Citation: R v Peters, 2026 MBCA 91
Date: 20261116

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Holly C. Beard
Mr. Justice James G. Edmond
Madam Justice Anne M. E. Turner

B E T W E E N:

	)	***E. J. Roitenberg, K.C.*** *and*
HIS MAJESTY THE KING	)	***O. G. Plotnik***
	)	*for the Appellant*
Respondent	)	
	)	***D. Sahulka*** *and*
	)	***M. A. Bodner***
- and -	)	*for the Respondent*
	)	
	)	*Appeal heard:*
RYAN NATHAN PETERS	)	***May 15, 2026***
	)	
(Accused) Appellant	)	*Judgment delivered:*
	)	***November 16, 2026***

NOTICE OF RESTRICTION ON PUBLICATION: No one may publish, broadcast or transmit any information that could disclose the identity of the witnesses (see C*riminal Code*, RSC 1985, c C-46, s 486.5(1)).

TURNER JA

Introduction

[1] The accused appeals his conviction for second degree murder (see *Criminal Code*, RSC 1985, c C-46, s 229(a)) in relation to the death of his partner, Tamara Benoit (the deceased).

[2] The accused raises two grounds of appeal. First, he argues that the trial judge erred in applying the principles set out in *Vetrovec v The Queen*,

1982 CanLII 20 (SCC) [*Vetrovec*], in his assessment of the evidence of two Crown witnesses, T.S. and S.P., who were both fifteen-year-olds at the time of the murder. He says that the trial judge's use of forensic evidence to confirm T.S.' evidence was an error. The Crown replies that the trial judge was correct in finding that there was sufficient independent evidence to confirm T.S.' version of events and that confirmatory evidence did not have to specifically incriminate the accused.

[3] Second, the accused argues that the trial judge erred in not staying the charge based on unreasonable delay pursuant to section 11(b) of the *Charter* (see *Canadian Charter of Rights and Freedoms*, s 11(b), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [the *Charter*]). He argues that, applying the principles in *R v Jordan*, 2016 SCC 27 [*Jordan*], the time from the charge to the conclusion of the trial exceeded thirty months, which was presumed to be unreasonable and could not be reasonably justified by the Crown.

[4] The Crown agrees that the gross delay exceeded the thirty-month presumptive ceiling set out in *Jordan*, but argues that the delay, after deducting defence delay and discrete exceptional circumstances, was below the presumptive ceiling, with the result that there was no unreasonable delay.

[5] For the reasons that follow, I would dismiss the appeal.

Background

[6] The deceased and the accused had been in an "on-again, off-again" relationship and shared five children.

[7] In July 2020, the deceased's mother reported her missing, informing the police that she had not seen the deceased since May 20, 2020. The police obtained surveillance videos from two locations on Long Plain First Nation from May 23, 2020, showing the deceased with the accused's sister, Tova Peters (Tova), on one occasion, and the deceased with the accused on the other occasion. These were the last times the deceased was seen in public.

[8] Police investigation also revealed that, after May 23, 2020, the deceased's bank account showed no activity, other than automatic deposits, and her social media activity stopped.

[9] In September 2020, during a wellness check, Tova told police that she had "information about a missing girl named Tamara." Tova took officers to a treed area on Long Plain First Nation, where an officer saw some black plastic sticking up from the ground. Officers believed that they had located the deceased's body and, therefore, engaged specialists to assist with the recovery of the remains and an examination of the scene.

[10] The grave was shallow, barely accommodating the size of the deceased's body. She had been wrapped in black plastic.

[11] The deceased's body was examined by an anthropologist and a pathologist. They noted that there were complete fractures of several of the deceased's facial bones and her neck had been severely compressed. The cause of death was determined to be neck compression.

[12] The anthropologist testified that, in her opinion, the grave had been dug within six months of its discovery. The pathologist's observations of the

deceased's body led her to conclude that the deceased had been buried several months before she was found.

[13] Police believed that the deceased had been killed at the residence where Tova resided in May 2020 (the house); therefore, they obtained a search warrant for the house, which was executed on September 8 and 9, 2020. In the crawl space, they found a large piece of cardboard with bloodstains matching the deceased's DNA, and contained Tova's hair. The new tenants of the house provided police with a thirty-pound, silver dumbbell (the dumbbell) with bloodstains that matched the deceased's DNA.

[14] After further police investigation, the accused was charged with murder on January 7, 2021. Subsequently, Tova and T.S. were also arrested for murder. T.S. pled guilty to second degree murder and, on February 17, 2023, was sentenced to the maximum youth sentence. On January 13, 2023, Tova pled guilty to manslaughter. S.P. was never charged in relation to the murder. T.S. and S.P. testified at the accused's trial; Tova did not.

Grounds of Appeal

Ground 1: Did the Trial Judge Err in Finding That There Was Evidence Capable of Confirming T.S.' Testimony?

[15] The accused asserts that the trial judge was correct in declaring T.S. a *Vetrovec* witness; however, erred in concluding that there was evidence capable of confirming T.S.' evidence. The Crown replies that there was sufficient evidence to support T.S.' version of events and that the confirmatory evidence did not have to specifically incriminate the accused.

[16] Whether evidence is legally capable of confirming the testimony of a *Vetrovec* witness is a question of law. An appellate court reviews that determination on a correctness standard (see *R v Labossière*, 2014 MBCA 89 at para 41 [*Labossière*]; *R v Chartrand*, 2014 MBCA 87 at para 25).

[17] Once it is established that the evidence is legally capable of serving a confirmatory function, the question of whether it does so in a particular case is a factual determination left to a trial judge's discretion. That exercise of discretion is entitled to deference on appeal, and an appellate court should not intervene merely because it would have reached a different conclusion (see *Labossière* at para 41; *R v Richard (DR) et al*, 2013 MBCA 105 at para 85; *R v Flores (RB)*, 2013 MBCA 4 at para 18; *R v Grant (IM)*, 2009 MBCA 9 at para 57, leave to appeal to SCC refused, 33065 (11 June 2009)).

T.S.' Evidence

[18] T.S. testified that at the time of the murder, he was staying at the house and met the deceased a few weeks prior to her death. He had not known her previously.

[19] On the morning of the murder, T.S. heard the accused and the deceased arguing in the living room, so T.S. and S.P. decided to go for a walk. When they returned home, the house was quiet. T.S. heard the accused calling for him and S.P. from the crawl space under the house. When they went down, T.S. saw the deceased lying on the floor, her face "puffy" and bloody. T.S. then saw the accused strike the deceased's head with the dumbbell. It appeared the deceased was unconscious, but still breathing.

[20] Tova then told T.S. that he had to "finish it". When T.S. refused, the accused punched him in the head and chest, telling him that if he did not do it, he would be next.

[21] T.S. testified that he was afraid of the accused and, as a result, he agreed to do what he was told. The accused showed T.S. how to choke the deceased then the accused and Tova left the crawl space. T.S. heard what he thought to be the washing machine or dryer being pulled over the crawl space hatch to shut it. T.S. concluded that he had no choice but to do what he was told. He said he laid down next to the deceased and choked her until she was dead.

[22] T.S. then knocked on the crawl space hatch, heard something being dragged again and the hatch opened. The accused asked whether it was done and T.S. replied that he was not sure. The accused then allowed T.S. and S.P. out of the crawl space.

[23] The next day, the accused said that they had to bury the deceased. The accused and Tova wrapped the deceased's body in plastic bags and placed her in a plastic bin. Once it was dark, the accused, Tova, T.S. and S.P. used a cart to move the body to a treed area. Using their hands and small garden tools, they began to dig a grave. The accused and Tova tipped the body into the grave and buried the deceased's body.

S.P.'s Evidence

[24] S.P. testified that on the day of the murder, the accused and the deceased were arguing at the house. S.P. and T.S. went for a walk to get away

from the arguing and, when they returned home, they initially did not see any adults in the house.

[25] S.P. then heard Tova calling to her from the laundry room. S.P. and T.S. went to the hatch in the laundry room and descended to the crawl space under the house. She saw the deceased lying on the ground; her face was "puffy" and "unrecognizable."

[26] She testified that the accused hit the deceased with the dumbbell and with his hands. The accused told T.S. to "finish [the deceased] off." T.S. was reluctant, but finally agreed. The accused showed T.S. how to choke the deceased and then he and Tova left the crawl space. S.P. heard a scraping sound, "[l]ike something being put over the [crawl space hatch]."

[27] S.P. also testified that T.S. choked the deceased, and when he was finished, T.S. and S.P. knocked on the crawl space hatch. Either the accused or Tova asked whether "it [was] done", and then they were allowed to leave the crawl space.

The Trial Judge's Findings

[28] The trial judge recognized that the Crown's case against the accused rested primarily on the evidence of T.S. and S.P., and that he should treat them both as *Vetrovec* witnesses. He acknowledged that he should act with caution in the assessment of their testimony and that it would be dangerous to convict on unconfirmed evidence from these witnesses; however, he could convict if he was satisfied that their evidence was true. He went on to caution himself that he should look for evidence from other sources which could demonstrate the veracity of T.S. and S.P.'s evidence.

[29] After a review of T.S. and S.P.'s testimony, including an assessment of the inconsistencies between their evidence, the trial judge concluded that T.S. was a more convincing witness who maintained his version of events throughout. The trial judge went on to state, "If [T.S.'] version of events is a lie, it's difficult to understand how it was meant to benefit him."

[30] The trial judge noted that, in his view, the following independent evidence confirmed the details of T.S.' version of events:

- The cardboard seized from the crawl space, where T.S. said the deceased was beaten and left bloody, was stained with the deceased's blood and contained Tova's hair.
- The deceased's DNA was found on the dumbbell seized from the house where T.S. said the deceased was killed.
- The autopsy confirmed blunt force trauma to the deceased's face and determined that the cause of death was strangulation.
- The deceased's body was found wrapped in black plastic.
- The anthropologist testified that the grave where the deceased was found had been dug with small tools.
- The pathologist's observations of the deceased's body led her to the conclusion that the time of death was around the end of May 2020 and the anthropologist's observations of the gravesite led her to the conclusion that the body had been buried for less than six months from when it was found in September 2020.

- T.S.' evidence regarding when the deceased was killed aligned with the deceased's mother's reporting to the police, the video surveillance evidence regarding when the deceased was last seen in public and the last transactions on the deceased's bank account.

[31] The trial judge went on to state:

> [T]he forensic evidence confirms many of the particulars of [T.S.'] version of [the deceased's] death. These particulars include the manner of her death, the disposal of the body, the bank records from the Canadian Imperial Bank of Commerce [that] put [the deceased and the accused] together shortly before [the deceased] ceases all activity with her bank card or is ever seen again.
>
> The independent evidence gives me comfort that the evidence provided by [T.S.] can be trusted in his assertion that [the accused] assaulted [the deceased] and then forced him to choke her to death.
>
> The independent evidence rebuts the suggestion that [T.S.] is falsely implicating the accused. I'm satisfied beyond a reasonable doubt that [the accused] took [the deceased] into the crawlspace of [Tova's] home where he beat her with a dumbbell. He then forced [T.S.] to choke her to death.

Analysis

[32] The accused submits that the relevant aspects of T.S.' evidence were not confirmed by other evidence led by the Crown. In particular, there was nothing in the rest of the Crown's evidence that confirmed T.S.' testimony that the accused was a principal in the deceased's murder, that the accused ordered T.S. to kill the deceased and that the accused was the directing mind in the disposal of the deceased's body.

[33] This Court has previously held that "it is well established that confirmatory evidence need not incriminate an accused" (*Labossière* at para 44; see also *R v Khela*, 2009 SCC 4 at para 40). In addition, in *R v Kehler*, 2004 SCC 11 at para 15, the Supreme Court of Canada observed:

> [W]hile confirmatory evidence should be capable of restoring the trier's faith in relevant aspects of the witness's account, it hardly follows that the confirmatory evidence must, as a matter of law, implicate the accused where the only disputed issue at trial is whether the accused was a participant in the crimes alleged.

[34] In the present case, the trial judge thoroughly reviewed T.S.' evidence. As listed above, independent evidence led by the Crown, including undisputed forensic evidence, supported T.S.' version of events. I see no reason to conclude that the trial judge was incorrect in finding that the independent evidence was legally capable of confirming T.S.' testimony.

[35] The trial judge's decision to identify the independent evidence as confirmatory is a discretionary decision that is owed deference on appeal. In my view, the trial judge did not err in his findings, and I see no reason to interfere. I would therefore dismiss this ground of appeal.

Ground 2: Did the Trial Judge Err in Finding That There Was No Unreasonable Delay?

[36] On March 21, 2024, the accused filed an application for a judicial stay of proceedings based on the infringement of his section 11(b) *Charter* right (the delay motion).

[37] There is no dispute that the total time between the charge being laid against the accused and the conclusion of his trial in the Court of King's Bench

(i.e., January 7, 2021 to April 3, 2024) was thirty-eight months and twenty-eight days (or 1,183 days) (the gross delay). This was above the presumptive ceiling of completing a trial within thirty months for a trial in a superior court (see *R v Jacques-Taylor*, 2026 SCC 20 at para 25 [*Jacques-Taylor*]) (the presumptive ceiling).

[38] The determination of delay involves "calculating the total delay from the charge to the actual or anticipated end of the trial" (*Jordan* at para 60) and then deducting defence delay. After that calculation, if a case exceeds the presumptive ceiling, the Crown may rebut the presumption of unreasonableness by showing either that (i) specific periods of delay constitute "discrete exceptional circumstances" or (ii) the case was "particularly complex" such that a delay above the presumptive ceiling was reasonable (*Jacques-Taylor* at para 35).

[39] In *R v Vrbanic*, 2026 SCC 19 at para 23 [*Vrbanic*], the Supreme Court reviewed its goals as set out in *Jordan*:

> *Jordan* aimed to create structural incentives for all actors within the justice system to ensure that trials were held within a reasonable time. The presumptive ceilings put in place in *Jordan* were intended to enhance the "clarity and predictability" of the s. 11(b) analysis, encourage *proactive* efforts to mitigate delay from all actors within the criminal justice system, and ensure transparency and accountability to the public (para. 108).
>
> [emphasis in original]

[40] One must also keep in mind that timely justice is a shared responsibility (see *Vrbanic* at para 27). While the Crown and the court each have a role to play in protecting an accused's right to be tried within a

reasonable time, defence counsel must also seek "the timely resolution of criminal proceedings in a just manner" (*ibid*).

[41] As I will review below, the trial judge gave limited reasons for dismissing the delay motion. He undoubtedly could have provided a more extensive analysis to categorize and characterize the periods of delay. However, as I explain below, the trial judge's reasons are sufficient to allow for meaningful appellate review (see *R v Sheppard*, 2002 SCC 26 at para 25). I pause simply to signal that trial judges should be careful to follow the *Jordan* analytical framework when they are faced with delay motions.

Late Disclosure and The Abuse of Process Motion

[42] While Tova was in custody as a co-accused to the deceased's murder, she was subject to a court order that she have no contact with S.P. On April 8, 2022, S.P.'s social worker contacted the Crown's office and advised that Tova had been speaking to S.P. on the phone.

[43] That same day, the Crown asked police to follow up. Police obtained recordings of the phone calls from the jail (the recordings) and were of the view that Tova was not telling S.P. what to say regarding the murder. After discussion with the Crown, a decision was made not to lay any charges against Tova for breaching the court order. The police dealt with this as a new complaint with a new file, as was their regular procedure. Given that no charges were laid, the recordings were not provided to the Crown or trial counsel.

[44] On March 15, 2023, trial counsel received further disclosure from the Crown. Within that disclosure were handwritten notes of a police officer,

dated April 8, 2022 and June 3, 2022, that referenced Tova's phone calls with S.P.

[45] On April 19, 2023, trial counsel requested further information about the recordings. The same day, the Crown replied that it appeared that it did not obtain the recordings from the police, but that it would follow up with the police to confirm.

[46] On April 27, 2023, trial counsel contacted the Crown asking for "[a]ll disclosure related to the phone calls between [S.P.] and Tova that she made while at [the Women's Correctional Centre]". On April 28, 2023, the Crown replied, "Crown did not request, as such, police did NOT obtain" [capitalization in original].

[47] As it turns out, the Crown's reply was incorrect in that the police had obtained the recordings in 2022, although they had not been provided to the Crown. On April 30, 2023, the Crown contacted trial counsel and advised that the recordings had in fact been obtained by the police. The Crown said that it did not have them, but would get them from the police. The recordings were provided to trial counsel on May 2, 2023.

[48] On the first day of trial (May 8, 2023), trial counsel filed a motion for an adjournment because of the late disclosure of the recordings. They also claimed that the accused's section 7 *Charter* rights had been violated because of the late disclosure and that a stay of proceedings was the appropriate remedy (the abuse of process motion). In addition, that motion sought disclosure of *all* of Tova's phone calls while she was in custody.

[49] The trial judge agreed that the accused should receive all of Tova's recorded phone calls that were still available from the jail. On that same day, the additional recordings were disclosed to trial counsel. The trial was adjourned to May 17, 2023, to allow trial counsel to review the new disclosure.

[50] On May 17, 2023, trial counsel advised that they had retained other counsel to advance the abuse of process motion (motion counsel) and that they were still reviewing the recordings.

[51] Between May 17 and 24, 2023, the trial proceeded and witnesses who were unrelated to the recordings testified. The Crown anticipated that the rest of its case would consist of the testimony of S.P. and T.S.

[52] On May 23, 2023, motion counsel attended to speak to an adjournment request. He submitted that trial counsel required more time to review the recordings before they could appropriately prepare to cross-examine S.P. and T.S. Ultimately, he asked for an adjournment of approximately four weeks.

[53] In reply to the adjournment request, the Crown highlighted its concern that the *Jordan* timeline was rapidly approaching. In the end, the Crown acquiesced to adjourn the trial until S.P. and T.S. testified, indicating that three to four days should be set, which would include time for closing arguments.

[54] Unfortunately, the trial coordinator did not have dates available in June 2023; therefore, S.P. and T.S. testified between July 24 and 27, 2023.

One additional day was set for August 28, 2023, for the last Crown witness to testify—the officer who had obtained the recordings.

[55] At the July 27, 2023 hearing, the trial judge asked about perfecting and scheduling the abuse of process motion, but those issues were put over to August 28, 2023, when the trial judge anticipated a hearing date for the motion would be set.

[56] Motion counsel did not attend on August 28, therefore, a date for the motion could not be set. On August 29, 2023, the trial coordinator emailed motion counsel and the Crown asking them to provide mutually agreeable dates for the motion. On August 30, 2023, the Crown sent their availability to motion counsel with dates as early as September 21, 2023 and into October 2023. Having received no reply, the Crown followed up on September 5, 2023. On September 7, 2023, motion counsel replied that they were available on September 22, 2023.

[57] Subsequently, the following email exchanges occurred:

- September 7, 2023–Crown to motion counsel

> Maybe it wasn't clear but these new dates are expected to be set for the motion to be argued with materials [filed] well in advance? Are you going to be able to do that in advance of the 22nd? It is your motion, how many days do you anticipate needing at this stage?
>
> Maybe the best course of action is for you and [co-counsel] to contact [the Crown speaking to the motion] and talk about the time requirements . . . ? That may help narrow the issues.

- September 8, 2023–Crown to motion counsel

> I'm just following up on [the September 7] email. Are we taking September 22 for your motion and, if so, when do you anticipate filing your materials?

- September 11, 2023–Trial Coordinator to Crown and motion counsel

> [P]lease provide dates ASAP so we can get these set.

- September 12, 2023–Crown to motion counsel

> I'm following up on this in light of the Court's email yesterday. Could you please confirm what your plans are with respect to the motion, whether the 22nd will work, and when we can expect to receive your materials.

- September 12, 2023–Motion counsel to Crown

> I do not know how we can be ready for the 22nd date. I will consult with [co-counsel] today.

- September 15, 2023–Crown to motion counsel

> I'm following up on this. Perhaps you could give us dates you are available so we can move this forward.

[58] On September 21, 2023, motion counsel emailed the Crown with a list of several questions related to the abuse of process motion, but did not provide any update regarding dates for the motion.

[59] On September 29, 2023, the Crown replied with its position on the questions posed and, again, attempted to find agreeable dates for the motion, writing:

> We have been seeking to set dates for your motion for some weeks now. Could you please provide some dates as soon as possible, as well as an indication of when we may expect your materials. Given the time that has passed since we last provided dates [the Crown's] calendar has opened somewhat so please don't assume you are restricted to the initial dates we suggested. This is an issue that needs to be resolved as soon as possible as I understand that [the trial judge] has directed that counsel appear at the October assignment court if dates haven't been worked out by then.
>
> [emphasis in original]

[60] On October 4, 2023, the Crown followed up on its email, asking that motion counsel provide available dates. On October 5, 2023, the Crown contacted the trial coordinator to advise that counsel had been unable to reach agreement on a date. In the end, a brief appearance before the trial judge occurred on November 3, 2023, to have a date set for the motion.

[61] The abuse of process motion ultimately proceeded on December 8, 2023. The trial judge provided reasons for dismissing the motion on January 25, 2024 (see *R v Peters*, 2024 MBKB 10 [*abuse of process decision*]). He found that the adjournment of the trial prior to T.S. and S.P.'s testimony addressed any potential prejudice that the accused may have suffered from the late disclosure of the recordings (see *ibid* at para 13). He went on to find that the evidence before him did not disclose an unacceptable degree of negligence by the Crown or the police which would justify finding an abuse of process (see *ibid* at para 24).

[62] I pause to note that the dismissal of the abuse of process motion has not been appealed.

The Delay Motion

[63] At the December 8, 2023 hearing, four days were set to complete the trial, including closing arguments—from April 2 to 5, 2024.

[64] On March 21, 2024, the accused filed a motion alleging unreasonable delay and seeking a stay of proceedings. After the Crown and trial counsel's closing submissions regarding conviction, the delay motion was argued on April 4, 2024. The trial judge reserved his decision on both matters.

[65] On May 3, 2024, the trial judge convicted the accused of second degree murder and dismissed the delay motion.

[66] The trial judge's reasons for dismissing the delay motion were brief. He referred to *Jordan* and reviewed the dates on which the trial and motion proceeded. He noted that the defence conceded that two-and-one-half months of delay should be deducted from the gross delay as defence delay related to setting the preliminary inquiry and case management hearings. He agreed with the Crown that additional time should also be attributed to the accused, and then he stated:

> The Crown argues that the decision of defence to bring the [delay motion] was something entirely outside of their control and submits that the delay caused by bringing that unsuccessful motion, should be attributed to [the] defence, and at least not be attributed to the Crown.
>
> I agree.

> The period of time between the closing [of] the case for the Crown and final argument was eight months. Attributing to that time, the defence's decision to bring their [delay motion] results in reducing the delay attributable to the Crown to under 30 months.

Standard of Review

[67] The Supreme Court recently detailed the standard of review applicable to issues of delay in *Vrbanic* at paras 83-84:

> The ultimate determination of whether delay is unreasonable and the accused's s. 11(b) right has been breached is a question of law reviewable for correctness (*R. v. Pauls*, 2020 ONCA 220, 453 D.L.R. (4th) 193, at para. 40, aff'd *R. v Yusuf*, 2021 SCC 2, [2021 1 S.C.R. 5, at para. 2). An application judge's factual findings, and their application of the law to the facts, attracts review on the deferential standard of palpable and overriding error (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 10 and 28).
>
> The assessment of case complexity, including the determination of whether the Crown made reasonable efforts to mitigate delay, is a question of mixed fact and law "well within the trial judge's expertise" and is accordingly entitled to deference (*Jordan*, at para. 79). Where an application judge's analysis is affected by an extricable legal error, no deference is owed to the judge's conclusions (*Housen*, at para. 37).

[68] On the same day, the Supreme Court also released *Jacques-Taylor* at para 23, where the standard of review was articulated as follows:

> The characterization of delay and the ultimate decision concerning the unreasonableness of delay are questions of law. Therefore, they are reviewed according to the correctness standard. However, underlying findings of fact invite deference, absent palpable and overriding error (*Boulanger*, at para. 4; *R. v. Pauls*, 2020 ONCA 220, 149 O.R. (3d) 609, at para. 40, aff'd 2021 SCC 2, [2021] 1 S.C.R. 5, at paras. 2-3).

Analysis

Defence Delay to Be Deducted

[69] Under the *Jordan* framework, defence delay is deducted from the gross delay to determine whether the resulting delay exceeds the presumptive ceiling and is, therefore, unreasonable. As explained in *Jacques-Taylor*, "[d]elay will be attributable to the defence where (1) a specific period of time has been waived by the defence or (2) the defence has caused the delay" (at para 28).

[70] Defence delay caused solely by the conduct of the defence has been described as "those situations where the accused's acts either directly caused the delay . . . or the acts of the accused are shown to be a deliberate and calculated tactic employed to delay the trial" (*Jordan* at para 63, quoting *R v Askov*, 1990 CanLII 45 at 1227-28 (SCC)).

[71] The accused does not dispute that the following seventy-two days of delay should also be deducted from the gross delay:

- earlier available case management conference dates (June 14, 2021 to July 2, 2021)—eighteen days;
- earlier available preliminary inquiry dates (December 20, 2021 to January 28, 2022)—thirty-nine days; and
- earlier available Court of King's Bench pre-trial dates (April 14, 2022 to April 29, 2022)—fifteen days.

[72] At issue is the delay that occurred in 2023, which related to the late disclosure. To understand the trial judge's decision, in other words, what he was agreeing should be deducted as defence delay, it is necessary to go back to the Crown's submissions on the delay motion.

[73] The Crown submitted that the period from August 28, 2023 (when a date for the abuse of process motion should have been set) and November 3, 2023 (when the date was set) should be deducted as defence delay. It argued that, while the abuse of process motion was not frivolous or ill-founded, given the length of time it took for the hearing of the motion to be set, the accused did not pursue setting the motion down proactively or in a timely manner. The Crown made significant attempts to have the abuse of process motion set as soon as possible to mitigate any delay. When motion counsel did not appear on August 28, 2023, when a hearing date for the motion was to be set, the Crown sent multiple emails attempting to set a date as quickly as possible. Many of those emails went unanswered, which inevitably created more delay in moving the matter forward.

[74] In *Jacques-Taylor* at para 44, the Supreme Court highlighted that the defence can be responsible for delay where they fail to ensure that the proceedings move forward quickly and efficiently:

> *It cannot be stressed enough that the accused must be proactive in resolving issues promptly when they arise. Where the accused cannot adequately explain inaction, tardiness, or a lack of cooperation, courts should not hesitate to make deductions for defence delay or, in certain cases, find that defence conduct amounts to a discrete exceptional circumstance* (*J.F.,* at para 33; *Cody*, at para. 33). Lest it be forgotten, s. 11(b) was always intended to be a shield, and not a sword with which to frustrate the

> ends of justice (*Jordan*, at para. 21; *Morin* at pp. 801-2; *Askov*, at p. 1222).
>
> [emphasis added]

[75] In saying that he agreed with the Crown's position, which was thoroughly set out in its written and oral submissions, in my view, the trial judge found that the time it took to set a hearing date for the abuse of process motion was defence delay. As dictated in *Vrbanic*, the trial judge's factual finding is owed deference on appeal, and I am not persuaded that the finding should be interfered with on appeal.

[76] When the above-noted periods of defence delay are deducted from the gross delay, the net delay was thirty-four months and eight days (or 1,043 days), which remains above the presumptive ceiling.

Exceptional Circumstances

[77] Given that the net delay in completing the accused's trial was above the presumptive ceiling, the burden was on the Crown to rebut the presumption of unreasonableness. The Crown can do this by demonstrating that specific periods of delay constitute "discrete exceptional circumstances" or that the trial was "particularly complex" (*Jacques-Taylor* at para 35).

[78] *Jordan* at para 69 defines exceptional circumstances as follows:

> Exceptional circumstances lie *outside the Crown's control* in the sense that (1) they are reasonably unforeseen *or* reasonably unavoidable, *and* (2) Crown counsel cannot reasonably remedy the delays emanating from those circumstances once they arise. So long as they meet this definition, they will be considered

> exceptional. They need not meet a further hurdle of being rare or entirely uncommon.
>
> [emphasis in original]

See also *Jacques-Taylor* at paras 36-38.

[79] In *Jacques-Taylor*, the Supreme Court explained that exceptional circumstances are not rare; rather, "what makes these events 'exceptional' is that they 'lie outside the Crown's control'" (at para 38). The Court concluded that "[c]ourts should adopt a broader interpretation of what constitutes discrete exceptional circumstances because they can and do arise regularly" (*ibid*).

[80] The determination of whether circumstances are exceptional depends "on the trial judge's good sense and experience" and this determination "is a question of fact falling well within the expertise of the trial judge" (*Jordan* at paras 71, 91).

[81] Although not expressly addressed by the trial judge, I agree with the Crown that the seventeen-day period from January 28 to February 14, 2022, during which the preliminary inquiry was adjourned due to the COVID-19 pandemic, should be deducted as an exceptional circumstance (see *R v Agpoon*, 2023 ONCA 449).

[82] Again, it is necessary to review the Crown's submissions to understand the trial judge's decision on delay relating to the abuse of process motion. The Crown's submissions focussed on the abuse of process motion being an exceptional circumstance that was out of its control. While the abuse of process motion was neither ill-founded nor illegitimate, the Crown

submitted that it was reasonably unforeseeable and that it took reasonable steps to mitigate any resulting delay, both in producing the recordings and in scheduling the motion.

[83] When read in context of the submissions, in my view, the trial judge made a finding that the disclosure of the recordings and the abuse of process motion were discrete exceptional circumstances. In addition, the trial judge found that the mistake in not disclosing the recordings earlier was not unacceptably negligent and that any potential prejudice caused was cured by the adjournment prior to T.S. and S.P.'s testimony (see *abuse of process decision* at para 13).

[84] There is no doubt it was a mistake to not disclose the recordings earlier; however, in *Jordan*, and later in *R v Cody*, 2017 SCC 31 [*Cody*], the Supreme Court recognized that trials are "not well-oiled machines" (*Jordan* at para 73) and mistakes happen because they are an "inevitable reality of a human criminal justice system" (*Cody* at para 58).

[85] The Crown did what it reasonably could to mitigate the delay. Once the mistake was discovered, the Crown acted quickly to obtain the recordings from the police and disclosed them to the defence immediately. When the trial judge ordered disclosure of all of Tova's phone calls, they were disclosed that same evening.

[86] When the trial judge concluded that "[t]he period of time between the closing [of] the case for the Crown and final argument was eight months", in addition to the deductions for defence delay discussed above, he found that the delay from November 3, 2023 to April 3, 2024, was a result of discrete

exceptional circumstances which were reasonably unforeseeable by the Crown.

[87] In my view, the accused has not shown that the trial judge made a reviewable error; therefore, I see no reason to intervene.

Conclusion on Delay

[88] To summarize, it is not disputed that the gross delay from the date of the charge to the conclusion of the trial was thirty-eight months and twenty-eight days (or 1,183 days). The trial judge found that the following deductions were attributable to defence delay or caused by discrete exceptional circumstances:

- earlier available case management conference dates (June 14, 2021 to July 2, 2021)—eighteen days (defence delay);
- earlier available preliminary inquiry dates (December 20, 2021 to January 28, 2022)—thirty-nine days (defence delay);
- adjournment of the preliminary inquiry due to COVID-19 (January 28, 2022 to February 14, 2022)—seventeen days (exceptional circumstances);
- earlier available Court of King's Bench pre-trial dates (April 14, 2022 to April 29, 2022)—fifteen days (defence delay);
- delay in setting the abuse of process motion (August 28, 2023 to November 3, 2023)—sixty-seven days (defence delay); and

- discrete exceptional circumstances of the late disclosure (November 3, 2023 to April 3, 2024)—152 days.

[89] There was ample evidence to support the trial judge's findings and I would not interfere with those determinations. After deducting these periods from the gross delay, the resulting delay was less than thirty months, therefore, below the presumptive ceiling. Accordingly, the trial judge did not err in dismissing the delay motion and I would dismiss this ground of appeal.

Disposition

[90] For the above-noted reasons, I would dismiss the appeal.

Turner JA

I agree: Beard JA

I agree: Edmond JA