IN THE COURT OF APPEAL OF MANITOBA

Coram: Chief Justice Richard J. Chartier
Madam Justice Diana M. Cameron
Madam Justice Janice L. leMaistre

B E T W E E N :

HER MAJESTY THE QUEEN	)	***T. L. Mariash***
	)	*for the Appellant*
	)	
Respondent	)	***M. A Bodner*** *and*
	)	***C. P. R. Murray***
- and -	)	*for the Respondent*
	)	
VINCENZO GIOVANNI TUMMILLO	)	*Appeal heard:*
	)	***May 7, 2018***
	)	
(Accused) Appellant	)	*Judgment delivered:*
	)	***October 4, 2018***

On appeal from 2015 MBQB 111

CAMERON JA

Introduction

[1] The accused appeals his convictions for three counts of causing bodily harm while operating a motor vehicle with a blood alcohol concentration of over eighty milligrams of alcohol in one hundred millilitres of blood (driving over .08), (section 255(2.1) of the *Criminal Code* (the *Code*)). He asserts that the trial judge erred in refusing to find that the delay in the proceedings breached his section 11(b) *Charter* right to a trial within a reasonable time (see the *Canadian Charter of Rights and Freedoms* (the *Charter*)). He also maintains that the trial judge erred in failing to find that

the conduct of the police investigation breached his rights pursuant to sections 7, 8 and 9 of the *Charter*.

[2] In my view, the trial judge carefully considered each of the accused's arguments regarding the breaches that he alleged. She provided detailed reasons that supported her conclusions. The accused has not demonstrated that the trial judge erred in her statements of the law or her application of the law to the facts. Therefore, for the reasons below, I would dismiss the appeal.

Background and Proceedings

[3] The facts of this case are relatively simple. While towing a trailer with a boat on it, the accused drove his truck through a red light into an intersection on a well-travelled highway in Manitoba. The intersection exists (in part) to accommodate traffic from a casino that is situated along the highway. The accused did not slow down or swerve as he approached the intersection. A surveillance video from the casino showed that the light had been red for approximately five seconds before he entered the intersection. A number of eyewitnesses saw the accused drive through the red light.

[4] As he entered the intersection, the accused collided with another vehicle. The passengers in that vehicle included three children between the ages of 11 and 14 years. Each of them sustained serious injuries including fractures, abrasions, embedded glass, lacerations, concussions and intracranial haemorrhages. The injuries sustained by the children form the basis for the convictions of causing bodily harm while driving over .08.

[5] When the main investigating officer (the officer) arrived at the scene of the collision, fire crew and ambulance paramedics were already there. One of the fire crew members told the officer that the accused had run the red light, smelled of alcohol and was believed to be intoxicated. As a result, after speaking with and observing the accused, the officer placed the accused in his cruiser car, demanded a breath sample and transported him to the local Royal Canadian Mounted Police detachment.

[6] At the detachment, the accused spoke to a lawyer. He agreed to take breath tests. The breath technician testified that the first two samples he gave were invalid. In her view, the accused stopped blowing and started sucking in air during the first test and he only blew minimally and non-continuously during the second test. As a result, the breath technician read the refusal demand to the accused. The accused then gave two valid breath samples. His readings were 140 milligrams per cent and 120 milligrams per cent respectively. Because the samples were taken more than two hours after the driving occurred, the Crown called expert evidence at the trial. That evidence established that, at the time of driving, the accused's blood alcohol concentration was between 152 milligrams per cent and 184 milligrams per cent.

[7] The accused also gave a video statement wherein he stated that the light was green when he entered the intersection, that he had a witness but did not take down that person's name and that he did not think that his blood alcohol level was over .08 at the time he was driving.

[8] The accused was charged with the offences in question on September 26, 2012. At the time he argued his motion alleging unreasonable

delay, his trial was not anticipated to conclude until December 22, 2016, a delay of approximately 51 months. Prior to the commencement of his trial, the accused made a motion to have his charges stayed based on a breach of his right to a trial within a reasonable time pursuant to section 11(b) of the *Charter*. The trial judge dismissed the motion. In reaching her conclusion, the trial judge attributed significant delay to the accused.

[9] At his trial, the accused argued that comments that he made to the officer at the scene of the collision and at the police station, as well as the certificate of analysis of his breath samples, should be excluded from evidence. A *voir dire* was held wherein the accused alleged that the police investigation breached his rights pursuant to sections 7, 8, 9, and 10(b) of the *Charter* (the *voir dire*). In total, he alleged seven *Charter* breaches. He also argued that the comments that he made to the officer were involuntary. Nevertheless, he agreed that the video statement that he gave was admissible evidence.

[10] Save for excluding one comment made at the scene of the collision, the trial judge dismissed all of the accused's *Charter* arguments. For the purposes of this appeal, it is important to note that the trial judge dismissed the accused's motion that his section 7 *Charter* right to life, liberty and security of the person was violated by the failure of the officer to provide the accused with medical assistance. She also found that the failure of the police to video record their interactions with the accused, including when he was giving his breath samples, did not constitute a breach of section 7 of the *Charter*. She dismissed his argument that his right to be free from arbitrary detention pursuant to section 9 of the *Charter* had been breached. Finally, she held that his right to be free from unreasonable search and seizure pursuant to

section 8 of the *Charter* was not violated by the fact that the officer formed some of his grounds to make a breath demand during the course of the accused's detention.

Grounds of Appeal

[11] The accused raises five grounds of appeal. First, he argues that the trial judge erred in dismissing his section 11(b) *Charter* motion. Next, he argues that she erred in failing to find breaches of section 7 of the *Charter* regarding the lack of provision of medical assistance and failure to video record the entirety of his interactions with police. He also argues that she erred in failing to find that his detention constituted a breach of section 9 of the *Charter*. On a related note, he argues that she erred in rejecting his argument that the officer breached his section 8 *Charter* right by making a breath demand during the course of his detention absent reasonable grounds to believe that he had committed an offence.

Ground 1—*Charter* Section 11(b)–Unreasonable Delay

The Law

[12] The analytical framework regarding the right to a trial within a reasonable time has been recently revised by the Supreme Court of Canada in the case of *R v Jordan*, 2016 SCC 27, and reinforced in *R v Cody*, 2017 SCC 31. In *Jordan*, a majority of the Court held that the framework for analysing section 11(b) as set out in *R v Morin*, [1992] 1 SCR 771, had "given rise to both doctrinal and practical problems" (at para 29) and required revision. The *Morin* framework involved a balancing of: 1) the length of the delay; 2) defence waiver; 3) the reasons for the delay; and 4) prejudice to the

accused's interests in liberty, security of the person and a fair trial (see *Jordan* at para 30).

[13] The new framework sets out a presumption of unreasonableness for any delay in excess of 18 months in provincial court and 30 months in the superior court. Delay waived or otherwise attributed to the defence is to be deducted from the total delay. In cases where the delay exceeds the ceiling, the Crown must rebut the presumption of unreasonableness on the basis of exceptional circumstances. Exceptional circumstances are those that lay beyond the control of the Crown. They include situations that are reasonably unforeseeable or reasonably unavoidable and that cannot reasonably be remedied. Treatment of delay caused by exceptional circumstances depends on the reason for the delay. If it was caused by a discrete event, it is subtracted from the total delay. If it is justifiably caused by the complexity of the case, the delay will be reasonable. For a helpful review of the new framework, see *R v Schenkels*, 2017 MBCA 62; and *R v Johnston*, 2018 MBCA 8.

[14] Cases such as this, that were in the system prior to the release of *Jordan*, are considered to be transitional and subject to a contextual and flexible application of the framework (see *Jordan* at para 94). In *Johnston*, Steel JA explained (at para 18):

> [F]or transitional cases where the delay, after subtracting any periods of time attributable to defence delay and discrete events, exceeds the presumptive ceiling, the delay will be unreasonable, unless the Crown shows that the parties reasonably relied on the prior law and what opportunity the system had to adapt to the new law. The application of transitional exceptional circumstances is highly contextual and discretionary. It involves a consideration of the balancing performed under the former regime, including whether seriousness of the offence is overcome by prejudice (see

Cody at paras 73-74; *Jordan* at para 96; and *R v Schenkels*, 2017 MBCA 62).

The Proceedings Related to the Delay Motion

[15] As earlier indicated, the accused was charged with the offences in question on September 26, 2012.

[16] The accused's first court appearance was on October 19, 2012. The matter was adjourned three times for the provision of disclosure and for counsel to review it. On December 14, 2012, a pre-trial conference was set for February 20, 2013.

[17] The pre-trial conference was delayed at the request of defence counsel who explicitly waived the accused's section 11(b) right between February 20, 2013 and the next available date of April 4, 2013.

[18] On April 4, 2013, the Crown elected to proceed by indictment and the accused elected to have a trial in the provincial court. Three days were scheduled for the trial—January 30, 2014 and February 12-13, 2014.

[19] A little more than seven months later, on November 28, 2013, the accused re-elected to have his trial in the Court of Queen's Bench, before a judge alone. He requested a preliminary inquiry and the parties agreed that only the two days reserved in February would be required.

[20] On February 12, 2014, the accused was committed to stand trial and the matter was adjourned to the next assignment court date in the Court of Queen's Bench of April 9, 2014.

[21] Counsel for the accused was not available on the first pre-trial conference date offered in the Court of Queen's Bench. Therefore, the pre-trial conference, which is required in order to set a trial date, was delayed from April 14, 2014 to May 7, 2014 to accommodate his schedule.

[22] At the pre-trial conference, the *voir dire* was set for February 17-19, 2015, and the trial was scheduled for March 16-19, 2015. The judge with conduct of the pre-trial conference set a deadline of 30 days after the pre-trial conference for the accused to file his motions. She set a deadline for the filing of his motion brief of 60 days prior to the *voir dire*.

[23] The accused failed to respect the above deadlines. He did not file his notice of motion, motion brief and book of authorities until February 9, 2015—eight days prior to the date set for the *voir dire*. In addition, he raised new *Charter* arguments (including alleged breaches of section 7 of the *Charter*), which required the Crown to arrange to call more evidence than originally anticipated. The Crown could not appropriately respond to the numerous issues raised before the date set for the *voir dire*. Thus, the accused agreed to the Crown's request for an adjournment. The February 2015 dates were cancelled and the *voir dire* proceeded on the dates in March 2015 that were originally scheduled for the trial.

[24] At the request of the trial judge, supplementary submissions were made regarding the *voir dire* on May 27, 2015. The trial judge delivered her reasons for decision on the *voir dire* on June 29, 2015.

[25] Unfortunately, the 2016 court calendar was not available until September 2015. At that time, potential trial dates were offered in February 2016, but counsel for the accused was not available. The Crown

was not available for dates that were offered in March, so the trial was set for May 4-6, 2016.

[26] On April 11, 2016 the accused filed the motion for unreasonable delay that is the subject of this appeal.

[27] On April 22, 2016, the accused filed a motion for production of the third-party maintenance records of the breathalyzer machine (the disclosure motion). The Crown filed a motion requesting summary dismissal of the disclosure motion. The motions were adjourned to the first day of the trial for hearing.

[28] On May 4-6, 2016, the motion for summary dismissal of the motion for the production of third-party records was heard. The trial judge reserved her decision. In addition, the Crown presented its evidence in the trial. However, because the accused was not in a position to proceed with the disclosure motion, the trial could not be completed. The accused had not subpoenaed the third-party record holder. As a result, the trial had to be adjourned. At the time that he argued the delay motion, he agreed that the time period from the adjournment of the trial on May 6 until the scheduled continuation dates in May 2017 was attributable to the late filing of the disclosure motion.

[29] The Crown's motion for summary dismissal of the disclosure motion was dismissed on May 31, 2016. Also on that date, submissions were made regarding the section 11(b) *Charter* motion. The Court was scheduled to deliver its decision on the section 11(b) motion on July 13, 2016. However, on July 8, 2016, the *Jordan* decision was released. Thus, on

September 9, 2016, counsel made further submissions in response to that decision.

[30] One day prior to the *Jordan* submissions, on September 8, 2016, the accused withdrew his disclosure motion because the third-party had produced the records that he had requested.

[31] In addition, the trial judge advised that, as a result of a cancellation in her calendar, continuation dates were now available in December 2016. Those dates were acceptable to all parties. Thus, approximately four and one-half months of potential delay were eliminated.

[32] On October 27, 2016, the trial judge gave oral reasons dismissing the accused's section 11(b) motion.

[33] The remainder of the trial continued on December 19-20, 2016. Of note, at one point during the continuation of the trial, the accused's counsel suggested adjourning the matter to enable him to review transcripts from March 2015, which he had not yet received. In an effort to avoid any further delay, the trial judge allowed counsel to use her copies of the transcripts.

[34] On February 1, 2017, the accused was convicted of the three charges of causing bodily harm while driving over .08.

The Decision of the Trial Judge

[35] In detailed oral reasons, the trial judge commenced her analysis by applying *Jordan*. As earlier indicated, the charges were laid on September 26, 2012. At the time that the section 11(b) motion was heard, the trial was scheduled to be concluded by December 22, 2016. The total delay,

therefore, was 51 months. However, based on the concession by counsel for the accused that any delay occasioned between May 2016 to December 2016 was attributable to the conduct of the defence, she deducted seven and one-half months from that total. She also found that the accused specifically waived one and one-half months of delay when he requested an adjournment of the pre-trial conference in Provincial Court. Considering the above two factors, she calculated the delay to be 42 months.

[36] The trial judge then characterized the following three additional periods as delay attributable to the defence:

- The delay between February 19, 2015 to March 19, 2015: this was caused by the late filing of his motions on the *voir dire* as well as the raising of new issues.

- The delay between the original trial date of March 19, 2015 to the next proffered trial dates of February 8-11, 2016: she noted that the original trial dates had to be adjourned because they were now required for the *voir dire*. She said that the necessity of adjourning the trial dates was the direct result of defence counsel's failure during the pre-trial conference process to properly identify the *Charter* issues that he was raising and the time required to argue them. In addition, she said the delay was caused by his failure to file his material within the deadlines set by the pre-trial judge.

- The delay between February 11, 2016, the first of four consecutive days offered for continuation of the trial, and March 24, 2016, the second offered date: she allocated this delay on the basis that the Court and the Crown were available to proceed on the four days

> offered in February, but counsel for the accused was not. She noted, however, that the accused was available for offered dates in March 2016, but that the Crown was not.

[37] Based on the above, the trial judge found the total period from March 19, 2015, to March 24, 2016, a period of just over 12 months, to be attributable to the conduct of the defence. After deducting that 12 months from the delay of 42 months, she concluded that the total delay was just under 30 months. Therefore, it was just under the ceiling set in *Jordan* and was presumptively reasonable.

[38] Next, the trial judge recognized that *Jordan* provides that unreasonable delay can still be found in circumstances where the total delay is under the ceiling. For that to be the case, defence counsel must demonstrate that it made a sustained effort to expedite the proceedings and that the case took markedly longer than it should have (see *Jordan* at para 84). The trial judge held that such a circumstance did not apply in this case. In her view, defence did not express concern about the delay until March 2016, took no initiative to address it and, in fact, caused delay.

[39] Finally, the trial judge considered that perhaps the matter could have been scheduled for trial in October or November 2015 had the parties asked for trial dates to be set immediately upon the conclusion of the *voir dire*, rather than awaiting her ruling. In her view, this would have resulted in only three months of the delay not being attributed to the accused, thereby increasing the total delay to 33 months. However, despite this, she still would not have found the delay to be unreasonable. In her view, exceptional transitional

circumstances were present based on the facts of this case and the parties' reasonable reliance on the law pursuant to *Morin*.

Analysis

[40] First, the accused argues that the trial judge erred when she deducted the period of time that he explicitly waived when he requested an adjournment of the pre-trial conference in the Provincial Court. In his view, that period should not have counted against him as the local trial court calendar was full and a date could not have been set. He blames the Crown for having accepted his waiver, claiming that the Crown had knowledge of the lack of trial dates.

[41] The Crown argues that there was no evidence about the knowledge of the Crown who had conduct of the file at the relevant time (not the same as the Crown who ultimately had conduct of the prosecution). However, it agrees that the local court trial calendar was full at the time of the waiver. Despite this, it argues that the trial judge did not err in holding that an express waiver need not be shown to have caused delay.

[42] Whether it is necessary to show that an express waiver caused delay in order for it to be deducted from the total delay in the *Jordan* analysis constitutes a question of law reviewable on the standard of correctness. See *R v Vandermeulen (M)*, 2015 MBCA 84 at para 24.

[43] First, I am not certain that the fact that the local court trial calendar was full at the time of the waiver necessarily means that the accused might not have received earlier trial dates in the Provincial Court had he proceeded with his pre-trial conference on February 20, 2013, when it was originally scheduled. There was no evidence as to how trial dates were prioritized once

they became available. It may have been that, if the accused had not waived delay, and had attended the first pre-trial conference, his request for trial dates would have been afforded priority and he might have received trial dates in early January 2014 as opposed to late January and February 2014. Either way, there is simply no evidence as to the actual effect that the waiver had on the delay.

[44] Secondly, and more importantly, I agree with both the Crown and the trial judge that "waiver need not be assessed in the context of whether it actually caused delay". In this regard, the trial judge stated:

> The court in Jordan mentioned no such requirement. Furthermore, this would be a retrospective and potentially complex analysis in each case of waiver, which is contrary to the objectives described in Jordan. That is, the court was attempting to simplify the approach to delay motions and avoid retrospective rationalizations.

[45] In my view, the approach taken by the trial judge is the correct approach. Counsel for the accused has provided no authority to the effect that an explicit waiver of delay should later be subject to retrospective rationalization and potentially complex analysis. I would therefore dismiss this argument.

[46] Next, the accused argues that the trial judge erred in characterizing the delay attributable to the defence. He argues that he should not be responsible for the entire period of delay from March 16, 2015 to February 1, 2017 (the date on which he was convicted). In support of his argument, he claims that both his counsel and the Crown underestimated the

time that the *voir dire* would take by two days and that he should not be solely responsible for the delay.

[47] In *Cody*, the Court described appellate review of determinations of the legitimacy of defence conduct when considering delay attributable to the defence. It noted that such decisions are highly discretionary and must be afforded a correspondingly high level of deference by appellate courts (see para 31).

[48] It clarified that defence conduct includes not only the decision to take a step, but also the manner in which it is conducted. It stated (at para 32):

> To determine whether defence action is legitimately taken to respond to the charges, the circumstances surrounding the action or conduct may therefore be considered. The overall number, strength, importance, proximity to the *Jordan* ceilings, compliance with any notice or filing requirements and timeliness of defence applications may be relevant considerations. Irrespective of its merit, a defence action may be deemed not legitimate in the context of a s. 11(*b*) application if it is designed to delay or if it exhibits marked inefficiency or marked indifference toward delay.

[49] In this case, the trial judge found that the accused was directly responsible for the delay of the trial, which was caused by him failing to comply with the deadlines to file his materials for the *voir dire*. She noted that he missed his deadline to file the *Charter* motions by eight months and that his material was filed only eight days before the *voir dire*. She found that the adjournment of the trial was the direct result of this inaction. These findings of fact were available to her on the record.

[50] The trial judge also considered the accused's argument that, even if he had filed his documents on time, the *voir dire* would have had to be adjourned because it ultimately took longer than the time allotted. She held:

> The defence should have been in a position to advise at the pre-trial conference as to the scope of the *Charter* challenges to be advanced on the *voir dire*. Furthermore, it should have made a better estimate of the time required for the *voir dire*. This is not like an underestimation of time for a preliminary inquiry or trial resulting largely from the Crown's failure to communicate with the parties with a view to tying down the evidence needed, or without attempting to streamline the issues (Jordan, para. 129). Rather, it was the defence that knew the nature and extent of the challenges and was therefore in the best position to know how much time would be required for the *voir dire*. In fact, defence counsel sent an email to the court as late as December 22, 2014 estimating the time required for the *voir dire* to be two to three days. Had the defence been in a position at the pre-trial conference or within the filing deadline of 30 days thereafter to better identify the issues and time requirements, presumably dates would still have been available in the spring of 2015 - and appropriate dates for the *voir dire* and trial could have been set for about that time.

[51] As noted in *Jordan*, first instance judges are "uniquely positioned to gauge" whether defence conduct is legitimate (at para 65). The accused has not demonstrated any error that would negate the application of the highly deferential standard which this Court is to apply to the trial judge's allocation of defence delay.

[52] The accused also argues that he was diligent in ensuring that the proceedings moved along expeditiously. He argues that he often accepted the first pre-trial conference and trial dates that were offered to him. He says that on those occasions that his counsel was not available for the first dates offered, he was available for the second dates offered. However, in determining that

the accused had not met the test for unreasonable delay where the delay occasioned was below the 30-month ceiling, the trial judge found that the accused had not taken meaningful or sustained steps to expedite the proceeding. She stated:

> In this case, the defence expressed no concern about delay until March 2016 and, throughout, no defence initiatives were taken to address delay. In fact, as I have said, there was defence delay in filing materials on the *Charter* motions. As well, the accused elected to change his trial in Provincial Court to a preliminary inquiry by virtue of a re-election for a trial in this court. And the defence has since filed a disclosure motion with the predictable result that the trial could not be completed on the dates set in May 2016, and was adjourned. That motion was filed at the 11th hour and had not been served on the record holder by the first day of the trial.

[53] Most of the delay in this case occurred during the time when the trial judge had conduct of the proceedings. Therefore, she was in the best position to assess the merit of the accused's assertion of diligence. The application of her findings of fact regarding his efforts to expedite the proceedings to the legal standard required to rebut the presumption of reasonableness is reviewable on the correctness standard. In my view, the accused has not demonstrated that the trial judge erred.

[54] Finally, the accused argues that the trial judge's finding that the facts of this case constituted a transitional exceptional circumstance is wrong. In his view, the delay was well above the *Morin* guidelines.

[55] While I agree that the delay in this case was well above the *Morin* guidelines, the trial judge conducted a *Morin* analysis and considered all of the factors. In applying the *Morin* factors, the trial judge noted that it was

conceded that none of the delay would have been characterized as "Crown delay". Further, the additional delay caused by the accused in this case would have been attributable to him. She noted that some of the delay would have have been neutral, such as time spent on judicial deliberations. Finally, she balanced the prejudice to the accused with the serious charges that he was facing. She considered all of the relevant factors in concluding that a *Morin* analysis supported the finding of exceptional transitional circumstances. In her view, the time the case took was justified based on the parties' reasonable reliance on the law as it previously existed.

[56] In *R v Regan*, 2018 ABCA 55, the Court commented on the standard of review to be applied to the trial judge's determination of transitional exceptional circumstances. It stated (at para 34):

> For cases that were in the system prior to the release of *Jordan*, trial judges are also well positioned to decide whether the transitional circumstance exception applies. If the trial judge has erred in law in the course of his or her analysis, however, an appellate court does not owe the same deference to the trial judge's conclusion about whether the transitional exception applies: *R v Picard*, 2017 ONCA 692 at para 137, 137 OR (3d) 401.

See also *Vandermeulen* at para 29.

[57] The accused's argument that the trial judge did not infer prejudice when she conducted the final balancing pursuant to the *Morin* test is not convincing on the facts of this case. While it is true that jurisprudence pursuant to *Morin* indicated that inherent prejudice should be considered in the final balancing, that jurisprudence does not necessarily apply with much

vigour where significant delay has been attributed to actions of the defence. See *R v George*, 2006 MBCA 150 at para 74.

[58] Based on all of the above, I would dismiss this ground of appeal. In my view, the remaining grounds of appeal can be dealt with summarily.

Ground 2—*Charter* Section 7—Failure to Provide Medical Attention

[59] At the *voir dire* the accused testified that he sustained a significant ankle injury as well as neck strain and light-headedness from the collision. He said that the day after the collision he went to see a physician, whose name he could not remember. Although an x-ray determined that his ankle was not fractured, it was swollen and painful. He said that he was given a brace and some crutches. He agreed that he did not mention that there was anything wrong to either the officer or the breath technician on the day of the collision.

[60] The accused then testified that about a month later he went to a chiropractor complaining of neck pain and a swollen right ankle. A report by that doctor was filed in evidence. He diagnosed the accused as having a sprain and strain of both the ankle and upper back. He was also of the opinion that deployment of the airbag upon the collision may have caused the accused to suffer a concussion.

[61] The officer and the breath technician each testified that they did not notice anything remarkable about the accused's emotional condition, nor did they observe any physical injuries. They testified that he did not mention that he was injured, nor did he request any medical attention.

[62] The accused asserted that the nature of the accident should have prompted the police to question him as to whether he required medical assistance. He argued that, based on the fact that he was injured, the failure to provide medical assistance constituted a breach of his right to life, liberty and security of the person pursuant to section 7 of the *Charter*.

[63] The trial judge found that the evidence provided by the accused did not form a sufficient factual foundation to support his argument. Further, relying on *R v Dryseth*, 2007 ONCJ 446 at paras 26 and 28, she stated that the key consideration in cases where there has been a delay in providing medical attention is whether the delay caused serious psychological and physical suffering. She said there was no evidence of such suffering in this case.

[64] The findings of fact made by a trial judge when determining whether there is a breach of the *Charter* are to be reviewed on a standard of deference. The application of legal principles to the facts is reviewable on the standard of correctness. See *R v Farrah (D)*, 2011 MBCA 49 at para 7.

[65] In my view, the accused has not shown that the trial judge erred. He was able to walk to the police cruiser car after the accident and able to walk from the cruiser car to the police detachment. He was responsive to police questions and able to understand their statements to him. He understood his rights. He did not mention any discomfort. The trial judge did not err when she found that there was no factual foundation to this ground of appeal and I would dismiss it.

Ground 3—*Charter* Section 7—Lack of Video Recording

[66] The accused argues that the police should have video recorded their entire interaction with him, particularly while he was with the breath technician. He submits that their failure to do so constituted a breach of section 7 of the *Charter*. He maintains that a video recording would have resolved a minor credibility issue that he had with the testimony of the breath technician.

[67] The trial judge summarily dismissed this argument. In reaching her conclusion, she relied, in part, on this Court's ruling in *R v Ducharme*, 2004 MBCA 29. *Ducharme* held that the police are not required to video record all encounters with persons in custody in order to establish voluntariness.

[68] The accused argues that this Court should reconsider *Ducharme* on the basis that, like in *Ducharme*, the police had the video equipment in place but simply failed to use it. His only argument in this regard is that we now live in a day and age where most people and businesses have access to video recording equipment, so there is no excuse for police not to record all of their dealings with accused persons. He reasons that a failure to record amounts to a *Charter* breach.

[69] The problem with the accused argument is that, unlike *Ducharme*, the trial judge in this case clearly accepted the testimony of the officer that there was "no audio or video equipment in the breath test room"(at para 27 of June 29th judgment). In any event, the *Ducharme* case represents a precedent of this Court. As such "it cannot be lightly discarded or overruled" (*Cody* at para 3). The argument of the accused is not convincing, nor does it provide

sufficiently cogent reasons for this Court to sit as a panel of five to consider overturning itself. Thus, I would dismiss this ground of appeal.

Grounds 4 and 5—*Charter* Sections 8 and 9—The Detention of the Accused and Breath Demand

[70] The accused argues that the officer arbitrarily detained him contrary to section 9 of the *Charter*. He maintains that, when the officer detained him at the scene of the collision, he did not have reasonable grounds to suspect that the accused had been involved in any criminal activity. The accused also claims that the officer had no reasonable grounds to make the breath demand, thereby breaching his section 8 *Charter* right. The standard of review is correctness. See *Farrah* at para 7.

[71] Regarding the detention, the trial judge considered the constellation of circumstances, including:

1) that there had been a collision with three damaged vehicles;

2) that the accused was standing at the driver's side of a badly damaged truck;

3) that the accused admitted the truck was his; and

4) the information from the fire crew member that the accused was alleged to have gone through a red light, smelled of alcohol and was believed to be impaired.

[72] She held that those circumstances were sufficient to detain the accused to investigate whether he had been impaired by the consumption of

alcohol at the time of the collision. I agree. All that was required was that the officer have a reasonable suspicion that the accused committed the offence. A reasonable suspicion is something more than a mere suspicion and something less than a belief based on reasonable and probable grounds. See *R v Kang-Brown*, 2008 SCC 18 at para 75. Otherwise stated, the reasonable suspicion standard addresses the "possibility of uncovering criminality and not a probability of doing so" (*R v Chehil*, 2013 SCC 49 at para 32; also see *R v Molnar*, 2018 MBCA 61 at paras 25-27).

[73] In my view, it was open to the trial judge to find that there was sufficient evidence for the officer to reasonably suspect that the accused had been impaired by the consumption of alcohol at the time of the collision.

[74] Next, in her consideration of section 8 of the *Charter*, the trial judge found that, when the officer made the breath demand, he had reasonable grounds to believe that the accused had committed the offence of driving while his ability to do so was impaired by alcohol within the preceding three hours. In making that finding, the trial judge relied on the evidence that she considered in determining that the accused was not arbitrarily detained. She also relied on the officer's observations that the accused had a lumbering gait as he walked to the cruiser car, that he smelled of alcohol and that he needed to hold on to the cruiser car for support. Based on all of the above, the trial judge found that the officer had a subjective belief that the accused had committed the offence which was objectively reasonable.

[75] The trial judge dismissed the accused's argument that the officer should have taken steps to discern whether there were causes other than impairment that would explain the observations he made of the accused. He

makes the same argument on appeal. The trial judge made no error in dismissing this argument. It is trite law that an officer is not required to consider all of the alternative explanations for the observed conduct relied on to form reasonable grounds to make a breath demand. See *R v Shepherd*, 2009 SCC 35; *R v Wong*, 2011 BCCA 13 at para 19.

[76] In the end, there is no merit to this ground.

Decision

[77] In the result, for all of the above reasons, I would dismiss the appeal.

Cameron JA

I agree: Chartier CJM

I agree: leMaistre JA