CITATION: *R. v. Douse*, 2022 ONSC 3117
COURT FILE NO.: CR-21-50000137
DATE: 20220524

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
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	)	
HER MAJESTY THE QUEEN	)	*K. Lockhart,* for the Crown
	)	
	)	
	)	*R. Handlarski and T. Lau,* for Mr. Douse
– and –	)	
	)	*D. Derstine and J. Cowley,* for Mr. Smith
	)	
	)	*Mr. Sitladeen,* unrepresented
ANDRAE DOUSE, MICHAEL SMITH and DANE SITLADEEN	)	
	)	
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	)	
	)	**HEARD:** March 20, 2022
	)	

RULING
(Severance Application)

SCHRECK J.:

[1] Blaine Grindley was shot to death on May 1, 2019. Following an investigation, the police obtained warrants for three individuals they suspected were responsible: Andrae Douse, Michael Smith and Dane Sitladeen. Mr. Douse turned himself on May 16, 2019 and Mr. Smith did so a few days later on May 20, 2019. Both were charged with first degree murder. Mr. Sitladeen did not turn himself in. Instead, he went to the United States.

[2] Mr. Douse and Mr. Smith retained counsel, had a preliminary inquiry and set a date for a trial in this court which is scheduled to begin on April 19, 2022 and end four weeks later, about 36 months after Mr. Douse and Mr. Smith were charged.

[3] In the meantime, Mr. Sitladeen was arrested for and later convicted of firearms offences in Minnesota and the Canadian authorities made attempts to have him returned to Canada. He was eventually ordered extradited on January 10, 2022 and arrived back in Canada on March 18, 2022.

[4] The Crown preferred an indictment against Mr. Sitladeen and joined him on the indictment charging Mr. Douse and Mr. Smith. Upon arriving in Canada, Mr. Sitladeen, who had not yet retained counsel, indicated that he was not prepared for a trial and would be seeking an adjournment, which the Crown consented to. Mr. Douse and Mr. Smith applied to be severed from Mr. Sitladeen so that their trial could proceed as scheduled. The Crown opposed the application.

[5] After reviewing the materials filed by counsel and hearing submissions, I made an order severing Mr. Sitladeen from the indictment, with reasons to follow. These are those reasons.

I. FACTS

A. Overview of the Allegations

[6] At about 1:00 p.m. on May 1, 2019, a black Honda Accord entered the parking lot of a housing complex on John Garland Boulevard in Toronto. Three men wearing face coverings and gloves exited the car and were seen on security video from various cameras in the area walking directly towards the townhouse where Blaine Grindley lived. The men were off-camera for about 50 seconds, after which they were seen running back the way they came to the Honda Accord. They got into it and it immediately drove away. A neighbour heard two gunshots at around this time and saw the three men coming out of the yard behind Mr. Grindley's house. Paramedics and police arrived soon after and found Mr. Grindley's body in the house. He had been shot once in the chest and died of his injuries.

[7] A few minutes before the Honda Accord arrived at the housing complex, it had stopped outside a dollar a store in a plaza a short distance from the housing complex. A man, later identified as and admitted to be Mr. Douse, got out and entered the store. He bought gloves and neck gaiters and then got back into the car, which left the plaza heading in the direction of the housing complex.

[8] It is the Crown theory that Mr. Smith and Mr. Sitladeen were two of the three men who went to Mr. Grindley's house (the third never having been identified) and that they went there to carry out a plan to murder him. The Crown alleges that Mr. Douse knowingly assisted in the plan by purchasing items which the men used to disguise themselves.

[9] The police later discovered that the Honda Accord had been rented from a car rental agency by a man who had agreed to rent it in exchange for drugs. In addition to the video evidence showing the three men going to and from the house and Mr. Douse purchasing the items at the dollar store, the Crown will rely on GPS and cell phone evidence to track the movements of the car and various cell phones which the police believe were being used by Mr. Smith and Mr. Sitladeen in an effort to show that they were in the car when it arrived at the housing complex. While the evidence against Mr. Douse is fairly discrete, there is significant overlap in the evidence against Mr. Smith and Mr. Sitladeen.

[10] The Crown will also rely on evidence showing an association between the three accused and the Honda Accord. There is no evidence of any relationship between any of the accused and Mr. Grindley or of any motive they may have had to harm him.

B. Chronology

(i) The Applicants' Proceedings

[11] As noted earlier, Mr. Grindley was allegedly murdered on May 1, 2019. Mr. Douse turned himself in and was charged on May 16, 2019. Mr. Smith did the same on May 20, 2019.

[12] The applicants retained counsel and obtained disclosure. A preliminary hearing was scheduled to begin on April 1, 2020, but was delayed because of the COVID-19 pandemic. The court offered new dates beginning on September 14, 2020, but Crown counsel was unavailable until November 23, 2020, so the preliminary inquiry was re-scheduled to that date.

[13] The preliminary inquiry began on November 24, 2020 and continued until December 15, 2020 when submissions were heard and the presiding judge reserved his decision. Both applicants applied unsuccessfully for bail.

[14] On January 26, 2021, the applicants were committed for trial. They had a judicial trial in this court in February 2021 and set dates for a four-week trial to begin on April 19, 2022.

[15] There was no evidence as to when the court could offer new dates if the trial was adjourned, although I can take judicial notice of the fact that there is currently a significant backlog due to jury trials having been suspended for several months because of the pandemic. If the trial is adjourned, counsel for Mr. Smith is not available until 2023.

(ii) Events Involving Mr. Sitladeen

[16] Mr. Sitladeen was arrested in Minneapolis, Minnesota on July 23, 2019 for aggravated robbery but released the following day before the Canadian authorities became aware of the arrest. When they learned of it, a provisional arrest warrant was issued on April 16, 2019.

[17] On January 10, 2021, Mr. Sitladeen was arrested for possession of a number of handguns and later arrested on the provisional warrant On May 27, 2021, Canada made a formal request for his extradition. The American authorities made a decision to prosecute Mr. Sitladeen prior to returning him to Canada.

[18] Mr. Sitladeen pleaded guilty to the American charges and on December 20, 2021 was sentenced to imprisonment for 78 months. He was ordered extradited on January 10, 2022 and a warrant for his surrender was issued on March 8, 2022. He arrived in Canada on March 17, 2022.

[19] The Crown obtained a direct indictment against Mr. Sitladeen on October 14, 2021, joining him on the indictment charging the applicants. Mr. Sitladeen appeared in this court on the indictment on March 21, 2022 and then on March 25, 2022.

[20] Mr. Sitladeen has not yet retained counsel. He advised the court that he was not prepared for a trial beginning on April 19, 2022 and made a request for an adjournment, to which the Crown consented. No party has suggested that Mr. Sitladeen should be forced to go to trial in April unrepresented.

II. ANALYSIS

A. Overview – Applicable Legal Principles

[21] The severance of accused is governed by s. 591(3)(*b*) of the *Criminal Code,* which provides as follows:

> 591. (3) The court may, where it is satisfied that the interests of justice so require, order
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> . . . .
>
> (*b*) where there is more than one accused or defendant, that one or more of them be tried separately on one or more of the counts.

[22] The term "interests of justice" was explained by Doherty J.A. in *R. v. Savoury* (2005), 200 C.C.C. (3d) 94 (Ont. C.A.), at para. 22:

> A trial judge may order severance of the trial of a co-accused only if satisfied that "the interests of justice so require": *Criminal Code*, s. 591(3). The interests of justice encompass those of the accused, the co-accused, and the community as represented by the prosecution. The trial judge must weigh these sometimes competing interests and will direct severance only if the accused seeking severance satisfies the trial judge that severance is required. To satisfy that burden, the accused must overcome the presumption that co-accused who are jointly charged and are said to have acted in concert, should be tried together.

See also *R. v. Last,* 2009 SCC 45, [2009] 3 S.C.R. 146, at para. 16.

[23] While the "interests of justice" encompass a variety of individual and societal interests, there are two competing interests which are at the forefront of this application: the societal interest in a joint trial and the applicants' interest in having a trial within a reasonable time.

B. The Societal Interest in a Joint Trial

[24] As noted in *Savoury,* there is a strong societal interest in having accused who are alleged to have acted in concert tried together and there is therefore a presumption that there will be a joint trial in such cases: *R. v. Chow*, 2005 SCC 24, [2005] 1 S.C.R. 384, at paras. 47-48; *R. v. Rojas*, 2008 SCC 56, [2008] 3 S.C.R. 111, at para. 26; *R. v. Crawford*, [1995] 1 S.C.R. 858, at para. 30; *R. v. Zvolensky*, 2017 ONCA 273, 352 C.C.C. (3d) 217, at para. 24. The reason for the presumption was explained in *R. v. Sarrazin* (2005), 75 O.R. (3d) 485 (C.A.), at para. 59:

> The law respecting severance under s. 591(3) of the *Criminal Code* in common enterprise/conspiracy cases is well established: unless it can be shown that a joint trial would result in an injustice to an accused, it is generally in the interests of justice that such persons be tried jointly. There are strong policy reasons for this principle: joint trials enhance the truth-finding exercise and preclude the possibility of inconsistent verdicts; they spare all those concerned, and ultimately the community, the expense (financial and emotional), inconvenience to witnesses, and institutional stress associated with multiple trials of the same issues.

[25] In this case, the applicants and Mr. Sitladeen are alleged to have acted in concert and there is therefore a presumption that they should be tried jointly.

C. The Right to a Trial Within a Reasonable Time

[26] Section 11(*b*) of the *Canadian Charter of Rights and Freedoms* guarantees the applicants a trial within a reasonable time. In the context of a trial in the Superior Court, that right has been interpreted to mean a trial within 30 months of being charged (after delay caused by the defence has been deducted) unless the Crown can justify any additional delay as being the result of exceptional circumstances that could not have been mitigated, such as the complexity of the case: *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631.

[27] This is not a s. 11(*b*) application and I do not have the full record that would usually accompany such an application. As a result, I can only draw general conclusions about the delay that has or is expected to occur in this case: *R. v. Fitzpatrick*, 2021 ONSC 647, at para. 9.

[28] Based on the information that I have been provided, it seems that the applicants' trial is scheduled to end 36 months after they were charged. About five and half months of delay (April 1, 2020 to September 14, 2020, when the court was available but the Crown was not) was due to the preliminary inquiry having to be rescheduled because of the pandemic. Based on this record, I conclude that the applicants are very near, if not over the *Jordan* ceiling. If Mr. Sitladeen is not severed, the applicants' trial will take place long after the 30-month period set out in *Jordan.*

D. Balancing the Interest in a Joint Trial Against the Right to a Trial Within a Reasonable Time

[29] It is clear from the foregoing that determining where the "interests of justice" lie requires a balancing of the public's interest in a joint trial on the one hand, and the applicants' right to a trial within a reasonable time on the other.

[30] Prior to *Jordan*, delay caused by a co-accused was considered to be neutral on a s. 11(*b*) analysis, although it has always been the law that the Crown's interest in a joint trial must be balanced against the right to a trial within a reasonable time: *R. v. Heaslip* (1983), 9 C.C.C. (3d) 480 (Ont. C.A.), at pp. 496-497; *R. v. Whylie* (2006), 207 C.C.C. (3d) 97 (Ont. C.A.), at para. 24; *R. v. Vassell*, 2016 SCC 26, [2016] 1 S.C.R. 625, at paras. 5-7.

[31] After *Jordan,* co-accused delay is no longer treated as neutral because doing so is usually inconsistent with the individualized approach that is now required: *R. v. Gopie,* 2017 ONCA 728, 140 O.R. (3d) 171, at para. 128. But that does not mean that the fact that there are multiple accused has no effect on a s. 11(*b*) analysis as it may be a factor in assessing the complexity of the case and whether that complexity justifies delay in excess of the ceiling: *Gopie,* at para. 169. As noted in *Jordan,* at para. 77, "[p]roceedings jointly against multiple co-accused, so long as it is in the interests of justice to do so, may also impact the complexity of the case." See also *R. v. Manasseri,* 2016 ONCA 703, 132 O.R. (3d) 401, at para. 311. The same point was made by Fairburn J. (as she then was) in *R. v. Ny,* 2016 ONSC 8031, 343 C.C.C. (3d) 512, at para. 47 (cited with approval in *Gopie,* at para. 170):

> [T]he concept of "reasonable time" within s. 11(*b*) may fluctuate depending on whether accused are standing alone or together. Provided it is in the interests of justice to proceed jointly, delay above the ceiling may reflect the realities of life in a joint trial and transform an otherwise unreasonable delay into a reasonable one.

[32] There are, however, limits to the extent to which actions by a co-accused can be used to justify delay in excess of the ceiling. As was stated in *Gopie,* at para. 171:

> There may come a time when the interests of justice are no longer served by proceeding jointly, including where s. 11(*b*) rights are in jeopardy. The Crown has an obligation to continually assess whether the decision to proceed jointly remains in the best interests of justice. One accused cannot be held "hostage" by his co-accused's actions or inactions (*Vassell,* at para. 7; and *Manasseri,* at para. 323).

As Watt J.A. put it in *Manasseri,* at para. 373, "[a] joint trial is not some magic wand the Crown can wave to make a co-accused's s. 11(*b*) rights disappear."

[33] Is this a case where the presence of multiple accused justifies delay that could well amount to a year over the 30-month ceiling? There are several reasons why I have concluded that this question must be answered in the negative.

E. Balancing in This Case

(i) Complexity

[34] First, this is not a case where the presence of a co-accused really affects the complexity of the proceedings. Ordinarily, the presence of a co-accused means that there may be additional legal and factual issues, or may mean that scheduling requires a co-ordination of the calendars of all counsel. However, this is not a complex case. There are no pre-trial motions and the evidence is fairly straightforward. It is a circumstantial case where the jury will have to determine what inferences can be drawn from the evidence, much of which is not in dispute and which would be the same regardless of whether Mr. Sitladeen is tried with the applicants.

[35] The delay that would result if the applicants are tried together with Mr. Sitladeen is not a result of the complexity of the case but, rather, a result of the fact that Mr. Sitladeen left the country and did not return until he was extradited. If this is an exceptional circumstance, it is more properly described as a "discrete event" rather than as a "particularly complex case": *Jordan*, at para. 71.

(ii) Mr. Sitladeen's Extradition as a Discrete Event and the Crown's Duty to Mitigate

[36] Of course, "discrete events" can also justify delay above the ceiling. However, once they occur, the Crown has a duty to mitigate the resulting delay, as was explained in *Jordan*, at para. 75:

> The period of delay caused by any discrete exceptional events must be subtracted from the total period of delay for the purpose of determining whether the ceiling has been exceeded. Of course, the Crown must always be prepared to mitigate the delay resulting from a discrete exceptional circumstance. So too must the justice system. Within reason, the Crown and the justice system should be capable of prioritizing cases that have faltered due to unforeseen events (see *R. v. Vassell*, 2016 SCC 26, [2016] 1 S.C.R. 625). Thus, any portion of the delay that the Crown and the system could reasonably have mitigated may not be subtracted (*i.e*. it may not be appropriate to subtract the entire period of delay occasioned by discrete exceptional events).

[37] The obvious way in which the delay occasioned by Mr. Sitladeen's extradition could be mitigated would be to sever him, but that of course begs the question of whether doing so is in the interests of justice. To answer that question, it is useful to look at cases in which delay caused by a co-accused rendered the overall delay unreasonable.

[38] One such case is *Vassell*, which was cited in *Jordan* as an example of when the Crown is required to take steps to mitigate delay. In that case, Moldaver J.A. stated (at paras. 6-7):

> In many cases, delay caused by proceeding against multiple co-accused must be accepted as a fact of life and must be considered in deciding what constitutes a reasonable time for trial. But here, it was clear from the outset that the delay caused by the various co-accused not only prevented the Crown's case from moving forward, it also prevented Mr. Vassell from proceeding expeditiously, as he wanted. Importantly, this is not a case where Mr. Vassell simply did not cause any of the delay; rather, it is one in which he took proactive steps throughout, from start to finish, to have his case tried as soon as possible. In this regard, his counsel reviewed disclosure promptly, pushed for a pre-trial conference or case management, worked with the Crown to streamline the issues at trial, agreed to admit an expert report, made the Crown and the court aware of s. 11(*b*) problems, and at all times sought early dates.

> *In these circumstances, I believe that a more proactive stance on the Crown's part was required. In fulfilling its obligation to bring all accused to trial within a reasonable time, the Crown cannot close its eyes to the circumstances of an accused who has done everything possible to move the matter along, only to be held hostage by his or her co-accused and the inability of the system to provide earlier dates*. That, unfortunately, is what occurred here. [Emphasis added].

In this case, as in *Vassell,* the applicants have caused no delay and have taken steps throughout the proceedings to have their trial proceed expeditiously.

[39] Another example is *Manasseri.* In that case, one accused, Kenny, who was initially charged only with assault causing bodily harm, was later charged with manslaughter and joined on an indictment with another accused, Manasseri, who, as Watt J.A. put it, "seemed to lack any appetite for an expeditious trial" (at para. 375). As in this case and as in *Vassell,* one accused who had tried to keep the proceedings moving was frustrated by the actions of a co-accused who clearly did not share that objective. In concluding that Kenny's s. 11(*b*) *Charter* rights had been violated, Watt J.A. stated (at para. 373):

> I do not for a moment suggest that the Crown was disentitled to proceed jointly against Manasseri and Kenny. *But what it was required to do, but failed to do as later events confirmed, was to remain vigilant that its decision not compromise Kenny's s. 11(b) rights. A joint trial is not some magic wand the Crown can wave to make a co-accused's s. 11(b) rights disappear*. The "right" to a joint trial only prevails to the extent that such a proceeding is in the interests of justice both pre and post-*Jordan*: *Vassell*, at para. 4; *Jordan*, at paras. 77 and 79. [Emphasis added].

[40] In *R. v. Topol* (2007), 160 C.R.R. (2d) 100 (Ont. S.C.J.), aff'd 2008 ONCA 113, 236 O.A.C. 1, a pre-*Jordan* case, the schedules of counsel for two co-accused caused a significant amount of delay for a third accused, who had been attempting to set an early trial date. In staying the proceedings against the third accused, Nordheimer J. (as he then was) stated (at paras. 53-54):

> In this case, the Crown consistently consented to delays in setting a trial date in order to accommodate the schedules of counsel for two of the other accused. There is no doubt that the court expects that all counsel will do their best to take into account the commitments of other counsel in determining when matters are to be heard. However, the Crown cannot prefer the interests of counsel for some accused to the prejudice of the rights of other accused. In this case, Mr. Topol made it clear from the outset that he wanted a trial at the earliest possible date. He never resiled from that position. Indeed, the transcripts are replete with instances of Mr. Topol asking for the earliest available trial date for his case. In those circumstances, the

> Crown had an equal obligation to consider the impact of delays on Mr. Topol as it did to consider the schedules of counsel for the other accused.
>
> Regardless of how one characterizes such delays, the delays caused by the unavailability of counsel for the other accused are delays that must be considered in determining whether the overall period of time to get the charges against Mr. Topol to trial is, or is not, reasonable. *As that time period lengthened, the Crown had the obligation to determine whether it either had to cease its practice of accommodating those counsel's schedules or it had to consider proceeding with Mr. Topol separately from those other accused*. [Emphasis added].

[41] The common feature in each of these cases is that one accused proactively sought to have his matter proceed expeditiously, only to have his efforts frustrated by one or more other accused who did not share that goal. As it was put in some of the case, one accused was held "hostage" by his co-accused's conduct: *Gopie,* at para. 171, *Manasseri,* at para. 291; *Ny,* at paras. 113, 116; *Fitzpatrick,* at paras. 17-18. These cases make it clear that when this occurs, the Crown is required to take a "proactive stance": *Vassell,* at para. 116; *Manasseri,* at paras. 375-377.

[42] In this case, the applicants have done everything they could to have the matter proceed expeditiously. Both turned themselves in once a warrant was issued, retained counsel and scheduled a preliminary inquiry. When the preliminary inquiry was delayed due to the pandemic, they were willing to accept the first dates on which the court was available. After committal, they quickly had a judicial pre-trial in this court and set trial dates. There is nothing in the record before me to suggest that they have caused any delay.

[43] In addition, this is not a case like *R. v. Millard*, 2017 ONSC 4030, at para. 51, where severance will not produce a significantly speedier trial. As things stand, the applicants are at the cusp of the 30-month period after which delay is deemed to be unreasonable. Absent a severance order, their trial will occur at least eight to 12 months later, or even more. The interest in a joint trial is not being weighed against a possible s. 11(*b*) violation but, rather, a certain one.

[44] The decisions reviewed above are all s. 11(*b*) decisions where the delay has already occurred and the court must consider what caused it and whether it could have been prevented. In this case, the delay has not yet occurred and the issue is whether steps should be taken to prevent it. In my view, they should, and if the Crown will not take a "proactive stance," then the court will.

(ii) Public Interest Factors

[45] The second reason I would grant severance is that the while there is clearly a public interest in a joint trial in this case, that interest is not as strong as in some other cases. I draw this conclusion for a number of reasons.

[46] First, while severing Mr. Sitladeen will obviously result in the expense and time required for a second trial, this trial is scheduled to take four weeks, which is relatively short for a murder trial. Mr. Sitladeen's trial will likely to take less time, as there will be only one accused and some of the evidence connecting Mr. Smith to a particular phone number may not be required.

[47] Second, while joint trials enhance the truth-finding exercise, based on my experience, the defence approach in this case will likely be to attempt to expose weaknesses in the circumstantial evidence rather than call evidence to contradict that called by the Crown. I am obviously not privy to defence counsel's tactics, particularly where Mr. Sitladeen has not even retained counsel, but in my view this is a case where the enhancement of the truth-finding exercise caused by a joint trial is likely to be limited.

[48] Third, while there are some witnesses who will have to testify twice, there are no alleged victims or other witnesses for whom testifying will be particularly emotionally painful. A number of the witnesses are likely to be police officers or other professional witnesses.

[49] Fourth, this is not a case where there is likely to be a danger of inconsistent verdicts. The evidence against each accused is different and different verdicts would likely be explainable on this basis. There is no indication that any of the accused will mount a "cut throat" defence.

(iii) The Crown Was Prepared to Proceed Without Mr. Sitladeen

[50] Finally, I note that the warrant for Mr. Sitladeen's surrender was not issued until March 8, 2022 and he did not arrive in Canada until March 17, 2022, a month before the trial was to begin. It is my understanding that up until that point, it was unknown whether he would be returned to Canada in time for the trial, and there has been no suggestion that the Crown would have sought an adjournment if he was not. In other words, the prospect of separate trials was always in the cards and there is no indication that the Crown was not prepared to proceed in such a case.

III. DISPOSITION

[51] The application is granted.

Justice P.A. Schreck

Released: May 24, 2022