COURT OF APPEAL FOR ONTARIO

CITATION: Ontario (Labour) v. Nugent, 2019 ONCA 999
DATE: 20191218
DOCKET: C66275

Huscroft, Paciocco and Nordheimer JJ.A.

BETWEEN

Her Majesty the Queen in Right of Ontario (Ministry of Labour)

Appellant

and

Andrew Nugent, Richard Guillemette and Tyler Buckingham

Respondents

Daniel Kleiman and Indira Stewart, for the appellant

Ian R. Smith and Andrew Guaglio, for the respondent Andrew Nugent

Jeremy Warning, for the respondent Richard Guillemette

Richard Stephenson, for the respondent Tyler Buckingham

Heard: September 25, 2019

On appeal from the order of Justice Robin Y. Tremblay of the Superior Court of Justice, dated June 8, 2018, dismissing an appeal from the stay entered on November 23, 2017, by Justice Joseph G. R. Maille of the Ontario Court of Justice.

Huscroft J.A.:

OVERVIEW

[1] On June 3, 2015, Denis Millette died while working at the Detour Lake Mine, an open-pit gold mine operating near Cochrane, Ontario. He was an experienced millwright, but had been employed at the mine only briefly when he was instructed to replace a leaking expansion joint on a reactor that used cyanide. He died of acute cyanide intoxication caused by skin absorption.

[2] After a lengthy investigation by the Ontario Provincial Police and the Ontario Ministry of Labour, charges were laid under both the *Criminal Code*, R.S.C. 1985, c. C-46, and the *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1 (*OHSA*).

[3] Detour Gold Corporation (DGC), the corporation that owned and operated the gold mine, was charged with criminal negligence causing death contrary to the *Criminal Code*, along with various offences under the *OHSA*. DGC pleaded guilty to one of the criminal charges and was sentenced. The *OHSA* charges against DGC were withdrawn.

[4] Michale Okros, an Inline Leach Reactor operator, and the respondent Andrew Nugent, who was the Acting Process Plant Manager, were also charged with criminal negligence causing death contrary to the *Criminal Code*. Those charges were withdrawn after DGC pleaded guilty.

[5] Mr. Nugent and co-respondents Tyler Buckingham, who was a Process Plant Superintendent, and Richard Guillemette, who was Health and Safety and Asset Protection Manager, were charged with various offences under the *OHSA* on May 26, 2016. Their trial was not scheduled to begin until January 29, 2018 – about three months beyond the 18-month presumptive ceiling established in *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631. The respondents brought an application seeking to have the charges against them stayed under s. 11(b) of the *Canadian Charter of Rights and Freedoms*.

[6] The application judge found that the net delay in this case was 23 months. This figure included the 21 months from the swearing of the information until the anticipated last day for evidence and submissions at trial, and an additional two months the application judge estimated would be required for the decision to be written (judicial reserve time). Although the application judge found that this was a particularly complex case, he found that the Crown had failed to develop and follow an adequate plan to minimize delay resulting from the complexity. As a result, he concluded that s. 11(b) was breached and stayed the *OHSA* charges against all of the respondents. The application judge's decision was upheld by the appeal judge.

[7] The appellant argues that the application judge erred by including the time a decision is under reserve in calculating delay, and misinterpreted the requirement that the Crown develop and follow a concrete plan to minimize

delay. I conclude that, regardless of whether time for judicial deliberation is properly included in calculating net delay, the application judge misinterpreted the particularly complex case exception established in *Jordan,* and the appeal judge failed to recognize and remedy this error. Properly interpreted, the particularly complex case exception justifies the delay in this case.

[8] I would allow the appeal and order that the charges proceed to trial.

BACKGROUND

Procedural history

[9] This case is unusual in that it involves concurrent charges under the *Criminal Code* and the *OHSA*. The death of Mr. Millette was investigated by both the Ontario Provincial Police and the Ontario Ministry of Labour. Criminal charges came first, on April 15, 2016 and May 3, 2016, against DGC, Mr. Okros, and the respondent Mr. Nugent. Charges under the *OHSA* were sworn on May 26, 2016. The *OHSA* information alleged 15 counts against DGC and two counts against each of the respondents.

[10] Following a number of pre-trials, DGC agreed to plead guilty to one count of criminal negligence causing death. It was fined $1.4 million and ordered to pay a victim fine surcharge of $420,000 and restitution of $805,333 to Mr. Millette's widow. The criminal charges against Mr. Okros and the respondent Mr. Nugent were withdrawn. It was further agreed that the 15 *OHSA* charges against DGC

would be withdrawn. However, no resolution was reached concerning the *OHSA* charges against the respondents, and as a result a trial was necessary.

The application judge's decision

[11] The application judge noted that the information was sworn on May 26, 2016, and the evidence and submissions were scheduled to conclude on February 23, 2018. He concluded that the time the decision would be under reserve must be included in calculating total delay, following the decision in *R. v. J.M.*, 2017 ONCJ 4, 344 C.C.C. (3d) 217, and estimated that two months would be required for this purpose. This resulted in a total delay that he rounded-off at 23 months. The Crown did not allege any defence delay. As a result, the net delay was 23 months – some five months over the presumptive ceiling of 18 months for trials in the provincial court.

[12] The application judge considered whether the Crown could establish exceptional circumstances. He found that the Crown had succeeded in establishing that this was a particularly complex case and went on to consider whether the Crown had developed and followed a concrete plan to minimize delay, in accordance with the requirements of *Jordan*. He found that each step taken by the Crown, including the Crown's participation in extensive joint judicial pre-trials, was appropriate. However, he concluded that the steps taken by the Crown to advance the prosecution were, as a whole, inadequate.

[13] Specifically, the application judge found that the Crown did not take reasonable steps to bring the case to trial under the presumptive ceiling in the event that it did not resolve. In his view, it was unreasonable for the Crown not to seek a trial date until June 9, 2017 – about 5.5 months before the presumptive ceiling – because this left only a 2.5-month window in which to complete this lengthy trial before the ceiling was reached. This narrow window made completion of the trial under the ceiling "highly unlikely, if not next to impossible."

[14] As it happened, on June 9, 2017 when the Crown sought a trial date, the earliest date available was January 8, 2018. January 29, 2018 was ultimately selected in order to accommodate the requirements of counsel. The application judge found that the Crown ought to have anticipated such a time frame in setting a trial date in this matter.

[15] The application judge also criticized the Crown's trial management of this case, focusing on the Crown's failure to reply to the May 25, 2017 email message from counsel for the respondent Mr. Buckingham in a timely way. The Crown did not reply until June 8, 2017, just prior to commencement of a scheduled judicial pretrial, and its reply was incomplete, as it included only a "very preliminary witness list" and did not respond to the various trial management issues raised by counsel in the email. The application judge found that the Crown made no effort prior to the June 9, 2017 pretrial to narrow the

issues or shorten the trial, to attempt to negotiate an agreed statement of facts, or to seek agreement regarding documents.

The appeal judge's decision

[16] The appeal judge first considered whether the application judge erred in his evaluation of the Crown's efforts to minimize delay caused by the complexity of the case. He noted that the Supreme Court did not articulate a standard by which to evaluate whether the Crown had developed and followed a concrete plan to minimize the delay occasioned by a complex prosecution. However, he accepted that the Crown must act reasonably and that the court should not retroactively micromanage the Crown's case.

[17] The appeal judge found that the application judge did not err in his interpretation of the principles applicable to determining whether the Crown had developed and followed a concrete plan to minimize delay, and properly took a global perspective in evaluating the steps taken by the Crown on the reasonableness standard. The two critical findings of the application judge were: (i) that the Crown did not secure a trial date in a timely fashion; and (ii) that the Crown's case management was problematic because it did not take steps to streamline the evidence to be introduced at trial. The appeal judge concluded that these findings were amply supported by the evidentiary record and were entitled to great deference.

[18] The appeal judge next considered whether these factual findings allowed the application judge to conclude that the Crown had failed to take reasonable steps to bring the case to trial under the presumptive ceiling. The appeal judge found that the application judge's view on securing a trial date in this case was entitled to substantial deference and that it was open to him to conclude that the Crown's failure to secure a trial date in a timely manner was unreasonable. The respondents' acquiescence did not undermine this conclusion, because the obligation to develop and follow a concrete plan to minimize delay rested solely on the Crown. The appeal judge added that the Crown's "problematic case management" was properly considered by the application judge, who made no palpable and overriding errors in the course of his assessment.

[19] As a result, the appeal judge concluded that there was no basis to interfere with the application judge's conclusion that the Crown had failed to establish exceptional circumstances outside of its control, and there was no need to determine whether the net delay included a further two-month period anticipated for judicial deliberation.

DISCUSSION

[20] On the same day that this case was argued, the Supreme Court of Canada heard argument in *R. v. K.G.K.*, 2019 MBCA 9, [2019] 5 W.W.R. 492, a case that squarely raises the first issue raised by the appellant – whether the time a

decision is under reserve is included in calculating net delay. The Supreme Court reserved its decision, and it continues to be under reserve at this time.

[21] I need not address this issue in order to resolve this appeal. As I will explain, even if the two-month period in which the decision was expected to be under reserve properly counted in calculating net delay, the resulting delay of five months is justified in the circumstances of this particularly complex case, and as a result s. 11(b) is not breached. Accordingly, I will say no more about this issue and will proceed to consider the Crown's duty to develop and follow a concrete plan to minimize delay in a particularly complex case.

The standard of review

[22] This is a second appeal of a provincial offences matter. As such, only questions of law are subject to review: *Provincial Offences Act*, R.S.O. 1990, c. P.33, s. 131(1). The decision under appeal is that of the appeal judge, not the application judge, but as I will explain it is necessary to consider whether the application judge misinterpreted the law before considering whether the appeal judge erred in upholding the application judge's decision.

[23] The Crown submits that "whether there has been unreasonable delay" is a question of law to which the correctness standard applies, citing this court's decision in *R. v. Jurkus*, 2018 ONCA 489, 363 C.C.C. (3d) 246, leave to appeal refused, [2018] S.C.C.A. No. 325, at para. 25:

> I do not agree that the designation of a period of time as defense delay is a finding of fact that is owed deference. Although underlying findings of fact are reviewed on a standard of palpable and overriding error, the characterization of those periods of delay and the ultimate decision as to whether there has been unreasonable delay are subject to review on a standard of correctness[.] [Citations omitted.]

[24] The respondents' submission on the standard of review relates to the question whether the Crown adequately prepared and implemented a litigation plan to minimize delay in a particularly complex case. This, the respondents say, is a factual finding that is not reviewable by this court on a second appeal. The respondents cite this court's recent decision in *R. v. Majeed*, 2019 ONCA 422, as well as the decision of the Alberta Court of Appeal in *R. v. Regan*, 2018 ABCA 55, 359 C.C.C. (3d) 53, leave to appeal refused, [2018] S.C.C.A. No. 102, in support of this point. In *Majeed* this court stated: "In our view, whether the Crown acted quickly and effectively enough was the kind of factual determination that lies at the heart of the trial judge's fact-finding role" (para. 11).

[25] In this case, there is no doubt that the presumptive ceiling has been exceeded. The respondents agree that this was a particularly complex case, so the question is whether the particularly complex case exception operates to justify the delay.

[26] In order to take advantage of the particularly complex case exception, *Jordan* requires the Crown to develop and follow a concrete plan to minimize the

delay occasioned by the complexity. As the Supreme Court explained: “Where it has failed to do so, the Crown will not be able to show exceptional circumstances, because it will not be able to show that the circumstances were outside its control” (para. 79).

[27] Whether the Crown has developed and followed a concrete plan to minimize delay is not a question of characterization to which the correctness standard applies. The particularly complex case exception does not depend on the characterization or calculation of delay. If the particularly complex case exception is found to apply in a particular case, and the further finding is made that the Crown developed and followed a concrete plan to minimize delay, no “ultimate question” arises as to whether s. 11(b) has been breached; the delay is justified and s. 11(b) has not been breached.

[28] As this court stated in *Majeed*, the application of the particularly complex case exception is factual in nature and the application judge’s decision is entitled to deference. But deference to a decision applying the particularly complex case exception is premised on the requirement that the exception be interpreted correctly as a matter of law. As I will explain, the application judge erred in interpreting the particularly complex case exception, and in doing so failed to give effect to the purpose of this exception. The appeal judge erred in failing to recognize and correct that error.

The application judge misinterpreted the particularly complex case exception

[29] The Supreme Court made clear in *Jordan* that although delay beyond the ceilings it established is presumptively unreasonable, the Crown may rebut the presumption of unreasonableness by establishing exceptional circumstances. In general, exceptional circumstances fall into two categories: discrete events and particularly complex cases. These categories operate in fundamentally different ways, and must be kept analytically distinct.

[30] The discrete event exception operates within the context of the presumptive ceiling and the calculation of delay. If the Crown establishes a discrete event (such as an illness or unexpected event at trial), the delay that is reasonably attributable to that event is subtracted from the total delay that has occurred. The net delay figure is then assessed against the presumptive ceiling. In other words, the presumptive ceiling remains the reference point for the analysis.

[31] In contrast, the particularly complex case exception operates outside the context of the presumptive ceiling, and without regard to it as a reference point. The focus of the particularly complex case exception is on whether the delay that exceeds the presumptive ceiling is justified in light of the overall complexity of a case. The trial judge must consider whether the Crown developed and followed a

concrete plan to minimize the delay occasioned by the complexity – not whether the Crown developed and followed a concrete plan to attempt to bring the trial to a conclusion within the presumptive ceiling. As the court stated in *Jordan*: "Where the trial judge finds that the case was particularly complex such that the time the case has taken is justified, the delay is reasonable and no stay will issue. No further analysis is required" (para. 80).

[32] In summary, the particularly complex case exception operates to justify delay beyond the presumptive ceiling. The exception must be interpreted in a manner that gives effect to this purpose.

[33] As the court explained in *Jordan*, particularly complex cases are cases that "require an inordinate amount of trial or preparation time such that the delay is justified" (para. 77). This may be because of the nature of the evidence or the nature of the issues in a particular case, or both.

[34] The application judge's finding this was a particularly complex case is not contested. Nor could it be; as the application judge found, this case bears all of the hallmarks of complexity the Supreme Court identified in *Jordan*, because of both the nature of the evidence and the nature of the issues:

- A detailed investigation, with a summary exceeding 100 pages;
- Voluminous disclosure (6 binders and over 2500 pages);
- A large number of witnesses (estimated at 32);

- Requirements for expert evidence (engineering, toxicology, and pathology);
- A large number of charges (21 charges against 4 accused, reduced to 6 charges against 3 accused);
- The involvement of several different defence counsel (four reduced to three);
- The requirement for a lengthy trial (estimated at four weeks) in the Ontario Court of Justice in a single-judge northeastern Ontario jurisdiction covering a vast geographic area with multiple court locations; and
- Several judicial pre-trial conferences (five, with a sixth scheduled closer to the trial date).

[35] What is at issue is whether the Crown followed a concrete plan to minimize delay. The application judge and the appeal judge recognized that the Crown's plan must be reasonable, assessed on a global basis. The reasonableness of a plan to address a particularly complex case is not to be assessed by reference to how close it brought – or could have brought – a case to the presumptive ceiling. It is assessed having regard to nature of the evidence and the issues in the case.

[36] The application judge identified two key concerns. He concluded that it was unreasonable for the Crown not to seek a trial date in a timely way, and that the Crown's case management was problematic because it did not take steps to streamline the evidence to be introduced at trial. The appeal judge described

these as “two critical factual findings” that were entitled to great deference. I will address each of these points separately.

(1) Delay in setting trial dates

[37] The appeal judge erred in deferring to the application judge’s decision that the Crown failed to secure a trial date in a timely fashion. This conclusion was based on a clear legal error: the application judge used the presumptive ceiling as the benchmark against which to judge the timeliness of the Crown’s actions.

[38] The error is apparent in this passage of the application judge’s reasons:

> [I]t was unreasonable for the Crown not to seek a trial date until about 5½ months before the presumptive ceiling was reached, leaving about a 2½ month window, including the summer months, in which to start this lengthy trial. *By doing so, the Crown made completion of this trial under the presumptive ceiling highly unlikely, if not next to impossible.* [Emphasis added.]

[39] Given that the very purpose of the particularly complex case exception is to justify delay for cases that require time beyond the presumptive ceiling, the availability of the exception cannot be conditioned on attempts to meet that ceiling. Put another way, a plan to minimize the delay caused by a particularly complex case is neither undermined nor rendered inadequate because it does not aim to conclude a case within the presumptive ceiling.

(2) The Crown's trial management of the case

[40] The appeal judge also erred in deferring to the application judge's decision that the Crown's case management was problematic. This decision was also based on a legal error.

[41] The application judge found that many of the most significant steps taken by the Crown during the course of the proceedings were reasonable, appropriate, and in the interests of justice. These included:

- The decision to proceed against multiple accused rather than sever the proceedings;
- The decision to initially link the *OHSA* prosecution to the parallel criminal prosecution through the judicial pre-trial process;
- The decision to participate in the extensive combined judicial pre-trial process, which resulted in all criminal charges being resolved without a trial and the withdrawal of all 15 *OHSA* charges against DGC;
- The prompt delivery of voluminous disclosure;
- The replacement of the prosecuting Crown when he became incapacitated;
- The early joining of the two sets of charges, so as to streamline the process; and

- The acceptance of any and all dates offered by the court.

[42] Despite these findings, the application judge went on to conclude that, on the whole, the steps taken were inadequate.

[43] The appeal judge erred in concluding that the application judge evaluated the steps taken by the Crown on the reasonableness standard. In fact, the application judge did not apply the deferential reasonableness standard that was required. Instead, he parsed various steps taken by the Crown and in effect micromanaged the Crown's case management. He applied an overly stringent standard, and in doing so he erred in law.

[44] Both the application judge and the appeal judge failed to heed the Supreme Court's instruction in *Jordan* that the Crown "is not required to show that the steps it took were ultimately successful – rather, just that it took reasonable steps in an attempt to avoid the delay" (para. 70). This point was reiterated by this court in *R. v. Saikaley*, 2017 ONCA 374, 348 C.C.C. (3d) 290, leave to appeal refused, [2017] S.C.C.A. No. 284, at para. 47:

> [W]e do not read *Jordan* as requiring the Crown to take any and all steps proposed by the defense to expedite matters. … So long as the Crown acts reasonably and consistently with its duties, it would be unconscionable to deny it the benefit of the complex case exception[.]

[45] In short, the Crown is to be held to a standard of reasonableness, not perfection.

Applying the correct standards

[46] The test that must be applied is this: did the Crown's plan for dealing with this particularly complex case, *considered as a whole*, reasonably attempt to minimize delay occasioned by such complexity?

[47] The Crown's so-called failure to secure a trial date in a timely fashion does not disentitle the Crown from relying on the particularly complex case exception, even assuming that it did not advance the Crown's plan for minimizing delay. I see no failure on the part of the Crown in any event. The Crown should not be encouraged or required to set trial dates that may well prove to be unnecessary or unrealistic (depending on the result of the judicial pre-trial process), lest it contribute to additional systemic delay – undermining rather than reinforcing the purpose of *Jordan*. It should also not be encouraged or required to set trial dates where the issues in contest are not yet settled. One of the core purposes of the judicial pre-trial process is to determine what evidence is necessary, and what evidence may be rendered unnecessary by the agreement of counsel. This had yet to occur in this case.

[48] Similarly, although there may have been additional steps that the Crown could have taken – in particular, the steps suggested by the defence in its May 25, 2017 email message, to which the Crown did not reply in a timely manner – there was no obligation on the Crown to take the particular steps suggested by

the defence, and its failure to take those steps does not undermine the reasonableness of the Crown's handling of this case, judged as a whole. This is a paradigm example of a particularly complex case, for all of the reasons outlined above – the very sort of case for which the exception was created. And, considered on the whole, the Crown acted reasonably in attempting to minimize delay occasioned by its complexity.

[49] At the end of the day, the application judge erred in law by using the presumptive ceiling as a reference point and applying an overly stringent standard in assessing the Crown's plan to minimize delay. The appeal judge erred in failing to recognize and remedy this legal error.

[50] The question at the heart of this case is this: all things considered, was the delay in completing this particularly complex case reasonable? In my view, applying the proper legal standard, it clearly was.

CONCLUSION

[51] I would allow the appeal and order the matter to trial.

Released: December 18, 2019 ("G.H.")

"Grant Huscroft J.A."
"I agree. David M. Paciocco J.A."
"I agree. I.V.B. Nordheimer J.A."