

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. H.B., 2026 ONCA 160¹

DATE: 20260305

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van Rensburg, Coroza and Dawe JJ.A.

BETWEEN

His Majesty the King

Respondent

and

H.B.

Appellant

Alexander Ostroff, for the appellant

James Clark, for the respondent

Heard: May 1, 2025

On appeal from the convictions entered by Justice David G. Carr of the Ontario Court of Justice on November 22, 2021.

Coroza J.A.:

I. INTRODUCTION

[1] The appellant was accused of possessing child pornography and sexually abusing two complainants. The complainants were the appellant's niece, N.S., and the granddaughter of the appellant's landlords, I.C.

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.

[2] After a trial in the Ontario Court of Justice, the appellant was acquitted of the charges involving I.C., but convicted of the charges involving N.S. The appellant was convicted of sexual assault, sexual interference, invitation to sexual touching and possession of child pornography.²

[3] Prior to trial, the appellant brought an application seeking a stay of proceedings, claiming that his right to be tried within a reasonable time under s. 11(b) of the *Canadian Charter of Rights and Freedoms* had been breached. That application was dismissed by Wolfe J. (the “application judge”).

[4] The appellant also brought an application seeking the exclusion of evidence, claiming that his right against unreasonable search and seizure under s. 8 of the *Charter* had been breached when police seized a computer from his bedroom. That application was dismissed by Carr J. (the “trial judge”).

[5] The appellant appeals his convictions. He raises three grounds of appeal: (i) the application judge erred in dismissing his s. 11(b) application; (ii) the trial judge erred in dismissing his s. 8 application; and (iii) the trial judge failed to properly consider and address issues about N.S.’s reliability.

[6] For the reasons that follow, I conclude that the application judge erred in dismissing the s. 11(b) application. Properly approached, the net delay in this case

² Recent legislative amendments replaced the term “child pornography” with “child sexual abuse and exploitation material” in the *Criminal Code*, R.S.C. 1985, c. C-46. I use the former terminology only because the amendments came into force after the appellant’s convictions.

exceeded the presumptive ceiling of 18 months for provincial court matters: see *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631.

[7] Accordingly, I would quash the convictions and enter a stay of proceedings. Given my conclusion on the first ground of appeal, it is unnecessary to deal with the other two grounds of appeal.

II. GENERAL PRINCIPLES

[8] The framework for assessing unreasonable delay under *Jordan* requires the calculation of net delay. Net delay is calculated by subtracting defence delay from total delay. The net delay is then compared with the presumptive ceiling. For matters proceeding in the provincial courts, the presumptive ceiling is 18 months.

[9] If the net delay is below the presumptive ceiling, the delay is presumed reasonable. If the net delay exceeds the presumptive ceiling, the delay is presumed unreasonable. The Crown bears the onus of rebutting this latter presumption, by showing that exceptional circumstances exist: *R. v. Jurkus*, 2018 ONCA 489, 363 C.C.C. (3d) 246, at para. 7, leave to appeal refused, [2018] S.C.C.A. No. 325.

[10] This appeal turns on the meaning of defence delay. Defence delay arises from an explicit or implicit waiver that is clear and unequivocal, or where delay is caused solely or directly by the defence's conduct. This includes tactical choices

that delay the trial, such as frivolous applications and requests: *R. v. Coulter*, 2016 ONCA 704, 133 O.R. (3d) 433, at para. 44.

[11] Periods of time during which the court and the Crown are prepared to proceed, but the defence is not, also qualify as defence delay: *Jordan*, at paras. 63-64. However, when defence counsel rejects a date offered by the court, there is no bright-line or automatic rule that all delay incurred until the next available date necessarily constitutes defence delay. The relevant circumstances should be considered to determine how delay should be apportioned among the participants: *R. v. Hanan*, 2023 SCC 12, [2023] 1 S.C.R. 467, at para. 9.

[12] Legitimate actions taken by the defence to respond to the charges, such as taking time to prepare and bring non-frivolous applications and requests, are not properly characterized as defence delay: *Jordan*, at paras. 64-65.

[13] Lastly, this court has also suggested that defence delay does not include defence actions taken in response to negligent Crown conduct such as late disclosure, even where such conduct is not deliberate: see, e.g., *R. v. Pyrek*, 2017 ONCA 476, 349 C.C.C. (3d) 554, at paras. 19-22; *R. v. D.A.*, 2018 ONCA 96, 402 C.R.R. (2d) 303, at paras. 20-22.

III. BACKGROUND

[14] The appellant was initially charged in relation to the sexual abuse of I.C. on August 30, 2018. The first information containing those allegations was sworn on

the same date. The second information, containing the allegations involving N.S., was sworn on October 3, 2018. The Crown proceeded on all charges on a single information, which it laid on December 18, 2019. The last day of the trial was scheduled to be July 16, 2020 at the time the s. 11(b) application was brought.

[15] Based on the dates detailed above, for purposes of the s. 11(b) application, the total delay in this case was 686 days (i.e., from August 30, 2018 to July 16, 2020). Expressed in days, the 18-month *Jordan* presumptive ceiling was 547 days: see e.g., *R. v. Shaikh*, 2019 ONCA 895, 148 O.R. (3d) 369, at para. 33. Accordingly, the total delay will exceed the *Jordan* presumptive ceiling unless the number of days that are properly deducted as defence delay comes to at least 139 days.

[16] Before the application judge, defence counsel conceded 11 days of defence delay. This included:

- the delay from December 9 to 17, 2019 (8 days), as defence counsel was not available for pre-trial motions on December 9, whereas only Crown counsel was unavailable on December 17; and
- the delay from February 25 to 28, 2020 (3 days), as defence counsel was not available on February 25 to receive the court's decision on a

severance application, and the parties received this decision on February 28 instead.³

[17] This appeal turns on the application judge's determination that three other periods of delay should be deducted from the total delay as defence delay: (i) delay in scheduling pre-trial motions (148 days); (ii) delay in completing pre-trial motions (41 days); and (iii) delay in scheduling the trial (24 days). This amounted to an additional 213 days of defence delay. After deducting these periods of defence delay from the total delay, the application judge concluded that the net delay in this case did not exceed the 18-month ceiling under *Jordan*.

[18] As a preliminary matter, I note that the application judge's calculations reflect a few errors.

[19] In respect of the 148-day period he deducted, this was intended to reflect his finding of defence delay from August 13 to December 17, 2019 and from December 20, 2019 to January 8, 2020. However, the complete span of time running from August 13, 2019 to January 8, 2020 totals 148 days. As noted,

³ The application judge counted these concessions of defence delay as totaling 13 days; they were the only date ranges he calculated in an inclusive manner (i.e., by including both the first and last date of the range in question). However, the date of December 17, 2019 was a date when defence counsel was available and the Crown was not, and February 28, 2020 was a court date; neither of these dates should therefore be counted toward the defence concession.

The Supreme Court of Canada calculates date ranges in a manner consistent with including the first date, but excluding the last date, of the range in question (the last date typically being when court proceedings resumed, or when a different cause of delay arose). See, e.g., the calculations in *R. v. Boulanger*, 2022 SCC 2, [2022] 1 S.C.R. 9, at para. 6 (referring to the "84-day delay between March 1 and May 24, 2018") and para. 7 (referring to "the period of 112 days between May 21 and September 10, 2019").

defence counsel had already conceded December 9-17, 2019 as defence delay, but the application judge deducted it again here. The application judge's 148-day sum also includes a three-day period he indicated would not be counted as defence delay, namely December 17-20, 2019 (as it was the Crown who was unavailable on December 17). Therefore, on the application judge's own analysis, he meant to deduct 118 days for the period from August 13 to December 9, 2019, and a further 19 days for the period running from December 20, 2019 to January 8, 2020. This totals 137 days.

[20] In respect of the 41-day period the application judge deducted, this was intended to reflect his finding of defence delay from January 14 to February 25, 2020. This is a 42-day period.

[21] There are no calculation errors in respect of the application judge's deduction of 24 days of defence delay.

[22] Accordingly, the application judge meant only to deduct 203 days of defence delay (in addition to the defence concessions which, as noted, total 11 days).

[23] The question on appeal is whether the application judge's characterization of these three time periods as defence delay was correct: *Jurkus*, at para. 25; *R. v. Pauls*, 2020 ONCA 220, 149 O.R. (3d) 609, at para. 40, *aff'd R. v. Yusuf*, 2021 SCC 2, [2021] 1 S.C.R. 5, at para 2.

[24] Respectfully, as I will explain, the application judge erred in characterizing these three time periods as defence delay. These periods of delay were not waived by the defence, nor were they caused solely or directly by the defence. Properly assessed, the defence delay, once deducted from the total delay, still results in a net delay exceeding the *Jordan* ceiling. Therefore, the delay was presumptively unreasonable. The Crown was unable to rebut this presumption. The application should not have been dismissed, and a stay of proceedings should have been entered.

IV. ANALYSIS

a. The Delay in Scheduling the Pre-Trial Motions

[25] On July 31, 2019, the parties determined that an entire day would be needed for pre-trial motions. These motions included a severance application, a similar fact application and a *Stinchcombe* disclosure motion. The earliest date canvassed by the court, and for which both parties were available, was January 8, 2020.

[26] Before landing on January 8, 2020, the following dates were also offered by the court but not accepted by the parties:

- August 13 and 14, 2019: The Crown was available, the defence was not.
- December 9, 2019: The Crown was available, the defence was not.

- December 17, 2019: The defence was available, the Crown was not.
- December 20, 2019: The Crown was available, the defence was not.

[27] The application judge ruled that the entire period of delay between August 13, 2019 and January 8, 2020 – with the exception of the few days of Crown delay between December 17 and 20, 2019 – was defence delay. The application judge found this period to total 148 days. As noted earlier, however, he mistakenly double-counted defence counsel’s concession that December 9-17, 2019 (8 days) qualified as defence delay, and he mistakenly included the December 17-20 period for which the Crown was responsible (3 days). He therefore meant to deduct 137 days (August 13 to December 9, 2019 and December 20, 2019 to January 8, 2020).

[28] In making his findings on defence delay in scheduling pre-trial motions, the application judge rejected two arguments raised by the defence.

[29] First, defence counsel argued that the defence delay over this period should be limited to what he conceded (i.e., December 9-17, 2019), because he was still awaiting outstanding disclosure that he had requested from the Crown on July 29, 2019. This disclosure was not received until March 2020, well after the date scheduled for the pre-trial motions.

[30] The application judge rejected this argument. In his view, the outstanding disclosure was not relevant to the defence’s severance application. Therefore, the

fact that this disclosure had not yet been provided did not prevent the defence from accepting an earlier date.

[31] Second, the defence argued that the short time frame between July 31, 2019, when motion dates were canvassed, and August 13, 2019, the first date offered by the court, did not allow adequate time for the defence to prepare and serve the application materials.

[32] The application judge rejected this argument too. He noted that, when the motions were ultimately argued on January 8, 2020, the defence had filed its materials for the severance application only nine days prior. In his view, this was “part of a pattern” of defence materials being late, and it also showed that the Crown would have been able to respond to short service. While the defence must be allowed adequate time to prepare, all parties were required to rise above the culture of complacency. Therefore, when faced with the delay from August 13, 2019 to January 8, 2020, it was incumbent on defence counsel to accept the earlier date or take the steps necessary to be available on some other date.

[33] On appeal, the appellant accepts that the period from December 20, 2019 to January 8, 2020 (19 days) was defence delay. However, the appellant contends that the period between August 13 and December 9, 2019 (118 days) was not. I accept the appellant’s submission.

[34] First, I agree with the appellant that it is neither fair nor reasonable to characterize nearly the entire period from the first dates rejected by the defence (August 13-14, 2019) to the final date chosen (January 8, 2020) as defence delay.

[35] Recall that *Jordan* holds that defence delay is a period of delay that is either waived by the defence or solely or directly caused by the defence. Here, the court initially offered two consecutive dates (August 13-14, 2019) which were then only thirteen days away. The next date offered was not until several months later, on December 9, 2019. No court dates were offered between August and December. It was therefore simply not possible for the defence to make itself available on a different date before December 9, 2019. As such, this delay was not solely attributable to the defence. The court's unavailability was a major contributor to delay over this period.

[36] As the Supreme Court of Canada has held, in cases such as this one, all relevant circumstances must be considered. In *Hanan*, at para. 9, Côté and Rowe JJ. stated:

[W]e reject the Crown's proposed "bright-line" rule according to which all of the delay until the next available date following defence counsel's rejection of a date offered by the court must be characterized as defence delay. We agree with van Rensburg J.A. and Tulloch J.A., as he then was, that this approach is inconsistent with this Court's understanding of defence delay. Defence delay comprises "delays caused solely or directly by the defence's conduct" or "delays waived by the defence". Furthermore, "periods of time during which

the court and the Crown are unavailable will not constitute defence delay, even if defence counsel is also unavailable". All relevant circumstances should be considered to determine how delay should be apportioned among the participants." [Citations omitted.]

This approach was recently applied by this court in *R. v. Qureshi*, 2026 ONCA 20.

[37] When the defence rejects an available date, *Hanan* directs courts to consider all relevant circumstances so as to apportion the ensuing delay fairly and reasonably among the participants, rather than simply ascribing it entirely to the defence. The application judge failed to do that here – though, in fairness, *Hanan* was not available to him at the time of his decision.

[38] In the wake of *Hanan*, the entire period from the dates first offered in August to the motions date of January 8, 2020 (minus the three days attributable to Crown delay) could not be qualified as defence delay. Essentially, the trial judge took the “bright-line rule” approach that the Supreme Court later rejected in *Hanan*. In my view, the appellant’s concessions before the application judge and on appeal amply reflect a contextual apportionment of responsibility for delay for the period running from August 13, 2019 to January 8, 2020.

[39] Second, I am persuaded by the appellant’s submission that it was not unreasonable for defence counsel to be unavailable for the initial dates offered.

[40] These dates were offered on relatively short notice: see *R. v. Safdar*, 2021 ONCA 207, at para 50. As noted, the first dates offered were just thirteen days

away. In my view, where the court proposes dates on such a quick turnaround, defence counsel is not obliged to either make itself immediately available for those dates or risk bearing all ensuing delay as defence delay.

[41] While I acknowledge that the application judge was in a good position to assess the defence's conduct here, there is no suggestion that the defence's unavailability on August 13-14, 2019 was illegitimate. There appears to be no appellate authority holding that counsel must indicate, much less 'prove', the reason for their unavailability for specific dates: see *R. v. Dunnett*, 2025 ONCA 392, 177 O.R. (3d) 430, at para. 35, leave to appeal refused, [2025] S.C.C.A. No. 342.

[42] What is more – and as I elaborate on below – the application judge himself recognized that preparing these motions would take some time. Nonetheless, he held that it was incumbent on defence counsel to either accept the date or risk having the entire delay that followed it attributed to the defence. I do not agree. That would put the defence in an untenable position. As the Supreme Court recognized in *Jordan*, “the defence must be allowed preparation time, even where the court and the Crown are ready to proceed”: at para 65; see also *R. v. Cody*, 2017 SCC 31, [2017] 1 S.C.R. 659, at para 29.

[43] Third, I agree with the appellant that the application judge focused unduly on the time needed to prepare the severance application alone. The record is clear

that the severance application was not the only application at issue. As mentioned above, the defence was also bringing a disclosure application and had to respond to the Crown's similar fact evidence application. This made the 13-day turnaround between the scheduling date (July 31, 2019) and the first dates offered by the court (August 13-14, 2019) exceedingly difficult for the defence to accommodate. Thirteen days indeed seems insufficient for the defence to prepare two applications and respond to another.

[44] Similarly, I find the application judge's focus, and the respondent's reliance, on when the defence filed its severance materials (i.e., nine days before the January 8, 2020 hearing) unreasonable. Recall that the Crown laid the joint information in this case on December 18, 2019. The record is clear that the defence reminded the Crown at least twice before then that the joint information had not yet been laid; as the appellant puts it, there was nothing "with respect to which a severance motion could be brought" until that occurred. The record offers no indication that the trial Crown, or any judge before whom the parties appeared, suggested that the severance application could proceed without the joint information. The onus was on the Crown to lay the joint information in a timely manner or indicate that the application could proceed otherwise. In my view, the fact that the Crown was able to respond to the defence's "short service" of its severance materials shows only that the Crown was making the best of a delay *it* caused, i.e., by belatedly laying the joint information.

[45] In sum, I agree with the appellant that the 118-day period running from August 13 to December 9, 2019 cannot be characterized as defence delay. I can find no basis for apportioning any of this delay to the defence. I would reiterate that this period forms part of a lengthier period (i.e., August 13, 2019 to January 8, 2020) in respect of which the appellant has already conceded almost a month of defence delay (i.e., the 8 days from December 9 to 17, 2019, conceded below; and the 19 days from December 20, 2019 to January 8, 2020, conceded on appeal). In my view, whatever apportionment to the defence is appropriate for this lengthier period has already been achieved by these defence concessions.

[46] As the parties on appeal noted, this conclusion is dispositive of this ground of appeal. If the 118 days from August 13 to December 9, 2019 had not been deducted by the application judge, the net delay would exceed the *Jordan* ceiling. However, for the sake of completeness, I will go on to consider the other two periods that the application judge characterized as defence delay.

b. The Delay in Completing the Pre-Trial Motions

[47] Prior to trial, the defence also brought a third-party records application to obtain documents from Niagara Detention Centre. The defence asserted that these records were relevant to the accused's bail and, should he be convicted, his eventual sentencing. This third-party records application was initially meant to be heard on December 9, 2019. However, the defence had not yet filed a necessary affidavit in time for that date. The motion was adjourned to December 18, 2019.

On December 18, 2019, the affidavit had still not been filed. The motion was again adjourned, this time to the previously set January 8, 2020 motions date.

[48] When the parties arrived on January 8, 2020, there was a scheduling conflict. A trial was scheduled in the same courtroom as the motions. Before defence counsel arrived, the Crown incorrectly informed the court that only two hours had been reserved for pre-trial motions, rather than the entire day. The court decided to hear the pre-trial motions in the afternoon. Counsel agreed to meet in the interim to try to streamline the afternoon session.

[49] That afternoon, counsel advised the court that three applications would proceed: (1) the severance application; (2) the third-party records application; and (3) the *Stinchcombe* application.

[50] The Crown suggested that the *Stinchcombe* application be heard first. The defence agreed. Next, the parties made submissions on the third-party records application. Once those submissions were completed, the third-party records application was dismissed. Defence counsel then made submissions on the severance application. However, there was not enough time for the Crown's submissions on that application. The parties returned on January 14, 2020 for an additional 45 minutes to conclude submissions on the severance application and to argue the Crown's pending similar fact application.

[51] After submissions had concluded, the court offered February 25, 2020 as a date to deliver its decision on the severance application. The defence was not available. The decision was instead received on February 28, 2020.

[52] As noted earlier, the defence conceded that the delay in receiving the severance decision, i.e., from February 25 to 28, 2020 (3 days), was defence delay. However, the application judge went further and also found that the 42-day period between the close of submissions on January 14, 2020 and February 25, 2020 qualified as defence delay.

[53] The application judge stated that defence counsel ought to have prioritized the severance application on January 8, 2020. Instead, the defence chose to argue the third-party records application before the severance application. For that reason, the parties did not have time to complete their submissions on the severance application on January 8, 2020. This necessitated additional court time that could have been used to receive the severance ruling and to target trial dates.

[54] The application judge further stated that this delay was attributable to the defence because the third-party records application should not have been heard that day at all. The third-party records application was premature, brought in the wrong forum, and only heard on the same day as the other motions because the defence was not prepared on two earlier scheduled dates.

[55] Therefore, the application judge concluded that the period running from January 14 to February 25, 2020 was wholly attributable to the defence.

[56] While the defence certainly bore some responsibility for the delay in completing these applications, I agree with the appellant that the defence was not solely responsible for the January 14 to February 25, 2020 period. In my view, there were multiple causes of this delay. Consistent with the contextual approach directed by *Hanan*, I would find that the delay should be apportioned equally between the defence, on one hand, and the Crown and the court, on the other.

[57] An apportionment of this sort accords with the approach taken in a number of appellate decisions: see *R. v. Boulanger*, 2022 SCC 2, [2022] 1 S.C.R. 9, at para. 10; *R. v. M.E.*, 2025 ONCA 729, at para. 26; *R. v. Jones*, 2025 ONCA 103, 176 O.R. (3d) 81, at paras. 31-37; and *Qureshi*, at para. 41. In my view, it is also appropriate in the context of this case, for the following reasons.

[58] One-half of this 42-day period (i.e., 21 days) is attributable to the defence for: (i) proceeding with the third-party records application despite multiple prior judicial cautions that it was not brought in the right forum; (ii) causing the third-party records application to be adjourned to January 8, 2020 because it was not ready on the dates it was scheduled for in December 2019; and (iii) prioritizing the third-party records application over the severance application on January 8, when the latter was required in order for trial dates to be set.

[59] The other half of this 42-period should be attributed to the Crown and the court together. The Crown bears some responsibility for this delay for (i) prioritizing the *Stinchcombe* application even when it recognized the urgency of the severance application; and (ii) more importantly, making the *Stinchcombe* application necessary in the first place, as a result of its delay in disclosure despite defence counsel's persistent inquiries to this end:⁴ see *Pyrek*, at paras. 19-22; *D.A.*, at paras. 20-22.

[60] The court also bears some responsibility for this delay. The court clawed back half of the full day scheduled for pre-trial motions (i.e., January 8, 2020) despite this date having been set more than five months prior. I would add, as the respondent conceded at the appeal hearing, that it was well within the court's case management powers to direct the sequence of the applications once it became apparent that there would not be enough time to hear them all that day: see *R. v. Haevischer*, 2023 SCC 11, [2023] 1 S.C.R. 416, at para. 102; see also *Jordan*, at para. 139.

⁴ The record indicates that the defence requested disclosure on at least eight different occasions between October of 2018 and December of 2019. While the parties made submissions on January 8, 2020, the application judge noted that a ruling was not sought on the *Stinchcombe* application. It appears no ruling was necessary as the parties attempted to work on the issue of outstanding disclosure in the absence of a ruling. The application judge continued to revisit the outstanding disclosure on January 14 and then again on February 28, 2020.

[61] Accordingly, in my view the application judge erred in characterizing the full 42-day period running from January 14 to February 25, 2020 as defence delay. The appropriate apportionment would be that one-half of this period (i.e., 21 days) be attributed to the defence, and that the other half be ascribed to the Crown and the court.

c. The Delay in Setting Trial Dates

[62] On March 3, 2020, a final judicial pre-trial was conducted in order to set trial dates. The trial was set for July 13-16, 2020. The following earlier dates were also canvassed: April 22, May 5, May 11 and June 22.

[63] When trial dates were being set, defence counsel indicated that they still had several additional pre-trial motions to bring. These pre-trial motions were later scheduled to be heard on May 5, 2020. However, a COVID-19 directive suspended all criminal trials and preliminary hearings at that time. In response to this directive, defence counsel requested that the May 5, 2020 pre-trial date be adjourned to the first date set for trial, i.e., July 13, 2020.

[64] The application judge attributed a period of delay in setting trial dates to the defence, namely the 24 days running from June 22, 2020 (i.e., the last of the earlier trial dates offered) to July 16, 2020 (i.e., the last day of trial, as then scheduled). He observed that the four earlier trial dates offered by the court meant that the trial

could have been completed by June 22, 2020. He found that the defence declined those dates in furtherance of pre-trial motions.

[65] The application judge concluded that the 24-day delay from June 22 to July 16, 2020 was “occasioned by defence tactics” and should be characterized as defence delay. He also noted that, at the time of his deliberations on the s. 11(b) application (mid-May 2020), defence counsel had yet to file his pre-trial motions materials.

[66] As mentioned above, the motions were set to be heard on May 5, 2020, but court operations were suspended at that time due to COVID-19. As a result, the motions were put over to the intended first day of trial, i.e., July 13, 2020.

[67] While it is true that four dates earlier than July 13-16, 2020 were offered, the Crown expressly agreed at the s. 11(b) hearing that the defence did not reject these dates, much less “for the specific purpose of [using this] time to prepare and file pre-trial applications” (as the application judge put it in his reasons). Rather, both counsel had agreed that the July dates aligned best with the trial judge’s schedule and that the pre-trial motion dates would be determined thereafter. Plainly, the application judge erred in overlooking the agreement between the defence and the Crown, and this led him to misapprehend the record in relation to this period. It cannot be said that the defence is “solely or directly” responsible for

the delay where the trial dates were reached based on a mutual agreement between the defence and Crown in consideration of the trial judge's schedule.

[68] Nor do I agree with the respondent's argument that this court should not be bound by the "concession" made by the Crown at trial. There is no suggestion that counsel's agreement was unclear or confusing. While it is true that this court is not bound by erroneous concessions made by counsel in the court below, the respondent has pointed to no arguable or actual error in the trial Crown's acknowledgment of how the trial dates were chosen.

[69] I also reject the respondent's argument that the trial could have been completed sooner were it not for the pre-trial motions. This argument simply implies that the defence should not have brought these pre-trial motions. But neither the application judge nor the Crown (at trial or on appeal) suggested that any of the defence's applications during this period were "frivolous" or anything other than "defence actions legitimately taken to respond to the charges": *Jordan*, at paras 65-66; *Cody*, at para 29.

[70] In any event, whether or not these applications were brought would not change the fact that the July dates were chosen based on an agreement by both counsel that they best fit the trial judge's schedule. That is not defence delay.

[71] The application judge erred in characterizing the 24-day period running from June 22 to July 16, 2020 as defence delay. I can find no basis for apportioning any of this delay to the defence.

d. The Net Delay Exceeded the Ceiling and Was Presumptively Unreasonable

[72] I return now to the calculation of the net delay.

[73] Recall that the total delay spans the period from August 30, 2018 to July 16, 2020 and totals 686 days.

[74] Defence counsel below conceded the periods from December 9 to 17, 2019 (8 days) and from February 25 to 28, 2020 (3 days) as defence delay. On appeal, the appellant also concedes the application judge's ascription of the period running from December 20, 2019 to January 8, 2020 (19 days) as defence delay. These concessions amount to 30 days.

[75] The application judge erred by characterizing the delay in scheduling pre-trial motions (August 13 to December 9, 2019, for a total of 118 days) as defence delay. I see no basis for apportioning any of this delay to the defence. The defence concessions noted above already reflect an appropriate apportionment for the broader period running from August 13, 2019 to January 8, 2020.

[76] The application judge also erred by characterizing the full 42-day period for completing pre-trial motions as defence delay. When fairly and reasonably

apportioned, only one-half of this period (21 days) is properly characterized as defence delay. The remaining 21 days should have been attributed to the Crown and the court.

[77] Finally, the application judge erred in characterizing the 24-day period in setting trial dates as defence delay. I see no basis for apportioning any of this delay to the defence.

[78] Correctly calculated, the net delay in this case was 635 days. This exceeds the *Jordan* ceiling by nearly three months.⁵

[79] Before leaving this issue, I would address the respondent's submission at the appeal hearing that, if this Court finds this to be a close case, we might consider different 'start dates' for the charges against the appellant. This would involve (i) staying the charges laid against the appellant on August 30, 2018 if the net delay from that date to July 16, 2020 exceeded the *Jordan* ceiling; but (ii) declining to stay the charges laid against him on October 3, 2018 if the net delay from that date to July 16, 2020 fell below the ceiling.

[80] There is no need to consider this submission, because this is not a borderline case. On my analysis, the net delay would exceed the ceiling by almost two months even if an October 3, 2018 start date were used.

⁵ As noted earlier, the appellant's presumptive ceiling of 18 months amounted to 547 days, which is 88 days less than the net delay.

e. There Are No Exceptional Circumstances

[81] Net delay that exceeds the applicable presumptive ceiling is presumptively unreasonable. However, the Crown can rebut this presumption by establishing that there were exceptional circumstances excusing the delay.

[82] Although the application judge found that the net delay did not exceed the presumptive ceiling, he nonetheless went on to assess whether the Crown had established that there were exceptional circumstances. He considered and rejected two kinds of exceptional circumstances raised by the Crown: discrete events and the complexity of the case.

[83] First, the application judge rejected the Crown's argument that a discrete event in the case amounted to an exceptional circumstance.

[84] The Crown submitted that, one year after the accused was charged, the Crown who was initially assigned to prosecute the case became unexpectedly unavailable. As such, the Crown was unable to appear in court from August to November 2019. A new Crown was eventually assigned to the file. No explanation was put forth for the original Crown's unavailability. The Crown who argued the s. 11(b) application submitted that the period from August 22 to November 20, 2019 should be deducted as a discrete exceptional event. The application judge rejected this argument because the Crown's submissions were too vague to permit such a finding.

[85] Second, the application judge rejected the Crown's argument that the complexity of the case amounted to an exceptional circumstance.

[86] The Crown argued that several factors made this case particularly complex. These included: the historical nature of the charges; the disclosure requests necessitating searches through outdated databases; sensitive information that required particularly careful vetting; multiple ITOs, two of which were declined and all of which were unsealed and vetted for disclosure; a similar fact application; motions of doubtful merit on the part of the defence; and the defence's failure to adhere to filing deadlines and lack of preparation.

[87] The application judge noted that both counsel agreed that only four days were needed for trial. He also made an independent finding that the evidence at issue was not particularly complex. Therefore, despite the factors listed above, the application judge found that the features of this trial did not approach the requisite level of complexity to qualify as an exceptional circumstance.

[88] In sum, the application judge determined that there were no exceptional circumstances. The respondent does not challenge these findings, and I see no basis to intervene with the application judge's determinations on this issue.

[89] Therefore, the Crown has not rebutted the presumption that delay was unreasonable. The s. 11(b) application should have been granted. The application judge erred in dismissing it.

V. DISPOSITION

[90] Given my conclusion on the primary ground of appeal, it is unnecessary to deal with the other grounds of appeal.

[91] I would allow the appeal, quash the convictions and enter a stay of proceedings.

Released: March 5, 2026 "K.M.v.R."

"S. Coroza J.A."

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

"I agree. J. Dawe J.A."