SCC File No. 39110

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N:

AZIZ PAULS, JAMAL YUSUF and JAMIS YUSUF

APPELLANTS

-and-

HER MAJESTY THE QUEEN

RESPONDENT

JOINT FACTUM OF THE APPELLANTS

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW AND STATEMENT OF FACTS

1. In *R. v. Jordan* and *R. v. Cody*,[1] this Court revitalized the legal framework governing an accused's right under s. 11(b) of the *Charter of Rights and Freedoms* to be tried within a reasonable time, rescuing it from the doctrinal morass into which it had sunk. In so doing, this Court assailed the "culture of delay and complacency" that had taken root in the criminal justice system, and exhorted all participants – police, Crown attorneys, defence counsel and the lower courts – to engage in "proactive, preventative problem-solving" and "to work in concert to achieve speedier trials." The purpose in departing from precedent, and adopting a ceiling-based analysis of unreasonable delay, was to enhance the clarity and predictability for all actors in the justice system, and to move away from a "micro-counting" approach wherein "[e]ach day of the proceedings from charge to trial is argued about, accounted for and explained away", an approach that relied "on judicial 'guesstimations', and has been applied in a way that allows for tolerance of ever-increasing delay." The Court of Appeal's decision in the case at bar demonstrates, however, that despite this Court's direction, the micro-counting approach to the 11(b) analysis is not only alive and well in the post-*Jordan* era, it has seeped into appellate review of determinations made by trial judges applying the *Jordan* framework.

2. The trial in this case commenced almost exactly a year after the Appellants were charged. Although the charges were serious, the case itself was straightforward. As the Crown described it at the outset of the trial, it was a "press play" case based primarily on surveillance footage. In recognition of this fact, the trial was initially scheduled to take two days. Ultimately, the trial took almost 22 months to complete. By the time that submissions concluded on June 2, 2017[2], the Yusuf Appellants had been before the court for 34 months and 2 days, and the Appellant Pauls had been before the court for 33 months and 22 days. As the Appellants were tried in the provincial court in Ontario, the delay far exceeded the 18-month ceiling.

3. The progress of this case was emblematic of the culture of complacency that *R. v. Jordan* was intended to combat. The trial judge was an experienced jurist, familiar with the local conditions in that jurisdiction. More importantly, he had a front row seat to the conduct of the trial and the actions of the parties. It was the trial judge's conclusion that, notwithstanding some

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[1] *R. v. Jordan*, 2016 SCC 27; *R. v. Cody*, 2017 SCC 31

[2] The appropriate end date for the *Jordan* calculation – *R. v. K.G.K.*, 2020 SCC 7 at para. 31

discrete events and counsel unavailability, the main driver of the unacceptable delay in this case lay at the feet of the Crown and the manner in which it prosecuted the case. The trial judge reasonably concluded that, had the Crown correctly taken stock of its case in advance, more than two days would have initially been booked for trial, likely obviating the need for repeated continuations. Importantly, the Crown did not adjust its strategy as the case progressed, and exhibited little concern for the repeated delay. The trial judge was right to stay the proceedings. The delay in this case was not tolerable under the *Morin* regime and is all the more intolerable in the age of *Jordan*.

4. Yet instead of deferring to the trial judge's findings, the Court of Appeal undertook the analysis anew, apparently unrestrained by any standard of review. The Appellants first submit that the Court of Appeal erred in its articulation of the standard of review. While this Court has not explicitly identified the appropriate standard of appellate review of s. 11(b) decisions, it is clear from the language employed by this Court in *R. v. Jordan* and *R. v. Cody* that enforcement of the *Jordan* framework relies heavily on the experience and good judgment of trial-level judges. The standard of correctness, which the jurisprudence of the Court of Appeal for Ontario applies to all elements of a trial judge's s. 11(b) decision other than findings of fact, is inconsistent with *Jordan* and *Cody*. The correctness standard operates to undermine the culture change that this Court intended to promote with the new framework. The decision in this case calls out for this Court to reiterate that deference to trial judges, who are in the best position to undertake the *Jordan* assessment and balancing, is the standard most consistent with changing the culture of complacency that continues to plague the Canadian justice system.

5. The Court of Appeal's treatment of the defence disclosure request is a case in point. The defence wrote to the Crown three months before trial to inquire into an issue with the video surveillance. The Crown provided no response until less than three weeks prior to trial, leading to the loss of the two days originally scheduled for trial. The trial judge adjudged that the Crown was responsible due to its inexplicably delayed response. On appeal, the Crown conceded the propriety of the trial judge's assessment. The Court of Appeal did not accept this concession. Instead, without notice to the parties, and without identifying any palpable or overriding error in the trial judge's assessment, the court overturned the trial judge's finding, re-allocating 5 months and 6 days delay to the Appellants. The Appellants take issue with this conclusion not only on

substantive grounds as a misapplication of the standard of review, but on grounds of procedural fairness. The propriety of defence conduct not having been argued as a result of the Crown concession, the panel was obligated to give the parties notice that it was contemplating rejecting the Crown's concession on appeal.

6. The Court of Appeal's flawed approach is also demonstrated by the manner in which the court assessed the delay on almost an hour-by-hour basis. Despite this Court's rejection of the "micro-counting" required by the previous *Morin* framework, the Court of Appeal's reasons demonstrate that the "micro-counting" approach is alive and well. By focusing on each quarter day increment, this case illustrates the well-known danger in s. 11(b) cases of losing the forest for the trees. There can be no question that the delay in this case well exceeded what the justice system can tolerate and the decision of the trial judge should be restored[3].

A. FACTUAL BACKGROUND

1. Arrest and Pre-Trial Proceedings

7. The Yusuf Appellants were arrested on August 1, 2014. The Appellant Pauls was arrested on August 12, 2014[4]. By September 23, 2014, two of the Appellants had retained trial counsel, who were in the process of reviewing disclosure[5]. On October 16, 2014, counsel for the Yusuf Appellants appeared and scheduled a judicial pre-trial for November 25, 2014, noting that "[d]espite efforts, there is no possibility of getting any earlier dates for a judicial pre-trial."[6] There is no indication that earlier dates were offered for which any defence counsel were unavailable. On October 28, 2014, an agent for the Appellant Pauls' trial counsel appeared and agreed to join Pauls' case up with his co-accused for the November 25, 2014 judicial pre-trial in order to expedite the matter, despite the fact that trial counsel was unavailable[7]. The judicial pre-trial

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[3] The delay would have been unreasonable even under the analysis set out in *R. v. Morin*, [1992] 1 S.C.R. 771, as the combined institutional and Crown delay well exceeded the 8-10 months for trials in the provincial courts. As the trial judge correctly concluded, the Crown cannot meet its burden to establish that the transitional exception applies to justify the delay in this case.

[4] Appellants' Record ["AR"], Vol. II, Part V, Tab 25, August 13, 2014, p. 4, ll. 15-20
[5] AR, Vol. II, Part V, Tab 27, September 23, 2014, p. 7, ll. 23-27
[6] AR, Vol. II, Part V, Tab 29, October 16, 2014, p. 3, ll. 9-15
[7] AR, Vol. II, Part V, Tab 30, October 28, 2014, p. 3, ll. 18-32

proceeded as expected on November 25, and a two-day trial was scheduled for August 5 and 6, 2015. The Crown advised the court that it was "obviously going to combine the Informations onto all one Information and all three individuals will proceed to trial together." Counsel acting as agent for all defence counsel noted that the matter was a "he said, she said type of matter, and we could certainly proceed almost immediately." Counsel indicated that the first trial dates offered by the court were in June, but that counsel for the Appellant Pauls' was unavailable for the June dates[8].

2. The Disclosure Request and the Start of Trial

8. On May 15, 2015, almost three months in advance of the trial starting, counsel for the Appellant Jamal Yusuf wrote to the Crown about surveillance video that had been disclosed but did not display any video feed[9]. The intent of the letter was to determine whether the Crown's copy was also inoperable. Counsel followed up with another letter on June 18 advising the Crown that, if the Crown's copy was in the same state, she would be requesting the release of the exhibit in order to retain an expert to examine the video[10]. Trial counsel did not receive a response until July 14, 2015 when counsel received a letter confirming that the Crown copy of the video also did not work. By the time trial counsel spoke with her expert, the expert was on vacation. On the first day of trial, defence counsel sought an Order releasing the exhibit for testing, and an adjournment to have the testing conducted. The Crown opposed the adjournment. The trial judge ultimately granted the application for the release of the exhibit for testing, finding that "as I look at the concept of full answer and defence, if there's something on that tape on which this witness and/or others can be challenged, then it ought to be available to the defence."[11] The parties then agreed to hear the evidence-in-chief of the first Crown witness, Mr. Sliwa, with the cross-examination to be delayed until the video could be examined,[12] as counsel for the Appellant Jamal Yusuf expressed on behalf of all accused the desire to proceed expeditiously with the trial and not delay the matter any further[13].

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[8] AR, Vol. II, Part V, Tab 31, November 25, 2014, pp. 3-4, ll. 26-31, 20-32
[9] AR, Vol. I, Part II, Tab 11, Letter to Crown, May 15, 2015
[10] AR, Vol. I, Part II, Tab 11, Letter to Crown, June 18, 2015
[11] AR, Vol. II, Part V, Tab 32, August 5, 2015, p. 15-16, ll. 11-32, 1-15
[12] *Ibid*, pp. 3-4, 15-18, ll. 10-32, 1-20
[13] *Ibid*, p. 5, ll. 16-28

9. The parties returned on August 6, 2015 but were unable to proceed as the expert had not completed his examination. Crown counsel indicated to the court that the Appellant Jamal Yusuf's trial counsel had advised him that the expert would likely need a week to examine the exhibit, but expressed the opinion that a week "might be a bit ambitious. We thought about two weeks…"[14]. The parties scheduled three additional days – January 11, 12 and 14, 2016. Counsel for Yusuf observed that there was one additional court day on August 17, 2015 offered, clarifying that "[i]t wasn't a three day, nor two-day", but that the Appellant Pauls' trial counsel was unavailable. The Crown disagreed, suggesting that August 17, 18 and 19 had been offered[15]. The trial confirmation sheet recorded only a single date of August 17, 2015 as being offered[16]. The Appellant Pauls' trial counsel was also unavailable for dates beginning in December 2015, but adjourned a trial to accommodate the January 2016 dates. The witness, Mr. Sliwa, was bound over and directed to attend on January 11, 2016 at 9:00 a.m.[17]

3. The First Continuation – January 2016

10. Mr. Sliwa arrived late, shortly after noon on January 11, 2016. In the interim, the Crown called two officers who had not previously been listed as witnesses. The evidence commenced at 10:30 a.m. when the Crown played a 911 call. The defence cross-examination of the officers was very short. The cross-examination of Mr. Sliwa began shortly before lunch and was complete by 3:25 p.m., taking less than two hours[18].

11. On January 12, 2016, the examination-in-chief of the complainant began shortly before noon due to the fact that other matters had to be addressed. It proceeded for an hour until lunchtime before the day was lost due to an issue with the interpreter after one of the defence counsel raised a concern about the accuracy of the translation. When the issue was put before the trial judge, the trial judge ruled that "out of an abundance of caution and having a view to expediency, in fact, I think it is best for all parties, defence and Crown, and particularly the accused, that another interpreter take over in this matter."[19] There was no other interpreter

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[14] AR, Vol. II, Part V, Tab 33, August 6, 2015, p. 3, ll. 4-26
[15] *Ibid*, p. 3, ll. 1-26
[16] AR, Vol. I, Part II, Tab 15, Trial Confirmation Sheet of August 6, 2015
[17] AR, Vol. II, Part V, Tab 33, August 6, 2015, pp. 3, 8, 11, ll. 4-26, 1-27, 24-30
[18] AR, Vol. II, Part V, Tab 34, January 11, 2016, p. 2, l. 28, p. 42, ll. 13-16, p. 102, l. 28
[19] AR, Vol. III, Part V, Tab 35, January 12, 2016, p. 1, l. 5, p. 41-42, ll. 15-20, 21-28

available to take over, but one was confirmed for the next date, January 14. The trial Crown then suggested that the parties attend at the trial coordinator's office to obtain a further day beyond January 14, as he did not think it likely that the Crown's case would finish on Thursday. The complainant's examination-in-chief lasted the entire day on January 14, 2016 ending at 4:00 p.m. At the conclusion of the day, the parties obtained two further dates of June 20 and 24, 2016. The Appellant Pauls' counsel was unavailable for dates offered in April, but the Crown was unavailable for dates in February that all defence counsel could have accommodated[20]. Trial counsel for the Appellant Jamal Yusuf expressed her view that a further half day may be needed, and expressed concern about the length of the Crown case, given the original estimate of two days, and the fact that the complainant's original statement to the police was only 10 or 15 minutes long. Counsel again emphasized that her client was eager to move the case forward, given that his bail restricted him from traveling, and the resulting prejudice to his music career, and indicated her client's willingness to be severed. She also requested that the same interpreter be assigned, as she had confirmed the interpreter was available and suggested to the Court that they sit earlier to ensure the evidence was completed. The Court agreed to try and ensure that the proceedings began promptly at 9:30 a.m.[21]

4. The Second Continuation – June 2016

12. The examination-in-chief continued on June 20, 2016. Despite trial counsel's request, a different interpreter was assigned. Trial counsel for the Appellant Yusuf raised concerns about the interpreter's knowledge of the specific dialect that the complainant was speaking. The court recessed in the morning and continued at 2:30 in the afternoon with the interpreter from January 14, 2016. The examination-in-chief continued until 4:30 p.m.[22] The matter could not proceed on June 24, 2016 because of the Appellant Pauls' illness. Trial counsel for the other two Appellants sought severance, which was denied by the trial judge. In response to the severance application, the Crown indicated that he believed that had they proceeded, the Crown realistically may have

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[20] The trial confirmation sheet filled out by the trial coordinator on January 14, 2016, did not list any dates in March or April, however. See AR, Part II, Tab 15

[21] AR, Vol. III, Part V, Tab 36, January 14, 2016, pp. 92-94, ll. 9-15, 20-29, 1-28, 8-28, pp. 98-99, ll. 11-29, 3-7

[22] AR, Vol. III, Part V, Tab 38, Vol. II, Tab 16, June 20, 2016, pp. 17-18, 22 ll. 10-32, 1-16, 20-31

closed its case on that day, as he expected to be finished the examination-in-chief by the morning break[23].

13. In light of the Appellant Pauls' illness, the parties obtained continuation dates of September 8 and 9, 2016 on June 24, 2016. The record is silent as to whether earlier dates were offered. On the same day, during submissions on the severance application, counsel for the Appellant Jamis Yusuf raised concern that the two September dates were insufficient: "Your Honour, even if we were to proceed today and we have the 8th and 9th, I don't even think that is sufficient time to finish", a proposition the trial judge agreed with[24]. Counsel for the Appellant Jamal Yusuf then made a formal request to schedule a third day[25]. Unfortunately, the court was unable to accommodate this request at the time, as, in the Crown's words, "it involves getting the approval of outside parties."[26]

5. The Third Continuation – September 2016

14. On September 8, 2016, the complainant gave evidence for the entire day. All parties were present at 10:09 a.m., but for reasons that are not clear from the transcript, the evidence did not commence until 10:45 a.m.[27] Despite the trial Crown's expectation on June 24, the examination-in-chief continued throughout the morning and did not conclude until sometime around 3 p.m. or so[28]. Trial counsel for the Appellant Jamal Yusuf began her cross-examination and continued

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[23] AR, Vol. III, Part V, Tab 39, June 24, 2016, pp. 14, ll. 15-27
[24] *Ibid*, p. 12, ll. 1-5
[25] *Ibid*, p. 15
[26] *Ibid*, p. 20
[27] AR, Vol. III, Part V, Tab 40, September 8, 2016, p. 3, ll. 4-32.
[28] AR, Vol. III, Part V, Tab 41, September 8, 2016, p. 26, ll. 25-30, p. 45, ll. 13-28. The exact time that the examination-in-chief ended is unclear from the transcript. The examination-in-chief began at 10:45 on page 1 of the transcript (Vol. II, Tab 19) and the court recessed for lunch at p. 18 of the transcript. It is unclear when exactly the court resumed, but other matters were spoken to briefly after the lunch recess, before the examination-in-chief resumed at p. 19 of the transcript. The remainder of the examination-in-chief comprised a further 8 pages of the transcript. The cross-examination begins at page 27 and at page 32 of the transcript, the afternoon recess is taken at 3:30 p.m. This assessment is supported by the trial judge's finding of fact at para. 34 of the 11(b) reasons.

throughout the morning of September 9, 2016. The parties broke for lunch, with the intention to return at 2:15 to continue the cross-examination[29]. Because of another matter scheduled in court, the matter could not continue in the afternoon and was adjourned to further dates that had already been scheduled the previous day for February 21 and 22, 2017. As trial counsel for the Appellant Yusuf observed, however, those days had been scheduled on the assumption that the Crown only had an hour remaining in the examination-in-chief on September 8 and on the assumption that the parties would have the full day on September 9, 2016. Trial counsel suggested obtaining a further two dates beyond February 21 and 22, 2017. The Crown canvassed the possibility of adjourning the other matter scheduled in the court, and all trial counsel indicated their preference to move forward in the belief that they could finish the cross-examination of the complainant that day. The trial judge ultimately ruled that the Appellants' case would be adjourned as it would not be finished that day even if it proceeded. As a result, the parties lost the afternoon and the matter was adjourned to February 21, 2017. Trial counsel returned after attending the trial coordinator's and indicated the parties were looking at further dates of April 24-26, 2017. Trial counsel for the Appellant Jamal Yusuf indicated that the earliest dates for the Appellant Pauls' counsel were in March, but that she and the other defence counsel were available on earlier dates[30]. Trial counsel for Yusuf re-iterated that only two dates were scheduled in February on the basis of the Crown's representation that the examination-in-chief would finish much quicker than it did[31]. On September 20, 2016, the parties confirmed that further dates of April 24-26, 2017 had been scheduled[32].

6. The Fourth Continuation – February 2017

15. The matter resumed on February 21, 2017. Trial counsel for Yusuf completed her cross-examination of the complainant shortly after the morning recess. The Appellant's trial counsel, last on the Information, was well into his cross-examination by 1:00 p.m., when the Court recessed for lunch. The Appellant's trial counsel completed his cross-examination of the complainant shortly before 3:00 p.m. on February 21, 2017, at which point the Crown closed its

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[29] AR, Vol. III, Part V, Tab 42, September 9, 2016, pp. 49-50, ll. 30-32, 1-6
[30] The record is silent as to the whether the Crown would have been available for those dates.
[31] AR, Vol. III, Part V, Tab 43, September 9, 2016, p. 2, ll. 9-30, pp. 5-7, ll. 17-30, 1-21, 15-30, p. 10-11, ll. 27-30, 1-30
[32] AR, Vol. IV, Part V, Tab 45, September 20, 2016, p. 26, ll. 19-25

case. The defence began its case at approximately 3:15 with the evidence of the Appellant Jamal Yusuf[33]. The defence case resumed on February 22, 2017 with the Appellant's continued examination-in-chief beginning at 10:25 a.m. The examination-in-chief concluded shortly after noon. The Appellant was briefly cross-examined by counsel for his co-Appellants, and the Crown commenced its cross-examination shortly before the lunch recess, continuing at 2:27 p.m. after the lunch recess until the end of the day. At this point, trial counsel for the Appellant Jamal Yusuf requested an interim return date to determine if earlier dates were available that late April, citing the prejudice to her client. The trial judge advised counsel that the earliest date he would be able to hear the matter was April 18, only one week prior to the previously scheduled continuation dates[34].

7. The Fifth and Final Continuation – April-June 2017

16. The cross-examination and re-examination of the accused Yusuf were completed on the morning of April 24, 2017[35]. The remaining defence witness was unavailable on April 24 and 25 due to employment considerations. The witness attended on April 26, 2017 and gave evidence in the morning[36]. The parties then gave brief closing submissions in addition to filing written submissions. The parties scheduled a date of July 7, 2017 for the trial judge to provide his judgment. The parties returned on June 2, 2017 to provide the trial judge with an opportunity to review the written submissions and pose further questions of counsel[37]. The matter was then remanded to July 7, 2017 for judgment. On July 7, 2017, the trial judge issued a decision convicting all three Appellants of assault causing bodily harm.

B. THE TRIAL JUDGE'S S. 11(B) DECISION

17. Upon receiving the decision, trial counsel advised the court of their intent to seek a stay of proceedings due a breach of their right to be tried within a reasonable time, pursuant to s. 11(b) and 24(1) of the *Charter*. Ultimately, in a 29-page judgment, the trial judge allowed the application. From the total delay of 34 months 25 days vis-à-vis the Appellant Pauls, the trial

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[33] AR, Vol. IV, Part V, Tab 46, February 21, 2017, pp. 65, 67, ll. 19-20, 10-25
[34] AR, Vol. IV, Part V, Tab 47, February 22, 2017, pp. 43, 53, ll. 7-10, 25-29, pp. 64, 76, ll. 25, 5-10, pp. 146-148, ll. 25-30, 3-29, 4-8
[35] AR, Vol. IV, Part V, Tab 48, April 24, 2017, p. 10, ll. 20-30
[36] AR, Vol. V, Part V, Tab 50, April 26, 2017, p. 46, ll. 9-30
[37] AR, Vol. V, Part V, Tab 51, June 2, 2017

judge deducted 12 months and 7 days owing to defence unavailability and discrete circumstances[38], leaving 22 months and 18 days. For the Yusuf Appellants, the trial judge deducted 3 months, leaving 32 months and 5 days[39].

18. The trial judge found that much of the delay in the trial, and the cause of the numerous continuations was largely due to the manner in which the Crown prosecuted the case including the failure to properly estimate how long their case would take. In respect of the loss of the August 2015 court days, the trial judge found the Crown at fault for not responding to the disclosure issue in a timely way. As the trial judge noted, "from May 15 until July 13, the Crown did nothing in respect of the request when it could have". As a result, the August adjournment request "was necessitated by the Crown's late response to the repeated requests for a copy of the defective video's release." The trial judge found that the Crown failed to mitigate this delay[40].

19. The trial judge also pointed to the Crown's failure to realistically assess the length of its case as a major factor for the delay, and as an avoidable error[41]:

> This gross underestimate of time, be it in the *Jordan* era or pre-*Jordan* era, has a domino effect. A case that was scheduled for two days, as in this case, because it was categorized as a "press and play" case by the Crown, by virtue of the gross underestimate amongst other reasons, snowballed…By definition, even in this imperfect system, this s. 11(b) assessment would not have covered such an extensive timeframe if the Crown had indicated how it was going to prosecute its case.

20. The trial judge also concluded that the Crown had not "reasonably relied on the pre-*Jordan* state of the law prior to that decision being released, given the manner of the prosecution", and as a result, the trial judge held that the transitional exception did not apply to justify the delay beyond the presumptive ceiling notwithstanding that this was a transitional case[42].

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[38] AR, Vol. I, Part I, Tab 8, 11(b) Reasons, para. 86. The periods deducted from Pauls are as follows: June 17, 2015 – August 5, 2015 (1 month 18 days); December 7, 2015 – January 11, 2016 (1 month 4 days); January 14, 2016 – June 20, 2016 (3 months, joint); June 24, 2016 – September 8, 2016 (2 months 15 days); September 9, 2016 – February 21, 2017 (3 months); February 21, 2017 – April 24, 2017 (1 month). The only period deducted from the Yusuf Appellants was the 3 months between January 14, 2016 and June 20, 2016.
[39] AR, Vol. I, Part I, Tab 8, 11(b) Reasons, para. 86
[40] *Ibid*, para. 69
[41] *Ibid*,, para. 75, 82
[42] *Ibid*,, paras. 80, 84-85

C. THE DECISION OF THE COURT OF APPEAL

21. The Crown appealed the stay of proceedings to the Court of Appeal for Ontario. On appeal, the Crown alleged that the trial judge had made four separate errors of law: (1) that the trial judge erred in not allocating the delay caused by the unavailability of the Appellant Pauls' counsel to the Yusuf Appellants; (2) that the trial judge erred in calculating the delay arising from discrete events; (3) that the trial judge erred in counting the time while the case was on reserve for judgment as part of the delay; and (4) that the trial judge failed to conduct a proper analysis of the transitional exception[43].

22. Justice Simmons, writing for the court, granted the Crown's appeal, lifted the stay and remitted the matter back to the trial court for sentencing. The Court of Appeal concluded that the net delay for the Yusuf Appellants was 17 months and 29.5 days, one half day under the ceiling, and that the net delay for the Appellant Pauls was 16 months and 4.5 days[44].

23. The Court determined that the trial judge erred in approaching the issue of defence delay individually, rather than communally. Relying on the Court of Appeal's decision in *R. v. Albinowski*, the Court held that the period between June 17 and August 5, 2015, and December 7, 2015 to January 11, 2016 should have been deducted from the net delay with respect to each of the Appellants, not just the Appellant Yusuf[45].

24. The Court also found that the trial judge erred in laying responsibility for the delay following the originally scheduled dates at the feet of the Crown. The Court based this conclusion on its finding that the defence request for disclosure of the blank video was "unnecessary and inappropriate from the outset."[46] The Court acknowledged that the Crown conceded responsibility for the delay arising from its dilatory response to the disclosure request, but framed the issue as "characterizing the reason for the delay arising from the adjournment." The Court concluded that it was the defence that was responsible for the initial adjournment and as a result, deducted the entire period from August 5, 2015 to January 11, 2016 from the net delay[47]. The Court also attributed the delay arising between February 24, 2017 to the end of evidence on April 24, 2017 to

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[43] AR, Vol. I, Part I, Tab 9, 2020 ONCA 220 ["CoA Decision"], para. 12
[44] *Ibid*, para. 15, 83
[45] *Ibid*, paras. 50-54
[46] *Ibid*, para. 69
[47] *Ibid*, para. 72

the defence, on the basis that "[a]bsent the initial adjournment of the trial, even with all the other problems, the April 2017 continuation simply would not have been necessary."[48]

25. The Court also found that the trial judge failed to give sufficient consideration to the various interruptions to the trial that constituted discrete events. In the Court of Appeal's view, the trial judge ought to have recognized that, but for the initial adjournment and the discrete events, the trial would have been completed in September 2016. The Court found that, although the Crown was initially responsible for the misestimate of trial time, the Appellants were jointly responsible for the delay beginning in January 2016, once it was clear how the Crown was proceeding. The Court therefore split the delay for the period between September 9, 2016 and February 21, 2017, on a 50-50 basis, deducting a further 2 months and 21 days[49]. On two occasions, the Court deducted quarter days from the net delay due to discrete events[50].

26. The Court ultimately determined that the net delay fell below the *Jordan* threshold. In arriving at this conclusion, the Court did not address the Crown's argument impugning the trial judge's treatment of the transitional exception[51].

PART II – STATEMENT OF ISSUES

27. The Appellants raise the following issues on appeal:

a. Did the Court of Appeal for Ontario err in applying the wrong standard of review and/or in misapplying the standard of review by substituting its own factual findings for that of the trial judge in re-calculating which party was responsible for the delay?

b. Did the Court of Appeal for Ontario err by, after the conclusion of argument on the appeal, requesting supplementary materials be provided by the Crown, and/or in then relying on these materials to reject the Crown's concession in relation to a

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[48] *Ibid*, para. 81
[49] *Ibid*, paras. 76-79, 81-82.
[50] *Ibid*, para. 82 (1/4 of a day on September 8, 2016, and 2 ¼ days for April 24-26, 2017)
[51] *Ibid*, paras. 83-84. As indicated above, the Appellants take the position that deference was owed to the trial judge's determination, and that there was no basis for finding error with the trial judge's determination that the Crown had not met its burden to establish the transitional exception. The Crown also argued that the trial judge improperly included judicial reserve time in the net delay. That issue was recently decided by this Court in *R. v. K.G.K., supra*.

factual finding as to delay made by the trial judge, all without providing the Appellant the opportunity to make submissions on the issue?

c. Did the Court of Appeal for Ontario err by adopting the "micro-counting" approach rejected by this Court in *R. v. Jordan* in allocating delay in quarter-day increments?

d. Did the Court of Appeal for Ontario err by deducting periods of delay which were caused by the Appellant Pauls when calculating the "net delay" for the Yusuf Appellants[52]?

PART III – STATEMENT OF ARGUMENT

ISSUE 1: DID THE COURT OF APPEAL ERR IN IDENTIFYING AND/OR APPLYING THE STANDARD OF REVIEW?

A. IDENTIFYING THE APPROPRIATE STANDARD OF REVIEW

28. As a preliminary issue, the Appellants submit that the Ontario Court of Appeal identified the wrong appellate standard of review. Raised by the Yusuf Appellants on appeal to the court below, the court reaffirmed that a trial judge's findings of fact attracted a standard of deference, but that "characterizations of periods of delay and the ultimate decision concerning whether there has been unreasonable delay are reviewable on a standard of correctness."[53] In so doing, the court relied on its own post-*Jordan* jurisprudence, which in turn adopted the standard of review applied by the Ontario Court of Appeal pre-*Jordan*[54].

29. The Appellants renew the challenge to the Court of Appeal's identification of the appropriate standard of review on appeal to this Court. In particular, the Appellants submit that the proper standard for reviewing the ultimate decision as to whether the delay in question is unreasonable is not correctness, but reasonableness. This Court has not explicitly stated the appropriate standard governing appellate review of s. 11(b) decisions in either *R. v. Jordan* or any of the decisions that this Court has issued concerning s. 11(b) subsequent to *Jordan*. Prior to *Jordan*, a doctrinal split had emerged between the courts of appeal across Canada as to the

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[52] This ground of appeal is unique to the Yusuf appellants.

[53] AR, Vol. I, Part I, Tab 9, CoA Decision, para. 40

[54] *R. v. Jurkus*, 2018 ONCA 489, leave ref'd [2018] S.C.C.A. No. 325; *R. v. Albinowski*, 2018 ONCA 1084; *R. v. Schertzer*, 2009 ONCA 742, leave ref'd [2010] S.C.C.A. No. 3; *R. v. Tran*, 2012 ONCA 18.

standard of review[55]. While the appellate courts agreed that factual findings were assessed on a standard of palpable and overriding error, and articulation of legal principles and the characterization and allocation of the *Morin* factors were assessed on a standard of correctness, the appellate courts disagreed on the standard of review governing the ultimate decision of whether the delay was unreasonable. As the Manitoba Court of Appeal summarized in 2015[56]:

> [25] A review of the jurisprudence regarding the fourth category, being errors in the ultimate conclusion of the reasonableness of the delay, shows that appellate courts are, at present, split on the applicable standard of review[57].
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> [26] On the one hand, the courts in Ontario and British Columbia have, at least recently, adopted the standard of correctness for this fourth category of error.
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> [27] On the other hand, the courts in Saskatchewan, Manitoba and Nova Scotia have taken the position that arriving at the ultimate conclusion involves the balancing of various competing interests which is a discretionary decision by the trial judge that is entitled to deference and attracts a high standard of review. Thus, barring an underlying error in one or more of the first three categories, the trial judge's ultimate conclusion on the reasonableness of the delay will be upheld unless it is unreasonable.
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> [28] While Canadian appellate courts are not, at the present, consistent in the standard of review for this fourth category, an analysis of the decisions that adopt the correctness standard reveals that they have only overturned a trial judge's decision on the ultimate conclusion and the reasonableness of the delay when the appeal court has determined that the trial judge committed a relevant, underlying legal error or an overriding factual error.
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> [29] Further, the application of the deference standard to the ultimate conclusion regarding the reasonableness of the delay only occurs if there are no underlying legal errors or overriding factual errors. If such errors are found and are material, then deference is no longer owed and the appellate court must step in to reassess

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[55] In *R. v. Maracle*,[1998] 1 S.C.R. 86, this Court, in a short endorsement, seemed to adopt a deferential standard of review, although this appears to have received little consideration in subsequent appellate jurisprudence

[56] *R. v. Vandermeulen (M)*, 2015 MBCA 84 at paras. 25-30 [citations omitted]

[57] This appears to still be the case subsequent to *Jordan*. In addition to Ontario, in British Columbia and Alberta, the standard on the ultimate decision is correctness, see e.g. *R. v. K.N.*, 2018 BCCA 246 at para. 13 and *R. v. J.E.V.*, 2019 ABCA 359 at paras. 22, 24; In Manitoba and Quebec, the standard is reasonableness. See e.g. *R. v. Brar*, 2020 MBCA 58 at para. 20 and *R. c. Rice*, 2018 QCCA 198 at paras. 33, 35

> the delay periods and re-evaluate the question of whether there has been an unreasonable delay.
>
> [30] Thus, while two standards have been articulated for the review of the trial judge's ultimate conclusion, in practice there may be little or no difference in the outcomes. That said, clarification of this inconsistency is required.

30. This Court's decisions in *Jordan* and *Cody* did not explicitly address this issue. The following statements in *Jordan*, and the subsequent decisions issued by this Court on s. 11(b), however, suggest a deferential attitude toward the assessments made by trial judges at first instance:

a. <u>On the propriety of defence actions</u>:

   i. "first instance judges are uniquely positioned to gauge the legitimacy of defence actions." (*Jordan* para. 65)

   ii. "It is highly discretionary, and appellate courts must show a correspondingly high level of deference thereto." (*Cody*)

b. <u>On exceptional circumstances</u>: "the determination of whether circumstances are 'exceptional' will depend on the trial judge's good sense and experience." (*Jordan* para. 71)

c. <u>On what constitutes a particularly complex case</u>: "It bears reiterating that such determinations fall well within the trial judge's expertise." (*Jordan* para. 79)

d. <u>On whether a case under the ceiling has markedly exceeded reasonable time requirements</u>: "trial judges should also employ the knowledge they have of their own jurisdiction, including how long a case of that nature typically takes to get to trial in light of the relevant local and systemic circumstances." (*Jordan*, para. 89) and "this determination is a question of fact falling well within the expertise of the trial judge" (*Jordan*, para. 91)

e. <u>On the transitional exception</u>: "We rely on the good sense of trial judges to determine the reasonableness of the delay in the circumstances of each case." (*Jordan*, para. 98)

f. On the trial judge's attribution of responsibility for disclosure: "We **defer** to the trial judge's finding that 'it was the Crown's refusal to release the disclosure that pushed the delay beyond what might otherwise be viewed as reasonable'" (*Cody*, para. 52) [*emphasis added*]

31. The above language in *Jordan* and *Cody* clearly emphasizes the important role that first instance judges have in safeguarding the right to a reasonable trial. As Justice Moldaver took pains to emphasize in *Jordan*, the new framework governing the s. 11(b) analysis is not simply a numerical ceiling. Context matters. Indeed, it is critical to the balanced assessment of an individual's right to a trial within a reasonable time. The standard of review of correctness adopted by the jurisprudence of the Ontario Court of Appeal in this case and others risks stripping away this context and diluting the ability of the *Jordan* framework to positively curb lengthy trial times in local jurisdictions.

32. Not only is adopting a deferential standard of review more consistent with the aims of combating the culture of complacency, it is also consistent with the standard for other fact-driven balancing decisions in criminal law, such as whether the admission of evidence obtained as a result of a *Charter* violation will bring the administration of justice into disrepute under s. 24(2)[58], or the propriety of the sentence imposed[59]. The rationale for deference in these contexts is that it is the judge at first instance who has had the opportunity to personally hear and observe the evidence or the proceedings, and is therefore most intimately familiar with the matter and best equipped to carry out the balancing analysis required. In the context of s. 11(b), the appellate court will often not have the advantage of having personally observed trial counsel, nor will it have the same familiarity with the local conditions that might inform how exceptional the circumstances are. The Appellants ask this Court to provide clarity as to the proper standard of review that applies in the appellate context. The Appellants urge this Court to adopt the standard articulated by the Quebec Court of Appeal in *Rice*: "Appellate courts must not intervene unless it can be demonstrated that a judge erred in drawing an inference or came to a clearly wrong

[58] *R. v. Grant,* 2009 SCC 32 at para. 86, 127; *R. v. Cote*, 2011 SCC 46 at para. 44; *R. v. Beaulieu*, 2010 SCC 7 at para.
[59] *R. v. LaCasse*, 2015 SCC 64 at paras. 42-44

conclusion which is unsupported by the evidence or which is clearly unreasonable, or made some other palpable and overriding error that impacts the result."[60]

B. THE COURT OF APPEAL DID NOT PROPERLY APPLY THE STANDARD OF REVIEW

33. Even if the Court below identified the proper standard of review, the Appellants submit that the Court of Appeal's reasoning demonstrates a significant departure from that standard. As the Court below acknowledged, at the very least it owed deference to the trial judge's findings of fact. Despite this recognition, however, the Appellants submit that the Court of Appeal effectively started from scratch in assessing the reasonableness of the delay, without any pretense of affording the trial judge's findings the appropriate degree of deference. It is the Appellants' position that the Court of Appeal fell into legal error by misapplying the standard of review, which led it to misallocate the delay at various points to the defence. Absent these errors, there would have been no basis to lift the stay of proceedings.

1. The Disclosure Issue and the Allocation of Delay due to the Initial Adjournment

34. The most striking illustration of the Court's failure to apply the standard of review is its assessment of the proper characterization of the delay arising from the dispute over disclosure of the blank video for testing. Importantly, the Crown conceded on appeal that the initial delay of 12 days arising from the adjournment of the first trial dates lay at the Crown's feet[61]. The issue as joined by the parties on appeal was simply whether the delay from August 17, 2015 (the first continuation date offered) until December 7, 2015 ought to have been allocated to the defence and deducted from the net delay. As framed by the parties, the question came down to the resolution of a factual issue – whether or not the Court had offered a bloc of three days on August 17, 2015, or simply a single day[62]. If the latter, the delay would be included in the net delay.

35. The Court of Appeal sidestepped that issue, however, and resolved the issue by revisiting the cause of the adjournment, notwithstanding the Crown's concession of responsibility. After

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[60] *Rice, supra* at para. 33

[61] AR, Vol. I, Part I, Tab 9, CoA Decision, para. 58. The Court of Appeal's treatment of this issue from a procedural perspective is the subject of the next ground of appeal

[62] Whether any delay arising from the unavailability of Pauls' counsel is attributable to Yusuf Appellants is a separate question that is addressed in issue 4 below.

reviewing the disclosure provided to the defence, Justice Simmons, writing for the Court, held that the true cause of the adjournment was defence counsel's failure to properly interpret the disclosure which allegedly made clear that the video was blank. According to the Court, "rather than asking for an additional copy of the recording, the defence should have immediately applied for, and requested the Crown's consent to, the production order it eventually requested at trial."[63] In effect, the Court concluded that trial counsel's conduct in corresponding with the Crown first was illegitimate: "Particularly in an era of scarce resources, the defence should not be entitled to pass off responsibility for delay to the Crown by making unnecessary and inappropriate disclosure requests and then complaining that the Crown did not attend to them promptly."[64] The Court framed its finding not as re-litigating the "propriety of the adjournment" in the face of the Crown's concession, but rather "as characterizing the reason for the delay arising from the adjournment."[65]

36. The Appellants respectfully submit that, in so concluding, the Court of Appeal itself mischaracterized the issue, and failed to accord the proper deference to the trial judge's finding of fact. The cause of the adjournment rested on findings of fact made by the trial judge. In his reasons granting a stay of proceedings, the trial judge made the following findings of fact in relation to the video disclosure issue[66]:

- That defence counsel "were prudent in requesting the release of the black video for testing", as "it was important to ascertain if there were images on the defective video in order to exhaust all areas in an effort to provide full answer and defence."
- That the timing of the defence preparation for trial was reasonable, and that the discovery of the defective video happened well before trial;
- The Crown failed to respond to the defence request in a timely manner;
- The request could have been fulfilled quickly, and the testing could have been done prior to trial;
- Had the Crown responded in a timely manner, "the matter would have proceeded on August 5 and 6 as scheduled".
- "The request for adjournment was prudent and was necessitated by the Crown's late response to the repeated requests for a copy of the defective video's release"

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[63] AR, Vol. I, Part I, Tab 9, CoA Decision, para. 71.
[64] *Ibid*, para. 72
[65] *Ibid*.
[66] AR, Vol. I, Part I, Tab 8, 11(b) Reasons, paras. 68-69

37. The Court of Appeal evidently disagreed with the trial judge's assessment of the defence conduct, but its task on appeal (assuming those findings were legitimately in question given the Crown's concession) was limited to assessing whether the trial judge's findings disclosed palpable and overriding error, not whether it would have framed the conduct differently had it been hearing the issue as a court of first instance.

38. Contrary to its own framing of the issue, the panel's analysis of the video disclosure issue strikes directly at the propriety of the initial adjournment, and at the legitimacy of the defence request that led to it. As a result, the standard of review to be applied by the Court was governed by this Court's direction in *Jordan* and *Cody* regarding the assessment of illegitimate defence conduct and the appropriate standard of review of such findings on appeal. In *Jordan*, this Court held that "defence applications and requests that are not frivolous will also generally not count against the defence." As set out above, Justice Moldaver recognized that determining whether a defence action is frivolous or not "is by no means an exact science". As a result, "first instance judges are uniquely positioned to gauge the legitimacy of defence actions."[67] In *Cody*, this Court specifically cautioned the lower appellate courts that a trial judge's assessment of defence conduct is "highly discretionary, and appellate courts must show a correspondingly high level of deference thereto."[68] Before the panel was entitled to re-visit and displace the trial judge's finding that the defence had acted legitimately, it was obligated to explain why the trial judge's findings were the product of palpable and overriding error.

39. In assessing whether the trial judge's findings were reasonable, it is important to remember that defence actions will only qualify as illegitimate for the purpose of s. 11(b) "if it is designed to delay or it exhibits marked inefficiency or marked indifference towards delay."[69] A careful examination of the circumstances surrounding the defence disclosure request demonstrates no such attitude. Defence counsel reached out to the Crown about the blank surveillance video on May 15, 2015, almost three months in advance of the trial. As the trial judge recognized, had the

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[67] *Jordan, supra* at para. 65

[68] *Cody, supra* at para. 31. As pointed out above at para. 30f, this Court in *Cody* specifically deferred to the trial judge's finding as to the cause of delay (para. 52). It did not embark upon the analysis anew.

[69] *Ibid* at para. 32

Crown responded in a prompt manner, any testing could have been done well in advance of the trial. Despite counsel following up with another letter on June 18, 2015, and then making efforts to track down and speak to the Crown in person on June 22, 2015, the Crown provided no response to counsel's request until July 14, 2015, two months after the initial request. The limited time remaining before the trial, combined with the vacation schedules of counsel and the expert, meant that the defence could not reasonably take any further action to advance the request until the start of trial. It cannot seriously be contended that, in reaching out almost three months in advance, defence counsel either intended to delay the trial (because she somehow foresaw the Crown's dilatory response) or that her course of conduct displayed marked inefficiency or indifference toward delay.

40. In the panel's view, defence counsel ought to have simply filed a motion to have the exhibit released, and then subsequently sought the Crown's consent. First, there is no procedure for the release of an exhibit pre-trial by way of motion to a court. An exhibit can only be released to a party to the trial where two conditions are met: (1) It is made an exhibit at the trial; and (2) the judge is satisfied that the defence should be entitled to engage in independent testing. A provincial court judge (other than the trial judge) would have no jurisdiction to release an exhibit. While it is possible to seek access to something in the Crown's possession for independent testing by way of application to a trial judge or a Superior Court Justice in advance of trial, that would be a last resort scenario before attempting to resolve the issue with the Crown. Second, even were such a procedure reasonably available, the court's assessment not only holds defence counsel to a standard of perfection, contrary to *Jordan*, but is also counterproductive. There are sound policy reasons for encouraging correspondence between counsel prior to the filing of motions. Abrupt filing of motions risks consuming scarce judicial resources – dates are scheduled and set aside, materials are prepared, filed and reviewed – that may not have been necessary had counsel simply communicated beforehand. The Court must be alive to the unintended consequences of discouraging defence from writing to the Crown.

41. Nor should the fact that the answer was potentially available elsewhere render defence correspondence with the Crown illegitimate for the purposes of the s. 11(b) analysis. Before an appellate court finds that defence conduct in reaching out to the Crown is illegitimate, the Appellants submit that not only must the request be ill-founded or unnecessary, there must be

some other aspect of complacency present – an intention to delay the trial, a lack of timeliness, a failure to properly identify the subject of the correspondence or the possible courses of action arising out of the subject of the correspondence. For instance, the defence may well be considered solely responsible in this case if the correspondence had been sent at the 11th hour, a day or two before the trial. It was not. In fact, defence counsel's timely correspondence and repeated follow-ups (including making efforts to speak with the Crown directly) exhibit a clear intention to avoid delay, as did the fact that counsel put the Crown on notice that she would seek to have the evidence released for testing if the Crown's copy was in fact blank. The Crown cannot claim that the defence application at the outset of trial came out of the blue.

42. The Crown's failure to respond in a timely manner, on the other hand, illustrates the very culture of complacency that this Court decried and sought to remedy in *Jordan*. Taking two months to respond to a simple defence request can be described as nothing other than complacent and evincing indifference toward delay. The court below castigated defence counsel for "making unnecessary and inappropriate disclosure requests" and then attempting "to pass off responsibility for delay to the Crown", and yet excused the Crown for its unexplained two-month delay in responding. In order to begin to redress the delays that plague the criminal justice system, courts must hold all participants, Crown and defence, to the same standard. Respectfully, the court below held the defence conduct to an inappropriately high standard, while at the same time failing to critically assess the Crown conduct at all. There was ample basis for the trial judge's conclusion that defence counsel had acted prudently, and there was thus no basis for the Court of Appeal to intervene and conclude that the delay ought to be laid entirely at the feet of the Appellants.

43. Holding the Appellants responsible for the initial adjournment led the court below to deduct at least 6 months and 4 days as defence delay from the net delay[70]. The Appellants maintain that those months are properly included in the net delay, which would then clearly exceed the *Jordan* ceiling for trials in the provincial court.

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[70] August 5, 2015 – December 7, 2015 (4 months, 2 days); February 22 – April 24, 2017 (2 months, 2 days); the Court of Appeal also attributed some portion of 2 months and 21 days' delay between September 9, 2016 to February 21, 2017 classified as defence delay (CoA Decision, para. 82).

2. Responsibility for the Trial Underestimate

44. The Court of Appeal's flawed application of the standard of review is also evident in its allocation of responsibility for the trial underestimates. The trial judge found that defence counsel reasonably assessed the Crown case in agreeing to a two-day trial, and that the Crown's assessment of its own case was reflected in the Crown's statement on August 5, 2015 that it was a "press play" case. The trial judge found that the "gross underestimate of trial time was an event within the complete control of the Crown, and permeated the entire trial.[71] While the Court of Appeal agreed that the initial underestimate was properly attributed to the Crown, it held that "all counsel and the court must accept responsibility for the misestimate once Dawood [the complainant] began to testify (January 2016)."[72]

45. The trial judge's finding that it was the Crown underestimate that was the main driver of delay in the trial was a finding of fact that was entitled to deference on appeal[73]. Yet the Court of Appeal gave little effect to this finding. In the face of the trial judge's finding, the court below determined that, of the 21 months and 29 days between August 5, 2015 and June 2, 2017, 15 months and 17.25 days ought to have been deducted from the net delay of the Yusuf Appellants, and 17 months and 2.25 days from the Appellant Pauls. In other words, despite the trial judge's finding that it was the Crown's failure to properly estimate the time for trial that was the main cause of delay, the Crown only bore the weight of six months of delay in the case of the Yusuf Appellant, and a little over four months in the case of the Appellant Pauls.

46. Where the Crown realizes in the course of its preparation that the initial time estimate may prove insufficient, a positive duty arises to ameliorate the potential delay by immediately taking steps to alert counsel and the court and to procure additional dates in which the matter can reasonably be contemplated. The Appellants acknowledge that in *Jordan*, this Court observed that "if the trial goes longer than reasonably expected — even where the parties have made a good faith effort to establish realistic time estimates — then it is likely the delay was unavoidable and may therefore amount to an exceptional circumstance." But this statement does not relieve the Crown from the obligation of prosecuting its case in an efficient and timely manner. The decision

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[71] AR, Vol. I, Part I, Tab 8, 11(b) Reasons, para. 73
[72] AR, Vol. I, Part I, Tab 9, CoA Decision, para. 79
[73] *R. v. Evans*, 2019 ABCA 74 at para. 19; *R. v. Regan*, 2018 ABCA 55 at para. 32

about how to present the evidence is one that lies wholly within the power of the Crown and it bears the burden of "using court time efficiently[74]. As Justice Nakatsuru of the Ontario Superior Court of Justice recognized in *R. v. Majeed*, "improper estimates of time should never be used as a *carte blanche* excuse for endless continuations"[75] An underestimate, *without more*, does not qualify as a discrete event or exceptional circumstance. In fact, in *Jordan*, this Court rejected the notion that the underestimate qualified as a discrete event: "There is nothing in the record to indicate that any discrete, exceptional circumstances arose."[76] The point is put most clearly and forcefully by the Nova Scotia Supreme Court in *R. v. Foroughi-Mobarakeh*[77]:

> [57] I am of the view that simply misjudging or underestimating the time needed, is not the type of exceptional circumstance or discrete event that Jordan contemplated to exercise the delay.
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> …
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> [60] It is true that Jordan stated that the list of things that could constitute discrete events or exceptional circumstances is not closed as long as the events were unforeseeable or unavoidable and the crown took whatever steps they could to mitigate the delay.
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> [61] I acknowledge that a preliminary inquiry can go awry, as can a trial due to unexpected developments. However, wrongly estimating the time for trial would not, in my view, be considered a discrete event, nor should it be for a preliminary inquiry.
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> [62] Contrary to being unforeseeable or unavoidable counsel are expected to be able to forecast or reasonably foresee the amount of time a preliminary inquiry or trial will take. In fact, the Courts rely on counsel's informed estimate when such matters are set down.
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> [63] It is not uncommon that the estimate turns out to be incorrect but here the Crown, which has the burden, has not pointed to any specific fact or event that resulted in the time allotted being insufficient.
>
> [64] Other than wrongly estimating, there is no discrete event or exceptional circumstances that the Crown can point to here.

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[74] *Jordan, supra* at para. 138
[75] *R. v. Majeed*, 2017 ONSC 3554 at para. 27
[76] *Jordan, supra* at para. 125
[77] *R. v. Foroughi-Mobarakeh*, 2017 NSSC 100 at paras. 57-68

47. In "allocating joint delay to all parties for the delay from September 9, 2016 to February 21, 2017", the Court of Appeal misconceived both the concepts of defence delay and discrete events, and thereby misapplied the standard of review. A careful examination of the *Jordan* decision makes this clear. In *Jordan*, the Crown sought to attribute delay arising from the underestimate of the preliminary hearing to the defence. This Court rejected that argument, holding:

> [122] While these instances that the Crown points to are symptomatic of the systemic complacency towards delay that we have described, most of them are not attributable solely to the defence. The Crown and defence both share responsibility for the preliminary inquiry underestimation. Similarly, responsibility for the delay resulting from consent adjournments and the defence's failure to respond to the Crown's offer of a shorter trial time in July 2011 should not be borne solely by the defence.

This Court did not deduct the time periods referenced in this passage from the net delay[78]. It is clear therefore that shared responsibility for a period of delay does not render that period deductible from the net delay because it is not solely the responsibility of the defence. To do otherwise would relieve the Crown of its responsibility "to take proactive measures at all stages of the trial process to move cases forward and bring accused persons to trial in a timely fashion."[79] After all, it is important to remember, as Justice Cory reiterated in *Askov*, that "it is a fundamental precept of our criminal justice system that it is the responsibility of the Crown to bring the accused to trial."[80]

48. The Crown took no proactive steps in this case. Nor was this a case where an unforeseen issue arose at the last minute that derailed the trial.[81] Rather, the delay stemmed from the Crown's decision to examine its main witness in-chief in minute detail over the course of four days in court, before the defence even had an opportunity to begin cross-examination. Indeed, even well into the trial, on June 24, 2016, after the Crown had spent three days in-chief with the complainant, the Crown was unable to provide a reasonable estimate of how long he had left, indicating that it was only an hour and a half, when in fact his examination-in-continued for the

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[78] *Jordan, supra*, at paras. 122-125
[79] *R. v. Thanabalasingham*, 2020 SCC 18 at para. 9
[80] *R. v. Askov*, [1990] 2 SCR 1199. *Jordan, supra* reiterated this point at para. 112
[81] See e.g. *R. v. Purewal*, 2014 ONSC 2198 at para. 91

better part of a day[82]. The length of the Crown's case was directly within its control. As this Court recently observed in *R. v. Thanabalasingham*, "[t]he preliminary hearing [which had lasted more than a year] was not a discrete event, and its length was not outside the Crown's control in the sense contemplated by *Jordan*."[83]

49. The foregoing jurisprudence establishes that, regardless of whether the standard of review is correctness or reasonableness, the Court of Appeal erred in attributing any delay to the Appellants for the period between September 2016 and February 2017 (other than the 3 months found by the trial judge to be attributable to the unavailability of Pauls' trial counsel). As with the previous period, had the Court of Appeal properly applied the standard of review with respect to this period, the net delay for all Appellants would exceed the 18-month ceiling.

3. The Court of Appeal Misapprehended the Evidence and Failed to Consider Institutional Delay

50. The Court of Appeal failed to give sufficient consideration to the role that institutional delay played in the gap between the various continuation dates. The court bears responsibility for the delay between continuation dates. Particularly where it is clear that a trial has been dragging on, the court must make obtaining timely continuation dates a priority[84]. The trial judge acknowledged this and found that the overburdened justice system bore some responsibility for the delay[85]. Yet the Court of Appeal gave no effect to this finding. It failed to identify any palpable and overriding error with the trial judge's conclusion. In overturning the trial judge, the Court of Appeal itself misapprehended the evidence with respect to the delay between June 2016 and February 2017. On June 24, 2016, the parties raised concern as to whether the two September dates booked would be sufficient to complete the case, and requested a third date be scheduled. Because the trial judge had gone *per diem*, as Crown counsel explained, the third date could not be scheduled because it required approval from "outside third parties"[86]. Puzzlingly, in light of this clear exchange on the record, the Court of Appeal concluded that "I do not accept that Jamal

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[82] AR, Vol. III, Part V, Tab 39, June 24, 2016
[83] *Thanabalasingham, supra* at para. 5
[84] *R. v. Lahiry*, 2011 ONSC 6780 at para. 67
[85] AR, Vol. I, Part I, Tab 8, 11(b) Reasons, paras. 75-76
[86] AR, Vol. III, Part V, Tab 39, June 24, 2016, p. 20

Yusuf's counsel suggested in June 2016 that a third continuation date should be set aside."[87] The court's failure to accommodate scheduling a third date in September effectively necessitated the addition of the April 2017 dates, meaningfully extending the trial. Yet nowhere in the Court of Appeal's analysis is the institutional delay accounted for.

ISSUE 2: DID THE COURT OF APPEAL ERR IN FAILING TO PROVIDE THE APPELLANTS WITH THE OPPORTUNITY TO MAKE SUBMISSIONS BEFORE REJECTING THE CROWN'S FACTUAL CONCESSION?

A. THE PROCEDURAL HISTORY

51. The Court of Appeal heard oral argument in this case on October 22, 2019. The Crown, appellant in the court below, had conceded the Crown's responsibility for the initial adjournment arising from the late response to the defence disclosure request. The issue as joined by the parties in both written and oral argument dealt only with whether the delay between August 17, 2015 and December 7, 2015 ought to have been deducted as defence delay or included as net delay[88]. Resolution of the issue as argued by the parties revolved around the underlying factual dispute over whether the Court had offered only the single day of August 17, 2015 as a continuing date, or whether it had offered a block of three consecutive days beginning on that date. In the former case, the delay between August and December would be attributed to net delay; in the latter case, it would be deducted as defence delay.

52. At the time of the oral hearing, the s. 11(b) application record had not been made part of the record on appeal. The only material outside of the transcripts that was placed before the panel was a series of trial confirmation sheets, filed by the Yusuf Appellants, as respondents in the court below, which recorded that only a single date of August 17 had been offered[89]. On December 19, 2019, the parties received correspondence from the Court of Appeal, directing the Crown

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[87] AR, Vol. I, Part I, Tab 9, para. 80

[88] Allocation of the delay between December 7, 2015, when counsel for the Appellant Pauls was unavailable, and the ultimate continuation dates of January 11, 2016, turned on whether delay occasioned by co-accused defence delay was properly deducted as a discrete event. This issue is addressed below in ground 4.

[89] AR, Vol. I, Part II, Tab 15, Trial Confirmation Sheet, August 6, 2015

Appellant to file the s. 11(b) application record[90]. The Court's correspondence did not provide any further information. The Crown duly filed a two-volume supplementary appeal book on January 15, 2020 containing the application record filed in the Ontario Court of Justice[91]. On January 16, 2020, the parties received further correspondence from the court directing the Crown to file the notes of an officer that were made an exhibit during oral submissions on the application[92]. Again, the court provided no further information. The requested notes were subsequently filed by the Crown in a second supplementary appeal book[93]. The parties were not advised at any point, either during the oral hearing or in any of the subsequent correspondence, that the panel was contemplating rejecting the Crown's concession about the video disclosure issue. The Appellants, respondents in the court below, therefore made no submissions with respect to this aspect of the appeal.

B. THE COURT WAS OBLIGATED TO PROVIDE THE APPELLANTS WITH THE OPPORTUNITY TO MAKE FURTHER SUBMISSIONS

53. The manner in which the Court of Appeal dealt with the issue of the video disclosure request was prejudicial to the Appellants by denying them the opportunity to make meaningful submissions defending the propriety of the initial defence request. Precluding the Appellants from making submissions on this issue was particularly troublesome in light of the Court's characterization of defence counsel's request as "unnecessary" and "inappropriate". The Appellants do not suggest that the court below was not entitled to revisit the Crown's concession. An appellate court is, of course, not bound by Crown counsel's concession either at trial or on appeal.[94] Where a concession is made on appeal, however, and the appellate court has doubts about the propriety of the concession, the Appellants submit that the court is obligated to put the parties on notice, either during the course of the oral hearing, or subsequently, and provide the parties the opportunity to make submissions on the issue. As the British Columbia Court of Appeal has commented in the trial context, "trial fairness requires that a full and fair opportunity

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[90] AR, Vol. I, Part II, Tab 17, Correspondence from F. Debnath, Dec. 19, 2009
[91] AR, Vol. I, Part II, Tab 18, Correspondence from Crown Counsel
[92] AR, Vol. I, Part II, Tab 19, Correspondence from F. Debnath, January 16, 2020
[93] See AR, Vol. I, Part II, Tab 16
[94] *M. v. H.*, [1999] 2 S.C.R. 3 at para. 45; *Tran*, *supra* at para. 35; *R. v. J.E.K.*, 2016 ABCA 171 at para. 63; *R. v. Konstantakos*, 2014 ONCA 21 at para. 10; *R. v. Picard*, 2017 ONCA 692 at para. 102; *Regan*, *supra* at para. 75

be given to both parties to address or make submissions on a point of fact or law that may be troubling the court"[95]. Procedural fairness demands nothing less in the appellate context.

54. Two decisions of this Court in analogous contexts encapsulate the guiding principles that animate the above proposition. In *R. v. Mian*, this Court considered when and under what circumstances an appellate court could raise a new issue *ex proprio motu* on appeal. This Court defined a new issue as one that is "legally and factually distinct from the grounds of appeal as raised by the parties and cannot reasonably be said to stem from the issues as framed by the parties."[96] In raising a new issue, an appellate court must be alive to "any procedural prejudice to either party" and, where necessary, must safeguard "procedural fairness by adjusting the course of the appellate process."[97] This requires, at the least, that the appellate court "make the parties aware that it has discerned a potential issue and ensure that they are sufficiently informed so they may prepare and respond."[98] While the issue of the propriety of the adjournment request may not qualify as a new issue for the purposes of the *Mian* analysis, the appellate court is not entitled to simply throw procedural fairness out the window. *Mian* recognizes that "the principle of party presentation, under which courts 'rely on parties to frame the issues for decision'" is an integral element of the criminal justice system[99]. At times it is necessary for the court to depart from this principle by intervening, but the principle animating *Mian* is that whenever it does so, procedural fairness requires adequate notification to allow the parties to respond. A similar principle is at work in *R. v. Anthony-Cook*, where Justice Moldaver recognized that providing counsel an opportunity to address the court's concerns about a joint sentencing position is a matter of "fundamental fairness", one that reflects the "practical wisdom gained from the experience of our trial and appellate courts".[100]

55. Finally, considerations of judicial efficiency support the Appellants' position. If the parties cannot rely on notice as to when an appellate court is considering rejecting a party's concession, then the opposing party will inevitably feel obligated to fully argue the concession, in both written

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[95] *R. v. White*, 2019 BCCA 461 at para. 36. See also *R. v. Whincup*,2011 BCCA 520 at para. 11
[96] *R. v. Mian*, 2014 SCC 54 at para. 30 [citations omitted]
[97] *Ibid* at para. 52
[98] *Ibid* at para. 54
[99] *Ibid* at para. 39
[100] *R. v. Anthony-Cook*, 2016 SCC 43 at paras. 50, 58

and oral submissions, in anticipation of this possibility. Proceeding in this manner occupies valuable judicial resources, and creates unnecessary expense to litigants.

56. By failing to advise the Appellants that it was contemplating rejecting the Crown concession, the court below denied the Appellants the ability to fully participate in the appeal, thereby offending the principles of procedural fairness. The concession related to an important element of the appeal; indeed, the court's conclusion that the initial adjournment ought to have been laid at the feet of the defence was the prime finding driving the re-calculation of the net delay, and effectively decided the appeal in the Crown's favour. In the circumstances, the Appellants take the position that this error warrants this Court setting aside the Court of Appeal's decision lifting the stay and stepping into the shoes of the Court of Appeal in reviewing the trial judge's decision to stay the proceedings.

ISSUE 3: DID THE COURT OF APPEAL IMPROPERLY ENGAGE IN "MICRO-COUNTING"?

57. As far back as *R. v. Godin*, 2009 SCC 26, this Court has cautioned that, while the 11(b) analysis often requires minute examination of particular time periods, courts must not "lose sight of the forest for the trees while engaging in this detailed analysis."[101] In reframing the s. 11(b) analysis in *Jordan*, this Court expressed its disapproval of an approach where "[e]ach day of the proceedings from charge to trial is argued about, accounted for, and explained away." The reason is that "[t]his micro-counting is inefficient, relies on judicial 'guesstimations', and has been applied in a way that allows for tolerance of ever-increasing delay."[102]

58. Despite the language in *Jordan*, the Court of Appeal exhibited no reluctance about engaging in micro-counting in this case, assessing the delay on an almost hour-by-hour basis. On September 8, 2016, for instance, court did not start until 10:45 a.m. because the complainant was late. The Court of Appeal characterized this as a discrete event warranting a deduction of one quarter day from the net delay. Similarly, the Court deducted two and one quarter days from the net delay for the period of April 24-26, 2017, due to the absence of a witness, despite the fact that the witness' absence realistically did not meaningfully delay the trial in any fashion. The parties had already booked the dates in question and would still have had to attend on a later date to complete submissions. There is no basis on the record to find that had the witness attended at the

[101] *R. v. Godin*, 2009 SCC 26 at para. 18; *R. v. Vassell*, 2016 SCC 26 at para. 3.
[102] *Jordan*, *supra* at para. 37

earliest date, the trial could have been completed earlier than June 2, 2017. Conveniently, the net delay fell exactly one-half day below the threshold for the Yusuf Appellants.

59. By engaging in this hour-by-hour assessment, the Court of Appeal manifestly lost sight of the forest for the trees. The trial itself required a little over seven total days of court time to complete[103]. Analyzing the delay from this perspective, a global assessment of the case establishes that evidence would not have completed before the February dates, even had there been no interpreter issues, and the Appellant Pauls had not fallen ill. The August 2015 dates were lost due to the video disclosure request. Seven days of court time would therefore have required until the end of the day on September 9, 2016 at the very least, even if the court utilized its full sitting time during the January, June and September dates. Because the court prioritized the sentencing on the afternoon of September 9, 2016, the case would necessarily have needed the February 2017 dates to finish. By focusing excessively on analyzing each court day hour-by-hour in order to ferret out discrete circumstances, the Court of Appeal lost sight of the fact that the delay until at least February 2017 was largely a result of the time requirements of the case as prosecuted by the Crown. As Justice Paciocco (as he then was) has recognized, events occurring during the trial are only relevant to the 11(b) analysis to the extent that they affect the time the trial requires: "Put more simply, there is a causation requirement. Since the inquiry is into delay, discrete events, or legal or factual complexity, are not material unless they are responsible for the problematic delay."[104]

60. It is difficult to reconcile this Court's disapproval of "micro-counting" with an approach that divides and allocates delay into quarter-day increments. If the Court of Appeal's approach were to prevail, it would render the s. 11(b) analysis absurd. Must courts hearing s. 11(b) applications in advance attempt to predict with precision just how many hours of each day the trial will occupy, and deduct the remainder? Minutely analyzing every hour of delay is exactly the sort of approach that tolerates and encourages complacency in the justice system. It is the reason why a trial described as a straightforward "press play" matter initially scheduled to be commenced and completed within approximately a year of the charges being laid, instead ended up stretching over the better part of two years. This case exemplifies why this Court has

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[103] See Appendix A – Breakdown of Trial Dates
[104] *R. v. J.M.*, 2017 ONCJ 4 at para. 149

repeatedly endorsed a purposive, rather than a mathematical, approach to analyzing claims under s. 11(b).

ISSUE 4: DID THE COURT OF APPEAL ERR IN ATTRIBUTING DELAY CAUSED BY THE APPELLANT PAULS TO THE YUSUF APPELLANTS?[105]

61. By declining to deduct delay caused by the Appellant Pauls from the "net delay" of the Yusuf Appellants, the trial judge correctly took an individualized approach towards assessing delay. The Court of Appeal overturned this decision, first deducting 2 months and 23 days on the basis of it being "communal defence delay" caused by the unavailability of Pauls' counsel, then deducting a further 2 months and 14 days after characterizing the delay caused by Pauls' illness as a discrete event. The Yusuf Appellants submit that the Court of Appeal erred in this approach.

A. INDIVIDUALIZED VS. COMMUNAL APPROACH TO DEFENCE DELAY

62. In *R. v. Vassell,* decided shortly before *Jordan*, this Court held that the delay caused by co-accused persons must be factored into the assessment of whether an accused's right to trial within a reasonable time is infringed. While acknowledging there would be inevitable delays when proceeding against multiple co-accused, the court simultaneously made it clear that the Crown is still "required to remain vigilant that its decision [to prosecute accused jointly] not compromise the s. 11(b) rights of the accused persons."[106] As Justice Watt put it in *R. v. Manasseri, "*A joint trial is not some magic wand the Crown can wave to make a co-accused's s. 11(b) rights disappear."[107] Moreover, in *R. v. Gopie*, the Ontario Court of Appeal held that, under the *Jordan* framework, "an individualized approach must be taken to the attribution of defence-caused delay in cases of jointly-charged accused", since "attributing… delay caused by the actions or inactions of a co-accused is inconsistent with the approach and language of Jordan."[108] This broad proposition was later narrowed in *R. v. Albinowski*, where the Ontario Court of Appeal

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[105] This ground of appeal is unique to the Yusuf Appellants

[106] *Vassell, supra*, at paras. 4-6

[107] *R. v. Manasseri*, 2016 ONCA 703 at para. 373

[108] *R. v. Gopie*, 2017 ONCA 728 at para. 128, 136

held that an individualized approach may not be appropriate where jointly-charged accused proceed "as a collective" directly causing scheduling challenges.[109]

63. It is submitted that the Court of Appeal erred in two ways by applying *Albinowski*. First, attributing collective responsibility for delay is inconsistent with the individualized approach required by *Jordan* and *Vassell*. The individualized approach taken in *Gopie* should be adopted. Otherwise the Crown would be relieved of its duty to consider each accused's s.11(b) rights. With this approach, delay arising from one counsel's unavailability will only be deducted from the "net delay" of another co-accused where three conditions are met: the others truly acquiesce to that delay, the court demonstrates the scheduling flexibility required by Jordan, and the conduct of the Crown did not contribute to the delays. In *Albinowski* all three conditions were present.[110]

64. Second, even if *Albinowski* is not inconsistent with *Jordan* and *Vassell*, the Court of Appeal erred in its application to the present case because it is factually distinguishable. The evidentiary record establishes that the circumstances for the Yusuf Appellants were vastly different than for the co-accused in *Albinowski*. First, the Yusuf Appellants did not present a joint front or proceed as a "collective" with Pauls. On January 14, 2016, they raised the issue of severance (due to the unavailability of Pauls' counsel) and on June 24, 2016, they opposed Pauls' adjournment and unsuccessfully sought severance.[111] Second, when the trial and continuation dates were set, counsel for the Yusuf Appellants advised they had earlier availability and that delay was an issue, and in order to prevent further delay, counsel for Jamis Yusuf sent another lawyer from his office during the trial when he could not attend. These are hardly the actions of co-accused who merely acquiesced to the delay. Third, the court did not demonstrate the same

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[109] *Albinowski, supra* at para. 37. See also *R. v. Brissett*, 2019 ONCA 11 at para. 15 and *R. v. Potter; R. v. Colpitts*, 2020 NSCA 9 at para. 362

[110] A careful read of *Albinowski* shows that the delay was not ultimately deducted because the co-accused proceeded as a "collective", but, more fundamentally, because of the factual circumstances of that case which included the "court demonstrat[ing] the requisite scheduling flexibility demanded by *Jordan*" by offering seven dates within a 2.75-month period for the judicial pre-trials and eight sets of dates for the preliminary inquiry over a period of eight months (see paras. 42 and 46). The Crown in *Albinowski* did not contribute to any of the delay.

[111] AR, Vol. III, Part V, Tab 36, January 14, 2016, pp. 92, 94; *Ibid*, Tab 39, June 24, 2016, pp. 7-12, 16-17

scheduling flexibility that was present in *Albinowski*. For instances, when trial dates were set on November 25, 2014, there was only a single set of dates offered prior to the dates selected.[112] As this Court explained in *Godin* "scheduling requires reasonable availability and reasonable cooperation; it does not, for s. 11 (b) purposes, require defence counsel to hold themselves in a state of perpetual availability."[113] Fourth, in contrast to *Albinowski*, the Crown was responsible for causing delay which, as found by the trial judge, occurred as result of the Crown's "inaction … relating to the defective video" and "the grossly inaccurate time estimate".[114]

65. Beyond the errors associated with applying *Albinowski*, the Court of Appeal also erred in relying on the fact that the Yusuf Appellants were on separate informations from Pauls when the trial dates were set (and when the trial began) to support its finding that they effectively acquiesced to the delay caused by the unavailability of Pauls' counsel.[115] Respectfully, this fundamentally misunderstands the situation that the Yusuf Appellants were in. They initially scheduled a judicial pre-trial independently from Pauls, because the matters were on separate Informations. Later, Pauls was remanded to the same date so that the matters would be married up because the Crown intended to lay a new information and proceed jointly.[116] This is why the joint trial was scheduled following the judicial pre-trial. At that time, the Crown stated that he didn't "intend to bring the three accused back, or their counsel back, to respond to that Information" and that he was "simply going to have it present in court on the date of the trial".[117] Once this occurred, the Yusuf Appellants were without legal recourse to oppose the Crown's intention to exercise its right to proceed jointly—it is well established that the Crown has a wide discretion to decide whether it will proceed against co-defendants individually or jointly.[118] This was the Crown's call to make, as bad faith (to proceed jointly) clearly could not be shown. A severance

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[112] In addition, when the continuation dates were scheduled on August 6, 2015, there were only three sets of dates offered prior to the January 2016 dates which were selected.

[113] *Godin, supra*, at para. 23

[114] AR, Vol. I, Part I, Tab 8, s. 11(b) Decision, at para. 84

[115] This issue was not raised by the Crown at the Court of Appeal, nor did the Court of Appeal raise this issue in oral argument with counsel. In such circumstances, if it is necessary to do so, the Yusuf Appellants also rely on the arguments previously set out with respect to Issue 2.

[116] AR, Vol. II, Part V, Tab 30, October 28, 2014, at pp. 1-3

[117] AR, Vol. II, Part V, Tab 31, November 25, 2014, at pp. 3-4

[118] *R. v. Last*, [2009] 3 S.C.R. 146 at para. 1

application was not available at that stage, as jurisdiction to order severance rests solely with the trial judge.[119] This is a far cry from what the Court of Appeal described as the Yusuf Appellants "agree[ing]" to scheduling dates and "accepting" that their trials should proceed jointly. Given the Crown's comments when the trial was scheduled, it would be contrary to *Jordan* and fundamentally unfair for the Crown to benefit from its own decision to join the matters by then deducting the delay to the Yusuf Appellants that resulted from that decision.

B. DELAY CAUSED BY THE APPELLANT PAULS' ILLNESS

66. It is also submitted that the Court of Appeal erred by, without any analysis, overturning the trial judge and deducting the delay from June 24 to September 8, 2016, by characterizing this as a discrete event for the Yusuf Appellants caused by Pauls' illness. To qualify as an exceptional circumstance, even if a discrete event is reasonably unforeseen or reasonably unavoidable, the Crown and the court still have a duty to mitigate the delay caused by it.[120] Here, there was no evidence that the Crown or the system took any steps at all to mitigate the delay and prioritize this case after learning of Pauls' illness. In particular, it does not appear that the court offered any dates prior to the September dates. It was therefore an error of law to deduct this 2 month and 14 day period from the "net delay" of the Yusuf Appellants on this basis.

PART IV – SUBMISSION REGARDING COSTS

67. The Appellants do not ask for costs, and request that no costs be awarded against them.

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[119] *R. v. Litchfield*, [1993] 4 S.C.R. 333
[120] *Jordan*, *supra* at para. 75

PART V – ORDER REQUESTED

68. The Appellants respectfully request that this Court grant the appeal and re-impose a stay of proceedings.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 24th day of August, 2020

Michael W. Lacy & Bryan Badali

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Counsel for the Appellant,
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PART VII – TABLE OF AUTHORITIES

CASES REFERENCED IN FACTUM	AT PARA.
R. v. Jordan, 2016 SCC 27	1, 4, 29, 30, 31, 38, 40, 46, 47, 57, 66
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R. v. K.G.K., 2020 SCC 7	1
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R. v. Last, [2009] 3 S.C.R. 146	65
R. v. Litchfield, [1993] 4 S.C.R. 333	65

APPENDIX A – BREAKDOWN OF TRIAL DATES

Court Date	Evidence Called	Court Time Used	Total Court Time
August 5, 2015	Examination-in-chief of Sliwa	¼ of a day	0.25 days
August 6, 2015	No evidence heard	0	0.25 days
January 11, 2016	Evidence of officers, Cross-examination of Sliwa	¾ of a day (until 3:30 p.m.)	1 days
January 12, 2016	Examination-in-chief of complainant	¼ of a day (approximately an hour)	1.25 days
January 14, 2016	Examination-in-chief of complainant	1 day	2.25 days
June 20, 2016	Examination-in-chief of complainant	¾ of a day (remainder lost due to interpreter issue)	3 days
June 24, 2016	No evidence	0 days	3 days
September 8, 2016	Examination-in-chief of complainant (until 3:00 p.m.); cross-examination of complainant	1 day	4 days
September 9, 2016	Cross-examination of complainant (until 1:00 p.m.)	½ day	4.5 days
February 21, 2017	Cross-examination of complainant (until 3:30 p.m.); examination-in-chief of Jamal Yusuf	1 day	5.5 days
February 22, 2017	Continued examination-in-chief of Jamal Yusuf; Cross-examination of Jamal Yusuf	1 day	6.5 days
April 24, 2017	Continued cross-examination of Jamal Yusuf	¼ day	6.75 days
April 25, 2017	No evidence	0 days	6.75 days
April 26, 2017	Evidence of Gora	¼ day	7 days
June 2, 2017	Submissions	¼ day	7 ¼ days

APPENDIX B – POSITIONS ON DELAY

Date	Event	Trial Judge Deduction from Net Delay	Court of Appeal Deduction from Net Delay	Delay Acknowledged by Appellant Pauls	Delay Acknowledged by Yusuf Appellants
June 17, 2015 – August 5, 2015	First date offered to beginning of trial	1 month 18 days (**Pauls**)	1 month 18 days (defence delay and discrete event)	1 month 18 days	0 days
August 6, 2015 – December 7, 2015	Adjournment of initial trial date to first block of three days offered for continuance	N/A	5 months 6 days (joint defence delay)	0 days	0 days
December 7, 2015 - January 11, 2016	Delay due to unavailability of Pauls' counsel	1 month 4 days (**Pauls**)		1 month 4 days	0 days
January 11 – 14, 2016	First continuance – completion of Sliwa, examination-in-chief of complainant	1.5 days	1.5 days	0 days	0 days
January 14, 2016 – June 20, 2016	Delay between first and second continuance	3 months (joint)	3 months	3 months	3 months
June 20, 2016 – June 24, 2016	Second continuance – continued examination-in-chief and Pauls' sickness	N/A	0.5 days	0 days	0 days
June 24, 2016 – September 8, 2016	Delay between second and third continuance	2 months 15 days (**Pauls**)	2 months 14 days (defence delay and discrete event)	2 months 15 days	0 days
September 8, 2016	Third continuance –	N/A	0.25 days	0 days	0 days

Date	Event	Trial Judge Deduction from Net Delay	Court of Appeal Deduction from Net Delay	Delay Acknowledged by Appellant Pauls	Delay Acknowledged by Yusuf Appellants
	completion of exam-in-chief of complainant, beginning of cross-exam				
September 9, 2016 – February 21, 2017	Completion of cross-exam of complainant; delay between third and fourth continuance	3 months (**Pauls**)	2 months 21 days (**Yusuf**); 4 months 6 days (**Pauls**)	3 months	0 days
February 22, 2017 – April 24, 2017	Delay between fourth and fifth continuance	1 month (**Pauls**)	2 months 2 days	1 months	0 days
April 24-26, 2017	Completion of defence evidence	N/A	2.25 days	0 days	0 days
Total Deductions		**Pauls – *12 months 8.5 days* Yusuf – *3 months 1.5 days***	**Pauls – *18 months 20.5 days* Yusuf - *17 months 5.5 days***	**12 months 7 days**	**3 months**
NET DELAY[121]		**Pauls – 22 months 18 days Yusuf – 32 months 5 days**	**Pauls – 16 months 4.5 days Yusuf – 17 months 29.5 days**	**21 months 15 days**	**31 months**

[121] The net delay calculated by the trial judge and the Court of Appeal reflects an assumed end date of July 7, 2017, the date of conviction, as both cases were decided prior to *R. v. K.G.K.*, and the Court of Appeal did not weigh in on the issue. The Appellants' position on net delay takes into account that the period between June 2, 2017 and July 7, 2017 is no longer reflected in the net delay calculation. The total delay in Pauls' case was 33 months and 22 days, and in the Yusufs' case 34 months and 2 days.