NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Ellis*, 2020 NSCA 78

Date: 20201209
Docket: CAC 491916
Registry: Halifax

Between:

Her Majesty the Queen

Appellant

v.

Jordan Michael Ellis

Respondent

Restriction on Publication: pursuant to s. 486.4 of the *Criminal Code*

Judge:	The Honourable Justice Anne S. Derrick
Appeal Heard:	September 9, 2020, in Halifax, Nova Scotia
Subject:	Criminal Law. Section 11(b) delay analysis. *R. v. Jordan*. Standard of Review.
Summary:	The Crown appealed a judicial stay based on unreasonable trial delay. The trial judge applied *R. v. Jordan*, 2016 SCC 27, and found the respondent's trial had exceeded the eighteen-month presumptive ceiling for trials in Provincial Court. The respondent was charged on May 30, 2017. The evidence and submissions in his trial concluded on August 22, 2019. The trial judge found the central issue was the amount of delay for which the defence was responsible. Some of the delay, while the respondent sought to retain a new lawyer, was conceded to be defence delay. The trial judge found there was no defence waiver of delay otherwise. He concluded that two significant events contributed to the delay that resulted in the presumptive ceiling being exceeded. These events were (1) the double-booking of the original trial date which meant the

respondent's trial could not proceed; and (2) the failure of the Crown to disclose documents from the investigation that were in the possession of the police.

Issues: Did the trial judge err in his characterization and allocation of delay? Did the trial judge fail to consider remedies short of a judicial stay?

Result: The appeal was dismissed. The trial judge correctly articulated and applied the relevant law. His findings of fact, categorization of the periods of delay, and allocation of responsibility were entitled to deference. His findings were reasonable and not tainted by palpable and overriding error. He made no error entering a stay of proceedings, the only remedy that has ever been applied to vindicate an accused's right to a trial within a reasonable time.

NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Ellis*, 2020 NSCA 78

Date: 20201209
Docket: CAC 491916
Registry: Halifax

Between:

Her Majesty the Queen

Appellant

v.

Jordan Michael Ellis

Respondent

Restriction on Publication: pursuant to s. 486.4 of the *Criminal Code of Canada*

Judges:	Beveridge, Bryson and Derrick, JJ.A.
Appeal Heard:	September 9, 2020, in Halifax, Nova Scotia
Held:	Appeal dismissed, per reasons of Derrick, J.A.; Beveridge and Bryson, JJ.A., concurring
Counsel:	Erica Koresawa, for the appellant Zebedee Brown, for the respondent

Order restricting publication — sexual offences

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 from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day; or

(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).

Mandatory order on application

(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.

Reasons for judgment:

Introduction

[1] This Crown appeal concerns whether the trial judge, Judge Alan Tufts, erred in finding a violation of Mr. Ellis' right to a trial within a reasonable time, and staying the proceedings against him.

[2] In making his ruling, Judge Tufts applied *R. v. Jordan*, 2016 SCC 27, which established that compliance with s. 11(b) of the *Charter of Rights and Freedoms* requires the completion of trials in Provincial Court within eighteen months. That outer limit was referred to in *Jordan* as the "presumptive ceiling".[1] A delay above this ceiling is presumptively unreasonable.

[3] Whether the "presumptive ceiling" has been exceeded involves calculating the total delay from the date an accused is charged to the end of evidence and submissions (*R. v. K.G.K.*, 2020 SCC 7, at para. 31) minus delay that can be attributed to the defence (*Jordan*, at para. 47). Defence delay may be the result of waiver and/or defence conduct. If the net delay (total delay less defence delay) exceeds the presumptive ceiling, then exceptional circumstances, complexity or the transitional nature of the case[2] may justify the delay. The Crown is not suggesting those considerations were relevant in Mr. Ellis' case.

[4] In reaching the conclusion that Mr. Ellis' s. 11(b) right had been breached, the trial judge used the framework set out in *Jordan* for analyzing delay. The *Jordan* framework for this case was fairly straightforward. The trial judge was asked to determine how much of the delay lay at the feet of defence as a result of defence waiver.

[5] On appeal, the Crown argues the trial judge should have attributed more delay to the defence, including for reasons other than waiver. It is the Crown's submission that had he done so, the presumptive ceiling would not have been exceeded and a judicial stay of the proceedings would not have been warranted.

[6] I do not agree the trial judge's analysis was flawed and would dismiss this appeal. In the course of explaining my reasons, I will describe how Mr. Ellis' trial unfolded and the difficulties created by trial Crown's failure to provide timely or

[1] Trials in superior courts have a presumptive ceiling of thirty months.
[2] This was not a transitional case, that is a case where the charge had been laid before *Jordan* was decided.

complete disclosure. I will also use the opportunity provided by this appeal to clarify this Court's view of the appropriate standard of review in s. 11(b) appeals.

Roadmap to these Reasons

[7] On May 30, 2017, Mr. Ellis was charged with sexual assault pursuant to s. 271 of the *Criminal Code*. His trial started on February 8, 2019. On June 12, 2019, he made a motion for a stay of the proceedings due to unreasonable delay. The trial judge rendered his decision on August 22, 2019, following oral submissions.

[8] Before reviewing the trial judge's decision, I will first describe in detail the timeline of the case. I will set out the grounds of appeal and discuss the applicable standard of review for s. 11(b) appeals. I will then address the issues, including whether Mr. Ellis' fresh evidence application should be allowed. My analysis and conclusions will follow.

The Timeline of the Case

[9] **May 30, 2017** – Mr. Ellis was charged with sexual assault. He and the complainant had gone on a date. He told police there was consensual sexual intercourse. The complainant said he had raped her.

[10] **June 26, 2017** – Counsel from Nova Scotia Legal Aid appeared for Mr. Ellis in Annapolis Royal Provincial Court requesting an adjournment to allow for the issuance of a Legal Aid certificate. The reading of the charge was waived and the Crown elected to proceed by indictment. A return date of July 24, 2017 was set.

[11] **July 24, 2017** – Legal Aid counsel confirmed that a lawyer in private practice, Chris Manning, as he then was, had accepted the Legal Aid certificate. The matter was put over to July 27.

[12] **July 27, 2017** – Chris Manning appeared with Mr. Ellis before Judge Timothy Landry and an election was made for a trial in Provincial Court. Mr. Ellis entered a plea of not guilty. The court was asked to schedule a half-day trial.

[13] February 28, 2018 was offered by the court for trial. It worked for the Crown's schedule, but was not feasible for Mr. Manning as he had court in Kentville that day. March 14, 2018 was accepted by both Crown and defence. Mr. Manning told Judge Landry it was essentially a two-witness trial with no need for a pre-trial.

[14] **December 13, 2017** – The Crown made an adjournment request. No reason was given. The matter was set over to January 11, 2018 so Mr. Manning could be present to set a new date.

[15] **January 11, 2018** – The Crown explained that when Mr. Ellis' trial was set for March 14, the date had been double-booked. It was thought the other case would resolve, but it did not. As a consequence, there was not going to be time for the Ellis trial and it would have to be re-scheduled.

[16] The Crown and defence indicated a preference for a date before the end of June for a 3-hour trial. Judge Landry said there was "no chance" of that which prompted Mr. Manning to say: "I think I really need to speak to Mr. Ellis".

[17] The parties were directed to return on January 24 to set a new trial date. Judge Landry told them, "I might be able to come up with other options".

[18] **January 24, 2018 –** Mr. Ellis was present. The Crown had looked at the docket and sent a proposed date to Mr. Manning, but it was not workable for him. Judge Landry asked if there are "any *Jordan* concerns here…" Mr. Manning replied: "No, I don't think so."

[19] The judge advised counsel there was nothing available before the end of June, Mr. Manning's preferred time[3]. Mr. Manning said, "I think we'll have to set a date and we'll have to make other arrangements". In response to the judge saying "I don't think we have anything available", Mr. Manning replied: "Okay. That's fine. I spoke with Mr. Ellis about that." August 16, 2018 was then set for a half-day trial.

[20] **August 16, 2018 –** Defence counsel appearing for Mr. Ellis advised that since Mr. Manning's appointment to the Bench, Mr. Ellis and his family had been "diligent" but, to that point, unsuccessful in their efforts to find replacement counsel. An adjournment to September 17 for setting a new trial date was requested.

[21] Crown counsel expressed concern about the delay, saying "but we certainly understand Mr. Ellis's situation". He acknowledged that, "It's not like Mr. Ellis has been sitting around doing nothing…" and mentioned some of his unsuccessful

[3] It became apparent later that Mr. Manning was intending to retire from the practice of law at the end of June 2018. What transpired instead was his appointment as a judge of the Provincial Court in early June.

efforts to get a new lawyer. Crown counsel then "reluctantly" agreed to the adjournment.

[22] **September 17, 2018** – Mr. Ellis appeared, unrepresented. He advised Judge Landry that he had been told Zeb Brown would be attending court with him. The judge set the matter over to October 3 for Mr. Ellis to get in touch with Mr. Brown.

[23] **October 3, 2018** – The Crown confirmed that Mr. Brown would be representing Mr. Ellis but was not available for court. Mr. Brown wanted the matter put over so he could go through the disclosure and talk to Mr. Ellis. October 25 was scheduled to set a trial date.

[24] **October 25, 2018** – Mr. Brown appearing for Mr. Ellis told Judge Landry two days were needed for trial. The trial was set for February 8 and 15, 2019.

[25] **February 6, 2019** – Crown and defence attended by telephone with Judge Tufts ("the trial judge"). Mr. Brown was seeking an adjournment of the trial due to having very recently received further disclosure, on January 30, 2019. He advised he needed time to prepare for trial.

[26] In a review of the chronology of the case, the Crown indicated that in April 2018 it was learned that Mr. Manning had forwarded the disclosure to Ray Jacquard who was going to be taking over Mr. Ellis' representation. (Mr. Manning had been divesting himself of files with court dates past the end of June 2018 because of his plan to retire.) In July, the Crown contacted Mr. Jacquard's office and discovered that he was not representing Mr. Ellis. The disclosure had not been returned to the Annapolis Royal Legal Aid office. It was still in Mr. Jacquard's office from which Mr. Brown got it in mid-October, 2018.

[27] Mr. Brown advised he had sent a request to the Crown on January 7, 2019 for additional disclosure. This included CCTV footage from local businesses that had been obtained by the police, photographs of Mr. Ellis' motor vehicle, email attachments, and the Informations to Obtain (ITO's) for three search warrants, none of which had been disclosed to the defence. Crown counsel told the trial judge it was "simply not noticed that these items had not been included" in the original disclosure.

[28] Crown counsel opposed the February 6, 2019 adjournment request. He described the disclosure request as late and for "some marginally, possibly relevant material".

[29] The trial judge proposed that the February 8 trial date be used for a *voir dire* on the admissibility of the accused's statement. Mr. Brown said he wanted to view the surveillance videos, one of which no one had been able to open. He had also requested two photographs the Crown was trying to locate. These were photographs of Mr. Ellis downloaded by the complainant from social media and forwarded to police.

[30] It was agreed that Mr. Ellis' trial would start on February 8 with the statement *voir dire*. The complainant's testimony would be heard on February 15.

[31] **February 8, 2019 –** Defence waived the statement *voir dire*. Voluntariness was admitted. The video of Mr. Ellis' statement was played.

[32] Mr. Brown addressed disclosure. Although identity was not in issue, Mr. Brown wanted disclosure of a photo of Mr. Ellis and a screenshot of his Facebook profile which the complainant had provided to police, as "a matter of our due diligence". Mr. Brown said, "It's not a hill that we want to die on". The Crown explained that once they located Mr. Ellis, they did not retain the email from the complainant attaching the photos that were sent to assist in finding him.

[33] Of more significance to the defence was the disclosure of photographs taken three weeks after the incident during a search of Mr. Ellis' Honda Civic. Mr. Brown said the photos were the best evidence of what the interior of the car looked like. There was no dispute that sexual contact had occurred in the front seats. Crown counsel said it was likely the defence wanted to use the photographs to cross-examine the complainant on the improbability of non-consensual sex in such a confined space.

[34] Crown counsel advised he did not have the photographs. He had asked the police investigator in charge of the file to find them or explain why they weren't available.

[35] **February 15, 2019** – Although the complainant was present for the purpose of testifying, no evidence was heard. Mr. Brown advised the trial judge the car photographs had not been found. Mr. Brown wanted to be able to confront the complainant with the photographs.

[36] After a recess, Crown counsel indicated the IDENT officer had taken 83 photographs that could be made available within a few days.

[37] The trial judge agreed with Mr. Brown that he should at least have the opportunity to look at the photographs. Crown counsel was to speak to the complainant about coming back for her testimony another day. Mr. Brown said the defence took, "no position" on the trial going over to another day for the direct and cross-examination of the complainant.

[38] The trial judge granted an adjournment to February 28 to accommodate the complainant's preference of having direct and cross-examination dealt with on the same day.

[39] **February 28, 2019** – The complainant testified. Mr. Brown had her look at the car photographs during cross-examination. The Crown closed its case. The defence elected not to call any evidence.

[40] The trial judge ordered a transcript of the evidence and set April 4 for final submissions. He scheduled May 10, 2019 to render his decision.

[41] On March 10, Mr. Brown requested disclosure of the SANE (Sexual Assault Nurse Examiner) kit from the Crown, in particular, photographs taken during the complainant's examination.

[42] On March 27, 2019, Mr. Brown requested the Crown provide him with a copy of the documentary components of the SANE kit.

[43] On April 1, 2019, Crown counsel and Mr. Brown had a telephone appearance with the trial judge. Mr. Brown advised he was seeking disclosure of the SANE kit. The complainant had testified on February 28 there were photographs taken in the course of the SANE examination at the hospital. The Crown said no photographs were taken and undertook to obtain an itemized list of the contents of the kit.

[44] Mr. Brown indicated that he required an adjournment so he could look at the SANE disclosure before final submissions. He said he "would be very loath [*sic*] to go ahead with final submissions without having seen these documents".

[45] The trial judge granted the adjournment request. He expressed concern about delay. He said Mr. Ellis should have:

> …every opportunity to pursue all the evidence against him…What I don't want to do is be looking at some kind of a delay request as a result of this, okay?

[46] Mr. Brown responded by saying:

> …we're not looking at making a *Jordan* application. I mean, assuming that we're able to find some new dates within…you know, sort of the general timeframe you've mentioned…of May, possibly a little later than that, I don't think it'll be an issue".

[47] The trial judge set May 6 for final submissions. He directed Mr. Brown to advise the Crown by April 26 if, once he received the disclosure, he would be asking to re-open the defence case or, as the judge put it, pursuing, "whatever remedies or applications you may be looking at..."

[48] **May 6, 2019 –** This was the date scheduled by the court for final submissions. Mr. Brown advised the trial judge he was not satisfied with the SANE disclosure he had received, entitled: "Itemized List from Sexual-Assault Kit". There were 7 items listed, 6 of which were biological samples. The 7th item on the list was a document labelled "Forensic Evidence Record Form 4".

[49] Crown counsel informed the trial judge he had contacted the police about photographs the complainant had mentioned in her testimony and was told there were no such photos. When he asked police what was in the SANE kit, he received the itemized list and forwarded it to Mr. Brown.

[50] At this point, Mr. Brown observed the case was five months over the *Jordan* deadline for provincial court trials. He said: "We can't tolerate any further delay". He indicated the defence was not looking for another adjournment. He complained about the incomplete disclosure:

> But it is our position that we're going into final submissions without having received complete disclosure from the Crown, that the Defence is going into final submissions and had to cross-examine the complainant really with one hand tied behind its back because of this failure on the Crown's part to make full disclosure.

[51] Notwithstanding the outstanding disclosure, Mr. Brown agreed to proceed with submissions. He said he could follow up with the Crown about his disclosure request for the documentary (paper) components of the SANE kit.

[52] Following final submissions, the case was adjourned to June 12, 2019. Crown counsel undertook to request from the police: Forensic Record Form 4; a copy of the authorization signed by the complainant, Form 2; and additional hospital records.

[53] **June 12, 2019** – Mr. Brown brought related applications seeking a judicial stay on the basis of: (1) a breach of the Crown's disclosure obligations under s. 7 of the *Charter*, and (2) s. 11(b) delay based on the proceedings being prolonged by non-disclosure.

[54] Crown counsel arrived at court on June 12 with the disclosure Mr. Brown had been requesting: the complainant's authorization (Form 2) and the photographs of the complainant taken during the SANE examination at the hospital. He advised that Form 4 had never been forwarded to the Crown despite a number of requests to the police.

[55] Mr. Brown said once Form 4 was disclosed to him that would deal with his application for a stay based on non-disclosure.

[56] After a recess to examine the new disclosure, Mr. Brown advised the trial judge that the content of Form 2 "would have been useful in cross-examining the complainant". He indicated he was looking at the possibility of asking to have the complainant recalled for cross-examination on the document.

[57] The trial judge set August 22, 2019 to hear the defence application for a judicial stay based on s. 11(b) delay. Counsel were given dates for filing written submissions. On July 18, the complainant returned for further cross-examination. Mr. Brown advised he would not be making any use of Form 4 and was not proceeding with the s. 7 *Charter* application.

[58] **August 20, 2019** – A telephone conference was held during which the trial judge, Crown and defence discussed when disclosure requests were made and what the police and Crown did in response. The Crown conceded that the period of February 8, 2019 to the present time was not defence delay and should not be deducted.

[59] **August 22, 2019** – In the course of argument on the stay application, Crown counsel agreed there had been no frivolous defence applications. The issue was whether the defence had waived any of the delay.

[60] In his reply submissions, Crown counsel explained that the SANE photographs were located in the Middleton RCMP exhibit locker "simply floating around"…"and nobody knew what file they belonged to". He said neither the Crown nor the police had any knowledge there were photographs taken at the

hospital during the SANE examination. This only came to light when the complainant testified about them.

The Trial Judge's Decision

[61] The trial judge found the central issue before him was the amount of delay for which the defence was responsible. Once he determined that, he concluded the net delay exceeded *Jordan*'s eighteen month presumptive ceiling for provincial court trials.

[62] In reaching his conclusion that Mr. Ellis had been denied a trial within a reasonable time, the trial judge assessed various time periods and allocated responsibility for the accumulated delays.

[63] **August 16, 2018 to February 8, 2019** – It was undisputed that from August 16, 2018 (the date when the trial was to have proceeded but for Mr. Ellis needing a new lawyer) to February 8, 2019 (the start of the trial), a period of 155 days, was defence delay. Other periods of delay were not conceded by the defence.

[64] The trial judge found there was no defence waiver for the period between January 11, 2018 and a February 2018 date proposed to Mr. Manning for trial that was unsuitable because Mr. Manning was unavailable.

[65] **January 24, 2018 to August 16, 2018** – The trial judge rejected the Crown's argument that for this period Mr. Ellis had waived his s. 11(b) rights.

[66] In the Crown's submission, Mr. Manning's response on January 24, 2018 of "That sounds fine. Thank you." to the proposal of August 16 for trial amounted to defence waiver.

[67] The trial judge, in a reference to *Jordan* at para. 61, noted what constitutes waiver in a s. 11(b) analysis: the waiver must be clear and unequivocal, the accused must have full knowledge of their rights, and understand the effect of waiver on those rights. He found what was said by defence counsel in relation to obtaining trial dates "did not constitute an implicit or explicit waiver. It was not clear and unequivocal". He was satisfied there was a sound basis for the defence having no concern, at this time, about Mr. Ellis' s. 11(b) rights:

> All that was being stated was, in my opinion, the obvious, that at this point in the proceeding there was no *Charter* issue, particularly given that the proposed date in the matter could be anticipated to be concluded within the *Jordan* guidelines.

[68] The trial judge looked at various periods of delay within the February 28 to June 12, 2019 time frame. He did not attribute any of it to the defence.

[69] In his oral argument before the trial judge, Crown counsel argued that the period of February 28 to June 12, 2019 fell within deliberation time. The trial judge disagreed saying that deliberations "did not fully begin" until after further written submissions had been received on July 29, 2019.

[70] **April 1 to May 6, 2019** – The trial judge found the defence had not waived this period of delay between the defence seeking an adjournment of final submissions to review new disclosure and the new date for submissions. He described the concerns of the defence over disclosure as "understandable".

[71] **May 6 to June 7, 2019** – Submissions were made on May 6. The trial judge agreed that during "some portion of this period" he was deliberating but noted deliberations stopped on June 7 with the defence application for a stay on the basis of a s. 7 *Charter* breach for non-disclosure. He did not allocate any of this time as defence delay.

[72] **February 28, 2019 to July 18, 2019** – February 28 was the date of the complainant's direct and cross-examination. July 18, 2019 was the completion of the trial evidence which included further cross-examination of the complainant. Crown counsel conceded in its brief to the trial judge that the delay between these dates was mostly the responsibility of the Crown. (This was the period during which the defence was trying to obtain further disclosure as a result of the complainant's testimony that photographs had been taken of her during the SANE examination.)

[73] The trial judge considered short periods of time that may have constituted defence delay. As an example, he noted thirteen days from January 11, 2018 to January 24, 2018 when the August 16, 2018 trial date was set. He concluded:

> It is not clear that that short period had any effect at all…on the overall delay. To deduct these days and conclude that it affected the delay would, in my opinion, be speculation, and I choose not to do that.

[74] The trial judge found the net delay to be 20.52 months. He arrived at this figure through the following calculations: the actual number of days from when Mr. Ellis was charged (May 30, 2017) to the end of the trial evidence (July 18, 2019) totalled 779 days. Deducting the 155 days that was defence delay (August

16, 2018 to February 8, 2019) left 624 days or 20.52 months of net delay, a delay that exceeded the *Jordan* presumptive ceiling applicable in Mr. Ellis' case of eighteen months.

[75] The trial judge was satisfied the defence had established the violation of Mr. Ellis' s. 11(b) rights. He held that the *Jordan* requirements had been exceeded:

> Again returning to the *Jordan* analysis, 20.52 months is above the 18-month *Jordan* limit for Provincial Court proceedings. The delay is presumptively unreasonable. No exceptional circumstances have been identified. The burden lies with the Crown to establish that; it has not done so, nor has it made arguments, any arguments in that regard, and I think it is conceded that there are no exceptional circumstances.

[76] The trial judge was alive to the fact that the delay was only two-and-a-half months over the *Jordan* ceiling. He noted that *Jordan* did not allow for delay to fall within a range and observed the decision "seems to impose bright lines". The "bright line" of eighteen months had been exceeded and, in the trial judge's opinion, the only remedy available was a stay of proceedings. Furthermore, no other remedy had been proposed.

Standard of Review

[77] This appeal affords an opportunity to clarify this Court's view of the standard of review for s. 11(b) appeals. Appellate courts have not taken a uniform approach. The parties to this appeal agreed the standard was one of correctness, to be applied to both the trial judge's conclusion that there had been a *Charter* infringement and to the characterization and allocation of the various periods of delay. There was precedent from this Court to support this position. (*R. v. Potter*, 2020 NSCA 9, at para. 275)

[78] An earlier decision of this Court, *R. v. Brown*, 2018 NSCA 62, applied a deferential standard of review for the allocation of the delay aspect of a trial judge's s. 11(b) analysis. *Brown* noted that the majority reasons in both *R. v. Jordan* and *R. v. Cody*, 2017 SCC 31, made repeated references to the expertise trial judges bring to bear in assessing and categorizing delay. (*Brown*, at para. 46)

[79] The Ontario Court of Appeal has adopted the standard of correctness as the lens through which all aspects of the s. 11(b) analysis are to be viewed. In *R. v. Jurkus*, 2018 ONCA 489, the court held that a trial judge's characterization of periods of delay is not subject to deference. *Jurkus* viewed those characterizations

and the ultimate decision as to whether there has been unreasonable delay as subject to review on a standard of correctness (at para. 25). *Jurkus* was cited by this Court in *Potter*.

[80] On reflection, we have concluded that the view taken by the British Columbia Court of Appeal in *R. v. Pipping*, 2020 BCCA 104, is preferable to the *Jurkus* approach. That said, the ultimate determination of the issue of whether there has been unreasonable delay is subject to a correctness standard, as this Court has held previously. However, a trial judge's categorization of each period of delay, and findings of underlying facts, should not be subject to a correctness standard. These determinations are to be afforded deference.

[81] In *Pipping* the court held:

> [92] The post-*Jordan* s. 11(b) framework invokes different standards of review at three different stages: (1) findings of fact relevant to defence conduct; (2) the characterization of delay and the attribution of responsibility; and (3) the determination of whether the total delay is unreasonable and the decision to impose a stay.
>
> [93] At the first stage, the findings of fact of a trial judge that are relevant to defence conduct are afforded deference on review, and subject to a standard of palpable and overriding error: *R. v. Horner*, 2012 BCCA 7 at para. 70; *R. v. K.N.*, 2018 BCCA 246 at para. 13.
>
> [94] At the second stage, first instance judges are uniquely positioned to gauge responsibility for delay: *Jordan* at para. 65. The determination of whether defence conduct is legitimate or illegitimate is highly discretionary, and appellate courts must show a high level of deference on review: *Cody* at para. 31; *R. v. S.C.W.*, 2018 BCCA 346, leave ref'd (2019) SCC Docket 38403, at para. 38.
>
> [95] At the third stage, the ultimate determination of whether the total delay is unreasonable and the decision to impose a stay is a question of law subject to a correctness standard: *K.N.* at para. 13; *R. v. Christhurajah*, 2019 BCCA 210 at para. 113.

[82] I am satisfied the application of a correctness standard only to the ultimate determination of whether there has been a s. 11(b) violation is the appropriate approach. The first stage – findings of fact relevant to defence conduct being entitled to deference – is in keeping with the approach taken in *Brown*. The second stage – recognizing the unique qualifications of trial judges to assess responsibility for delay – acknowledges the high degree of deference *Jordan* and *Cody* have directed appellate courts to show (see, *Jordan*, at paras. 65, 79, and 91; *Cody*, at para. 31).

[83] And, at the third stage – the ultimate determination of whether the net delay is unreasonable – the trial judge's determination is, as stated in *Potter*, subject to a standard of correctness.

[84] Appellate review examines whether the trial judge correctly articulated and applied the relevant legal principles, and whether the factual findings made by a trial judge are unreasonable or tainted by palpable and overriding error.

[85] In assessing the trial judge's analysis of the delay in Mr. Ellis' case, I have applied deference to his factual findings and his categorization of the periods of delay and the allocation of responsibility for them. His ultimate determination that the net delay was unreasonable has been reviewed on a standard of correctness.

Issues

[86] In its Factum, the Crown listed four issues to be determined on appeal:

> 1) The trial judge erred in his s. 11(b) analysis by failing to deduct from the overall delay periods where the Crown and court were ready to proceed, but the defence was not.
> 2) The trial judge erred in his s. 11(b) analysis by failing to account for late disclosure requests by defence counsel throughout the course of the trial.
> 3) The trial judge erred in his s. 11(b) analysis by failing to account for deliberation time.
> 4) The trial judge erred in his s. 24(1) analysis by failing to consider the availability and appropriateness of remedies short of a stay of proceedings in the circumstances of this case.

[87] These issues are recited in the Crown's Amended Notice of Appeal along with another issue that has been abandoned. The Crown is no longer alleging that the trial judge should have accounted for the time between Mr. Manning's appointment to the Bench and the scheduled date for trial.

[88] Mr. Ellis views two of the issues being raised by the Crown on appeal as new issues. He says the Crown's reliance on "late disclosure requests" as defence delay is in contrast to its position before the trial judge. At trial, the Crown had not argued the defence was responsible for any of the delay related to late disclosure.

[89] Mr. Ellis also notes that, although trial Crown made no representations on the issue of remedy, appellate Crown is criticizing the trial judge for not considering remedies for delay short of a judicial stay.

[90] Mr. Ellis questions whether the Crown should be permitted to raise these issues. I am now going to deal with the late-disclosure and remedy issues and one other issue, Mr. Ellis' motion to have fresh evidence admitted. I will start there.

Mr. Ellis' Fresh Evidence Motion

[91] Mr. Ellis' proposed fresh evidence is in the form of an Affidavit of Wanda Ellis, his mother, which attaches the disclosure provided by the prosecution on November 18, 2019, after the trial. The disclosure is the complainant's consent to be photographed on April 22, 2017 by the SANE nurse, a photo log, and a description of 15 photographs of the complainant's face, back, shin, knee, foot, and calf.

[92] Mr. Ellis says this post-trial disclosure illustrates the scope of the problems he confronted at trial. It shows that even after the trial concluded, there was additional documentary disclosure from the SANE examination that the Crown had failed to locate and provide.

[93] We accepted the fresh evidence provisionally in order to consider the motion for its admission. I am satisfied it fails two of the criteria under the *Palmer* test for the admission of fresh evidence. (*Palmer v. The Queen*, [1980] 1 S.C.R. 759) It is not relevant to the s. 11(b) delay issue and had no bearing on the trial judge's finding there was unreasonable delay. It is not evidence that could have reasonably affected the trial judge's decision there was a s. 11(b) breach.

[94] The proposed fresh evidence adds nothing to what the record establishes about the problems with disclosure from the SANE examination. The motion to admit it is dismissed.

Disclosure-related Delay

[95] The Crown now says the trial judge should have held the defence responsible for delay caused by the disclosure issues.

[96] Appellate Crown is pinning the disclosure delays on the defence by invoking the long-standing duty of defence to diligently pursue disclosure. The Crown notes

this is one aspect of the obligation on defence to "avoid causing unreasonable delay" (*Cody*, at para. 33) and "proactively prevent unreasonable delay" (*Potter*, at para. 274).

[97] The Crown identifies two disclosure requests by defence that led to delay in this case: (1) on January 7, 2019 for email attachments, photographs of the motor vehicle, surveillance video, and ITOs – resolved Feb. 28, 2019, and (2) on March 10 and 27, 2019 for SANE-related disclosure – resolved July 18, 2019.

[98] The trial judge did not attribute any of this delay to the defence. At a pre-trial conference on August 20, 2019, the trial judge confirmed the Crown was not arguing that the delay to that point from February 8 when the trial started was defence delay.

[99] Although trial Crown did not assert that disclosure-related delays should be attributed to the defence, Appellate Crown now says the trial judge was in error for failing to count these delays against Mr. Ellis. The Crown says, in the alternative, the trial judge should have treated the failure to disclose as a discrete event.

[100] Discrete events are "[u]nforeseeable or unavoidable developments [that] can cause cases to quickly go awry, leading to delay" (*Jordan*, at para. 73). Delay caused by a discrete event must be subtracted from the total period of delay for the purpose of determining whether the presumptive ceiling has been exceeded. The Crown is expected to mitigate delay that results from a discrete event (*Jordan*, at para. 75).

[101] Appellate Crown, Ms. Koresawa, says the position of the trial Crown does not now bind the Crown on appeal. She is referring to trial Crown on August 22, 2019 confirming that the only issue being raised with respect to defence conduct was waiver. There was no evidence led or submissions made at trial about defence responsibility in relation to the missing disclosure.

[102] I find I do not need to deal with the broader question of when the Crown is entitled to change tack and resile from concessions made at trial. In this case, the trial judge made explicit findings of fact on the disclosure issue.

[103] The trial judge found as a fact that two significant events "contributed to the delay and pushed this proceeding over the *Jordan* limits". They were: (1) the double-booking of March 14, 2018 which forced the rescheduling of Mr. Ellis' trial; and (2) the failure of the Crown to disclose what the trial judge called "very

important documents", the SANE photographs and other documentation from the SANE sexual-assault kit, which he noted had been in the possession of the police all along. He concluded:

> …the bottom line is that the failure to disclose important materials contributed to the delay. Again, the explanations for this are all on the record. If either of these events had not occurred this proceeding could have been concluded within the *Jordan* time frame. In March of 2018, if the trial had have gone ahead at that time, it was less than 12 months out, even the February 2019, approximately 16 months out, could have been completed within the *Jordan* limit. It was the combination of both of these events which allowed the time frame to be exceeded.

[104] The record before the trial judge provided ample support for his factual findings. He found it was the Crown, not the defence, who bore responsibility for the late disclosure. His findings are entitled to deference.

[105] Furthermore, the failure to disclose the SANE-related disclosure was not a discrete event. The failure of the police to properly manage the evidence, with the result that it was not located for some time, cannot be characterized as an unforeseeable or unavoidable circumstance that could not have been mitigated.

Alternative Remedies for a s. 11(b) Breach

[106] The Crown argues the trial judge, having found a breach of Mr. Ellis' s. 11(b) rights, should have considered other remedies than a judicial stay. The suggestion of alternative remedies was not raised at trial. Trial Crown did not dispute that a judicial stay of proceedings was the proper remedy. Appellate Crown now invites an examination of whether the trial judge was in error by failing to allow for other remedies short of a stay of proceedings.

[107] There are good reasons not to accept the Crown's invitation. We do not have the benefit of a full trial record including substantive submissions on this issue that would enable consideration of all the factors relevant to determining the appropriateness of an alternative remedy.

[108] Furthermore, a remedy that would allow the continuation of the prosecution where an accused's constitutionally-protected right to a trial within a reasonable time has been violated seems incompatible with the emphatic approach taken by the Supreme Court of Canada in *Jordan* and *Cody*. In *Cody*, the Court re-emphasized the *Jordan* imperatives and restored a stay of proceedings that had been set aside by the Newfoundland and Labrador Court of Appeal.

[109] *Jordan* stressed the importance of timeliness in criminal justice. A majority of the Court said:

> [1] Timely justice is one of the hallmarks of a free and democratic society. In the criminal law context, it takes on special significance. Section 11(*b*) of the *Canadian Charter of Rights and Freedoms* attests to this, in that it guarantees the right of accused persons "to be tried within a reasonable time".
>
> [2] Moreover, the Canadian public expects their criminal justice system to bring accused persons to trial expeditiously. As the months following a criminal charge become years, everyone suffers. Accused persons remain in a state of uncertainty, often in pre-trial detention. Victims and their families who, in many cases, have suffered tragic losses cannot move forward with their lives. And the public, whose interest is served by promptly bringing those charged with criminal offences to trial, is justifiably frustrated by watching years pass before a trial occurs.
>
> [3] An efficient criminal justice system is therefore of utmost importance. The ability to provide fair trials within a reasonable time is an indicator of the health and proper functioning of the system itself. The stakes are indisputably high.

[110] The *Jordan* decision sought to introduce “discipline” into the criminal justice system. A stay of proceedings for failing to satisfy the *Jordan* requirements is a feature of that discipline.

[111] The trial judge made no error considering the only remedy that has ever been applied to vindicate an accused’s right to a timely trial. I have not been persuaded this Court should embark upon the exercise proposed by the Crown and assess the suitability of less onerous alternatives, especially where a failure to provide disclosure was a significant delay-causing factor.

[112] Two issues remain and I will proceed to address them below.

Did the trial judge err by failing to deduct from the overall delay periods where the Crown and Court were ready to proceed, but the defence was not?

[113] The Crown argues there were four periods when the Crown and the Court were ready to proceed but the defence was not. These were:

- February 28, 2018 to March 14, 2018 (14 days)
- February 28, 2018 to August 16, 2018 (169 days)

- September 17, 2018 to October 3, 2018 (16 days)
- February 28, 2019 to April 4, 2019 (35 days)

[114] I am satisfied the trial judge's treatment of these periods of time is entitled to deference.

[115] The 14-day period between February 28, 2018 and March 14, 2018 was inconsequential. *Jordan* intended to reduce the need for trial judges to "engage in complicated micro-accounting" (para. 111). Defence counsel was not available on the first trial date offered by the court. He was available for a date 14 days later.

[116] In any event, the trial date of March 14, which had been set on July 27, 2017, was, by January 11, 2018, no longer an option for reasons beyond the control of the defence. The date was double-booked and the competing trial had not resolved as expected by the Crown.

[117] I find the trial judge made no error in rejecting the Crown's submission that Mr. Ellis had waived his s. 11(b) rights for the period of February 28 to August 16, 2018. As the trial judge found, there was no waiver. The acceptance of the August 16 trial date did not constitute a clear, unequivocal waiver by Mr. Ellis of his right to a trial within a reasonable time. There was nothing said about Mr. Ellis' right, his knowledge of it and his understanding of the effect of a waiver on those rights, all features of an effective waiver (*Jordan*, at para. 61).

[118] In response to the trial judge's inquiry about whether there were "any *Jordan* concerns here…", Mr. Manning simply said, "No, I don't think so." His response is unsurprising as a trial for Mr. Ellis on August 16 would still have fallen within the *Jordan* presumptive ceiling.

[119] As for the period of September 17, 2018 to October 3, 2018, this 16-day delay was included by the trial judge in his attribution to the defence of delay from August 16, 2018 to February 8, 2019 (155 days) and deducted by the trial judge in his analysis.

[120] Finally, the Crown has said the delay from February 28, 2019 to April 4, 2019 was caused by the defence being unable to proceed. This is incorrect. The adjournment of the trial on February 28 was due to the fact that the complainant's evidence, and discussions concerning exhibits, took until 3 p.m. The defence, having called no evidence, would be making submissions after the Crown. Crown

counsel advised that he "wouldn't mind" a few minutes to review his notes but thought he could proceed. Defence counsel indicated his submissions would probably be "somewhat lengthy". The trial judge then asked if counsel might be interested in having a transcript of the evidence. The Crown saw a benefit in that suggestion, saying a transcript "would be useful".

[121] Contrary to Appellate Crown's submission, the defence did not effectively request an adjournment. The proximity to 4:30 p.m., when court would normally close, and the value in having a transcript, drove the result – an adjournment of the trial to April 4 for final submissions.

[122] I am satisfied there is no merit to the Crown's criticism of how the trial judge dealt with these periods of delay.

Did the trial judge err by failing to account for deliberation time in his s. 11(b) analysis?

[123] What were expected to be final submissions went ahead and concluded on May 6, 2019. There was an outstanding disclosure issue in the background that subsequently led to defence applications alleging *Charter* breaches – for failure to disclose and for unreasonable delay – and the recall of the complainant for further cross-examination. The trial judge acknowledged that deliberation occurred between May 6 and June 7, 2019, at which time he was notified of the *Charter* applications. He did not deduct the 32 days from the total delay.

[124] Trying to assess what deliberation was occurring during this time calls for speculation. At this point, it was the outstanding disclosure issue that prolonged Mr. Ellis' trial. To whatever extent the trial judge had started to deliberate on the evidence he had heard was immaterial.

[125] Further delay occurred from May 6 to July 18, the date when the complainant was recalled for cross-examination. The defence was also not responsible for this delay. The trial was stalled during this period in order for the Crown to obtain the missing disclosure, which led to the defence asking to have the complainant recalled to answer additional questions on cross-examination.

[126] In cases where deliberation time is a material issue for the purposes of a s. 11(b) analysis, the considerations set out in *K.G.K.* will be applicable. (see, *K.G.K.*, at paras. 51-73)

Calculating the Delay in Mr. Ellis' Case

[127] As I noted at the start of these reasons, in a s. 11(b) analysis total delay is calculated from the date the accused is charged to the end of evidence and submissions. The endpoint for the calculation was established in *R. v. K.G.K,* a decision rendered by the Supreme Court of Canada after the trial judge had found Mr. Ellis' trial had exceeded the *Jordan* presumptive ceiling by two-and-a-half months. Without the benefit of *K.G.K.*, the trial judge treated the end of the evidence on July 18, 2019 as the end of the trial. Applying *K.G.K.*, the end of Mr. Ellis' trial was August 22, 2019. The net delay in this case exceeded the presumptive ceiling by three-and-a-half months.

Conclusion

[128] The trial judge's factual findings, categorization of the periods of delay, and attribution of responsibility are entitled to deference. His determinations are amply supported by the record. He was correct in his conclusion the *Jordan* presumptive ceiling for Mr. Ellis' trial had been exceeded, constituting a violation of s. 11(b), and warranting a stay of proceedings. I would dismiss the appeal.

Derrick, J.A.

Concurred in:

Beveridge, J.A.

Bryson, J.A.