

ONTARIO COURT OF JUSTICE

HER MAJESTY THE QUEEN
(ONTARIO MINISTRY OF LABOUR)

-and-

STERLING CRANE DIVISION OF PROCRANE INC.

REASONS FOR JUDGMENT

HORNBLOWER, J. :

OVERVIEW

In May of 2012, Gerry Lukasiewicz was employed by Sterling Crane as a mobile crane operator. Mr. Lukasiewicz had been employed in that capacity since 1988, first with Sarnia Cranes, the predecessor to Sterling, and then with Sterling Crane. On May 7, 2012, Mr. Lukasiewicz was assigned a job by his employer at a work site at Imperial Oil's Sarnia facility. After conducting an inspection of the crane to be used for that job, Mr. Lukasiewicz drove the crane from the Sterling yard to the job site. Once at the job site, he set up the crane for use and inspected the boom from a position standing on the ground. From there he went to the control panel located on the deck of the crane. When he began to raise the boom from its position on the cradle in order to do a lift, he noticed

some movement on the jib that was stowed on the boom. He left the control panel and walked down the deck to get a better view of the jib. He did not see anything out of the ordinary in looking at the jib so returned to the control panel. As he got back to the control panel, the jib fell from the boom and a portion of the jib struck him in the head. As a result of being struck, Mr. Lukasiewicz suffered permanent and catastrophic injuries that have left him paralyzed.

During the weekend before the incident of May 6, 2012 occurred, the annual inspection of the crane was undertaken at Sterling's facility. In preparation for the use of the crane after the inspection, the jib had to be properly stowed on the boom. The jib was described as an extension of the boom that when in place, gives the boom greater length. When not in use, the jib is stowed to the side of the boom. A manual written by the manufacturer of the crane contains a procedure for installing the jib on the boom, as well as for stowing the jib. The installation procedure sets out a number of steps to be taken to ensure proper installation. The procedure for stowing the jib simply recites that the installation steps are reversed.

On May 6th, 2012, Brad Swain and Kevin Nichols were assigned the responsibility of stowing the jib on the boom while the crane was on the Sterling site. Mr. Swain was, at the time, an apprentice crane operator. Mr. Nichols, a mechanic, was his supervisor. Mr. Swain testified regarding the procedure he followed under Mr. Nichols' supervision, to stow the jib. He also testified regarding the

training he received at Sterling generally as well as specifically relating to the stowing of the jib.

Greg Barr was the shop supervisor for Sterling and testified regarding Sterling's training, including training on the procedure for stowing the jib. He had trained Mr. Nichols on that procedure. Included as part of that procedure was the need for a visual inspection to be conducted to ensure the jib was properly stowed.

The Ministry of Labour conducted an investigation into the accident and Sterling was subsequently charged. In addition, Mr. Nichols was charged under the Occupational Health and Safety Act however he passed away prior to the commencement of the trial. After a 6 day trial, Sterling was convicted of an offence under s. 25 (2) (a) of the Occupational Health and Safety Act. Following that conviction, Sterling brought an Application under the Charter of Rights seeking to have the proceeding stayed due to an unreasonable delay in bringing the matter to trial. That Application was dismissed and a sentence, by way of joint submission, was imposed.

The case for the Crown revolved around the manner in which the jib was stowed on the boom, Sterling's training in that regard, and evidence regarding causation.

Sterling now appeals both the conviction and the dismissal of its Application for a Stay.

THE CHARTER APPLICATION

On May 3, 2013, an Information was sworn alleging two violations of the Occupational Health and Safety Act by Sterling. Those violations related to the stowing of the jib on the boom of the crane the day before the accident.

The trial against Sterling commenced on May 11, 2015, nearly 24 months to the day after the charges were laid. The three days that had been set aside were not sufficient to allow the trial to be completed. Additional dates were selected and the calling of evidence was completed on September 30th, 2015, 29 months after the information was laid. The court requested written submissions. All submissions were filed by April 21st, 2016. On June 21, 2016, Her Worship Justice of the Peace Whelan delivered her reasons and convicted Sterling Crane of one of the two offences it had stood trial on. Sentencing submissions were set for September 20th and 21st, 2016. On July 16th, 2016, the Supreme Court of Canada released its decision in *Jordan* which significantly altered the law on the issue of delay. As a result, Sterling brought an Application under the Charter seeking a stay of the proceedings on account of unreasonable delay.

The issue of unreasonable delay is determined in accordance with the framework established in *R. v. Jordan* (2016) S.C.C. 27. The presumptive ceiling of 18 months, as set out in *Jordan*, constitutes the upper limit of the time to trial, beyond which is presumed to be unreasonable delay. Delay is determined by calculating the period between the date that the charge is laid and the end of

trial, minus any defence delay. If that period exceeds the presumptive ceiling, the delay is presumed to be unreasonable unless the Crown can establish that the delay was caused by exceptional circumstances beyond the control of the Crown. For cases that were in the system prior to *Jordan*, the manner in which *Jordan* is to be applied was succinctly stated in *R. v Mallozzi* (2017) ONCA 644 as follows at paragraph 26:

Jordan applies to cases that were already in the system at the time of its release, but is to be applied contextually and flexibly in such circumstances. For cases where the delay exceeds the presumptive ceiling but cannot be justified by exceptional circumstances, a transitional exceptional circumstance may arise if the Crown establishes that the time the case has taken is justified based on the parties' reasonable reliance on the law as it previously existed.

If as a result of the transitional exceptional circumstance analysis a delay is determined not to be unreasonable under the previous framework established in *Morin*, that concludes the matter regardless of whether the presumptive ceiling established in *Jordan* is exceeded.

These charges were laid in May of 2013 and judgment rendered 37 months later. The calling of evidence was completed 29 months after the charge was laid. Whichever period of time is considered, none of that time can be considered as defence delay. The presumptive ceiling is exceeded. There are no exceptional circumstances justifying the delay. The case was not

particularly complex. It would be an error to use the time required for the trial, 6 days, as an indication of complexity. If adequate time had been given for the trial when the initial date for trial was set and had that first trial date not been vacated by the Court, the trial could have been completed within the presumptive ceiling. Whatever complexity there is in the case played no part in the delay.

In order to determine if the transitional exceptional circumstance exists, the time to trial needs to be analyzed using the *Morin* framework.

MORIN ANALYSIS

Under the *Morin* framework, various discrete classes of delay are factored into an analysis in the determination of a breach of the right under s. 11 (b) of the Charter: inherent delay, Crown delay, Defence delay, and institutional delay. Of the overall time from the first appearance to the end of the trial, inherent delay and Defence delay are deducted in the calculation of reasonable time to trial. If the remaining delay exceeds the *Morin* guidelines, then the delay, if prejudicial, results in a stay of proceedings. As a general rule, the delay clock under the *Morin* framework begins to tick once the Defence is ready to proceed to trial, subject to Crown delay prior to the setting of the trial date being factored into the calculation of delay.

HISTORY OF THE PROCEEDINGS

In the present case, the first appearance in court was on June 21st, 2013, 6 weeks after the charges were laid. A pre-trial was conducted on May 26th,

2014, 12 months after the charge was laid and roughly 11 months after the first court appearance. Of that time that might otherwise be considered as inherent time, 4 months were the result of Crown delay. A one month adjournment between September 20th, 2013 and 18 October, 2013 was due to the need for additional disclosure to be provided by the Crown. That time can be classified as Crown delay. A pre-trial set for January 20th, 2014 did not proceed as scheduled as the Crown was late calling into the pre-trial. Insufficient time remained that day for the pre-trial to be completed and so it was adjourned until April 28th, 2014. That period of roughly 3 months is also Crown delay.

As of the first date for a pre-trial, January 20th, 2014, the charges had been before the court for 8 months. While the fault for the pre-trial not proceeding as scheduled was that of the Crown, in re-scheduling the matter to April 28, 2014 for a pre-trial, it does not appear that the court considered its role in ensuring matters moved efficiently through the system. Little effort appears to have been put into re-scheduling the pre-trial in a more timely manner. While the delay over that period rests primarily with the Crown, there is an aspect of institutional delay as a result of the inattention paid by the court to more timely scheduling the pre-trial.

The pre-trial commenced on April 28, 2014 and additional time was scheduled to complete the pre-trial. On May 26th, 2014, the pre-trial was completed and the matters were set for trial on December 8th and 9th, 2014. In setting the trial date, the presiding Justice of the Peace (not Justice of the Peace Whelan) turned a deaf

ear to Crown and Defence counsel's realistic assessment of the time required for the trial. While courts always need to be mindful of the efficient use of court time, two very experienced counsel clearly indicated the necessity for 5 days of trial time. The Justice of the Peace simply refused to consider their estimate, providing no reason other than "They're not getting it" (transcript of proceedings from November 17, 2014 at pg 95). A concern over losing valuable court time through inefficient scheduling is a valid concern. That concern could easily have been addressed if the Justice of the Peace had scheduled two days for the trial (her estimate), and the remaining three days (counsel's estimate) to occur several weeks later. Regrettably, no accommodation was made by the Court with respect to proper scheduling of the matters for trial. For lengthy matters, it is not uncommon to schedule several days consecutively for trial and then schedule the remaining time 4 to 6 weeks later. In proceeding in that manner, if the Justice of the Peace's estimate of the time required for trial was correct, the additional time could have been given back to be used for other matters. If counsel's estimate was correct, the time would already have been scheduled to follow relatively soon after the trial commenced, minimizing delay.

As it turned out, none of that mattered. When the trial dates were set, a confirmation hearing was scheduled for November 17th, 2014. As a result of a scheduling error, the Crown was not present for that hearing. Rather than stand the matter down in an effort to locate the Crown or simply re-schedule it in a timely manner, the Justice of the Peace (again not Justice of the Peace Whelan) arbitrarily chose to vacate the trial dates and adjourned the matters to December

15th to set new dates. There was no reason for the Justice of the Peace to have proceeded in such an arbitrary and capricious manner. While the Crown's failure to attend the Confirmation Hearing may have been inconvenient to the Court, every effort should have been made to keep the matters on the dates scheduled. That unilateral decision on the part of the Justice of the Peace was done without any regard for the proper administration of justice, and led to an unnecessary and unreasonable delay.

On December 15th, new trial dates were fixed for May 11th, 12th and 13th, 2015. The 5 month period between the original trial date of December 8/9, 2014 and the new trial dates is all institutional delay. While the vacating of the trial dates flowed from the Crown's inattention to its own schedule, the vacating of the dates was unnecessary, and the resulting delay all lay squarely at the feet of the Justice of the Peace. That period constitutes institutional delay.

The trial commenced on 11 May, 2015 as scheduled. While counsel, in setting the dates for trial, had once again requested 5 days, the Justice of the Peace, slightly less tone deaf to counsels' request, only allotted 3 days for trial. It became apparent part way through day 1 that insufficient time had been scheduled. Additional time was then scheduled for September 28th and 29th, 2015. That delay between the completion of the evidence on May 13th and the resumption of proceedings on September 28th, 4 months, is institutional delay that resulted from the Court's failure to be responsive to the reasonable estimates for trial time identified by counsel.

None of the time thereafter can be considered as delay that would be an aspect of the “unreasonable delay” analysis under *Morin*. The trial was completed, as scheduled, on September 29, 2015. Written submissions were requested and thereafter a decision had to be rendered. None of the time from the completion of the evidence to the decision on the merits is anything other than inherent delay, and reasonable in the circumstances.

A total of 20 months of the overall time to trial can be attributed to either Crown delay or institutional delay. That time is well in excess of the *Morin* guidelines even as they relate to lengthy matters. Had the court set sufficient time in the first place, and not arbitrarily vacated the trial dates, the matter would likely have been completed in December 2014 and would have been well within the *Morin* guidelines.

ANALYSIS

On a *Jordan* analysis, unreasonable delay has been established. The issue in considering whether the Crown can rely on the transitional exceptional circumstance is “if it can show that the time the case has taken is justified based on the parties’ reasonable reliance on the law as it previously existed” (*Jordan* at paragraph 90 as cited in *Cody* in paragraph 68).

The reasonableness assessment under the *Morin* guidelines required the Court to find prejudice for a corporate accused. In the absence of actual prejudice, a stay would not be granted. Proof of prejudice was particularly

problematic for a corporate accused. In *R. v. Live Nation*, 2016, ONCJ 735, Justice Nakatsura summarized the issue of prejudice for a corporate accused as follows at paragraph 9:

“There was nonetheless a clear and significant difference in the Application of the *Morin* test when it came to corporate defendants. When it came to the factor of prejudice, the only relevant prejudice to be considered was prejudice to the corporate defendant’s fair trial interests. A corporation had no liberty or security of the person interest to be protected. Thus, prejudice would not be presumed for a corporation in a s. 11 (b) analysis. Rather the corporation would have to prove that its fair trial interests had been irremediably prejudiced.”

Justice Nakatsura ultimately held in *Live Nation* that under *Jordan*, the presumption of prejudice when the delay exceeds the presumptive ceiling is as applicable to the corporate defendant as it is to an individual accused. I agree with his conclusion and his reasoning. As to how this change was to apply for transitional cases, Justice Nakatsura stated the following at paragraph 13:

“...for cases still in the system when the *Jordan* decision was released, this difference in approach to corporate accused under the CIP case will have to be factored in when it comes to the consideration of the transitional exceptional circumstance.”

The issue of delay never arose during the period between the laying of the information and the completion of the evidence. It is clear that at all times

both the Crown and the Defence were relying on the law as it then existed under *Morin*. There was simply no urgency to move matters along as no matter how long it took, it was unlikely to result in irremediable prejudice. Justice Nakatsura alluded to this very point in *Live Nation*, commenting in paragraph 13 as follows:

“While I cannot say with any certainty, the requirement for a corporate applicant to prove “irremediable prejudice” under the old test likely has resulted in a greater tolerance for delays in the regulatory context.”

That is precisely what happened here. Since irremediable prejudice could not be established, Sterling never raised delay as an issue. They cannot be faulted for that, knowing as they must have, that such an application would have no chance of success. They, along with the Crown, were content to let matters unfold without regard to time. I can only conclude that both parties were relying on the law as it then existed. Accordingly, while I disagree with many of the reasons cited by the Justice of the Peace in dismissing the Charter Application, I am satisfied the decision to dismiss that Application was correct. The appeal as it relates to the Charter Application is therefore dismissed.

APPEAL AGAINST CONVICTION

At the conclusion of the trial, Sterling Crane was convicted of one offence under s. 25 (2) (a) of the Occupational Health and Safety Act.

The relevant portion of that section reads as follows:

An employer shall:

(a) provide information, instruction and supervision to a worker to protect the health or safety of the worker.

The Information particularized the offence as follows:

The Defendant failed to ensure the jib stowage procedure of the National Crane 1100 Series, Unit 28-7-226 was done properly and in accordance with the Operating Manual issued by the manufacturer.

ANALYSIS

In order to succeed in its prosecution, the Crown needed to establish beyond a reasonable doubt that Sterling failed to provide training on the proper stowage of the jib and that Sterling failed to provide training on how to stow the jib in accordance with the manual issued by the manufacturer.

In convicting Sterling, the Justice of the Peace made several critical findings of fact:

1. There were deficiencies in the manual such that Sterling Crane needed to have a more detailed process in place to learn the procedure of stowing the jib (Reasons pages 73 – 77).
2. Sterling Crane relied upon a manual they should have known to be confusing (Reasons page 90).

3. There is no evidence that there was a proper Sterling Crane specific procedure or training or instruction for either Mr. Nichols or Mr. Swain to follow to stow the jib (Reasons page 90).
4. Sterling did not have a process of its own to ensure a visual inspection was done of the jib once stowed (Reasons page 75).
5. The method for checking to ensure that the fixed pin and the A (or T-pin) were properly positioned was a visual inspection (Reasons paragraph 77).
6. There is no evidence that Mr. Swain and Mr. Nichols were directly beneath the stowage bracket at the time they conducted the visual inspection of the stowed jib (Reasons page 89 – 90).
7. Mr. Swain did not understand the importance of the proper stowage procedure, namely how to trap the hook between 2 pins (Reasons page 88).

In accepting that there were deficiencies in the manual (term 1 above), the Justice of the Peace appears to have erred in concluding Sterling relied upon that manual (item 2 above), and that it did not have its own procedure or training for the proper stowage of the jib (point 3 above).

The proof of the offence required the Crown to prove two things beyond a reasonable doubt:

1. That Sterling did not provide information, instruction and supervision to ensure the jib was properly stowed, and;
2. That Sterling did not provide information, instruction and supervision to ensure that the jib was properly stowed in accordance with the manual.

At trial, Sterling's argument regarding the manual was that it was so deficient that it could not provide proper training for stowing the jib in accordance with that manual. The evidence discloses, and the Justice of the Peace accepted, that there were significant gaps in the manual. Given that finding, it follows that any training on how to stow the jib in accordance with the manual, would be as deficient as the manual. In raising the deficiencies in the manual as a defence, Sterling was not suggesting, as the Justice of the Peace found, that the deficiencies excused Sterling from complying with s. 25 (2)(a) of the Occupational Health and Safety Act (Reasons page 73, line 20 – 28). Rather, Sterling was arguing the manual was so deficient, the Crown could not prove that aspect of the case against it. That misunderstanding of Sterling's argument, appears to have coloured the Justice of the Peace's findings regarding Sterling's reliance on the manual, and the efforts Sterling took in developing its own procedure to comply with its obligations under s. 25 (2) (a).

The evidence of Mr. Barr and Mr. Swain established that Sterling did have its own procedures and training to ensure the jib was properly stowed. The training was hands on training and in Mr. Swain's case, was done under the supervision of either a crane operator or a mechanic. The evidence establishes that in this instance, the jib was stowed under the supervision of a mechanic. Kevin Nichols, who was the supervisor that day. Mr. Nichols was trained on the procedure by Mr. Barr.

The procedure that Mr. Swain was following that day was acknowledged by the

Crown's expert as being the correct procedure to follow to ensure the jib was properly stowed. If, as the expert testified, the procedure they followed was the correct procedure, that is evidence that Sterling did have a procedure, workers had been trained on it and that the workers understood it. Notwithstanding the opinion of the Crown's expert, the Justice of the Peace concluded that there was no evidence that there was a proper Sterling Crane specific procedure or training or instruction for either Mr. Nichols or Mr. Swain to follow to stow the jib and also concluded that Mr. Swain did not understand the importance of the proper stowage procedure, namely how to trap the hook between two pins. The Justice of the Peace, in assessing this evidence of the Crown's expert witness, was entitled to reject some or all of that evidence. In reaching the conclusions she did, it is unclear if the Justice of the Peace had rejected the Crown's evidence. If she did reject it, the reasons ought to have reflected that. As it stands, many of the Justice of the Peace's findings, as noted above, are without foundation. That constitutes an error.

A second and more critical error occurred in the consideration of the evidence regarding a visual inspection done at the conclusion of the stowage procedure in order to ensure the jib was properly stowed. The Justice of the Peace concluded that a visual inspection was the method by which a person or persons stowing the jib could ensure the fixed pin and the A pin were properly positioned.

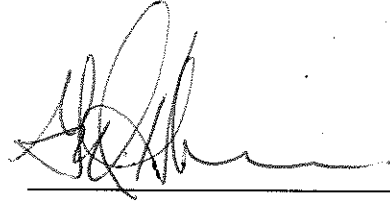
The evidence supports such a conclusion. The Justice of the Peace went on to find that Sterling did not have a process to ensure a visual inspection was done. That finding is contradicted by the evidence of Mr. Barr and Mr. Swain. There is nothing in the reasons that would indicate that the Justice of the Peace, alive to that evidence, chose to reject it. To find there was no process without addressing the evidence that there was such a process, reflects a misapprehension of the evidence. As part of this analysis of the evidence regarding the visual inspection, the Justice of the Peace also found there was no evidence that Mr. Swain and Mr. Nichols were directly beneath the stowage bracket at the time they conducted the visual inspection of the stowed jib. That finding is contrary to the un-contradicted evidence of Mr. Swain. It appears that the Justice of the Peace misapprehended Mr. Swain's evidence. Given the evidence of Mr. Barr and Mr. Swain, the misapprehension of it led to an error in a critical finding.

In *R. v. Morrissey*, (1995), 22 O.R. (3d) 514 at p. 541, the Court of Appeal held as follows:

Where a trial judge is mistaken as to the substance of material parts of the evidence and those errors play an essential part in the reasoning process resulting in a conviction then, in my view, the accused's conviction is not based exclusively on the evidence and is not a true verdict. This is so even if the evidence, as actually adduced at trial, was capable of supporting a conviction.

In light of these errors which played an essential role in the reasoning, the conviction was not based exclusively on the evidence and is therefore not a true

verdict. Accordingly, the appeal against conviction is allowed and the matter is remitted for a new trial.



Justice G. M. Hornblower

Dated at Sarnia, Ontario this 31st day of January, 2018