COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Nguyen, 2020 ONCA 609
DATE: 20200930
DOCKET: C67134 and C67136

Strathy C.J.O., Gillese and Watt JJ.A.

DOCKET: C67134

BETWEEN

Her Majesty the Queen

Respondent

and

Phuong Nguyen

Appellant

DOCKET: C67136

AND BETWEEN

Her Majesty the Queen

Respondent

and

Leonardo Graci

Appellant

Tiran Diran Tutunjian, for the appellants

Chris G. Bendick, for the respondent Her Majesty the Queen ex rel. the Regional Municipality of York

Heard: in writing

On appeal from the decision of Justice Mary E. Misener of the Ontario Court of Justice dated April 18, 2019, dismissing the appeal from conviction entered on May 22, 2018, by Justice of the Peace Marie-Christine Smythe of the Ontario Court of Justice (C67134).

On appeal from the decision of Justice Mary E. Misener of the Ontario Court of Justice dated April 18, 2019, dismissing the appeal from conviction entered on May 14, 2018, by Justice of the Peace Rhonda Shousterman of the Ontario Court of Justice (C67136).

Gillese J.A.:

[1] These appeals raise the following questions about s. 11(b) applications in proceedings under Part 1 of the *Provincial Offences Act*, R.S.O. 1990, c. P.33 (the "*POA*"):

1. Is 18 months the presumptive ceiling for Part I *POA* proceedings?

2. Are the Appellants entitled to a stay of proceedings despite the delay being less than the presumptive ceiling?

[2] As I explain below, my answer to the first question is "yes" and to the second is "no." Accordingly, I would dismiss the appeals.

Background in Brief

[3] On March 8, 2017, Leonardo Graci was charged under the *Highway Traffic Act*, R.S.O. 1990, c. H.8 (the "*HTA*") with speeding 80 km/h in a posted 60 km/h zone.

[4] On April 12, 2017, Phuong Nguyen was charged under the *HTA* with failing to stop at a red light.

[5] Both Mr. Graci and Mr. Nguyen (together, the “Appellants”) requested a trial date, received a Notice of Trial in the mail, ordered and received disclosure, and then filed a s. 11(b) *Charter* application that was returnable on their trial date.

[6] Justice of the Peace Shousterman heard and dismissed Mr. Graci’s s. 11(b) application on May 14, 2018. Following a trial, Mr. Graci was convicted of speeding, pursuant to s. 128 of the *HTA*. He was fined $90 and given 30 days to pay the fine.

[7] Justice of the Peace Smythe heard and dismissed Mr. Nguyen’s s. 11(b) application on May 22, 2018. Following a trial, Mr. Nguyen was convicted of failing to stop at a red light, pursuant to s. 144 of the *HTA.* He was fined $260 and given five months to pay the fine.

[8] Messrs. Gracie and Nguyen brought appeals against the dismissal of their s. 11(b) applications and convictions.

The Summary Conviction Appeals

[9] The appeals were heard together by Misener J. of the Ontario Court of Justice (the “Appeals Judge”). On April 18, 2019, the Appeals Judge released reasons for judgment in which she dismissed the appeals (the “Reasons Below”).

[10] The Appeals Judge first addressed the question of what presumptive ceiling applied to Part I *POA* proceedings. In this regard, she declined to follow *York (Regional Municipality) v. Tomovski,* 2017 ONCJ 785 (leave to appeal to Ont. C.A. refused, 2018 ONCA 57). In *Tomovski*, the court held that the 18-month presumptive ceiling set out in *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631, did not apply to proceedings under Part I of the *POA* and that a lower "case specific" presumptive ceiling ought to be imposed. In *Tomovski*, a ceiling of 14 months was set, above which delay was presumed to be unreasonable.

[11] In the Appeals Judge's view, *Jordan* "clearly held that the ceiling for matters proceeding in provincial court is 18 months and Part I offences are proceedings in the provincial court" (para. 15, Reasons Below). She gave compelling reasons for her view, including that differing presumptive ceilings would represent "a return to the litigation-generating uncertainty of *Morin*" (para. 21, Reasons Below).

[12] The Appeals Judge then dealt with whether the Appellants were entitled to a stay of proceedings despite the delay being less than the presumptive ceiling. The net delay for Mr. Graci was 12 months and 12 days and the net delay for Mr. Nguyen was 13 months and 10 days. As the delays were less than the presumptive ceiling, the Appellants had the burden to establish that (1) they took steps to move their cases along and (2) their cases took markedly longer than they reasonably should have.

[13] Before the Appeals Judge, the Appellants argued that the justices of the peace held them to a standard of perfection, rather than of reasonableness, when considering whether they had taken meaningful efforts to move their cases along. The Appeals Judge disagreed, expressly accepting the findings of the justices of the peace that the Appellants had done nothing to secure earlier trial dates.

[14] The Appeals Judge also rejected the Appellants' submission that, because proceedings for Part I offences are straightforward, anything in excess of 10-11 months from offence date to trial is markedly longer than is reasonable. The Appeals Judge acknowledged that Part I proceedings are simple and streamlined. However, she noted, the test for whether a case takes markedly longer than reasonable, as set out in *Jordan,* directs the court to consider a variety of factors including case complexity, local considerations, and whether the Crown took reasonable steps to expedite the proceedings. Further, trial judges are directed to use their knowledge of their own jurisdiction's local and systemic considerations and the length of time a similar case typically takes to reach trial in assessing the reasonableness of the time to trial in cases where the delay is below the ceiling.

[15] The Appeals Judge observed that the justices of the peace who tried the Appellants' cases regularly preside in the jurisdiction and were capable of quickly applying their extensive knowledge of local conditions and their experience with similar cases to assess the delays in the cases before them.

[16] The Appeals Judge then dealt with whether the Crown had taken reasonable steps to expedite the process. The Appellants submitted that it had not because it failed to offer earlier trial dates after being served with the s. 11(b) applications.

[17] The Appeals Judge disagreed. She saw no error on the part of the justices of the peace in concluding that the prosecutions had not taken markedly longer than usual. She observed that the Appellants had been provided with the earliest available trial dates after they filed their Notices of Intention to Appeal and that those dates were well below the presumptive ceiling. She stated that the filing of a s. 11(b) application did not trigger an obligation on the prosecution to obtain earlier dates and noted that the prosecution was ready to proceed on the first trial date, having provided the Appellants with timely disclosure. She concluded that the prosecution acted reasonably in expediting the matters.

[18] Accordingly, the Appeals Judge dismissed the summary conviction appeals.

The Issues

[19] The Appellants raise the following issues:

1. Does the 18-month presumptive ceiling established in *Jordan* apply to proceedings under Part 1 of the *POA* or should the ceiling be lower?

2. Are the Appellants entitled to stays despite the delays being below the presumptive ceiling?

Issue #1: 18 months is the presumptive ceiling for Part I *POA* proceedings

The Parties' Positions

[20] The Appellants' position on this issue can be summarized as follows. In setting the 18-month presumptive ceiling for criminal cases in provincial courts, *Jordan* made no reference to if, or how, the presumptive ceiling would apply to *POA* proceedings. They say that the 18-month presumptive ceiling established in *Jordan* was premised on factors that do not – or minimally – apply to such proceedings. As the *POA* was meant to provide a speedy, streamlined procedure for regulatory offences, the Appellants contend that a lower presumptive ceiling for such matters is warranted.

[21] The Crown submits that *R. v. K.J.M.,* 2019 SCC 55, a decision of the Supreme Court of Canada released after the appeals in this matter were decided, is a full answer to the Appellants' contention. It says that *K.J.M.* makes it clear that the presumptive ceiling for all provincial court proceedings is 18 months.

Analysis

[22] I accept the Crown's submission on this issue.

[23] In *K.J.M.*, the Supreme Court considered whether the presumptive ceilings in *Jordan* apply to youth justice court proceedings. Justice Moldaver, writing for the majority, concluded that they did. While Moldaver J. acknowledged the many

reasons why youth matters should proceed expeditiously, he found there was no need to introduce a lower presumptive ceiling for such matters.

[24] At para. 65 of *K.J.M.,* Moldaver J. states that *Jordan* established uniform ceilings "irrespective of the varying degrees of prejudice that might be experienced by different groups and individuals." He explains that setting different ceilings would "quickly become impracticable." Moreover, he concludes, setting different ceilings "would be incompatible with the uniform-ceiling approach adopted in *Jordan* and would undermine its objective of simplifying and streamlining the s. 11(b) framework."

[25] In *K.J.M.,* the Supreme Court reasoned that the creation of a separate criminal justice system, which codifies the need for timeliness in youth cases, does not justify the use of a different presumptive ceiling. That same reasoning applies to proceedings under Part I of the *POA.*

[26] The language in *K.J.M.* is categorical: the ceilings established in *Jordan* apply uniformly. Accordingly, while the *POA* is intended to provide a speedy and efficient process for dealing with regulatory offences, the 18-month presumptive ceiling for single-stage provincial court proceedings established in *Jordan* applies to proceedings under Part 1.

Issue #2: Neither Appellant is entitled to a stay of proceedings

[27] These appeals were conducted in writing. The Appellants' factum focuses almost exclusively on the first issue. Their arguments on this, the second issue, are cursory. They basically amount to a reiteration of the complaints that they advanced in the appeals court below, although the complaints are now levied against the decision of the Appeals Judge rather than those of the justices of the peace.

[28] The Appellants say that the Appeals Judge erred by holding them to a standard of perfection, rather than reasonableness, when considering their efforts to move their cases along. They repeat their complaint that the prosecution took no steps to mitigate the delay once served with notices of the s. 11(b) applications. And, the Appellants submit, it should not have taken more than 11-12 months from the offence dates to bring the Appellants to trial.

[29] I see no basis on which to interfere with the decisions under appeal. The Appeals Judge carefully reviewed the determinations of the justices of the peace on the issues of whether the Appellants took meaningful steps to move their cases along and whether their cases took markedly longer than they reasonably should have. In her reasons, the Appeals Judge thoroughly addresses the Appellants' complaints relating to those determinations. I agree with her determinations and with the reasons that she gave for them.

[30] As I have summarized the reasons of the Appeals Judge above, I will not repeat them here. Suffice to say that in her reasons, the Appeals Judge correctly articulates and applies the governing legal principles to unimpeachable factual findings. She made no error in concluding that the Appellants had failed to take reasonable steps to move their cases along or that their cases had not taken "markedly longer" than they reasonably should have.

Disposition

[31] Accordingly, I would dismiss the appeals.

Released: September 30, 2020 ("G.R.S.")

"E.E. Gillese J.A."
"I agree. G.R. Strathy C.J.O."
"I agree. David Watt J.A."