SCC File No.: 38532

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE MANITOBA COURT OF APPEAL)

B E T W E E N:

K.G.K.

APPELLANT
(Appellant)

- and -

HER MAJESTY THE QUEEN

RESPONDENT
(Respondent)

- and -

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REPLY

1. These are the Reply submissions of the Appellant to the Factum of the Respondent.

2. The Appellant’s position is that the Respondent has mischaracterized the Appellant's argument regarding delay, conviction, and trial fairness.

3. In para 117 the Respondent writes, "The Appellant does not argue that he should not have been convicted, merely that he should have been convicted sooner." This is not correct. The issue the Appellant is arguing is whether the length of trial was or was not constitutional. The result of that trial - conviction or acquittal - is immaterial to that question. To couch the argument as the Respondent has is disingenuous and intentionally prejudicial. While, as function of the remedy being redundant in the case of an acquittal the delay issue simply won't arise, the outcome of the trial is of no bearing on the question.

4. Also in para 117 the Respondent writes, "He had a fair trial and does not suggest otherwise". First, the issue of delay is itself one of trial fairness. Therefore, the Appellant absolutely does suggest otherwise - it's the reason for the appeal.

5. Even if one were to accept that trial fairness and delay are separate issues, the Respondent's comments are fatally flawed. It's long been law in Canada that lack of protest does not amount to consent. Since Ewanchuck[1] this Court has been resoundingly and repeatedly clear on that fact. Silence is not acquiescence.

6. Even putting aside that the other issues are not, without leave, properly before this court (due to Hamilton JA disposing of the appeal on the issue of delay alone), were this the only ground raised could be the result of myriad decisions and judgements, a great many of which are not only not indicative of endorsement of the conviction but entirely inconsistent with it. The Respondent asserts, crudely, that absent the Appellant's hue and cry, he consents to conviction.

7. The Respondent does a select comparison of the 11(b) right with other Charter rights that are, in key respects, fundamentally different in nature.

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[1] *R. v. Ewanchuk*, [1999] 1 SCR 330 (SCC).

8. The Respondent compares the remedy of a judicial stay for delay with lesser remedies imposed where other rights are breached. Notably the Crown proposes sentence reduction which has been granted in cases of section 7 breaches due to police misconduct (beatings) and which this Court left as an open question in lieu of exclusion recently in R. v. Omar[2]. That said, section 7 has both substantive and procedural aspects. Section 11(b) is procedural only - it concerns itself with the process that must be followed rather than a substantive right to security of the person.

9. While the Respondent attempts to compare unfavorably getting a 'lesser' remedy for a breach involving literal life and limb than one involving 'mere stress and anxiety of waiting' this fully misses the point. When a right is procedural the question is, binary, black and white - either the process was followed or it was not. So too is the remedy - when process is followed the result of that process stands, when it is not, the whole procedure is void.

10. This difference in character between process and substance is not an anomaly with an absurd result as suggested by the Respondent. It is in fact standard in and throughout law. Appellate standard of review is deferential on questions of fact (substance) but not questions of law (process). Judicial Review of administrative decisions likewise - questions of substance are reviewed with deference, process is not, and if there is an error in process the result is void.

11. The comparison the Respondent attempts is, quite simply, not on point. The issue of delay is intrinsic to the trial process, the 11(b) right guarantees a procedural right to be tried within a reasonable time. If that process is not adhered to, if the decision comes after a reasonable amount of time is passed, the process is itself void and correct remedy must be a stay.

12. Although the Respondent notes the issue is not one of jurisdiction being lost after delay, it is worth noting a more comparable situation, than a breach of s. 7, is where there is a reasonable apprehension of bias. The process is tainted, jurisdiction is lost, and the result is a stay. Procedural rights require the stay as a remedy. If the procedure is not sufficient the result - whatever it may be - should necessarily be void.

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[2] *R. v. Omar*, 2019 SCC 32.

13. The Respondent uses a flawed bifurcation of the trial and judicial decision making time which allows them to argue that notwithstanding delay the 'trial' was otherwise fair.

14. While obviously it is at issue in this appeal when a trial is 'complete' and what affect this has on the ceilings and delay, the Respondent artificially separates judicial decision making from the trial. It does so to allow the argument that the trial was "otherwise fair" and paint the delay issue as one of mere technicality amidst an otherwise unblemished proceeding. As already noted, that this issue is being argued does not amount to acquiescence on the proceedings being otherwise unblemished. But beyond that, it strains credulity to separate the decision making from the trial.

15. An accused waiting a decision remains on trial. An accused waiting deliberations of a jury remains in the hands of the jury. Moreover, any member of the public, made aware a trial was 'over' would immediately ask the result. When told there was none they'd surely inquire how, absent a result, a trial could be over.

16. Perhaps more important, the intellectual separation of trial and decision making allows the suggestion that decision making doesn't affect trial fairness. When in fact it is part and parcel of trial fairness. A trial that drags on, or takes years to begin, is itself unfair - that is what Jordan[3] was all about - the inherent unfairness to the trial of unreasonable delay. Absent a decision, the proceedings are, though no longer ongoing in a courtroom, nonetheless continuing.

17. Much of the discussion in appropriate remedy has to do with impact on the accused. However, Jordan[4] makes clear that delay is not an individual issue, but a systemic one, and moreover, one that impacts all justice system stakeholders.

18. Para 2 of Jordan[5] reads, "As the months following a criminal charge become years, everyone suffers Accused persons remain in a state of uncertainty, often in pre-trial detention. Victims and their families who, in many cases, have suffered tragic losses cannot move forward with their lives. And the public, whose interest is served by promptly bringing those charged

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[3] *R. v. Jordan*, [2016] 1 SCR 631.
[4] *Ibid.*
[5] *Ibid* para. 2.

with criminal offences to trial, is justifiably frustrated by watching years pass before a trial occurs" (emphasis added).

19. The focus on, as notes above, the mere 'anxiety' of the accused misses the point. The victim of delay is everyone involved. A sentence reduction, while it compensates, perhaps, in some small way, an accused for this impact, does nothing for any other actor. Moreover, if sentence reduction is allowed, it becomes a 'tax' of sorts for delay. But does nothing to force the system to change.

20. Beyond who the victim is, the Court in Jordan[6] took pains to express who the culprit was - everyone. The Court went to great lengths to lambaste the culture of complacency that the prior analytical approach to delay had bred. To suggest a lesser remedy is to suggest a return to this same complacency. There is no impetus on any actor to move things forward - the system will pay a small toll, in form of reduced sentence, for their complacency, but there will be no cost. And no cost means no change.

21. To address a systemic issue there needs to be not only an easily applied analytical framework as provided by Jordan[7] (and one that provides less ability to accept delay) but also a strong incentive to prevent delay. Being able to better label delay through an improved framework with presumptive ceilings is of little (if any) assistance in combating it without an incentive to do so. Only a stay of proceedings provides this incentive. There is, really, little other incentive with which to coax the state (both the Crown and the Courts). It is immune to fines or other sanctions. The only thing to be taken from it is its power to prosecute and hear cases. Sentence reduction will do nothing to address delay and will return the system to its pre-Jordan[8] complacency.

22. The 'call to action' for all actors in Jordan[9]. By the Respondent advocating for not calling to action the judiciary also flies in the face of Jordan that says Courts too need to do more - much more. And, as above, creating a 'late-fee' for delay through sentence reduction is hardly

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[6] *Supra.*
[7] *Supra.*
[8] *Supra.*
[9] *Supra.*

consistent with a call to action. It's merely a tax on inaction. A tax paid, incidentally, not by those responsible for the delay (Crown and Court) but that flows, instead and rather perversely, from victim (individual or society) to convicted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this, 19th day of August, 2019.

SIGNED BY:

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TABLE OF AUTHORITIES

Cases **at Paragraph(s)**

Statutory Provisions