COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Shaporov, 2025 ONCA 281[1]
DATE: 20250415
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Trotter, Zarnett and George JJ.A.

BETWEEN

His Majesty the King

Respondent

and

Aleksandr Shaporov

Appellant

Michael Lacy and Bryan Badali, for the appellant

Jason Wakelyand Mark Luimes, for the respondent

Heard: October 21, 2024

On appeal from the conviction entered on March 3, 2022 and the sentence imposed on June 28, 2022 by Justice Marquis S. V. Felix of the Ontario Court of Justice.

George J.A.:

[1] An international coalition of law enforcement agencies identified, investigated, and dismantled a child pornography website in South Korea called Welcome to Video ("W2V"). The U.S. Department of Homeland Security

[1] This appeal is subject to a publication ban pursuant to s. 486.4 of the *Criminal Code,* R.S.C. 1985, c. C-46.

("Homeland Security") played a crucial role in the investigation, assisting in the identification of W2V users who had transferred Bitcoin ("BTC") to access the site's content. Following the identification of the appellant as one such user, the Toronto Police Service obtained a search warrant for his residence. During the search the police discovered and seized a laptop computer which contained videos of child pornography. The appellant was charged with possessing and accessing child pornography.

[2] The appellant elected to be tried in the Ontario Court of Justice. Initially, the case was heard by Band J., who received evidence on an application under s. 8 of the *Canadian Charter of Rights and Freedoms* brought by the appellant. However, before the s. 8 application was completed, Band J. declared a mistrial. The trial judge, Felix J., was then assigned. The trial judge decided the s. 8 application on the record developed before Band J. He also heard the appellant's s. 11(b) *Charter* application.

[3] The trial judge dismissed both of the appellant's pretrial applications. The appellant was convicted of possessing child pornography and of accessing child pornography. He received a sentence of 14 months' imprisonment followed by 2 years' probation.

[4] The appellant appeals his convictions. He argues that the trial judge erred in dismissing his s. 11(b) application by i) improperly allocating the entirety of the

delay between October 2020 and April 2021 as defence delay, ii) double counting ten weeks when calculating total delay, and by deducting two periods of delay (totalling four months) as exceptional circumstances, and iii) finding, in the alternative, that if the total delay did exceed the *Jordan*[2] ceiling, it was on account of the complexity of the case. The appellant argues further that the trial judge erred in dismissing his s. 8 *Charter* application as i) the Information to Obtain ("ITO") did not disclose reasonable grounds to believe that evidence would be found at his residence, and ii) the affiant was not full and frank and did not make fair disclosure.

[5] With respect to the trial proper, the appellant submits that the trial judge erred by i) reversing the burden of proof regarding the possibility that a roommate named Roman committed the offences using his computer, and ii) misapprehending evidence about how Roman could have obtained his password and about when he installed the TOR-enabled browser that was required to access W2V. The appellant also seeks leave to appeal his sentence, arguing that the trial judge erred by not imposing a conditional sentence.

[6] For the reasons that follow I would dismiss both the conviction appeal and the sentence appeal.

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[2] 2016 SCC 27, [2016] 1 S.C.R. 631.

PROCEDURAL HISTORY AND FACTUAL BACKGROUND

Events leading to the first mistrial

[7] On February 21, 2019, the day his residence was searched, the appellant was arrested and charged. His matter initially proceeded with some haste. On July 10, 2019, the appellant's s. 8 *Charter* application was scheduled to be heard in November and December 2019, with a three-day trial set for March 30 to April 1, 2020.

[8] The s. 8 *Charter* application, which included a request for leave to cross-examine the affiant of the ITO, began before Band J. as scheduled. During the hearing, on December 19th, the parties secured additional trial dates (July 6-10, 2020). Due to the COVID-19 pandemic, the March 30, 2020 trial date was automatically postponed. Despite the pandemic, the parties ensured the case continued to progress. On June 22, 2020 Band J. advised that he would likely grant leave to cross-examine the affiant. On the same day, Band J. informed the parties, who were ready for the July 2020 trial dates, that for personal reasons he could not proceed in-person. The parties agreed to continue with Band J. presiding remotely while everyone else appeared in person. Band J. delivered an oral ruling to this effect.

[9] Cross-examination of the affiant began on the morning of July 10, 2020 and concluded on December 7, 2020. During this period the parties re-scheduled the

trial for April 2021. The appellant made submissions on the s. 8 motion over the course of two days: December 10, 2020 and February 10, 2021.

[10] During the appearance on February 10, the Crown requested permission for two witnesses to testify remotely under s. 714.2 of the *Criminal Code*, R.S.C., 1985, c. C-46. This application was made despite the Crown's prior agreement with the appellant, and Band J.'s ruling, that all evidence would be heard in person. On February 23, 2021, the appellant's trial counsel expressed concern about the Crown's application and suggested that his client might need to revoke his consent for Band J. to preside remotely. Concerns were raised about potential bias if Band J. had to rule on whether witnesses could attend remotely while he himself had personal reasons to attend remotely. Ultimately, the appellant's trial counsel sought a mistrial, which the Crown supported (without acknowledging any improper conduct). Band J. granted the application and declared a mistrial.

Assignment of the trial judge and proceedings up to the second mistrial

[11] On March 24, 2021 counsel appeared before the trial judge and agreed that instead of relitigating the s. 8 motion the trial judge could review the transcripts of the proceedings and the materials filed before Band J., and then set aside some time for submissions. On April 8, 2021 the appellant was re-arraigned and the trial judge heard argument on the Crown's s. 714.2 application for witnesses outside Canada to testify remotely, to which the appellant ultimately consented with certain caveats. The *voir dire* recommenced on April 22, 2021 with the cross-examination

of an expert witness flown in by the Crown from outside Canada; this witness's testimony lasted the better part of three days. The parties then selected the date of June 14, 2021 to complete outstanding pretrial motions, and June 28 and July 5 to 8, 2021 to complete the trial.

[12] Approximately three weeks before the June 14th court date, the appellant's trial counsel was appointed to the bench. While the appellant quickly retained new counsel, the July trial dates were lost. On June 28, 2021 another mistrial was granted with the trial judge remaining seized.

Continuation of Proceedings Before the Trial Judge

[13] Further submissions on the appellant's s. 8 motion were made on September 7, 2021, and applications to stay the proceedings pursuant to s. 7 for abuse of process and s. 11(b) for unreasonable delay were heard on November 15 and 17, 2021. The trial judge dismissed the applications and the trial proper re-commenced on December 1, 2021.

Section 8 Application

[14] The appellant challenged the search warrant on three grounds. First, he argued that there were no reasonable grounds to believe that evidence would be found in his residence due to an insufficient evidentiary basis connecting the BTC transaction to the downloaded pornography, and that the information was stale-dated. Second, he argued that several excisions should be made to the ITO. Third,

he argued that the trial judge should use his residual discretion to quash the warrant because the affiant had misled the issuing justice.

[15] The trial judge dismissed this application, stating that the ITO provided "ample" reasonable grounds supporting the statutory preconditions and that the affiant had appropriately relied on information from Homeland Security. The trial judge also rejected any suggestion that the affiant was not full, frank, or fair in the ITO.

Section 11(b) Application

[16] After original trial counsel was appointed a judge, the appellant applied for a stay of proceedings on account of delay. Before the trial judge, the appellant acknowledged periods of defence delay. He argued that, at most, 2 months and 27 days should be deducted from the calculation of total delay, including 1 month of delay due to trial counsel's unavailability for the initial re-scheduling of the trial after it was adjourned due to COVID-19, and 1 month and 27 days due to the second mistrial following original trial counsel's appointment to the bench. The appellant also conceded an additional 4 months of delay due to discrete events: 3 months and 9 days because of the pandemic, 3 days due to the passing of the former defence counsel's close friend, and 15 days following the appointment of former defence counsel.

[17] The trial judge dismissed this application. He concluded that the total delay was from February 21, 2019 to the anticipated end of trial on February 17, 2022 – 1,092 days, just less than 3 years. From that he deducted 7 months of defence delay (October 2020 through April 2021), resulting in a net delay of 29 months. The trial judge found that there was additional delay due to exceptional circumstances arising from the "protracted" nature of the s. 8 litigation and the "onset of the COVID-19 pandemic, the response by the court to the COVID-19 pandemic and the ongoing…drag on the system caused by the COVID-19 pandemic": 3 months from March 30, 2020 to July 9, 2020, and 4 months from April 2021 through July 2021.[3] The trial judge deducted a further 5 months as a discrete event due to the appointment of former defence counsel. The trial judge's calculation of net delay was 17 months, below the 18-month *Jordan* threshold. He also found that the complexity of the case would have justified "a modest time period in excess of the presumptive ceiling".

The Trial Proper

[18] The prosecution's case centered on the continuity and admissibility of electronic evidence from the W2V website and the devices seized from the appellant. The evidence included BTC transaction and credit card records, as well

[3] The trial judge described the four months between April and July 2021 as "the continued COVID-19 drag on the s. 8 proceedings, composed of the s. 8 … protracted proceedings, the continued challenges posed generally by the pandemic, defence counsel's illness, and the adjournment due to the death of defence counsel's best friend."

as electronic data linked to the username “flydaze”, which was associated with the W2V account that downloaded the pornographic materials. Although the appellant had instructed counsel to contest the admissibility of the electronic evidence, by the end of the trial the defence did not dispute the evidence showing that child pornography had been downloaded onto the appellant’s computer; the issue was the identity of the individual who had actually downloaded it.

[19] The appellant testified. He acknowledged using “flydaze” as a name for his online accounts and the email address flydazeeffort@gmail.com for his Coinbase account. However, he denied downloading or watching videos from the W2V website. He claimed he was unaware of the four videos depicting child pornography found on his computer, had never transferred BTC to the W2V website, and was not at home when the BTC transaction was completed and the videos were downloaded. He testified to his whereabouts during these times, with his counsel later arguing that the failure of the police to investigate his location when the videos were downloaded raised a reasonable doubt.

[20] The appellant further testified that, in 2017, he lived in a condominium with a roommate named Roman. His evidence suggested that Roman, or a guest admitted by Roman, was responsible for downloading the material. The appellant stated that Roman educated him about BTC technology and encouraged him to open an account. To facilitate their joint venture, they decided to set up a BTC mining operation and created an easy password to gain access to it on the

appellant's desktop computer. In January 2017, the appellant opened his Coinbase account using the password "Super2323", a password he used for several other websites and email accounts. While he did not recall sharing his passwords with Roman (except for the one to his desktop computer), the appellant testified that the computer had an active autofill feature. He was certain that he had never successfully[4] added any of his credit cards to his Coinbase account and did not know how one of his cards could have been added.

[21] The appellant testified that Roman moved out of his apartment at the beginning of November 2017, and that they had no further communication after that. During cross-examination, the appellant was confronted with emails showing money transfers sent by someone named Roman to him in late 2018 and early 2019, the last of which was one month prior to his arrest. The appellant testified that he did not recall receiving those transfers. In his statement to the police, in which he denied any wrongdoing, the appellant did not mention Roman. During examination-in-chief, the appellant attributed this omission to being in shock and wanting to understand the situation before involving anyone else.

[22] The trial judge found the appellant guilty on both counts. He rejected the appellant's claim that he had not accessed the W2V website, citing the fact that

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[4] The trial judge pointed out what he believed to be an inconsistency: the appellant initially testified that he did not add any of his credit cards but later said that he had tried to add one of them but that it did not work.

the username and password for the W2V account matched the combination the appellant used for other accounts. The trial judge rejected defence counsel's argument that the police failure to verify the appellant's whereabouts when the BTC transaction and the downloads occurred raised a reasonable doubt. In his view, even if the appellant's testimony was true, it did not serve as an alibi since it did not "conflict with the timeframe of the BTC conveyance…the time of the downloaded child pornography…or the time those files were opened."

[23] The trial judge described the appellant's evidence about Roman as the invocation of a third party suspect, requiring a defence application. However, he rejected the trial Crown's submission that an adverse inference should be drawn in the absence of such an application. Ultimately, the trial judge found that "there was not a spec of evidence" in the prosecution's case supporting the existence of a roommate named Roman, although he accepted that the appellant might well have had a friend named Roman.

[24] The appellant was sentenced to 14 months in jail, less 152 days credit for pre-sentence custody. The trial judge denied the appellant's request for a conditional sentence as there were no "exceptional circumstances" and because it would not be consistent with the principles of sentencing.

DISCUSSION

Section 11(b)

[25] Deference is owed to a trial judge's factual findings and their determination of whether exceptional circumstances exist, which is reviewed on a standard of palpable and overriding error. The correctness standard applies to the characterization of delay and the determination of whether the delay was reasonable. See *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; *R. v. Vrbanic*, 2025 ONCA 151, at para. 22.

[26] The appellant contends that the trial judge erred by attributing the entire delay between October 2020 and April 2021 to the defence, and that in considering the total delay, he double-counted ten weeks of delay and improperly deducted two periods of delay (four months) as exceptional circumstances. Furthermore, the appellant argues that the trial judge erred in his alternative finding that this was a particularly complex case justifying a delay above the ceiling. The appellant does not challenge the length of the delays attributed to exceptional circumstances related to COVID-19.

[27] The Crown accepts that the trial judge made two errors. First, the Crown agrees that the trial judge double-counted a period of delay such that 82 days were deducted when they should not have been. Second, the Crown contends that the

trial judge failed to deduct 50 days for non-contentious periods of illness and defence unavailability. Correcting these errors brings the total delay to approximately 17.5 months, which is below the *Jordan* ceiling. Alternatively, the Crown argues that even if delay exceeds the ceiling, there is no basis to disturb the trial judge's finding that this case was particularly complex, justifying the remaining delay.

[28] I agree with the parties that the trial judge double-counted two periods: April 2021 was deducted as both defence delay and as arising from the impact of COVID-19, and the six-week period from June 14, 2021 to the end of July 2021 was attributed to both trial counsel's judicial appointment and COVID-19.

[29] I now turn to the contested periods of delay and discrete events.

(i) Delay between October 2020 and March 2021

[30] The trial judge characterized the entire period from October 2020 to March 2021[5] as defence delay. He reasoned that, but for defence counsel's unavailability, the trial could have been accommodated in October 2020 after being adjourned due to COVID-19.

[5] Because the appellant does not challenge the trial judge's finding that the period from April to July 2021 was attributable to COVID-19, the month of April 2021 could be deducted as part of that discrete event and is thus excluded from my analysis of the impugned period of defence delay.

[31] The issue with the trial judge's treatment of this period is that while the Crown was indeed available to complete the trial in October 2020, there was no evidence that the court could have accommodated it at that time. As defence delay runs only where both the Crown and the court are available and the defence is not (*Jordan*, at para. 64; *R. v. Cody*, 2017 SCC 31, [2017] 1 S.C.R. 659, at para. 30), the appellant submits that the trial judge erred by attributing the entire period from October 2020 to April 2021 to the defence

[32] The evidence before the trial judge included the trial verification form, completed by the trial coordinator for scheduling purposes, which noted that the defence was unavailable and that the Crown was available, but the section to indicate the court's availability was left blank. The trial judge nevertheless accepted the trial Crown's submission that this did not mean the court had no availability since dates were set by email during the pandemic. Despite the absence of emails in the record about this time period, a trial judge may use his knowledge of his own jurisdiction, including relevant local and systemic circumstances, when addressing these types of issues: *Jordan,* at paras. 89. 91 and 97; *R. v. Agpoon*, 2023 ONCA 449, at para.,26.

[33] In situations like these, there is no "bright-line" rule that classifies all of the delay until defence counsel's next available date as defence delay: *R. v. Hanan*, 2023 SCC 12, 170 O.R. (3d) 240, at para. 9. All relevant circumstances should be considered to apportion the period in a fair and reasonable manner: *Hanan*, at

para. 9; *R. v. Boulanger*, 2022 SCC 2, [2022] 1 S.C.R. 9, at para. 10, citing *R. v. K.J.M.*, 2019 SCC 55, [2019] 4 S.C.R. 39, at para. 96; *R. v. Gordon*, 2017 ONCA 436, 137 O.R. (3d) 776, at paras. 6-7.

[34] It is worth noting that the parties utilized some dates in December 2020 and February 2021 for cross-examinations and submissions on the appellant's s. 8 *Charter* application. While counsel being available and prepared for pretrial motions does not necessarily mean they are available and prepared to proceed with the trial proper, attributing the entire period to the defence was not fair or reasonable in the circumstances of this case.

[35] I would therefore apportion only half of this period, three months, as defence delay.

(ii) Defence delay between January 5 and February 10, 2022

[36] The Crown argues that the trial judge should have deducted the period from January 5 to February 10, 2022 as defence delay due to defence counsel's unavailability.[6] It appears that the trial Crown was available throughout this period, and that the trial judge would have been able to clear his schedule to accommodate

[6] The transcript discussing availability between January 5 and February 10, 2022 did not appear to be part of the s. 11(b) application record before the trial judge. However, neither party raised an issue with this on appeal.

the appellant's trial. I therefore agree that this period of approximately 1.25 months should have been deducted as defence delay.

(iii) Crown illness between June 14 and 28, 2019

[37] I agree with the Crown that the trial judge overlooked a two-week period of delay arising from the postponement of the June 14, 2019 pretrial due to the trial Crown's illness. On appeal, the Crown asserts, and the record appears to reflect, that this was unchallenged in the court below. However, the appellant argued before us that nothing was going to happen regardless of the trial Crown's illness, as the defence had not yet received a vetted copy of the ITO, as requested. Upon my review of the record, it does not appear that the ITO was necessary in order to have a meaningful judicial pretrial at that point.

[38] Despite this, while I acknowledge that this two-week period is indeed a discrete event, I would not deduct it in the calculation of net delay as it overlapped with a period already deducted due to COVID-19.

(iv) Delay between August 1 and November 15, 2021 after former trial counsel's appointment to the bench

[39] The trial judge considered the appointment of the appellant's former trial counsel as a discrete event that delayed the proceedings until November 15, 2021,

when the s. 11(b) application was heard.[7] However, the appellant managed to retain new counsel, and submissions on the s. 8 motion actually took place on September 7, 2021. The transcript from the June 29 appearance also indicates that new trial counsel had some availability during that period, which could not be utilized due to the court's and the trial Crown's schedules. I reject the Crown's argument that the entire period until November 15 should be deducted as a continuation of the discrete event or as defence delay due to new counsel's inability to reschedule all of the lost dates. I would therefore deduct only 1.25 months to account for trial counsel's appointment.

[40] After adjusting the trial judge's calculations, and after considering the various discrete events, the net delay amounts to approximately 23.5 months.

(v) Complexity of the case

[41] Although the net delay exceeds the *Jordan* ceiling, I would not disturb the trial judge's finding that this is a "manifestly complex case" that "would justify a modest time period in excess of the presumptive ceiling".

[42] However, since the trial judge made this finding as an alternative to his conclusion that the delay was below the ceiling, he did not specify what he

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[7] The trial judge found that this period of delay was from June 14 to November 15, 2021. But, as mentioned, he had already deducted the months of April to July because of COVID-19. Therefore, the period to be considered as delay arising from former counsel's appointment is August 1 to November 15, 2021.

considered to be a “modest time period”. Nevertheless, his observations about complexity are compelling and, as I mentioned earlier, should not be disturbed. This is because complexity is determined through a qualitative assessment of various aspects of a case, a task that is “well within the expertise of a trial judge”: *Jordan*, at paras. 77, 79; *Cody*, at para. 64.

[43] As the trial judge noted, the complexity of this case was rooted in its international dimension. Servers supporting the W2V website were seized in South Korea, and the investigation was initially undertaken by law enforcement agencies in foreign jurisdictions. While the appellant correctly points out that a complex international investigation does not necessarily lead to a complex prosecution, the international aspect of this case significantly impacted its prosecution. The Crown had to navigate bureaucratic processes in the United States to secure additional disclosure required for trial, and a continuing judicial pretrial was necessary to resolve whether there were investigative privilege issues with the ITO, which relied on information provided by Homeland Security.

[44] I agree with the trial judge that the technical record was highly complex. It included evidence from three expert witnesses, one of whom was a contractor hired by the U.S. Internal Revenue Service’s investigative team. These experts testified about cryptocurrency tracing and analytics, blockchain technology, cryptocurrency exchanges, the dark web, and the use of code to query relevant data from the W2V servers. The highly technical nature of this evidence is

undoubtedly a significant factor in the complexity analysis: see e.g. *R. v. C.G.*, 2020 ONCA 357, 388 C.C.C. (3d) 290, at para. 44.

[45] It is also worth noting that the appellant, as was his right, made no concessions regarding the electronic evidence. While an accused putting the Crown to its onus cannot make a case complex or elevate its complexity, when defence concessions are made – which is not uncommon – it can reduce a case's complexity. The point being that, in this instance there was nothing about the conduct of the litigation that rendered the case less complex.

[46] The appellant also takes issue with the trial judge's comment, in his oral ruling, that the complexity of this case must be considered in the context of the COVID-19 pandemic. According to the appellant, this suggests that the trial judge effectively counted pandemic-related delay twice.

[47] I agree that it would be wrong to both deduct delays associated with court closures and jury blackouts due to the pandemic (see *R. v. Agpoon*, 2023 ONCA 449, 167 O.R. (3d) 721, at paras. 27-32, leave to appeal refused, [2023] S.C.C.A. No. 477 (*Flemmings*), and [2023] S.C.C.A. No. 478 (*Agpoon*)), while also using the mere fact of pandemic-related delay to bolster a finding of complexity. In this case, however, the pandemic gave rise to additional legal issues and pre-trial applications, which increased its complexity. For example, the Crown brought a s. 714.2 application for permission to have two American witnesses testify remotely

due to cross-border travel restrictions. This led to the appellant's mistrial application on the basis that the former trial judge's personal circumstances, which prevented him from attending in person, would compromise his objectivity when deciding the application. This is not to say that in every case where the pandemic gave rise to further applications, it became or was rendered more complex, but in certain circumstances it can, and in this case did. This is a question to be decided on a case by case basis.

[48] In the end, the trial judge did not deduct the time spent addressing these pretrial applications to account for COVID-19, which would have given some weight to the appellant's concerns. Instead, he used it to inform his qualitative assessment of complexity, which was open to him.

[49] It is important to note the trial judge's observations about the procedural development of this case. He highlighted that both parties had "grossly underestimated" the time required for the s. 8 proceedings, that neither party was at fault given the "highly technical and complex" subject matter, and the "perhaps even unprecedented s. 8 related issues".[8] The trial judge's assessment of the s. 8

[8] The trial judge did not specify what novel arguments he was referring to. The Crown, on appeal, argues that a somewhat novel argument was the defence submission that there is a "special obligation" to verify and corroborate when "putting forward information that is highly technical and unlikely to be knowable to an issuing justice".

litigation led him to be confident that "anyone reading [his] decision [would] understand that this is a complex case".

[50] Contrary to the appellant's assertion that the trial judge focussed on a "single isolated step", the s. 8 application, his finding that its complexity "appeared to be interwoven with proof of the essential elements of the offence" demonstrates that he assessed the case as a whole.

[51] The trial judge also found that the Crown and defence counsel had handled the complexity of this case in an "admirable manner", doing "what they could [to deal] with novel search warrant related arguments … in the throes of the novel pandemic". In other words, the Crown fulfilled its obligation to effectively and efficiently manage this case's complexity; it did not just sit back and allow delay to accrue: *Jordan*, at para. 70; *Vrbanic*, at paras. 30-31.

[52] In my view, the degree of complexity here, even if not at the high end of the range of particularly complex cases, justifies the 5.5-month increase above the *Jordan* ceiling.

Section 8

[53] The appellant contends that the trial judge erred in dismissing his s. 8 *Charter* application. He argues that 1) the ITO did not disclose reasonable grounds to believe that a search of his residence would yield evidence because a) mere suspicion connected him to the downloaded videos, and b) the information in the

ITO was stale, and 2) the trial judge erred in concluding that the affiant made full, frank and fair disclosure. The appellant advanced the same arguments he made in the court below, all of which were considered and rejected by the trial judge. I see no legal error or misapprehension of evidence in the trial judge's analysis.

(i) Sufficiency of the ITO

[54] To begin with, the grounds in the ITO went well beyond mere suspicion. It linked the appellant to five downloaded videos, four of which contained child pornography. These videos were downloaded by an individual operating under the username "flydaze", a username the appellant frequently used. It further established that the appellant's Coinbase account paid cryptocurrency to a dark web child pornography website, which subsequently delivered videos to "flydaze". This information sufficiently connected the appellant to the downloaded videos.

[55] The appellants' argument at trial, which he reiterates here, was that the .01 BTC transfer from his Coinbase account to W2V would not have granted downloading privileges. He claims the ITO suggests that .02 BTC was the minimum threshold for acquiring the "points" necessary to gain downloading privileges, which means he could not have downloaded the videos. For the same reasons provided by the trial judge, I reject this argument. Despite the appellant's description of how the website worked, the affiant testified that he had learned from other sources that at the relevant time .01 BTC was enough to purchase a

download. The trial judge accepted this evidence and found that the affiant's belief was reasonable. As the Supreme Court held in *R. v. Garofoli*, [1990] 2 S.C.R. 1421, what matters is whether the affiant's belief was reasonable, not whether the affiant is correct. Similarly, in *R. v. Maric*, 2024 ONCA 665, 442 C.C.C. (3d) 133, at para. 153, this court held that "the reviewing justice's task is not to determine whether the allegations underlying the warrant are ultimately true – a question for trial – but rather whether the affiant had a reasonable belief in the existence of the requisite statutory grounds at the time the affidavit was sworn".

[56] There is no reason to question the trial judge's acceptance of the affiant's evidence or his finding that the affiant's belief was reasonable.

[57] I also reject the appellant's argument that the information in the ITO was stale. The affiant explained why he believed there would still be evidence on the appellant's devices after a year and a half. His belief that people usually retain their devices for years and that, when they do change, they often transfer files from one device to another, was reasonable and based on common sense. He also explained that if a digital file was deleted, it could often be forensically recovered. Additionally, the cost and the specific steps taken to download the videos in this case would have increased their value to the person who paid for and downloaded them, making it more likely that they would be retained. Lastly, the affiant pointed out that the individual who downloaded the material appeared to be taking steps to maintain their anonymity, probably believing that downloads from the dark web

could not be traced back to them, making it less likely that they would have deleted the files to conceal them.

[58] The affiant's beliefs were not broad generalizations about the behaviours of child pornographers, which would have been improper: *R. v. Morelli*, 2010 SCC 8, [2010] 1 S.C.R. 253. Instead, they were rooted in his experience and technological qualifications, both of which were detailed in the ITO. To the extent the affiant improperly relied on propensity-based reasoning,[9] the trial judge excised that information from the ITO. What remained was sufficient to support the existence of reasonable and probable grounds, despite the passage of time.

[59] The trial judge's acceptance of the affiant's evidence and his finding that the affiant's beliefs were reasonable, are to be afforded deference. There is no basis for appellate intervention.

(ii) Full, frank, and fair disclosure

[60] The appellant argues that the affiant's mistaken description of the unsworn Timothy Devine document (from Homeland Security), as a sworn affidavit, means he was attempting to mislead the issuing justice. In my view, it was open to the trial judge to accept the affiant's evidence and to find that there was "nothing in the record, including cross-examination of the affiant, [to suggest] that the affiant

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[9] At para. 72 of the ITO, the affiant wrote that "the person who downloaded the videos of child pornography also has other child sexual abuse images and/or videos". This was excised from the ITO.

deliberately misled the issuing justice". It was also open to him to conclude that "[t]here is no evidence that the affiant intended to bolster the information from [Mr. Devine] by using the term affidavit. The use of the term could not have worked an injustice in the circumstances".

[61] The email from Homeland Security, which attached the Devine document, described it as "the search warrant affidavit which was sent to our field offices who received W2V leads". In the attachment, Devine referred to himself as "your affiant". The affiant was extensively cross-examined on this issue.

[62] The appropriate remedy was to correct the misnomer through amplification, which is what the trial judge did.

[63] The appellant argues further that the affiant breached his duty of candour by "failing to provide the issuing justice with any information as to how Homeland Security determined that the child pornography had been downloaded by the 'flydaze' account". The trial judge considered and rejected this argument, writing that:

> I do not agree that the [Homeland Security] information presented reliability concerns or that the affiant was obligated to conduct further investigation to enhance reliability. […] The affiant was entitled to accept what the special agents conveyed, particularly when there was nothing to suggest that [Homeland Security] personnel were misleading the affiant.

[64] The duty of candour does not require an affiant to go behind and verify every significant fact reported by a fellow officer. A warrant is to be "judged on the basis of the grounds that are set out in an ITO, not on the basis of what steps the police could have taken to acquire additional grounds": *R. v. Vu*, 2011 BCCA 536, 285 C.C.C. (3d) 160, at para. 45, aff'ed *R. v. Vu*, 2013 SCC 60, [2013] 3 S.C.R. 657. In this case, even though the affiant could have asked Homeland Security to explain exactly how they knew "flydaze" had downloaded the videos, that does not mean he was required to do so. The information was provided by a trusted law enforcement partner, and there was no reason to doubt its accuracy or seek further clarification. The information was detailed and specific, including the videos themselves and an indication of when they were downloaded. It was reasonable for the affiant to infer that the videos originated from the W2V server. And it was reasonable for the issuing justice, and the trial judge (as the reviewing justice), to be satisfied by it.

[65] I would also reject the appellant's assertion that the affiant "exaggerated" the link between the August 18 BTC payment and the August 20 download of videos depicting child pornography. When read as a whole, the ITO clearly explained the connection between this payment and the subsequent download. As the trial judge found, "the technological record was fairly presented to the issuing justice".

[66] I would reject this ground of appeal.

The Trial Proper

i) Reversing the burden of proof

[67] The appellant criticizes the trial judge's reference to the lack of forensic evidence supporting Roman's use of his computer and his conclusion that "there is not a spec of evidence even supporting" the existence of a roommate named Roman. He argues that this effectively reversed the burden of proof by requiring him to prove the existence of Roman and his access to his computer. Furthermore, he contends that, despite the trial judge's indication that he would not draw an adverse inference against the appellant for failing to bring a third party suspect application, he did exactly that, thereby reversing the burden of proof.

[68] I disagree. While the appellant was not required to lead evidence regarding Roman's existence and his access to the appellant's accounts, it was open to the trial judge to conclude, based on the evidence (and the lack thereof), that Roman's involvement was not a reasonable alternative inference: *R. v. Villaroman*, 2016 SCC 33, [2016] 1 S.C.R. 1000, at paras. 30 and 65-66.

[69] It is important to remember the context here. Most notably, in the appellant's statement to the police[10] he never mentioned Roman, even though the police asked him directly whether he had a roommate at the relevant time:

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[10] This statement was conceded, and found, to be voluntary, and the video-recording of it was filed as an exhibit at trial and tendered for the truth of its contents.

> Police officer: Did you have anybody who lives with you, who lived with you at that time?
>
> Appellant: At the time of 2017, I had roommates before, like I told you about a girls living as my roommate and before her I had roommates, but I don't think someone used to live there. Not at that time.

The appellant's statement to the police that he did not have a roommate at the time was a material fact that directly contradicted his testimony at trial.

[70] Furthermore, the trial judge found the appellant to be an incredible and unreliable witness, noting that "during [his] ten minute cross-examination, [he] obfuscated and stalled, insincerely sought clarification of the cross-examiner's questions and feigned lack of comprehension", and became "deliberately obtuse…essentially all of this presented as a rather obvious obstructive delay tactic as the [Crown] cross-examined".

[71] In light of the inconsistency between the appellant's testimony and police statement, and the finding that he lacked credibility, it was appropriate for the trial judge to place significance on the absence of any evidence in the extensive digital record suggesting a connection between a roommate named Roman and the computer. Doing so did not amount to a reversal of the burden of proof.

[72] That said, I do want to emphasize that it was incorrect for the trial Crown to argue that an adverse inference should be drawn from the appellant's failure to bring a third party suspect application implicating Roman, and for the trial judge to hold that a third party suspect application was required. There was no need for

such an application in this case, where evidence that a roommate also had access to the computer was already inherently material: *R. v. Rudder*, 2023 ONCA 864, 169 O.R. (3d) 561, at para. 65. However, in the end the trial judge thoroughly addressed the possibility that Roman downloaded the videos, and "decline[d] to draw an adverse inference against the [appellant] sourced in [his] failure to bring an application". In other words, the trial judge did not commit the error the trial Crown invited him to commit.

ii) Misapprehension of evidence

[73] The appellant argues that the trial judge, who rejected his evidence partly due to the improbability that someone else would have the same username and password as him, misunderstood his evidence regarding the password and the TOR browser.

[74] At trial, the appellant testified that his email accounts were configured to autofill the password. He argues on appeal that, although the TOR browser did not have an autofill function, Roman could have determined his password for the TOR browser from the autofill function on the email accounts. He asserts that the trial judge's misapprehension prevented him from considering that possibility as a reasonable alternative inference.

[75] I disagree. The trial judge did not misapprehend the evidence about the appellant's passwords. The trial judge rejected "the implication presented by the

[appellant's] evidence – that Roman compromised the [appellant's] credentials on at least two separate occasions, on two different dates, for the purpose of surreptitiously downloading child pornography". While the trial judge did not expressly discuss the possibility that Roman may have seen the appellant's password via the auto-fill feature on his email account, this is unsurprising given how speculative the possibility was. Defence counsel did not even raise this argument during closing submissions.

[76] The appellant argues further that the trial judge misapprehended his evidence regarding when he installed the TOR browser on his computer. The appellant told the police that he had installed the TOR browser, but claimed during his testimony that when he said that to the police he was referring to the time around his arrest, and not the time of the offence, implying that he did not have the TOR browser on his computer at the relevant time and therefore could not have downloaded the videos.

[77] In my view, the trial judge did not misapprehend this evidence. He watched the video of the police interview and observed the appellant's testimony in court. It was open to him to conclude that the time period underlying the appellant's statement to the police included the time of the offence and that the appellant had "adjusted his evidence about whether TOR was installed on his computer in August 2017" during his testimony. In any event, at the beginning of his cross-examination the appellant himself stated that TOR was first downloaded on his computer in

2016. Any misapprehension about what the appellant told the police could not have played an essential part in the trial judge's reasoning process, which is necessary for a misapprehension of evidence ground of appeal to succeed: *R. v. Lohrer*, [2004] 3 S.C.R. 732, at para. 2..

[78] I would therefore reject this ground of appeal.

Sentence

[79] In denying the request for a conditional sentence, the trial judge relied on this court's decision in *R. v. M.M.*, 2022 ONCA 441 which held, at para. 16, that conditional sentences for sexual offences against children "must be limited to exceptional circumstances that render incarceration appropriate, for example…a medical hardship that could not adequately be addressed within the correctional facility". The appellant argues that the trial judge erred by requiring a specific exceptional circumstance, such as a medical hardship, before considering the appropriateness of a conditional sentence, contrary to *R. v. Pike*, 2024 ONCA 608, 171 O.R. (3d) 241, at paras. 180-82.

[80] Although the *Pike* decision had not been released at the time of sentencing, the trial judge's reasons were not inconsistent with it. Immediately after noting the absence of evidence of medical hardship, the trial judge stated that "a conditional sentence would be manifestly inadequate to address the criminal law sentencing principles in this case". His reasons addressed the factors that the appellant urges us to focus on, including the appellant's rehabilitative potential and the relatively

small size of his pornography collection. I therefore disagree that the trial judge's decision to not impose a conditional sentence reflects a failure to consider "multiple seemingly non-exceptional factors" that "collectively render a conditional sentence appropriate": *Pike*, at para. 182.

[81] Lastly, the trial judge did not err by assigning only modest weight to the appellant's immigration status. The trial judge considered the two letters from immigration lawyers that were presented to him. One letter suggested that "the quantum of sentence imposed will have no impact on the defendant's immigration circumstances." And the trial judge found that the other letter, which set out the range of possible consequences upon his return to Russia, was dated and speculative. It is also important to note that at the time of sentencing the appellant was already subject to a deportation order (although not a removal order).

[82] The sentence imposed was fit and is not tainted by an error in principle.

CONCLUSION

[83] For these reasons, I would dismiss the conviction appeal. While I would grant the appellant leave to appeal sentence, I would dismiss his sentence appeal.

Released: April 15, 2025 "G.T.T."

"J. George J.A."
"I agree. Gary Trotter J.A."
"I agree. B. Zarnett"