

R. v. Moses, 2023 NWTTC 13.cor 1

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File: T-1-CR-2022-000723

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HIS MAJESTY THE KING

- and -

JOSHUA VERNON MOSES

REASONS FOR JUDGMENT

of the

HONOURABLE CHIEF JUDGE ROBERT GORIN

Corrected Judgment: A corrigendum was issued January 5, 2024; the corrections have been made to the text and the corrigendum is appended to this document.

Heard at: Yellowknife, Northwest Territories

Date of Decision: July 27, 2023

Date of Written Judgment: December 27, 2023

Counsel for the Crown: Matthew Scott

Counsel for the Accused: Peter Adourian

[SS. 271 & 264.1(1)(a) of the *Criminal Code*]

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INTRODUCTION

[1] Joshua Vernon Moses is charged that on January 12, 2022, he sexually assaulted FY and uttered a death threat to her contrary to ss. 271 and 264.1(1)(a) of the *Criminal Code*. He applies under s. 11(b) of the *Canadian Charter of Rights and Freedoms* for a stay of proceedings, submitting that his right to be tried within a reasonable time has been violated. The Crown opposes his application.

[2] Mr. Moses notes that the amount of time between the initial laying of the within charges against him is over the presumptive limit of 18 months for trials in the Territorial Court, set out by the Supreme Court of Canada in *R. v. Jordan*, [2016] 1 SCR 631. He concedes that when the delay caused by the defence is deducted from the total time between him being charged and the trial date, the delay is not beyond the presumptive limit. However, he submits that the defence delay is irrelevant since ultimately it would not have been possible to proceed prior to the present trial date in any event.

[3] For the following reasons I deny Mr. Moses' application.

ANALYSIS

[4] The original information setting out the charges against Mr. Moses was sworn on January 13, 2022. The Crown proceeded by way of indictment on May 17, 2022. On October 4, 2022, following several adjournments that were due to Mr. Moses' lack of contact with his defence counsel, he elected to be tried in the Territorial Court and pleaded not guilty to both charges. The delay between the date of the Crown's election and the date on which Mr. Moses entered his election and pleas was 140 days.

[5] The setting of the trial date was then adjourned to October 25, at which time the court set trial dates of May 18 & 19, 2023. However, on April 25 the trial was adjourned over to August 16 and 17, 2023. The time between the swearing of the information and the second trial date totals 19 months and 3 days, a delay exceeding the presumptive 18-month ceiling: *Jordan*, at paras. 5 & 46.

[6] One of the reasons for the adjournment of the trial was late Crown disclosure of certain DNA evidence. The other more important reason was the Crown's disclosure of the existence of certain records. These records fell within the scope of s. 278.1 of the Code and therefore engaged the regime for their production and disclosure provided for in ss. 278.1 to 278.98.

[7] While the time between the laying of the charges and the August trial dates exceeds the 18-month presumptive ceiling, a considerable part of the delay prior to October 4, 2022, the date when Mr. Moses finally entered his election and pleas, was because he missed meetings with his lawyer and did not provide them with necessary instructions. Mr. Moses concedes that it would have been possible for him to have entered his election and pleas earlier had he been more diligent. However, he argues that even if he had made the meetings and it been possible to set an earlier trial date than that which was initially scheduled, there is "good reason to believe" that the matter would still have had to be adjourned to the present trial date.

[8] Mr. Moses says that this is so since the RCMP did not seek authorization for the DNA evidence until February of 2023 and further, that at around that same time, the Crown disclosed the existence of the s. 278.1 records requiring applications for their review by the Court and disclosure to Mr. Moses. However, it should be noted that for reasons beyond the Crown's control, the records did not come into existence until the later part of 2022.

[9] Mr. Moses argues that because the Crown was only considering the possibility of obtaining the DNA evidence in early November, after his election and pleas had already been entered, an earlier election and entry of pleas would not have changed the date on which the DNA results would have been available. He similarly submits that the lateness of his election and pleas would not have affected the disclosure of the s. 278.1 records and the resulting process they necessitated. And so, he argues, the trial date would ultimately have had to be set to the August 2023 dates – and thusly, the delay between the laying of the charges would have been the same and the trial would still have exceeded 18 months.

[10] The Crown concedes that this is not a situation where “exceptional circumstances” exist that justify a departure from the usual 18-month ceiling. However, it submits that the court must consider the time at which certain information and material came into its possession. It is agreed that in the summer of 2022, the usual DNA analysis had been completed and no DNA match was obtained. However, it became apparent that an analysis of Y-STR DNA was possible. Unfortunately, there was a lack of coordination between the laboratory and the investigators about what that meant and what to do about it. As a result, a warrant to obtain the DNA from Mr. Moses was not executed until February of 2023. The Crown admits that following the obtaining of the DNA results, it could have called the DNA expert to testify during the May trial dates. It also acknowledges that it could have simply decided not to call the DNA evidence, since it was not crucial to its case.

[11] The Crown states that it was really the existence of the s. 278.1 records that caused the delay of the trial. On December 6th, 2022, the RCMP advised the Crown, of the existence of the records in question. The records related to incidents that transpired on August 28, and October 4, of 2022. They were created on the dates of the incidents and obviously could not have existed prior to that time. The Crown had a positive duty to disclose the existence of the records. Unfortunately, it took the Crown until February 28th, 2023, to request them from the RCMP.

[12] The Crown advises that it took that amount of time because it felt that it had to be careful to ensure that it fulfilled its disclosure obligations while not unduly invading the privacy of other individuals. The Crown states that this is something that it could not have done without considering its position in some detail. That said, the Crown candidly admits that the almost three-month delay between it becoming aware of the records and then requesting them was excessive.

[13] The delay of the Crown in requesting the records was certainly unfortunate. That delay resulted in late notice to Mr. Moses that the records existed and that they were likely relevant to the charges against him. It is even more unfortunate,

that that late disclosure and resulting process required an adjournment of the accused's trial from May 18 to August 16. However, I find that the resulting delay did not ultimately result in Mr. Moses' s. 11(b) right being violated.

[14] It is important to note the approach to the s. 11(b) Charter analysis as it has been set out in *Jordan*. Where the net delay – total delay subtracting defence delay – is more than 18 months, the onus will be on the Crown to establish that the delay is *not* unreasonable. However, if the delay is 18 months or less, the onus will be on the accused to establish that it *is* unreasonable: *Jordan*, paras. 28, 56, & 82. The presumption that the delay is either unreasonable or *not* unreasonable will depend on whether the 18-month presumptive ceiling is exceeded. The presumption against the Crown will be rebutted only where there are “exceptional circumstances” that justify the delay.

[15] Where the presumption is against the accused, they must show that the delay is unreasonable by establishing that: (1) it took meaningful steps that demonstrate a sustained effort to expedite the proceedings, and (2) the case took *markedly* longer than it reasonably should have. In *Jordan*, the majority stated that it expected that stays beneath the ceiling to be rare, and limited to clear cases: *Jordan*, para 48.

[16] Whether or not the onus is on the Crown or accused, the standard for rebutting the applicable presumption is high. That being the case, determining who bears the onus is essential. Fortunately, given the 18-month ceiling, doing so is a simple task. However, it is also necessary to otherwise conduct the analysis required by *Jordan* methodically and in order. In this case, there was a delay of 140 days from, May 17, 2022, the date of the Crown's election to proceed by way of indictment, and October 4, 2022, the date Mr. Moses elected to be tried in the Territorial Court and entered his not guilty pleas. That delay was excessive and unjustified. As stated, it was largely the result of him not making his appointments with counsel and their inability to get instructions. In my view, there is no reason why the election and pleas should not have been entered within 28 days following the date of the Crown's election. There has been no explanation that would justify the additional 112 days (3 months and 22 days) that he took to take that step. When one subtracts the delay caused by the accused from the total delay, the net delay amounts to 15 months and 15 days – well under the presumptive limit of 18 months.

[17] That being the case, the onus is on the accused to establish that the sub-ceiling delay was unreasonable. It may very well be that the delay of more than

four months between the laying of the charges and the Crown's election was considerably excessive. As noted, the Crown's additional delay between learning of the existence of the records and requesting them was also unfortunate. However, these delays on the part of the Crown in no way justify Mr. Moses' delay and do not change the fact that the net delay is considerably less than the presumptive 18-month ceiling.

[18] Mr. Moses has argued that because his co-accused also entered his election and plea a considerable amount of time following the Crown's election, an earlier election on his part would not have made a difference. In fact, Mr. Moses' coaccused elected to be tried in the Territorial Court and entered his plea to the single count against him on September 6, 2022, approximately one month before Mr. Moses did likewise.

[19] With the greatest of respect, Mr. Moses' submissions on this point are not sound. I agree with the Crown that the facts of this case are not analogous to those in *Brissett*, 2019 ONCA 11, where the accused was waiting patiently for his coaccused to enter their elections. Moreover, the obvious difficulty with Mr. Moses' argument is that his coaccused could easily make the same argument about Mr. Moses' delay. In fact, because Mr. Moses was the tardier of the two, his coaccused's argument, while weak, would be stronger than that of Mr. Moses. This is certainly not a situation where Mr. Moses was acting diligently and his coaccused was holding him up. If anything, it was Mr. Moses who was holding up his coaccused. Given the excessive amount of time it took each of them to enter their elections and pleas, it is far more logical and accurate to say that they were *both* responsible for excessive delay.

[20] Mr. Moses also argues that even had he entered his election and pleas earlier, the trial would ultimately have had to have been adjourned due to the records coming into existence and the Crown's subsequent delay of almost three months in requesting them from the RCMP. He submits that the ultimate trial date would therefore have been the same regardless. His argument on this point is not entirely devoid of merit in that it would still have been necessary to adjourn the trial date. However, the following paragraph in *Jordan* is noteworthy:

[74] Trial judges should be alive to the practical realities of trials, especially when the trial was scheduled to conclude below the ceiling but, in the end, exceeded it. In such cases, the focus should be on whether the Crown made reasonable efforts to respond and to conclude the trial under the ceiling. *Trial judges should also bear in mind that when an issue arises at trial close to the ceiling, it will be more difficult for the Crown and the court to respond with a*

timely solution. For this reason, it is likely that unforeseeable or unavoidable delays occurring during trials that are scheduled to wrap up close to the ceiling will qualify as presenting exceptional circumstances.

[Emphasis added.]

[21] Since the net delay is under the presumptive limit, the Crown need not and does not argue that exceptional circumstances exist. However, the foregoing observations of Supreme Court are still pertinent. As is stated, if a matter is set closer to the ceiling, there will be a greater risk that any important issue that arises will result in a delay that exceeds the ceiling.

[22] In this case, had Mr. Moses and his coaccused not delayed the entry of their pleas, it is very likely that the court could have scheduled initial trial dates that were several months earlier than the initial May dates. If the initial trial dates had been earlier, it is reasonably possible that there would ultimately have been a wider range of dates on which to schedule the records applications and to reschedule the trial. I am unable to find that had the accused entered his election on a timely basis, the circumstances occasioned by the existence of the records and the Crown's delay in requesting them would have inexorably led to the current trial dates being set. There are simply too many variables that can affect the viability of future court dates. Some obvious examples include not only the availability of future dates but also - given that the records application and trial must be dealt with by the same judge - the judge's availability on both required sets of dates. Such availability may depend on a multitude of different factors that may vary considerably depending on the date when the matter is before the court for scheduling. The foregoing examples are not exhaustive and in my view there are a wide range of possible factors.

[23] The Crown's delay after becoming aware of the records was unfortunate. However, in the present case I am far from convinced that had the accused acted in a more diligent manner, the delay between the laying of the charges and the trial date ultimately set would have been the same.

[24] The present case illustrates the importance of the procedure set out in *Jordan*, and how it is consequential. Because the net delay is under 18 months, the onus is on Mr. Moses to show that the delay was unreasonable. He must establish that (1) he took meaningful steps that demonstrate a sustained effort to expedite the proceedings, *and* (2) the case took markedly longer than it reasonably should have. He must further establish that those circumstances amount to a clear case of the presumption being rebutted. I find that he has not done so. It may be that he did

what he could to preserve the May trial dates after becoming aware of the DNA evidence and s. 278.1 records. However, his earlier unreasonable delay in entering his election and pleas must also be considered. It cannot be said that there was a *sustained* effort by him to expedite the proceedings after being charged. This is not one of the clear and rare cases where delay under the presumptive limit is unreasonable.

[25] While the case against Mr. Moses may initially have appeared to have been somewhat simple, additional and important issues surfaced following the time that Mr. Moses entered his plea. The potential relevance of special DNA evidence became apparent, and more importantly, records came into existence that required a considered response on the part of the Crown and a rather involved process on the part of the court. Given the presumptive limit and the onus that applies, these additional circumstances are not necessary to justify the delay that occurred. However, they certainly do not assist the accused. Ultimately, I am not persuaded that the net delay of less than 16 months in this matter is at all unreasonable.

CONCLUSION

[26] I find that the accused's right to be tried within a reasonable time has not been violated. The accused's application for a judicial stay of proceedings pursuant to s. 11(b) of the Charter is therefore denied. I thank both counsel for their assistance.

"Robert Gorin"

Robert D. Gorin

Chief Judge of the Territorial Court

Dated at Yellowknife, Northwest Territories
this 27th day of December 2023.

**Corrigendum of the Reasons for Judgment
of
The Honourable Chief Judge Robert Gorin**

1. An error occurred on Page 1 and the Backer, in the file number.

It reads:

“File: T-1-CR-2023-000619”

It has been amended to read:

“File: T-1-CR-2022-000723”

2. An error occurred on Page 2, in the header.

The case name in the header reads:

“R. v. Beaulieu”

It has been amended to read:

“R. v. Moses”

3. An error occurred beginning on Page 4, in paragraph 16 (repeat).

Paragraph [16] beginning with:

“That being the case, the onus is on the...”

The numbering of this paragraph has been amended to [17] and continues through the following paragraphs to the end of the document.

4. The Citation has been amended to read:

R. v. Moses, 2023 NWTTC 13.cor1

(The changes to the text of the document are underlined.)

R. v. Moses, 2023 NWTTC 13.cor 1

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[Ss. 271 and 264.1(1)(a) of the *Criminal Code*]