R. v. Long

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Subject: Criminal

WARNING

The President of the panel hearing this appeal directs that the following should be attached to the file:

An order restricting publication in this proceeding under ss. 486.4(1), (2), (2.1), (2.2), (3) or (4) or 486.6(1) or (2) of the *Criminal Code* shall continue. These sections of the *Criminal Code* provide:

> 486.4(1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of
>
> (a) any of the following offences;
>
> (i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 210, 211, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or
>
> (ii) any offence under this Act, as it read at any time before the day on which this subparagraph comes into force, if the conduct alleged involves a violation of the complainant's sexual integrity and that conduct would be an offence referred to in subparagraph (i) if it occurred on or after that day; or

(iii) REPEALED: S.C. 2014, c. 25, s. 22(2), effective December 6, 2014 (Act, s. 49).

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).

(2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall

(a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the victim of the right to make an application for the order; and

(b) on application made by the victim, the prosecutor or any such witness, make the order.

(2.1) Subject to subsection (2.2), in proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.

(2.2) In proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice shall

(a) as soon as feasible, inform the victim of their right to make an application for the order; and

(b) on application of the victim or the prosecutor, make the order.

(3) In proceedings in respect of an offence under section 163.1, a judge or justice shall make an order directing that any information that could identify a witness who is under the age of eighteen years, or any person who is the subject of a representation, written material or a recording that constitutes child pornography within the meaning of that section, shall not be published in any document or broadcast or transmitted in any way.

(4) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice when it is not the purpose of the disclosure to make the information known in the community. 2005, c. 32, s. 15; 2005, c. 43, s. 8(3)(b); 2010, c. 3, s. 5; 2012, c. 1, s. 29; 2014, c. 25, ss. 22, 48; 2015, c. 13, s. 18.

486.6(1) Every person who fails to comply with an order made under subsection 486.4(1), (2) or (3) or 486.5(1) or (2) is guilty of an offence punishable on summary conviction.

(2) For greater certainty, an order referred to in subsection (1) applies to prohibit, in relation to proceedings taken against any person who fails to comply with the order, the publication in any document or the broadcasting or transmission in any way of information that could identify a victim, witness or justice system participant whose identity is protected by the order. 2005, c. 32, s. 15.

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Long, 2023 ONCA 679
DATE: 20231018
DOCKET: C69899

MacPherson, Pepall and van Rensburg JJ.A.

BETWEEN

His Majesty the King

Respondent

and

Dennis Oliver Long

Appellant

Howard L. Krongold, for the appellant

Emily E. Marrocco, for the respondent

Heard: June 1, 2023

On appeal from the conviction entered on March 3, 2021 by Justice Melanie A. Sopinka of the Ontario Court of Justice.

Pepall J.A.:

Introduction

[1] The appellant, a manual osteopathy practitioner, was convicted of sexual assault, sexual interference, and invitation to sexual touching in relation to two of his patients.

[2] Before the trial judge, he unsuccessfully argued that his right to a trial within a reasonable time under s. 11(b) of the *Charter* was breached. He appeals from his conviction on two grounds: (1) the trial judge erred in dismissing his s. 11(b) application; and (2) the trial judge misapprehended the evidence.

[3] For the following reasons, I would dismiss the appeal.

Background Facts

[4] The appellant was first charged on November 16, 2018. These charges related to an adult complainant. He was then charged on January 16, 2019 in relation to offences against a minor.

[5] The appellant first appeared in court on February 7, 2019. The two sets of charges were joined.

[6] Bill C-75 was passed on June 21, 2019. The Bill amended the *Criminal Code* provisions regarding the availability of preliminary inquiries. These provisions took effect on September 19, 2019. The passing of Bill C-75 created confusion about whether the appellant was entitled to a preliminary hearing on all charges, as it restricted the availability of such hearings to offences liable to a maximum of 14 years or more of imprisonment. Only the offences relating to the minor complainant met this threshold.

[7] On June 28, 2019, the appellant elected trial in the Superior Court of Justice. A one-day preliminary hearing was set for January 28, 2020 in the Ontario Court of Justice (“OCJ”).

[8] On July 26, 2019, the Crown wrote to defence counsel, stating that as of September 19, 2019, the OCJ would only have jurisdiction to hold a preliminary hearing with respect to the minor complainant and would not have jurisdiction to hold a preliminary hearing for the case relating to the adult complainant. The Crown advised that her understanding was that the real purpose of the preliminary hearing related to the adult complainant, whom the Crown did not intend to call during the hearing. It was therefore "imperative that [the parties] have further discussions about this issue and the implications of the new Bill C-75 in the very near future."

[9] She then wrote: "I appreciate that you will need to seek further instructions from your client based on the new amendments to the *Criminal Code* and also appreciate that your client may wish to make a re-election as to their mode of trial." She proposed three options: (i) the accused could re-elect to have a trial in the OCJ and the date then set for the preliminary hearing could be converted to a trial in the OCJ; (ii) the accused could proceed to the Superior Court to be tried in accordance with his election; or (iii) the Crown was still prepared to elect summarily and then all of what was indicated in point (i) would apply. She closed by saying: "I appreciate that you may take a different position on this issue but please advise me as soon as possible so that we can keep the matter moving forward."

[10] The appellant was unresponsive.

[11] Although not expressly stated, the second option would maintain the status quo because the OCJ preliminary hearing date could not be converted into a trial date in the Superior Court.

[12] On November 7, 2019, the preliminary hearing set for January 28, 2020 was vacated pursuant to a joint request by the Crown and defence counsel.

[13] On November 18, 2019, this court released its decision in *R. v. R.S.*, 2019 ONCA 906, holding that the amendments arising from Bill C-75 did not apply to accused who had elected their mode of trial and requested preliminary hearings before the amendments came into force on September 19, 2019. This meant that the appellant was entitled to a preliminary hearing on both sets of charges as he had already both elected his mode of trial and scheduled a preliminary hearing on June 28, 2019.

[14] On February 7, 2020, the defence filed a notice of re-election for trial in the OCJ. This re-election required the consent of the Crown. The Crown requested a waiver of the appellant's s. 11(b) rights as a prerequisite to its consent to a re-election. This was not forthcoming. The Crown consented to a re-election for a trial in the OCJ nonetheless.

[15] On February 27, 2020, OCJ trial dates of May 25, 26, 27 and June 16, 2020 were set.

[16] On March 31, 2020, the trial was adjourned due to COVID-19.

[17] On July 6, 2020, the OCJ began to reschedule trials that had been adjourned due to COVID-19. It gave priority to trials of accused who were in custody over trials of out of custody accused whose trials had not begun.

[18] On August 22, 2020, the OCJ trial coordinator emailed the appellant's counsel offering to reschedule the trial. However, the subject line of the email (though not the body) used an inaccurate surname for the appellant with the

consequence that defence counsel missed the email. Another email to defence counsel went unanswered and it was not until September 29, 2020 that the case was scheduled for a severance motion to be heard November 10, 2020 and trial dates of January 18, 19, 20, 21 and 22, 2021 were set.

[19] On December 18, 2020, the appellant applied for a stay pursuant to s. 11(b) of the *Charter*. The total delay from when the charges against him were first laid on November 16, 2018 to the anticipated end of his trial in the OCJ on January 22, 2021 was 26 months and 7 days. This exceeded the presumptive ceiling of 18 months in the OCJ set by the Supreme Court in *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631.

Trial Judge's Reasons on S. 11(b) Application

[20] The trial judge dismissed the appellant's application.

[21] In her reasons for decision, the trial judge began by calculating defence delay. She noted that on January 9, 2020, an adjournment was required due to defence counsel's failure to obtain instructions on re-electing, followed by another adjournment on January 23 to obtain the appellant's instructions on severance, and then another similar adjournment on January 29 that lasted until February 7. She attributed these 29 days to defence delay. She added a further seven days of defence delay for counsel's late responses to the Crown's emails in September 2020 about rescheduling the trial. Subtracting these 36 days of defence delay from the total delay of 26 months and 7 days left 25 months and 1 day, well above the 18-month ceiling established in *Jordan* for trials in the OCJ.

[22] The trial judge then turned to a consideration of exceptional circumstances. She found that had there been no COVID-19, the trial would have started on May 25, 2020. Instead, due to COVID-19, the trial was to end on January 22, 2021, a delay of 7 months, 27 days. The trial judge treated this time period as an exceptional circumstance.

[23] The defence conceded that COVID-19 was an exceptional circumstance but disputed a deduction for any delay beyond July 6, 2020, when the OCJ began rescheduling. The trial judge rejected the defence arguments. The matter had been re-scheduled on September 29, 2020 for a five-day trial in January 2021. Both the Crown and the system took meaningful efforts to mitigate the delay caused by COVID-19.

[24] The trial judge observed that the OCJ had responded promptly and rationally to the complicated situation of prioritizing the many trials to be set and rescheduled and she rejected the defence submission that the approach taken was contrary to s. 11(b) and the principles set out in *Jordan*.

[25] As to how much of the COVID-19 delay ought to be deducted, she observed that "the weight of authority at this point in time has concluded that the delay attributable to the pandemic runs from the date the trial was adjourned to the anticipated end of the rescheduled trial." She determined that the Crown had discharged its onus to demonstrate that COVID-19 was an exceptional circumstance and that the period of delay should be calculated from the original start date of the appellant's trial, May 25, 2020, to the anticipated end of the rescheduled trial, January 22, 2021, a period of just

under 8 months. When deducted from the net delay, the remaining delay was 17 months and 4 days, which was below the presumptive ceiling.

[26] The trial judge then turned to the delay arising from Bill C-75 and its impact on the preliminary hearing that had been scheduled. She noted that until this court's decision in *R.S.*, lower court decisions had differed as to whether the Bill applied retrospectively. *R.S.* clarified that the Bill applied prospectively, with the result that the appellant was entitled to a preliminary hearing for the charges pertaining to both complainants. The trial judge stated at para. 38 of her reasons that: "The fact that Mr. Long's matter was delayed from the original preliminary hearing date in January 2020 to the trial that was set in May 2020 was as a result of the confusion regarding the continued availability of a preliminary hearing relating to the allegations of the adult complainant…The Crown and defence counsel jointly asked the court to vacate the preliminary hearing date as a result of their joint position at the time that a preliminary hearing was no longer available."

[27] By the time *R.S.* was released on November 18, 2019, however, the parties had already jointly asked the court to vacate the preliminary hearing date, given the amendments.

[28] The trial judge determined that before this request, the parties could have converted the vacated January 28, 2020 preliminary hearing into a trial in the OCJ. The actual trial was instead set for May 25, 2020. The trial judge considered this delay of 3 months and 27 days from January 28, 2020 to May 25, 2020 to have arisen from the confusion leading up to *R.S.*, an event which she found to be outside of the Crown's control. She further found that the

Crown had taken steps to mitigate the delay by suggesting on July 26, 2019 that the original preliminary inquiry be converted into a trial. Accordingly, she deducted the delay as an exceptional circumstance.

[29] This left a remaining delay of 13 months and 7 days, well under the presumptive ceiling. The trial judge accordingly dismissed the s. 11(b) application.

[30] In summary, the trial judge attributed 29 days to defence delay before COVID-19 and 7 days afterwards.[1] This left a remaining delay of 25 months and one day. She then made deductions on account of exceptional circumstances. Seven months and 27 days were deducted due to COVID-19 (May 25, 2020 to January 22, 2021) and 3 months and 27 days due to Bill C-75 (January 28, 2020 to May 25, 2020). When defence delay and exceptional circumstances delay were deducted from the total delay, the remaining delay fell below the presumptive ceiling of 18 months.[2]

Arguments on Appeal from S. 11(b) Decision

[31] In oral submissions, counsel for the appellant advised that he was confining his s. 11(b) appeal to two arguments, one relating to pre-COVID delay and the other to post-COVID delay arising from the prioritization of trials for in-custody accused.

(i) Pre-COVID Delay

[32] The appellant's first argument relating to pre-COVID delay had not been made before the trial judge. Before us, he argues for the first time that his s. 11(b) rights were violated before the onset of COVID-19. Before the trial judge,

defence counsel recognized that the pre-COVID-19 delay was 19 months but erroneously treated the net delay as 17.72 months because he calculated the delay as running to the projected start date of the trial (May 25, 2020) rather than its projected end date (June 16, 2020). The appellant argues that had the correct dates been used, the remaining delay would have been 18 months and 1 day. Bill C-75 did not cause any delay and but for COVID-19, the trial would have ended on June 16, 2020.

[33] There are two elements to address with respect to this argument. First, is it open to the appellant to argue for the first time on appeal that the remaining delay from the date of the charge to the end of the original trial date was 18 months and 1 day, thereby breaching the 18-month presumptive ceiling? Second, if it is open to him to make this new argument, were his rights under s. 11(b) breached?

[34] The appellant submits that parties are not bound by erroneous concessions about the characterization of periods of delay and that the presumptive ceilings toll until the end of evidence and argument. Moreover, there was no defence waiver.

[35] In response, the Crown submits that the defence position did not reflect an erroneous concession of law such that this issue may be raised for the first time on appeal. The Crown also relies on *R. v. J.F.*, 2022 SCC 17, 468 D.L.R. (4th) 216, for the proposition that there is a positive obligation on an accused to voice concerns about delay so the court can potentially address the issue. Here, both the defence and the Crown engaged in collaborative efforts and were happy with a June 16, 2020 end date for the original trial. Crown counsel

submits that it was incumbent on the defence to raise any pre-COVID-19 delay issues in February 2020. Although Crown counsel states that there is no need to get into waiver, given the appellant's conduct and representations, waiver would be available on the facts of this case.

(a) Appellant's Ability to Raise New Argument on Appeal

[36] For the following reasons, I conclude that it is open to this court to consider the appellant's new argument on appeal.

[37] The designation of periods of delay is a matter of law, attracting a standard of correctness: *R. v. Jurkus,* 2018 ONCA 489, 363 C.C.C. (3d) 246, at para. 25, leave to appeal refused, [2018] S.C.C.A. No. 325.

[38] It is well established that on an appeal from a decision on a s. 11(b) application, this court is not bound by erroneous concessions: *R. v. Shaikh*, 2019 ONCA 895, 148 O.R. (3d) 369, at para. 63; *R. v. Tran*, 2012 ONCA 18, 288 C.C.C. (3d) 177, at para. 31; *R. v. Steele*, 2012 ONCA 383, 288 C.C.C. (3d) 255, at para. 19; *R. v. Konstantakos*, 2014 ONCA 21, 315 O.A.C. 123, at para. 10; *R. v. Picard*, 2017 ONCA 692, 137 O.R. (3d) 401, at para. 102; and *R. v. Jurkus*, 2018 ONCA 489, 363 C.C.C. (3d) 246, at para. 71.[3] The rationale for refusing to be bound is grounded in the standard of review: we are to determine whether the trial judge's delay designations were legally correct.

[39] A review of the transcript of proceedings shows that counsel mistakenly understood that the delay between November 16, 2018 (when the charges were first laid) and June 16, 2020 (when the trial was to end) was under 18 months when in fact it was not.

[40] Given the standard of review, this court is not bound by defence counsel's erroneous calculation that the matter was under the 18-month presumptive ceiling. This is a reflection of the principle that the designation of periods of delay is a matter of law, attracting a standard of correctness.

[41] The Crown also argues, relying on *J.F.,* that defence counsel had a positive obligation to voice concerns about the first trial dates when they were set at the February 27, 2020 pretrial. Having failed to do so, it submits that the appellant is precluded from making this new argument on appeal.

[42] *J.F.* dealt with a stay of proceedings for unreasonable delay in the context of a retrial. The Supreme Court held that an accused who raises the unreasonableness of delay after trial and after conviction is generally not acting in a timely manner. This of course is not this case. Here, the appellant did bring his s. 11(b) application before trial. At para. 30 of *J.F.*, Wagner C.J. reiterated the principle established in *Jordan* at paras. 137-139 that "at all stages of the trial process, everyone must take proactive measures to remedy any delay." However, this principle is not independent from *Jordan*'s direction that defence delay has two components: waiver and delay caused solely by the conduct of the defence. If the delay does not fall into one of those two categories, based on *Jordan*, there is no basis to penalize the defence in the calculation of delay.

[43] Standing alone, this principle of proactivity is insufficient to defeat the appellant's request that this court consider his new argument that was not advanced before the trial judge.

[44] Chief Justice Wagner also addressed waiver in *J.F.* in some detail. Waiver must be clear and unequivocal: *J.F.,* at para. 47; *Jordan*, at para. 61; *R. v. Morin*, [1992] 1 SCR 771, at p. 790; *R. v. Askov*, [1990] 2 S.C.R. 1199, at p. 1228. At para. 47 of *J.F.*, the court cited *Askov* stating: "[T]here must be something in the conduct of the accused that is sufficient to give rise to an inference that the accused has understood that he or she had a s. 11(b) guarantee, understood its nature and has waived the right provided by that guarantee." Waiver is established on the basis of the accused's conduct, having regard to the circumstances of each case: *J.F.,* at para. 49.

[45] On appeal the Crown did not press waiver. This was reasonable. There is nothing in the evidence to suggest that any of the elements of waiver have been established. Given my conclusion that the defence was acting under an erroneous s. 11(b) calculation at trial, his conduct in not objecting to the original trial dates or raising his pre-COVID delay argument before the trial judge on the s. 11(b) application was not a deliberate and informed waiver of the right to trial within a reasonable time. An inadvertent miscalculation cannot amount to waiver.

[46] I would also reiterate that although requested, the Crown did not obtain a s. 11(b) waiver before consenting to the re-election for trial in the OCJ.

[47] In conclusion, it is open for this court to consider the appellant's argument that after an appropriate deduction for defence delay, the remaining delay from the date of the charge to the end of the original trial date was 18 months and 1 day. The appellant is not precluded from advancing this argument.

(b) Were the Appellant's s. 11(b) Rights Breached?

[48] I now turn to the second issue: were the appellant's s. 11(b) rights breached?

[49] As mentioned, before us, counsel for the appellant advised that he was confining his argument on s. 11(b) to two points.

[50] First, he argues that the time between the charges being laid on November 16, 2018 to the original projected end date of the trial of June 16, 2020 amounted to 19 months of delay. When the pre-COVID-19 defence delay of 29 days found by the trial judge, and which the appellant accepts, is deducted, this leaves 18 months and 1 day. *Jordan* states that the 18-month ceiling is a hard one. As counsel for the appellant put it, there is no exception for being "close".

[51] I agree that the *Jordan* ceiling is a hard one. This is consistent with the Supreme Court's choice of the word "ceiling" and its characterization of that term as a "hard backstop that offers certainty, predictability, and simplicity": *R. v. K.J.M.*, 2019 SCC 55, [2019] 4 S.C.R. 39, at para. 75.

[52] Therefore, 18 months and 1 day would exceed the presumptive ceiling.

[53] However, that is not the end of the matter. The trial judge concluded that both COVID-19 and the passage of Bill C-75 and the resulting confusion were exceptional circumstances, the former attracting a deduction of 7 months and 27 days and the latter a deduction of 3 months and 27 days. Only if the trial judge was incorrect in making both of these deductions would the delay be above 18 months. Put differently, the appellant must succeed on both prongs

of his argument to prevail. As I will explain, I conclude that the trial judge correctly treated the delay on account of COVID-19 as an exceptional circumstance.

[54] Exceptional circumstances are those that are outside the Crown's control in the sense they are reasonably unforeseen or reasonably unavoidable, and the Crown cannot reasonably remedy the delays emanating from those circumstances: *Jordan,* at para. 69.

[55] I will start with the Bill C-75 deduction. The trial judge found that the passage of Bill C-75 and the resulting confusion caused 3 months and 27 days of delay between the original preliminary hearing date of January 28, 2020, which could have been converted to a trial date in the OCJ, and the first scheduled trial date of May 25, 2020. She determined that the resulting confusion as to whether the Bill had retrospective effect was an exceptional circumstance. The Crown took steps to mitigate the delay by sending an email to counsel about one month after the Bill's passage and several months before it was to come into effect. The Crown suggested a number of options to mitigate delay, including converting the preliminary hearing date into a trial. Given the delay of the defence in responding to the Crown's email, by November 2019, that course of action was no longer available.

[56] The appellant asserts that Bill C-75 did not necessitate any delay. After the enactment of the Bill, regardless of any confusion, the appellant was still entitled to a preliminary hearing in respect of the charges relating to the minor complainant and had no obligation to waive it. The appellant thus submits that the delay was caused by his re-election to a trial in the OCJ and was not

reasonably unforeseen or reasonably unavoidable as the re-election required the Crown's consent. The Crown could have conditioned its consent on a waiver of the appellant's s. 11(b) rights. It did not do so even though the new trial dates fell outside the 18-month presumptive ceiling in the OCJ. Alternatively, the case could have stayed in the Superior Court which would have allowed for a 30-month ceiling.

[57] The Crown argues that the trial judge correctly found that the defence's failure to respond to the options proposed by the Crown in the face of Bill C-75 and the resulting joint request to vacate the scheduled preliminary hearing precluded the use of the January 2020 preliminary hearing date for a trial. In that regard, the trial judge relied on *R. v. Drummond,* 2020 ONSC 5495 where a preliminary hearing date for several co-accused was similarly adjourned due to an erroneous interpretation of the effect of Bill C-75 and the trial judge had characterized the resulting delay as exceptional circumstances.

[58] I agree with the appellant's position on this issue. Unquestionably, Bill C-75 caused confusion but unlike the facts in *Drummond*, its passage did not cause the delay in this case.

[59] In *R.S.*, Doherty J.A. described the impact of the Bill C-75 amendments at paras. 10, 11 and 14:

> The amendments deal with three closely-connected procedural steps that occur in the Ontario Court of Justice in the course of the prosecution of indictable offences in respect of which accused have a choice as to their mode of trial.
>
> At the first step, the accused elect their mode of trial. They choose trial in the Ontario Court of Justice, trial

> by judge alone in the Superior Court of justice, or trial by judge and jury in the Superior Court of Justice.
>
> […]
>
> In summary, under both the repealed and amended legislation, appellants charged with indictable electable offences are entitled to elect their mode of trial. That entitlement is unaffected by the amendments.

[60] After Bill C-75 was enacted, but before it came into force, the appellant elected a trial in the Superior Court and scheduled a preliminary inquiry. He always had the right to proceed with his trial in the Superior Court, and unlike some of the co-accused in *Drummond*, the prevailing view even before the release of *R.S.* was that he always retained a right to a preliminary hearing on one of his charges. Bill C-75 caused no confusion about that.

[61] In characterizing the delay resulting from Bill C-75, the trial judge placed significance on the fact that "the preliminary hearing could have been converted to a trial and that date could be used." The trial judge reasoned: "If that course of action had been acted on by the defence, it is reasonable to expect that the remaining dates for trial could have been set proximate to January 28, 2020". But the preliminary hearing could not have been converted into a trial date, regardless of any confusion surrounding Bill C-75, until the appellant re-elected trial in the OCJ and until the Crown consented to that re-election. Given his election for a trial in the Superior Court, which he was entitled to make regardless of the availability of a preliminary hearing in respect of the adult complainant and regardless of the availability of a preliminary hearing at all, the January 28, 2020 preliminary hearing date in the

OCJ could never have been converted into a trial date because the appellant had elected that his trial occur in a different court. The trial judge erred in concluding otherwise. The trial judge's finding that the appellant's matter was delayed from the original preliminary hearing date of January 28, 2020, when the case was still in the Superior Court, to the OCJ trial date of May 25, 2020 because of confusion surrounding Bill C-75 cannot be sustained.

[62] I would also observe that the appellant re-elected a trial in the OCJ on February 7, 2020, a re-election to which the Crown had to consent. The Crown was not required to consent. Moreover, the Crown consented in the face of the appellant's refusal to waive his s. 11(b) *Charter* right. As mentioned, exceptional circumstances are those that are outside the Crown's control in the sense they are reasonably unforeseen or reasonably unavoidable, and the Crown cannot reasonably remedy the delays emanating from those circumstances. A re-election that an accused makes on consent is not reasonably unforeseen or reasonably unavoidable: *R. v. Wookey*, 2021 ONCA 68, 154 O.R. (3d) 145, at para. 71. Nor were the circumstances beyond the Crown's control.

[63] For these reasons, I conclude that the trial judge incorrectly treated the period of delay from January 28, 2020 to May 25, 2020, representing 3 months and 27 days, as an exceptional circumstance.

(ii) COVID-19 Delay

[64] Turning to the issue of delay arising from COVID-19, the appellant acknowledges that COVID-19 was an exceptional circumstance justifying some delay. However, he argues that the trial judge erred in deducting COVID-

19 delay for two reasons: (i) she relied on the wrong dates in making the deduction; and (ii) the court system was capable of prioritizing the re-scheduling of the appellant's trial and therefore mitigating the delay.

(a) The Trial Judge's Choice of Dates

[65] The appellant challenges the dates on which the trial judge relied to determine the extent of the exceptional circumstance deduction for COVID-19. The original trial was scheduled to start on May 25, 2020 and was projected to end on June 16, 2020. On March 31, 2020, the trial was adjourned due to COVID-19. At trial, the Crown argued that the exceptional circumstance on account of COVID-19 should commence on March 31, 2020. The trial judge declined to use this commencement date for the calculation of COVID-19 delay as it would then overlap with the period she had deducted for Bill C-75 (January 28, 2020 to May 25, 2020). The trial judge attributed the period from May 25, 2020 to January 22, 2021 (the projected end date of the rescheduled trial) as COVID-19 delay and treated it as an exceptional circumstance.

[66] The appellant accepts that much of that time is properly considered an exceptional circumstance due to COVID-19. However, he argues that the start date for that calculation should not be May 25, 2020 but the projected end date of the original trial, June 16, 2020. Relying on *R. v. K.G.K.*, 2020 SCC 7, [2020] 1 S.C.R. 364, at para. 33, he submits that *Jordan* delay should be calculated to the end of trial. The period of June 16, 2020 to January 22, 2021 amounts to 7 months and 6 days. If this lesser amount is deducted from the total delay as an exceptional circumstance, then the remaining delay would exceed the 18-month ceiling absent any deduction for Bill C-75.

[67] I do not agree with the appellant's argument in this regard.

[68] In my view, the appellant's s. 11(b) rights were not breached. I reach this conclusion for the following reasons.

[69] First, it is true that, had the appellant's original trial proceeded as scheduled, it was projected to end outside the 18-month ceiling. However, it did not proceed then. On March 17, 2020, there was a province-wide closure of courts and on March 31, 2020, his matter was presumptively adjourned due to COVID-19. The rescheduled trial was to take place on January 18, 2021 and was anticipated to end on January 22, 2021. Reality should govern the analysis, not what might have been. The *Jordan* analysis should be based on the actual intervening event of COVID-19. By analogy, see *R. v. Tran*, 2023 ONCA 532, at para. 46.

[70] Second, the weight of legal authority supports the Crown's position either relying on the March 31, 2020 date or the May 25, 2020 date. Examples of the former are *R. v. Brooks*, 2022 ONSC 115, at para. 23; *R. v. M.T-S.*, 2022 ONSC 2471, at para. 17; *R. v. Thompson*, 2022 ONSC 6173, at para. 45; and *R. v. Stack*, 2020 ONCJ 544, 473 C.R.R. (2d) 272, at para. 44. Examples of the latter include *R. v. Obregon-Castro*, 2021 ONSC 1096, at para. 42; *R. v. Khattra*, 2020 ONSC 7894, at para. 70; *R. v. Buabeng*, 2022 ONSC 2181, at para. 102; *R. v. Hassan et al.*, 2022 ONSC 6369, at para. 28; *R. v. Thompson*, 2022 ONSC 2712, at para. 68; and *R. v. Osei*, 2022 ONSC 1607, at para. 49.

[71] In *R. v. Agpoon*, 2023 ONCA 449, 427 C.C.C. (3d) 417, at paras. 1, 38-40, this court stated that it was providing guidance on the issue of the impact of COVID-19 on the *Jordan* analysis and calculated COVID-19 exceptional

circumstance delay from March 2020. *R. v. Donnelly*, 2023 ONCA 243, at para. 25, took the same position.

[72] Third, commencing the start date from the date the courts closed lends certainty and simplicity as directed by the Supreme Court in *K.J.M.*, at para. 75.

[73] In this case, the trial judge used May 25, 2020 to avoid double-counting. For the purposes of this appeal, the distinction between March 31, 2020 and May 25, 2020 is immaterial as the remaining delay is under 18 months with either calculation. That said, in the absence of a deduction for Bill C-75 related delay, there is no double counting and consistent with this court's decisions, I would use the March 2020 date.

(b) The Court System's Prioritization

[74] As mentioned, the OCJ began to reschedule trials that had been adjourned due to COVID-19 on July 6, 2020 and prioritized them based on the custodial status of the accused. The appellant submits that this was unreasonable and that the proposition that an accused in custody has a greater entitlement to a speedy trial than someone such as the accused who was out of custody is inconsistent with *Jordan*. The individualized prejudice suffered by an accused or a group of accused is irrelevant. The oldest cases in the system ought to have been prioritized. He argues that this would have enabled the appellant to reschedule his trial on July 6, 2020 rather than on August 22, 2020.

[75] I disagree. *Jordan* was designed to respond to delays in the criminal justice system and the culture of complacency that had pervaded it. No one could have anticipated COVID-19 and the impact it had on society, including the criminal justice system. While it is captured by the exceptional circumstances characterization, arguably it went well beyond such a descriptor. Some system of prioritization was required. The court's response in prioritizing custodial over non-custodial accused was reasonable and any strictures embedded in *Jordan* must yield to that reality. This is also consistent with this court's decision in *Agpoon* at paras. 32-34.

[76] I see no basis on which to interfere with the trial judge's treatment of delay arising from COVID-19. She properly treated the 7 months and 27 days as delay arising from exceptional circumstances.

[77] In summary, I conclude that the trial judge correctly treated the COVID-19 delay as an exceptional circumstance but erred in treating the Bill C-75 related delay as an exceptional circumstance. The total delay from November 16, 2018 until the anticipated end of the trial on January 22, 2021 was 26 months and 7 days. A deduction of defence delay of 29 days resulted in net delay of 25 months and 8 days.[4] The Crown rebutted the presumption of unreasonable delay due to the interruption of the trial resulting from COVID-19, leading to a deduction of 7 months and 27 days. The remaining delay amounted to 17 months and 11 days. As this is below the presumptive ceiling, the absence of a deduction on account of Bill C-75 delay is immaterial.

[78] For these reasons, I would dismiss the appellant's s. 11(b) ground of appeal.

Arguments on Conviction Appeal

[79] The appellant also appeals his conviction on the grounds that the trial judge misapprehended the appellant's evidence and erred in finding that the appellant was "intentionally attempting to obfuscate the evidence."

[80] The appellant asserts that the trial judge said the appellant was warned that his evidence could not be understood if he did not properly delineate the body parts or muscles to which he was referring and that his continued use of technical language, which might be explained by his professional training, left the impression that he was intentionally attempting to obfuscate the evidence. He argues that this was unsupported by the record.

[81] The trial judge was correct in stating that the appellant used technical language and that she told the appellant in cross-examination that the court might not understand his evidence. Furthermore, the trial judge repeatedly told the appellant to slow down and spell out the meaning of the terms he was using. Whether the admonishments were warnings is a question of semantics. In any event, to the extent the trial judge misspoke, it was immaterial. Her analysis of credibility did not depend on this statement. The record fully supported her conclusion that the appellant was guilty as charged beyond a reasonable doubt.

Disposition

[82] For these reasons, I would dismiss the appeal.

Released: October 18, 2023 "J.C.M."

"S.E. Pepall J.A."
"I agree. J.C. MacPherson J.A."
"I agree. K. van Rensburg J.A."

[1] The 29 days attributed to defence delay is not in issue. The issue of the additional 7 days was not pressed in argument and, in any event, has no impact on the result.
[2] As illustrated, even without the deduction for Bill C-75, the remaining delay would still be less than 18 months.
[3] In *J.F.*, the Supreme Court set out the general test for raising a new argument on appeal in the context of a s. 11(b) application raised for the first time on a re-trial, where the arguments pertained to delay from the original trial. Among other things, the court must consider the state of the record, the fairness to all parties, and the importance of having the new issue resolved: *J.F.*, at para. 41. In a similar vein, in *R v. Charity*, 2022 ONCA 226, 161 O.R. (3d) 721, at para. 28, this court treated a new argument on appeal on the appropriate remedy for an 11(b) violation as a new issue on appeal subject to the same sorts of considerations described by the Supreme Court in *J.F*. Even if one were to apply this more expansive analysis to this case, no different result would ensue.
[4] This does not include the 7 days described in para. 30. Those days are already encompassed by the COVID-19 delay.