Citation: R v Poperechny, 2020 MBCA 81 Date: 20200827
Docket: AR19-30-09356

IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice William J. Burnett
Madam Justice Janice L. leMaistre
Madam Justice Karen I. Simonsen

B E T W E E N:

HER MAJESTY THE QUEEN	)	***S. A. Inness***
	)	*for the Appellant*
	)	*(via videoconference)*
(Appellant) Respondent	)	
	)	***C. R. Savage*** *and*
	)	***M. A. Bodner***
- and -	)	*for the Respondent*
	)	*(via videoconference)*
	)	
DANIEL PAUL POPERECHNY	)	*Appeal heard:*
	)	***May 25, 2020***
	)	
(Accused) (Respondent) Appellant	)	*Judgment delivered:*
	)	***August 27, 2020***

COVID-19 NOTICE: As a result of the COVID-19 pandemic and pursuant to r 37.2 of the Manitoba, *Court of Appeal Rules*, Man Reg 555/88R, all appeals are heard remotely by videoconferencing until further notice.

On appeal from 2019 MBQB 137

LEMAISTRE JA

Introduction

[1] The accused appeals the decision of the summary conviction appeal judge (the appeal judge) reinstating his charges that had been stayed for unreasonable delay.

[2] The accused was charged with driving while impaired and driving with a blood alcohol level over .08. After his trial in the Provincial Court was adjourned, the accused brought a motion for a stay of proceedings under section 24(1) of the *Canadian Charter of Rights and Freedoms* (the *Charter*) based on an alleged breach of his right under section 11(b) to be tried within a reasonable time (the delay motion). The motion judge concluded that the delay between the date on which the accused was charged and the date of his new trial was unreasonable and stayed the charges. The Crown appealed the decision of the motion judge. The appeal judge concluded that the motion judge had erred in finding a *Charter* breach and reinstated the charges.

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

Background

[4] The accused was arrested by police on July 22, 2017. The charges were laid on August 29, 2017, after a Crown attorney reviewed the file. The Crown provided the initial disclosure to the accused's lawyer on September 5, 2017. The initial disclosure did not include the notes and narrative report of the arresting officers. On September 14, 2017, the Crown attorney with conduct of the prosecution (the prosecutor) informed the accused's lawyer that she had requested the notes and narrative reports of all police officers involved in the investigation, as well as any other disclosure related to the file. The Crown's office received the additional disclosure on or around October 10, 2017, and emailed it to the accused's lawyer on October 25, 2017, after it had been vetted by staff in the Crown's disclosure unit.

[5] On November 21, 2017, the Crown's office provided possible trial dates and the accused's lawyer confirmed his availability for September 13-14, 2018 (the first trial date). Those dates were set in court on November 30, 2017.

[6] On July 19, 2018, the prosecutor's assistant contacted one of the arresting officers to arrange a meeting. When the officer was told that the trial was scheduled for September 13-14, 2018, he indicated that he would be on annual leave and would be out of the country on those dates. The prosecutor misunderstood the officer's correspondence that he would be unavailable on the first trial date and issued a subpoena requiring his attendance at the trial. On July 29, 2018, the officer received the subpoena for the trial and submitted a form to the Crown's office reiterating that he would be out of the country on the first trial date. The Crown's office received the officer's form on August 7, 2018 and it was reviewed by the prosecutor on August 14, 2018.

[7] On August 14, 2018, the prosecutor advised the accused's lawyer that she would be seeking an adjournment of the trial. She also took steps to secure new dates in the event that her adjournment request was granted.

[8] On September 5, 2018, the Court granted the prosecutor's request for an adjournment and the trial was rescheduled to January 22-23, 2019 (the second trial date).

[9] The motion judge heard the delay motion on December 12, 2018. She granted the delay motion and stayed the proceedings.

[10] The appeal judge granted the Crown's appeal of the motion judge's decision and reinstated the charges, returning them to the Provincial Court for trial.

[11] The accused sought, and was granted, leave to appeal the appeal judge's decision.

The Motion Judge's Decision

[12] The motion judge found that the total delay from the time the information was sworn until the second trial date was 16 months and 25 days. She subtracted nine days of defence delay for a net delay of 16 months and 16 days (16.5 months). Relying on the Supreme Court of Canada decision in *R v Jordan*, 2016 SCC 27, she concluded that the delay was below the presumptive ceiling of 18 months for a trial in the Provincial Court and that, therefore, the accused bore the onus of establishing that the delay was unreasonable. Accordingly, she considered whether the accused had established that: (1) the defence took meaningful steps that demonstrated a sustained effort to expedite the proceedings, and (2) the case took markedly longer than it reasonably should have (see *Jordan* at para 82).

[13] The motion judge concluded that the defence "made appropriate efforts to have the matter dealt with as soon as possible."

[14] Regarding the length of the delay, the motion judge identified two main issues which contributed to the delay:

> In my view, the most concerning aspects with respect to this case are . . . the unexplainable delay with respect to disclosure being provided on a very straight forward case of impaired driving and the practice with respect to professional witnesses of waiting up to six, sometimes eight weeks at best before trial date to have them subpoenaed.

[15] The motion judge expressed concern that the prosecutor did not personally take steps to expedite the disclosure by emailing the officer about

the missing notes or vetting the disclosure in circumstances where "there was already a lengthy delay." She also observed that the Crown's practice of issuing subpoenas "late" often arises in the Provincial Court in the form of adjournment requests and stated that this practice needs to be "re-evaluated". She found that this behaviour demonstrated an attitude of complacency on the part of the Crown. Finally, she concluded that the case was not overly complicated, that the trial could have been held at least six months earlier and that this was a clear case in which to enter a judicial stay.

The Appeal Judge's Decision

[16] In *R v Poperechny,* 2019 MBQB 137, the appeal judge reviewed the principles applicable to a delay motion pursuant to *Jordan*, as well as the standard of review as explained by Beard JA in *R v Vandermeulen*, 2015 MBCA 84. He also discussed the principle of laches as developed by the law of equity.

[17] The appeal judge described the central issue in the case in the following way (at para 32):

> At its core, this case is about a trial delay resulting from a Crown prosecutor forgetting to inform a witness in November of 2017 that a trial date was set for September of 2018 and then misreading an email about a police officer's vacation. The delay has nothing to do with laches because it is not rooted in a deliberate effort to cause a delay in a manner that prejudices the rights of another party.

[18] The appeal judge concluded that there was no evidence before the motion judge "that the delay arose from some kind of policy, written or unwritten, in the Crown's office as to the timing of the service of subpoenas to key witnesses" and that the motion judge granted the stay "because she felt

this case was a typical example of the chronic pattern of trial delays in her court caused by habitual lateness of Crown prosecutors in serving subpoenas on key Crown witnesses in a timely way" (at paras 33-34).

[19] The appeal judge found that, in coming to her decision, the motion judge either committed a palpable and overriding error of fact or incorrectly misstated and misapplied the legal principles and that no deference was owed to her conclusion that the delay was unreasonable (at para 35).

[20] Having found that the motion judge erred, the appeal judge considered afresh whether the delay was unreasonable and concluded that it was not. In doing so, he agreed with the motion judge that the defence took meaningful steps to expedite the proceedings (at para 36). He noted that the motion judge did not find that the delay between the date the accused was charged and the first trial date warranted a stay of proceedings and, therefore, he focussed on the four-month delay between the first trial date and the second trial date. He concluded that this four-month delay did not markedly exceed what was reasonable in the circumstances, particularly in light of the steps taken by the prosecutor to expedite the setting of the second trial date after it became clear she needed to pursue an adjournment of the first trial date. He also concluded that this was not a clear case in which a stay of proceedings was warranted and, therefore, he reinstated the charges (at para 45).

Grounds of Appeal

[21] The accused was granted leave to appeal on two grounds: (1) the appeal judge incorrectly stated and misapplied the standard of review when reviewing the motion judge's findings for error, resulting in a finding of error when there was none; and (2) the motion judge erred in law in the articulation

and application of the principle of "laches" in the context of a criminal case. The accused argues that the appeal judge erred when he overturned the motion judge's stay of proceedings on the delay motion and seeks to have the stay reinstated.

Standard of Review

[22] This is a second-level appeal pursuant to section 839 of the *Criminal Code*. It is an appeal from the decision of the appeal judge and the appeal is limited to questions of law alone. Both grounds of appeal raise questions of law and, therefore, the standard of review is correctness (see *Vandermeulen* at paras 24, 29). Counsel agree that, if the appeal judge is found to have erred, this Court should proceed to review the motion judge's decision.

Jordan Framework

[23] In *Jordan*, the Supreme Court of Canada established a new framework for determining whether an accused's section 11(b) *Charter* rights have been infringed and set a presumptive ceiling of 18 months for cases in the provincial court. In cases falling below the presumptive ceiling, the defence bears the onus of proving that the delay was unreasonable and must establish: (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. The factors relevant to the reasonable time requirements of a case include the complexity of the case, local considerations, and whether the Crown took reasonable steps to expedite the proceedings (see *Jordan* at paras 82, 87-91).

Discussion

Did the Appeal Judge Incorrectly State and Misapply the Standard of Review?

[24] I am not persuaded that the appeal judge incorrectly stated the standard of review. He relied on the submissions of counsel that *Vandermeulen* was the "leading authority in Manitoba" and quoted *R v Grant*, 2017 MBQB 39, in which Toews J summarised the principles from *Vandermeulen* (see *Grant* at para 2). He also correctly stated the test for determining whether the trial delay was unreasonable.

[25] That said, I would not wish to be taken as approving the appeal judge's approach to the application of the standard of review. The appeal judge concluded that the motion judge erred either in fact or in law when she concluded that the Crown had a policy of issuing subpoenas late. In his reasons, he stated (at para 35):

> In my view, it does not matter if I categorize the finding by the [motion judge] as to the key reason for the delay as an error of fact to which the "palpable and overriding error" standard of review applies or if it amounted to an error in the articulation and application of the relevant legal principles, which attracts the correctness standard. To the extent that it was an error, it is palpable and overriding. It can also be described as an underlying legal error as to the articulation and application of legal principles. In either circumstance, I am unable to apply the deference standard.

[26] On appellate review, it is important to identify the nature of the error and the applicable standard of review (see *Housen v Nikolaisen*, 2002 SCC 33 at paras 8-37). Despite the appeal judge not clearly doing so, a proper identification of the alleged error and application of the standard of review leads to the same conclusion that he reached.

[27] In my view, the motion judge's error was not a mistake of fact. It was an error of law reviewable on a standard of correctness. The error of law was taking judicial notice of a fact when it was inappropriate to do so.

[28] Judicial notice is the acceptance by a court of the truth of a particular fact or state of affairs without the requirement of proof (see Sopinka, Lederman & Bryant, *The Law of Evidence in Canada*, 5th ed (Toronto: LexisNexis, 2018) at 1393). In *R v Find*, 2001 SCC 32, McLachlin CJ (as she then was) explained that a court may take judicial notice of facts that are uncontroversial in appropriate circumstances (at para 48):

> Judicial notice dispenses with the need for proof of facts that are clearly uncontroversial or beyond reasonable dispute. Facts judicially noticed are not proved by evidence under oath. Nor are they tested by cross-examination. Therefore, the threshold for judicial notice is strict: a court may properly take judicial notice of facts that are either: (1) so notorious or generally accepted as not to be the subject of debate among reasonable persons; or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy: *R. v. Potts* (1982), 66 C.C.C. (2d) 219 (Ont. C.A.); J. Sopinka, S. N. Lederman and A. W. Bryant, *The Law of Evidence in Canada* (2nd ed. 1999), at p. 1055.

[29] The central issues in dispute in this case were the length of and reasons for the delay. The motion judge concluded that one of the main reasons for the delay was the Crown's practice "of waiting up to six, sometimes eight weeks at best before trial" to subpoena professional witnesses. However, there was no evidence of a Crown policy or practice of issuing subpoenas six or eight weeks prior to trial. The prosecutor's unchallenged submission was that her usual practice was to issue subpoenas three months prior to trial.

[30] In my view, the motion judge's finding regarding the Crown's practice as to when subpoenas are issued is an adjudicative fact that is neither notorious nor easily verified and, therefore, this fact should not have been judicially recognised (*R v Spence*, 2005 SCC 71 at paras 60-66).

[31] While *Jordan* encourages judges to employ the knowledge they have of their own jurisdiction, in this case, the record does not indicate sufficient knowledge on the part of the motion judge regarding the Crown's practice as to when subpoenas are issued.

[32] During the hearing, the motion judge commented on her experience with witnesses being unavailable for trial stating:

> [I]t's not unusual in trial situations that one or more Crown witnesses, often police officers with annual leave planned, are unavailable when trial dates are set? That, I mean, isn't that exactly what I've [been] saying is that every day in this court, not every day, but at least once a week, once a month, whatever it is, we're getting motions before the court delay absolutely caused as a result of a subpoena not going out when the trial date was set or not giving the police officer notice.

[33] While the motion judge articulated her experience with witnesses and police officers being unavailable for trial, it is unclear to what extent this is a systemic circumstance in Winnipeg (see *Jordan* at para 89). Moreover, the prosecutor's submission was clear that she had a practice of issuing subpoenas three months prior to trial (not six to eight weeks) and that she had not followed her usual practice in this case. There was also no evidence of a practice that needed to be "re-evaluated".

[34] Therefore, while I would not endorse the appeal judge's reasoning, I agree that the motion judge made a legal error and that her decision was not owed deference by the appeal judge.

[35] Having found that the motion judge erred in her finding as to the "key reason for the delay", the appeal judge conducted his own analysis as to whether the delay was unreasonable (see *Poperechny* at para 35). He accepted the motion judge's conclusion that the defence took meaningful steps that demonstrated a sustained effort to expedite matters. However, he concluded that the case did not take markedly longer than reasonably necessary and that this was not the clearest of cases in which to enter a stay of proceedings. In doing so, the appeal judge focussed on the four-month delay between the first trial date and the second trial date, as well as the efforts by the prosecutor to obtain an early trial date that was within the 18-month presumptive ceiling once she understood that her witness was not available.

[36] That the case was not complex was not in dispute, and I agree with the appeal judge that the Crown's efforts to expedite the setting of a new trial date was relevant to his analysis. However, in my view, the appeal judge's reasons do not demonstrate that he conducted a global assessment of the delay (see *Jordan* at para 111).

[37] Unfortunately, the record does not assist in determining how long a case of this nature normally takes in Winnipeg. In her reasons, the motion judge stated that the second trial date could have been held at least six months earlier. It is unclear whether this relates to how long a case of this nature normally takes in Winnipeg and, if so, on what basis she made this finding. The motion judge also stated that the court's website had trial dates available within the month, and there was some discussion during the hearing about this

issue, but ultimately, she did not make a specific finding as to how long a case like this normally takes to get to trial in Winnipeg.

Did the Appeal Judge Err in Law in the Articulation and Application of the Principle of Laches?

[38] I also have concerns about the appeal judge's articulation of the principle of laches in a criminal law context. The motion judge stated that her decision rested "to a large extent . . . on the [laches] . . . that the Crown took with respect to issuing subpoenas with respect to the police officers". Referring to the law of equity, the appeal judge disagreed that this conduct amounted to laches when he stated, "[t]he delay has nothing to do with laches because it is not rooted in a deliberate effort to cause a delay in a manner that prejudices the rights of another party" (see *Poperechny* at para 32).

[39] The Crown concedes, and I agree, that the concept of laches used by the motion judge is broader than the equitable doctrine of laches (see *Darville v The Queen* (1956), 116 CCC 113 at 117 (SCC)). I agree with the accused that the appeal judge erred in law by incorrectly stating the test for laches. While this may have influenced his view of the prosecutor's efforts to expedite the proceedings, I do not agree with the accused's submission that it caused him to find error when there was none. In his reasons, the appeal judge stated that the delay had nothing to do with laches and that it was caused by an oversight by the prosecutor. I would not accede to this ground of appeal.

Conclusion

[40] While I disagree with some of the appeal judge's reasoning, a proper articulation and application of the legal principles on the evidence, leads to the same result.

[41] I am not convinced that the record supports the motion judge's conclusion that the accused met his onus of establishing that his section 11(b) *Charter* rights were infringed and that this is the clearest of cases in which to enter a stay of proceedings (see *Jordan* at para 48).

[42] The delay was caused by the unavailability of a material witness and by the prosecutor issuing subpoenas later than her usual practice and then failing to understand at the earliest opportunity that the officer was not available for the trial. However, it is unclear and I would not speculate as to how much delay was caused by these factors or how long a case such as this normally takes in Winnipeg. Despite the defence efforts to expedite the proceedings, I am not persuaded on the evidence that the accused met his onus of establishing that the case took markedly longer than it reasonably should have.

[43] In the result, while I make no comment about whether 16.5 months would be markedly longer than reasonable in other cases involving similar offences, I would dismiss the appeal.

"leMaistre JA"

I agree: "Burnett JA"

I agree: "Simonsen JA"