



SUPREME COURT OF CANADA

CITATION: R. v. Thanabalasingham, 2020 SCC 18

APPEAL HEARD: June 10, 2020

JUDGMENT RENDERED: July 17, 2020

DOCKET: 37984

BETWEEN:

Her Majesty The Queen
Appellant

and

Sivaloganathan Thanabalasingham
Respondent

CORAM: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ.

REASONS FOR JUDGMENT: The Court
(paras. 1 to 10)

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R. v. THANABALASINGHAM

Her Majesty The Queen

Appellant

v.

Sivaloganathan Thanabalasingham

Respondent

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2020 SCC 18

File No.: 37984.

2020: June 10; 2020: July 17.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Constitutional law — Charter of Rights — Right to be tried within a reasonable time — Accused charged with second degree murder in death of spouse — Delay of almost five years between charge and anticipated end of trial — Whether accused's right to be tried within reasonable time under s. 11(b) of the Canadian

Charter of Rights and Freedoms infringed — Framework for determining s. 11(b) infringement set out in Jordan applied.

T was charged with the second degree murder of his spouse in August 2012. The preliminary hearing lasted more than a year. In June 2015, T's trial was scheduled for February 2018, but it was later rescheduled to proceed in April 2017. Shortly before his trial, T brought a motion for a stay of proceedings pursuant to s. 11(b) of the *Charter*. The trial judge ordered the stay. The Court of Appeal upheld the trial judge's order.

Held: The appeal should be dismissed.

The delay between the charge and the anticipated end of trial gave rise to a breach of T's s. 11(b) *Charter* right to be tried within a reasonable time. The delay in this case far exceed the 30-month presumptive ceiling established in *Jordan*. The preliminary hearing was not a discrete exceptional event and its length was not outside the Crown's control. Furthermore, although most of the delay accrued before *Jordan* was released, the transitional exceptional circumstance does not justify the delay. This case would certainly have qualified for a stay under the previous framework set out in *R. v. Morin*, [1992] 1 S.C.R. 771, as the institutional delay of 43 months greatly surpasses the *Morin* guidelines of 14 to 18 months. Accordingly, the trial judge's determination that a stay of proceedings was warranted should not be interfered with.

Cases Cited

Applied: *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631; **referred to:** *R. v. Cody*, 2017 SCC 31, [2017] 1 S.C.R. 659; *R. v. Morin*, [1992] 1 S.C.R. 771; *R. v. Williamson*, 2016 SCC 28, [2016] 1 S.C.R. 741.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, s. 11(b).

APPEAL from a judgment of the Quebec Court of Appeal (Duval Hesler C.J. and Morissette, Hilton, Gagnon and Vauclair JJ.A.), 2019 QCCA 1765, [2019] AZ-51638047, [2019] Q.J. No. 9048 (QL), 2019 CarswellQue 9212 (WL Can.), affirming a decision of Boucher J., 2017 QCCS 1271, [2017] AZ-51381182, [2017] Q.J. No. 3430 (QL), 2017 CarswellQue 2605. Appeal dismissed.

Maude Payette, Richard Audet and Catherine Perreault, for the appellant.

No one appeared for the respondent.

Louis Belleau, as *amicus curiae*, and *Antoine Grondin-Couture*.

The following is the judgment delivered by

THE COURT —

[1] The bulk of this case occurred before the release of this Court's decision in *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631. The facts leading to the respondent's s. 11(b) challenge are indicative of the culture of rampant and long-standing systemic delay — and complacency towards that delay — that had grown up in our criminal justice system. The manner in which these proceedings were conducted epitomizes this culture. Such facts are unlikely to be replicated in cases where the s. 11(b) framework set out in *Jordan* and applied in *R. v. Cody*, 2017 SCC 31, [2017] 1 S.C.R. 659, is adhered to from the outset.

[2] The respondent, Mr. Thanabalasingham, was charged with the second degree murder of his spouse in August 2012. At the preliminary hearing, the Crown chose to pursue a charge of first degree murder. The preliminary hearing lasted more than a year, due in no small measure to systemic delay. In June 2015, Mr. Thanabalasingham's trial was scheduled for February 2018. It was later rescheduled to proceed in April 2017. By then, *Jordan* had been released and it was the governing authority on s. 11(b) of the *Canadian Charter of Rights and Freedoms*.

[3] Shortly before he was scheduled to stand trial, Mr. Thanabalasingham brought a motion pursuant to s. 11(b) of the *Charter*, alleging that his right to be tried within a reasonable time had been violated. The trial judge agreed and ordered a stay of proceedings (2017 QCCS 1271). By a majority of 3-2, the Quebec Court of Appeal

upheld the trial judge's order (2019 QCCA 1765). The matter now comes to this Court as of right.

[4] In our view, the appeal must be dismissed. The delay in this case gave rise to a breach of Mr. Thanabalasingham's s. 11(b) right and we would uphold the trial judge's order.

[5] There is no doubt that the delay in this case far exceeded the 30-month presumptive ceiling established in *Jordan*. With respect to this calculation, the Crown urges us to adopt the dissenting reasons of Gagnon J.A. in the Court of Appeal. Applying the principles in *Jordan*, he found that the net delay was under 35 months. In so concluding, he treated the delay arising from the preliminary hearing as a discrete exceptional event. With respect, we are of the view that he erred in law in coming to this conclusion. The preliminary hearing was not a discrete event, and its length was not outside the Crown's control in the sense contemplated by *Jordan* (see *Jordan*, at paras. 69-70). We say this without endorsing the trial judge's critical comments regarding the Crown's exercise of its prosecutorial discretion (see trial reasons, at para. 39 (CanLII)); it was open to the Crown to pursue a charge of first degree murder. That said, as this Court noted in *Jordan*, "[w]hile the court plays no supervisory role for such decisions, Crown counsel must be alive to the fact that any delay resulting from their prosecutorial discretion must conform to the accused's s. 11(b) right" (para. 79). Had Gagnon J.A. properly accounted for the delay arising

from the preliminary hearing, he would have arrived at a net delay of 45 months — well beyond the 30-month presumptive ceiling.

[6] In view of this conclusion, we need not address the issue of defence delay. In particular, it is unnecessary to consider how the calculation of defence delay may have been impacted by efforts made by the court and the Crown to move the original trial date forward from February 12, 2018. Even if Gagnon J.A. was correct in attributing a year of delay to the defence for its inability to take up an earlier trial date, the resulting delay would still have been 45 months, as indicated.

[7] Since most of the delay in this case accrued before *Jordan* was released, we must consider, as the courts below did, whether the transitional exceptional circumstance justifies the delay (see *Jordan*, at para. 96). Here, it bears repeating that the vast majority of the lengthy delay in this case stemmed from systemic delay that had reached epidemic proportions across many parts of this country — a key factor that motivated this Court’s decision in *Jordan*. Indeed, as the trial judge noted, this problem had “plagued the criminal justice system in the district of Montreal” specifically (para. 40).

[8] With respect to the transitional exceptional circumstance, we cannot say that the trial judge erred in concluding that the Crown failed to establish that the exception applied. As this Court said in *Cody*, the Crown will “rarely, if ever, be successful in justifying the delay as a transitional exceptional circumstance under the *Jordan* framework” if the case would have warranted a stay under *R. v. Morin*, [1992]

1 S.C.R. 771 (para. 74). In our view, this case would certainly have qualified for a stay under the previous framework. The trial judge calculated the institutional delay in this case at roughly 43 months, which greatly surpasses the *Morin* guidelines (14 to 18 months). Mr. Thanabalasingham spent nearly five years in custody awaiting trial, and he accordingly suffered actual prejudice as well as inferred prejudice (trial reasons, at para. 33). With respect to the nature of the charge, the trial judge recognized that the offence charged was “very serious” and that “a woman lost her life in tragic circumstances” (para. 36). That said, we agree with Crown counsel and the *amicus curiae* that the trial judge erred by stating that the “seriousness of the offence charged is a factor of very limited relevance in the analysis” (para. 37). In fairness to the trial judge, he did not have the benefit of this Court’s reasons in *Cody*. There, the Court clarified that *R. v. Williamson*, 2016 SCC 28, [2016] 1 S.C.R. 741, “should not be read as discounting the important role that the seriousness of the offence and prejudice play under the transitional exceptional circumstance” (para. 70) and recognized that “[u]nder the *Morin* framework, prejudice and seriousness of the offence ‘often played a decisive role in whether delay was unreasonable’” (para. 69, quoting *Jordan*, at para. 96). It would appear that the trial judge read *Williamson* in the manner cautioned against in *Cody*. However, we are of the view that, given the circumstances of this case, this error was inconsequential. Even if the trial judge had not made this error, he would have arrived at the same result. We would therefore not interfere with his determination that a stay of proceedings was warranted.

[9] Nothing in the foregoing should be taken as a retreat from the message that *Jordan* sought to convey, or from the principles and policy considerations underlying it. *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). Defence counsel must be aware that, aside from time legitimately taken to respond to the charges, they “will have directly caused the delay if the court and the Crown are ready to proceed, but [they are] not” (*Jordan*, at para. 64; see also para. 65). As we did in both *Jordan* and *Cody*, we again emphasize the special role that trial judges — who are charged with curtailing unnecessary delay and changing courtroom culture — must play in this shift (*Cody*, at para. 37, citing *Jordan*, at para. 114). For example, where the defence seeks an adjournment, a court may deny it “on the basis that it would result in unacceptably long delay, even where it would be deductible as defence delay” (*Cody*, at para. 37). In sum, practices that were formerly commonplace or merely tolerated are no longer compatible with the right guaranteed by s. 11(b) of the *Charter* — a right that inures not just to the benefit of accused persons, but to the benefit of victims and society as a whole as well.

[10] For these reasons, we would dismiss the appeal.

Appeal dismissed.

*Solicitor for the appellant: Director of Criminal and Penal Prosecutions,
Montréal.*