Citation: R v Grant, 2017 MBCA 84 Date: 20170905
Docket: AR17-30-08809

IN THE COURT OF APPEAL OF MANITOBA

B E T W E E N :

HER MAJESTY THE QUEEN	)	***M. R. Buchart***
	)	*for the Applicant*
	)	
(Appellant) Respondent	)	***C. P. R. Murray***
	)	*for the Respondent*
- and -	)	
	)	*Chambers motion heard:*
GENEVIEVE L. GRANT	)	***August 10, 2017***
	)	
	)	*Decision pronounced:*
(Accused) (Respondent) Applicant	)	***September 5, 2017***

CAMERON JA

Introduction and Facts

[1] The accused applies for leave to appeal the decision of the summary conviction appeal judge, who determined that a delay of just under 18 months—from the time that she was issued an offence notice for speeding and the time of her trial—did not infringe her right to be tried within a reasonable time pursuant to section 11(b) of the *Canadian Charter of Rights and Freedoms* (the *Charter*).

[2] On November 4, 2014, an offence notice was mailed to the accused alleging that she was the registered owner of a vehicle that was speeding on October 27, 2014. This alleged infraction was a result of an image of her

vehicle being captured by a photo-radar device. She submitted a not guilty plea by mail. After an internal delay of seven weeks she was assigned a trial date of April 27, 2016. That date was approximately eight days less than 18 months from the time that the offence notice was issued.

[3] Neither the Crown nor the accused requested any adjournments of the proceedings or otherwise delayed the matter.

[4] On March 22, 2016, the accused filed a motion requesting a stay of proceedings pursuant to section 24(1) of the *Charter* alleging a breach of her section 11(b) right to a trial within a reasonable time.

The Decision of the Motion Judge

[5] The motion judge granted a stay of proceedings (see 2016 MBPC 27). Applying the then leading case of *R v Morin*, [1992] 1 SCR 771, she noted that both parties agreed that institutional delays appeared to have been the greatest contributor to the overall delay. She stated that the institutional delay clearly exceeded the starting point of eight to ten months for a criminal summary conviction matter provided for in *Morin*. Noting that the Crown did not call evidence regarding the resource demands flowing from the volume of cases in Manitoba's "traffic court" (at para 35) and the simplicity of prosecution of "photo enforcement" cases (at para 34), she stated (*ibid*):

> There is a strong argument to be made that these guidelines ought not to apply to simple matters such as a *Highway Traffic Act* prosecution, and if they do, should fall within the lower end of [the six to eight month] suggested time range.

[6] She found some prejudice to the accused as a result of the delay.

[7] Ultimately, she concluded that the delay was unreasonable and entered a stay of proceedings. In *obiter*, she stated (at para 42):

> [I]n respect of future prosecutions, it seems reasonable to expect these types of summary proceedings to be completed within four to six months of a plea being entered.

The *Jordan* Decision

[8] Between the time that the matter was decided in provincial court and the time that it was before the summary conviction appeal judge, the Supreme Court of Canada released its decision in *R v Jordan*, 2016 SCC 27. In that case, a majority of the Court found that the *Morin* framework "has given rise to both doctrinal and practical problems" which contributed to "a culture of delay and complacency towards it" (at para 29).

[9] The Court set a ceiling of 18 months' delay from the time a charge is laid until the anticipated or actual time of the trial for offences prosecuted in provincial court. Any delay beyond that ceiling is presumed to be unreasonable. The Crown can rebut the presumption by establishing the presence of "exceptional circumstances" (at para 47).

[10] When the total delay (minus defence delay or a period of delay attributable to exceptional circumstances) is below the presumptive ceiling, the onus is on defence to show that it is unreasonable. In that regard, the defence must establish that it took "meaningful steps that demonstrate a sustained effort to expedite the proceedings" and that the case took "markedly longer than it reasonably should have" (at para 48). The analysis of the second requirement involves trial judges employing, "the knowledge they have of

their own jurisdiction, including how long a case of that nature typically takes to get to trial in light of the relevant local and systemic circumstances" (at para 89).

[11] Additionally, the Court allowed for transitional provisions applicable to cases that were already in the system at the time that *Jordan* was decided. For summary conviction cases such as this, where the delay has not exceeded the presumptive ceiling, the Court held that the defence need not demonstrate having taken initiative to expedite matters. Nonetheless, the court still must consider action or inaction by the accused (see para 99).

[12] Regarding the requirement to show that the delay was unreasonable, the majority stated (at para 100):

> Further, if the delay was occasioned by an institutional delay that was reasonably acceptable in the relevant jurisdiction under the *Morin* framework before this decision was released, that institutional delay will be a component of the reasonable time requirements of the case for cases currently in the system.

The Decision of the Summary Conviction Appeal Judge

[13] Applying *Jordan*, the summary conviction appeal judge held that the delay occasioned in this case was not unreasonable. In support of his conclusion, he noted that the trial date was scheduled within the presumptive ceiling of 18 months. He found that the accused did not take any action to expedite the proceedings and that the case did not take markedly longer than it should have.

[14] The summary conviction appeal judge also found that the motion judge erred in her analysis of *Morin* by relying on the simplicity of the

summary conviction offence to find the delay unreasonable and consequently establishing a new guideline of four to six months for institutional delay. Finally, he found that she erred in finding prejudice to the accused.

[15] In deciding that the case did not take markedly longer than it reasonably should have, the summary conviction appeal judge relied on a number of provincial court decisions which held that an institutional delay in the area of 17-18 months was not unreasonable for trials involving highway traffic matters such as the one in this case. Ultimately, he concluded that "on the basis of the application of the principles set out in the *Jordan* decision and the *Morin* decision, as modified by *Jordan*", there was no unreasonable delay (at para 54).

[16] In the result, the summary conviction appeal judge reversed the finding of a breach of section 11(b) of the *Charter* and remitted the matter for trial.

Grounds of Appeal

[17] Briefly summarized, the accused's two grounds of appeal are that the summary conviction appeal judge erred in applying the framework established in *Jordan* and that he erred in applying the transitional provisions provided for in that case.

Discussion and Decision

[18] Applications for leave to appeal under section 839 of the *Criminal Code* should be granted sparingly. That is because the case has already been subject to appellate review by a judge of the Court of Queen's Bench and the

granting of leave to appeal that decision constitutes a second-level appeal. See *R v Forsythe (JR)*, 2009 MBCA 62.

[19] The criteria for granting leave to appeal from a summary conviction appeal are: 1) the ground of appeal must involve a question of law alone; 2) it must raise an arguable matter of substance; and 3) the arguable matter must be of sufficient importance to merit the attention of the full Court.

[20] In this case, there was no dispute as to the facts of the case. The issues solely involve the application of the law to the facts and therefore involve a question of law. See *R v Araujo*, 2000 SCC 65 at para 18; *R v Shepherd*, 2009 SCC 35 at para 20; and *R v Alexson* (*TL)*, 2014 MBCA 20 at paras 9-10.

[21] Further, I agree that the second and third criteria have also been met. In determining whether the delay markedly exceeds the reasonable time requirements of the case, the court should consider "how long a case of that nature typically takes to get to trial in light of the relevant local and systemic circumstances" (*Jordan* at para 89). Similarly, when considering cases that were in the system at the time *Jordan* was released, the court will take into account the institutional delay that was reasonably acceptable in the relevant jurisdiction under *Morin* (see *Jordan* at para 100).

[22] In this jurisdiction, provincial court decisions as to what institutional delay is reasonably acceptable for highway traffic offences under *Morin*, are conflicting. For example, in the pre-*Jordan* case of *R v Segodnia*, 2016 MBPC 29, the Court held that a 19-month delay from the time of the charge to the time of the trial was unacceptable. In reaching its conclusion, the Court, like the motion judge in this case, relied on the simplicity of the nature of the

prosecution as a matter which should reduce the amount of reasonable institutional delay.

[23] In *R v Yaworski*, 2016 MBPC 56, a post-*Jordan* case, the Court found that the 18-month presumptive ceiling had been exceeded and that the Crown failed to show exceptional circumstances. In considering the transitional provisions, the Court held that the institutional delay of 16 months was well above the *Morin* guidelines and commented to the effect that, in its view, the lack of institutional resources had contributed to the culture of delay in Winnipeg's traffic court. The Court found a breach of section 11(b) and entered a stay of proceedings.

[24] On the other hand, in the pre-*Jordan* unreported cases of *R v Urbanik* (28 July 2015), Winnipeg (Man Prov Ct); *R v Zang*, (11 March 2016), Winnipeg (Man Prov Ct); *R v Solmundson* (2 May 2016), Winnipeg (Man Prov Ct); and *R v Jennings* (21 June 2016), Winnipeg (Man Prov Ct), overall delays of 14-18 months, between the time of the charge and trial, were found to be reasonable for trials in traffic court.

[25] As well, in the post-*Jordan* cases of *R v Cancilla* (2 August 2016), Winnipeg (Man Prov Ct); and *R v Lakshman-Janjua* (3 August 2016), Winnipeg (Man Prov Ct), delays of up to 17 and one-half months were found to be reasonable.

[26] In this case, the summary conviction appeal judge relied on *Lakshman-Janjua* in concluding that the case did not take markedly longer than it should have considering "context and the reliance of the previous law and the situation in the Province of Manitoba with respect to these matters" (at para 27 quoting *Lakshman-Janjua*).

[27] While I must be circumspect in my comments, in my view, there exists tension between the weight to be assigned the simplicity of the prosecution of offences, such as the one in this case, and the allocated institutional resources. *Jordan* is a recent decision and its application in the context of this case, and cases similar to it, involves a matter of substance that is of sufficient importance to merit the attention of this Court. As I have explained, trial judges are interpreting the law differently, and one of the roles of this Court is to settle the law.

[28] Therefore, I would grant the accused leave to appeal on the following questions.

1. Did the summary conviction appeal judge err in law in applying the framework established in *Jordan* for determining whether there has been a breach of section 11(b) of the *Charter*?

2. Did the summary conviction appeal judge err in law in applying the transitional provisions in *Jordan* including his consideration of the institutional delay that was reasonably acceptable under the *Morin* framework?

Cameron JA