File Number: 38532

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE MANITOBA COURT OF APPEAL)

BETWEEN:

K.G.K

Appellant
(Appellant)

and

HER MAJESTY THE QUEEN

Respondent
(Respondent)

and

ATTORNEY GENERAL OF ONTARIO,
CRIMINAL LAWYERS' ASSOCIATION OF ONTARIO,
DIRECTOR OF PUBLIC PROSECUTIONS and
DIRECTOR OF CRIMINAL AND PENAL PROSECUTIONS

Interveners

FACTUM OF THE INTERVENER
DIRECTOR OF PUBLIC PROSECUTIONS

(Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*)

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PART I: OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. The Director of Public Prosecutions (DPP) intervenes in this appeal to argue that judicial decision-making time—including the time taken to decide interlocutory matters—should be assessed independently of the presumptive ceilings established in *R. v. Jordan*[1].

2. The DPP also intervenes to address the respondent's alternative argument that if this Court finds a s. 11(b) *Charter* breach, the Court should reconsider its prior jurisprudence which has held that a stay of proceedings is the only available remedy. The DPP's position is that the Court should not determine this issue on this appeal.

B. Facts

3. The DPP takes no position on the facts.

PART II: POSITION ON THE QUESTION IN ISSUE

4. The rationale for excluding judicial decision-making time related to the verdict from the presumptive ceilings applies with equal force to interlocutory judicial decision-making time. The issues to be decided by a trial judge in interlocutory motions are of such importance to the proceedings and the fair trial rights of the accused, that this judicial decision-making time should also be assessed outside of the *Jordan* framework.

PART III: ARGUMENT

A. Judicial Decision Making Time as it Relates to Interlocutory Motions

i. Overview of Position

5. There is no meaningful distinction to be drawn between verdict decision-making time and interlocutory decision-making time. In both cases, the parties are unable to estimate, control, or prevent judicial decision-making time. Including judicial decision-making time within the presumptive ceilings creates significant practical difficulties.

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[1] *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631.

ii. The Appellate Jurisprudence to Date

6. As noted by the respondent, appellate courts have been divided on how judicial reserve time should be treated.[2] Judicial treatment of interlocutory decision-making time has also been subject to various opinions, although no appellate case has addressed the issue directly.

a. In *R. v. Mamouni*, 2017 ABCA 347[3] at para. 92, Slatter JA held that all judicial decision-making time should be excluded from the *Jordan* framework; whereas Watson JA, at para. 55 said that judicial decision-making time, including those for motions, could be characterized as exceptional circumstances;

b. In *R. v. Rice*, 2018 QCCA 198 at para. 86, the Court in *obiter*, stated that judicial decision-making time for interlocutory matters may constitute a discrete event, or be an expression of the complexity of the case;

c. In *R. v. King*, 2018 NLCA 66 at para. 180, the majority in *obiter* stated that they were disinclined to the notion that interlocutory decision-making time should be included in the presumptive ceiling and that it may be considered to be an exceptional circumstance. The dissenting justice, at para. 139 was opposed to the idea that judicial reserve time could be considered to be an exceptional circumstance;

d. In *R. v. Brown*, 2018 NSCA 62 at para 74, relying on Slatter JA's opinion in *Mamouni*, the Court stated that there were compelling reasons for not including the time it takes for a judge to render a decision in the *Jordan* framework; and

e. In the case at bar Cameron JA at para. 218, in *obiter* agreed with the approach taken in *Brown* and Slatter JA in *Mamouni*.

iii. Modern Day Criminal Trials

7. Today's criminal trials are more complex in large measure because of the significant role that process plays in our criminal justice system.[4] The focus on police conduct in obtaining evidence in the context of constantly developing *Charter* jurisprudence routinely results in motions

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[2] Respondent's Factum, para. 30.
[3] Leave to appeal dismissed, [2018] 2 S.C.R. viii.
[4] *Jordan*, at para. 53.

where the accused seeks to establish that the evidence was obtained in a manner that contravened the *Charter*.

8. This is a common approach to the defence of charges arising from proactive investigations and is best illustrated in cases involving offences under the *Controlled Drugs and Substances Act*[5] where the evidence-gathering methodology is routinely challenged. The accused may seek to bring several motions alleging various breaches of the *Charter*. It is not uncommon for this approach to effectively be the trial because resolution of the *Charter* applications is determinative. If the evidence is excluded an acquittal follows; and if the evidence is admitted the accused often admits guilt, because there is no defence on the merits. The issues are frequently complex, both factually and legally, and trial judges are often required to reserve their decision.[6]

9. Added to the proliferation of motions that might be made by an accused is the ever-evolving *Charter* jurisprudence that is responsive to advances in technology and evolving societal norms. The vast majority of drug cases involve some form of a search which may or may not be a search within the meaning of s. 8 of the *Charter*. Stated simply, whether or not a state action attracts s. 8 *Charter* scrutiny is dependent upon whether the claimant has a reasonable expectation of privacy. This Court has been called upon numerous times, even just in recent years, to determine whether a claimant has a reasonable expectation of privacy in a variety of different contexts and to determine other intimately related matters: *R. v. Le*, 2019 SCC 34 (visitor in a backyard); *R. v. Mills*, 2019 SCC 22 (online communications and use of screen capture software), *R. v. Jarvis*, 2019 SCC 10 (surreptitious video recording),[7] *R. v. Reeves*, 2018 SCC 56 (co-owner's consent to seize computer), *R. v. Jones*, 2017 SCC 60, [2017] 2 S.C.R. 696 (text messages stored by service provider); *R. v. Marakah*, 2017 SCC 59, [2017] 2 S.C.R. 608 (text messages located in recipient's phone); *R. v. Paterson*, 2017 SCC 15, [2017] 1 S.C.R. 202 (warrantless entry of a residence); *R. v. Fearon*, 2014 SCC 77, [2014] 3 S.C.R. 621 (search of cell phone incident to arrest); *R. v. Spencer*, 2014

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[5] This approach is also common in cases involving other organized criminality, terrorism offences, financial frauds and tax fraud, for example.

[6] *Mamouni*, at para. 86; See also *Jordan*, at para. 42.

[7] Although *Jarvis* was not a s. 8 *Charter* case, the extensive discussion about s. 8 *Charter* jurisprudence in the context of a statutory interpretation question has been considered in ss. 8 and 24(2) *Charter voir dires* by some trial judges: *R. v. Flintroy*, 2019 BCSC 213 at para. 109; *R. v. Brown*, 2019 ONSC 2882 at p. 16; *R. v. Anthony*, 2019 ONCJ 115 at para. 13.

SCC 43, [2014] 2 S.C.R. 212 (internet protocol address); *R. v. MacDonald*, 2014 SCC 3, [2014] 1 S.C.R. 37 (implied license and safety searches); *R. v. Vu*, 2013 SCC 60, [2013] 3 S.C.R. 657 (search of computer and cell phone); *R. v. Chehil*, 2013 SCC 49, [2013] S.C.R. 220 and *R. v. MacKenzie*, 2013 SCC 50, [2013] 3 S.C.R. 250 (sniffer dog); *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34 (search of employer-owned computer).

10. In light of the ongoing development of the *Charter* jurisprudence, trial judges are required to consider and apply this Court's seminal decisions, even in "typical" or seemingly non-complex cases. For example, in *Mamouni* three accused were charged with the importation of 1886 grams of cocaine. The police investigation was relatively straightforward and involved a controlled delivery. Nevertheless, the trial judge dealt with a number of issues and produced formal decisions on at least four occasions. Despite demonstrating "exceptional diligence" the decision-making time for the four decisions (including the verdict) amounted to about 6½ months.[8]

11. That it can take time for a trial judge to render a decision in this context is hardly surprising. As Slatter JA, in *Mamouni* noted, "all of this takes time, none of which can truly be described as being either 'delay', 'unexpected' or 'extraordinary.'"[9]

iv. Impractical to include voir dire decision-making time in the framework

12. For the reasons advanced by the respondent, including interlocutory decision-making time within the presumptive ceilings is similarly impractical. The inability to estimate judicial decision-making time in the context of interlocutory motions is even more unpredictable, outside of the control of Crown counsel and unable to be properly accounted for after-the-fact. Not only are the parties unable to estimate how long it might take a judge to reach a decision, judges are not able to determine how long it might take them to deliberate because they don't know how the motion will unfold and what other demands will be placed on their time.[10]

13. The number and scope of motions heard in a case are largely determined by how an accused chooses to conduct their defence. Through the proper exercise of their case management powers, trial judges can summarily dismiss applications that are apparently frivolous and can consider

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[8] *Mamouni*, at para. 84.
[9] *Mamouni*, at para. 86.
[10] *R. v. Ashraf*, 2016 ONCJ 584.

whether a proposed motion has a reasonable prospect of success before allowing it to proceed,[11] but in reality, most applications will be permitted to proceed.

14. The effect of permitting multiple *Charter* applications to proceed may mean that the motions need to be heard and decided sequentially because the results of one motion may inform the scope of the next motion. For example, an accused may establish that a certain evidence-gathering technique breached the *Charter*, the result of which will lead to excisions from an information to obtain a search warrant. The reasons for the *Charter* breach may inform the scope of the *Garofoli*[12] review and can affect whether and to what extent the accused may seek leave to cross-examine the affiant. In these cases, not only do the parties need to know the result of the motion but they need to know the reason why the judge found a *Charter* breach. Certainly, prior to advancing arguments or determining whether to call evidence in the s. 24(2) *Charter* hearing, the parties will need to know the basis for the breach found and the trial judge's assessment of the witnesses called in the *voir dires*. This is critical information required to argue whether the evidence should or should not be excluded under s. 24(2) of the *Charter*. This makes it extremely difficult to accurately estimate the amount of time required.[13]

15. In these cases, it is to be expected that judges require time to determine the issues raised. The result of several motions, and the required judicial decision-making time associated with the motions can lead to the case exceeding the presumptive ceilings. This is because it is difficult for the parties to accurately estimate—even leaving aside judicial decision-making time—how long the motions will take. The trial judge's determination on one motion can prolong the proceedings because the effect of the ruling may lead an accused to bring other motions that were not previously anticipated (e.g. the mistrial application / s. 7 *Charter* application in *Cody*). In the context of this type of litigation, it is not possible for the parties to also factor in some undetermined judicial decision-making time.

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[11] *R. v. Cody*, 2017 SCC 31, [2017] 1 S.C.R. 659, at para. 38.

[12] *R. v. Garofoli*, [1990] 2 S.C.R. 1421.

[13] For example, in *R. v. Horner*, 2012 BCCA 7 the parties estimated that it would take one month for *Charter* applications, but the challenges to the wiretap authorizations took at least four months.

16. If judicial decision-making time is included within the presumptive ceilings and if the judicial decision-making time leads to a presumptive s. 11(b) *Charter* breach the Crown will have no ability to explain or account for the 'delay'. As noted by the respondent, the Crown will rarely know why a judge could not render a decision sooner[14] and it is inappropriate for the Crown to ask the judge for an explanation. Such inquiries unreasonably interfere with judicial independence.[15]

v. Exceptional Circumstances

17. In the alternative, in light of the identified problems with accounting for judicial decision-making time within the *Jordan* framework, this Court should conclude that judicial decision-making time constitutes exceptional circumstances.

18. Exceptional circumstances lie outside of the Crown's control in the sense that they are reasonably unforeseen or reasonably unavoidable, and Crown counsel cannot reasonably remedy the delays emanating from those circumstances once they arise.[16] Generally speaking, exceptional circumstances fall into two categories: particularly complex cases and discrete events.[17] Most judicial decision-making time does not fit neatly into either category and the courts below have not universally endorsed judicial decision-making time as an exceptional circumstance.

19. In cases found to be particularly complex, a reasonable amount of judicial decision-making time associated with it should also be considered to be acceptable. The overall delay should be considered to be reasonable and a stay should not issue.[18] In *Jordan*, this Court described a particularly complex case as one where the delay is defensible because the nature of the evidence or the nature of the issues requires an inordinate amount of trial or preparation time. Particularly complex cases may be characterized by, amongst other things: a large number of charges and pre-trial applications; novel or complicated legal issues; and a large number of significant issues in dispute.[19]

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[14] Respondent's Factum, para. 63.
[15] In British Columbia, Supreme Court Practice Direction PD-27 "*Corresponding with the Court*" specifically discourages counsel from making inquiries about the issuance of reasons for judgment unless "special circumstances have arisen" and it prohibits counsel from making an inquiry directly of a judge.
[16] *Jordan*, at para. 69.
[17] *Jordan*, at paras. 71, 81.
[18] *Jordan*, at para. 80.
[19] *Jordan*, at paras. 77, 78.

However, as the Court noted in *Cody*, case complexity requires a qualitative, not a quantitative assessment. Complexity is an exceptional circumstance only where the case as a whole is particularly complex.[20]

20. In other cases, a particular interlocutory motion and the judicial reserve time associated with it might be considered to be a discrete event. This Court accepted that discrete events can include: (a) trials that take longer than reasonably expected in circumstances where the parties have made a good faith effort to establish realistic time estimates; and (b) the time taken to address issues that arise close to the ceiling where it is more difficult for the Crown and the court to respond with a timely solution.[21] However, since discrete events are unforeseeable or unavoidable developments in the proceedings, categorizing judicial decision-making time as a discrete event is an ill fit because this reserve time is a normal part of the criminal trial process and not "extraordinary".[22] The parties are unable to account for judicial decision-making time because they do not know how long a judge will require to reach a decision nor do they have the ability to inquire. Strictly speaking, categorizing judicial decision-making time as a discrete event is not always possible.

21. The difficulty with categorizing judicial decision-making time as a discrete event is demonstrated by the decision in *R. v. Tsega*, 2019 ONCA 111. In *Tsega*, the Court held that it should be open for the Crown to argue that the time taken for its *certiorari* application was a discrete event. However, the Court recognized that this did not fit neatly within the examples of discrete events provided in *Jordan* and held that a broader approach to discrete events was necessary otherwise the Crown would be precluded from taking steps that were consistent with their obligation. Characterizing the *certiorari* application as a discrete event was consistent with public policy imperatives animating the *Jordan* decision.[23]

22. The amount of time it will take a judge to decide an interlocutory motion cannot be predicted. The parties have no ability to schedule all known interlocutory motions and the trial proper to account for the consequent judicial decision-making time. If judicial decision-making time is

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[20] *Cody*, at para. 64.
[21] *Jordan*, at para. 74.
[22] *Mamouni*, at para. 89.
[23] *Tsega*, at paras. 78-81.

not excluded from the presumptive ceiling, then exceptional circumstances should be flexible enough to account for it.

vi. Conclusion

23. All criminal justice system participants are responding to the *Jordan* and *Cody* decisions and efforts are being made to ensure that trials complete within a reasonable time and below the presumptive ceilings. However, despite these efforts there will always be cases that unfortunately do not complete within the presumptive ceilings. In our experience, it is in the *voir dire* stage of the proceedings where delays most frequently occur due to the nature and extent of the issues raised, combined with the application of the jurisprudence to the particular issues for determination.

24. The accused, the Crown, and the justice system as a whole benefit from carefully considered interlocutory decisions which can in effect be the accused's trial. Considered reasons enhance the quality of justice in the criminal process.[24] The inclusion of interlocutory judicial decision-making time within the presumptive ceilings will have the effect of causing judges to provide reasons before they are properly prepared to do so. No one benefits from a rushed judgment.[25]

25. Judicial decision-making time is not immune from s. 11(b) *Charter* scrutiny, the time taken by a judge may cause unreasonable delay and result in a breach of an accused's s. 11(b) *Charter* right. As outlined by the respondent,[26] judicial decision-making time should be assessed on a reasonableness standard that takes into account the nature of the decision to be made in the context of the specific case and the circumstances of the judge. However, due to the nature of judicial delay, judicial independence, and because judicial reserve time cannot be estimated, controlled, or prevented by the parties, the time taken to provide cogent reasons for judgment should not be included within the *Jordan* presumptive ceilings.

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[24] *R. v. Lamacchia*, 2012 ONSC 2583.
[25] *Mamouni*, at para. 92.
[26] Respondent's Factum, at paras. 78-85

B. Alternative Remedies

26. The respondent argues that if this Court determines that the appellant's s. 11(b) *Charter* right was breached, this Court should revisit its own jurisprudence which has held that a stay of proceedings is the only available remedy for a s. 11(b) *Charter* breach. The DPP submits that the Court should decline the respondent's invitation and should consider the issue only in a case where it squarely arises, with the benefit of full submissions by all parties and with the benefit of considered reasons from a court below.[27]

27. In this case, the issue has been raised for the first time in this Court as an alternative position. It was not raised in the courts below by either party, or by the appellant in this Court. Had the issue been raised earlier, there may well have been other intervention applications.

28. Overruling precedents of this Court is not a step to be undertaken lightly;[28] it is uncommon and the Court proceeds with caution when deciding to do so.[29] Whether this Court should chart a new course and determine that alternatives to a stay of proceedings can be considered is a significant issue which will have an immense impact on s. 11(b) *Charter* litigation. In a future case, if this Court is inclined to consider whether alternative remedies should be available, the Court should be in a position to offer guidance and provide a proper framework for the parties. Without this important guidance, more court time and judicial resources will be required for s. 11(b) *Charter* litigation. This is antithetical to one of the goals of the *Jordan* decision.

29. The Canadian criminal justice system is still reacting and adapting to the *Jordan* and *Cody* decisions and appellate courts have not yet had the opportunity to consider any cases that do not involve some aspect of the transitional exceptions. The law should be permitted to develop as it ordinarily would before this Court determines this issue. In due course, the Court will be in a far better position, after the courts below have more fully grappled with the *Jordan* framework, to properly assess whether the jurisprudence should be overruled.

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[27] *R. v. Gill*, 2018 BCCA 144 at para. 9.
[28] *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3, at paras. 56, 130.
[29] *Canada v. Craig*, 2012 SCC 43, [2012] 2 S.C.R. 489, at para. 26; *R. v. Salituro*, [1991] 3 S.C.R. 654.

PART IV: SUBMISSIONS AS TO COSTS

30. The DPP does not seek any costs and makes no submissions as to costs.

PART V: ORDER SOUGHT

31. The DPP takes no position on the relief to be granted in this appeal.

All of which is respectfully submitted this 23rd day of July, 2019.

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John Walker and Shelley Tkatch
Counsel for the intervener, Director of Public Prosecutions

PART VI: TABLE OF AUTHORITIES

Judgments	**Paragraphs Cited**
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