SUPREME COURT OF YUKON

Citation: *R v Simpson*, 2023 YKSC 78

Date: 20231109
S.C. No. 22-01500
Registry: Whitehorse

BETWEEN:

HIS MAJESTY THE KING

AND

COLE ROBERT SIMPSON

Publication, broadcast or transmission of any information that could identify the complainant or a witness is prohibited pursuant to s. 486.4 of the *Criminal Code*.

Before Justice K. Wenckebach

Counsel for the Crown — Kathryn Laurie

Counsel for the Defence — Vincent Larochelle

This decision was delivered in the form of Oral Reasons on November 9, 2023. The Reasons have since been edited for publication without changing the substance.

REASONS FOR DECISION

[1] WENCKEBACH J. (Oral): I will begin with the s. 11(b) decision.

[2] Mr. Simpson is charged with sexual assault. He has brought an application seeking that the charge be stayed because of unreasonable delay, pursuant to s. 11(b) of the *Charter*.

[3] Mr. Simpson was charged on May 20, 2021. On November 20, 2023, 30 months will have passed since he was charged. Mr. Simpson's trial starts on November 27, 2023, and is scheduled to finish on December 5, 2023, or 30 months and 15 days after Mr. Simpson was charged.

[4] The complete timeline of the proceedings, from the date of the Information was sworn until the scheduled date of the completion of trial, is as follows:

- May 20, 2021, the Information is sworn.
- June 23, 2021, there was a first appearance which led to an adjournment.
- September 8, 2021, was for election and it led to an adjournment.
- October 20, 2021, was for election and Mr. Simpson elects Territorial Court and a plea of not guilty is entered.
- October 28, 2021, is fix-date. Mr. Simpson seeks a two-day trial, while the Crown seeks a three-day trial. A pre-trial conference is therefore ordered.
- December 1, 2021, the pre-trial conference is held.
- December 9, 2021, is a fix-date and the trial is scheduled for June 14-16, 2021.
- March 14, 2022, the election application for a re-election. Mr. Simpson re-elects to Supreme Court with a judge and jury trial.
- April 12, 2022, is a fix-date and a pre-trial conference is booked for June 10, 2022.
- June 10, 2022, a pre-trial conference is held.
- June 14, 2022, is a fix-date and a pre-trial application date is set for December 7, 2022. The trial is set for March 6-10, 2023.

- March 3, 2023, a pre-trial conference and motion are held in the morning. There, defence counsel confirms that he can proceed with the trial despite late disclosure. In the afternoon, Mr. Simpson applies for an adjournment based on additional disclosure. The adjournment application is granted.
- March 7, 2023, a pre-trial conference is held. The Court seeks counsel's availability for an April trial. Defence counsel indicates that neither he nor defence witnesses are available in April.
- March 14, 2023, at fix-date court, pre-trial applications are set for August 24, 2023, and October 11, 2023. The trial date is set for November 27 to December 5, 2023.

[5] Defence counsel submits that, in the case at bar, the delay to get to trial is unreasonable because the delay surpasses the *Jordan* ceiling. Alternatively, if the Court decides that the delay falls below the *Jordan* ceiling then the delay is nevertheless unreasonable in the circumstances of the case.

[6] In the analysis of whether the delay surpasses the *Jordan* ceiling, counsel agree that the only real question is whether there is defence delay that should be subtracted from the *Jordan* period. If the delay period falls below the *Jordan* ceiling, the questions are broader.

[7] The issues here are therefore, first, in addressing whether the delay is unreasonable because it surpasses the *Jordan* ceiling: (a) does Mr. Simpson's re-election to Supreme Court constitute defence delay; and (b) does defence counsel's declining trial dates in April 2023 constitute defence delay?

[8] If the delay falls below the *Jordan* ceiling, the questions are as follows: (c) did the defence take meaningful and sustained steps to move the matter forward; and (d) did the case take markedly longer than it reasonably should have?

[9] Before addressing these questions, I will set out the general legal principles on undue delay.

[10] In criminal proceedings before superior courts, when a proceeding takes more than 30 months to go to trial, there is presumptively unreasonable delay. The 30 months is calculated from the date of the charge to the end of trial minus delay that is caused by defence's calculated or illegitimate actions. When the 30-month ceiling is reached, the Crown must establish the presence of exceptional circumstances or a stay is warranted (*R v Jordan*, 2016 SCC 27 at paras. 46-47).

[11] The accused may also establish that there has been an undue delay even where the 30-month ceiling has not been reached. To establish undue delay in those circumstances, the defence must prove that it took meaningful and sustained steps to be tried quickly and the time the case has taken markedly exceeds the reasonable time requirements of the case.

[12] I now turn to the analysis of the issues.

[13] First, I will consider whether Mr. Simpson's re-election to Supreme Court results in defence delay.

[14] As I understand it, Crown does not take the position that Mr. Simpson's re-election to Supreme Court should be considered as defence delay for the purposes of determining whether the *Jordan* threshold has been reached or, if it does, it does not

take a very strong position on it. However, as both counsel made submissions on the question, I will consider it.

[15] Whether re-elections are to be considered defence delay and deducted from the total delay has been considered in the case of *R v Lai*, 2021 BCCA 105. The principles arising from the Court of Appeal's decision can be summarized as follows. The 30-month ceiling for trials in superior court takes into account the possibility that an accused will re-elect "as of right", which are re-elections in which the Crown's consent is not needed. It follows that re-elections made as of right are not *per se* exceptional circumstances and a re-election as of right should therefore not be counted as defence delay unless the Court finds the re-election was an illegitimate defence action (para. 105).

[16] The British Columbia Court of Appeal decision was appealed to the Supreme Court of Canada. In its decision, *R v Lai*, 2021 SCC 52 at paras. 2-3, the Supreme Court of Canada disagreed with the Court of Appeal about whether, on the facts on the case before it, defence actions were legitimate or illegitimate. It did not, however, raise any issue with the legal principles the Court of Appeal laid out.

[17] I therefore conclude that the Supreme Court of Canada agreed with the British Columbia Court of Appeal's formulation of the legal principles.

[18] Turning to the case at bar, Mr. Simpson re-elected as of right. There is nothing in the circumstances surrounding the re-election to suggest that it was an illegitimate action. There is therefore no defence delay arising from the re-election.

[19] The second issue is whether defence counsel's rejection of trial dates in April 2023 should be considered defence delay and deducted from the total delay.

[20] Facts on this period of delay are:

- On March 6, 2023, the trial coordinator sent an email to defence counsel and the Crown seeking to set down a pre-trial conference. The email also included a message from me, as presiding judge, stating that I wanted to determine if trial dates could be set in April and wanted the pre-trial conference to take place as soon as possible. Mr. Simpson's counsel replied agreeing to attend the pre-trial conference dates as offered. He stated, however, that he was not available most of April and he was waiting on hearing about defence witness availability. The Crown replied by also agreeing to attend the pre-trial conference dates.
- The pre-trial conference was therefore heard the next day. During the pre-trial conference, defence reiterated that neither he nor his witnesses were available in April. Counsel both agreed that the trial should be set for seven days rather than five. The next available dates were November 27th to December 5th. Crown counsel raised concerns about the *Jordan* deadline, but the trial was still set for those dates.

[21] In order for this delay to be attributable to the defence, I must find: first, that it is solely or directly caused by Mr. Simpson; and second, that it arises from defence action that is illegitimate.

[22] The determination of whether defence conduct is legitimate or illegitimate involves examining the decision to take a step as well as the manner in which it is conducted (*R v Cody*, 2017 SCC 31 at para. 32). The Court may consider the

circumstances surrounding the action. Additionally, not only are defence's actions subject to scrutiny but their inaction is as well.

[23] In the case at bar, whether the delay was caused solely or directly by Mr. Simpson and whether defence's actions are illegitimate are both at issue.

[24] In determining whether the delay was caused solely or directly by Mr. Simpson, I must determine whether the Crown was also available. If the Crown was not available for trial dates in April, the delay does not qualify as defence delay (*Jordan* at para. 44). I will therefore address this question first.

[25] The Crown, in her email about the pre-trial conference and at the pre-trial conference, did not state positively that she would be available for an April trial date. During the *Jordan* hearing, defence counsel submitted that absent an affirmative indication from the Crown that they could not proceed, I should conclude that the Crown could not proceed. The Crown, on the other hand, submitted that there was no requirement that the Crown state on the record that they could proceed in April.

[26] The real question is not whether the Crown is required to put on the record that they are able to proceed but whether I can conclude from the evidence that the Crown was available for a trial in April.

[27] I find that the Crown was available, and I do so for two reasons.

[28] First, during the pre-trial conference, the Crown raised the concern about the *Jordan* deadline when the November dates were offered. This suggests that the Crown understood that if there were only two options, one before the *Jordan* deadline and one after, that even if significant efforts were needed to be available for April, she would try to meet them.

[29] Second, the Crown who attended the pre-trial conference was new to the file because the Crown who had previously conducted the file was leaving the Crown's office. I presume that the new Crown would have taken some time to familiarize herself with the matter. However, her depth of knowledge would not be such that there would be concerns about losing her experience if the file were transferred to someone else. This would provide more flexibility then in meeting the trial dates even if another Crown needed to take the file over.

[30] The counter argument is that no precise date was fixed, and the Crown did not do anything more than express concerns about the *Jordan* deadlines. This does make it more difficult to draw the inference that the Crown would be available for a trial.

[31] Despite these concerns, given the other factors, I find, in this case, that the Crown would make itself available for a trial date in April.

[32] I would note that, although I have determined that it is not necessary for Crown to indicate their availability when trial dates are proposed, it is best practice to do so. Crown should ensure that they are actively engaged in discussing trial dates; otherwise, there may not be sufficient evidence to make findings about Crown's availability.

[33] The next question is whether defence counsel's inability to proceed in April was legitimate or illegitimate.

[34] Defence counsel submits that the actions were legitimate. He submits that new disclosure required s. 276 applications and neither he nor defence witnesses were available during April.

[35] I do not find these arguments persuasive. While it is true that Mr. Simpson had additional reasons to bring the s. 276 application following the late disclosure, it could

have been heard before trial dates in April. While far from ideal, the Court has before conducted full s. 276 and s. 278 applications on very tight deadlines. The new disclosure was not extensive. While it raised new facts, the issues themselves were not new. There was adequate time to determine a s. 276 application.

[36] Defence counsel also submitted that two defence witnesses were unavailable in April: a lay witness and a doctor who conducted the sexual assault examination on the complainant. He submits that they are key witnesses. Mr. Simpson should therefore not be faulted for declining a trial date in April.

[37] As Crown noted, a lay witness can be subpoenaed. There was no evidence that the lay witness would not be able to comply with a subpoena. With regard to the doctor, she would not have testified had the trial proceeded as originally scheduled in March. Defence counsel was, however, prepared to go to trial without her in March. If the trial could go ahead without the doctor's testimony in March, it could also go ahead without her testimony in April. I conclude that defence counsel has overstated the importance of the doctor's testimony.

[38] On the other hand, defence counsel's lack of availability in April could be a legitimate reason for declining dates during that month. The trial was adjourned on March 3rd. The new trial dates would have started at the latest a month and three weeks after they had been decided upon. For a busy sole practitioner, such as defence counsel, a trial date in April may simply not have been possible. Here, however, there are indications that defence counsel did not carefully consider whether he could accommodate the trial in April. My message emailed to counsel was simply about setting trial dates during the month of April. No specific dates were provided. Defence

counsel replied very shortly after the email was sent stating that he was not available in April.

[39] My concern here is that counsel did not take sufficient care to look at his calendar and determine if there was any way to carve out the necessary time. Moreover, counsel did not further explain his lack of availability either at the pre-trial conference or in the *Jordan* application.

[40] When considering what level of detail defence counsel should provide when asserting lack of availability for trial dates as a legitimate action, the Court in *R v Aeichele*, 2021 BCSC 801 at para. 21, stated:

> There is no mechanism that allows either the Crown or the court to question or second-guess the defence on the reasons for not accepting early preliminary inquiry or trial dates that are offered (for example, a busy trial schedule). Therefore, if earlier dates are offered and are available to the Crown and the courts and those dates are rejected by the defence for reasons that are not explained, it constitutes a defence delay. …

[41] There are times where the Court may be able to find that defence's unavailability is legitimate without the need of further evidence. However, in this case, because of the importance of moving the matter forward and my concerns that defence counsel did not carefully consider his availability, further evidence about why he was unavailable in April is necessary.

[42] An additional factor I also consider is defence counsel's response when setting the trial dates for November. In *R v Chang*, 2019 ABCA 315, the Alberta Court of Appeal stated that it is open to the Court to find that the defence showed marked inefficiency or marked indifference where defence blithely agrees to trial dates far into the future in circumstances where the *Jordan* deadline is approaching (at para. 44).

[43] Here, while Crown raised concerns that the *Jordan* threshold would be reached before the trial would be heard, defence counsel was content to set trial dates after the *Jordan* deadline had been reached.

[44] Ultimately, it is not one of the factors but the combination of factors that lead me to conclude that defence was responsible for the delay when defence did not agree to trial dates in April. Counsel refused the dates because he wanted a witness to attend, although the witness would not have been available for the original dates. He did not adequately explain his lack of availability in April and he agreed to trial dates after the *Jordan* deadline was reached without further comment. Cumulatively, I conclude that defence counsel showed marked indifference to delay in that period.

[45] The extent of the delay Mr. Simpson is responsible for also needs to be considered.

[46] Crown is responsible for the delay between the adjournment of the first trial and the dates the trial would have been able to proceed had the trial been able to proceed in April. Given that the trial is a jury trial, time would be needed to formulate a list for the jury pool and to send summonses. A reasonable date for the trial would likely have been April 17th. Thus, Crown is responsible for the delay between March 3rd and April 16th.

[47] The defence is not responsible for all the delay after that period, however. Some of it still lies with the Crown, given the repercussions of having to adjourn at the eve of trial.

[48] Moreover, the Court bears some responsibility — specifically, I bear some responsibility. I have been the judge who has conducted most, if not all, of the pre-trial conferences and have heard the pre-trial applications. I was also responsible for

ensuring that the trial was heard in a timely manner and before the end of November. Institutional delay therefore plays a part. However, it was lucky that, when the trial was adjourned in March, the Court was able to offer seven days of trial time in April. It would not be reasonable to expect that such court time would have been available again in May. At the earliest then, trial dates perhaps could have been found in June. I therefore conclude that April 17th to May 31st should be counted as defence delay. Subtracting that period from the total delay means that the *Jordan* threshold has not been reached.

[49] I will now consider whether, despite falling under the *Jordan* ceiling, the delay is unreasonable.

[50] As noted above, in determining whether delay below the *Jordan* ceiling is unreasonable, the Court must assess whether the defence took meaningful and sustained steps to be tried quickly and whether the time the case has taken markedly exceeds the reasonable time requirements of the case.

[51] The onus is on the accused to establish unreasonable delay and the onus on the defence is heavy. The defence must satisfy both parts of the test to be successful.

[52] I will first consider whether the defence took meaningful and sustained steps to be tried quickly.

[53] For the most part, defence was extremely diligent. The accused did not take unreasonably long to obtain counsel and set dates for trial. When the accused was presented with the first late disclosure document, he worked to ensure the trial would still go ahead.

[54] I have also found, however, that the defence was responsible for some delay because he showed marked indifference to the delay when the Court was attempting to set new trial dates after adjourning the first trial. This has an impact on my analysis.

[55] Crown submits that, while in some ways, the defence worked to ensure that there was a speedy trial, in other ways he did not. Specifically, the way he dealt with the evidence of the complainant's sexual activity and potential s. 276 issues were not with the spirit of having the trial heard in an expeditious manner.

[56] I agree that defence should have dealt with the s. 276 issues differently. He first brought an application that did not meet the notice requirements. He then decided not to bring a s. 276 application at all, reasoning that it was not necessary as the sexual activity evidence all formed the subject matter of the charge. The better approach would have been to bring an application, including for determination of whether s. 276 applied, before the trial, as has been directed by the Supreme Court of Canada in *R v JJ*, 2022 SCC 28.

[57] Defence counsel's failure to do so would have added complexity to the trial and likely lengthen it somewhat. However, I do not conclude that it would have had a real impact on delay. As such, I do not take that into consideration in this analysis.

[58] In the end, however, given defence's actions around setting trial dates in April, I conclude that, at times, he did not take the necessary steps to be tried quickly. Defence has not proved the first part of the test, so it is not necessary to consider the second part.

[59] However, in this instance, I will still examine whether the case markedly exceeds the reasonable time requirements.

[60] The factors used to determine whether the case markedly exceeds the reasonable time requirements include the complexity of the case, local considerations, and whether the Crown took reasonable steps to expedite the matter.

[61] I will begin by considering Crown actions.

[62] Generally, the Crown conducted the file in an efficient manner. However, the Crown is also responsible for delays caused by the adjournment of the first trial. It was required because Crown provided very late disclosure to the defence that could have an impact on Mr. Simpson's defence. Moreover, there were delays in getting Mr. Simpson other disclosure. In this way, Crown did not take reasonable steps to expedite the proceedings.

[63] On the other factors, defence counsel submits that the original date of trial provides a good yardstick for determining the reasonable time requirements of the case. Defence calculated from the date of the first appearance at Supreme Court until the date of the original trial, and states that this matter should have taken one year to get trial.

[64] I do not agree with his assessment for two reasons:

- First, by using the first appearance at Supreme Court, the defence counsel ignores all the steps that were taken before the matter got to Supreme Court, including retaining counsel, receiving and reviewing disclosure, and making elections. This additional time should also be counted.
- Second, the trial was originally set down for five days, while it is now set down for seven. The Court is more readily able to set down a trial for five

> days than for seven. Had the original time estimate been seven days, it likely would have been harder to find court time and would likely have been scheduled later.

[65] The assessment of the reasonable time requirements to take the matter to trial is complicated by two factors: Mr. Simpson's re-election to Supreme Court; and the complexity of the matter.

[66] Mr. Simpson elected Territorial Court on October 20, 2021, and then re-elected to Supreme Court almost five months later, on March 14, 2022. Had Mr. Simpson elected to go to Supreme Court in October rather than March, the matter would have been in the Supreme Court system for a longer period of time. It is difficult to determine what impact that has, however. On the one hand, this suggests that potentially an earlier trial date would have been possible. On the other hand, it also means that the matter had been in Territorial Court for longer than other matters where accused do not have the right to a preliminary hearing and immediately elect to Supreme Court. Thus, there was likely a shorter *Jordan* period for the Court to work with in Mr. Simpson's matter than for other similar matters.

[67] Given that the Court prioritizes matters that will reach the *Jordan* threshold sooner, it may have been "jumping the queue", so to speak, when the trial was set down for March. In stating this, I am not stating that Mr. Simpson did anything wrong when re-electing to Supreme Court. It does, however, make it more difficult to determine how long it reasonably should have taken for this matter to get to trial when comparing it to other similar matters.

[68] The complexity of this matter also makes it more difficult to assess this question. Defence counsel states that the issues are not complicated and, on the face of it, they do not appear so. Mr. Simpson is facing one charge of sexual assault about events occurring over the course of an evening. There is evidence of the complainant's sexual activity that potentially falls under s. 276 but that, too, is not unusual.

[69] What is unusual is the legal questions arising from evidence of the complainant's sexual activity, particularly of whether the sexual activity evidence does fall under s. 276 or if it forms the subject matter of the charge. Counsel has not presented to me, and I have not found, case law that is directly on point given the specific factual matrix underlying the issues. It has been sufficiently challenging that there have been three applications brought in an attempt to deal with this evidence: a withdrawn s. 276 application brought by Mr. Simpson, a subsequent failed *Seaboyer* application brought by the Crown, and a final s. 276 application which was heard on the same day as this *Jordan* application. This is not routine.

[70] Taking everything together, I conclude that the matter has taken longer than it reasonably should have. However, Mr. Simpson has failed to convince me that it has taken markedly longer than it should have. I therefore dismiss Mr. Simpson's *Jordan* application.

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WENCKEBACH J.