

ONTARIO COURT OF JUSTICE

CITATION: *R. v. DeSouza*, 2016 ONCJ 588

DATE: 3 October, 2016.

COURT FILE No.:15-05180 Newmarket

B E T W E E N :

HER MAJESTY THE QUEEN

— AND —

PAULO DESOUBA

RULING ON s.11(b) APPLICATION

Before Justice Joseph F. Kenkel

Heard and Delivered October 3, 2016.

Mr. Daniel Lerner counsel for the Crown/Respondent
Mr. Adam Little counsel for the defendant/Applicant

KENKEL J.:

Introduction

[1] Mr. DeSouza applies for a stay of proceedings under s.11(b). It's been 15 months since the Information was sworn charging him with two drinking and driving offences. This is his third trial date. Applying the *Jordan*¹ framework both parties agree that there's been 15 months of net² delay. In this case the simple procedural history would have led to a net calculation under the *Morin* test of 12 months of institutional delay.

[2] The defence submits that 15 months of delay combined with the unfortunate fact of three trial dates is a s.11(b) breach under both tests. The Crown submits that s.11(b) breaches under the *Jordan* framework are rare and this is not a clear case of marked delay.

[3] I agree with the defence that under the *Morin* test, 12 months of delay with

three trial dates for this case in this jurisdiction would have been found to breach the accused's s.11(b) right.³ The issue for decision is what result obtains applying the *Jordan* framework to the same circumstances.

Jordan – Below the Presumptive Ceiling

[4] The presumptive ceiling is not a limitation date. Delay below the ceiling may still be unreasonable.⁴ Where net delay falls below the presumptive ceiling the defence must show:

- 1) It took meaningful steps that demonstrate a sustained effort to expedite the proceedings, and
- 2) The case took markedly longer than it should have.

[5] Here the defence requested disclosure within days of the Information being sworn. Both parties agree that the defence actions throughout show a sustained effort to expedite the proceedings.

[6] To determine whether the defence has proved that the case took markedly longer than it should have, the court must consider all of the circumstances including:

- The complexity of the case
- Local considerations
- Whether the Crown took reasonable steps to expedite the proceedings

[7] This was not a complex case. It was scheduled for one day and both the Crown and defence agree that it would have been completed in one day if it had proceeded as scheduled. Local considerations and actions of the Crown are both relevant.

Markedly Longer?

[8] In *R v Yen* 2014 ONCA 210 the Court of Appeal noted that trial decisions in this jurisdiction found 9 months of institutional delay under the *Morin* framework was the local limit for most impaired driving cases. The court found that a 10 month institutional delay remained within the guidelines for a longer two day trial, "albeit barely".

[9] Three trial dates for a one day matter is exceptional in this jurisdiction as is 15 months to complete a one day trial.

[10] The matter was not reached on the first date set for trial as a result of Newmarket's triage system. That evidence-based system optimizes our use of court time overall but occasionally results in a trial matter not being reached. Where an

adjournment results that matter is typically given priority such that the trial is completed within a reasonable time.

[11] Mr. DeSouza's trial should have been completed on the second day but it wasn't due to a late start. The trial was set to start at 9:30 a.m. but the assigned Crown was not available until 10:45 a.m. The Crown was sent to speak to another matter first. Unfortunately this delay meant that the trial was not completed as scheduled and a third trial date, 3 months later was required.

[12] I find that the Crown did not take reasonable steps to expedite the proceedings in this case. This matter should have been given priority. Given the number of Crown witnesses it was plain that it was certain to take the full day as scheduled.

Stays as Rare

[13] The Crown submits that *Jordan* imposes a new timeline such that delays that might have been found to be unreasonable under *Morin* may not lead to that result in the new framework. In support of that argument they cite paragraph 48 where the court mentions that they expect, "stays beneath the ceiling to be rare, and limited to clear cases".

[14] The stated purpose of the *Jordan* decision was to encourage all participants in the justice system to do better when it comes to delay, not worse. Within days of the release of the decision the trial courts in this province began work on further procedural reforms to implement the direction in *Jordan*. Given the new instruction provided in that case the Supreme Court is right to expect that stays beneath the ceiling will be rare.

[15] Under the previous *Morin* framework stays were also rare. Given the nature of the relief, stays were not granted for marginal cases. The vast majority of cases were resolved or tried well before an 11(b) application was required. That's not to say that all cases moved along with sufficient speed. The *Jordan* framework provides further helpful instruction in that regard and a framework that focuses every participant in the justice system on moving matters on towards trial or resolution.

[16] What is reasonable in terms of s.11(b) is not determined solely by one number or circumstance. The new *Jordan* framework is not solely focused on time calculation.⁵ Case specific factors remain relevant. Trial courts are instructed to, "Step back from the minutiae and adopt a bird's eye view of the case."

[17] Applying the *Jordan* framework in context to the circumstances of this case, I find that the defence has shown that the case has taken markedly longer than is reasonable for this trial. The 18 month presumptive ceiling for this court recognizes the complexity of many of the cases now tried at this level, but it is not an "aspirational target."⁶ I disagree that *Jordan* necessarily sanctions delay even in simple cases beyond what would have been acceptable under the prior guidelines.

Conclusion

[18] I find that the applicant has proved the s.11(b) breach alleged on the balance of probabilities. A stay of proceedings must result.

Released: 3 October 2016

Justice Joseph F. Kenkel

¹ *R v Jordan* 2016 SCC 27

² Total delay – defence delay (here 0) = Net delay (*Jordan* at para.66)

³ See: *R v Yen* 2014 ONCA 210 where the court notes the many trial decisions from this jurisdiction which recognized 9 months as the outer limit for delay in simple impaired driving cases.

⁴ *Jordan* at para 82

⁵ *Jordan* at para 51

⁶ *Jordan* at para 56