On appeal from a decision of a Provincial Court Judge dated December 18, 2019.

Date: 20220923
Docket: CR 20-15-01131
(Thompson Centre)
Indexed as: R. v. Crate
Cited as: 2022 MBKB 182

COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

HER MAJESTY THE QUEEN,	)	Appearances:
	)	
respondent,	)	MICHAEL A. BODNER
	)	VUK MITROVIC
	)	for the Crown (respondent)
- and -	)	
	)	
AMY ROBIN JORDEN CRATE,	)	BORIS BYTENSKY
	)	for the accused (appellant)
(accused) appellant.	)	
	)	
	)	JUDGMENT DELIVERED:
	)	September 23, 2022

GRAMMOND J.

INTRODUCTION

[1] The appellant appeals her conviction for having care and control of a motor vehicle with a blood alcohol concentration of over 80 milligrams of alcohol in 100 hundred millilitres of blood (the "Offence") pursuant to s. 830(1) of the ***Criminal Code,*** R.S.C., 1985, c. C-46. The main issue on the appeal relates to the infringement of the appellant's bail rights after her arrest. The appellant also seeks a general direction from this court that would prohibit meaningless "remand appearances" in northern Manitoba courts.

BACKGROUND

[2] The facts of this matter are as follows. On Saturday, February 3, 2018 at 8:24 a.m. the appellant was arrested in Norway House, Manitoba. She was then detained at the RCMP detachment, and charged with four offences, including the Offence and one count of possession of cannabis for the purpose of trafficking. The appellant was brought before a Judicial Justice of the Peace (the "JJP") on Sunday, February 4, 2018 at 9:45 a.m. for a hearing pursuant to s. 503(1) of the ***Code*** (the "First Appearance"). In other words, she was in custody for over 25 hours prior to the First Appearance. The Crown acknowledged at trial that the appellant was not brought before a judicial officer either without unreasonable delay, or within 24 hours of her arrest pursuant to s. 503(1), which violated her rights under s. 9 of the ***Canadian Charter of Rights and Freedoms***.

[3] The First Appearance lasted no more than three minutes and no lawyers participated. The arresting officer advised the JJP that the Crown opposed the appellant's release. Apparently, the officer gleaned this position from a letter written by the Federal Crown to the RCMP on September 20, 2017 which gave the RCMP "authority to remand any individual charged with serious CDSA offences (such as trafficking…) if the circumstances warrant their detention or for their release on a recognizance". The officer viewed the letter as a direction to remand into custody anyone charged with trafficking, and did not consult with the Crown about the appellant's case.

[4] The trial judge found that the arresting officer failed to fairly consider the appellant's release as required by s. 497 of the ***Code***, and that he erroneously interpreted the Crown's letter as a direction for an "auto remand", which constituted a breach of the

appellant's rights under ss. 9 and 11(e) of the ***Charter***. These findings are not under appeal.

[5] The appellant's charges were remanded from the First Appearance to the next sitting of Provincial Court in Thompson, Manitoba, on Monday, February 5, 2018 (the "Second Appearance"), at which time she was released with the consent of the Crown.

[6] Prior to trial, the appellant brought a motion for a stay of proceedings under s. 24(1) of the ***Charter***, on the basis that her rights were breached. The Crown entered stays of proceedings on two of the charges against the appellant, including the drug trafficking charge. The two remaining charges proceeded to trial, resulting in a conviction for the Offence and an acquittal on the charge of having care and control of a motor vehicle while impaired.

ISSUES

[7] The issues on the appeal are:

a) Did the trial judge err by failing to admit into evidence an affidavit submitted by the appellant's trial counsel?

b) Did the trial judge err by charactering the First Appearance as a "reverse onus" situation?

c) Did the trial judge err by failing to find that the appellant's constitutional rights were violated by the manner in which the First Appearance was conducted?

d) Did the trial judge err by failing to find a systemic constitutional violation?

e) Did the trial judge err by failing to grant a stay of proceedings, and instead reducing the appellant's sentence, or, in the alternative, should this court order a stay of proceedings? and

f) If this court does not order a stay of proceedings, should evidence of the appellant's breath samples be excluded from evidence pursuant to s. 24(2) of the ***Charter***?

ANALYSIS

Did the trial judge err by failing to admit into evidence an affidavit submitted by the appellant's trial counsel?

[8] The trial in this matter commenced on July 15, 2019 with a *voir dire* relative to the appellant's motion for ***Charter*** relief. Evidence was presented on July 15 and 16, 2019, and arguments were heard on October 25, 2019. On November 27, 2019, counsel appeared again, at the trial judge's request, to discuss making further submissions on the *voir dire* given the release on November 14, 2019 of the decision in ***R. v. Balfour and Young***, 2019 MBQB 167 (CanLII), where the court examined and made findings relative to the "dysfunctional" bail system in northern Manitoba.

[9] At the November 27, 2019 appearance, the trial judge asked counsel whether the bail practices that were ongoing in the Thompson area in February 2018, when the appellant was arrested, were continuing or had changed. In response, the Crown stated "…the process has not changed in a relevant way". The appellant's trial counsel stated: "I'm going to admit to completing an affidavit". He explained that the affidavit would

highlight other cases in which he was involved as counsel, to support allegations of ongoing systemic problems in the bail system. Counsel stated that he would attach transcripts to the affidavit but he did not advise of whether those transcripts were in his possession or would be ordered.

[10] The trial judge directed that the appellant's trial counsel forward the affidavit to the Crown, to determine if the Crown objected to its admission into evidence, and if the Crown did object, that a time be set for the trial judge to hear from both counsel as to whether the affidavit should be considered. The trial judge set December 18, 2019 as the next appearance date, on which he would deliver his decision on the *voir dire*.

[11] At the end of the November 27, 2019 appearance, the trial judge stated:

> …December 18th at 1:00 p.m., of course if you provide me with a blizzard of further information, I'm not going to commit to necessarily being done at that time. But should there be only relatively limited further information, it will be done for December 18th at 1:00 p.m.
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> [Transcript of Proceedings, November 27, 2019, p. T6, lines 3 - 6]

[12] In other words, the trial judge was advised that an affidavit had been or was being prepared, and he gave a direction as to the next steps relative to serving and filing that affidavit. Unfortunately, the appellant's trial counsel does not appear to have forwarded the affidavit to the Crown as directed and no appearance was set before the trial judge to address admission of the affidavit.

[13] Instead, on December 17, 2019 at 6:25 p.m., the appellant's trial counsel sent to the trial judge's personal e-mail address a lengthy affidavit with 21 exhibits, totalling over 580 pages. Counsel advised by e-mail that he had received transcripts to attach to the affidavit the day before. The trial judge reviewed the affidavit and a sampling of the

exhibits and concluded that they did not materially add to his analysis or conclusions, so he declined to accept them as evidence.

[14] The law is clear, as the appellant acknowledged, that a trial judge has the power to control the trial process and to impose filing deadlines. The appellant argued that since no filing deadline was set in this case, the trial judge's decision to reject the affidavit was inappropriate, unreasonable, and legally incorrect. In addition, while the trial judge told counsel that if voluminous materials were forthcoming, he may not be able to give his decision as planned, he did not suggest that he would reject the materials. The appellant submitted that, accordingly, the trial judge committed to consider any materials that were filed, and erred by failing to do so.

[15] In ***R. v. Samaniego***, 2022 SCC 9 (CanLII), the court stated that a trial judge's power to control the trial process "…has three interrelated purposes: ensuring that trials proceed fairly, effectively, and efficiently". The court also stated that:

> [22] … The trial management power is an essential and versatile tool; it must, however, be exercised carefully (*R. v. Felderhof* (2003), 2003 CanLII 37346 (ON CA), 68 O.R. (3d) 481 (C.A.), at para. 38). Parties should generally be allowed to present their cases as they see fit (*Polanco*, at para. 29).
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> [23] Managing the conduct of trials to ensure timely justice is particularly important, considering this Court's decision in *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631, at para. 139. Excessive trial delay can be mitigated by proper trial management.
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> …
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> [25] Trial management decisions and the rules of evidence must generally remain separate issues on appellate review. The standard of review for evidentiary errors is correctness, while deference is owed to trial management decisions. Extricable evidentiary errors are held to a more stringent standard of review than trial management decisions. The trial management power is not a license to exclude otherwise relevant and material evidence in the name of efficiency.

> [26] Sometimes trial management decisions will overlap with the rules of evidence. … it is important on appellate review that trial management decisions are examined in the context of the trial as a whole, rather than as isolated incidents. Trial management decisions … engage the judge's discretion. Absent error in principle or unreasonable exercise, these discretionary decisions deserve deference (*R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089, at para. 44).

[16] In this case, the trial judge refused to admit the affidavit into evidence well after the evidentiary portion of the *voir dire* had been concluded, and his directions to counsel had been ignored. Had the trial judge admitted the affidavit, a further adjournment may have been necessary to enable both the court and the Crown to review it. In other words, there could have been another mid-trial delay in a matter that the trial judge characterized as "plagued by avoidable delays", caused by the appellant's trial counsel failing to attend court and failing to file materials on previous occasions. For these reasons, I am satisfied that when the trial judge excluded the affidavit due to the manner in which it was provided, he was exercising his trial management powers.

[17] As such, the trial judge's decision to reject the affidavit due to its late filing is entitled to deference, but in any event I agree with his decision. While the trial judge could have, and perhaps should have, imposed a filing deadline for the affidavit at the November 27, 2019 appearance, the appellant's trial counsel represented that the affidavit was complete, or in the process of being completed, and would be sent to the Crown for review pursuant to the court's direction. Counsel did not advise the trial judge that any delay was anticipated. In that context, counsel should not have submitted a voluminous filing the evening before the next court appearance, and doing so was inappropriate.

[18] Moreover, even if the trial judge had imposed a filing deadline, he had the power at common law, and pursuant to Provincial Court Practice Directives[1], to dispense with the deadline in the interests of justice. In other words, it was wholly within the trial judge's discretion to accept or reject the affidavit regardless of whether a filing deadline was imposed.

[19] I reject the appellant's submission that the trial judge relinquished his control over the trial process, or guaranteed the acceptance of any and all future filings, by speculating aloud that if a "blizzard" of materials was provided, he may require more time to make a decision. He made that comment in the context of a specific direction given to the appellant's trial counsel.

[20] I will add that the affidavit was sworn by a colleague of the appellant's trial counsel, and reflected very little direct or admissible evidence, because it was sworn on the basis of information and belief from the appellant's trial counsel regarding other cases in which he acted as counsel. The affidavit also contained several instances of double hearsay[2].

[21] Despite all of these shortcomings, the trial judge reviewed the affidavit and a sampling of the exhibits, and concluded that the evidence did not materially add to his analysis or conclusions. As the appellant pointed out, it is impossible to know which or how many of the exhibits the trial judge reviewed. Those details are immaterial, however, because the vast majority of the exhibits are transcripts of the court appearances that

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[1] Practice Directives for Contested Applications in the Provincial Court of Manitoba, issued November 4, 2013.

[2] The appellant submitted that the appeal book does not include the actual affidavit materials sent to the trial judge and that a supplementary appeal book would be forthcoming, which did not occur. Accordingly, I have relied upon the version of the affidavit filed by the Crown.

were described in the body of the affidavit. Accordingly, the trial judge could ascertain the gist of each of the court appearances by reading the body of the affidavit.

[22] In addition, transcripts from other matters were already in evidence, and the Crown conceded that there had been no relevant changes to bail practices since February 2018. In that context, the affidavit would have changed very little in terms of the evidentiary record and would not have had a meaningful impact on the trial judge's decision.

[23] For all of these reasons, I reject the appellant's submission that the trial judge erred by failing to admit the affidavit into evidence.

Did the trial judge err by characterizing the initial bail hearing as a "reverse onus" application?

[24] The trial judge's decision reflects that although a reverse onus applied at the First Appearance, the appellant advanced no attempt to show cause why she should be released. The trial judge stated, therefore, that the arresting officer was not required to present the Crown's case for continued detention, which would have triggered the requirements of s. 515 of the ***Code***.

[25] It is clear, and the Crown has conceded, that the trial judge erred by characterizing the First Appearance as a reverse onus application. The Crown bore the onus at the First Appearance because although the appellant was charged with drug trafficking, the offence was not punishable by a maximum sentence of life imprisonment. Unfortunately, trial counsel did not identify this detail for the trial judge, and the *voir dire* proceeded under the mistaken belief that the reverse onus applied.

[26] The Crown argued that this error formed a small part of the trial judge's decision, was harmless, and did not affect the outcome of the trial, so the curative proviso in s. 686(1)(b)(iii) of the ***Code*** should apply. I have considered that issue in the context of my analysis of the First Appearance, set out below.

Did the trial judge err by failing to find that the appellant's constitutional rights were violated by the manner in which the First Appearance was conducted?

[27] The trial judge's decision on this issue was a finding of mixed fact and law, reviewable on a standard of correctness (***R. v. Farrah (D.)***, 2011 MBCA 49 (CanLII) and ***R. v. Le***, 2019 SCC 34 (CanLII), at para. 23).

[28] The trial judge found that the approach taken at the First Appearance was to glean basic biographical material from the appellant and establish whether she had spoken to a lawyer. He also stated "…[t]here is little doubt that the presumption of the JJP was that a remand to Thompson Court was the best option" (***R. v. Crate***, 2019 MBPC 80, at para. 55). In addition, the trial judge noted that although the JJP advised the appellant that she had a right to a bail hearing, she was not invited to consider whether she would consult with counsel with a view to advancing a bail application at the First Appearance. The trial judge also considered the lack of involvement of counsel and stated "…there is little doubt with more active and meaningful participation of counsel at this stage the [appellant] would have been released at that hearing and not transported to Thompson" (***Crate***, at para. 60).

[29] In addition, the trial judge found that the arresting officer may have misrepresented the level of consultation he had with the responsible Crown. In particular, when the JJP asked the officer "…did you speak to the Crown?", the officer answered "Yes. I have Matt Sinclair on file". At trial, the officer testified that he did not in fact speak with the Crown relative to the appellant's bail. Instead, he was relying upon the September 20, 2017 letter as a direction to oppose release in trafficking cases.

[30] The trial judge's factual findings are not at issue on this appeal, and I agree with his conclusions. At the First Appearance, the JJP asked the appellant for her language of choice "when you have a hearing", and the JJP also stated:

> …[y]ou heard the officer and the Crown are not agreeable to your release at this time. You do have a right to a bail hearing. You also have a right to have a lawyer help you with that. So you indicated that you spoke to counsel, so we'll put your matter over to tomorrow morning …And you'll have a lawyer help you with a bail plan.
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> [Transcripts of Proceedings, February 4, 2018, p. T4, lines 22 – 27]

[31] These comments reflect clearly that no bail hearing would take place at the First Appearance. The question is whether the trial judge was correct when he determined that the various shortcomings of the First Appearance did not constitute a breach of the appellant's ***Charter*** rights, particularly in the context of his mistaken belief that the reverse onus applied.

[32] The starting point for this analysis is the ***Charter***, and in particular ss. 9 and 11(e), which provide, respectively, that everyone has the right not to be arbitrarily detained or imprisoned, and that any person charged with an offence has the right not to be denied reasonable bail without just cause. Further, s. 515(1) of the ***Code*** provides that in the

absence of a reverse onus under s. 515(6), an accused shall be released unconditionally unless the Crown shows cause for detention or any other order such as a conditional release or an adjournment.

[33] The law is clear that release is favoured at the earliest reasonable opportunity, that bail hearings must be a high priority, and that waiver of a hearing must be clear and informed. The courts in ***R. v. Myers***, 2019 SCC 18 (CanLII), (at para. 41) and ***Balfour*** (at para. 76) also stated that the court's exercise of its authority must be guided by the overarching purpose of the ***Code***, which is to prevent an accused person from languishing in pre-trial custody.

[34] I will comment first upon the issue of the onus that applied at the First Appearance. Although the arresting officer's written bail brief did not indicate that a reverse onus applied (that box was not checked), neither the officer nor the JJP mentioned the onus. The Crown argued that, accordingly, the matter was treated as a Crown onus which did not impact the decision to remand the charges by one day. In the absence of any authority that silence on the issue of onus equates to the application of a Crown onus, I do not accept that submission.

[35] More importantly, if the matter was treated as a Crown onus at the First Appearance, the JJP was required to release the appellant pursuant to s. 515(1) of the ***Code*** unless the "prosecutor" showed cause why the appellant should be detained or the matter adjourned. That did not occur, which constituted a clear ***Charter*** breach.

[36] The trial judge's statement that the appellant advanced no attempt to show cause why she should be released, such that the arresting officer was not required to present

the Crown's case for continued detention, was clearly rooted in the erroneous belief that a reverse onus applied at the First Appearance. For that reason alone, the trial judge erred by failing to find that the appellant's constitutional rights were violated by the manner in which the First Appearance was conducted, and this error gave rise to a substantial wrong and a miscarriage of justice, which was not harmless and affected the outcome of the *voir dire*. As such, the error cannot be cured pursuant to s. 686(1)(b)(iii) of the ***Code***.

[37] Although I would allow the appeal on this issue on that basis alone, I will comment also upon the other arguments raised relative to the First Appearance. The Crown argued that regardless of where the onus lies, an accused must indicate a desire to apply for bail, and the appellant made no such request at the First Appearance. I agree that the appellant did not ask to be released or to have a bail hearing, but in ***Balfour***, the court stated that in the context of a Crown onus:

> [74] … Notionally it is not the accused who must apply for bail, he is entitled to be released unless the Crown asks for his detention, or for increasingly stringent bail according to the ladder principle (see *R. v. Antic*, 2017 SCC 27, [2017] 1 S.C.R. 509). Presumptively, an accused is to be released on the least onerous form of bail, unless the Crown shows otherwise.

[38] This approach makes practical sense, because many accused persons are not familiar with the provisions of the ***Code***, and may not be sufficiently assertive to request a bail hearing. That is so particularly where the accused is not offered a bail hearing and where, like the appellant, they have no criminal record.

[39] Having said that, I accept the Crown's submission that regardless of which onus applies, the Crown does not, and should not, force an accused person to request bail. As stated in ***Myers***, an adjournment may serve the interests of justice and underlying

purposes of the legislation, where, for example, a key piece of information is missing or a key event is pending (at para. 41). Certainly, this approach is reasonable where the Crown is opposed to release and an accused and/or their counsel are considering whether or when to apply for bail.

[40] In this case, however, the Crown had not been consulted and hence was not opposed to release, yet there was a failure to give the appellant any real opportunity to apply for bail at the First Appearance.

[41] The law is clear that a culture of complacency in Canadian criminal courts is to be denounced, (***R. v. Jordan***, 2016 SCC 27 (CanLII) and ***Myers*** (at para. 38)) and that adjournments must be done in a manner that safeguards and is consistent with the rights of an accused, and enhances rather than undermines the applicable legislative provisions. As stated in ***Balfour***, "[a]n in-custody remand cannot be routine or perfunctory, the remand must be for a good reason" (at para. 76).

[42] In ***Balfour***, the court considered a set of facts very similar to this case relative to the accused's arrest in May 2018. In that instance a reverse onus applied, and the court did not find a ***Charter*** breach, but stated "…the whole event lays bare the systemic flaws and waste, especially in light of the Crown appropriately agreeing to her release once she got to Thompson". The trial judge in this case echoed that conclusion in support of his finding that the inadequacies of the First Appearance did not amount to a ***Charter*** breach. I reject the appellant's submission that the trial judge misstated the conclusions in ***Balfour***, or relied upon findings that were not made. The May 2018 arrest was an

ancillary issue before the court in ***Balfour***, and the court's finding that there was no breach is distinguishable from this case because the reverse onus applied.

[43] The facts of this case bear more similarity to ***R. v. Budd***, 2021 MBPC 13 (CanLII), where the JJP made comments to the accused that were akin to those made at the First Appearance. In particular, the accused's options for bail were misstated, and the Crown onus was not explained to the accused. The court found that the accused did not give fully informed consent to his matter being adjourned by one day, and all of these factors contributed to a finding that his ***Charter*** rights were breached.

[44] I recognize that the appellant spoke with a lawyer shortly after her arrest, and well before the First Appearance, but the JJP did not advise the appellant that she could have a lawyer participate in the First Appearance and did not ask whether she wished to do so. The Crown submitted that the appellant may have been advised of her rights when she spoke to counsel, and while we can assume that the legal advice received was sufficient and correct[3], the receipt of that advice does not detract from the obligations prescribed by s. 515 of the ***Code***.

[45] I also recognize that at the First Appearance the appellant said nothing about the remand to the Second Appearance, and since she did not testify on the *voir dire*, her perspective on the First Appearance is unknown. Having said that, the appellant's silence in response to the adjournment was not informed consent at law.

[46] Unfortunately, the First Appearance in this matter exhibited the complacent culture against which the court must guard, and the adjournment was both routine and

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[3] ***R. v. Sinclair***, 2010 SCC 35 (CanLII), at para. 57.

perfunctory, with no participation or consent by the appellant. That type of meaningless appearance should not occur in Canadian courts.

[47] I will also comment upon the absence of counsel at the First Appearance, which contributed to the issues that arose. Although police officers can appear before a JJP, within specific limitations, the law is clear that they cannot act as Crown counsel[4].

[48] In addition, pursuant to a Provincial Court Directive issued on November 18, 2013 (the "2013 Directive"), prior to a JJP hearing all police agencies are required to obtain consent from the Provincial Crown, and to advise the JJP coordinator of which Crown consented to an accused being remanded in custody. The 2013 Directive also provides that a Crown attorney must be present for all contested bail applications.

[49] Clearly, the 2013 Directive was intended to apply after an officer has considered their obligations pursuant to ss. 497 and 498 of the ***Code***, and decided not to release an accused. In this case, as found by the trial judge, that step was omitted and the arresting officer simply "opposed" bail on behalf of the Crown, without actually speaking to the Crown as directed. In doing so, the officer defied the 2013 Directive and thwarted any possibility that Crown counsel would either participate in the First Appearance or consent to the appellant's release at that stage.

[50] In conclusion, the appellant had the right not to be denied reasonable bail without just cause under s. 9 and 11(e) of the ***Charter***, and pursuant to s. 515(1) of the ***Code*** she was to be released unconditionally unless the Crown showed cause for detention. The Crown showed no such cause, yet the appellant's options were not explained and the

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[4] ***Hearing Office Bail Hearings (Re)***, 2017 ABQB 74 (CanLII).

Second Appearance was scheduled without her informed consent, after the arresting officer misrepresented the Crown's position to the JJP. The First Appearance was conducted in a perfunctory manner, and was not a meaningful appearance. In the result, the appellant's ***Charter*** rights were breached at the First Appearance, and the trial judge's finding on that question is set aside.

Did the trial judge err by failing to find a systemic constitutional violation?

[51] The trial judge concluded that while the requirements of ss. 497 and 498 were generally understood by police, there was confusion over the use of an officer's discretion in drug cases given the erroneous interpretation often applied to the letter from the Federal Crown. He found that there were "worrisome misconceptions" among some of the police officers who testified at trial, and that training should be provided with respect to the duties and obligations set out in ss. 497 and 498 of the ***Code***. He did not find, however, sufficient evidence of a systemic disregard by officers for their obligations.

[52] Similarly, the trial judge found that the shortcomings of the First Appearance did not constitute proof of systemic failure to comply with constitutionally protected standards. He relied, in part, upon a representation by the appellant's trial counsel that he was successful in several telephone bail hearings before JJPs in other matters.

[53] The trial judge did not consider whether the failure to bring the appellant before the JJP without unreasonable delay or within 24 hours was a systemic failure.

[54] The appellant argued that whether a systemic issue exists is a legal conclusion arrived at through subsidiary findings of fact, and is not a question of fact entitled to deference.

[55] The Crown argued that the trial judge's decision was a factual finding, not a legal conclusion, because a "systemic problem" is not a legally defined term. Instead, the analysis includes an exercise of inductive reasoning where a number of instances of specific facts, taken together, are sufficient to establish a general principle.

[56] I have concluded that a finding of whether a constitutional violation is a systemic issue is a mixed question of fact and law, as is a finding of a single constitutional breach. The difference between a single breach and a systemic issue is the frequency with which the violations are taking place, and the reasons underlying those violations. The evidence in each case must be examined on its merits, and if multiple violations are found to exist, and to have been caused by the system or a component thereof, as opposed to discrete, individual causes, the violations may be systemic. The applicable standard of review, therefore, is correctness.

[57] I will comment first upon the trial judge's conclusion that there was no systemic disregard by Norway House police officers for their obligations under the ***Code***.

[58] I have reviewed the evidence given by police officers at the *voir dire*, including the arresting officer, and I agree with the trial judge's assessment that while there was some confusion relative to the Federal Crown's letter, the evidence was insufficient to establish a systemic issue. Most of the officers commented upon and clearly understood their own responsibility to determine whether someone should be released from custody, and the

appropriate factors to consider in making that decision. I agree that any misconceptions held by the minority of the officers could be corrected by training, and I am satisfied that the trial judge's conclusion was open to him on the evidence as presented.

[59] I have also considered the trial judge's conclusion that the shortcomings of the First Appearance did not constitute proof of systemic failure to comply with constitutionally protected standards.

[60] The appellant argued that the trial judge misunderstood the significance of her trial counsel's representation that he successfully obtained bail in 12 of 13 appearances before JJPs, because in fact no counsel are involved in 99% of the appearances before JJPs in Manitoba each year. With respect, that percentage is not in evidence before me and as such I do not accept it as fact.

[61] At the *voir dire* in this matter, the appellant's trial counsel attempted to lead evidence of a systemic issue relative to "remand hearings" such as the First Appearance through the testimony of seven police witnesses and the filing of transcripts from 19 other matters. The trial judge heard evidence on the *voir dire* over one-and-a-half days, from 10 witnesses,[5] who testified about the appellant and her charges, as well as general practices at the Norway House RCMP detachment.

[5] In addition to the seven police officers, the court heard from the appellant's mother and from two cell guards (one of whom is also related to the appellant).

[62] I contrast this approach with that taken in ***Balfour***, where the court received affidavit evidence from the accused, many northern Manitoba lawyers and other individuals, dozens of court transcripts, extensive briefs, and undertook an extensive oral hearing. I appreciate that the charges in ***Balfour*** were either stayed or dismissed prior to the ***Charter*** hearing, and accordingly the bail related issues were the sole focus of the court's attention, but it is clear that the evidence presented in that case was more voluminous[6] and of a greater breadth than in this case.

[63] I acknowledge, however, that the events in this case may bear some relationship to the events in ***Balfour*** for three reasons: the appellant's arrest was contemporaneous with the timeline of events in ***Balfour***, both incidents arose in Norway House, Manitoba, and both cases involved remands to Thompson Provincial Court. As such, the systemic issues found by the court in ***Balfour*** may well have existed in the background of this matter also. Having said that, the trial judge in this case had to determine whether he was satisfied that a systemic issue existed based upon the evidence that he heard in the *voir dire* in this case. Certainly, there were many facts and issues that arose in ***Balfour*** that did not occur in this case.

[64] Given the limited evidence in this case relative to s. 503 hearings generally, I am satisfied that the trial judge's conclusion was available on the evidence before him, and I agree with his conclusion that there was no systemic violation.

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[6] The appellant submitted that the record reflected sufficient evidence to establish a systemic issue even without the affidavit rejected by the trial judge.

REMEDY

Should a stay of proceedings be entered?

[65] Having found that the accused was arbitrarily detained when the police failed to consider her release pursuant to the ***Code***, and to bring her before the JJP without unreasonable delay, the trial judge determined that the appropriate remedy was a declaration of a ***Charter*** violation and the potential mitigation of her sentence, if convicted. He declined, at the conclusion of the *voir dire,* to impose a stay of proceedings. Instead, after convicting the appellant of the Offence at trial, the trial judge imposed a $1,000.00 fine (payable within two years) and a one-year driving prohibition, both of which are statutory minimum sentences.

[66] The Crown acknowledged that if I found that the trial judge erred, as I have now done, I can substitute my own discretion and order a different remedy if I choose to do so.

[67] Section 24(1) of the ***Charter*** provides that anyone whose rights have been infringed may apply to obtain such remedy as the court considers appropriate and just in the circumstances. In other words, the court has a very wide and unfettered discretion.

[68] The appellant argued that a stay of proceedings was the only reasonable remedy to be ordered in this case, particularly given that the arresting officer attempted to mislead the JJP. In addition, the impact of a stay of proceedings would be significant upon the handling of future bail cases in Manitoba.

[69] In ***R. v. Babos***, 2014 SCC 16 (CanLII), the court stated that there are rare cases in which a stay of proceedings for an abuse of process will be warranted, which generally fall into two categories, only one of which was argued here: that the state conduct risks undermining the integrity of the judicial process, also known as the residual category. In addition, there are three requirements that must be met: prejudice to the integrity of the justice system, no alternative remedy capable of addressing the violation, and, where there is still uncertainty after steps 1 and 2, the balancing of interests.

[70] The court also stated in ***Babos*** that:

> [44] … Indeed, in the residual category, cases warranting a stay of proceedings will be "exceptional" and "very rare" (*Tobiass*, at para. 91). But this is as it should be. It is only where the "affront to fair play and decency is disproportionate to the societal interest in the effective prosecution of criminal cases" that a stay of proceedings will be warranted (*R. v. Conway*, 1989 CanLII 66 (SCC), [1989] 1 S.C.R. 1659, at p. 1667).

[71] In ***R v. Hardy (S.R.)***, 2015 MBCA 51 (CanLII), the court stated:

> [67] … appellate jurisprudence has consistently held that a judicial stay of proceedings is not an appropriate remedy in circumstances such as this, where the alleged conduct is post-offence and post-investigation. See *Iseler, Cutforth*, and *R. v. Salisbury (T.J.)*, 2011 SKQB 153 (CanLII), 372 Sask.R. 242. In Manitoba, there has not been a case where a charge has been judicially stayed based on a finding of a s. 9 breach as a result of arbitrary post-offence detention.
>
> [68] In my view, a declaration of a *Charter* breach as occurred in *R. v. Osiowy (D.L.)*, 2007 MBPC 61 (CanLII), 221 Man.R. (2d) 222, or a sentence reduction as recognized in *R. v. Nasogaluak*, 2010 SCC 6 (CanLII), [2010] 1 S.C.R. 206, are more appropriate remedies.

[72] The issue in this case is whether there is an appropriate alternate remedy to a stay of proceedings. The court in ***Babos*** stated:

> [39] … the goal is *not* to provide redress to an accused for a wrong that has been done to him or her in the past. Instead, the focus is on whether an alternate remedy short of a stay of proceedings will adequately dissociate the justice system from the impugned state conduct going forward.

[73] In support of her submission that there is no appropriate alternate remedy in this case, the appellant argued that a reduction in sentence should not be considered as a remedy for an overholding violation before an accused is convicted of an offence. Given that I will exercise my own discretion with respect to the remedy in this case, I need not determine that issue.

[74] The appellant also argued that:

a) a reduction of sentence for the Offence was meaningless given the applicable mandatory minimum sentence; and

b) a declaration of a ***Charter*** breach was meaningless because the court in ***Balfour*** made a declaration previously and no changes appeared to be forthcoming.

[75] With respect to the adequacy of a reduction of sentence, I note that the appellant came before the court with no criminal record. Her blood alcohol readings were at the lower end of the range (100 milligrams of alcohol in 100 millilitres of blood), she was not driving at the material time, was not involved in a collision, and no bodily injuries were suffered. She was observed, however, to have switched seats with her boyfriend when police arrived on the scene, which would be an aggravating factor on sentencing.

[76] The trial judge stated that he would have imposed a fine "in the area of $1,500" and costs of $450 in this case, and I accept that, absent the ***Charter*** breaches, that sentence would have been within the range of a fit and appropriate sentence in the circumstances of this case.

[77] The appellant relied upon ***R. v. Noor***, 2022 ONCJ 140 (CanLII), where the court stated that the only potential reduction in sentence in this type of case would be to impose the minimum fine, where the court is persuaded that a higher fine is warranted on the merits of the case. Having said that, any such reduction could not be described as meaningful or significant where no driving or accident was involved.

[78] I accept that a $500 fine reduction and a waiver of costs may seem like an insignificant reduction relative to the seriousness of the multiple infringements of the appellant's ***Charter*** rights in this case. Having said that, a reduction of the fine and the waiver of costs benefited the appellant to the extent of approximately $950, which was almost one-half of the overall amount at issue, and she was given two years to pay the fine ordered, which is longer than normal. In addition, a reduction of the appellant's sentence can be accompanied by another remedy.

[79] I have also considered the impact of the court's declaration. The trial judge in this matter stated, approximately one month after ***Balfour*** was released, that:

> [84] … Up until this point, there has been little litigation on the issue of the adequacy of northern police detachments' approach to their duties under s. 497 and s. 498 and s. 515 of the *Criminal Code* or the adequacies of s. 503 hearings in rural areas. The appropriate authorities have not had an opportunity to react to any shortfalls identified.

[80] Although the Crown conceded in November 2019 in this matter that there had been no relevant changes to the system since February 2018, I have no evidence of what, if any, changes have been implemented thereafter. Moreover, it is not reasonable to expect the state to have responded to ***Balfour*** in a meaningful way within one month following its release. Further, in my view the declarations in this case and in ***Balfour***, standing together, should have been impactful, and should have given rise to significant changes to the system.

[81] I am not convinced, therefore, that a reduction in sentence and a declaration in this case, taken together, were not an adequate alternate remedy to a stay of proceedings.

[82] I will now consider whether the integrity of the justice system is better protected by entering a stay of proceedings, or allowing the appellant's conviction to stand.

[83] The appellant's ***Charter*** rights were infringed in multiple ways, which is a very serious matter given the importance of her bail rights.

[84] Having said that, and as I have found, the evidence in this case was not sufficient to establish a systemic and ongoing problem that was not addressed satisfactorily over time. As such, ***R. v. Reilly***, 2020 SCC 27 (CanLII), upon which the appellant relied, is distinguishable, because there the court concluded that a systemic and ongoing problem was not being addressed satisfactorily. In addition, the law is clear that alcohol related motor vehicle offences are very serious and are rightly condemned by the public because of the potential for death, injury, and the destruction of property.

[85] For these reasons, I am not satisfied that the integrity of the justice system is better protected by entering a stay of proceedings in this case.

[86] Having considered all of the ***Babos*** factors, I have concluded that this is simply not one of the clearest of cases, and a stay of proceedings should not be entered.

[87] I will add that where the ***Charter*** is breached and a stay of proceedings is denied, damages remain a potential remedy to be awarded by this court. The appellant did not request a damages award, and this option was mentioned only in passing on this appeal. Accordingly, I make no order of damages in the appellant's favour, but had it been requested I would have given it serious consideration, particularly in the circumstances of this case.

If this court does not order a judicial stay of proceedings, should evidence of the appellant's breath samples be excluded from evidence pursuant to s. 24(2) of the *Charter*?

[88] The appellant did not request the exclusion of evidence as a remedy at trial. As such, the trial judge did not hear evidence or argument or make findings about the nexus, if any, between the ***Charter*** violations and the taking of the samples. Accordingly, there is no trial decision for me to consider on this appeal.

[89] Generally, appellate courts will not entertain an issue for the first time on an appeal (***R. v. Boukhalfa***, 2017 ONCA 660 (CanLII)). On that basis alone, I am not prepared to exclude the appellant's breath samples from evidence.

[90] There is, however, another issue with the exclusion of the breath samples in this case. In ***R. v. Tim***, 2022 SCC 12 (CanLII), the court stated that when considering whether evidence was obtained in a manner that breached an accused's ***Charter*** rights, the court should take "a purposive and general approach", examining the "entire chain of

events" involving the breaches and the impugned evidence. In addition, the court stated that: "[e]vidence will be tainted if the breach and the discovery of the impugned evidence are part of the same transaction or course of conduct", and that the connection between the breach and the impugned evidence can be "…temporal, contextual, causal or a combination of the three".

[91] The appellant concedes that the breath samples were taken appropriately, and that the last breath sample was taken at 10:13 a.m. on February 3, 2018. The arresting officer testified at trial that he did not bring the appellant before the JJP prior to the end of his shift at 4:00 p.m. because he was concerned about her sobriety, and that assessment was not challenged. The officer expected his colleagues to bring the appellant before a justice after he left work for the day, which did not occur. When he returned to work on Sunday, February 4, 2018 at 8:00 a.m. he arranged for the First Appearance.

[92] On these facts, it is clear that none of the breaches were investigative in nature, and there was no temporal, contextual, or causal connection between the breaches and taking the breath samples. Having considered the entire chain of events, there is simply no meaningful nexus or relationship between the breaches and the samples.

[93] For all of these reasons I would not exclude the appellant's breath samples from the evidentiary record.

CONCLUSION

[94] The appellant's bail related rights were breached in multiple ways. She should have been released from custody by police, whether pursuant to an exercise of discretion under the ***Code***, or with the consent of the Crown.

[95] The trial judge erred when he failed to find that the manner in which the First Appearance was conducted constituted a ***Charter*** breach.

[96] Having said that, this is not one of the clearest cases, and I am not prepared to enter a stay of proceedings.

_____ J.