



SUPREME COURT OF CANADA

CITATION: R. v. Hanan, 2023
SCC 12

**APPEAL HEARD AND JUDGMENT
RENDERED:** April 17, 2023
REASONS FOR JUDGMENT:
May 5, 2023
DOCKET: 40097

BETWEEN:

Dia ‘Eddin Hanan
Appellant

and

His Majesty The King
Respondent

CORAM: Côté, Rowe, Martin, Kasirer and Jamal JJ.

**JOINT REASONS
FOR JUDGMENT:** Côté and Rowe JJ. (Martin, Kasirer and Jamal JJ. concurring)
(paras. 1 to 10)

NOTE: This document is subject to editorial revision before its reproduction in final form in the *Canada Supreme Court Reports*.

Dia ‘Eddin Hanan

Appellant

v.

His Majesty The King

Respondent

Indexed as: R. v. Hanan

2023 SCC 12

File No.: 40097.

Hearing and judgment: April 17, 2023.

Reasons delivered: May 5, 2023.

Present: Côté, Rowe, Martin, Kasirer and Jamal JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Constitutional law — Charter of Rights — Right to be tried within reasonable time — Transitional exceptional circumstance — Accused applying for stay of proceedings based on violation of right to be tried within reasonable time — Trial judge holding that net delay exceeded Jordan ceiling but denying stay based on application of transitional exceptional circumstance — Court of Appeal upholding trial judge’s decision — Whether courts below erred in applying transitional exceptional

circumstance — Whether accused's right to be tried within reasonable time infringed — Canadian Charter of Rights and Freedoms, s. 11(b).

The accused was charged with various offences in December 2015. A trial by jury was scheduled for November 2018, within the *Jordan* ceiling. However, changes to the Crown's case threatened to adjourn the proceedings. The defence offered to proceed by judge alone so that the trial could conclude within the *Jordan* ceiling, but the Crown refused. The trial judge then offered a trial date in June 2019, but defence counsel was unavailable. The trial was therefore set to begin on October 28 and it ultimately ended on November 28, 2019. The accused applied for a stay of proceedings based on a violation of his right to be tried within a reasonable time under s. 11(b) of the *Charter*. The trial judge denied the stay, even though the net delay of about 35 months exceeded the *Jordan* ceiling. Applying a transitional exceptional circumstance, he found that the parties had reasonably relied upon the law as it had been before *Jordan* was decided. The accused was convicted of several offences and a majority of the Court of Appeal upheld the convictions, finding no violation of s. 11(b).

Held: The appeal should be allowed, the convictions set aside and a stay of proceedings entered.

No transitional exceptional circumstance applies in the instant case. The net delay of about 35 months is an unreasonable delay contrary to s. 11(b) of the *Charter*. First, the trial judge erred in concluding that the delay was justified based on the parties' reasonable reliance on the law as it previously existed. The parties could

not have reasonably relied upon the pre-*Jordan* state of the law after *Jordan* had been decided in July 2016, nor did they, as they consciously scheduled a trial within the *Jordan* ceiling. The focus for the delay that accrues after *Jordan* was decided should instead have been on the extent to which the parties and the courts had sufficient time to adapt. Second, the delay beyond the ceiling was due not to a lack of time for the parties and system to adapt, but to the Crown's refusal to agree to a trial by judge alone, despite being warned of the possible consequences of delay and despite *Jordan* having been decided almost two and a half years earlier. Finally, it is unfair and unreasonable to characterize the entire period between June and October 2019 as defence delay. There is no 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. All relevant circumstances should be considered to determine how delay should be apportioned among participants.

Cases Cited

Referred to: *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631; *R. v. Cody*, 2017 SCC 31, [2017] 1 S.C.R. 659; *R. v. Boulanger*, 2022 SCC 2.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, s. 11(b).

APPEAL from a judgment of the Ontario Court of Appeal (Tulloch, van Rensburg and Nordheimer JJ.A.), [2022 ONCA 229](#), 161 O.R. (3d) 161, 412 C.C.C. (3d) 233, [2022] O.J. No. 1320 (QL), 2022 CarswellOnt 3450 (WL), affirming the convictions of the accused. Appeal allowed.

Saman Wickramasinghe and Parmbir Gill, for the appellant.

Tracy Kozłowski and Andrew Hotke, for the respondent.

The reasons for judgment of the Court were delivered by

CÔTÉ AND ROWE JJ. —

[1] This is an appeal as of right from a judgment of the Court of Appeal for Ontario which affirmed the appellant’s convictions by a jury for manslaughter, discharging a firearm with intent to wound, and possession of a loaded restricted firearm without a licence. Two grounds of appeal are raised: first, a violation of the appellant’s right to be tried within a reasonable time under s. 11(b) of the *Canadian Charter of Rights and Freedoms* that would justify a stay of proceedings and, second, an error in the charge to the jury that would require a new trial. We are of the view that the first ground is dispositive, so we decline to address the second.

[2] The events giving rise to the charges occurred on December 23, 2015. The appellant was charged the next day with various offences. The case was eventually scheduled for trial by jury in November 2018, which both parties agreed would be

within the ceiling set by *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631. However, on the eve of trial, changes to the Crown's case threatened to adjourn the proceedings. The defence offered to agree to a trial by judge alone, but the Crown refused. It is not disputed that had the Crown agreed to proceed by judge alone as proposed, the trial would have concluded within the *Jordan* ceiling. Because the Crown did not agree, the trial judge offered a trial date in June 2019, but defence counsel was unavailable. The trial was therefore rescheduled to the autumn of 2019, beginning on October 28, and it ultimately ended on November 28.

[3] The appellant applied for a stay of proceedings. The trial judge calculated total delay as about 47.5 months. He deducted about 10 months for defence delay before committal for trial, and another 1.5 months as a discrete exceptional circumstance relating to issues with the Crown's evidence. After finding that the complexity of the case did not warrant further delay, the trial judge concluded that the net delay was about 35 months.

[4] Even though the net delay exceeded the *Jordan* ceiling, the trial judge denied the stay. Applying a transitional exceptional circumstance, he found that the parties had reasonably relied upon the law as it had been before *Jordan* was decided. He also suggested that while the parties were aware of *Jordan*, they had not yet developed a "full understanding of the lessons of *Jordan*" (2019 ONSC 320, at para. 277 (CanLII)).

[5] In our respectful view, the trial judge erred in holding that a transitional exceptional circumstance applied, and the majority of the Court of Appeal erred in upholding his decision.

[6] First, the parties could not have reasonably relied upon the pre-*Jordan* state of the law after *Jordan* had been decided in July 2016. Nor did the parties actually rely upon the pre-*Jordan* state of the law, as they consciously scheduled a trial within the *Jordan* ceiling. Rather, as this Court held in *R. v. Cody*, 2017 SCC 31, [2017] 1 S.C.R. 659, the focus for delay that accrues after *Jordan* was decided “should instead be on the extent to which the parties and the courts had sufficient time to adapt” (para. 71). As noted by Nordheimer J.A. in dissent, “only a very small portion of the delay in this case preceded the decision in *Jordan* and most, if not all, of that delay has been laid at the feet of the defence” (2022 ONCA 229, 161 O.R. (3d) 161, at para. 143). Therefore, the trial judge erred in concluding that the delay in this case was “justified based on the parties’ reasonable reliance on the law as it previously existed” (para. 278).

[7] Second, as Nordheimer J.A. correctly observed, the Crown had “ample time” to adapt to *Jordan* (para. 148). The delay beyond the ceiling was due not to a lack of time for the system to ameliorate ingrained institutional delays, but to the Crown’s refusal to agree to a trial by judge alone, despite being warned of the possible consequences of delay, and despite *Jordan* having been decided almost two and a half years earlier. Were it not for the Crown’s decision, the trial would have occurred within

the ceiling. This clearly demonstrates that there was enough time for the parties and system to adapt.

[8] We conclude that no transitional exceptional circumstance applies in this case. The result is that the net delay of about 35 months is an unreasonable delay contrary to s. 11(b) of the *Charter*.

[9] Like the majority and the dissent below, we 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, at para. 56, 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” (*Jordan*, at para. 66). 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” (para. 64). All relevant circumstances should be considered to determine how delay should be apportioned among the participants (*R. v. Boulanger*, 2022 SCC 2, at para. 8). We share the view of the majority and dissenting judges in the Court of Appeal that, in the circumstances of this case, it is unfair and unreasonable to characterize the entire period between June and October 2019 as defence delay (paras. 59 and 136).

[10] We would therefore allow the appeal, set aside the convictions, and order a stay of proceedings.

Appeal allowed.

Solicitors for the appellant: Ursel Phillips Fellows Hopkinson, Toronto.

*Solicitor for the respondent: Ministry of the Attorney General for Ontario,
Crown Law Office — Criminal, Toronto.*