R. v. Lin

Ontario Judgments

Ontario Court of Justice

St. Catharines, Ontario

P.H. Wilkie J.

Heard: August 9, 2017.

Oral judgment: August 9, 2017.

Information No. S16-0771

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Between Her Majesty the Queen, and Jin Lin, Xiu Lin, Minh Tong and Zeng Wang

(36 paras.)

Counsel

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RULING ON APPLICATION

P.H. WILKIE J. (orally)

1 The applicants, Jin Lin, Xiu Lin, Minh Tong and Zeng Wang, all charged with production of cannabis, marijuana, applied for a stay of proceedings, pursuant to section 11(b) of the *Charter*.

2 The charge was laid on March 21st, 2016 and the anticipated end of the trial is August

15th, 2017, which is the last scheduled day for the trial. The total delay under consideration therefore is 16 months and 17 days.

3 This application was argued before me on June the 2nd, 2017. At that time, I had substantial doubt that if the matter was fully litigated, it would conclude by the last scheduled day for trial, and for this reason, considered not hearing the application until the end point was identified with more certainty. Both counsel requested otherwise however and given that the materials filed demonstrated an arguable case, I concluded that the potential to free up three days of court time should the application succeed, was worth the risk that the application would be renewed and need to be re-argued, should it fail.

4 The cause of the delay in this case is uncomplicated. It was triggered by the fact that a significant body of late disclosure was provided to the defence a week before the two-day trial was scheduled to begin. The trial had to be adjourned and rescheduled so that a matter that was on track to complete in just under 11 months, now had an anticipated end date a few days short of 17 months.

5 Applying the factors laid down in the Supreme Court of Canada case of *R. v. Jordan*, to the particular circumstances at hand, I find that this period markedly exceeds the reasonable time requirements of the case and that the defence has demonstrated a sustained effort to expedite the proceedings, and that therefore, the defendants have established a breach of their right to be tried within a reasonable time even before the presumptive ceiling has been reached.

6 An overview of the timelines and significant events in the progress of the case are quite straightforward.

7 The applicants were all found working at a commercial grow operation in Niagara-On-The-Lake at the time a warrant was executed at the premises. According to the Crown synopsis, the site in question was the subject of three personal production licences and one designated-person production licence. As I understand it, the issues on the trial would centre on whether the production being carried out was in accordance of the terms of the licences, and if not, whether the applicants knew that to be the case.

8 They were arrested and charged on March 21st and released the next day. By the time of their next appearance on April 28th, all had retained a single counsel to represent their interests. By the time of the next appearance on May 26th, the disclosure had been received.

9 The local process then required a Crown pre-trial and a judicial pre-trial. The Crown

pre-trial was done four days later on May 30th and the judicial pre-trial conducted on July 22nd. At the judicial pre-trial, the defence indicated the matter would proceed to trial at the Ontario Court of Justice and that they would concede date, time, jurisdiction and the nature and continuity of the drugs. The Crown said they would call eight witnesses. Trial time was estimated for two to three days.

10 Both parties were apparently ready to set a date at that point, but the judicial pre-trial judge asked the defence, as a precaution, to have their clients obtain independent legal advice, to ensure there would be no conflict with one counsel representing all. The defence position was that there was no conflict, but they obviously agreed to adjourn the case to comply with the Court's direction. The independent legal advice confirming the lack of a conflict was promptly arranged, and on September first, the parties attended court to set the date.

11 Two days were set for trial; February 16 and 17, 2017. It was noted that both Cantonese and Mandarin interpreters would be required. These dates, I should note, were consistent with the current time to trial experience in this jurisdiction, which is five to six months for multi-day matters.

12 As indicated, however, the trial did not proceed on that date and had to be adjourned because of the vast amount of additional disclosure, which was turned over to the defence one week prior, on February 9th. The disclosure consisted of 5,550 videos files, taken from 38 days of video surveillance at the greenhouse where the defendants were arrested. It was material which had been in the hands of the police since the day of the arrests, but which apparently had only recently been provided to the Crown. The Crown made it clear that it intended to rely on the images captured as a means of proving the case against the defendants.

13 In the circumstances, the defence had no alternative but to seek an adjournment, to review and assess this material. And the Crown, given they intended to rely on it to prove the case, had no real alternative but to consent to the adjournment and concede that the delay was as a result of late disclosure. Which is precisely what they did and said on the return of the application. Indeed, Crown counsel went so far as to acknowledge that the new material dramatically changed the complexion of the case. In his words, the new disclosure represented a "paradigm shift" for the defence, in responding to the charges.

14 In their submissions on this application several months later, the Crown took the position that the adjournment of the trial was not only the responsibility of the defence, but a strategic decision calculated to delay the trial. This argument is completely

unmeritorious, and given the totally contrary position taken at the time of the application, is also somewhat disingenuous.

15 The only strategic decision that flowed from the late disclosure was made by the Crown. Until shortly before the trial, they were obviously prepared to prosecute the case without the newly-disclosed evidence. Once made aware of it, they decided that the need to rely on it to prove their case outweighed the risk associated with the inevitable trial delay.

16 The Crown also seemed to suggest in supplemental submissions presented after the Supreme Court of Canada released their decision in *R. v. Cody*, that the emergence of this new disclosure somehow qualified as a discreet event, brought about by an inadvertent oversight that caught the Crown unaware. This argument completely mischaracterizes the situation. What was at issue here was relevant evidence that the police had seized on the day of the arrests some 10 months earlier. Not only was there no suggestion at the time of the adjournment that the explanation for the disclosure over 10 months later, showed it to be a reasonably unavoidable or unforeseeable event, but rather, in fact, there was a total absence of any explanation whatsoever offered by the Crown for this turn of events at all. The same can be said for the Crown's written submissions in response to the delay application; not a word of explanation for why it took so long.

17 Indeed, it would seem that there would never have been an explanation of any sort to account for the timing of the disclosure, had the Court not directly asked Crown counsel about this during oral submissions. It was then and only then that the Court received confirmation that the police had seized the video surveillance evidence on the day of arrest; that the OIC waited until January 9th, to apply for a warrant to search the system; that he did not do it sooner because, in the words of the Crown, other investigations took priority; that the warrant was granted the same day and the material assessed by the Niagara Regional Police video analyst on January 11th; that it was turned over to the Crown on January 19th and then to the defence on February 9th. Even then, there was no explanation provided for the delay by the Crown in alerting the defence to the new disclosure, or in failing to use the time available to it, to narrow the material to see if the trial date could be salvaged.

18 It was apparent therefore that the delay of this trial stemmed from the failure of the Crown and police to communicate, which in turn meant the prosecution failed in their obligation to provide timely disclosure to the defence. Whether the Crown was made aware that potentially relevant video evidence had been seized and failed to follow up on it, or whether their first knowledge that the material might exist came in early January with the video warrant application, it all amounts to the same thing; namely, that the actions or

non-actions of state actors derailed the trial that was otherwise on track to be dealt with within a reasonable time.

19 To argue, as the Crown seems to do on their written submissions, that notwithstanding what the police failed to do, the Crown acted responsibly, is to betray a fundamental misunderstanding of the necessary interplay between these two entities in the disclosure process.

20 It was common ground between the parties at the time of the adjournment, that the new disclosure profoundly altered the case that the defendants had to meet and that a further JPT was needed. This happened on March 7th, at which point, it was determined that the trial would now take three days. In addition, the changes in the case the defendants had to defend against caused them to bring a section 8 application to challenge the grounds for the issuance of the warrant. They also advised that, in light of the delay, there would be an 11(b) application.

21 Accordingly, when the new dates were set on March 23rd, June 1 and 2 were fixed for pre-trial motions and August 9, 10, portions of August 11 and 15, for the three days of trial.

22 It is worthy of note that the defence filed their material in support of the *Charter* motions in a timely manner. The Crown did not file their response to the 11(b) motion until May 30th, and to the section 8 motion, until May 31st, the day before the scheduled hearing dates. In neither case did the Crown apply to abridge the time for filing or make any explanation for this obvious breach of the Rules in their written or oral submissions. The defence argued that the Court would be justified in disregarding the Crown submissions on the issue. I did not do so, but considered that the unexplained nonchalance of the Crown in this regard, informs the bird's eye view that I am required to take of the case.

23 When the matter came before the Court on June the first for pre-trial motions, the matter could not proceed because the services of interpreters, which had been ordered, could not be secured. The court day was therefore lost, and on the following day, there was only time for the 11(b) motion to be argued. The section 8 motion was adjourned to the commencement of the trial in August, putting in peril the prospect that the case would conclude as scheduled on August 15th. This was the reason for the Court's concern referred to earlier, that the trial would not end on the last scheduled day.

24 Applying the principles of *Jordan* to these circumstances gives rise to the following

findings:

> I would note first that, while this is a transitional case commencing before the *Jordan* judgment was released, it is barely so. The parties were operating with the knowledge of the new *Jordan* framework during the significant events leading up to the trial including the JPT. The operative period of delay and the events that triggered came well after the *Jordan* decision. And in any event, neither party in this case have pleaded reasonable reliance on the law as it previously existed, in justification of their actions.

25 The total delay from charge, (March 21, 2016) to the end or anticipated end of the trial, (August 15th, 2017) is 16 months and 25 days.

26 I am satisfied that there is no defence delay to be deducted, that is, no delay waived and none caused by defence conduct. With regard to the latter concept, I cannot accept the Crown assertion that the 40-odd days of delay in setting the trial date, while the defence arranged for independent legal advice for the accused, can possibly be considered the kind of illegitimate defence delay that is referred to in *Jordan*. This was not delay caused solely by the defence. It was action that the defence did not consider needed to be taken, but was required to take, at the direction of the Court. The defence position that there was no conflict was quickly borne out, and indeed, the fact that the Court request was so swiftly complied with can be seen as part of the defence effort to expedite the proceedings.

27 The total delay being below the presumptive ceiling, the onus is on the defence to show that it is unreasonable. To do so, they must establish that the case has taken markedly longer than it should have and that the defence demonstrated a sustained effort to expedite the proceedings. As I've indicated, I have no hesitation in finding that they have satisfied both prongs of the test.

28 This is a case of modest complexity, requiring the Crown to prove a valid search of a single premise on a single day, and involvement of the accused in the knowingly-unlawful production of drugs found there. As I understand it, the search warrant information was not complicated and involved no confidential informant. The trial estimate form (that is, the second one, prepared for the second trial date and factoring the new disclosure) indicates five Crown witnesses, including one on the *Garofoli* application. In setting aside two days for the motions and three for the trial, the trial coordinator no doubt factored in additional time due to the need for interpreters.

29 The first trial date involved total delay of just over 10 and a half months from the date of the charge, which is typical of cases of this nature in this jurisdiction. This is based on

the intake period of four to five months and time to trial from 'set date' (as was the case in both instances here) of five to six months. This timeframe would not have been markedly different, even had all the disclosure been made at the outset and the case proceeded in the first instance as a four to five day trial.

30 It should go without saying in this connection, that the prosecution did not do its part to ensure the matter proceed expeditiously. Quite apart from the police misconduct in sitting on a significant body of evidence for over 10 months, the Crown who received the disclosure just over a month before the trial, failed to make any attempt to salvage the trial or avoid delay by summarizing the evidence or particularizing what they intended to rely on. Interestingly enough, it appears this was done but not until after they conceded the trial had to be adjourned. And, of course, it is clear that it was open to the Crown to attempt to avoid any delay at all by offering to proceed with the trial without the reliance on the new disclosure. The proactive approach to preventing delay, as referred to in *Jordan*, was not engaged here.

31 Taking an overall view of the case, it is beyond question that the reasonable time requirements of this case markedly exceeded by five to six months. I'm also satisfied the defence took meaningful and sustained steps, including some taken prior to the release of *Jordan*, to expedite the trial.

32 Counsel was retained by all promptly, by the time of the first appearance following bail. To further streamline the proceedings, they ascertained early in the process that they were not advancing inconsistent defences and agreed to be represented by a single counsel. They elected trial in the Ontario Court of Justice, giving up their right to a preliminary hearing. They made concessions on matters of proof, dispensing with the need for the Crown to prove the nature and continuity of the drugs in question and the identity of the defendants. As noted earlier, they were cooperative and responsive to the Court's request to get independent legal advice, arranging this on behalf of four non-English-speaking defendants in just over a month. At the first pre-trial, after the trial was adjourned, they put the Crown on timely notice that they perceived the delay to be a problem, and in contrast to the Crown, filed their materials in relation to their application in a timely manner. Finally, I have nothing before me on this record to suggest that they did not accept the earliest possible trial dates. I am satisfied there is nothing more the defence could reasonably have done to move the case along or to get it heard more quickly, and certainly, nothing they did do that was inconsistent with the desire for a speedy trial.

33 As the Supreme Court of Canada said in *Jordan*, in setting the 18 month presumptive ceiling, it is not an aspirational target. It is well beyond the guidelines set down in *Morin*.

34 This is a clear example of the culture of complacency at work, where indifference and inattention by the police to their constitutional obligation to provide timely disclosure of relevant evidence, stopped the case in its tracks and where the Crown then declined to take any measures to attempt to mitigate or avert the resulting delay.

35 I am satisfied that the defence has met the onus of establishing that the prospective delay of 16 months and 25 days in this case, is unreasonable. The charge is stayed against all four defendants.

36 You are all free to go. Thank you.
