COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Hanan, 2022 ONCA 229
DATE: 20220321
DOCKET: C68236

Tulloch, van Rensburg and Nordheimer JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Dia ‘Eddin Hanan

Appellant

Saman Wickramasinghe and Parmbir Gill, for the appellant

Michael Fawcett and Andrew Hotke, for the respondent

Heard: September 7, 2021 by video conference

On appeal from the conviction entered by Justice Kirk W. Munroe of the Superior Court of Justice, sitting with a jury, on November 28, 2019, and the sentence imposed on March 2, 2020, with reasons reported at 2020 ONSC 1209.

van Rensburg J.A.:

I. OVERVIEW

[1] The appellant was charged with first degree murder, attempted murder and firearms-related offences in connection with a shooting of two individuals on December 23, 2015. One victim died and the other was severely injured. The preliminary inquiry judge discharged the appellant on first degree murder and

committed him to trial on second degree murder, attempted murder and the firearm charges.

[2] On October 28, 2019, the appellant's trial by judge and jury commenced. It concluded four weeks later. The appellant was acquitted of second degree murder and convicted of manslaughter in connection with the victim who died. He was acquitted of attempted murder but convicted of discharging a firearm with intent to wound in connection with the second victim and of possession of a restricted firearm without a license. He was sentenced to 15 years in custody, less credit for pre-sentence custody and restrictive bail conditions.

[3] The appellant appeals his conviction and sentence.

[4] The appellant raises two grounds of appeal against his conviction. First, he asserts that the trial judge erred in dismissing his application for a stay of proceedings under s. 24(1) of the *Charter*, for violation of his s. 11(b) rights (oral reasons reported at 2019 ONSC 320). He alleges two errors. First, he contends that the trial judge, in concluding that there was a net delay of 35 months and 7 days under *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631, erred in his assessment of defence delay, and that the net delay was in fact 40 months and 7 days. The appellant asserts that it was an error to attribute several months of delay to the defence arising from repeated adjournments before a judicial pre-trial was set, when the Crown provided insufficient and delayed disclosure. Second, he

argues that the trial judge erred in his application of the transitional exceptional circumstance, where only approximately six months of the case occurred pre-*Jordan* and where the Crown made a "significant mistake" well after *Jordan* had been released, resulting in a delay of the trial by almost a year. For its part, the Crown argues that the trial judge erred by not attributing more of the delay in respect of the rescheduled trial to the defence, and that the net delay was in fact 32 months.

[5] In an argument made in this appeal as well as two other appeals heard the same week, *R. v. Charity* and *R. v. Campbell*,[1] the Crown submits that, if this court concludes that there was a violation of the appellant's s. 11(b) rights, a remedy other than a stay of proceedings should be considered.

[6] The appellant's second ground of appeal against his conviction is based on an alleged error in the trial judge's jury charge. He submits that the jury was misdirected on the burden of proof when told that they should choose between the accounts of the appellant and the surviving victim in the trial judge's instructions on self-defence.

[7] The appellant also seeks leave to appeal his sentence, arguing that the trial judge's reasons make it clear that he was sentenced as though he was convicted

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[1] *R. v. Charity*, 2022 ONCA 226; *R. v. Campbell*, 2022 ONCA 223.

of murder, and that the global sentence for manslaughter and the offences of which he was convicted was demonstrably unfit.

[8] For the reasons that follow, I would dismiss the appeal.

[9] With respect to the s. 11(b) issues, I would not interfere with the trial judge's refusal to stay the proceedings due to delay. The trial judge correctly assessed net delay at 35 months and 7 days. He did not err in attributing to the defence the delay of nine months, 4.5 months of which is conceded by the appellant, for the time that defence counsel refused to set a judicial pre-trial. Nor would I accept the Crown's argument that the entire period between the available June 2019 trial dates, for which the defence was not available, and the eventual commencement of trial in October 2019 counts as defence delay. In his treatment of defence delay, the trial judge properly applied the principles articulated in *Jordan* and other cases, having regard to the particular circumstances before him. I would also not interfere with the trial judge's conclusion that the delay, which exceeded the *Jordan* ceiling, was nevertheless justified by the transitional exceptional circumstance. His assessment of the relevant factors in the context of the case does not reveal any legal error and is entitled to deference.

[10] Because of my conclusion on the first ground of appeal, it is unnecessary to consider the Crown's argument that a remedy other than a stay of proceedings should be considered. If I had concluded that there was a s. 11(b) breach, I would

have ordered a stay of proceedings, for the reasons expressed in *R. v. Charity*, 2022 ONCA 226, which is released together with these reasons.

[11] I would also reject the appellant's argument that there was a reversible error in three passages of the jury charge where the trial judge referred to the "competing" and "conflicting" versions of events of the appellant and the surviving victim. When considered in the context of the entire jury charge and the issues at trial, the impugned passages do not reveal error. The charge provided clear direction to the jury on the Crown's burden of proof and their assessment of the evidence, including the application of *R. v. W.(D.)*, [1991] 1 S.C.R. 742, to the elements of the offences and the defence of self-defence.

[12] Finally, I am not persuaded that the sentence was demonstrably unfit. Recognizing that the shootings were intentional, in the sense that they were not accidental, the trial judge imposed a reasonable sentence, having regard to all of the relevant circumstances, including the seriousness of the offences.

[13] I will deal with each ground of appeal in turn.

II. THE STAY APPLICATION: SECTION 11(b) OF THE *CHARTER*

[14] I will begin by setting out the relevant procedural chronology, followed by a summary of the trial judge's reasons for dismissing the s. 11(b) application. I will then discuss each of the issues: whether the trial judge erred in his assessment of

defence delay during two periods, and whether he erred in his application and assessment of the transitional exceptional circumstance.

(1) Procedural Chronology

[15] The appellant was charged with first degree murder and attempted murder on December 24, 2015. He was initially detained in custody. The Crown alleged that the two victims attended the appellant's home, and while they were in the driveway, he shot them both, killing one and leaving the other paralyzed. The surviving victim, Gregory Henriquez, was a Crown witness.

[16] The matter proceeded slowly through the Ontario Court of Justice (the "OCJ"). The Crown provided substantial initial disclosure on January 7, 2016. On January 21, defence counsel attended court and asked for a one-week adjournment for the purpose of setting a judicial pre-trial date. However, a judicial pre-trial was not set for several months. On January 28, the defence asked for a further adjournment, citing outstanding disclosure. This became a pattern, and over the next few months, the matter stalled as the Crown provided further disclosure and, instead of agreeing to scheduling a judicial pre-trial, the defence requested adjournments to review disclosure or to await further disclosure.

[17] On March 10, 2016, the Crown filed a replacement information, adding six firearms charges. Again, the defence asked for an adjournment because they were awaiting additional disclosure.

[18] On April 7, 2016, the defence requested a one-week adjournment for the purpose of setting a judicial pre-trial, and again, no pre-trial was scheduled. On April 14, the defence asked for a further adjournment to review disclosure. On this occasion, the Crown pushed to set a judicial pre-trial, given that the matter had been stagnant for some time. The defence opposed the request, suggesting that a judicial pre-trial would not be meaningful without full disclosure. This pattern continued for the next two months as the Crown continued to make disclosure.

[19] In June 2016, the appellant advised the court that he intended to change counsel. At the next few court appearances, the defence requested adjournments to confirm new counsel's retainer and for the new counsel to review disclosure.

[20] On July 8, 2016, the Supreme Court released its decision in *Jordan*. After the release of *Jordan*, Crown counsel became increasingly concerned that the matter had been dragging on for too long without a judicial pre-trial. On July 21, the defence again requested an adjournment because of the change in counsel and to receive further disclosure, and Crown counsel expressed the need to move the case forward.

[21] The new defence counsel got on the record in August 2016 and sought adjournments to review disclosure. In the multiple appearances that followed, the Crown stressed that a judicial pre-trial needed to be set as soon as possible. On October 19, the court set a judicial pre-trial, which took place on November 9, 2016.

The parties planned to have a continuing judicial pre-trial. On December 15, the defence asked to delay setting a continuation of the judicial pre-trial pending the result of the appellant's application for judicial interim release.

[22] On December 20, 2016, the appellant was released from custody, and a continuing judicial pre-trial was set for January 16, 2017. The parties intended to set preliminary hearing dates in March 2017, but on March 1, 2017, the defence asked to delay setting such dates to review recently provided disclosure and to obtain further disclosure. The Crown submitted that dates should be set sooner rather than later, and suggested that the parties could adjust the dates as required. The matter was adjourned to March 29, 2017 to set preliminary hearing dates.

[23] On March 29, 2017, the parties set preliminary hearing dates for 15 days beginning on October 31, 2017. In the end, the preliminary inquiry lasted only eight days, concluding on December 4, 2017. On December 12, 2017, the appellant was committed for trial on second degree murder, attempted murder, and the firearms charges.

[24] On January 5, 2018, the first appearance in the Superior Court, the presiding justice in assignment court, Pomerance J., asked defence counsel to identify how much of the delay to date was defence delay. The Crown's position was that there were eight months of defence delay at the beginning of the case. Defence counsel accepted that the defence delay was somewhere in that range. Based on this

assessment, the *Jordan* ceiling of 30 months would be reached on or around February 24, 2019. The court was eager to set trial dates as soon as possible.

[25] In February 2018, following a judicial pre-trial, a six-week jury trial was scheduled to commence on November 5, 2018. Pre-trial motions were set for September 2018. The dates were confirmed in August 2018, at which time Crown counsel updated defence counsel on the police's efforts to analyze the appellant's cell phone, and advised that technical issues prevented an analysis (the cellphone was password-protected and the existing technology prevented access). Crown counsel had no information about when a report might be obtained and warned defence counsel that "it might end up affecting our trial timeline if it arrives unexpectedly."

[26] Pre-trial motions commenced as scheduled on September 17, 2018. The Crown confirmed that the surviving victim, who lived in the United States and had testified by video at the preliminary inquiry, would be attending the trial.

[27] On the eve of trial, the Crown encountered two significant challenges. First, the surviving victim refused to testify and could not be compelled to do so because he was not in Canada. As a result, the Crown intended to apply to introduce his preliminary hearing testimony and police statement as evidence at the trial, which would entail motions that would inevitably delay the start of the trial. Second, the police had succeeded in analyzing the appellant's cell phone and had provided a

report to the Crown at the last minute. The Crown intended to rely on this evidence, but the police had not provided the Crown with the information to obtain ("ITO") and search warrant authorizing the search of the phone.

[28] On November 2, three days before the jury trial was to begin, the Crown informed the court of these problems. The defence raised the possibility of re-electing to a trial by judge alone under s. 561 of the *Criminal Code*, to avoid an adjournment. The Crown asked for time to consider the possibility of re-election. The trial judge warned the Crown that, while the matter was "fine if we proceed right now", if there was further delay, they "might start having *Jordan* problems". The trial judge told the Crown to obtain and disclose the ITO and search warrant over the weekend, given that the defence was concerned about potential *Charter* problems with the cell phone evidence.

[29] On November 5, 2018, the date on which the trial was scheduled to begin, the Crown advised that it would not consent to a re-election. The defence requested an adjournment, and Crown counsel conceded that the defence request was appropriate. The trial judge asked about the s. 11(b) consequences of granting an adjournment. Defence counsel confirmed that, if the trial could not be rescheduled in the next six months, he would likely bring a s. 11(b) application. The trial judge deferred consideration of the adjournment request to the following day. The ITO for the cell phone search was provided to the Crown and disclosed to the defence after court on November 5.

[30] On November 6, after confirming the Crown's position regarding re-election, the trial judge adjourned the trial to October 28, 2019, almost a year later. The court had offered to reschedule the six-week jury trial beginning on June 3, 2019, after making exceptional efforts to reorganize the trial judge's schedule. However, defence counsel was unavailable because he was conducting another trial for an in-custody client at that time. Later that day, after the trial was adjourned, the Crown advised that, having reviewed the ITO, it no longer intended to rely on the cell phone evidence.

[31] The trial judge did not allow the 2018 trial dates to go to waste. He used the time to conduct further pre-trial motions, including the s. 11(b) application. On November 16, 2018, the parties held a judicial pre-trial to discuss the s. 11(b) issues. At the Crown's request, the court disclosed the trial judge's schedule to the Crown, so that the Crown could assess the other matters assigned to the trial judge and determine whether any Crown matters could be resolved or adjourned. There were no other six-week periods when the judge was available. The Crown also proposed that the trial could be completed in four weeks, a suggestion that was opposed by defence counsel and rejected by the trial judge. In January 2019, the trial judge dismissed the appellant's s. 11(b) application.

[32] The appellant's trial commenced as scheduled on October 28, 2019 and concluded on November 28, 2019.

(2) The Trial Judge's Section 11(b) Decision

[33] The trial judge dismissed the s. 11(b) application, holding that, although the net delay exceeded the *Jordan* ceiling of 30 months, it was justified because this was a transitional case where the transitional exceptional circumstance applied. The total delay was about 47.5 months. From that total, the trial judge deducted defence delay, leaving a net delay of 35 months and 7 days.

[34] The trial judge deducted as defence delay approximately 12.5 months as follows:

- January 21 to October 19, 2016 (9 months): During this period, the defence refused to set a judicial pre-trial because disclosure was incomplete and ongoing. The appellant also changed counsel. The appellant acknowledged that the delay caused by the change in counsel was properly deducted, but argued that the remaining delay was not. The trial judge held that the defence position that disclosure must be complete before a judicial pre-trial could be set was "misguided and wrong". In cases of even modest complexity, disclosure will be an ongoing process. Defence counsel had accepted that there were eight months of defence delay during this period at a previous court appearance.

- December 15 to December 20, 2016 (5 days): The appellant agreed to a finding of defence delay because the defence had asked to delay setting a judicial pre-trial continuation date.
- March 1 to March 29, 2017 (28 days): The defence asked to delay setting preliminary hearing dates to obtain and review disclosure. This delay was unnecessary, as the parties could have set dates and adjusted them later if required.
- Six weeks beginning June 3, 2019 (6 weeks): The Crown and the court were available to conduct the rescheduled trial for six weeks beginning June 3, but the defence was unavailable. The trial judge declined to attribute the entire period of delay from June 3 to the October 28, 2019 trial dates to the defence, holding that because the court was unable to accommodate the trial sooner, it did not count as defence delay.

[35] The trial judge declined to find any other defence delay based on the adjournment of the first trial dates in November 2018. The adjournment was caused by the late disclosure of the cell phone analysis and the surviving victim's refusal to testify. The defence application for an adjournment was legitimate, given the Crown's concession that proceeding to trial would be unfair.

[36] The trial judge also held that the late disclosure of the cell phone analysis and the surviving victim's refusal to testify did not qualify as discrete exceptional circumstances. The late disclosure did not qualify because it was not reasonably

unforeseen or reasonably unavoidable. The Crown had warned the defence that this might happen, and should have been able to tell the court sooner that it did not intend to rely on the evidence.

[37] The surviving victim's refusal to testify also did not qualify as a discrete exceptional circumstance. Although the trial judge accepted that this was unavoidable, he concluded that the Crown failed to take reasonable steps to address the problem before the delay exceeded the *Jordan* ceiling. The Crown's proposal that the trial be shortened and efforts to find an earlier trial date were not sufficient. When the defence proposed a re-election, the Crown knew that the approximate *Jordan* ceiling was in February 2019, that the earliest available trial date was October 2019, and that the defence was likely to bring a s. 11(b) application. The only reasonable step in the circumstances was for the Crown to consent to re-election.

[38] The trial judge rejected the Crown's position that the delay was justified by the complexity of the case. It was a "classic self defence murder case", with typical disclosure and standard issues.

[39] Finally, the trial judge applied the transitional exceptional circumstance to conclude that the delay was justified. He rejected the defence argument that the transitional exceptional circumstance did not apply because most of the proceedings (all but the first six months or so) occurred after the release of *Jordan*.

He held that the time the parties have had to adapt following *Jordan* is a factor to be considered. The trial judge considered the following additional factors:

- Complexity of the case: The case was of moderate complexity.
- Period of the delay in excess of the guidelines under *R. v. Morin*, [1992] 1 S.C.R. 771: The combined institutional and Crown delay was five months in the OCJ, and ten months in the Superior Court. This was below the guideline for the OCJ, above the guideline for the Superior Court by two months, and under the overall guidelines.
- Crown's response to institutional delay: The Crown repeatedly pushed the case forward in the face of defence delay, and only contributed to the delay by refusing to consent to the defence re-election.
- Defence efforts to move the case along: The trial judge gave the defence "almost no credit for any effort to move this case forward". In fact, the defence sought delay. The only effort the defence made to avoid delay was the proposal to re-elect.
- Prejudice to the accused: The trial judge inferred prejudice and noted that the appellant was in custody for a year before he was released on bail.

[40] The trial judge also considered the limited time the case spent under the *Morin* framework and the seriousness of the offences. He stated that the final assessment was "difficult". The Crown conducted itself impeccably until the first trial date, while the defence caused delay. The trial judge held that the Crown's

single misstep in refusing to consent to re-election was not determinative. The court in *Jordan* recognized that change takes time. While Crown counsel was aware of *Jordan* within weeks of its release, learning the full lessons of *Jordan*, including the meaning of concepts such as “defence delay”, “discrete exceptional circumstances”, “particularly complex cases”, and “transitional exceptional circumstance”, required time. An example of this was the repeated adjournment requests by the defence, even after *Jordan* was released. The trial judge accepted that, assessing the case contextually and qualitatively, the Crown had established that the time it would take to try the case was justified.

(3) Discussion

[41] The standard of review of a decision on a s. 11(b) application is well-established. Deference is owed to a trial judge’s underlying findings of fact. The correctness standard applies to the trial judge’s characterization of periods of delay, and to the determination of whether the delay was unreasonable: *R. v. Jurkus*, 2018 ONCA 489, 363 C.C.C. (3d) 246, at para. 25, leave to appeal refused, [2018] S.C.C.A. No. 325. Trial judges are generally in the best position to determine whether exceptional circumstances exist (including in the assessment of the transitional exceptional circumstance): *Jordan*, at para. 98. While typically deference is owed to such a determination, a clear legal error would justify interference: *R. v. Picard*, 2017 ONCA 692, 137 O.R. (3d) 401, at para. 137, leave to appeal refused, [2018] S.C.C.A. No. 135.

a) Defence Delay

[42] There are two relevant periods at issue: (a) the 4.5-month period between January 21 and June 9, 2016, when the defence refused to set a judicial pre-trial based on incomplete and ongoing disclosure; and (b) the period commencing June 3, 2019, when a six-week trial date was offered but the defence was not available, until the trial proceeded on October 28, 2019.

i. <u>January 21, 2016 to June 9, 2016</u>

[43] The appellant contends that the trial judge erred in characterizing the 4.5-month period from January 21 to June 9, 2016 as defence delay when defence counsel reasonably refused to set a judicial pre-trial date because of inadequate Crown disclosure. The appellant submits that, tracking the definition of defence delay in *Jordan* and *R. v. Cody*, 2017 SCC 31, [2017] 1 S.C.R. 659, counsel's request for time to review extensive outstanding disclosure before setting a judicial pre-trial was not "illegitimate defence action" that failed to respond to the charges. Rather, it was reasonable for the defence to refuse to set a judicial pre-trial, given that disclosure was incomplete and ongoing. Not counting that period as defence delay would result in a net delay of 40 months and 7 days.

[44] I would not interfere with the trial judge's attribution of delay to the defence resulting from the repeated adjournment requests that were based on the need for more disclosure. Authorities both before and after *Jordan* make it clear that the

Crown is not obliged to make complete disclosure before a judicial pre-trial is set: see, e.g., *R. v. N.N.M.* (2006), 209 C.C.C. (3d) 436 (Ont. C.A.), at para. 37; *R. v. Kovacs-Tatar* (2004), 73 O.R. (3d) 161 (C.A.), at para. 47; and *R. v. Carbone*, 2020 ONCA 394, 150 O.R. (3d) 758, at paras. 51-53.

[45] In *R. v. D.A.*, 2018 ONCA 96, 402 C.R.R. (2d) 303, a case relied on by the appellant, the parties scheduled pretrial and trial dates despite outstanding disclosure. This court concluded that, after the Crown continued to provide significant new material in the moments leading up to each appearance, it was legitimate for the defence to require time to review the disclosure before proceeding as scheduled: at paras. 7, 12-22. In this case, by contrast, where defence counsel continually refused to set dates for a judicial pre-trial citing inadequate Crown disclosure, the trial judge found that the Crown had been diligent in providing disclosure and that the defence had sufficient disclosure to set a judicial pre-trial. In fact, defence counsel had told the court on two occasions, before again requesting adjournments, that she intended to set a judicial pre-trial.

[46] The trial judge found that the defence's repeated delay of the pre-trial was "misguided, drastically inefficient, and wrong", and he noted that, when the proceedings moved to the Superior Court, defence counsel acknowledged that this period was defence delay. He concluded that "this was not a case of refusing or delaying [disclosure] by Crown counsel". A high level of deference is owed to trial judges' findings on the legitimacy of defence conduct: *Cody*, at para. 31. The

appellant has not pointed to any palpable and overriding error in these factual findings and accordingly, in my view, there is no reason to interfere with the trial judge's characterization of this period as defence delay.

ii. June 3, 2019 to October 28, 2019

[47] The trial judge attributed six weeks of delay during this period to the defence. He arrived at this conclusion after rejecting the Crown's argument that the entire delay between the adjournment of the November 2018 trial date to the ultimate October 28, 2019 trial date was caused by a discrete exceptional circumstance. After concluding that the adjournment of the trial did not meet the test for a discrete exceptional circumstance, he addressed the fact that the six-week trial could have commenced on June 3, 2019, but for the unavailability of defence counsel. He treated this six-week period, when the court and Crown counsel were available but the defence was not, as defence delay. In his view, because the system could not accommodate a trial after the six-week block declined by the defence, the time that fell afterward "does not count as defence delay because the court was unavailable to proceed".

[48] The issue here, which is raised by the Crown, is whether the entire period from June 3 to October 28, 2019, which was the next available court date for the six-week jury trial, ought to have been attributed to the defence. The Crown says that this is the logical result of applying *Jordan*, and that post-*Jordan* case law sets

a “bright-line rule” providing that, if defence unavailability causes a scheduling delay, then the defence must take complete responsibility for the entire period of delay. Counting this period as defence delay would result in a net delay of only 32 months.

[49] In my view, the trial judge did not err in his characterization of the delay during this period. His conclusion that the defence was responsible for six weeks of delay, but not for the ensuing delay when the court could not accommodate the trial, is consistent with the directives of the Supreme Court in *Jordan* and *Cody*.

[50] In *Jordan*, the Supreme Court identified the two components of defence delay as “delay waived by the defence” and “delay caused solely by the conduct of the defence”: at paras. 61 and 63. With respect to the latter, the court noted that this kind of defence delay comprises “those situations where the accused’s acts either directly caused the delay … or the acts of the accused are shown to be a deliberate and calculated tactic employed to delay the trial”: at para. 63. The court identified, as a straightforward example of defence delay, “[d]eliberate and calculated defence tactics aimed at causing delay, which include frivolous applications and requests”: at para. 63.

[51] Importantly, however, the court continued with the following, and oft-quoted statement, at para. 64:

> As another example, the defence will have directly caused the delay if the court and the Crown are ready to

> proceed, but the defence is not. The period of delay resulting from that unavailability will be attributed to the defence. However, periods of time during which the court and the Crown are unavailable will not constitute defence delay, even if defence counsel is also unavailable. This should discourage unnecessary inquiries into defence counsel availability at each appearance.

[52] In *Cody*, the Supreme Court elaborated on its definition of this category of defence delay, describing it as delay "which: (1) is solely or directly caused by the accused person; and (2) flows from defence action that is illegitimate insomuch as it is not taken to respond to the charges": at para. 30. The court cited again the example "where the court and Crown are ready to proceed, but the defence is not": at para. 30.

[53] Typically, aside from time legitimately taken to respond to the charges, the delay that results when the court and the Crown are ready to proceed and the defence is not is counted as defence delay: *R. v. Thanabalasingham*, 2020 SCC 18, 390 C.C.C. (3d) 400, at para. 9; *Jordan*, at para. 64. There is, however, a qualification: "periods of time when the court and the Crown are unavailable will not constitute defence delay, even if defence counsel is also unavailable": *Jordan*, at para. 64.

[54] The issue of defence delay in the context of defence unavailability was addressed recently by the Supreme Court in *R. v. Boulanger*, 2022 SCC 2, in an appeal from a decision of the Québec Court of Appeal that upheld a stay of proceedings for breach of the respondent's s. 11(b) rights. One of the issues

concerned the attribution by the trial judge of 112 days of delay to the defence between May 21 and September 10, 2019, where additional trial dates were required, and the defence was not available on certain dates in May 2019. Kasirer J., for the Supreme Court, concluded that the majority in the Court of Appeal was correct to intervene because this delay could not be attributed entirely to the respondent, despite the fact that his counsel was unavailable on certain dates. Referring to para. 64 of *Jordan*, where the court explained that where the court and the Crown are ready to proceed but the defence is not, the resulting delay is attributable to the defence, Kasirer J. noted that "in some cases, the circumstances may justify apportioning responsibility for delay among [the participants in the criminal justice system] rather than attributing the entire delay to the defence". He recognized that the delay was caused by the conduct of defence counsel, as well as changes in Crown strategy, institutional delay and the court's lack of initiative in obtaining earlier dates. Kasirer J. stated that, in the particular circumstances of this case, it was "fair and reasonable" for the Court of Appeal to have apportioned responsibility for the 112-day delay, attributing up to half the delay to the defence (as well as ten additional days based on a defence concession in the Court of Appeal). In the end, however, the 30-month *Jordan* ceiling was exceeded, no exceptional circumstance had been raised to justify exceeding the ceiling, and a stay of proceedings was warranted. The Supreme Court dismissed the appeal.

[55] In my view, that is the appropriate approach to take in this case.

[56] Once it is accepted that the reason for defence unavailability (other than legitimate defence preparation time) is not taken into account in determining defence delay, it does not necessarily follow, as the Crown urges this court to find, that there is a "bright-line" rule that, once the defence is unavailable, all of the delay until the next available date is characterized as defence delay. That would be inconsistent with the principle that the delay must be "solely or directly" caused by the defence, and the qualification that "periods of time during which the court and the Crown are unavailable will not constitute defence delay, even if defence counsel is also unavailable": *Jordan*, at para. 64. Like Roberts J.A. in *R. v. Albinowski*, 2018 ONCA 1084, 371 C.C.C. (3d) 190, I would reject the "categorical approach" proposed by the Crown that all of the delay following the rejection of a date offered by the court must be characterized as defence delay, and I agree with her statement that "it is necessary to consider the circumstances of [the] case": at para. 46. The court must take a contextual approach that considers the circumstances relevant to whether, in respect of a particular period of time, the defence refusal of a date is the "sole or direct" cause of the resulting delay.

[57] In some cases, it may be appropriate to attribute all of the delay to the defence: see, for example *R. v. McManus*, 2017 ONCA 188, 353 C.C.C. (3d) 493, at para. 33, and *R. v. Baron*, 2017 ONCA 772, 356 C.C.C. (3d) 212, at para. 48, where in each case the defence requested an adjournment at the last minute of a

multi-day hearing and the next available date was several months later. In these cases, there was no question that the defence caused the event that precipitated the need for new dates. This is delay “solely or directly” caused by the defence.

[58] In the present case, however, a six-week jury trial had been scheduled for November 2018 when the matter first arrived in the Superior Court in January 2018, after specific consideration of when the *Jordan* threshold would be exceeded (February 2019). A last-minute adjournment was required because of the unexpected refusal of the surviving victim to testify, and the Crown’s late disclosure of the cell phone data. The appellant offered to re-elect to avoid losing the original trial dates, and the Crown refused. Through significant efforts, including an adjustment to the trial judge’s schedule, the court was able to offer a six-week period commencing on June 3, 2019 for the trial. Defence counsel was already scheduled for another matter, so the trial was scheduled to proceed on the next available dates in October 2019. In these circumstances, the defence was only the “direct or sole” cause of the six-week delay starting June 3, 2019, because during this period the Crown and the court were ready to proceed and the defence was not. However, after that six-week period, there was no availability in the court schedule until October 28. The trial judge took the correct approach in concluding that this was not defence delay because the court was unable to accommodate the trial sooner.

[59] The trial judge, in determining what portion, if any, of the delay between June and October 2019 should be attributed to the defence, applied an appropriate contextual approach that is faithful to *Jordan*. The trial judge's refusal to attribute more than six weeks to the defence was, in the circumstances of this case, a fair allocation and entirely appropriate, considering that it was the trial adjournment that resulted in the need for new dates, and the court had no other dates available between June and October 28, 2019. In the circumstances, it would not have been "fair and reasonable" to characterize as defence delay the remaining months when the court could not accommodate a trial. This was not delay that was "solely or directly" caused by the defence.

b) The Transitional Exceptional Circumstance

[60] The appellant contends that the trial judge erred in concluding that the transitional exceptional circumstance justifies the presumptively unreasonable delay in this case, given that only 6.5 months of the case occurred pre-*Jordan* and the cause of the delay exceeding the *Jordan* ceiling was the Crown's unreasonable refusal to consent to a re-election. The Crown contends that the trial judge's approach to the transitional exceptional circumstance was based on his findings of fact and is entitled to deference.

[61] A transitional case is one that was "in the system" when *Jordan* was released: *Jordan*, at para. 95; *Cody*, at para. 67. For such cases, a court can

consider whether there is a transitional exceptional circumstance as a final step in the analysis after concluding that the net delay exceeds the threshold or is otherwise unreasonable: *Jordan*, at para. 96; *Cody*, at para. 67. The transitional exceptional circumstance recognizes that all participants in the criminal justice system need time to correct their behaviour and to adjust to the new framework, which represents a "significant shift from past practice": *Jordan*, at paras. 96-97, 108.

[62] A transitional exceptional circumstance will apply "when the Crown satisfies the court that the time the case has taken is justified based on the parties' reasonable reliance on the law as it previously existed": *Jordan*, at para. 96. This involves a "qualitative exercise": *Cody*, at para. 68. The court in *Jordan* observed that the analysis must always be contextual and "sensitive to the manner in which the previous framework was applied, and the fact that the parties' behaviour cannot be judged strictly, against a standard of which they had no notice": at para. 96; see also *R. v. Williamson*, 2016 SCC 28, [2016] 1 S.C.R. 741, at para. 24; *R. v. Manasseri*, 2016 ONCA 703, 132 O.R. (3d) 401, at paras. 320-21, leave to appeal refused, [2016] S.C.C.A. No. 513.

[63] The relevant circumstances to be considered in the assessment of the transitional exceptional circumstance include: (i) the complexity of the case; (ii) the period of delay in excess of the *Morin* guidelines; (iii) the Crown's response, if any, to institutional delay; (iv) the defence efforts, if any, to move the case along; and

(v) prejudice to the accused: *Picard*, at para. 71; *R. v. Gopie*, 2017 ONCA 728, 140 O.R. (3d) 171, at para. 178. Factors that played a decisive role in whether delay was unreasonable under the previous framework, such as prejudice and the seriousness of the offence, may now inform whether any excess delay in transitional cases may be justified as reasonable: *Jordan*, at paras. 96-98; *Cody*, at para. 70. Although a case may not be sufficiently complex to meet the requirements of exceptional circumstances under *Jordan*, for transitional cases moderate complexity bears on the reasonableness of the delay: *Picard*, at para. 73, citing *R. v. Pyrek*, 2017 ONCA 476, 349 C.C.C. (3d) 554, at para. 30. The parties' general level of diligence and the conduct of counsel are also relevant: see *Cody*, at para. 70; *R. v. Rice*, 2018 QCCA 198, 44 C.R. (7th) 83, at paras. 202-3.

[64] The court explained in *Cody*, at para. 71, that the focus of the transitional exceptional circumstance for proceedings that occurred post-*Jordan* is as follows:

> When considering the transitional exceptional circumstance, trial judges should be mindful of what portion of the proceedings took place before or after *Jordan* was released. For aspects of the case that pre-dated *Jordan*, the focus should be on reliance on factors that were relevant under the *Morin* framework, including the seriousness of the offence and prejudice. <u>For delay that accrues after *Jordan* was released, the focus should instead be on the extent to which the parties and the courts had sufficient time to adapt.</u> [Citation omitted; emphasis added.]

[65] As noted earlier, the authorities make it clear that trial judges are generally in the best position to determine whether exceptional circumstances exist, including in the assessment of the transitional exceptional circumstance. Given the contextual and qualitative nature of this assessment, "[w]e rely on the good sense of trial judges to determine the reasonableness of the delay in the circumstances of each case": *Jordan*, at para. 98. While typically deference is owed to such a determination, a clear legal error would justify interference: *Picard*, at para. 137. In this regard, the Québec Court of Appeal aptly observed in *Rice*, at para. 207:

> It falls to judges, relying on experience, to determine whether transitional exceptional circumstances may be invoked in a given case despite delays that could be characterized as being very long. This is a multifactor analysis that is, above all, the purview of trial judges. In this equation which is anything but mathematic, there is no perfect result. Though the analytical framework must be followed correctly, the weighing of the different factors leading to a reasonable assessment and result are protected from appellate intervention. [Translation.]

[66] The appellant acknowledges that this is a transitional case – that is, that it was not an error for the trial judge to assess whether the transitional exceptional circumstance applied. The appellant contends, however, that the trial judge misunderstood how it applies. In particular, he erred in applying the *Morin* framework to the entire delay, and not just to the 6.5-month period that pre-dated *Jordan*. The appellant argues that the Crown's refusal to consent to the defence re-election occurred more than two years after the release of *Jordan* and that,

contrary to the trial judge's assessment, the parties had sufficient time to adapt to the new regime. The appellant relies on certain *obiter* comments in *R. v. Gordon*, 2017 ONCA 436, 137 O.R. (3d) 776, and *Picard*, decisions of this court that were released in May and September 2017 respectively, to say that the Crown was on notice that its decision to oppose the defence re-election would be considered unreasonable delay post-*Jordan*. Finally, the appellant contends that the transitional exceptional circumstance ought not to have been applied where the Crown's mistake was a tactical decision that ignored the teachings of *Jordan* and manifested the culture of complacency that *Jordan* was meant to eradicate.

[67] I disagree. There was no reversible error in the trial judge's assessment of the relevant factors and his conclusion that the net delay, which exceeded the *Jordan* ceiling by five months, was nevertheless justified, having regard to the transitional exceptional circumstance.

[68] First, the trial judge properly articulated the relevant principles to guide his analysis and the exercise of his discretion: see paras. 51-62 of his reasons. He specifically adverted to the relevant passages from *Jordan*, *Cody* and *Williamson* and he referred to this court's decision in *Picard*.

[69] Second, while the trial judge considered the entire delay through the lens of *Morin* in assessing whether the transitional exceptional circumstance ought to apply, he did not make the error alleged by the appellant. The trial judge did not

collapse the pre- and post-*Jordan* delay. In fact, he specifically referred to the fact that only approximately six months of the delay occurred pre-*Jordan* as a factor in his overall analysis. The trial judge found that the parties had not had sufficient time to adapt to the new framework. Although they were aware of *Jordan*, they had not yet learned its more difficult lessons and changed their behaviour accordingly. Therefore, as was required as part of the transitional exceptional circumstance analysis, the trial judge conducted an exhaustive assessment of the entire delay under the *Morin* framework. He disagreed with the defence submission that the overall delay would have been intolerable under *Morin*. Contrary to the appellant's suggestion, however, the *Morin* analysis was not determinative. It was but one factor in the trial judge's qualitative and contextual analysis.

[70] Third, as he was required to, the trial judge conducted a contextual assessment of the relevant factors. Recognizing that the case was only under the *Morin* framework for around six months, and citing para. 71 of *Cody*, he noted that for post-*Jordan* delay, the focus was properly on the time the parties had to adapt.

[71] The trial judge noted that the assessment was qualitative, rather than quantitative, and contextual. He considered the following factors: that the case was of moderate complexity; that under the *Morin* guidelines, the delay was two months above Superior Court guidelines, but under the OCJ guidelines and the total guidelines; that the Crown's response to delay was impressive until the trial adjournment; that defence efforts to move the case along were non-existent until

that time; and that there was inherent prejudice to the accused. He identified two additional relevant factors: the time the case was under the *Morin* framework and, relying on *Cody*, at para. 70, the serious nature of the offences alleged.

[72] The trial judge observed that the assessment was difficult: “Up until the first trial date Crown counsel conducted themselves impeccably in [avoiding delay]. They repeatedly and vigorously pushed the system for quicker settings. In marked contrast, up until the first trial date, the defence caused delay and showed no interest in pushing the case forward”. He noted that the Crown made a “major misstep” in refusing to consent to the defence re-election when the jury trial was adjourned, and that, without considering the transitional exceptional circumstance, a stay would have resulted. The trial judge’s analysis continued, at paras. 274-78:

> I cannot and do not ignore the Crown’s major misstep. The Crown was aware of the s. 11(b) problem and did not react well. But the analysis here is not limited to one misstep by one party, rather it must be contextual in consideration of all of the circumstances.
>
> I am fully aware of the following admonition in *Jordan*, at para. 98:
>
> > [T]he s. 11(b) rights of all accused persons cannot be held in abeyance while the system works to respond to this new framework. Section 11(b) breaches will still be found and stays of proceedings will still be entered for cases currently in the system. For example, if the delay in a simple case vastly exceeds the ceiling because of repeated mistakes or missteps by the Crown, the delay might be unreasonable

> even though the parties were operating under the previous framework. The analysis must always be contextual. We rely on the good sense of trial judges to determine the reasonableness of the delay in the circumstances of each case.

The *Jordan* decision brought radical changes to our courts. The Supreme Court seeks to effect real change. The Court was fully aware that change takes time. It was sensitive to the need for time to adapt. The necessary changes, even now, continue to be identified. The hard cap numbers and the math are the easy part. More difficult is an understanding of the needed adaptations to conform to the framework's bright-line rules. The pace and the rhythm of cases flowing through the system must change. How to effect the change is not easy to grasp nor to effect. The course of a river is never easy to alter.

There is no question here that Crown counsel was aware of the *Jordan* decision within weeks of its release. Crown counsel referred to *Jordan* by name in the OCJ when pressing for quicker dates. But awareness of the presumptive ceiling and the need for speed are the easiest lessons of *Jordan*. *Jordan* introduced a totally new framework with new concepts and new definitions: defence delay, discrete exceptional circumstances, particularly complex cases, and transitional exceptional circumstances. The precise meaning of these new concepts continues to be refined in court cases more than two years after the release of *Jordan*. It is the full understanding of the lessons of *Jordan* that Crown counsel and the courts lagged in their adjustment in this case. This is most notable in the OCJ where the case stalled, quite unnecessarily in most instances, without understanding. No longer can the courts in the OCJ unquestioningly go along with defence requests for delay before setting a JPT. The JPT is intended to advance cases, including as the forum to identify and resolve disclosure issues. The JPT should not evolve into a mechanism to retard cases. And, perhaps unfortunately, no longer can the Crown and the courts accommodate

> the defence in extending preliminary hearings for defence discovery without holding the defence responsible for that extra time. These too are lessons of *Jordan* to which we must adapt.
>
> Viewing this case as a whole, in the OCJ while the Crown was pushing and making commendable efforts to be fair, the defence sat back, complained generally about disclosure, and let the time-clock keep ticking. Then, on the edge of the *Jordan* cliff, the Crown was confronted by a serious delay-causing event. The Crown did not respond well. If my assessment rests on this Crown decision, the Crown loses. But it cannot and does not rest on that decision. And this is not a case where the Crown made repeated missteps. I am to assess contextually and qualitatively. In that assessment, I find that the Crown has established that the time it will take to try this case is justified based on the parties' reasonable reliance on the law as it previously existed. [Emphasis added.]

[73] The trial judge properly considered not only the delay that was occasioned by the Crown's misstep, but also the overall progress of the case, when he concluded that the parties had not yet adapted to the lessons of *Jordan*. He aptly observed that *Jordan* introduced new concepts and definitions that the case law was continuing to interpret. Although the parties may have been aware of *Jordan*, they had not had sufficient time to adapt to its lessons. As an example of the time taken to adapt, the trial judge referred to the continued conduct of the defence in delaying setting a judicial pre-trial which persisted both before and after the release of *Jordan*.

[74] As the appellant notes, this court's decisions in *Gordon* and *Picard* were released in 2017, about a year after *Jordan*. I do not, however, agree with the

appellant that these cases would have made it clear to the Crown that its refusal to consent to a re-election would necessarily lead to a stay. Nor do I agree with the appellant that the Crown's "misstep" was a tactical decision that ignored the teachings of *Jordan* and manifested the culture of complacency that *Jordan* was meant to eradicate.

[75] In both *Gordon* and *Picard*, the transitional exceptional circumstance was applied where the net delay well exceeded the *Jordan* threshold (44 months in *Gordon* and 40 months in *Picard*). In *Gordon*, this court deferred to the decision of the trial judge to refuse a stay, notwithstanding that the Crown's refusal to accept the accused's re-election in part caused a nine-month delay. Doherty J.A. saw "no reason to disagree with the factual findings underlying the trial judge's allocation of the various time periods": at para. 22. Noting that the Crown's decision must be considered in the context of other steps the Crown took at about the same time, in attempting to shorten the trial and to obtain earlier dates for a jury trial, and that there was no evidence of any repeated mistakes or missteps by the Crown that contributed to the delay, he stated that "[p]laced in its proper context, the Crown's refusal to consent to a re-election in June 2014 cannot be described as a 'misstep'. Nor does it reflect the 'culture of complacency' that so concerned the court in *Jordan*": at para. 26. He went on to observe, at para. 27, that "[t]he Crown's decision to keep the jury and consequently delay the trial, while probably unreasonable in the context of the 'hard cap' approach in *Jordan*, was reasonable

in the context of the *Morin* analysis as applied to the chronology of this case". The delay in the case was well within the *Morin* guidelines. Additional factors weighing against granting a stay under *Morin* were the fact that the case was moderately complex and the seriousness of the offences.

[76] *Picard* involved the appeal of a stay of a murder charge. This court allowed the appeal, concluding that the trial judge, among other things, erred in law in refusing to consider the transitional exceptional circumstance after finding that Crown and institutional delay exceeded the guidelines under the *Morin* framework. Rouleau J.A. concluded that the delay was under the *Morin* guidelines. He also disagreed with the trial judge's characterization of the Crown's refusal to accept earlier trial dates and to expedite the trial based on the unavailability of the two assigned Crowns as an example of the Crown making a choice that "paid no heed to the accused's s. 11(b) rights": at para. 133. Rouleau J.A. noted that, "as a result of the decision in *Jordan*, a decision such as the one the Crown made in this case would weigh heavily against the Crown and might in fact be determinative as to whether a stay should issue": at para. 130. Because this was a transitional case, however, he went on to consider whether the delay was justified by the transitional exceptional circumstance. He referred to excerpts from *Jordan* noting that it will be relatively rare for the delay in cases already in the system when *Jordan* was decided that complied with *Morin* to be found unreasonable under *Jordan*, and he observed that this was not a case where the parties had time following the release

of *Jordan* to correct their behaviour. The few months of delay that accrued after *Jordan* were not enough time for the parties and court to adapt. Noting that this was a difficult case, and after weighing all of the factors, he concluded that the delay above the presumptive *Jordan* ceiling was justified by the transitional exceptional circumstance: at paras. 137-141.

[77] The appellant focuses on the fact that most of the delay in *Gordon* and *Picard* was pre-*Jordan* and on the comments in each case suggesting that the result might have been different under a *Jordan* analysis. However, this is precisely what the trial judge observed in the present case – under the "hard cap" approach in *Jordan* (to echo Doherty J.A. in *Gordon*), a stay would have resulted. As a transitional case, however, it warranted an evaluation as to whether the delay was nevertheless justified because of the time required to adapt to the lessons of *Jordan*.

[78] The trial judge properly considered the factors that supported the existence of a transitional exceptional circumstance. He accepted the points raised in this court by the appellant: first, that the pre-*Jordan* delay was only 6.5 months, and that Crown counsel was aware of *Jordan* and its implications as soon as it was released, and second, that the Crown had made a "serious misstep" in not accepting the appellant's re-election, which would have avoided the s. 11(b) issue. Importantly, however, he noted that the precise meaning of the new concepts introduced in the *Jordan* framework continued to be refined some two years after

Jordan had been decided. This is an important observation in the context of this case: the case law was evolving, and the Crown might well have concluded that the trial delay that occurred just prior to the estimated *Jordan* ceiling date would qualify as a discrete exceptional circumstance or be attributed in part to the defence or that, based on *Gordon* and *Picard*, there was a transitional exceptional circumstance.

[79] The trial judge also looked at the overall pace of the case, observing as an example of the time to adapt, the stalling of the case in the OCJ because of defence counsel's repeated adjournment requests. Some delay preceded *Jordan* but there was little change in the defence approach even after *Jordan* was released. The trial judge properly, in my view, took into consideration the overall Crown and defence approaches to the progress of the case, as well as the fact that "on the edge of the *Jordan* cliff" the Crown made one serious misstep. This informed the trial judge's assessment that the Crown had established that the time it will take to try this case is justified based on the parties' reasonable reliance on the law as it previously existed.

[80] As the authorities recognize, a trial judge is in the best position to evaluate, in a transitional case, whether the overall delay was justified by the transitional exceptional circumstance. The trial judge here, after considering all of the factors, and with due regard for the fact that only about six months of the case occurred pre-*Jordan*, carefully explained why he had reached his decision. He concluded

that the parties had not had sufficient time to adapt to the lessons of *Jordan* after properly considering not just the Crown misstep that pushed the case over the *Jordan* threshold, but the conduct of both parties throughout. The conclusion that the delay was justified by the transitional exceptional circumstance reveals no error in law, and is entitled to deference.

[81] For these reasons, I would reject the appellant's argument that the trial judge erred in applying the transitional exceptional circumstance.

III. THE ALLEGED ERRORS IN THE CHARGE

[82] The appellant submits that, based on three passages from the jury charge, the trial judge erred by instructing the jury that its decision on the ultimate issues would depend on which version of events it accepted. In doing so, the trial judge framed the case as a credibility contest, shifting the burden of proof to the appellant and undermining the presumption of innocence. Apart from the impugned passages, the appellant takes no objection to the trial judge's instructions. Nevertheless, the appellant asserts that the trial judge's error, based on the three impugned passages, renders the verdict unsafe and necessitates a new trial.

[83] The Crown contends that the appellant's argument must fail for three reasons. First, it is undermined by the jury's verdict. The jury acquitted the appellant of murder and attempted murder, and found him guilty of manslaughter and discharge with intent to wound. There was no path to this outcome if the jury

had felt compelled to accept one of the two conflicting versions of events in its entirety. Second, the whole of the charge shows that the trial judge took care to emphasize, on several occasions, that the jury must consider all the evidence in making its findings and should not treat the case as a credibility contest. Third, defence counsel did not raise any objection to the adequacy of the charge on this issue.

(1) The Two "Versions" of the Events

[84] The Crown alleged that the appellant had intentionally shot two individuals with the intent required for murder: Alekesji Guzhavin, who died at the scene, and Gregory Henriquez, who survived, but was paralyzed, and testified by video at the trial. The appellant acknowledged that he had shot both men, but asserted that the shootings were not intentional, and that they occurred in defence of himself and his family.

[85] From the outset of the trial, it was apparent that there were two "versions" of the events, that of Mr. Henriquez and that of the appellant, and that these two versions differed both in broad terms and in their respective details. The defence position, supported by the appellant's evidence, was that he wrestled a gun from Mr. Guzhavin and, in self-defence and defence of his family, shooting blindly, he shot both men. According to Mr. Henriquez's version, which was relied on by the Crown, the appellant turned on him and Mr. Guzhavin with a gun, shooting

Mr. Henriquez as he was fleeing, and then shooting Mr. Guzhavin. While there was a great deal of other evidence – including the testimony of police officers about their observations of the scene, forensic evidence about the bullet wounds to the two victims, and a recording of gun shots – the appellant and Mr. Henriquez were the only eye-witnesses to the events.

[86] The fact that there were “competing”, “conflicting” or “different” versions of the events was obvious to everyone in the courtroom, and a repeated refrain of counsel and the trial judge. Indeed, during closing arguments, defence counsel focussed on comparing the accounts of the events proffered by the Crown and the appellant, pointing to aspects of the two “versions” on more than 15 occasions, and urging the jury to reject Mr. Henriquez’s version of what occurred and to accept some or all of the appellant’s version. The trial Crown referred to the two “versions” of events on some five occasions. The trial judge referred to the different “versions” throughout his charge, including in his summary of the defence and Crown positions, using wording provided by counsel.

[87] The issue is not whether the trial judge erred in his characterization of the two accounts as different “versions” that could not both be true, and in his repeated reference to aspects of the evidence of the two eye-witnesses as “versions”. Rather, the question is whether the jury was properly instructed with respect to (a) the approach they needed to take in assessing the evidence, and in particular the

evidence of the appellant, in circumstances where Mr. Henriquez had provided conflicting evidence; and (b) the burden of proof.

(2) Relevant Legal Principles

[88] The legal principles that are applicable to the analysis of this ground of appeal can be stated briefly.

[89] First, the general rule is that a jury should not be left with the impression that they can or should decide a case based on whether they accept either the accused's evidence or the Crown's evidence. It is essential that the jury understand that they must acquit if, without believing the accused, and after considering the accused's evidence in the context of the evidence as a whole, they have a reasonable doubt as to his guilt: *W.(D.)*, at p. 757.

[90] Second, the adequacy of jury instructions is not determined according to the interpretations that might be given to select or isolated passages from a charge. Any alleged deficiencies must be assessed in the context of the entire charge and the trial as a whole. It is an error to examine minute details of the charge in isolation, as it is the overall effect of the charge that matters: *R. v. Araya*, 2015 SCC 1, [2015] 1 S.C.R. 581, at para. 39. Where, as here, the contention is that the trial judge erred in suggesting that the jury should choose between competing versions, and in effect depart from a proper *W.(D.)* analysis, the question is whether the charge when read as a whole makes it clear that the jury could not

have been under any misapprehension as to the correct burden and standard of proof: *W.(D.)*, at p. 758.

[91] Third, it is relevant in determining whether there was a misdirection to consider whether the deficiency in the charge alleged on appeal was raised at first instance. While "failure to object to jury instructions is not determinative on appeal", it nonetheless "says something about both the overall accuracy of the jury instructions and the seriousness of the alleged misdirection": *Araya*, at para. 51, citing *R. v. Jacquard*, [1997] 1 S.C.R. 314, at para. 38.

(3) The Impugned Passages

[92] The passages relied on by the appellant as reflecting a misdirection arise in the context of the trial judge's instructions on self-defence. The first excerpt appears at p. 71 of the transcript of the charge, when the trial judge stated:

> I suggest to you that the major issue for you to decide is whether Dia Hanan was acting in lawful self defence when he shot Alekesji Guzhavin and Gregory Henriquez. Intention is also an issue; did Mr. Hanan have the required intent for murder when he shot Alekesji Guzhavin and did he have the required intent for attempt murder when he shot Gregory Henriquez.
>
> The resolution of these issues, I suggest to you, is driven in large part on which version you accept. The two versions you have heard cannot both be true. Of course, you must resolve this decision according to the law as given to you. In making your assessment, you may find it helpful to examine the physical and independent evidence you do accept to see whether each version is

> consistent or inconsistent with that evidence. [Emphasis added.]

[93] The appellant also contends that the jury was misdirected in two additional passages from the charge relating the reasonableness element of self-defence. In relation to self-defence in the killing of Mr. Guzhavin, the trial judge stated at pp. 89-90:

> The reasonableness of the shooting of Mr. Guzhavin by Mr. Hanan is largely dependent on which of the two conflicting versions you accept. According to Mr. Hanan, Mr. Guzhavin, with the assistance of Mr. Henriquez, was extorting money from him at gunpoint and threatening to involve Mr. Hanan's family. According to Mr. Henriquez, although he did not know Mr. Hanan at all and did not know Mr. Guzhavin well, nothing was violent or threatening at the scene until he saw Mr. Hanan with a gun shooting Mr. Guzhavin.
>
> You may conclude that shooting Mr. Guzhavin under Mr. Hanan's version is reasonable but shooting Mr. Guzhavin under Mr. Henriquez's version is unreasonable. Again you may find that the resolution of this issue hinges upon which version is accepted. [Emphasis added.]

[94] And in relation to the reasonableness of the appellant's shooting of Mr. Henriquez, the trial judge stated at pp. 110-111:

> Was it reasonable to shoot Mr. Henriquez? The answer again is largely dependent upon which version is accepted. If you accept the version of Mr. Hanan that Mr. Henriquez was shot during or immediately after the struggle over the gun, then you approach your assessment from that point of view to determine whether the shooting of Mr. Henriquez was reasonable under all the circumstances. If, on the other hand, you accept the evidence of Mr. Henriquez that he was shot in the back

> while trying to run away, then you may consider the reasonableness of such conduct. [Emphasis added.]

[95] In each passage, according to the appellant, the trial judge framed the case as an either/or contest between duelling versions, and "corralled the jury" into accepting either the appellant's version or Mr. Henriquez's version, to the exclusion of a third possibility where neither version was accepted. Moreover, the trial judge suggested that the appellant could be acquitted only if his version was accepted, shifting the burden to the appellant to prove his innocence.

(4) Discussion

[96] When the impugned passages are considered, as they must be, in the context of the trial judge's very clear instructions on the assessment of the evidence, and the live issues in this trial, I am satisfied that there is no reasonable prospect that the jury would have understood that they were to decide what happened by simply choosing between competing accounts. The trial judge provided careful and detailed instructions about the legal elements of the defence of self-defence, identified the questions the jury was to determine, and related the evidence to those questions. The jury was not misdirected on how they were to approach the evidence or on the burden of proof.

[97] First, the impugned passages were preceded and followed by detailed and appropriate instructions about how the jury should approach their task when dealing with two different versions of events.

[98] Early in the charge, at page 10 of the transcript, under the heading “Burden of Proof in a Conflicting Versions Case” (the jury was provided with a written copy of the charge), the trial judge presented a summary of the evidence of each of the appellant and Mr. Henriquez about what happened at the scene. He then instructed the jury on how they should approach the evidence of these two witnesses, referring back to instructions he had given earlier on the burden and standard of proof. He cautioned the jury specifically that they were not to choose between two versions, but to decide whether, on all the evidence, or the lack of evidence, the Crown had proven its case against the appellant beyond a reasonable doubt. The trial judge stated, at p. 12:

> When deciding this case, I remind and caution you to never forget my instructions I just gave you on the burden and standard of proof. The Crown always has the burden to prove the guilt of Mr. Hanan. That burden never shifts to the defence. So, when you are confronted with two conflicting versions, as you are here, you do not approach it asking which version do you prefer. You do not decide this case on which version you prefer. This is not a contest between duelling versions, and you must not approach it in that fashion. You are not here to make that kind of choice. Rather, you must decide whether, on all the evidence, or the lack of evidence, the Crown has proven its case against Mr. Hanan beyond a reasonable doubt. [Emphasis added.]

[99] This was immediately followed, at pp. 12-13, by an instruction on how to approach the appellant’s testimony and a *W.(D.)* instruction:

> Dia Hanan has testified. You will assess his evidence in the same way that you assess the testimony of any other

> witness. Recall what I said to you earlier about how to decide how much or how little you believe of and rely upon the testimony of any witness. You may believe some, none or all of Mr. Hanan's testimony.
>
> However, when an accused person testifies at his trial, as Mr. Hanan did here, because of the law on presumption of innocence and burden of proof as I instructed you, the law requires you, the fact finder, to approach your ultimate decision making in a particular manner.
>
> First, if you believe Dia Hanan's evidence that he did not commit the offence as charged, that all his actions were in lawful self defence, you must find him not guilty.
>
> Second, even if you do not believe Dia Hanan's evidence, if it leaves you with a reasonable doubt about his guilt, about an essential element of an offence charged, or about self defence, you must find him not guilty of that offence.
>
> Third, even if Dia Hanan's evidence does not leave you with a reasonable doubt of his guilt, about an essential element of the offences charged, or about self defence, you may convict him only if the rest of the evidence that you do accept proves his guilt beyond a reasonable doubt.
>
> To make your decision, you should consider carefully, and with an open mind, all the evidence presented during the trial. It will be up to you to decide how much or little you will believe and rely upon the testimony of any witness. You may believe some, none or all of it.

[100] The trial judge repeated this specific direction later in the charge after his instructions on the intent required for murder, at pp. 96-97 of the transcript, under the heading, "Reminder of How to Assess Conflicting Versions".

[101] The trial judge provided similar instructions on a number of occasions throughout the charge, as he addressed the specific elements of each offence and the defence of self-defence, on each occasion tailoring the instructions to the particular issue, after summarizing the relevant evidence and relating it to the particular element. In fact, specific instructions of this nature were provided immediately after both of the second and third passages criticized by the appellant. The appellant does not take issue with any of these instructions.

[102] Second, it is important to note that the trial judge never suggested to the jury that they were to accept the whole of the testimony of either the appellant or Mr. Henriquez; to the contrary, he repeatedly emphasized that they could accept, some, all or none of the evidence of any witness, including the two eye-witnesses. The jury was not invited to choose between the entire accounts provided by the two eye-witnesses, nor did they do so. There were many details within the testimony of each, for example, Mr. Henriquez's evidence about the appellant pointing the gun at Mr. Guzhavin and saying, "Die, motherfucker, die". Clearly, by its verdict, the jury did not accept this part of Mr. Henriquez's evidence.

[103] In some instances, the trial judge used the word "version" to refer to the broad outlines of the evidence of the defence and Crown positions: that the appellant, acting in self-defence, grabbed the gun from Mr. Guzhavin and started shooting, or that the appellant pulled out a gun and shot Mr. Guzhavin and Mr. Henriquez, without any prior violence. On other occasions, the trial judge

referred to specific aspects or details of the evidence of the appellant and Mr. Henriquez as “versions” in the course of relating the evidence to a particular issue.

[104] This is what occurred in the second and third passages criticized by the appellant. These impugned passages are from the trial judge’s instructions on the “reasonableness” of self-defence, first in relation to the shooting of Mr. Guzhavin, and then in relation to the shooting of Mr. Henriquez.

[105] The trial judge, after explaining what was meant by the “reasonableness element”, reviewed the evidence that was relevant to the jury’s determination of this issue. It was in this context that, in the second impugned passage, he identified as “conflicting versions” the appellant’s evidence that Mr. Guzhavin and Mr. Henriquez were extorting money from the appellant at gunpoint, and threatening to involve his family, and Mr. Henriquez’s evidence that, although he did not know the appellant at all and did not know Mr. Guzhavin well, nothing was violent or threatening at the scene until he saw the appellant with a gun shooting Mr. Guzhavin. The trial judge properly instructed the jury that they might conclude that shooting Mr. Guzhavin under the appellant’s version was reasonable but shooting him under Mr. Henriquez’s version was not. He went on to review other evidence that the jury might examine, as well as the reasonableness of the different versions, in relation to the parties’ physical sizes, and the evidence about

the presence or absence of injuries. He concluded his discussion with a direction on reasonable doubt.

[106] The third impugned passage reflects a similar approach, where, in instructing the jury on the reasonableness element of self-defence in relation to the shooting of Mr. Henriquez, the trial judge referred to the two “versions” being the appellant’s evidence that Mr. Henriquez was shot during or immediately after a struggle over the gun, and Mr. Henriquez’s evidence that he was shot in the back while trying to run away.

[107] When these passages are read in context, it is apparent that the trial judge, in referring to the two “versions”, was reminding the jury of the evidence of the two eye-witnesses that was relevant to their determination of the “reasonableness” of the appellant’s conduct, as an element of self-defence. This was a necessary instruction for the jury to relate the evidence to the reasonableness element of self-defence, in order that they might make the required finding of fact and approach the question of the reasonableness of the appellant’s conduct in the context of each of these factual circumstances. Indeed, the trial judge concluded each of these passages with a reminder that the jury should consider all of the evidence, and a reasonable doubt instruction.

[108] The trial judge did not, as the appellant asserts, set up a choice between two competing versions, suggesting to the jury that, unless they accepted the

appellant's account, they had to convict him. Rather, he helped the jury to focus on how to approach the reasonableness issue, depending on their assessment of the evidence.

[109] Third, the appellant's reliance on *R. v. Austin* (2006), 214 C.C.C. (3d) 38 (Ont. C.A), is misplaced. In that case, which involved sexual assault charges, the jury had asked several questions during their deliberations, including how reasonable doubt related to the assessment of witness credibility. The trial judge's answer invited the jury to decide the case based on who they believed, without regard to the requirement that the Crown prove the case beyond a reasonable doubt. The jury was led to believe that its task was to determine which of two versions of an event was true. The jury was not instructed that, if it could not decide whose story to believe, it must acquit.

[110] The appellant argues that the trial judge deprived the jury of the same understanding in this case. However, unlike what happened in *Austin*, the trial judge here did not lead the jury to believe that its task was to determine which of the versions – that of the appellant or that of Mr. Henriquez – was true. In the context of all of the other instructions given by the trial judge, it would have been clear that the trial judge, just as counsel had done, was drawing the jury's attention to the different details in the competing narratives. The trial judge provided detailed instructions on how the jury should approach the evidence, including specific instructions that this was not a choice between the two accounts, repeated

references to the need to assess all of the evidence, and the reminder that they could accept, some, all or none of a witness's evidence.

[111] The trial judge methodically addressed the elements of each of the offences and of the defence of self-defence. In each instance, he reminded the jury of the relevant evidence (including relevant parts of the testimony of the appellant and Mr. Henriquez), and he related the evidence to the particular element. He instructed the jury on how to approach the evidence, repeatedly instructing the jury that "you may find that the physical and independent evidence may assist you in your assessment of the conflicting evidence". In respect of each element, he reminded the jury of the Crown's burden of proof beyond a reasonable doubt – whether to prove an element of the offence, or to negate an element of self-defence. It was never suggested that the jury had to decide which version in its entirety was believed, or more importantly, that in order to acquit, the jury had to accept all the details of the appellant's version.

[112] Fourth, the fact that the objection now raised on appeal was not raised by defence counsel at trial is significant. The pre-charge conference extended over several days, with multiple drafts of the jury charge provided to counsel. Defence counsel, although making many submissions and suggestions for changes to the draft, including on the defence of self-defence, did not express any concern about the language that the appellant points to in this appeal. As the Supreme Court noted in *Araya*, at para. 51:

> It is also relevant that Mr. Araya's trial counsel (not counsel on appeal) — the person in the courtroom most attuned to Mr. Araya's interests — did not object to the allegedly confusing and insufficient instruction at trial. This failure to object suggests that the phrasing of this instruction, heard in its full context in the courtroom, did not sound likely to confuse or to invite improper reasoning. This Court has stated that while defence counsel's failure to object to jury instructions is not determinative on appeal, it nonetheless "says something about both the overall accuracy of the jury instructions and the seriousness of the alleged misdirection": *Jacquard*, at para. 38.

[113] I would therefore not give effect to this ground of appeal, and would dismiss the conviction appeal.

IV. SENTENCE APPEAL

[114] The appellant seeks leave to appeal his sentence of 15 years' imprisonment, less 23 months' credit for pre-sentence custody and 6 months' credit for restrictive bail conditions (an effective global sentence of 12 years and 7 months). He was sentenced to 12 years and 7 months for the manslaughter of Mr. Guzhavin, 3 years concurrent for possession of a loaded restricted firearm without a license; and 10 years concurrent for discharge of a firearm at Mr. Henriquez with intent to wound.

(1) The Parties' Positions

[115] The appellant submits that the trial judge imposed a demonstrably unfit sentence and that eight years' imprisonment would have been a more appropriate global sentence. He raises two arguments in support of this submission. First, he

says that the trial judge sentenced him for murder rather than manslaughter on the basis that, immediately before passing sentence, the trial judge said, “Mr. Hanan, you unlawfully and intentionally ended the life of one person and forever crippled the life of another.” The appellant also submits that the trial judge engaged in flawed reasoning in accepting the “core” of Mr. Henriquez’s version. This “core”, the appellant says, led to the inevitable conclusion that Mr. Hanan had the intent for murder, which is inconsistent with the verdict the jury reached.

[116] In response, the Crown contends that the appellant’s argument about *mens rea* lifts the trial judge’s statements out of context, and when his reasons are considered as a whole, it is clear that the trial judge did not sentence the appellant as though he had the *mens rea* for murder. Moreover, the appellant’s evidence was a hybrid of self-defence and accident. As such, when the trial judge spoke to the appellant and said that he “intentionally” ended one person’s life, after saying he lacked the “intent to kill”, it is clear he was referring to the appellant’s intention to shoot the victims (i.e., this was no accident), not to kill them.

[117] The appellant’s second argument is that the trial judge erred in finding that he brought the gun to the scene. This finding could only have been based on Mr. Henriquez’s evidence, which the jury must have rejected because it found the appellant not guilty of murder. The appellant submits that the trial judge erred in failing to follow the rule that a trial judge must accept the factual implications of the jury’s verdict.

[118] For its part, the Crown contends that the appellant's second argument relies on the false premise that there was a wholesale rejection of Mr. Henriquez's evidence by the jury, instead of just parts of it. In any event, after reviewing the evidence in detail, the trial judge made his own finding that the appellant brought the gun.

(2) Discussion

[119] While I would grant leave to appeal the sentence, I would dismiss the sentence appeal.

[120] The trial judge provided comprehensive and thorough reasons for the sentence he imposed. There is no suggestion that he erred in his articulation of the relevant sentencing principles, and in his assessment of the relevant factors, including mitigating and aggravating factors. It is clear, from a review of the reasons as a whole, that the trial judge, despite using the language of "intention", did not sentence the appellant for an intentional killing; rather, he properly concluded that the shooting was intentional, in that it was not accidental, but that the appellant did not shoot with intent to kill. At para. 2 of his sentencing reasons the trial judge stated:

> Mr. Hanan intentionally and unlawfully shot two people killing one and paralyzing the other. He did not act in lawful self-defence. He shot without an intent to kill. He shot with a handgun that was illegal for him to possess. This is the conduct for which Mr. Hanan now is being sentenced.

[121] Later in his reasons, under the heading “Circumstances of the Offence”, the trial judge provided a similar summary, referring to the fact that the appellant “intentionally and unlawfully shot” the victims and that he “shot without an intent to kill”.

[122] It is true that in the passage of the transcript relied on by the appellant, the trial judge addressed him directly and said that he “unlawfully and intentionally ended the life of one person and forever crippled the life of another”. However, the entirety of his reasons make it clear that the trial judge sentenced for the offences that were committed by the appellant, and not as though he had intentionally killed, that is, murdered, Mr. Guzhavin.

[123] I also do not accept the appellant’s submission that the trial judge’s conclusion that the killing was intentional was based on his faulty reasoning that, by its guilty verdict on manslaughter and the two firearm offences, the jury “rejected Mr. Hanan’s version of the shooting and accepted the core of Mr. Henriquez’s version”, which according to the appellant was consistent only with an intentional killing.

[124] In their submissions on sentencing, counsel asked the trial judge to make findings of fact with respect to four matters: (1) who brought the gun to the scene of the shootings; (2) how the shootings happened; (3) whether Mr. Henriquez was shot in the back; and (4) whether the shooting caused Mr. Henriquez’s paralysis.

The trial judge agreed to do so, after concluding that such findings were necessary in order to impose an appropriate sentence for each offence.

[125] With respect to the first two issues, which are relevant here, the trial judge reasoned that, based on the jury's verdicts, they must have concluded that (1) the appellant brought the gun to the scene, and (2) the shooting happened as per the "core" of Mr. Henriquez's version. However, he went on to make independent findings on each issue, in the event that he was incorrect in his conclusions with respect to the findings based on the jury's verdicts. In doing so, he carried out a careful analysis of the evidence at trial, explaining why he rejected the appellant's evidence on each issue, why it did not leave him with a reasonable doubt, and why he made the findings based on his acceptance of certain aspects of Mr. Henriquez's evidence and the other evidence at the trial.

[126] Contrary to the appellant's submission, in referring to the "core" of Mr. Henriquez's evidence, the trial judge did not say that his evidence in its entirety was accepted, including that the appellant shot Mr. Guzhavin at point blank range, while saying "Die, motherfucker, die" (which could only have been consistent with an intentional killing). Indeed, in his analysis, the trial judge pointed to several problems with the evidence of Mr. Henriquez, who was a "classic" *Vetrovec* witness, and, in making his findings of fact, he did not accept the entirety of Mr. Henriquez's account. Rather, the "core" of Mr. Henriquez's evidence was described by the trial judge as follows, at para. 100:

> With regard to the core of the evidence of Mr. Henriquez – that he was only peripherally involved in the discussions between Mr. Guzhavin and Mr. Hanan; that Mr. Guzhavin never threatened Mr. Hanan with a gun in front of Mr. Henriquez; that Mr. Hanan did not grab a gun out of the hand of Mr. Guzhavin leading to a struggle for the gun involving Mr. Henriquez; that all was calm until he looked up to see Mr. Hanan pointing a gun at Mr. Guzhavin and then shooting him; that on seeing Mr. Hanan shooting Mr. Guzhavin, Mr. Henriquez turned and started to flee up the driveway; and that he was shot twice as he was fleeing, the last shot being in his back which knocked him face down on the driveway – I believe Mr. Henriquez.

[127] The fact that the trial judge said that the jury (and he) accepted the "core" of Mr. Henriquez's evidence does not mean that the trial judge concluded that the killing of Mr. Guzhavin was intentional and that he then proceeded to sentence the appellant for murder.

[128] The appellant's second argument in support of his submission that the sentence was demonstrably unfit is that the trial judge erred in his factual finding that he, not Mr. Guzhavin, brought the gun to the shooting. The appellant submits that this finding was not open to the trial judge because it is inconsistent with the jury's verdict. According to the appellant, when the jury found him not guilty of murder, it necessarily rejected Mr. Henriquez's evidence. Because Mr. Henriquez's evidence was the only evidence that the appellant brought the gun, the jury's rejection of Mr. Henriquez's evidence meant that the trial judge's

determination that the appellant brought the gun was contrary to the factual implications of the jury's verdict.

[129] I would reject this submission. Although the appellant faulted the trial judge for allegedly presenting the jury with an "all or nothing" contest between the differing narratives, he takes the same erroneous approach in his submission on this point. The appellant's "all or nothing" approach to the evidence of Mr. Henriquez is inconsistent both with the trial judge's instructions to the jury about the assessment of the evidence of Mr. Henriquez and other witnesses, and the trial judge's findings on sentencing. The fact that the jury found the appellant not guilty of murder does not mean that they rejected all of Mr. Henriquez's evidence. As the trial judge noted, they must have accepted the "core" of his evidence, which the trial judge described, and I have set out above.

[130] For these reasons, I would not give effect to the appellant's submissions on the sentence appeal. The trial judge did not make the errors the appellant asserts, and there is no basis for interfering with the global sentence of 15 years, which was, in all the circumstances, a fit sentence.

V. DISPOSITION

[131] For these reasons I would dismiss the conviction appeal and, after granting leave to appeal the sentence, I would dismiss the sentence appeal.

"K. van Rensburg J.A."
"I agree. M. Tulloch J.A."

Nordheimer J.A. (dissenting):

[132] I have read the reasons of my colleague. I do not agree with the conclusion that she reaches. In my view, there was a breach of s. 11(b) of the *Canadian Charter of Rights and Freedoms* in this case and the charges should be stayed. Further, even if a breach of s. 11(b) had not been made out, I would find that there was a serious error in the trial judge's instructions to the jury such that the verdict cannot stand. The matter would have to be remitted for a new trial. Given my views on these two issues, I do not reach the appellant's sentence appeal.

[133] My colleague has set out the background facts. It is unnecessary for me to repeat them, except insofar as I must address the attribution of delay and certain aspects of the jury instructions.

A. Section 11(b)

(i) Defence delay

[134] As my colleague has set out, there are two relevant periods at issue: (a) the four and one-half month period between January 21 and June 9, 2016, when the defence refused to set a judicial pre-trial based on incomplete and ongoing disclosure; and (b) the period commencing June 3, 2019, when a six-week trial date was offered but the defence was not available, with the result that the trial did not proceed until October 28, 2019.

[135] I agree with my colleague's conclusion on the proper treatment of the first of these two periods, for the reasons that she has given. The first period of delay is properly attributable to the defence arising out of its failure to agree to setting a date for the judicial pre-trial because of disclosure issues. It is well-established that disclosure does not need to be complete in order for the parties to agree to a pre-trial date. I accept that, if the state of the disclosure is such that conducting a judicial pre-trial would be futile, then the refusal by the defence to agree to a judicial pre-trial date should not be laid at the feet of the defence. However, in this case, the defence did not make that point at the time. It is too late to now make it when the state of the disclosure cannot be examined or fully explained.

[136] I am also prepared to agree with my colleague's treatment of the second period of delay starting on June 3, 2019. Like my colleague, I reject the Crown's

contention that the entire period of the delay between the two trial dates should be attributable to the defence. In so agreeing, however, I should not be taken as agreeing with the deduction of the six-week period when defence counsel could not proceed because of another trial commitment. In my view, that deduction is not consistent with the decision in *R. v. Godin*, 2009 SCC 26, [2009] 2 S.C.R. 3, where Cromwell J. said, at para. 23:

> Scheduling requires reasonable availability and reasonable cooperation; it does not, for s. 11(*b*) purposes, require defence counsel to hold themselves in a state of perpetual availability … "To hold that the delay clock stops as soon as a single available date is offered to the defence and not accepted, in circumstances where the Crown is responsible for the case having to be rescheduled, is not reasonable." [Emphasis added.]

[137] In this case, defence counsel had another trial set for that timeframe involving a client who was in custody. It is the antithesis of reasonable cooperation to hold that defence counsel, who is otherwise scheduled for trial, must essentially abandon another client in order to take a re-scheduled trial date, or face the consequence that the resulting delay will be attributed to the defence. However, as the appellant did not take issue with the deduction of this six-week period in this case, it is unnecessary to resolve the issue, notwithstanding that the Crown took issue with the whole period of delay and its proper attribution.

(ii) Transitional exceptional circumstance

[138] Where I do part company with my colleague is respecting her agreement with the trial judge that the transitional exceptional circumstance could be relied upon to excuse the delay over the *Jordan* ceiling. Unlike my colleague, I find that the trial judge erred in his reliance on that principle to excuse the delay in this case.

[139] The approach to the transitional exceptional circumstance is set out in *Jordan* at para. 96. The court said the "transitional exceptional circumstance will apply when the Crown satisfies the court that the time the case has taken is justified based on the parties' reasonable reliance on the law as it previously existed."

[140] There is no basis for applying the transitional exceptional circumstance in this case since it is clear that the parties were not relying on that pre-existing law. The parties were well aware of the *Jordan* requirements at an early stage of this proceeding. The decision in *Jordan* was released only seven months after the charges were laid in this case and four months before the first judicial pre-trial was held. One clear indication that the parties were not relying on the pre-*Jordan* law are the discussions about *Jordan*, and delay that occurred, during the course of scheduling that judicial pre-trial.

[141] My colleague refers to this problem and quotes a significant portion of the trial judge's reasons on it. I reproduce just the portion of that quotation to which my colleague added emphasis, but without repeating the emphasis:

> But awareness of the presumptive ceiling and the need for speed are the easiest lessons of *Jordan*. *Jordan* introduced a totally new framework with new concepts and new definitions: defence delay, discrete exceptional circumstances, particularly complex cases, and transitional exceptional circumstances. The precise meaning of these new concepts continues to be refined in court cases more than two years after the release of *Jordan*. It is the full understanding of the lessons of *Jordan* that Crown counsel and the courts lagged in their adjustment in this case.

[142] With respect, the "totally new framework with new concepts" is a vast overstatement of what *Jordan* established. Defence delay, exceptional circumstances, and complex cases are not new concepts. Defence delay was part of the *R. v. Morin*, [1992] 1 S.C.R. 771, process: see *Morin*, at pp. 790-91 and 793-94. Exceptional circumstances is a concept that has been applied in our law for decades in a variety of different contexts. And we are all familiar with determining whether individual cases are, or are not, complex. If Crown counsel and the courts "lagged in their adjustment" to the requirements of *Jordan*, that simply reflects a continuation of the "culture of complacency" that was criticized in *Jordan*. It does not provide an excuse for the delay.

[143] It remains the fact that only a very small portion of the delay in this case preceded the decision in *Jordan* and most, if not all, of that delay has been laid at

the feet of the defence. The delay for which the Crown and the courts in this case bear responsibility occurred well after the *Jordan* decision. It is improper to take refuge in the fact that this case had a scant few months prior to *Jordan* as providing a justification for the delay in this case. To do so fundamentally undermines the change in culture that the decision in *Jordan* was trying to achieve.

[144] In terms of the decisions of this court to which the respondent referred, my colleague correctly points out that most, or all, of the delay in *R. v. Gordon*, 2017 ONCA 436, 137 O.R. (3d) 776, and *R. v. Picard*, 2017 ONCA 692, 137 O.R. (3d) 401, leave to appeal refused, [2018] S.C.C.A. No. 135, was pre-*Jordan*. That is a fundamental distinction between those cases and this one. A fair reading of the decisions in those two cases strongly suggests that had that not been the case, the results would have been different under a *Jordan* analysis. Indeed, Rouleau J.A. made that very point in *Picard* at para. 4.

[145] In an effort to justify the trial judge's application of the transitional exceptional circumstance, my colleague then says, at para. 78, that "the Crown might well have concluded that the trial delay that occurred just prior to the estimated *Jordan* ceiling date would qualify as a discrete exceptional circumstance or be attributed in part to the defence or that, based on *Gordon* and *Picard*, there was a transitional exceptional circumstance." With respect, we have no knowledge of what the Crown considered when it made the decision not to consent to a re-election. What we do know is that the trial judge warned the Crown about the s. 11(b) consequences of

not proceeding with a judge alone trial, both when the request for the Crown's consent was made and again, a few days later, when the Crown refused to consent. The Crown cannot pretend that the consequences of that decision, in terms of s. 11(b), were not crystal clear.

[146] In the end result, the trial judge's conclusion that the parties had not had sufficient time to adapt to the lessons of *Jordan* reflects a fundamental misunderstanding of the dictates that emanated from that decision. As the court said in *Jordan* at para. 81: "To be clear, the presence of exceptional circumstances is the only basis upon which the Crown can discharge its burden to justify a delay that exceeds the ceiling" (emphasis added).

[147] Consequently, on that ground alone, the delay exceeded the presumptive ceiling, and a stay ought to have been granted. There were no exceptional circumstances that would justify having this case take longer than 30 months. It is not an exceptional circumstance to find that "the time to adapt to the lessons of *Jordan*" was insufficient. If that were to be found as an exceptional circumstance, precious few cases would not qualify. Indeed, it could be said that we are all still learning the lessons from *Jordan* – some quicker than others it would appear.

[148] The fact remains that almost two and one-half years had passed since *Jordan* was decided when the Crown made its decision to refuse to consent to the re-election. The Crown had ample time to adapt to the new world that *Jordan*

created. It chose not to do so, notwithstanding the clear warning that the trial judge provided about the consequences of its decision. To treat that situation as an exceptional circumstance is to remove all reasonable meaning from the term.

[149] In light of my conclusion, I should address the respondent's submission that a remedy short of a stay should be considered when a s. 11(b) breach is found. The Supreme Court of Canada has, in many cases, said that the remedy for a s. 11(b) breach is a stay of proceedings. Indeed, in *Jordan* at para. 35, the court referred to it as the "one remedial tool". In my view, if some other remedy is to become available for a s. 11(b) breach, that availability will need to be determined by the Supreme Court of Canada. I refer to the discussion of this issue in *R. v. Charity*, 2022 ONCA 226, being released concurrently with the reasons in this matter.

[150] I would allow the appeal and stay the charges.

B. The jury instructions

[151] Putting aside the delay issue, there is another serious problem in this case and that involves the instructions to the jury regarding how they should approach the evidence in the case. My colleague finds that the concerns regarding the impugned instructions are assuaged by other sections of the instructions. Again, I do not agree.

[152] There were two diametrically opposing versions of what had taken place leading up to the shooting. The appellant said he was threatened by the two men, one of whom brandished a handgun during the course of their confrontation. The appellant says that he reacted in self-defence, by grabbing the gun away from him and shooting his attackers without aiming. Only one of the other two men involved gave evidence. He said it was the appellant who produced the gun and then shot him and the other man.

[153] The jury was faced with these two opposing versions of the events. Their decision as to whether the charges had been proven beyond a reasonable doubt would clearly be determined if they believed one version as opposed to the other.

[154] However, that is not the core concern in this case. The crux of the issue turns on what would happen if the jury could not decide which version they accepted or, alternatively, if some members of the jury accepted one version and other members of the jury accepted the other version.

[155] It is in just this type of circumstance where the instruction in *R. v. W.(D.)*, [1991] 1 S.C.R. 742, becomes of critical importance. Its importance arises from its fundamental application to a proper understanding of the burden of proof. The members of the jury must understand that, if they are unable to decide which version of the events they accept, or if there is disagreement on that question, the

jury must acquit, because the Crown will have failed to prove the charges beyond a reasonable doubt.

[156] Unfortunately, in this case, the trial judge did not drive home that important aspect of the burden of proof. Rather, he set up the question for the jury as a stark choice between the two versions. My colleague has set out the problematic sections of the instructions, but they bear repeating. For example, in describing self-defence, the trial judge told the jury:

> The resolution of these issues, I suggest to you, is driven in large part by which version you accept. The two versions you have heard cannot both be true.

[157] He repeated this instruction three more times when he discussed the issue of the reasonableness of the force that the appellant had used. The trial judge said:

> The reasonableness of the shooting of Mr. Guzhavin by Mr. Hanan is largely dependent on which of the two conflicting versions you accept.
>
> …
>
> Again you may find that the resolution of this issue hinges on which version is accepted.
>
> …
>
> The answer again is largely dependent upon which version is accepted.

[158] It was crucial, when discussing the elements of the offences, and the issue of self-defence, for the trial judge to make it clear to the jury that, if they could not decide between the two versions of the events, they would have to have a

reasonable doubt and the appellant would then have to be found not guilty. The trial judge did not do this.

[159] This issue was directly addressed by this court in *R. v. Austin* (2006), 214 C.C.C. (3d) 38 (Ont. C.A.), where Doherty J.A. said, at para. 20:

> The trial judge's instruction ignored the possibility that the jury might not be able to decide which version of the events to believe and, therefore, would be unable to make the findings of fact described by the trial judge. Recognition of the possibility that a jury may not be able to come to a definitive conclusion with respect to the credibility of competing versions of the relevant events is integral to a proper application of the reasonable doubt standard. This potential middle ground is especially important in cases like this one where the accused testifies and presents a version of events that is diametrically opposed to that given by the Crown witnesses. <u>The jury must understand that if it cannot decide whose story to believe, it must acquit.</u> [Citation omitted; emphasis added.]

[160] The respondent contends that the jury's verdict demonstrates that they understood there was a "middle ground" between the two versions where neither version was accepted. I do not agree. First, it is, in my view, very risky to attempt to reach definitive conclusions as to the reasoning of a jury. We have no knowledge of their discussions, and we have no reasons from them. What might seem reasonable to us, as outside observers, may or may not bear any resemblance to what went on in the jury room.

[161] Second, it can be argued that the jury's verdict demonstrates that they did not understand the second prong of *W.(D.)*, that is, that the inability to agree on

one version or the other must give rise to a reasonable doubt. Indeed, the fact that the jury convicted the appellant of manslaughter, as opposed to murder, might well represent what is often referred to as a compromise verdict. Such a verdict is not based on a proper application of the principles from *W.(D.)*, but rather represents a compromise reached by the opposing sides because they are unable to agree on which version of the events they accept.

[162] The respondent also suggests that the concern about the trial judge's instructions is alleviated because the trial judge had, earlier in his charge, told the jury: "when you are confronted with two conflicting versions, as you are here, you do not approach it asking which version do you prefer." My colleague relies on this fact heavily to discount the problems with the impugned instructions.

[163] I accept that jury instructions must be read as a whole. However, I believe it is risky to assume that what a jury is told early on in the instructions will necessarily resonate with them respecting matters that arise later in the instructions. The fact that basic concepts are contained in what I respectfully characterize as the boilerplate portion of the instructions will not have the same impact as when the trial judge turns to the elements of the offence and any defences that arise on the evidence.

[164] In that regard, the problematic portions of the instructions are included at the very point that the jury is being instructed on self-defence, which was the key

defence in this case. It is at the very point when the jury is focused on what they are being told are the key issues that they have to decide regarding the question of guilt that the erroneous instructions are given. Suggesting that the jury will, at that point, harken back to something they were told much earlier, as somehow limiting (if not contradicting) what the judge is then saying, is neither realistic nor of much comfort. In any event, when concerns arise about a matter as serious as the burden of proof and the meaning of reasonable doubt, I do not accept that one can gloss over these possible consequences in this fashion.

[165] I would add that it is also at the point when the trial judge is discussing self-defence in his charge that he told the jury that "[t]he two versions you have heard cannot both be true." This is the same error that this court identified in *R. v. T.A.*, 2020 ONCA 783, at para. 31, and which led to a new trial in that case.

[166] Finally, the respondent, and my colleague, both take shelter in the failure of defence counsel (not counsel on appeal) to object to the charge. While that is a relevant consideration, the failure to object, when the error is as serious as it is here, is not fatal to an appeal. As Lamer C.J. said in *R. v. Jacquard*, [1997] 1 S.C.R. 314, at para. 37, "the Court has not lost sight of the fact that the jury charge is the responsibility of the trial judge and not defence counsel."

[167] Given this error in the jury instructions, had I not decided that there was a s. 11(b) breach that warranted a stay of proceedings, I would have set aside the convictions and ordered a new trial.

Conclusion

[168] I would allow the appeal, set aside the convictions, and order a stay of proceedings.

Released: March 21, 2022 “M.T.”

“I.V.B. Nordheimer J.A.”