File No. 39267

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF QUEBEC)

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

J.F.

Respondent

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PART I – OVERVIEW AND STATEMENT OF FACTS

1. Retrials cause unique hardships for accused persons. They are put through a new round of prolonged stress, expense and dispruption to their lives, through no fault of their own. In many cases, a retrial will effectively double the amount of time that an accused is required to be subject to either bail terms or pretrial detention and will also significantly increase their legal bills. All of this is to say nothing of the psychological toll of going through multiple trials. Where, as in this case, the first trial results in an acquittal, the accused is strapped to a rollercoaster, first believing his ordeal to be over, only to later be informed that, due to a judge's legal error, he has to go through the whole process again. Whereas rules against double jeopardy prevent appellate review of acquittals at all in many jurisdictions, Canada, by contrast, grants the Crown the most liberal appeal rights "among the major English-speaking common-law jurisdictions",[1] a peculiarity that – at minimum – demands a systemic commitment to reducing associated delay. Even where a first trial results in a conviction that is then overturned for legal error, the blame still does not lie with the accused. In all cases, fairness dictates that retrials proceed with dispatch.

2. The law should therefore create incentives to minimize the resulting prejudice to the greatest extent possible. It is not sufficient for a retrial to proceed at the same speed as the first trial. The retrial must have scheduling priority and must proceed on an expedited basis, subject to waiver by an accused. A much reduced presumptive ceiling must therefore apply to retrials. Additionally, courts hearing s. 11(b) applications in retrial cases should be cognizant, not just of the retrial delay, but also of the *global* delay since the start of the prosecution, as the latter represents a significant part of the actual prejudice suffered by the accused. Where relevant, and where the retrial delay does not in and of itself exceed the reduced presumptive ceiling that the Criminal Lawyers' Association ("CLA") urges the Court to adopt in this case, the courts should proceed to also consider the global delay in the case.

3. On the issue of whether the failure to bring an 11(b) application during the first trial precludes an accused from complaining about that period of delay at a subsequent retrial, the CLA argues for the right of all accused persons to benefit from an acquittal without thereby relinquishing their right to a trial within a reasonable time. Where an accused seeks an acquittal and this acquittal

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[1] *R. v. Evans,* [1993] 2 S.C.R. 629, pp 645-646.

either does not materialize or is overturned on appeal, there should be no suggestion that the accused has thereby waived his or her right to seek a stay of the proceedings on the basis of delay. Any different approach would deprive the accused of fundamental rights. Moreover, the suggestion that judicial resources are best conserved by deeming the first trial delay to have been waived is a red herring that ought not be countenanced by this Court.

4. The CLA takes no position on the facts of this case.

PART II – STATEMENT OF POSITION ON THE QUESTIONS IN ISSUE

5. The CLA submits as follows regarding the issues on appeal:

i. The scheduling of retrials should be prioritized;

ii. It is important that courts have the ability to consider the *overall* delay during which an accused person is awaiting trial, whether in the first instance or on a retrial; and

iii. The failure to bring a stay application for unreasonable delay during the first trial should in no way be said to constitute a waiver of the right to be tried within a reasonable time in respect of that initial period of delay.

PART III – STATEMENT OF ARGUMENT

A. Retrials Should Be Prioritized

6. Retrials can and should be scheduled quickly following the appellate ruling.[2] It is therefore necessary to incentivize a prompt retrial in all cases, even where the first trial proceeded promptly. This can be achieved either (1) by way of a standalone ceiling for the retrial, above which the delay will be presumptivey unreasonable, or (2) by permitting the accused to establish that the retrial took markedly longer than it should have in the circumstances of his or her case. The latter approach was adopted in *K.G.K.*[3] with respect to verdict deliberation time.

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[2] Many courts have recognized that retrials must be prioritized: see, for instance, *R. v. MacIsaac*, 2018 ONCA 650 ("***MacIsaac***") at paras 59, 65; *R. v. J.A.L.*, 2019 ABCA 415 at para 14; *R. c. Boisvert*, 2014 QCCA 191 at para 51; and *R. v. Bowers*, 2017 NSPC 21 at paras 53 and 105.

[3] *R. v. K.G.K.*, 2020 SCC 7 ("***K.G.K***").

7. The reasons which led a majority of the Court to decline to implement a new standalone ceiling for youth in *K.J.M.* do not apply to retrials. In particular, the Court was concerned about opening the door to a multiplicity of constitutional ceilings depending on "the unique level of prejudice experienced by the particular category or subcategory of persons in question" – after youth generally, youth in pre-trial custody, adults in pre-trial custody, persons who experience heightened memory loss, and so on.[4] But just like the *Jordan* ceiling, the retrial delay ceiling would apply equally to *everyone*. It would also more directly serve *Jordan*'s purpose of doing away with a framework that was "too unpredictable, too confusing, and too complex" for courts to apply.[5] It would simplify and streamline the 11(b) framework for retrial delay.

8. If a standalone ceiling for retrial delay is adopted, this ceiling should be *substantially* shorter than the 18 and 30 month presumptive ceilings applicable to first trials.[6] If this Court decides to adopt a more flexible approach, such as one analogous to that set out in *K.G.K.* with respect to verdict deliberation time,[7] it should nevertheless make clear that retrials are expected to move quickly and that time periods which might be well under the *Jordan* ceilings for first trials can still be markedly longer than what is necessary for a retrial.

9. Many of the sources of intake delay which affect how quickly first trials can be scheduled either do not exist or are substantially reduced in the context of retrials. Disclosure will already have been prepared, in many instances the case will have already been pretried in advance of the first trial (and, in any event, the experience of the first trial itself will provide even greater insight into what to expect in a retrial), and both Crown and defence should already be familiar with the evidence and have formulated their respective theories of the case. Subject to waiver by the defence, there is no reason why parties should not be ready to set retrial dates almost immediately following the appellate court's decision. The crux of the delay in retrials is thus, for all intents and purposes, tantamount to institutional delay: the length of time it will take the trial court to accommodate the new trial. Given the need for courts to prioritize retrials, this institutional delay should be minimal, and should not differ as between the provincial court and superior court.

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[4] *R. v. K.J.M.*, 2019 SCC 55 ("***K.J.M.***") at para 65
[5] *R. v. Jordan*, 2016 SCC 27 ("***Jordan***") at paras 32-38; *K.J.M.*, *supra*, at para 43.
[6] See *MacIsaac*, *supra*, at paras 27-28, 59; *R. v. Crant*, 2018 ONSC 1479 at paras 18-19; *R. v. J.E.V.*, 2019 ABCA 359 at para 38; *R. v. Fitts*, 2015 ONCJ 746, at paras 20-22 ("***Fitts***").
[7] *K.G.K.*, *supra*.

10. Prior to this Court's decision in *Jordan*, "administrative guidelines" were used to assess the reasonableness of institutional delay between "when the parties were ready for trial to when the system could accommodate the proceeding."[8] These guidelines provided for periods of "eight to ten months in the provincial court and a further six to eight months after committal for trial in the superior court."[9] As both Crown and defence should be ready to set retrial dates without delay, institutional delay should be the only major source of delay for retrials and the administrative guidelines from the pre-*Jordan* case law are therefore of assistance in determining how long retrials should take. Moreover, while the administrative guidelines provided for longer periods of institutional delay for first trials in the superior court, this distinction does not apply in the retrial context. There is no reason that retrials in superior court should take any longer than retrials in provincial court. Following an appellate ruling, counsel can move directly to setting retrial dates in superior court without any need to first go through the intake process (including conducting a preliminary inquiry) in provincial court.

11. As such, the pre-*Jordan* administrative guidelines for superior court trials, which limited institutional delay in the superior court to six to eight months, are an appropriate ceiling for how much delay is reasonable in the retrial context. Retrials should normally proceed more quickly than first trials, and thus more quickly than the eight to ten months *Morin* provided for in respect of institutional delay in the provincial court. Scheduling retrials – in particular when an accused is in custody – should be the *first* priority of Crowns and trial coordinators, even before scheduling substantially delayed first trials, because, in most cases, accused being retried will have experienced the greatest total delay and therefore the greatest total delay-based prejudice. Accused persons scheduling retrials should receive the very first trial dates available, resulting in shorter periods of institutional delay than those set out in the administrative guidelines applicable to the provincial court.

12. While the various actors in the criminal justice system are undoubtedly well meaning, experience has shown that these actors respond to incentives, and that clear standards mandating speed are the only thing likely to have the effect of significantly expediting the retrial process. The *Jordan* framework has worked well in the context of single trials and has led to appropriate

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[8] *K.J.M.*, *supra*, at para 41; *R. v. Morin*, [1992] 1 S.C.R. 771 ("***Morin***"), pp 794-795.
[9] *K.J.M.*, *supra*, at para 41; *Jordan*, *supra*, at para 31, *Morin*, *supra*, at p 801.

prioritization of trial scheduling based on the need to have matters heard in advance of the presumptive ceilings. Whatever framework this Court adopts in the retrial context should be both clear and strict enough to create an overriding incentive to prioritize the scheduling of retrials. As discussed, this additional protection is warranted given the psychological – never mind financial – toll that the mere fact of having to undergo a second trial represents for an accused person. A retrial occasions inherent hardship on an accused, irrespective of how long the first trial took and retrials can and should therefore proceed more expeditiously in all cases, subject to waiver by the accused.[10]

B. It Is Important That Courts Have the Ability to Consider the *Overall* Delay

13. It is also important that Courts have the ability to consider the overall or combined delay attributable to the original trial and any subsequent retrials. The issue of overall delay can be addressed either by way of a global delay ceiling (in addition to the standalone ceiling for retrial delay[11]) or by making a too-lengthy global delay a factor to be considered as part of a more flexible test for assessing whether the retrial took markedly longer than it should have. In the former case, a standalone ceiling for retrial delay and a global ceiling for total delay would each have an important role to play and would therefore be complementary. While all retrials should be heard as quickly as possible due to the unique hardships they cause (and all retrials should proceed substantially more quickly than first trials), retrials in cases where there has already been substantial first trial delay should be afforded the absolute *highest* scheduling priority, as it is in these cases where accused persons have suffered the greatest prejudice. While this priority scheme is both fair

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[10] If an accused for instance seeks to retain new counsel for the retrial, the accused may well waive the delay in order to allow his new counsel to be retained and to have time to prepare.

[11] A standalone ceiling for the retrial remains important given the inherent hardship that any retrial occasions – even where the initial trial proceeded promptly – and in order to incentivize the speedy scheduling of retrials. A standalone ceiling is also important *from a practical perspective*: to avoid burdening both the accused and the system with a full record of the delay stemming from the initial trial, where the accused sees no need to complain about the initial delay. In other words, the framework ultimately chosen by the Court should not be one that forces the parties to account for the first trial delay when that period of delay is not contentious.

and intuitive, it is not something that is currently being implemented in any systematic way as a result of uncertainty about how s. 11(b) will be applied in the retrial context.

14. Prior to this Court's decision in *Jordan*, "the bulk of the authorities [held] that where there has been a retrial, the delay calculation 'includes the period when the charge was laid to the completion of the first trial, as well as the period from when a new trial is ordered to the new trial date'".[12] In *Fitts*, Paciocco J. (as he then was) explained the reasoning for this as follows:

> **S. 11(b) is a constitutional assurance that the state will not subject a person charged to "overlong exposure to the vexations and vicissitudes of pending criminal accusation".** Put more simply, section 11(b) recognizes that individuals who are being prosecuted are presumed to be innocent, and that the prosecution process can have significant adverse impact on the liberty interests and personal well-being of those who are charged. Since an accused person facing a retrial will have experienced the adverse effects of the prosecution from the time the charge was initially laid, that entire period should, in my view, be taken into account. This is particularly so given that accused persons are not ordinarily responsible for the need for a second trial. A second trial becomes necessary because of judicial error, or extenuating circumstances requiring a mistrial at the first hearing. Accused persons should not, in my view, be expected to undergo unacknowledged subjection to the stress and challenges of delay simply because, through no fault of their own, the first trial failed to dispose of the matter.[13] [Citations omitted.]

15. An approach which considers global delay will also ensure parity between accused who have suffered similar prejudice. The prejudice faced by an accused will primarily be determined by the overall delay experienced, as opposed to how that delay has been apportioned between different trials. An accused who experiences 40 months of delay will likely not think it especially important whether 17 months were attributable to the first trial and 23 months to the retrial, or vice versa. What matters is the total time during which the accused will have been subjected to "the vexations and vicissitudes of a pending criminal accusation."[14] An approach which fails to account for overall delay, or which wipes the slate clean as of the order for a retrial, not only incentivizes complacency but is also disconnected from the way that prejudice is actually experienced. Where

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[12] *Fitts*, *supra*, at para 5; *R. v. Spencer* [2004] O.J. No. 5463, at para 105 (Ont CJ). See also *R. v. Windibank*, 2017 ONSC 855 at para 61; *R. v. Follows*, 2013 ONSC 7771; *R. v. Konnafis* [1996] O.J. No 3961 (Ont. CJ); *R. v. Owens*, 2008 ONCJ 625, at para 110; *R. v. Barros*, 2014 ABCA 367; *R. v. Dias*, 2014 ABCA 402; *R. v. Nikkel (D.J.)*, 2009 MBCA 8.
[13] *Fitts*, *supra*, at para 5 [Emphasis added]. See also *R. v. Mills*, [1986] SCJ No 39, at para 146.
[14] *Jordan*, *supra*, at para 154.

an accused already incurred substantial delays related to his first trial, a retrial compounds the prejudice suffered by further lengthening the time during which the accused's life is consumed by the trial process and during which he or she cannot make plans for the future. The Crown's position that the slate should effectively be wiped clean as of the order for a retrial ignores this reality and is inconsistent with what justice demands in this context.

C. Accused Persons Do not Waive Their 11(b) Rights by Seeking an Acquittal Instead of a Stay

16. The Crown takes the position that the failure by the accused to complain about the delay in the first trial by way of a stay application ought generally to be deemed a waiver of that time period in the overall calculus. The CLA submits that the Crown position, if adopted, would create difficulties and, most significantly, grave unfairness. An accused person set to be acquitted should be *entitled* to pursue that acquittal without waiving his or her *Charter* rights should that acquittal be overturned on appeal. They should not feel bound to bring an 11(b) stay application merely to preserve their ability to later complain about this period of delay. To force an accused person to choose between an acquittal and a stay – to which the accused might both be entitled to – and to then characterize this as a "strategic" choice, or a complacent one, is a fundamental misconception of cardinal rights including the right to be tried on the merits and have the presumption of innocence be vindicated. It is, respectfully, an offensive proposition.

17. Aside from the inherent value that an acquittal can have from the accused's perspective, in many cases, an acquittal is preferrable to a stay of proceedings for very concrete reasons. For instance, where an accused is also facing concurrent professional discipline proceedings, an acquittal will often be helpful in the ancillary proceedings in ways that a stay of proceedings on the basis of unreasonable delay will not. As such, where the delay in the first trial exceeds the *Jordan* ceiling but defence counsel anticipates an acquittal, defence counsel may well advise the client to seek an acquittal as opposed to bringing a s. 11(b) application. If the accused is in fact acquitted, and that acquittal is then overturned on appeal as a result of a legal error, it would not be fair for the accused, who was not at fault for the delay in the first trial and who will now face additional delay, to be prohibited from raising the first trial delay as a component of his total prejudice.

18. This approach also best meets the goal of addressing complacency. It incentivizes a proactive culture and helps prevent complacency resulting from the Crown being able to turn back the 18- or 30-month *Jordan* clock and get it ticking anew, or otherwise benefitting from a complete erasure of the delay from the first trial – in effect wiping the slate clean irrespective of its own conduct during the first trial process. It also avoids Crown counsel relying on the accused's lack of assertion of his or her s. 11(b) rights as a basis for failing to move the matter forward. The point of *Jordan* was precisely to avoid "on the record" complaints about delay as a necessary precondition to successfully invoking s. 11(b) rights and getting the Crown to discharge its responsibilities.[15] The Crown of course has a duty to move a matter forward *regardless* of the lack of complaint or stay motion on the part of the accused.[16]

19. The Crown argues that to allow an accused person to complain of delay in the first trial for the first time on a retrial is to encourage complacency on the part of the *accused*, and leads to a waste of public resources. The CLA submits that it is incorrect to characterize the fact of the accused *not* introducing an application that could potentially bring an early end to a trial – and to instead allow the otherwise necessary process to play out by putting the Crown to its onus and seeking an acquittal – as a show of complacency or a waste of public resources. Were it not for the potential breach of the accused's *Charter*-protected rights, this same process would have been required to play out. And in many instances, the accused may in fact be *lessening* the burden on the courts by not bringing an application which could well prove unsuccessful, and simply having the case adjudicated on its merits. One cannot predict in advance which of the two it will be.

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[15] *Jordan*, *supra*, at paras 110-112.

[16] *Jordan*, *supra*, at para 112; *R. v. Jurkus and Lonsbary*, 2017 ONSC 1025, at para 43; *R. v. Hundal*, 2009 CanLII 25615 (ON SC) at para 29; *R. v. Askov* (1990), 59 C.C.C. (3d) 449 (SCC) at p 479; *Morin, supra,* at p 23. As this Court stated in *K.J.M.*, *supra*, at para 81: "Prosecutors cannot be content to wait until the 18-month mark is within eyesight before kicking into gear. That is precisely the sort of normalized indifference towards delay that prompted *Jordan*. Rather, they should take active steps from the outset to ensure the matter is dealt with promptly, even if the presumptive ceiling is still far on the horizon."

20. Moreover, the Attorneys General advocating for the accused to be required to bring a s. 11(b) application at the earliest opportunity – failing which delay will be deemed waived – underestimate the number of viable 11(b) applications that are *not* currently brought by the defence. Many considerations may factor into such a decision by the accused, on the advice of counsel. If defence counsel now face the prospect of waiver and thus an allegation of ineffective assistance for failing to bring a *potentially* meritorious 11(b) application, they will have little choice but to bring every such application, including mid-trial when they otherwise would not. This would, of course, be entirely counter-productive to the stated goal of saving court time and judicial resources. It would, in fact, occasion further delay and no doubt inundate the courts with delay applications.

21. There is also little merit to the assertion that the first trial judge is best placed to adjudicate an application for a stay of proceedings based on the first trial delay. The bulk of that delay will relate to intake delays, pre-trial appearances, judicial pre-trials and case management conferences – none of which are within the personal knowledge of the trial judge. Nor does the trial judge have any direct knowledge of the steps taken by the parties and trial coordinators to schedule the trial and any related motions. A s. 11(b) application is adjudicated on the basis of an *evidentiary record* put before the judge by the parties. There is no reason why the second trial judge would be in any different or less advantageous position than the first trial judge to adjudicate the application on the basis of that record. If the Crown wishes to advance any argument related to how the first trial unfolded, it can adduce this evidence as part of its responding record on the application.

22. Finally, the issue of whether delay attributable to the first trial is deemed to be waived, solely by failing to bring a s. 11(b) application in the first trial, is premised on a view that each trial can be siloed and that the prejudice attributable to each trial is discrete rather than ongoing and cumulative. Such an analysis is both strained and has the potential to create unfair and absurd results.

D. Conclusion

23. Whether this Court decides to impose a new presumptive ceiling applicable to retrials that is analogous to the *Jordan* ceilings applicable to first trials,[17] or instead decides to adopt a more

[17] *Jordan*, *supra*.

flexible approach analogous to how verdict deliberation time is analyzed in *K.G.K.*,[18] the CLA submits that the standards should be sufficiently clear and strict so as to incentivize the prompt scheduling of retrials in all cases given the hardships caused by retrials. The accused must also have the opportunity to reference the first trial delay as well as the global delay attributable to all trials together, since the entirety of that delay is captured by the s. 11(b) right to trial within a reasonable time, and it may be the best measure of the actual prejudice suffered by an accused.

PART IV – COSTS

24. The CLA does not seek costs and requests that none be awarded against it.

PART V – ORDER SOUGHT

25. The CLA has been granted permission to present oral argument not exceeding 5 minutes at the hearing of the appeal and does not request a further order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 9th day of August, 2021.

Christine Mainville and Andrew Burgess
Counsel to the Intervener CLA

[18] *K.G.K.*, *supra*.

PART VI – TABLE OF AUTHORITIES

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