WARNING

The President of the panel hearing this appeal directs that the following should be attached to the file:

An order restricting publication in this proceeding under ss. 486.4 or 486.6 of the *Criminal Code* shall continue. These sections of *the Criminal Code* provide:

> 486.4(1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of
>
> (a) any of the following offences:
>
> (i) an offence under section 151, 152, 153, 153.1, 155, 160, 162, 162.1, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or
>
> (ii) any offence under this Act, as it read from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day; or
>
> (b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).
>
> (2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall
>
> (a) as soon as feasible, inform any witness under the age of 18 years and the victim of the right to make an application for the order;
>
> (b) on application made by the victim, the prosecutor or any such witness, make the order; and

(c) if an order is made, as soon as feasible, inform the witnesses and the victim who are the subject of that order of its existence and of their right to apply to revoke or vary it.

(2.1) Subject to subsection (2.2), in proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.

(2.2) In proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice shall

(a) as soon as feasible, inform the victim of their right to make an application for the order;

(b) on application of the victim or the prosecutor, make the order; and

(c) if an order is made, as soon as feasible, inform the victim of the existence of the order and of their right to apply to revoke or vary it.

(3) In proceedings in respect of an offence under section 163.1, a judge or justice shall make an order directing that any information that could identify a witness who is under the age of eighteen years, or any person who is the subject of a representation, written material or a recording that constitutes child pornography within the meaning of that section, shall not be published in any document or broadcast or transmitted in any way.

(3.1) If the prosecutor makes an application for an order under paragraph (2)(b) or (2.2)(b), the presiding judge or justice shall

(a) if the victim or witness is present, inquire of the victim or witness if they wish to be the subject of the order;

(b) if the victim or witness is not present, inquire of the prosecutor if, before the application was made, they determined if the victim or witness wishes to be the subject of the order; and

(c) in any event, advise the prosecutor of their duty under subsection (3.2).

(3.2) If the prosecutor makes the application, they shall, as soon as feasible after the presiding judge or justice makes the order, inform the judge or justice that they have

(a) informed the witnesses and the victim who are the subject of the order of its existence;

(b) determined whether they wish to be the subject of the order; and

(4) An order made under this section does not apply in either of the following circumstances:

(a) the disclosure of information is made in the course of the administration of justice when the purpose of the disclosure is not one of making the information known in the community; or

(b) the disclosure of information is made by a person who is the subject of the order and is about that person and their particulars, in any forum and for any purpose, and they did not intentionally or recklessly reveal the identity of or reveal particulars likely to identify any other person whose identity is protected by an order prohibiting the publication in any document or the broadcasting or transmission in any way of information that could identify that other person.

(5) An order made under this section does not apply in respect of the disclosure of information by the victim or witness when it is not the purpose of the disclosure to make the information known to the public, including when the disclosure is made to a legal professional, a health care professional or a person in a relationship of trust with the victim or witness.

486.6(1) Every person who fails to comply with an order made under any of subsections 486.4(1) to (3) or subsection 486.5(1) or (2) is guilty of an offence punishable on summary conviction.

(1.1) A prosecutor shall not commence or continue a prosecution against a person who is the subject of the order unless, in the opinion of the prosecutor,

(a) the person knowingly failed to comply with the order;

(b) the privacy interests of another person who is the subject of any order prohibiting the publication in any document or the

broadcasting or transmission in any way of information that could identify that person have been compromised; and

(c) a warning to the individual is not appropriate.

(2) For greater certainty, an order referred to in subsection (1) applies to prohibit, in relation to proceedings taken against any person who fails to comply with the order, the publication in any document or the broadcasting or transmission in any way of information that could identify a victim, witness or justice system participant whose identity is protected by the order.

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Vallotton, 2024 ONCA 492
DATE: 20240619
DOCKET: COA-22-CR-0408

Fairburn A.C.J.O., Roberts and Trotter JJ.A.

BETWEEN

His Majesty the King

Respondent

and

Dean Vallotton

Appellant

Mark C. Halfyard, for the appellant

Eunwoo Lee, for the respondent

Heard: May 15, 2024

On appeal from the convictions entered by Justice Edward J. Kelly of the Ontario Court of Justice, dated October 26, 2021.

Trotter J.A.:

(1) Introduction

[1] The appellant was convicted of sexual assault, sexual exploitation, making child pornography, and possessing child pornography.

[2] Prior to his trial, the appellant brought a motion to stay the proceedings, alleging a breach of his right to a trial within a reasonable time under s. 11(b) of

the *Canadian Charter of Rights and Freedoms*. The motion judge, who was not the trial judge, dismissed the motion.

[3] The appellant appeals his convictions. He submits that the motion judge erred in applying s. 11(b) of the *Charter*. For the reasons below, I would allow the appeal. The motion judge erred in his allocation of two periods of delay as defence delay. When these errors are corrected, the net delay exceeds the presumptive ceiling of 18 months for cases in the provincial court: *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631. The proceedings must be stayed under s. 24(1) of the *Charter*.

(2) Background

[4] The appellant faced two sets of charges. On January 30, 2019, he was arrested for sexual assault and sexual exploitation against his stepdaughter. An information was sworn on January 31, 2019.

[5] While the police were investigating these offences, they discovered child pornography on computers that they seized from him. Some of the material involved the appellant's stepdaughter; some involved other individuals. A second information was sworn on May 2, 2019, charging the appellant with making, accessing, and possessing child pornography.

[6] At one point during the course of these two prosecutions, the Crown joined the charges in a single information. However, the charges were later severed, requiring two trials.[1]

[7] Trial dates for the first trial were eventually scheduled for August 16-19, 2021, for a total delay of 30 months, 19 days, or 931 days. Trial dates for the second trial were subsequently scheduled for August 23-25, 2021, for a total delay of 27 months, 23 days, or 846 days.

[8] On the consent of the parties, a s. 11(b) motion was heard by the motion judge on June 30, 2021 in relation to both sets of charges. As noted, the motion was dismissed and both cases proceeded to trial.

[9] The appellant was found guilty on four counts at his first trial: sexual exploitation, sexual assault, and both making and possessing child pornography involving his stepdaughter. He was acquitted on all counts at his second trial.

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[1] Though the two sets of charges were severed, they were not severed to reflect the original informations. The child pornography charges relating only to the appellant's stepdaughter that were originally in the second information were tried with the sexual assault and sexual exploitation charges in the first original information. The second trial related to the child pornography charges involving other individuals.

(3) The Motion Judge's Reasons

[10] It is not necessary to address all of the many appearances leading up to the s. 11(b) motion. Instead, the focus is on the contentious issues arising from the motion judge's reasons.

[11] After setting out the events leading to the two sets of charges, the motion judge was critical of the Crown's decision to join all charges on a single information, noting that the pornographic images that did not relate to the appellant's stepdaughter would have been prejudicial to the appellant if both sets of charges were tried together. As the motion judge explained:

> I am explaining all of this because if the first information had been kept separate, the date for that trial would likely not have been delayed by the disclosure in the seized computers and the further request for metadata, and that trial date could have likely [been] set sometime in 2019, and there would have not been any allegation of unreasonable delay relating to the first set of charges.

[12] The motion judge also observed that, apart from COVID-19, the main cause of the delay was the result of slow disclosure of the materials seized from the appellant's computers.

[13] At the hearing of the motion, both parties agreed that 90 days was properly attributable as defence delay. This is not challenged on appeal.

[14] The motion judge deducted an additional 47 days as defence delay (January 17 to March 4, 2020). He found the defence at fault for failing to follow up with the Crown to set a date for a judicial pre-trial ("JPT") after reviewing disclosure. He found that this delayed the setting of trial dates.

[15] The motion judge also considered the impact of the COVID-19 pandemic on trial scheduling. The Crown submitted that a period of five months of delay, from March 17, 2020 to August 17, 2020, should be attributable to the pandemic and classified as an exceptional circumstance for *Jordan* purposes. However, without putting either counsel on notice or seeking the submissions of counsel, the motion judge also extended the time attributed to COVID delay out to the time of trial, 9 months later, but at a rate of 50%. This resulted in a deduction of 4.5 months, on top of the 5-month deduction requested by the Crown.

[16] Trial dates for the two sets of charges were set on January 8, 2021 to commence on August 16 and August 23, 2021, respectively. The motion judge held that the period of time from January 26, 2021 (the date the trial dates were put on the record, which the motion judge referred to as the date the trial was scheduled) to the time of trial was implicitly waived by the appellant, who did not complain about the pace of the proceedings, and who filed his s. 11(b) application two months later. The motion judge said: "A bird's eye view of this case, from the very beginning, leads me to infer that the applicant waived the delay between the

date the trials were set and the trial dates. I therefore accept the crown's analysis and calculations of the delay within the [*Jordan*] framework."

[17] Based on the motion judge's calculations, the relevant delay on the first set of charges, before considering further deductions for the time that he found was implicitly waived by the defence, was 506 days, or 16.8 months; on the second information, it was 418 days, or 13.9 months. Given that these periods of delay were below the *Jordan* presumptive ceiling of 18 months, the motion judge found that there was no breach of s. 11(b) of the *Charter*. As the motion judge concluded:

> The applicant has not rebutted the presumption of unreasonable delay. The applicant has not taken meaningful steps to expedite the proceedings, and as I have already mentioned, the applicant has delayed the proceedings in certain instances. Furthermore, the applicant has not shown that these proceedings have taken markedly longer than it should have in the circumstances of the Covid pandemic.

[18] The motion was dismissed.

(4) Discussion

[19] This appeal relates only to the first set of charges. The appellant submits that the motion judge erred in three respects. First, he erred in attributing 47 days as defence delay in relation to arranging a second JPT following the review of disclosure. Second, he erred in finding that the appellant had implicitly waived the entire period of delay between the set date and the trial date (as it related to the

first information). Third, the motion judge erred in the amount of time he attributed to COVID delay, almost double the amount that the Crown conceded to be the appropriate amount for this exceptional circumstance.

[20] It is only necessary to address the first two grounds of appeal. Correcting for these errors, the net delay exceeds the applicable *Jordan* ceiling, warranting a stay of proceedings under s. 24(1) of the *Charter*.

(a) Delay Leading Up to the Second JPT

[21] In my view, the motion judge erred in attributing the 47-day period as defence delay.

[22] By way of background, disclosure in this case had been seriously delayed, taking over 13 months since the first set of charges were laid. On a December 18, 2019 appearance, the case was adjourned to January 17, 2020 to allow the defence to review the disclosure and to then set a trial date.

[23] On January 17, 2020, the defence was ready to set trial dates. However, the assigned Crown was not in that court; she was in the courtroom next door, dealing with a different matter. In the hopes of being able to set trial dates, the presiding judge, Robertson J., permitted defence counsel to take a moment to speak to the assigned Crown in the courtroom next door, with a view to ascertaining her

available dates for the trials. Defence counsel tried, but the assigned Crown was not able to provide available dates.

[24] When defence counsel returned before Robertson J., the Crown appearing on these matters asked for an adjournment for the purpose of setting a new JPT to address trial scheduling. Robertson J. granted an adjournment until February 7, 2020. He directed defence counsel to be in touch with the assigned Crown during the week of January 20, 2020 to agree on a new date for a JPT. Defence counsel sent an email to the Crown on January 24, 2020, offering dates as early as March 4, 2020. The Crown did not respond for ten days. On February 4, 2020, she wrote back and both counsel agreed to March 5, 2020 as the date for the second JPT. The Crown gave no indication that she was available any earlier.

[25] The motion judge characterized the period from January 17, 2020 to March 4, 2020 as defence delay, for the following reasons:

> The crown asks, that I also accept a defence delay, the 47 days between January 17, 2020 to March 4, 2020. I do accept this as defence delay. The defence did nothing to reach out to the crown to schedule a Judicial Pre-Trial, and then was not available to do a pre-trial until March 4, 2020. This delay was unnecessary, and it was caused by the defence.

[26] I agree with the appellant that this finding was unreasonable. It was not supported by the record. As noted, on January 17, 2020, defence counsel was

ready to set trial dates. The Crown was not and requested an adjournment. Defence counsel then followed Robertson J.'s direction and consulted with the Crown in a timely manner. There was no evidence before the motion judge that a JPT could have been arranged any earlier than March 4, 2020, the earliest date offered by the defence. The 47-day delay in setting trial dates should not have been attributed to the defence. It was caused by the Crown not being able to set a date on January 17, 2020.

(b) Waiver of Delay and the Notice of the s. 11(b) Motion

[27] The appellant submits, and the Crown concedes, that the motion judge erred by inferring that the defence waived the period of time between the set date and the trial dates. During submissions on the s. 11(b) motion, this would appear to have been the most contentious issue between the parties.

[28] At the time the motion was argued, neither the motion judge nor counsel had the benefit of the Supreme Court of Canada's decision in *R. v. J.F.*, 2022 SCC 17, 413 C.C.C. (3d) 293, which held that "waiver of the delay cannot be inferred solely from the accused's silence or failure to act" (at para. 44); any waiver must be clear and unequivocal (at paras. 45-48).

[29] There was nothing in defence counsel's conduct that could warrant a finding that there was a clear and unequivocal waiver of his client's rights under s. 11(b)

of the *Charter*. The Crown on appeal does not suggest otherwise. However, he makes an alternative submission. The Crown submits that, because the appellant was tardy in raising the s. 11(b) issue, he should be responsible for some portion of the delay between the set date and the trial date. Relying on some trial decisions, the respondent submits that a "grace period" of 30 days should be recognized as a reasonable period of time for counsel to consider bringing a s. 11(b) motion. Thereafter, the allocation for the residual delay should be shared 50/50 by the Crown and the defence.

[30] The theory behind this approach is that delays in initiating s. 11(b) proceedings hamper the Crown's ability to respond to the complaint and work towards expediting the trial. I also note that it may deprive trial courts from utilizing the previously set trial dates that may not be used. In this case, there was never any indication that earlier trial dates could have been arranged had notice been provided sooner. The Crown and the defence had just recently set mutually agreeable trial dates. Presumably, had earlier dates been available, subject to counsel's availability, they would have been captured.

[31] In *J.F.*, the Supreme Court of Canada recognized that an accused person has a duty to raise an infringement of their right to be tried within a reasonable time in a timely manner, and that "[i]naction may be considered illegitimate conduct, and the delay associated with it may be attributed to the defence": at para. 52. Because

J.F. was decided after the motion in this case, we do not have the benefit of the motion judge's findings on this issue. However, the record does not support the conclusion there was any "illegitimate conduct" on the part of the defence in initiating his s. 11(b) motion. Nor does the record establish that defence counsel's timing deprived the Crown of the ability to mitigate the delay by obtaining earlier trial dates.

(5) Re-calculations

[32] In light of the above conclusions, the entire period from January 26, 2021 to August 16, 2021, must be added back into the mix as part of the net delay. This brings us back to the motion judge's total, prior to his subtracting time for implicit waiver: 506 days. Adding back in the 47-day period as well, this results in a total delay of 553 days (or 18.2 months).

[33] In *Jordan*, Moldaver, Karakatsanis and Brown JJ. held, at para. 56, that the presumptive ceiling "is not an aspirational target. Rather, it is the point at which delay becomes presumptively unreasonable" (emphasis added). The Court also held that some cases may be sufficiently complex so as to justify a period of net delay that exceeds the presumptive ceiling (at paras. 68-81). The Crown bears the onus on this issue*: R. v. Wookey*, 2021 ONCA 68, 154 O.R. (3d) 145, at paras. 83-98. The Crown in this case did not raise this argument, either at trial or on appeal.

Indeed, the case was not complex. Consequently, s. 11(b) of the *Charter* was infringed.

(6) Conclusion

[34] I would allow the appeal and impose a stay under s. 24(1) of the *Charter* based on an infringement of the appellant's s. 11(b) rights.

Released: June 19, 2024 "J.M.F."

"Gary Trotter J.A."
"I agree. Fairburn A.C.J.O."
"I agree. L.B. Roberts J.A."