

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

HER MAJESTY THE QUEEN

Respondent

)
)
) *Jason Mitschele and Kelvin Ramchand* for
) the Crown Respondent

- and -

ITOLO MALLOZZI

Applicant

)
)
) *Leora Shemesh* for the Applicant Defendant

)
)
) **HEARD: April 7, 2017**

T. DUCHARME J.

REASONS FOR JUDGMENT
Section 11(b) Charter Application

1. This is a s. 11(b) *Charter of Rights* application brought by the Applicant, Itolo Mallozzi, alleging a violation of his right to be tried within a reasonable time. He was arrested on July 27, 2014 and is charged with possession of Ketamine for the purpose of trafficking and breach of recognizance. His trial is scheduled to commence on May 23, 2017 and is anticipated to take two weeks.

2. In its recent decision in *R. v. Jordan*, the majority of the Court repeatedly stated that the relevant time period runs from "the charge to the actual or anticipated end of trial."¹ Thus the total delay in this case is 34 months. This exceeds the ceiling set in *Jordan* of "30 months from the charge to the actual or anticipated end of trial." However, the majority went on to hold that "delay attributable to the defence must be subtracted" and that this subtracted period includes both "delay waived by the defence" and "delays caused solely or directly by the defence's conduct." It is only then that it can be determined whether the case conforms to the guidelines set down in *Jordan*.

3. In this case the defence submits that there is no delay caused by the defence and that there are no exceptional circumstances to justify the 34 months. The Crown argues first that there is at least 164 days of defence delay. If this is correct, after subtracting defence delay, there would be a net delay of 28 months and 23 days, which is less than the presumptive

¹ *R. v. Jordan*, 2016 SCC 27 at paras. 47-49

ceiling in *Jordan*. In the alternative, the Crown argues that the adjournment of the first preliminary inquiry is a discrete event that should be considered an unforeseen exceptional circumstance that justifies the delay above the ceiling. In the further alternative, the Crown submits that in this case, a transitional exceptional circumstance applies in which the time the case has taken is justified based on the parties' reasonable reliance on the law as it previously existed.

4. I shall first consider the total delay under the *Jordan* framework and consider the Crown's argument that there was a discrete event that was an exceptional circumstance. I shall then consider whether the delay is reasonable given the parties' reliance on the pre-*Jordan* law.

Analysis Under the *Jordan* Framework

5. The following chart sets out the chronology of the case:

TIME IN THE ONTARIO COURT OF JUSTICE			
Relevant Period	Event	Suggested Characterization	Explanation
July 27, 2014- November 18, 2014	Date of Arrest of Applicant to date of disclosure.		This period covers the initial bail hearing in which the Applicant was ordered detained, two bail reviews, and initial disclosure being vetted and disclosed.
November 18, 2014-December 16, 2014	Setting a JPT date.	Defence Delay: 28 days	Counsel for the Applicant was the only counsel to have <i>not</i> conducted a Crown pre-trial. A Judicial pre-trial (JPT) date could not be set on Nov 18 th .
December 16, 2014-March 12, 2015	Scheduling and conducting two JPT's.		The first JPT scheduled for January 13 th was not held. It is not clear which lawyers were not present leading to the adjournment. The Crown was ready to set dates. The JPT was finally held on January 22 nd . The Crown was ready to set dates but the JPT judge suggested a second JPT be held. A follow up JPT was held on March 12 th .
March 12, 2015- April 2, 2015	Scheduling Preliminary Hearing	Defence Delay: 20 days	The Crown was ready to set dates. The Applicant's counsel agreed to go to April 2, 2015.
April 2, 2015- Mar 30, 2016	Preliminary Hearing Scheduled Co-accused, Mr.		Preliminary hearing scheduled for April 11-16, 2016. January 14 th was the earliest offered date.

TIME IN THE ONTARIO COURT OF JUSTICE			
Relevant Period	Event	Suggested Characterization	Explanation
	<p>Gowanlock, enters a guilty plea</p> <p>Retainer issues arise for the first time</p> <p>New Counsel for co-accused is retained, seeks and is granted an adjournment</p>		<p>The matter returned before the court several times to canvass earlier dates and to determine if one of the co-accused would be resolving.</p> <p>One co-accused resolved on October 22nd.</p> <p>Further disclosure provided by Crown on March 30, 2016.</p> <p>Judge grants adjournment on March 30th. New preliminary inquiry dates are set. Both Crown and counsel for the Applicant express a willingness to return to court periodically to see if earlier dates have opened up.</p> <p>Crown opposed the adjournment but the Applicant did not. Crown also indicated that severance would not be in the public interest. However, Applicant is clear they are ready to proceed on the scheduled April dates.</p>
March 30, 2016-December 19, 2016	Rescheduling of Preliminary Hearing		Crown attempted to get earlier in custody dates. Dates in September did not work for counsel for the Applicant.
December 19, 2016-December 22, 2016	Preliminary Hearing conducted		Both co-accused were committed to stand trial. Further Crown disclosure was supplied but did not necessitate any further delay. Counsel agreed to discover one further witness after committal.

6. The foregoing chart shows that there were three periods of defence delay totalling 56 days: The first was from November 18, 2014 when a judicial pre-trial date could have been set but for the Applicant's failure to have conducted a Crown pre-trial, to December 16, 2014 when it finally was. The second was from March 12, 2015 when dates for the preliminary inquiry could have been set, to April 2, 2015 when the date was set. The third was the eight-day period between January 4, 2017 and January 12, 2007, when Applicant's counsel was available for a judicial pre-trial.

7. The Crown also suggests that the 108 days from January 23, 2017 to May 23, 2017 is defence delay. Their rationale here is that the Crown had offered trial dates as early as January 25, 2017 and the Applicant's counsel was not available. I reject this for several reasons. First, the Crown was aware that a witness from the preliminary inquiry was scheduled to be discovered on March 27, 2017 and that this had to be done before trial. Therefore any suggestion of setting a trial date before this date cannot be said to be a meaningful offer. After that date, the Crown had offered dates of April 3, 2017; May 8, 2017; and May 29, 2017, and the trial date was set for May 23, 2017. Allowing the defence some time to digest the evidence of the witness discovered on March 27th also eliminates the April 3, 2017 date. This means that, at most, there were 15 days of further defence delay, i.e. between May 8th and May 23rd. But to consider this defence delay would require defence counsel "to hold themselves in a state of perpetual availability," a proposition rejected by the Supreme Court of Canada in *R. v. Godin* [2009] S.C.J. No. 26. I would decline to do so. There is no suggestion that Ms. Shemesh was being unreasonable in rejecting these earlier dates. Indeed, Ms. Shemesh eventually facilitated the setting of the May 23, 2017 trial date by moving the trial of one of her other clients to another date.

8. Deducting 56 days from the total delay still leaves a delay of 985 days, which still exceeds the 30-month presumptive ceiling in *Jordan*.² Delay that exceeds the ceiling is presumptively unreasonable and the burden shifts to the Crown to rebut this presumption by showing that the delay is reasonable because of the presence of exceptional circumstances. The *Jordan* majority defined these as:

Exceptional circumstances lie outside the Crown's control in the sense that (1) they are reasonably unforeseen or reasonably unavoidable, and (2) Crown counsel cannot reasonably remedy the delays emanating from those circumstances once they arise. So long as they meet this definition, they will be considered exceptional. They need not meet a further hurdle of being rare or entirely uncommon.

9. Such delays can be deducted from the total delay where the Crown can "show that it took reasonable available steps to avoid and address the problem before the delay exceeded the ceiling."

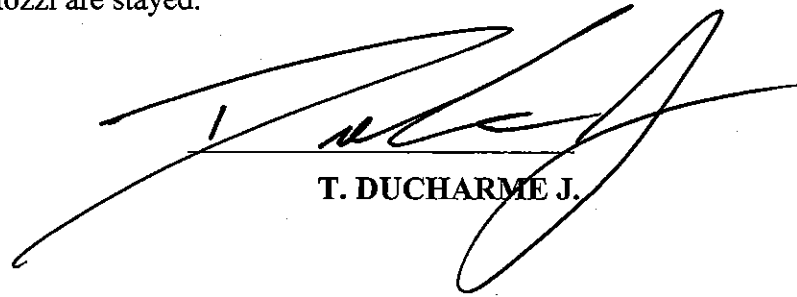
10. The Crown argues that the adjournment granted to the co-accused's counsel was such an exceptional circumstance and that this requires that one deduct the delay resulting from the adjournment of the preliminary inquiry from the total delay. While there had been some prior indication of retainer problems, I agree that the need for an adjournment was not something that the Crown could easily have foreseen. However, the Crown could easily have remedied the resulting delay to Mr. Mallozzi's case by severing the accused and letting Mr. Mallozzi conduct his preliminary inquiry on the scheduled dates. While the Crown at the time said that severance was not in the public interest, this is significantly undercut by the fact that they subsequently agreed to sever the two co-accused. I appreciate that the adjournment was granted before the decision in *Jordan* was released. But this does not assist the Crown, as the delay on March 30, 2016 was already 20 months, which exceeds the administrative guidelines

² Given the comments in *Godin* I would be reluctant to attribute all of this time to the defence. But I need not analyze this time any further as a deduction of 56 days from the total delay will not change the result in this case.

set out for delay in *R. v. Morin*, which suggested 8 to 10 months following the intake period to the completion of the preliminary inquiry.

11. For the same reason, although this is a transitional case, the Crown cannot satisfy me that the time the case has taken is justified based on the parties' reasonable reliance on the law as it previously existed. When the new preliminary inquiry date was set, the delay was already 20 months, and no more than 48 days of this could be laid at the feet of the Applicant. Mr. Mallozzi never waived his s. 11(b) rights and his counsel expressed concern about delay throughout the proceedings. While the Crown did make efforts to move the matter along, these efforts were too little and too late and Mr. Mallozzi's right to a trial within a reasonable time was violated.

12. In the result, the charges against Mr. Mallozzi are stayed.



T. DUCHARME J.

Released: April 26, 2017

Citation: R. v. Mallozzi, 2017 ONSC 2606
Court File No. CR-17-90000070-0000
Date: 20170426

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