



**IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR**

Citation: *R. v. Nofall*, 2018 NLCA 63

Date: November 13, 2018

Docket Number: 201701H0099

BETWEEN:

CHARLES SHANNON NOFTALL

APPELLANT

AND:

HER MAJESTY THE QUEEN

RESPONDENT

Coram: Fry C.J.N.L., Welsh and Hoegg JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
General Division 201701G4105
2017 NLTD(G) 74; 2017 NLTD(G) 158

Appeal Heard: September 20, 2018

Judgment Rendered: November 13, 2018

Reasons for Judgment by: Welsh J.A.

Concurred in by: Fry C.J.N.L. and Hoegg J.A.

Counsel for the Appellant: Erin Breen

Counsel for the Respondent: Elaine Reid

Welsh J.A.:

[1] On June 30, 2017, Charles Nofall was convicted of conspiracy to traffic in cocaine and marihuana (2017 NLTD(G) 128). He was sentenced to three years imprisonment in relation to the cocaine offence and two years concurrent in relation to the marihuana offence (2017 NLTD(G) 185). Prior to trial, Mr. Nofall applied to have the charges stayed on the basis that his right to be tried within a reasonable time had been infringed contrary to section 11(b) of the *Canadian Charter of Rights and Freedoms*.

[2] The application under section 11(b) was dismissed at the first instance with the judge relying on the decision in *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631. After Mr. Nofall was convicted, but before he was sentenced, he applied for a reconsideration of the section 11(b) decision based on the subsequent Supreme Court of Canada decision in *R. v. Cody*, 2017 SCC 31, [2017] 1 S.C.R. 659.

[3] The judge who decided the first section 11(b) application, but who was not the trial judge, concluded that he had jurisdiction to hear the reconsideration application. Again, he dismissed Mr. Nofall's claim under section 11(b) of the *Charter*. Mr. Nofall appeals that decision.

BACKGROUND

[4] On March 11, 2013, Mr. Nofall was charged with conspiracy to traffic in cocaine and marihuana. He was charged jointly with three others on a single indictment. In the first application under section 11(b) of the *Charter*, the applications judge concluded that the time between laying the charges and the anticipated end of the trial was fifty-two months. From this number, the judge subtracted twenty-seven and one-half months, comprised of: (1) five months to take account of the complexity of disclosure; (2) five months for the time taken for an abuse of process application brought by the defence, which was subsequently withdrawn, but which delayed the setting of trial dates for five months; and (3) seventeen and one-half months consequent upon a disclosure application arising from a serious incident response team investigation involving the conduct of Royal Newfoundland Constabulary officers in relation to their dealings with confidential informants (the "SIRT disclosure application").

[5] The calculation resulted in a total delay amounting to twenty-four and one-half months, which is well below the thirty month presumptive ceiling

established in the *Jordan* decision. The section 11(b) application having been dismissed, the trial proceeded before a different judge on the basis of an agreed statement of facts, the expert opinion of a police officer, and cell phone and intercepted private communications records.

[6] Following release of the decision in *R. v. Cody*, Mr. Nofall sought a reconsideration of the first decision dismissing his application under section 11(b) of the *Charter*. In the reconsideration decision, the applications judge confirmed his conclusion that Mr. Nofall's right under section 11(b) had not been infringed. However, he made some alterations to how the various delays were dealt with and concluded that the delay did, in fact, exceed the presumptive ceiling established in *Jordan* (reconsideration decision, 2017 NLTD(G) 158):

[65] Following reconsideration I made the following changes:

1. Five months for complex disclosure should be reversed, raising the delay to 29.5 months.
2. The time required to obtain a hearing date for the SIRT disclosure application was too long, and I would add in another 2 months, raising the delay to 31.5 months.

[66] This means that the delay is one and a half months above the presumptive ceiling of 30 months set by the *Jordan* decision. My analysis of the final factors has concluded that based on the complexity of the case, the general conduct of the Crown in managing the case, and the balancing of the prejudice to [Mr. Nofall] with the seriousness of the offences, the delay over the ceiling was justified.

[7] For purposes of this appeal, the Crown concedes that, on a quantitative basis, five months for the complexity of disclosure and five months for the abuse of process application brought by the defence should not have been deducted from the total delay. The Crown submits that the only period of delay that should be deducted from the fifty-two month total is seventeen and one-half months caused by the SIRT disclosure application. The resulting delay would be thirty-four and one-half months, which exceeds the thirty month presumptive ceiling established in the *Jordan* decision.

ISSUES

[8] The issues under appeal are: (1) whether the applications judge had jurisdiction to reconsider his initial decision under section 11(b) of the *Charter*; and (2) whether the applications judge erred in concluding that Mr. Nofall's right to trial within a reasonable time had not been infringed. In considering the

second issue, the appeal turns on deduction of all or part of the delay attributed to the SIRT disclosure application as a discrete event and application of the transitional exceptional circumstance.

ANALYSIS

Jurisdiction to Reconsider a Decision Prior to Sentencing

[9] The longstanding common law principle regarding reconsideration of a decision of a judge sitting without a jury is set out in *R. v. Head*, [1986] 2 S.C.R. 684, at page 698:

It is generally accepted that a trial judge sitting without a jury is not *functus officio* until he has finally disposed of the case. Where the accused is acquitted the trial judge will have exhausted his jurisdiction when the accused is discharged and the trial judge cannot then reopen the case. Following a finding of guilt, however, the judge's duties are not spent until after a sentence is imposed. The trial judge can, in exceptional circumstances and before the imposition of the sentence, reopen the case to permit the accused to tender further evidence. ...

I note, in passing, that special considerations apply where there is a jury. See, for example: *R. v. Burke*, 2002 SCC 55, [2002] 2 S.C.R. 857.

[10] In this case, the decision in *Cody* was released after Mr. Noftall had been convicted but before he was sentenced. Accordingly, the Court retained jurisdiction for purposes of a reconsideration. Two questions arise: first, is this an exceptional circumstance warranting reopening the case; and, second, assuming an affirmative answer to the first question, which judge had jurisdiction over the reconsideration?

[11] As to the first question, this was an exceptional circumstance for which reconsideration was available and appropriate. The applications judge had originally applied the approach taken by this Court in *Cody*, which was subsequently reversed by the Supreme Court of Canada. No new evidence was required for the reconsideration. Applying the principles discussed by the Supreme Court of Canada in *Cody* significantly affected the result. That is, prior to reconsideration, the judge concluded that the delay fell well below the presumptive ceiling set out in *Jordan*. After reconsideration, the delay was deemed to exceed the ceiling, placing the burden on the Crown to establish exceptional circumstances.

[12] Consideration of the second question arises in this case because it was not the trial judge who decided the section 11(b) *Charter* application. However, the

Criminal Code does not require that all pre-trial applications be heard by the trial judge. An application under section 11(b) is a discrete issue which would not involve the merits of the case. Accordingly, it would be expected that the judge hearing such an application would not be called upon to make a decision that would interfere with the jurisdiction and decision-making authority of the judge hearing the trial. An application under section 11(b) would simply determine whether the trial will proceed or be stayed. Of course, if as a result of a section 11(b) application, there is reason to conclude that the judge has become seized of the matter, then that judge would be required to continue with the trial. In addition, I note that, in the absence of special circumstances, a reconsideration should be heard by the judge who made the initial decision. Otherwise, the reconsideration may be construed as an appeal.

[13] In the circumstances of this case, I am satisfied that, prior to the imposition of sentence, it was open to Mr. Noftall to seek a reconsideration of whether his right to be tried within a reasonable time had been infringed. The applications judge's decision, at first instance and on reconsideration, did not result in his becoming seized of the matter.

[14] Accordingly, I am satisfied that the applications judge in these circumstances had jurisdiction to reconsider the section 11(b) *Charter* application and that the reconsideration was properly heard by the judge who made the initial determination on the application.

Trial Within a Reasonable Time - the Law

[15] The *Jordan* framework for analyzing delay for purposes of an application under section 11(b) of the *Charter* is summarized in the *Cody* decision. The analysis begins with a "presumptive ceiling", that is, a "ceiling on the time it should take to bring an accused person to trial: 18 months for cases going to trial in the provincial court, and 30 months for cases going to trial in the superior court" (*Jordan*, at paragraph 5).

[16] The first step in the analysis is to calculate "the total delay from the charge to the actual or anticipated end of trial" (*Cody*, at paragraph 21). The second step is to deduct from the total delay any delay attributable to the defence; that is, delay that is waived by the defence or delay that is caused solely or directly by the conduct of the defence and "flows from defence action that is illegitimate inasmuch as it is not taken to respond to the charges" (*Cody*, at paragraph 30), or is designed to cause delay or "if it exhibits marked inefficiency or marked indifference toward delay" (*Cody*, at paragraph 32).

[17] Where the resulting delay exceeds the ceiling, the delay is presumptively unreasonable. The Crown may rebut the presumption by establishing “exceptional circumstances”. In addition, where the charge pre-dates the decision in *Jordan*, if, applying the ceiling in *Jordan*, the delay is presumptively unreasonable and the presumption is not rebutted by exceptional circumstances, “the Crown may nevertheless demonstrate that the transitional exceptional circumstance justifies the delay (*Jordan*, at paras. 95-96)” (*Cody*, at paragraph 25).

[18] Exceptional circumstances are those that “lie outside the Crown’s control in the sense that (1) they are reasonably unforeseen or reasonably unavoidable, and (2) Crown counsel cannot reasonably remedy the delays emanating from those circumstances once they arise” (*Cody*, at paragraph 45). The Court explained:

[46] Exceptional circumstances generally fall into two categories: discrete events and particularly complex cases (*Jordan*, at para. 71). In addition, transitional considerations may be taken into account as a third form of exceptional circumstances where, as here, the case was already in the system when *Jordan* was decided (*Jordan*, at paras. 94-98).

...

[48] ...The delay caused by discrete exceptional events or circumstances that are reasonably unforeseeable or unavoidable is deducted to the extent it could not be reasonably mitigated by the Crown and the justice system (*Jordan*, at paras. 73 and 75).

(Emphasis added.)

[19] For example, in *Cody*, the Court deducted only a portion of delay due to the *McNeil* disclosure, which had been characterized as a discrete event:

[55] That said, we would not deduct the entire five months for this event. Two months, specifically the time it took for the Crown and defence to be prepared to proceed (until late June 2013), should be deducted. However, the court was unable to accommodate them until September – that portion of delay was therefore a product of systemic limitations in the court system and not of the discrete event (*Jordan*, at para. 81) and therefore those months should not be deducted. ...

(Emphasis added.)

[20] Finally, it is not necessary that steps taken by the Crown were successful in remediating an error or minimizing delay; it is necessary to show only that reasonable steps were taken in an attempt to avoid delay.

[21] Where delay resulting from a discrete event or the complexity of the case does not reduce the delay below the presumptive ceiling, and if the charge was brought prior to the release of *Jordan*, it is necessary to consider whether the transitional exceptional circumstance applies. The analysis is qualitative, not quantitative in nature. Under the law prior to *Jordan*, the focus of a section 11(b) analysis was on prejudice to the accused and seriousness of the offence. In recognizing the parties' reasonable reliance on the law in place at the time of the charge, the Court in *Cody* explained:

[68] ... Put another way, the Crown may show that it cannot be faulted for failing to take further steps, because it would have understood the delay to be reasonable given its expectations prior to *Jordan* and the way delay and the other factors such as the seriousness of the offence and prejudice would have been assessed under *Morin* [[1992] 1 S.C.R. 771].

...

[71] When considering the transitional exceptional circumstance, trial judges should be mindful of what portion of the proceedings took place before or after *Jordan* was released. For aspects of the case that pre-dated *Jordan*, the focus should be on reliance on factors that were relevant under the *Morin* framework, including the seriousness of the offence and prejudice. For delay that accrues after *Jordan* was released, the focus should instead be on the extent to which the parties and the courts had sufficient time to adapt (*Jordan*, at para. 96).

Application of the Law

The Discrete Event – the SIRT Disclosure Application

[22] In this case, the charges were laid on March 11, 2013. The SIRT disclosure application was made on January 18, 2016, the day the trial was to commence. On June 6, 2016, the SIRT application was set to be heard on November 24, 2016 and a trial date was set for June 2017. In the first section 11(b) decision, the judge explained (2017 NLTD(G) 74):

[28] On the day set for the beginning of the trial in January 2016, counsel raised an issue that was in the news media in the previous few days. It appeared the police were being investigated for inappropriate dealings with confidential informants. Defence wished to file an application seeking disclosure of the details of the investigation and whether any of the informants were involved in this case. The trial was postponed,

and the Crown claims delay of 17.5 months as a result ought to be credited against the total.

...

[37] The SIRT investigation was a surprise to all concerned. Neither the Crown nor the Defence had any advance notice of this development. It could have been completely irrelevant to this matter, except for the fact that the Defence raised the possibility of complicity of the confidential informants in this trial. But both the Crown and the Court, on January 18, 2016, agreed that this was a matter that should be considered further.

...

[41] ... The investigation by SIRT was completely unforeseen by both the Crown and Defence, and arose on the eve of the date set for trial. It was outside the ambit of the Crown's control, and was therefore completely unavoidable. Since the Defence had a plausible argument that this matter had to be dealt with before proceeding with the trial, it could not be remedied by any action by the Crown.

(Emphasis added.)

[23] The SIRT related application was heard by a different applications judge on November 24, 2016, December 20, 2016 and January 13, 2017, with an oral decision on January 13, 2017 dismissing the application. The convictions were entered on June 30, 2017.

[24] The decision in *Jordan* was released on July 3, 2016. Accordingly, forty months of the total delay occurred before the release of the *Jordan* decision and twelve months after. The SIRT related application was initiated almost six months before the *Jordan* decision was released, and the November 24, 2016 date for the hearing was set on June 6, 2016, again preceding the *Jordan* decision by approximately one month.

[25] In the reconsideration decision, the applications judge referenced the discussion in *Cody* regarding characterization of delay related to a discrete event and, in particular, whether the entire delay or only a portion should be deducted from the total delay. While this issue had been addressed in *Jordan*, the Court elaborated on the analysis in *Cody*. With respect to the delay allocated to the SIRT application, the judge concluded:

[31] As for the remainder of the time, there were three distinct periods of delay which must be considered. The first is the time between raising the issue, and when

[Mr. Nofall] was ready for a hearing. That took from January to June 2016, or about five months. [Mr. Nofall] acknowledges that this period should be deducted.

[32] The second is the time it took to schedule a one day hearing for the Application. On June 6, 2016, the Court set November 24, 2016 for the hearing. That was a period of about 5.5 months. I accept that this is somewhat longer than was reasonable for the scheduling of a one day matter. I am prepared to consider that two months of that period should be deducted. The justice system should have been prepared to mitigate this portion of the delay at least to that extent.

[33] The third is the time required to set the matter for trial. Once the date for hearing the SIRT disclosure application was set, there was realistic ability to set a new trial date. ...

(Emphasis added.)

[26] When the applications judge reduced the deduction from the total delay by two months, I accept that he was in the best position to assess approximately how quickly a short one or two day application could or should be set down for hearing. Given the judge's familiarity with processes and scheduling in the court appealed from, that decision is owed a high level of deference on appeal. I would compare it to the deference referenced in *Cody*, at paragraph 31, regarding the first instance judge's assessment of defence conduct which that judge is uniquely positioned to determine.

[27] In this case, the Crown relies particularly on the decision in *R. v. McManus*, 2017 ONCA 188. I begin by noting that that decision preceded the decision in *Cody*. However, while the comments in *Cody* expand upon and provide additional guidance, the essential principles regarding discrete events were set out in *Jordan*.

[28] In *McManus*, the Court deducted the entire delay occasioned by the discrete event, commenting that the Crown could not have reasonably remedied or mitigated the delay. The Court did not consider whether a portion, rather than the whole, of the delay should be deducted. Accordingly, I would distinguish *McManus* from the case before this Court in which the applications judge gave reasons for deducting from the total delay only a portion of the delay related to the discrete event.

[29] As discussed above, the applications judge's decision to reduce the deduction for the discrete event is owed deference. That said, a factor not referenced by the judge is the fact that, when the date was set for hearing the application, the *Jordan* decision had not been released and the parties were

reasonably relying on the law as it had existed under *Morin*. I note, in passing, that the SIRT application was, in fact, heard on three dates (see paragraph 23, above). In the circumstances, I would accept the judge's decision to reduce the deduction for delay related to the SIRT application by two months but would factor it into the assessment under the transitional exceptional circumstance.

[30] To summarize, accepting the concession by the Crown regarding the improper deduction of ten months (paragraph 7, above), and the decision of the applications judge reducing the deduction related to the SIRT application to fifteen and one-half months, the total delay amounts to thirty-six and one-half months. This exceeds the presumptive ceiling and triggers a consideration of the complexity of the case and the transitional exceptional circumstance. That analysis was undertaken by the applications judge, but on the basis of a delay of thirty-one and one-half months.

[31] Before proceeding with the analysis, it should be noted that a delay of five months, not addressed by the applications judge, arose on the appeal as a result of the positions taken by the parties at the reconsideration hearing and on appeal.

[32] In the reconsideration decision, the judge set out the issues raised by Mr. Noftall. These included the five months deducted for complexity of the disclosure and the seventeen and one-half months for the SIRT application. The issues on reconsideration did not include the five month deduction the judge made in his initial decision related to the abuse of process application brought by the defence. On appeal, Crown counsel advised this Court that the Crown was conceding that these two five-month delays should not have been deducted from the total delay for purposes of determining whether the delay exceeded the presumptive ceiling. The Crown submits that only seventeen and one-half months attributed to the SIRT application should have been deducted for that purpose. In the circumstances, I would accept the Crown's concessions as setting the parameters of the appeal.

Complexity of the Case

[33] The applications judge recognized that the Crown's decision to proceed jointly against the accused increased the complexity of the case. Mr. Noftall submits that proceeding in this way resulted in delay occasioned by his co-accused, for which he should not be penalized.

[34] The Crown conceded that, from a quantitative perspective, the ten months attributed to the complexity of disclosure and the abuse of process application

should not have been deducted from the total delay for purposes of determining whether the delay exceeded the presumptive ceiling. However, the Crown submits that the delay related to the abuse of process application is relevant from a qualitative perspective relative to assessing the complexity of the case and applying the transitional exceptional circumstance.

[35] Crown counsel points out that Mr. Nofall was unsure if he would be joining in Mr. Noseworthy's abuse of process application. Initially, his counsel requested time to consider her position and possibly make submissions. At no point did Mr. Nofall take a position. Ultimately, Mr. Noseworthy withdrew the application. The five month delay was not deducted from the total delay for purposes of determining whether the presumptive ceiling was exceeded, but it may be considered in assessing whether, in all the circumstances, the delay was unreasonable, resulting in an infringement of Mr. Nofall's right under section 11(b) of the *Charter*.

[36] In the reconsideration decision, the applications judge discussed complexities that result when conspiracy charges are laid against multiple accuseds:

[45] It was the Crown's decision to include four Accused on the indictment. If the four had been charged individually, it is likely that Mr. Nofall's trial could have been dealt with more efficiently. However, the courts are reluctant to second-guess the Crown in its prosecutorial decisions. This issue was raised and dealt with in my previous decision. After a review of the considerations which may arise to justify severance, I noted, at paragraph 51 in 2017 NLTD(G) 74 (N.L.T.D.):

The Crown has control over the proceeding and it has the right to proceed in the most expeditious manner as it sees fit. Just because an obstacle arises does not justify severance. Justice does demand efficiencies and joint trials. The problems which arise with severance may make for a less efficient dealing with the merits. The challenges of duplicate trials and applications, and the possibility of conflicting results, make for a strong argument to proceed jointly.

[46] In raising this issue the last time, the Defence more or less acknowledged that the case was complex. In addition, in agreeing that complexity was a factor, the argument was made that the Crown did not have a reasonable plan in response. I rejected that argument then, and at paragraph 54 noted:

I am not sure where the Crown in this case could have done anything different to streamline the case. There were significant complexities in both the investigation and the fact of multiple Accused. Further difficulties arose as each Accused sometimes pursued differing trial strategies. From the transcripts of each appearance filed, it is apparent that the Crown, as early as

2013 while the matter was still in Provincial Court, expressed concern about expediting the process. I find no conduct on the part of the Crown which led to delay. On the contrary, I find the Crown handled a difficult case in a reasonable fashion.

[47] The factors noted lead me to the view that even on a qualitative assessment, this case has complex characteristics which justify a delay marginally over the presumptive ceiling. The unforeseen discrete event of the SIRT investigation was unusual in this case, and was one additional factor increasing the complexity.

[48] Sometimes cases are complex, either from the beginning, in the nature of the investigation, the charges and the accused, or over time, as matters arise which increase the complexity. This case had both. I am satisfied that the circumstances of this case were sufficiently complex that would justify exceeding the ceiling.

[37] The judge did not specify the extent to which the complexity inherent in these circumstances would justify exceeding the presumptive ceiling. Rather, he proceeded to a discussion of the transitional exceptional circumstance.

Transitional Exceptional Circumstance

[38] In this case, forty of the total fifty-two months of delay occurred prior to the release of the decision in *Jordan*. In the reconsideration decision, the applications judge was satisfied that, although the date for the SIRT application was set under the *Morin* framework, the hearing should have been rescheduled to an earlier date in light of the requirement to adjust to the new legal framework set out in *Jordan*.

[39] However, the judge also recognized that, prior to the release of *Jordan*, the parties could reasonably rely on the law set out in *Morin*. The application of the *Morin* framework for transitional cases is discussed in *Jordan*:

[96] ... This transitional exceptional circumstance will apply when the Crown satisfies the court that the time the case has taken is justified based on the parties' reasonable reliance on the law as it previously existed. This requires a contextual assessment, sensitive to the manner in which the previous framework was applied, and the fact that the parties' behaviour cannot be judged strictly, against a standard of which they had no notice. For example, prejudice and the seriousness of the offence often played a decisive role in whether delay was unreasonable under the previous framework. For cases currently in the system, these considerations can therefore inform whether the parties' reliance on the previous state of the law was reasonable. Of course, if the parties have had time following the release of this decision to correct their behaviour, and the system has had some time to adapt, the trial judge should take this into account.

...

[98] ... For example, if the delay in a simple case vastly exceeds the ceiling because of repeated mistakes or missteps by the Crown, the delay might be unreasonable even though the parties were operating under the previous framework. The analysis must always be contextual. ...

[40] In considering the effect of the extent to which the delay in this case exceeded the presumptive ceiling, it is particularly relevant that most of the delay occurred prior to the release of the *Jordan* decision. Accordingly, the context for the analysis under section 11(b) of the *Charter* must include the extent to which the parties, particularly the Crown, reasonably relied on the *Morin* framework which pre-dated *Jordan* and *Cody*. To this purpose the applications judge addressed the issues of prejudice to Mr. Nofall and seriousness of the offence as applied under the *Morin* framework.

[41] The judge was satisfied that the prejudice suffered by Mr. Nofall, which was personal in nature and related to his family and his occupation, resulted from the fact that he was charged with criminal offences, and that the prejudice was not attributable to the delay. This is a determination by the applications judge based on the evidence. There is no basis on which to conclude that the judge erred in this determination.

[42] Regarding the seriousness of the charge, the judge wrote in the reconsideration decision:

[60] ... The charges involved participation in a conspiracy to traffic in prohibited drugs. The investigation uncovered a long term and fairly extensive operation involving importing drugs from mainland Canada in the gas tanks of motor vehicles, and retrieving them through the use of [Mr. Nofall's] garage facilities. These are serious offences, for which [Mr. Nofall] is liable to a term in jail.

[43] The judge concluded that the delay above the presumptive ceiling was justified "based on the complexity of the case, the general conduct of the Crown in managing the case, and the balancing of the prejudice to [Mr. Nofall] with the seriousness of the offences" (reconsideration decision, at paragraph 68). In the circumstances, there is no basis on which to conclude that the judge erred in determining that a delay of thirty-one and one-half months would not infringe Mr. Nofall's right to be tried within a reasonable time under section 11(b) of the *Charter*.

[44] However, given the Crown's concession regarding the five month deduction for the abuse of process application, the delay amounts to thirty-six and one-half months. For purposes of the transitional exceptional circumstance, that delay "requires a contextual assessment, sensitive to the manner in which the previous framework was applied, and the fact that the parties' behaviour cannot be judged strictly, against a standard of which they had no notice" (*Jordan*, at paragraph 96). In this case, the context includes the Crown's reasonable reliance on the *Morin* framework during the majority of the delay and the complexity inherent in charges of conspiracy to traffic in drugs against multiple accuseds. The applications judge was satisfied that the Crown had acted diligently, attempting to reduce delay.

[45] In the result, applying the framework set out in *Jordan* and *Cody*, the above considerations, and the applications judge's analysis, I am satisfied that, in the context of this case, the Crown established the presence of exceptional circumstances, thereby rebutting the presumption that the thirty-six and one-half month delay was unreasonable because it exceeded the presumptive ceiling.

SUMMARY AND DISPOSITION

[46] In summary, the applications judge had jurisdiction in these circumstances to reconsider the section 11(b) *Charter* application. The reconsideration was properly heard by the judge who made the initial determination on the application.

[47] The delay to be deducted from the total delay to account for the SIRT application is fifteen and one-half months, leaving a total delay of thirty-six and one-half months. While that delay exceeds the presumptive ceiling of thirty months, the Crown established the presence of exceptional circumstances, rebutting the presumption that the delay was unreasonable because it exceeded the presumptive ceiling.

[48] The conclusion follows that Mr. Nofall's right under section 11(b) of the *Charter* to be tried within a reasonable time was not infringed. Accordingly, I would dismiss the appeal.

I Concur: _____

D. E. Fry C.J.N.L.

I Concur: _____

L. R. Hoegg J.A.