SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Burgess*, 2022 NSSC 335

Date: 20221116
Docket: CRH No. 513198
Registry: Halifax

Between:

His Majesty the King

Appellant

v.

Stacey Jaye Burgess

Respondent

SUMMARY CONVICTION APPEAL DECISION

Judge:	The Honourable Justice Kevin Coady
Heard:	September 14, 2022, in Halifax, Nova Scotia
Decision:	November 16, 2022
Counsel:	Stephen Anstey, for the Appellant James Giacomantonio, for the Respondent

By the Court:

Background:

[1] On August 17, 2019 Ms. Burgess was arrested and charged with impaired driving and refusal of a breath demand. She was released on a promise to appear in Provincial Court on September 26, 2019. On October 26, 2021 Ms. Burgess filed an Application pursuant to section 11(b) of the Charter of Rights and Freedoms. She claimed that her right "to be tried in a reasonable time" was infringed as per the principles set forth in *R. v Jordan* 2016 SCC 27. The motion was heard on December 7, 2021. The Learned Provincial Court Judge granted the motion and entered a judicial stay. The Crown has appealed that decision, submitting that "the Trial Judge erred in her s.11(b) analysis by incorrectly categorising the period of time from the December 7, 2021 trial date to the April 2022 trial date."

Procedural History:

[2] In order to fully appreciate the issues in this appeal, it is helpful to review the procedural history of this prosecution. The following Court appearances, and the actions taken, are as follows:

August 26, 2019: Ms. Burgess is charged and released with the promise that she would appear in Provincial Court on September 26, 2019 for plea. This represents 40 days of delay.

September 26, 2019: Defence counsel requested the plea be put over until October 21, 2019 pending receipt of disclosure. The Crown elected to proceed summarily. The Court stated, “we can do that.” This represents 25 days of delay.

October 21, 2019: The Defence indicated it just received disclosure from the Crown and needed some time to discuss it with Ms. Burgess. It suggested an adjournment until November 18, 2019. The Court stated, “Makes sense. Okay, with the Crown.” The Crown responds, “That’s fine.” This represents 28 days of delay.

November 18, 2019: The Defence entered not guilty pleas and requested a one-half day trial. June 2, 2020 was offered but the Defence was unavailable. The next available date was July 6, 2020. The Crown indicated, “That’s fine with the Crown, and for the record, the Crown is available on June 2, as well.” This represents a further delay of 231 days.

June 29, 2020: This appearance was prompted by the Court and was held by telephone. The Learned Provincial Court Judge stated as follows:

> All right, so this was a matter for trial coming up on July 6. It is being adjourned at this point, not necessarily because of COVID- 19 but because things were so uncertain up until recently about whether the trial will be going ahead, that there's some issues with expert witnesses and the like that can more effectively be dealt with by way of adjournment given that the matter can be adjourned to a date within the *Jordan* timeline.

The trial was adjourned until February 18, 2021 with the consent of both parties. This represents a further delay of 227 days.

[3] The record indicates that the Defence was prepared to go to trial on July 6, 2020 as long as the Crown was prepared to waive a few days off the 30 day notice period required for the expert. The Crown refused that concession and the adjournment was granted. It should be noted that the February 18, 2021 trial date was 551 days from charge, or slightly over 18 months.

January 27, 2021: This appearance was prompted by the Court. The record indicates that the scheduled Judge required a weeks vacation and directed this case be adjourned. It was adjourned, without comment, until May 31, 2021. This represented a further delay of 102 days or approximately 3 months over the *Jordan* timeline for Provincial Court matters.

May 21, 2021: This appearance was prompted by the Court as a result of COVID-19 health directives. The Court proposed December 7, 2021 as the next trial date. It was accepted by counsel. This represents a further delay of 190 days, bringing the

clock to 843 days, or 27.7 months. Nothing was said by the Court, or counsel, about the new date being almost a year past the *Jordan* ceiling.

November 5, 2021: This conference was convened by Ms. Burgess as a result of her section 11(b) application. She requested that the application be heard on the December 7, 2021 trial date. The Crown requested that the trial proceed as scheduled and the application be argued post trial. The Learned Provincial Court Judge ordered the section 11(b) motion be heard on December 7 and set a trial date, if required, of April 11, 2022. The Court stated, "I'm not sure if there's any realistic option of having a delay application heard prior to December 7." Nothing was said about the fact that the April 11, 2022 date was 968 days post charge, or 31.8 months.

[4] It is noteworthy that a Crown Attorney was not assigned to this file as of November 5, 2021, given *Jordan* concerns. The Crown of the day stated, "So it would have been a very straightforward refusal trial with, I believe, some extra evidence, so there-there would have been no reason for us to have it assigned up to this point." The record discloses several Crowns appeared over the two and a half years from charge.

December 7, 2021: Ms. Burgess' section 11(b) motion was heard on this date.

February 3, 2022: The Learned Provincial Court Judge found there was an infringement of Ms. Burgess' section 11(b) rights. She entered a judicial stay.

Standard of Review:

[5] The Nova Scotia Court of Appeal addressed the standard of review in section 11(b) appeals in *R. v Ellis*, 2020 NSCA 78. That Court endorsed the approach of the British Columbia Court of Appeal in *R. v Pipping*, 2020 BCCA 104. Justice Derrick stated at paragraph 81:

> **81** In *Pipping* the court held:
>
> > [92] The post[] *Jordan* s. 11(b) framework invokes different standards of review at three different stages: (1) findings of fact relevant to defence conduct; (2) the characterization of delay and the attribution of responsibility; and (3) the determination of whether the total delay is unreasonable and the decision to impose a stay.
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> > [93] At the first stage, the findings of fact of a trial judge that are relevant to defence conduct are afforded deference on review, and subject to a standard of palpable and overriding error: *R. v. Horner*, 2012 BCCA 7 at para. 70; *R. v. K.N.*, 2018 BCCA 246 at para. 13.
> >
> > [94] At the second stage, first instance judges are uniquely positioned to gauge responsibility for delay; *Jordan* at para. 65. The determination of whether defence conduct is legitimate or illegitimate is highly discretionary, and appellate courts must show a high level of deference on review: *Cody* at para. 31; *R. v. S.C.W.*, 2018 BCCA 346, leave ref'd (2019) SCC Docket 38403, *[2018] S.C.C.A. No. 452* at para. 38.
> >
> > [95] At the third stage, the ultimate determination of whether the total delay is unreasonable and the decision to impose a stay is a question of law subject to a correctness standard: *K.N.* at para. 13; *R. v. Christhurajah*, 2019 BCCA 210 at para. 113.

The court noted that the Ontario Court of Appeal have taken the view that all aspects of the section 11(b) analysis should attract the correctness standard (*R. v Jurkos*, 2018 ONCA 489). I am also of the view that the *Pipping* approach is preferrable.

Decision Under Review:

[6] The following cites from the section 11(b) ruling indicate the decisions made by the Learned Provincial Court Judge:

- "The total time between Ms. Burgess' arrest and the trial days offered is 968 days, or 31 months and 25 days, or 418 days more than the 18-month presumptive ceiling established by *Jordan*."
- "The Crown says that both the Crown and the Court, were ready to proceed to trial on July 6, 2020 but the subsequent adjournment was a result of issues with the Defence's expert witness… I agree with the Defence that this delay cannot be attributed to Defence delay as the matter was brought forward to be adjourned because of the Court shutdown resulting from the pandemic, and not because of the Defence with their expert, and the notice requirements."
- "I find that none of the delay can be attributed to the Defence. The net delay remained 968 days. This exceeds the presumptive ceiling by 420 days."
- "Exceptional circumstances fall under two categories. Discrete events and particularly complex cases. There is no suggestion that this case is complex. Here we have only one discrete event alleged by the Crown, and conceded by the Defence, the pandemic."
- The Crown and the Defence agree that the entire period between the initial trial date of July 6, 2020 and the rescheduled trial date of February 18, 2021 to be subtracted from the net delay. I agree, 227 to be deducted will be deducted as an exceptional circumstance resulting from the pandemic restrictions."
- "Next the Court brought the matter forward prior to the trial on February 18, 2021, and rescheduled the trial to May 31, 2021, as the Court was no longer available.

> That was a delay of 102 days. The Crown is suggesting that the period be deducted from the net delay as an exceptional circumstance. The Defence says that the accused cannot be responsible for a delay resulting from a lack of judicial resources. I agree with Defence counsel. The period between February 18, 2021 and the May 31, 2021 will not be deducted from the net delay."
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> - The Crown and Defence agree that the entire period between the scheduled trial date of May 31, 2021 and the rescheduled trial date of December 7, 2021 should be subtracted from the net delay. I agree. 190 days will be deducted as an exceptional circumstance resulting from the ongoing pandemic restrictions."
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> - "So the total delay resulting from the pandemic… Is the initial period of 227 days, followed by the period of 190 days, totally 417 days."
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> - "So from the date of arrest, and the proposed trial date of April 11, 2022, there is a period of 968 days, none of which can be attributed to Defence delay, but some of which can be attributed to exceptional circumstances resulting from the pandemic. That 968 days, minus 417 days, equals 551 days. 18 months, or 548 days, is a presumptive ceiling for unreasonable delay. If this matter were to proceed to trial on April 11, 2022, it would be three days beyond the *Jordan* timeline."

The *Jordan* Framework:

[7] The Supreme Court of Canada in the *Jordan* decision determined that a culture of complacency had infected the prosecution of criminal cases in Canada. All participants shared responsibility. Delay became the norm and section 11(b) of the Charter received little attention. Toleration of delay became normal. The Court defined the following framework for section 11(b) applications at paragraphs 46-48:

> [46] At the heart of the new framework is a ceiling beyond which delay is presumptively unreasonable. The presumptive ceiling is set at 18 months for cases going to trial in the provincial court, and at 30 months for cases going to trial in the superior court…

> [47] If the total delay from the charge to the actual or anticipated end of trial (minus defence delay) *exceeds* the ceiling, then the delay is presumptively unreasonable. To rebut this presumption, the Crown must establish the presence of exceptional circumstances. If it cannot, the delay is unreasonable and a stay will follow.
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> [48] If the total delay from the charge to the actual or anticipated end of trial (minus defence delay or a period of delay attributable to exceptional circumstances) falls *below* the presumptive ceiling, then the onus is on the defence to show that the delay is unreasonable. To do so, the defence must establish that (1) it took meaningful steps that demonstrate a sustained effort to expedite the proceedings, *and* (2) the case took markedly longer than it reasonably should have.

I am satisfied that the Learned Provincial Court Judge adhered to this framework.

Defence Delay:

[8] Defence delay has two components. The first is waiver and the second is delay caused solely by the conduct of the Defence. The *Jordan* Court made it clear that defence actions legitimately taken to respond to the charges fall outside the ambit of defence delay. Waiver did not play a role in this case.

[9] In *R. v. Cody,* 2017 SCC 31 defence delay was extensively canvassed and the following principles were established:

- Where the Court and Crown are ready to proceed, but the defence is not, the resulting delay should be deducted.
- Examples of defence delay in *Jordan* are only examples and should not be taken as exhaustively defining deductible defence delay. It remains open to trial judges to find that other defence actions or conduct have caused delay warranting a deduction.

- The determination of whether defence conduct is legitimate is not an exact science and is something trial judges are uniquely positioned to gauge.
- Determining defence delay is highly discretionary, and appellate courts must show a correspondingly high level of deference.
- Defence conduct encompasses both substance and procedure. The decision to take a step, as well as the manner in which it is conducted, may attract scrutiny.
- Irrespective of its merit, a defence action may not be legitimate if it is designed to delay or if it exhibits marked inefficiency or marked indifference toward delay.
- Inaction may amount to defence conduct that is not legitimate. Defence counsel are expected to actively advance their client's right to a trial within a reasonable time.
- Legitimacy takes its meaning from the culture change demanded in *Jordan*.

I take no issue with the Learned Provincial Court judge's decision that there was no defence delay in Mr. Burgess' case.

Exceptional Circumstances:

[10] The *Jordan* court defined exceptional circumstances as those that are out of the Crown's control because they were reasonably unforeseen or reasonably unavoidable and the Crown could not reasonably remedy the resulting delay. There are two categories: discrete events and particularly complex cases. The case at bar is not complex, in fact, it was straight forward. Exceptional circumstances are the only basis upon which the Crown can discharge its burden to justify a delay that exceeds the ceiling.

[11] The majority in *Jordan* discussed discrete events at paragraph 75:

> [75] The period of delay caused by any discrete exceptional events must be subtracted from the total period of delay for the purpose of determining whether the ceiling has been exceeded. Of course, the Crown must always be prepared to mitigate the delay resulting from a discrete exceptional circumstance. So too must the justice system. Within reason, the Crown and the justice system should be capable of prioritizing cases that have faltered due to unforeseen events (see *R. v. Vassell*, 2016 SCC 26, [2016] 1 S.C.R. 625). Thus, any portion of the delay that the Crown and the system could reasonably have mitigated may not be subtracted (i.e. it may not be appropriate to subtract the entire period of delay occasioned by discrete exceptional events).

The Court emphasised that all participants in the criminal justice system will be expected to work together to avoid impermissible delay.

Mitigation of Delay:

[12] The Court and the Crown must take steps to mitigate delay once it is apparent. The *Jordan* court stated at paragraph 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.

In this case that equates to taking steps to mitigate the effects of the pandemic on delaying the trial.

[13] This issue was addressed by the Alberta Court of Appeal in *R. v. Ghraizi*, 2022 ABCA 96 at paragraph 12:

> We agree with both the trial judge and summary conviction appeal judge that Crown counsel illness, unavailability due to the assigned Crown's jury trial extending, and the Covid-19 pandemic were exceptional circumstances. However, identifying an exceptional circumstance is not sufficient. As the Supreme Court of Canada instructs us in *Jordan*, at paras 74-75, once the ceiling is exceeded. "the focus should be on whether the Crown made reasonable efforts to respond and to conclude the trial under the ceiling" and that "the Crown must always be prepared to mitigate the delay resulting from a discrete exceptional circumstance. So too must the justice system."

December 7, 2021 – April 11, 2022:

[14] *Jordan* directs that the end point in a section 11(b) analysis is the "actual or anticipated end of trial." In this case counsel and the Court agreed to use the anticipated end of the trial for the delay calculations. The scope of this appeal was expanded when the defence filed a Notice of Contention prior to oral submissions. That document contained the following:

> The Respondent says that the Learned Trial Judge did not err in her s.11(b) analysis when categorizing the period of time from December 7, 2021, to April 11, 2022.
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> The Respondent also contends, in the alternative, that the Learned Trial Judge mis-categorized other discrete periods of time as exceptional circumstances that should have been counted as either Crown or systemic delay. As a result, the total period of delay when calculated in the alternative still exceeds 18 months.

This opened up the arguments such that the entire procedural history came under scrutiny.

[15] The record indicates that the Court ruled, and counsel agreed, that April 11, 2022 would be the end date. The following exchange took place during the December 11, 2021 hearing:

> **MR. COADY**: I would say, Your Honour, that the April 11th date, while is what's being considered now, is speculative. If the 11(b) argument fails, the Crown and the court does have an opportunity to try and get this matter in here sooner than that is certainly it it's something that can be attempted.
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> So I – I would day it should be calculated to the date that the Crown was ready to proceed on – on the 7th, today.
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> THE COURT: But at the time that the matter was brought in, in November, the date that was being offered was April 11th, so knowing that we were going to hold this application today, on the scheduled day of trial, we offered April 11th. Doesn't that mean something? That was – that was the date that we – that we discussed. We would have had the calendar back in November, looking at the earliest date, would it not?
>
> **[…]**
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> **MR. COADY**: … I think it was conceded that that [April 11, 2022] would be the date that we'd be calculating to.
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> **MR. GIACOMANTONIO**: Yes, Your Honour, that's correct.
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> **THE COURT**: Okay.

[16] The Learned Provincial Court Judge confirmed this in her February 3, 2022 decision:

> The trial date offered during the Pre-Trial held in November of 2021, was April 11, 2022. This date will be used as the end date as the trial date of December 7, 2021, was used to argue this *Jordan* Application.

[17] I would have thought that the end date would have been February 3, 2022 when Ms. Burgess' jeopardy ended. However, I am not prepared to interfere and in the end, it will not be determinative of this appeal.

Analysis:

[18] The prosecution of Ms. Burgess is precisely the kind of case that drove the *Jordan* ceilings. It was a straightforward case without evidentiary issues. It only required one-half day of court time. The section 11(b) motion was argued in 1 ½ hours. There is no reason why this trial and motion could not be heard in one day. Further, I am of the view that the trial should have proceeded on July 6, 2020; eleven months post charge. The Crown's strict adherence to the expert notice requirements was not consistent with the principles in *Jordan*. The record indicates that after the July 6, 2020 trial cancellation complacency set in and nothing was done to address delay. There were various Judges and Crowns involved throughout which resulted in a lack of continuity. Given that the scope of this appeal has expanded, I have determined that I should consider the entirety of the delay.

[19] I agree with the Learned Provincial Court Judge that the total time from charge to the anticipated trial date is 968 days, or 31 months and 25 days. This is approximately 12 months over the 18-month *Jordan* ceiling. Consequently, the delay is presumptively unreasonable and offends Section 11(b) of the *Charter*.

[20] I also agree that there was no defence delay. The only factors that could be argued as defence delay are the expert witness issue of July 6, 2020, and the timing of the section 11(b) motion. I have already addressed the former. I do not consider the timing of the motion to be problematic. It was an entirely appropriate

application and could have been heard before trial. It did not require much time. No efforts were made to address delay even though the case was well beyond the 18-month ceiling.

[21] The Learned Provincial Court Judge attributed 417 days delay to the pandemic. It is at this point that our views diverge. The Supreme Court of Canada in *Cody* articulated the following principles:

- Exceptional circumstances that are reasonably unforeseeable or unavoidable is to be deducted, but only to the extent it could not have been reasonably mitigated by the crown and justice system

The record indicates that at no point did the Crown ask for delay to be waived. Further, there is no evidence of the Court or the Crown making efforts to prioritize this case.

[22] I am of the view that the Crown must be responsible for a greater portion of the 417 days attributed to the pandemic. There were lots of opportunities to mitigate the delays after the July 6, 2020, aborted trial date. It does not appear that the various Crowns kept an eye on the ongoing delay. It is my view that 200 days is the appropriate deduction for pandemic delay. This results in the delay being reduced to 768 days or 25 months. Consequently, Ms. Burgess' Section 11(b) rights were breached and therefore a Judicial Stay is to remain in place.

Coady, J.