IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
TRIAL DIVISION (GENERAL)

Citation: *R. v. Hoskins*, 2017 NLTD(G) 94
Date: May 17, 2017
Docket: 201404G0176

GARY GERARD HOSKINS

v.

HER MAJESTY THE QUEEN

Before: Justice David F. Hurley
Edited Transcript of Oral Reasons for Judgment

Place of Hearing:	Corner Brook, Newfoundland and Labrador
Date of Hearing:	November 30, 2016
Date of Oral Judgment:	February 16, 2017

Summary:

The Applicant was charged with two counts of sexual assault. He applied for a stay of proceedings alleging his section 11(b) rights to a trial within a reasonable time had been breached. Application granted.

Appearances:

Kari Ann Pike, Q.C.	Appearing on behalf of Her Majesty The Queen
Gerard J. Martin, Q.C.	Appearing on behalf of Gary Gerard Hoskins

Authorities Cited:

CASES CONSIDERED: R. v. Jordan, 2016 SCC 27; **R. v. Stinchcombe**, [1991] 3 S.C.R. 326; **R. v. C. (M.H.)**, [1991] 1 S.C.R. 763; **R. v. Williamson**, 2016 SCC 28; **R. v. Morin**, [1992] 1 S.C.R. 771

STATUTES CONSIDERED: *Criminal Code*, R.S.C. 1985, c. C-46; *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982* being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11

REASONS FOR JUDGMENT

HURLEY, J.:

INTRODUCTION

[1] The charges before the Court relate to historical sexual assault allegations which according to the wording in the Indictment extend back to possibly 33 years. As well, the Defence has maintained that the charges themselves are historical in that 52 months will have elapsed by the time the scheduled trial is completed.

[2] Mr. Hoskins is charged that he:

> Count No. 1
>
> on or between the 1st day of January, 1984 A.D. and the 31st day of December, 1986 A.D., at or near Stephenville in the Province of Newfoundland and

> Labrador, did commit a sexual assault on L.J., contrary to Section 246.1 of the *Criminal Code*;
>
> Count No. 2
>
> on or between the 1st day of January, 1984 A.D. and the 31st day of December, 1986 A.D., at or near Stephenville in the Province of Newfoundland and Labrador, did commit a sexual assault on L.J., contrary to Section 246.1 of the *Criminal Code*;

[3] Mr. Hoskins brought an application for a stay of proceedings based on a violation of his right to a trial within a reasonable time. The Court is required to apply the new framework from **R. v. Jordan**, 2016 SCC 27, a decision which considered all Defence-caused delays, the presence of exceptional circumstances, and any transitional exceptional circumstances to justify exceeding the presumptive ceiling, which in this case is 30 months.

[4] If the total delay, after deducting any Defence delay, exceeds the ceiling of 30 months, delay is assumed to be presumptively unreasonable. The Crown then has the onus to rebut the presumption by establishing the presence of exceptional circumstances justifying the delay. The Supreme Court of Canada in **Jordan** stated the circumstances will be exceptional where they are "reasonably unforeseen or reasonably unavoidable" and the Crown cannot reasonably expect to remedy the delay arising from these circumstances (paragraph 69). Exceptional circumstances therefore are beyond the control of the Crown. Trials that are particularly complex can give rise to exceptional circumstances.

[5] The framework established in **Jordan** applies to cases currently in the system. However, the Crown can rebut the presumption of unreasonable delay by establishing that "transitional exceptional circumstances" exist. The onus on the Crown is to establish "that the time the case has taken is justified based on the parties' reasonable reliance on the law as it previously existed" (paragraph 96).

[6] Should this matter proceed, the anticipated end of trial will be in excess of 52 months from the laying of the charges.

HISTORY

(i) Proceedings in Provincial Court

[7] On November 8, 2012, an Information was laid charging the Applicant with two offences under section 246.1 of the *Criminal Code*, R.S.C. 1985, c. C-46. The Information had originated with a complaint to incidents that occurred between January 1, 1984 and December 31, 1986. The Applicant was summoned to court for January 28, 2013.

[8] The Applicant's counsel requested disclosure from the Crown on December 12, 2012 in advance of the January 28, 2013 court appearance.

[9] I will now deal with the matter as it proceeded in Provincial Court.

Appearance Date	Summary of Appearance
January 28, 2013	This matter was first called in Provincial Court. The Defence had requested disclosure on December 12, 2012. The Crown had not provided disclosure and the matter was set over to February 25, 2013.
February 25, 2013	Disclosure not provided. Crown asked for four weeks postponement and the matter was set over to March 25, 2013.
March 25, 2013	Defence counsel advised that he had received disclosure; it was quite extensive and he needed more time to review and forward material to his client in Ontario so he could discuss it with him. Asked for postponement for another month and the matter was set over to April 29, 2013.

Appearance Date	Summary of Appearance
April 29, 2013	Defence advised that the review of the disclosure and discussions with his client in Ontario had not taken place. Requested that the matter be postponed to June 3, 2013 for election and plea.
June 3, 2013	Defence elects judge and jury and a preliminary inquiry is requested. The court asked whether the Defence would be filing a Statement of Issues and Witnesses in accordance with s. 536.3 of the *Criminal Code* and set the matter over to July 22, 2013 to set a date for the preliminary inquiry, thus delaying the matter for 49 days.
July 22, 2013	The preliminary inquiry was set to January 14, 2014, a time convenient to the court schedule.
January 13, 2014	The matter was called a day earlier to deal with a Defence motion to have the matter postponed. The brother of the Applicant died suddenly on January 11, 2014 in St. Albans with the funeral to take place on January 15, 2014. The court recommended that the matter be set over to February 3, 2014 to set a date or for the purposes of determining the status of the matter.
February 3, 2014	The matter was set over to February 17, 2014 to set a date for the preliminary inquiry. This was done at the request of Defence counsel.
February 17, 2014	Defence counsel appears by agent who requested an adjournment of one month. Crown counsel indicated this was previously arranged and was consenting to having the preliminary inquiry set at the next date being March 31, 2014.

Appearance Date	Summary of Appearance
March 31, 2014	The matter was called. An agent appeared for Defence counsel who asked that the matter be set over to the following day when Defence counsel would be in court on another matter. The Crown had previous knowledge of this and consented.
April 1, 2014	The court set the matter to September 16, 2014 for a one day preliminary inquiry.
September 16, 2014	The preliminary inquiry was held by calling one witness. Mr. Hoskins was committed to stand trial.

[10] Apart from the delay filing a Statement of Issues and Witnesses and in commencing and concluding the preliminary inquiry, there would appear to be no other adjustments to be made to the presumptive ceiling. The Crown and Defence took approximately the same time in vetting the disclosure. Defence had the added burden of sending the material to Ontario and dealing with his client in that province.

[11] I have listened to the recordings of the various court appearances in Provincial Court and I am of the opinion that the various steps taken by Defence counsel were reasonable in the best interests of his client. The nine-month delay from January 14, 2014 to September 16, 2014, the period when the preliminary inquiry was delayed is attributable to the Defence. There were delays from January 14, 2014 to September 16, 2014, but obviously these would be counted within the nine month adjustment. Also, there was a 49-day delay by the Defence in filing a Statement of Issues and Witnesses, which is attributed to the Defence. Therefore, while the matter was pending in Provincial Court, the total delay attributed to Defence would be approximately ten and a half months. As will be discussed, the nine-month delay may be considered an exceptional circumstance. In any event, this nine-month period, similar to it being a Defence delay, will not be assessed as against the Crown if considered an exceptional circumstance.

(ii) Proceedings in Supreme Court

[12] I will now deal with the matter as the case proceeded in Supreme Court.

Appearance Date	Summary of Appearance
October 6, 2014	The Defence did not appear. The Crown admitted that the Defence was not properly served as the *Criminal Proceedings Guidelines* provide for a 10-day notice prior to the arraignment. The matter was postponed to December 1, 2014.
December 1, 2014	The Court noted that at the last date the Defence counsel had not been notified of the October 6, 2014 date. The Court noted that a Focus Meeting Report had not been filed. Crown counsel requested that the matter be set over to determine the trial prosecutor's schedule and file a Focus Meeting Report. Crown requested the matter be set over to January 12, 2015 to set a date for the pre-trial conference.
January 12, 2015	Crown counsel who appeared did not have the schedule of the prosecuting Crown. The matter was postponed to February 26, 2015 for a pre-trial conference with a further arraignment date of March 2, 2015.

Appearance Date	Summary of Appearance
February 26, 2015	The Pre-Trial Conference did not proceed as the Court received counsels' Pre-Trial Conference Brief Report early that morning. The report was signed by Defence counsel but not by Crown counsel. In the report the Crown indicated that it will be calling similar fact evidence, the details of which were not disclosed to Defence prior to compiling the report. The Crown indicated that it may be filing an updated Report. The matter was set over to arraignment court on March 2, 2015. It was indicated the Crown would be providing disclosure on similar fact evidence and filing the appropriate application.
March 2, 2015	Pre-trial conference date set to May 5, 2015 with an arraignment date of June 1, 2015.
May 5, 2015	Defence counsel appeared. The Crown did not appear. It appears that the Crown who filled in for the prosecuting Crown did not advise the prosecuting Crown of the date. The matter was set over to May 7, 2015.
May 7, 2015	The pre-trial conference did not proceed as the prosecuting Crown was not available. The matter was set over to June 1, 2015 to set a new date for the pre-trial conference.
June 1, 2015	Pre-trial conference set over to June 25, 2015 with an arraignment date of September 14, 2015.

Appearance Date	Summary of Appearance
June 30, 2015	Pre-Trial takes place five days later than anticipated. Although the Crown did not provide disclosure of the similar fact evidence, the Defence did not object to the Pre-Trial Conference proceeding. The Crown confirms that it would be leading similar fact evidence at trial and would be providing documentation upon which it would be relying. Crown indicated it would be making an application for the admission of this evidence prior to trial. Defence indicated that it would be filing a **Seaboyer** application. As disclosure was outstanding and no applications were filed, the Court set September 14, 2015 to set a date for the Application.
September 14, 2015	The Court set dates for the pre-trial applications to March 15 – 17, 2016 with a trial date of April 25 – 26, 2016. Crown counsel appears by telephone. No application for similar fact evidence filed by the Crown. Crown counsel waiting for documents from Provincial Court. Defence counsel said it would file a **Seaboyer** application concerning the Applicant's sexual history. The matter was set over to May 12, 2016.
May 12, 2016	Crown appears by telephone. No application for similar fact evidence had been filed. Crown counsel advised that she has now received material from Provincial Court and will be filing an application for similar fact evidence. Defence counsel has not filed his **Seaboyer** application. Counsel is told that the next available date is September 20, 2016.

Appearance Date	Summary of Appearance
September 20, 2016	While the similar fact matter was to be heard on that date, Crown counsel only filed its factum and supporting documentation on that date. Mr. Martin had received the factum and materials just prior to the hearing and needed time to review the material as did the Court. He indicated he was pursuing a **Seaboyer** application. As well, he would be making a **Jordan** application based on the Supreme Court of Canada released on the prior court hearing. The applications were set for November 30, 2016 with a trial date for March 21 – 22, 2017.
November 4, 2016	Defence filed a **Jordan** application.
November 10, 2016	The Defence advised he would not be pursuing the **Seaboyer** application.

[13] I will now comment on the issue of delay as the matter proceeded in Supreme Court.

[14] There was an initial delay relating to the first appearance in arraignment court. This was not a Defence delay as counsel was not properly served as acknowledged by the Crown on October 6, 2015. There were further delays up to the anticipated conclusion of trial but none could be attributed to the Defence. These were either inherent delays or delays occasioned by the unavailability of the Crown. As well, in the Pre-Trial Report of February 26, 2015, the Crown, for the first time indicated that it intended at trial to put forward evidence of a documentary nature to support similar fact evidence against the Accused. The Crown also intended to make an application on the admissibility of this evidence prior to trial. The Crown advised that much of this evidence involved material from Provincial Court relating to a prior conviction of the Accused.

[15] The Crown did not indicate the reason for not disclosing this evidence previously even though such evidence would be used against the Accused. The Crown first advised in a Pre-Trial Conference Report of February 26, 2015, that it was leading similar fact evidence, some 27 months after the November 8, 2012, laying of the charges. Defence counsel told the Court that he requested full disclosure at the time. In any event, the Crown was obligated to provide full disclosure as the initial March 2013 disclosure was incomplete.

[16] After a number of court appearances, the disclosure was not provided until May 12, 2016, some 15 months after the Crown advised that it would be calling similar fact evidence, and as indicated, approximately 27 months after the laying of the charges. It is not disputed that the police and the Crown knew about the previous conviction from the beginning of their respective involvements.

[17] The Crown takes the position that the significant delay in obtaining material including that from Provincial Court can be discounted as it coincided with an ongoing intention by the Defence to bring a **Seaboyer** application. I do not accept the Crown's argument. The Crown had an overriding obligation to make full disclosure of its case against the Accused from the beginning. Disclosure of the similar fact evidence should have occurred before Mr. Hoskins was called upon to elect the mode of trial or to enter a plea (**R. v. Stinchcombe**, [1991] 3 S.C.R. 326, at paragraph 28). Prior to **Stinchcome**, in **R. v. C. (M.H.)**, 1 [1991] S.C.R. 763, McLachlin, J. speaking for the court indicated that failure to disclose would impair the fairness of the trial. It should be pointed out that in this case Defence requested full disclosure on December 12, 2012 which was prior to the first appearance of the Accused in court. Failure of the Crown to deal with this issue in a timely fashion demonstrates a lack of focus of the issues that it intended to put forward at the preliminary inquiry and at trial.

[18] Even after the Crown advised at a very late stage that it would be putting forth similar fact evidence, disclosure of this evidence took a further 15 months to make this available to the Defence which is approximately 27 months after the laying of the charge. The delay over this period of time necessitated a number of adjournments. The Crown alleges that the delays and postponements were waived by the Defence. This is incorrect based on two considerations.

[19] Firstly, when the Crown indicated on or about February 26, 2015 that it was expanding the scope of the trial by bringing forward additional evidence, the Defence was at the mercy of the Crown until disclosure was provided. To its credit, the Defence did proceed with the pre-trial conference on June 30, 2015 even though disclosure had been outstanding at that time. Under the *Criminal Proceedings Guidelines*, a pre-trial conference is not set down until disclosure has been finalized. While at one time Defence indicated it would be taking a **Seaboyer** application, it was fully entitled to delay the decision until disclosure was completed. In fact, it would have been unwise for the Defence to do otherwise. While the decision to proceed with similar fact evidence was within the discretion of the Crown, it should have been aware of its impact of the delay on the Accused.

[20] In dealing with a discretionary matter, the majority in **Jordan** stated at paragraph 79, "While 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..."

[21] Secondly, a review of the transcript of the various adjournments necessitated by the Crown's delay in making disclosure and setting the matter down for its similar fact application indicates that these were made in keeping with the Court's schedule. In any event, the Court could not hear the matter until the Crown was in a position to file the material relied upon for the admission of the evidence. Failure of the Defence to object was a recognition that the disclosure and the filing of the application were in the hands of the Crown. In fact, upon the filing of its application for similar fact evidence on September 20, 2016, the Defence agreed to have the matter heard on November 30, 2016, a date selected by the Court. The Defence and the Court were constrained to wait while the Crown complied with its disclosure obligations and filed the similar fact application.

[22] Also, on the issue of waiver, in **Jordan** at paragraph 61, the majority concluded, "...Waiver can be explicit or implicit, but in either case, it must be clear and unequivocal." Since February 26, 2015, and certainly since June 30, 2015 up until November 30, 2016, there were various postponements whereby the Crown was unable to proceed due to its inability to conclude its obligation of disclosure as well as to file its application for similar fact evidence. As well, the majority in

Jordan stated at paragraph 64: "However, periods of time during which the court and the Crown are unavailable will not constitute defence delay, even if defence counsel is also unavailable." As well, the majority noted "…defence delay is delay caused solely by the conduct of the defence..." (paragraph 63). I therefore find that the delays encountered in the Supreme Court are the responsibility of the Crown and cannot be adjusted in calculating the delay in excess of the presumptive ceiling.

UNDER THE JORDAN FRAMEWORK

(i) Has the presumptive ceiling been breached; and is the issue of exceptional circumstances applicable?

[23] The total amount of time that will have elapsed from the date the charges were laid (November 8, 2012), to the completion of trial anticipated to be approximately March 23, 2017, is a total of 52 months. At the hearing, the postponement of the Preliminary Inquiry due to the death of Mr. Hoskins' brother was considered in the context of a Defence delay rather than an exceptional circumstance. This delay is complicated by the submission of the Defence counsel that part of that delay occurred because there was a period of time during this nine month period when there was no judge in Stephenville. The Court was reluctant to set a date for the preliminary inquiry until the replacement judge was appointed. I note that this issue is not reflected in the record provided to the Court.

[24] The Supreme Court in **Jordan** held that circumstances were the exception when they are "reasonably unforeseen or reasonably unavoidable" and the Crown cannot reasonably remedy delays arising from these circumstances (paragraph 69). Exceptional circumstances are therefore beyond the control of the Crown. By way of example, the majority in **Jordan** (paragraph 72) stated "…by way of illustration, it is to be expected that medical or family emergencies (whether on the part of the accused, important witnesses, counsel or the trial judge) would generally qualify."

[25] As indicated, the delay in Provincial Court by Defence in filing statements, issues and witnesses is a Defence delay covering a period of approximately one and a half months. The nine-month period for which the preliminary inquiry was delayed may be considered a Defence delay being a period of ten and half months in total, which is not counted in calculating whether the presumptive ceiling has been breached. Even if the nine-month period cannot be characterized as a Defence delay, I am satisfied that the death in Mr. Hoskins' family and the unavailability of a judge are circumstances outside the control of the Crown. Therefore, also on the basis of this alternative finding, the presumption of unreasonable delay for this period is rebutted.

Do transitional exceptional circumstances exist?

[26] The Crown has not put forward argument that transitional exceptional circumstances exist in this matter.

[27] In **Jordan**, the Supreme Court recognized that section 11(b) rights under the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982* being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11 cannot be suspended until the system adjusts to its new framework. However, trial judges were advised to apply the new framework in a flexible and contextual manner (paragraph 105).

[28] In **R. v. Williamson**, 2016 SCC 28, the Supreme Court applied the new **Jordan** framework to a case in which delay had exceeded the presumptive ceiling. The accused was convicted of historical sexual assault. A net delay of 34 months occurred to the conclusion of his trial. There were no discrete events contributed to the delay and the case did not qualify as exceptionally complex. As Mr. Williamson was charged before the release of **Jordan**, the Supreme Court had to consider whether the transitional exceptional circumstance applied. The court found that the transitional exceptional circumstance did not apply. The court considered whether the delay could be justified under the framework set out in **R. v. Morin**, [1992] 1 S.C.R. 771. As well, the court referred to the complacency of the Crown as failure to take the appropriate action to move the matter along.

[29] Under the **Jordan** regime, the onus is on the Crown to establish that a delay is affected by the category of transitional exceptional circumstance. The Crown has failed to put forward evidence or to make argument or submissions on this point. Therefore, this category of delay will not be deducted from the overall net delay.

Prejudice to the Accused

[30] While demonstrating actual prejudice is not a factor in obtaining relief under section 11(b) of the *Charter*, the Court was told that the Accused was dismissed from his employment as a psychologist when the charges were laid and has not found employment since that time.

SUMMARY AND DISPOSITION

[31] The delay in excess of 40 months is simply too long for a relatively straight-forward case as this one, whether under the **Morin** or **Jordan** framework, and amounts to a clear breach of section 11(b) rights of the Accused.

[32] Accordingly, the application is granted and the charges are stayed.

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DAVID F. HURLEY
Justice