16, 2020 for the *voir dire*. At this juncture in the discussion, defence counsel asked: "And then we're taking the April 6th date as…setting that for the trial…" to which the judge responded, "Yes". Defence counsel said: "Thank you", accepting the April 2021 trial date without protest.

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[15] Section 715.1 of the *Criminal Code* allows for the admission into evidence of a video recording made within a reasonable time of a witness under the age of eighteen at the time of the offence provided the witness adopts the contents and the trial judge is of the opinion that admission of the recording will not interfere with the proper administration of justice.

[32] The matter was adjourned to November 16, 2020 for the s.715.1 *voir dire*. It proceeded as scheduled and the judge admitted K.R.'s statement.

[33] On April 6, 2021, the appellant's trial went ahead with the Crown witnesses. After a long day, the Crown closed its case. Defence counsel indicated he would be calling evidence, including that of the appellant. After a back-and-forth discussion about dates for the continuation of the trial, Friday, May 28, 2021 was settled on—a half-day—which is all the defence thought would be needed.

[34] The judge made a general apology about the delay and observed that because of staffing shortages he tried to avoid Fridays. He remarked that the delay was "a frustration for all of us".

[35] On April 11, 2021 defence counsel and a lawyer representing the Crown appeared before the judge. Defence counsel indicated he would need the better part of a day for the defence case. The witness line-up was the same as he had indicated when the half-day of May 28, 2021 had been set.

[36] The trial judge proposed July 16, 2021 despite staffing shortage issues on Fridays in his courtroom. He noted that X.J. was a young person at the time of the alleged offences: "Yeah, so we got to get on with that one and I apologize to staff here. But…" He observed that if July 16, 2021 wasn't a feasible date there would be nothing sooner than September 10, 2021 the next available full day. Both counsel were available for July 16, 2021.

[37] On July 16, 2021 the trial hit a speed bump. Before any defence evidence was called, Crown counsel put the court on notice he would be seeking to call rebuttal evidence, that of an endocrinologist to speak about whether K.R.'s medical condition had affected the reliability of her answers in the course of a lengthy and stressful cross-examination.

[38] The trial judge quickly indicated he would likely allow the expert evidence because he also had concerns about K.R.'s responses under defence questioning.

[39] Defence counsel pushed back against the Crown's proposal to be allowed to call expert evidence. He raised concerns about the nature of the proposed evidence and its relevance and then, as a third point, addressed delay:

> And my third concern, Your Honour, is with the delay in this matter. There certainly are Covid times that were in there, but this is a matter where my client was arrested, initially, July 23rd, 2019. The Information was September 9,

> 2019…we put a plea in November 18th. The focus hearing on the first time came January 6th, 2020 and the trial was set for April 28th, 2020. That, by my count, is roughly nine months.
>
> Unfortunately, April 28th we're in the midst of Covid, and we went to August 5th to set a new trial date. August 5th, 2020. So if we take that time out as Covid, as the Covid-allowed time, then we'd be at… August 5th, 2020. Set a new trial date. *Voir dire* is November 16th, 2020. Our trial beginning was April the 6th. The continuation, July 16th, 2021.
>
> If we take out the…just the time from April 28th to August 5th as sort of the Covid time we're up to 11 months plus the earlier nine months, that puts us at 20 [months]. We're already over *Jordan*. If we extend that from not only the trial date April 28th…not to setting the new trial date but going to the *voir dire*, that puts us…bumps us back a few months. That's another eight months. Nine and eight. We're at 17. If we're looking at more time for an expert witness we're not going to get it back into this court within a month.

[40] Defence counsel's math was off a little due to his mistake in thinking the *Jordan* clock started ticking on the date of the appellant's arrest. As I mentioned earlier, trial delay is calculated from the date of the charge, in this case, September 9, 2019. On July 16, 2021 when defence counsel made his comments, the total delay stood at just over 22 months. Defence counsel was correct that the case was "already over *Jordan*".

[41] The defence concern about delay appears to have been focused on the Crown's intention to call expert evidence in rebuttal. Defence counsel told the judge: "So delay is certainly a concern if we're even passing those first two tests of re-opening the Crown's case". The "first two tests" was a reference to the legal arguments he had made earlier in opposing the Crown calling further evidence.

[42] Crown counsel's response revealed that he misunderstood the *Jordan* ceilings despite the clear articulation of them by the Supreme Court of Canada. Arguing that the appellant's trial had not already exceeded its *Jordan* outer limit, the prosecutor said the presumptive ceiling for the case was 30 months because the charges were "an indictable matter".

[43] The trial judge did not correct the Crown's error. He queried it only to the extent of saying: "Isn't an indictable matter 30 months because the presumption of preliminary inquiry, which you don't get?" It is plain the judge was referring to the rationale for a 30 month *Jordan* ceiling in cases where there either has been or could be a preliminary inquiry. The majority reasons in *Jordan* held:

> **[49]** The most important feature of the new framework is that it sets a ceiling beyond which delay is presumptively unreasonable. For cases going to trial in the provincial court, the presumptive ceiling is 18 months from the charge to the actual or anticipated end of trial. For cases going to trial in the superior court, the presumptive ceiling is 30 months from the charge to the actual or anticipated end of trial. We note the 30-month ceiling would also apply to cases going to trial in the provincial court after a preliminary inquiry…

[44] Crown counsel's response demonstrated he had a faulty recall of *Jordan*:

> There's plenty of…there may be a presumption, but there are lots of indictable matters now where the…where Parliament has removed preliminary inquiries but hasn't changed the *Jordan* ceiling…it is because they're serious. Serious charges necessitate more procedure, procedure like this. This was not foreseeable…

[45] The trial judge did not counter the Crown counsel's view of when the delay in the case would become presumptively unreasonable.

[46] The 30 month ceiling error persisted in the trial judge's mind. On November 2, 2021 the judge, writing by email to counsel to indicate post-verdict delay did not factor into the *Jordan* timeline, said:

> I have reviewed the ***R. v. Charley*** **2019 ONCA 726** case that I provided to you. It appears clear from the ONCA that the Jordan timeline does **NOT** apply to the post verdict timeframe which should have its own 5 month timeframe. The logic in this is that time is needed for proper preparations for sentencing after a verdict is given.
>
> Please review your [X.J.] timeline and *if there is no 30 month breach to the date of verdict then there is no 11(b) breach* and time (less than the *Charley* 5 months) will be allotted for a proper sentencing pursuant to *Charley*.
>
> We can formalize this discussion on the record but I want you to be aware of the caselaw that will be guiding my deliberations on this matter.
>
> (emphasis added)

[47] On July 16, 2021 with the wrong *Jordan* ceiling of 30 months hanging in the air, the discussion turned to how quickly the Crown could obtain the expert report he wanted.

[48] The judge, mindful he was dealing with a young person, was not prepared to book the trial continuation for the next available full day, which was June 14, 2022. He told the court clerk: "Pick a trial to bump". Defence counsel had had a three-week murder trial resolve in September 2021. The judge directed the clerk:

"Figure out what you think we can bump in those three weeks that I'm here, obviously, and we'll go from there".

[49] After a recess, everyone returned to the courtroom to talk about what could be displaced from the docket to accommodate the continuation of the trial. September 7, 2021 was selected. The judge said he was "clearing the decks", with nothing else to be scheduled for that day. "…this is going to go ahead this day, and that's going to be the end of it". He then apologized to "everyone on both sides for these delays. Just the nature of the beast lately".

[50] Defence counsel told the judge his delay concerns had been put on the record. The judge responded by saying the delay fell squarely on the Crown: "He acknowledges that". Earlier, Crown counsel had said it was "his duty" to apologize. He explained that he "would not have waited till today" to raise the issue of an expert but that his "case research" suggested the evidence should be called in rebuttal.

[51] The case returned on September 8, 2021 with the Crown formally closing its case. Crown counsel advised he was unable to obtain the expert opinion he had hoped for. The judge, indicating his determination to get the trial concluded, set a return date of September 14, 2021. Defence counsel weighed in to support the Crown's proposal that final submissions be in writing, given the amount of evidence.

[52] On September 14, 2021 defence counsel advised he had witnesses to call. He addressed the issue of delay, apparently intending to make submissions on the issue:

> …when my friend was seeking expert evidence I made mention concerns about reopening the case but more so about delay. I think this is a case where, unfortunately, 11(b)…even with Covid time taken…removed from it is squarely in play…

[53] The trial judge directed defence counsel to finish the trial and make his delay arguments in his final submissions. The defence called its evidence and closed its case. Crown counsel advised that he and defence counsel preferred to make oral submissions. September 21, 2021 was scheduled for this purpose.

[54] At the September 14, 2021 appearance, no one—not the Crown, defence counsel or the trial judge—had a good handle on the parameters of the *Jordan* total delay calculation. The Crown told the judge it was necessary to identify "a notional date" because "The trial concludes when sentence is passed or an acquittal is entered...". He went on to add:

> We can notionally assign dates for those purposes [merits decision and sentence] if we want to give Mr. Hoehne [defence counsel] the ability to start his math right away. Or we can just wait until those dates are come and gone and do a final assessment at the end of it.

[55] This was wrong.

[56] The trial judge set November 15, 2021 as the date he would render his decision on the merits. Ultimately, in his s. 11(b) decision, the trial judge pointed out the argument for a "notional date for decision" was incorrect and the appellant's trial had ended with the submissions of counsel on September 21, 2021.

[57] On September 21, 2021 it was agreed that the s.11(b) delay arguments would be made in writing. Defence counsel told the judge: "…the trial, given Covid…is really what we're…I think what we're going to be looking at, where Covid takes its timeout".

[58] As a result of counsel having a mistaken view of when a trial concluded for the purposes of a s. 11(b) delay analysis, the parties returned to court on November 1, 2021 for a discussion about getting a sentencing date (even though the judge had not rendered his decision on the merits) in order, in their view, to properly calculate the extent of any delay. Crown counsel told the trial judge incorrectly the trial ended "when the sentencing is passed".

[59] Defence counsel acknowledged some of the delay was due to "Covid exceptional circumstances". Crown and defence counsel talked about the delay being "26 or 27 months total. Way over" (Crown counsel) and "28 months, over, I think…" (defence counsel). The defence calculation of 28 months had to have used the date of the appellant's arrest in July 2019 (which was an incorrect starting point) and an end date of November 15, 2021, the date the judge had indicated he would deliver his decision on the merits. As I have noted, that too was wrong.

[60] The total delay in this case is calculated from September 9, 2019, the date the appellant was charged to September 21, 2021, the date Crown and defence made their final submissions—24 months and 11 days. Of this, defence counsel

explicitly acknowledged waiver of 7 days of delay, from September 7 to 14, 2021 due to being unavailable to proceed on September 7, 2021 as scheduled.

[61] I find the delay to be assessed is 24 months and 4 days.

Categorization of the Delay

[62] The total delay was presumptively unreasonable. The appellant's trial entered unreasonable delay territory at 18 months, that is March 9, 2021.

[63] Whether a judicial stay should be entered depends on what constitutes the net delay. Implied waiver by the defence can reduce the total delay so that it falls below the presumptive ceiling.

[64] At the appeal, the appellant's counsel did not concede there was any implied waiver of delay although his position could be seen as accepting there was. What appellate counsel said is this: on August 5, 2020 defence counsel accepted the already-past-the-*Jordan*-presumptive-ceiling date of April 6, 2021 because the delay was necessarily moderated by the extraordinary circumstance of the pandemic. In counsel's submission, on August 5, 2020 defence counsel did not need to raise any concern about delay. Delay was attenuated by Covid. We do not need to address whether that constituted implicit waiver.

[65] On July 16, 2021, defence counsel raised s. 11(b) concerns. The trial was already a little over four months past the *Jordan* limit of 18 months. Counsel at the appeal said delay to this point had been tolerable but on July 16, 2021, or shortly thereafter, the trial should have been completed. Defence counsel had objected to the Crown's proposal to call expert rebuttal evidence and noted it would put the trial "over *Jordan*". He was prepared to make a s. 11(b) motion for stay.

[66] Had the trial Crown not thrown a spanner in the works on July 16, 2021 defence counsel could have called its case. There had already been an agreement to make final submissions in writing. Instead, the appellant's trial was delayed further, to September 8, 2021 when Crown counsel indicated he had been unable to secure the evidence he was looking for. The defence case was heard on September 14, 2021 and final submissions delivered orally on September 21, 2021.

[67] On July 16, 2021 the trial judge placed the delay that followed at the feet of the Crown. At the appeal, respondent counsel conceded that the period of July 16, 2021 to September 7, 2021 was Crown delay. This alone would seem to put the s.

11(b) issue to rest: the appellant's trial fell afoul of *Jordan*, even taking into account Covid.

[68] The appellant has accepted that the delay of 24 months and 4 days—September 9, 2019 to September 21, 2021 (taking into account the 7 days he has acknowledged as defence delay) can be Covid-justified only to the extent of 4 months and 1 week—March 9, 2021 to July 16, 2021. That leaves a delay of nearly 20 months, over the *Jordan* redline. A stay is the appropriate remedy where *Jordan* has been exceeded.

[69] It cannot be overlooked that on July 16, 2021 and thereafter, as evidenced by the judge's email in November 2021, the trial judge and Crown counsel appear to have been operating on the basis that the applicable *Jordan* ceiling was 30 months. Some time later, on July 13, 2022, when Crown counsel filed his written submissions, he identified the correct *Jordan* ceiling of 18 months. As evidenced by their confusion over the parameters of the *Jordan* timeline, the court and the Crown did not have an authoritative grasp on *Jordan*.

Conclusion

[70] *Jordan* established that everyone in the criminal justice process has a responsibility to expedite proceedings. As the majority in *R. v. K.J.M.* held, Crown failure to take reasonable steps,

> [81] …to expedite the proceeding is one indicator that the case may have taken markedly longer than it reasonably should have (see *Jordan*, at para. 81). This is particularly so in the youth context, since the tolerance for delay in this context has always been – and will continue to be – lower than in the adult context.[16]

[71] By prolonging the appellant's trial on July 16, 2021, Crown counsel did not take reasonable steps to expedite its conclusion. I accept the appellant's arguments that the trial should have been concluded on July 16, 2021 or within a few weeks after to accommodate final submissions. Accepting the extraordinary circumstance of the pandemic and its effect on the operation of the courts, the appellant was prepared to tolerate the delay to July 16, 2021. He raised his s. 11(b) rights at that time. The delay that followed was accepted as Crown delay, and acknowledged as Crown delay on appeal. The appellant's trial had been pushed above the *Jordan* ceiling and the appropriate remedy is a stay of proceedings.

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[16] *Supra*, note 4.

Disposition

[72] I would stay the proceedings against the appellant for unreasonable delay, a violation of his s. 11(b) right to be tried within a reasonable time.

Derrick, J.A.

Concurred in:

Farrar, J.A.

Beaton, J.A.