SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Colpitts*, 2017 NSSC 40

Date: 20170209
Docket: CRH 346068
Registry: Halifax

Between:

Her Majesty the Queen

v.

Robert Blois Colpitts and Daniel Frederick Potter

MID-TRIAL RULING
SCHEDULING SECTION 11(b) AND 7 DELAY APPLICATIONS
(POST *JORDAN* AND *HUNT*)

Judge:	The Honourable Justice Kevin Coady
Heard:	February 9, 2017
Written Decision:	February 15, 2017
Counsel:	James Martin, Mark Covan and Scott Millar, for the Crown Robert Blois Colpitts, Self-Represented Jane O'Neill, for Daniel Frederick Potter

By the Court:

Introduction and Background:

[1] On February 7, 2017, Mr. Colpitts advised this Court of his intention to bring an application seeking a stay of proceedings on the basis of "delay". On the same date, Ms. O'Neill advised this Court that Mr. Potter would be joining this Application. She advised she would be arguing both pre-trial and post-charge delay. Pro forma Notices have been filed with the Court and, as such, the particulars of these Applications have not been fully articulated. The issue today is whether these Applications should be heard now or at the end of this trial. The Defendants argue the former while the Crown argues the latter. Obviously, the Defendants' position envisages a significant interruption in the conduct of the trial proper.

[2] Messrs. Potter and Colpitts made a similar Application in early 2015 pursuant to Sections 7, 16 and 24 of the *Canadian Charter of Rights and Freedoms*. It was scheduled for one week but extended from April 20 to July 10, 2015. These Applications were dismissed at 2015 NSSC 224. Subsequent to this ruling, two Appellate level decisions were released which impact on delay jurisprudence. In *R v. Jordan*, 2016 SCC 27, the Supreme Court of Canada significantly altered the principles respecting post-charge delay. In *R. v. Hunt,* 2016 NLCA 61, the Newfoundland Court of Appeal endorsed a trial Judge's stay of proceedings based on pre-charge delay. These cases were neither argued nor considered during the 2015 delay hearing. Messrs. Potter and Colpitts rely on these cases to breed new life into their second delay Application.

[3] There are numerous factors that impact the narrow issue before this Court:

- The complexity of this prosecution;
- This trial started on November 16, 2015 and is presently in its 128th day;
- Mr. Colpitts elected to call evidence on November 1st, 2016, and he has been calling witnesses for the past several weeks. Mr. Colpitts indicated

he would prefer to argue the delay application before testifying on his own behalf; and

- Mr. Potter has not opened his case but indicates he will be calling up to 35 witnesses. One of his counsel, Mr. Greenspan, stated that Mr. Potter would be testifying on his own behalf at the end of the trial.

Given these factors, this Court has no reliable information as to when this trial will be completed.

[4] There is ample authority that a trial Judge has considerable discretion when it comes to trial management. In *R. v. Bordo,* 2016 QCCS 477, the Court stated that a trial Judge has a "duty" to manage the trial process while balancing fairness to the parties as well as efficient and orderly discharge of the Court process. In *R. v. Auclair,* 2013 QCCA 671, Justice Doyon stated that in large complex cases a Judge's role should not be limited to that of a mere arbiter allowing parties to conduct their case as they see fit. Similar authority is found in *R. v. Schneider,* 2004 NSCA 99 and *R.* v. *West,* 2010 NSCA 16.

[5] In *R. v. Nazarek,* 2016 BCSC 1927, Watchuk J. stated at Paragraphs 22 and 23:

> [22] The exercise of discretion by a trial judge with respect to applications to re-open, or to re-calling a witness for additional examination, is a function of the issues and facts that arise in a particular case, including the need for orderly conduct of the trial.
>
> [23] Concerns regarding the orderly and expeditious conduct of the trial have been frequently commented on by the judiciary . In *R. v. Sipes,* 2008 BCSC 1257 (CanLII), Smart J. held (at paras. 30 and 31):
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> > A trial judge's management power can include requiring reasonable notice and particulars of a pre-trial application from the defence, including a synopsis of the evidence to be adduced and the issues and the law to be argued. As stated in *Horan,* a judge owes a duty to the parties and to the public to promote the efficient use of court time and to ensure that all parties are treated fairly.
> >
> > It is important that each party to an application clearly knows in advance of the application what is at issue, what evidence will be led, what arguments will be made and what case law will be presented.

This was a case where delay arguments were advanced “in light of the recent decision in *R. v. Jordan”.* The Court stated at paragraph 70 that the law is well established that a Court may exercise its discretion to revisit prior rulings on delay and that it is appropriate given the significant change in the law. In *R. v. Nazarek, supra,* the Court directed that the delay issue will be argued at conclusion of the trial.

[6] In *R. v. Fast,* 2016 ONSC 6426 the question before the Court was the same as the question before this Court; that is, “the timing for an accused’s application for a stay of proceedings based on his right to trial within reasonable time.” While *Fast* was not as complex or as lengthy as is here, it had its features. It had been interrupted a number of times. At the time of the Application the trial had consumed 9-10 weeks of trial time. Justice Leach directed that the Application would be heard after completion of the trial. She stated at Paragraph 17, “in the context of s. 11(b) Applications brought mid-trial, special measures may be required to achieve, to the extent possible, planning and efficiency goals.” The Court stated that allowing an Application to interrupt process at this late stage created the obvious risk of wasting resources already expended and of significant further delay as the outcome of the Application could not be presupposed.

[7] Justice Leach stated further at paragraph 19:

> There is no set or single procedure for the determination of Charter violations and relevant remedies. The appropriate procedure and process will depend on the particular circumstances of the case, taking into account all of the relevant factors. There will be situations where a Charter breach needs to be dealt with immediately, and in other situations redress can wait until matters are adjudicated at trial. There are no hard and fast rules, nor would it be possible to set such rules.

She then addresses policy reasons for hearing mid-trial Applications at the end of the trial.

> Having said that, such discretionary decisions generally should be exercised having regard to two policy decisions. The first is that criminal proceedings should not be fragmented by interlocutory proceedings which take on a life of their own, (which is the basis of the rule against interlocutory appeals in criminal matters). The second discourages adjudication of constitutional issues without a factual foundation. Both policies favor disposition of applications at the end of the case, and in exercising his or her discretion, a trial judge generally should not depart

> from these policies unless there is a strong reason for doing so - - for example, where the court itself is implicated in a constituational violation, where substantial ongoing constitutional violations require immediate attention, and/or where substantial time will be saved by deciding constitutional questions before proceeding to trial on the evidence.

In the case at hand, I do not find that this Court is implicated in any constitutional violations; there is no ongoing constitutional violations that require immediate attention and no time will be saved by dealing with these mid trial. I did not find violations in my initial delay ruling. Nothing new has happened since then that creates an urgency that would dictate hearing these Applications mid trial.

Conclusion

[8] I am directing that the Defendants' delay Applications be heard after the trial evidence is complete. I offer the following reasons for this decision:

- The trial started on November 16, 2015, approximately 16 months ago. Past evidence is voluminous and complex and it is difficult to recall it all in its proper context. Another trial interruption will exacerbate that reality.

- There is no indication how much Court time these Applications will require. The 2015 Application was scheduled for one week but was heard over ten weeks. A similar delay could mean not getting back to the trial for months should these Applications fail.

- It would make little sense to hear these Applications mid-trial and not give a decision mid-trial. It took a month to write a 104-page decision on the 2015 Application. Writing the decision after briefs would further delay a return to the trial proper.

- I find it unlikely that these Applications are ready to be heard. The Defendants' Application will, in part, be based on failed memory. They will be required to prepare transcripts and to parse all affected testimony for material memory loss. This will be time consuming and could delay hearing these Applications for weeks if not months. In the meantime, this Court would not be able to sit.

- It is conceivable that if these Applications were successful and then overturned on appeal, the reviewing Court would be left with no indication of what the outcome of the trials on the merits would have been and this

could result in a complete re-trial. Given the time requirements and complexity of this prosecution, such would be a very troublesome scenario.

- This Court will be in a better position to decide these Applications when the underlying factual record is as complete as possible.

- I accept that Messrs. Colpitts and Potter have been living under this prosecution for a long time. It has, no doubt, impacted the life of themselves and their families. In the event these Applications fail, those impacts will be extended. The outcome of these Applications is uncertain. Hearing these Applications at the end of the trial could result in less time under the spotlight.

There is no doubt in my mind that the best way forward is to continue with the trial and to deal with these Applications at the end of this trial. In time, I will have discussions with counsel and Mr. Colpitts as to the logistics of proceeding in this fashion.

Coady, J.