

COURT OF QUEEN’S BENCH OF MANITOBA

B E T W E E N:

HER MAJESTY THE QUEEN,)	<u>Appearances:</u>
)	
)	<u>CHARLES P. R. MURRAY</u>
)	for the Crown
- and -)	
)	
)	
ANNETTE AKERHOR ONAKPOYA,)	<u>ANNETTE AKERHOR ONAKPOYA</u>
also known as TRACY LIBERTY KERRHS,)	<u>also known as TRACY LIBERTY KERRHS</u>
)	on her own behalf
accused.)	
)	JUDGMENT DELIVERED:
)	August 03, 2022

GRAMMOND J.

INTRODUCTION

[1] The accused Annette Akerhor Onakpoya, also known as Tracy Liberty Kerrhs, is charged with the aggravated assault of an infant, and the trial is set to take place from September 26 to October 7, 2022, before me.

[2] On April 4, 2022, the accused filed a motion for a stay of proceedings, alleging a breach of her right to be tried within a reasonable time, pursuant to s. 11(b) of the

Canadian Charter of Rights and Freedoms. On June 9, 2022, I dismissed the motion and advised that written reasons for my decision would follow. These are those reasons.

LAW

[3] The law with respect to motions to dismiss for delay is well-established. In particular, in ***R. v. Jordan***, 2016 SCC 27 (CanLII), the court stated:

[105] The new framework for s. 11(*b*) can be summarized as follows:

- There is a ceiling beyond which delay becomes presumptively unreasonable. The presumptive ceiling is 18 months for cases tried in the provincial court, and 30 months for cases in the superior court (or cases tried in the provincial court after a preliminary inquiry). Defence delay does not count towards the presumptive ceiling.
- Once the presumptive ceiling is exceeded, the burden shifts to the Crown to rebut the presumption of unreasonableness on the basis of exceptional circumstances. Exceptional circumstances lie outside the Crown's control in that (1) they are reasonably unforeseen or reasonably unavoidable, and (2) they cannot reasonably be remedied. If the exceptional circumstance relates to a discrete event, the delay reasonably attributable to that event is subtracted. If the exceptional circumstance arises from the case's complexity, the delay is reasonable.
- Below the presumptive ceiling, in clear cases, the defence may show that the delay is unreasonable. To do so, the defence must establish two things: (1) it took meaningful steps that demonstrate a sustained effort to expedite the proceedings; and (2) the case took markedly longer than it reasonably should have.
- For cases currently in the system, the framework must be applied flexibly and contextually, with due sensitivity to the parties' reliance on the previous state of the law.

[4] In ***R. v. Thanabalasingham***, 2020 SCC 18 (CanLII), the court stated:

[9] ...*Jordan* sought to put an end to an era where interminable delays were tolerated, and to the complacent, "anything goes" culture that had grown up in the criminal justice system. The clear and distinct message in *Jordan* was that all

participants in the system are to take proactive measures at all stages of the trial process to move cases forward and bring accused persons to trial in a timely fashion. Crown counsel is tasked with “making reasonable and responsible decisions regarding who to prosecute and for what, delivering on their disclosure obligations promptly with the cooperation of police, creating plans for complex prosecutions, and using court time efficiently” (*Jordan*, at para. 138)....

[5] In this case, the parties agree that the total delay is 39 months and two weeks. Defence delay must be subtracted from that amount. Defence delay could relate to delay waived by the defence, or delay caused solely or directly by the defence’s conduct, excluding actions taken legitimately to respond to the charges (*Jordan* at para. 66).

[6] If the net delay exceeds the ceiling set out in *Jordan*, the onus is on the Crown to rebut the presumption of unreasonable delay by establishing that the delay is reasonable due to exceptional circumstances. In general, exceptional circumstances arise in two categories: discrete events and particularly complex cases. The Crown did not argue that this is a particularly complex case.

BACKGROUND

[7] The material steps in this proceeding relative to the issue of delay are as follows:

- a) **June 26, 2019**: the accused was charged with aggravated assault;
- b) **August 6, 2019**: the first appearance in Provincial Court took place, and Mr. Saheel Zaman appeared as the accused’s counsel of record;
- c) **October 1, 2019**: an appearance took place in Provincial Court, at which time the accused discharged Mr. Zaman as her counsel, and undertook to represent herself in this matter;

- d) **December 20, 2019 and January 16, 2020:** on each of these dates a case management conference took place in provincial court;
- e) **February 25, 2020:** the Crown laid a direct indictment against the accused;
- f) **March 30, 2020:** the first appearance in this court, set for April 6, 2020, was adjourned to June 1, 2020 due to the Covid-19 pandemic;
- g) **June 24, 2020:** a pre-trial conference took place in this court, and trial dates were set, from September 13 to 24, 2021;
- h) **May 12, 2021:** the accused suggested to the Crown that the trial be put on hold pending the outcome of an appeal filed by the accused relative to a preliminary motion. The Crown did not agree to postpone the trial;
- i) **July 2, 2021:** a pre-trial conference took place in this court, and the accused asked for an adjournment of the September 2021 trial, which the pre-trial conference judge denied;
- j) **July 15, 2021:** I heard on a contested basis the accused's written motion to adjourn the September 2021 trial, which I denied;
- k) **August 4, 2021:** a lawyer advised the Crown that he had been retained¹ by the accused, and asked for an adjournment of the September 2021 trial, to which the Crown did not agree; and

¹ The next day the same lawyer advised the Crown that he would not be acting for the accused.

- l) **September 7, 2021:** I heard on a contested basis the Crown's motion to adjourn the September 2021 trial, which I granted. The trial was then re-scheduled to September 26 to October 7, 2022.

ANALYSIS

Waiver

[8] It is clear that the main period of delay in this matter, of just over 12 months, arose from the adjournment of the trial from September 2021 to September 2022.

[9] As set out above, on each of May 12, July 2, July 15, and August 4, 2021, the accused or her representative sought an adjournment of the September 2021 trial. Not long thereafter, on September 7, 2021, the Crown requested an adjournment because of a change of personnel at the Child Protection Centre (the "CPC"), and more particularly, a determination by the new director of the CPC that there should be additional testing and reporting relative to the infant complainant in this case. Accordingly, the Crown received some additional disclosure and provided it to the accused shortly before the September 2021 trial dates. As at September 7, 2021 when I heard the adjournment motion, even more disclosure was expected to be forthcoming.

[10] The issue is whether the accused waived the delay relative to the adjournment of the trial. It is trite law that defence waiver of the inclusion of specific periods in the overall assessment of reasonableness can be explicit or implicit, but it must be clear and unequivocal (*R. v. J.F.*, 2022 SCC 17 (CanLII) at paras. 46 and 47).

[11] Further, in **J.F.** the court stated:

[48] Waiver must be proved by the prosecution (*Askov*, at p. 1229). For a court to find that delay has been waived, the accused must therefore take "some direct action from which a consent to delay can be properly inferred" (*Askov*, at p. 1229). The "mere silence of the accused is not sufficient to indicate a waiver of a *Charter* right" (*Askov*, at p. 1229; see also *Mills*, at p. 929). To be inferable, implicit waiver "requires advertence to the act of release rather than mere inadvertence. If the mind of the accused or his or her counsel is not turned to the issue of waiver and is not aware of what his or her conduct signifies, then this conduct does not constitute waiver" (*Morin*, at p. 790).

[12] In **R v Clemons**, 2020 MBCA 4 (CanLII), the court confirmed that where an accused is self-represented, the court may find a waiver where the "circumstances as a whole" give rise to an inference of waiver.

[13] In this case, the accused or her representative requested an adjournment of the September 2021 trial on four occasions between May and August 2021, and it was clear that there would have been a lengthy delay if the adjournment was granted. On July 2, 2021, the pre-trial conference judge said to the accused, in the context of her adjournment request, "...[i]t strikes me that you are trying to find a way to force the Court to set a new [trial] date..." (Transcript of Proceedings, July 2, 2021, p. T10, line 41 and p. T11, line 1).

[14] On July 15, 2021, the Crown stated in court that "...if these dates are adjourned... based on the fact of trying to get two week trials in QB, I would suspect that it's very unlikely, it's impossible to get dates for two weeks before the [*Jordan*] date." The Crown also referred repeatedly to "...putting the amount of delay at the feet of the accused...", while the accused stated that "...adjourning the trial will be fair and

will give me a chance to have a fair trial.” (Transcript of Proceedings, July 15, 2021, p. T16, lines 14 – 17 and line 36, and p. T14, lines 37 to 38).

[15] It is clear that the accused’s multiple attempts over a 12 week period to adjourn the September 2021 trial constitute direct action from which a consent to delay can be properly inferred. Accordingly, I have concluded that the accused implicitly waived the delay arising from an adjournment of the September 2021 trial. The delay in this case, of 39 months and two weeks, is thereby reduced by 12 months and one week, such that the presumptive ceiling is not exceeded.

Defence Delay

[16] There are other periods of delay that the Crown argued are properly characterized as defence delay, and that would bring this matter further below the presumptive ceiling.

[17] In ***R. v. Cody***, 2017 SCC 31 (CanLII), the court stated:

[32] Defence conduct encompasses both substance and procedure — the decision to take a step, *as well as the manner in which it is conducted*, may attract scrutiny. ... 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.

[18] In ***Cody***, the accused’s change of counsel was deducted as defence delay. In this case, the consequence of the accused choosing to self-represent on October 1, 2019 was that Mr. Zaman had to return all disclosure to the Crown, to be provided to the accused. Thereafter, when a case management conference took place on December 20, 2019, the accused was not prepared to make an election, or set dates

for a trial or preliminary inquiry. Instead, the matter was put over to January 16, 2020 for the accused to consider her position.

[19] Certainly, the accused was entitled to discharge her counsel and choose to represent herself, but she cannot rely upon the resultant delay as being unreasonable delay for the purposes of this motion. Accordingly, one month and 26 days (Mr. Zaman's time as counsel of record) will be deducted from the total delay in this matter.

[20] In addition, having been self-represented for over two and one-half months, the accused ought to have been in a position to set hearing dates at the first case management conference on December 20, 2019, but an adjournment to January 16, 2020 was needed for her to further review the disclosure. Accordingly, an additional four weeks will also be deducted from the total delay in this matter.

Net Delay

[21] On the basis of all of the foregoing, just over 15 months² will be deducted from the period of total delay, such that the period of net delay in this case is approximately 24 months and two weeks, which is well below the presumptive ceiling of 30 months. For that reason, the accused's motion is dismissed.

² 12 months and one week for the trial adjournment, plus 1 month and 26 days for the discharge of Mr. Zaman, plus 4 weeks between case management conferences equates to just over 15 months.

Exceptional Circumstances

[22] In addition to my conclusions above, I accept that there were certain exceptional circumstances in this case, outside of the Crown's control, that were reasonably unforeseen or reasonably unavoidable, and that could not reasonably be remedied. First, there was an approximate two month delay caused by the pandemic, when the first appearance in this court was delayed from April 6, 2020 to June 1, 2020. In *Kalashnikoff v Her Majesty the Queen*, 2021 ABQB 327 (CanLII), the court stated, after a lengthy analysis relative to the Covid-19 pandemic, that "...the entire delay occasioned by the COVID 19 pandemic...is properly considered an exceptional circumstance and should be deducted from the total delay." (at para. 35). The court in *R. v. Pierpoint et al.*, 2022 MBQB 117 (CanLII) reached a similar conclusion.

[23] Also, I accept that the situation in which the Crown found itself relative to its adjournment request was a discrete event giving rise to an exceptional circumstance, because there was a change of personnel in the Director position at the CPC, and the new representative took a somewhat different view of this matter than did their predecessor. The opinion and approach taken by a new expert medical witness in this case was clearly unforeseen, and could not reasonably be remedied.

Constitutional Question

[24] The accused, in pursuing this motion, was required to file and serve a notice of constitutional question upon the Attorneys General of Canada and Manitoba pursuant to *The Constitutional Questions Act*, C.C.S.M. c. C180.

[25] Despite the accused refusing to do so, the Crown agreed to defend the motion on its merits. It appears, however, that the Attorney General of Canada was never made aware of these proceedings, and had no opportunity to take a position on the motion. Given my decision to dismiss the motion I have not ordered that a notice be served, but nevertheless this issue constituted a deficiency in the manner in which the accused proceeded, despite the explicit advice of the pre-trial conference judge that a notice of constitutional question was required in this case.

CONCLUSION

[26] For the foregoing reasons, the accused's motion is dismissed.

J.