R. v. Singh

Ontario Judgments

Ontario Superior Court of Justice

J.M. Fragomeni J.

Heard: July 9-11, 29-31, August 1 and 12, 2014.

Judgment: December 18, 2014.

Court File No.: CRIM J(P)2328/12

[2014] O.J. No. 6164 | 2014 ONSC 7347

Between Her Majesty the Queen, Respondent, and Jaswinder Singh, Asogian Gunalingam and Jora Jassal, Applicants

(104 paras.)

Case Summary

Criminal law — Constitutional issues — Canadian Charter of Rights and Freedoms — Legal rights — Procedural rights — Delay — Prejudice — Trial within a reasonable time — Application by three co-accused for stay of proceedings dismissed — Accused charged in November 2011 with kidnapping, unlawful confinement, assault and extortion in connection with forced entry to victim's home, her two-day confinement bound to bed, and threats to induce provision of bank card access — Of 37-month delay, 14.5 months was attributable to institutional delay and mistrial caused by inadvertent non-disclosure by Crown — Accused did not experience undue prejudice to liberty or fair trial interests — Societal interest in trial on merits was very high given nature of allegations.

Application by three co-accused, Singh, Gunalingam and Jassal, for a stay of proceedings based on a breach of their right to be tried within a reasonable time. The applicants were charged with kidnapping, unlawful confinement, assault, and extortion. The Crown alleged that the applicants forced entry into the victim's home, confined her in the basement, bound and blindfolded her, took partially nude photographs for extortion purposes, transported her to another location, and held her captive tied to a bed for two days. She was threatened until she revealed her bank card PIN numbers. A missing person investigation resulted in police learning of two withdrawals from the victim's bank card. A 911 call the following day led police to the home in which the victim was held captive. The applicants were arrested in November 2011. They were committed to stand trial in November 2012. Pre-trial motions and jury selection commenced in November 2013. Trial commenced in January 2014. The discovery of inadvertently undisclosed evidence resulted in a mistrial. Retrial was scheduled for September 2014 through December 2013. The applicants sought a stay of proceedings based on prejudice flowing from unreasonable delay.

HELD: Application dismissed.

The 37-month total delay warranted further scrutiny. Five months was attributable to the inherent intake period. Two months was attributable to neutral preparation time for the preliminary inquiry. Four months was attributable to conducting and completing the preliminary inquiry. 1.5 months was attributable to inherent delay setting trial dates. 8.5 months was attributable to neutral institutional delay. One month was inherent delay necessitated by pre-trial motions. 9.5 months was attributable to the Crown based on the mistrial. The total delay attributed to Crown and institutional delay was 14.5 months, which was within the Morin guidelines. This was a complex case that involved voluminous disclosure. No undue prejudice to liberty or the right to make full answer and defence was established. Given the nature of the allegations, the societal interest in a trial on the merits was very high. The request for a stay of proceedings was thus refused.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, R.S.C. 1985, App. II, No. 44, Schedule B, s. 11(b), s. 24(1)

Criminal Code of Canada, *R.S.C. 1985, c. C-46, s. 266*, s. 279(1)(a), s. 346(1.1)

Counsel

David Fisher, Carson Coughlin and Michael Coristine, for the Respondent.

Mr. Jesse M. Razaqpur for Jaswinder Singh, Mr. Robert Lapore for Asogian Gunalingam, and Mr. Fariborz Davoudi for Jora Jassal.

[Editor's note: The note "[Text deleted by LexisNexis Canada]" indicates the removal of information which may identify individuals protected under LexisNexis Canada's Guidelines for the Protection of Identities.]

REASONS FOR JUDGMENT

SECTION 11(b) APPLICATION

J.M. FRAGOMENI J.

1 The Applicants, Jaswinder Singh, Asogian Gunalingam and Jora Jassal seek an order staying the proceedings against them pursuant to s. 24(1) of the *Charter of Rights and Freedoms* on the ground that their right to be tried within a reasonable time as protected by s. 11(b) of the *Charter* has been violated.

THE INDICTMENT

2 The Applicants are charged as follows:

Jaswinder SINGH, Asogian GUNALINGAM and Jora JASSAL stand charged:

1. That they, on or about the 11th day of November, 2011, at the City of Brampton in the Central West Region, did kidnap V.B. with intent to cause her to be confined against her will, contrary to section 279(1)(a) of the *Criminal Code of Canada;*

Jaswinder SINGH, Asogian GUNALINGAM and Jora JASSAL stand charged:

2. That they, on or about the 11th day of November, 2011, at the City of Mississauga in the Central West Region, without reasonable justification or excuse and with intent to obtain money, did induce V.B. by threats to provide access to her bank account, contrary to section 346(1.1) of the *Criminal Code of Canada;*

Jaswinder SINGH, Asogian GUNALINGAM and Jora JASSAL stand charged:

3. They they, on or about the 11th day of November, 2011, at the City of Mississauga in the Central West Region, did unlawfully commit an assault on V.B., contrary to section 266 of the *Criminal Code of Canada.*

SUMMARY OF THE FACTS AND ALLEGATIONS

3 The allegations are reasonably summarized by the Crown in his Factum at paragraphs 7 to 43 as follows:

7. The complainant, Ms. V.B. is a 40 year-old single mother, who is employed as a supply teacher. At the time of the incident, Ms. J.B. resided at [text deleted by LexisNexis Canada] with her eight year old daughter, J.B., and boyfriend of six months, G.S.

8. On November 11, 2011, at approximately 8:00a.m., Ms. J.B. was getting ready for work when the doorbell rang. Mr. Gunalingam, posing as a fence contractor, grabbed Ms. J.B. by the neck and forced his way into the residence. A second male, unindicted co-conspirator, Vajinder Singh, then entered the house behind them.

9. The two men confined Ms. J.B. in the basement of her home where she was bound and blindfolded. The men demanded money, opened Ms. J.B.'s shirt and took partially nude photos of her to be used for extortion purposes. She was then taken from the basement of her home to a waiting vehicle in the garage. Ms. J.B. was forced to lie across the floor of the vehicle and was transported to another location. While in the vehicle she heard a third voice talking to Mr. Gunalingam and Vajinder Singh.

10. Once at the new location, Ms. J.B.'s blindfold was removed and she was taken to the basement. The men then tied her to a bed "spread-eagle" and held her captive over the next two days. During the time she was confined, she was inappropriately touched in a sexual manner, by a man wearing a balaclava (alleged to be Jora Jassal), she was assaulted, her bank cards were taken, and she was forced to reveal her PIN numbers. The "fence contractor" (Gunalingam) and the man wearing a black balaclava (Jassal) repeatedly screamed threats at her, demanding access to money from her family.

11. On Saturday, November 12, 2012 at 10:44 a.m. police received a call from I.K., a friend of Ms. J.B.. Ms. I.K. advised that Ms. J.B. had not been seen or heard from since the morning of November 11, 2011. Ms. I.K. also reported that Ms. J.B.'s vehicle, a red 2009 four door Honda Civic, was missing from the driveway. A check with Ms. J.B.'s cell phone provided revealed that Ms. J.B.'s cell phone had been turned off.

12. Police commenced a missing persons investigation and learned that Ms. J.B.'s bank card had been used on November 11, 2011, at 1:35 p.m. to make a withdrawal of $500 from a TD bank located at 2754 Finch Avenue West in the City of Toronto. Police discovered a second transaction on the victim's bank card for another $500 withdrawal. The second withdrawal was made on November 11, 2011 at 2:43 p.m. at the Royal Bank of Canada branch located at 129 Kipling Avenue in the City of Toronto. Police obtained still photos of the individual making the withdrawals from both banks. While the individual's face is not shown, both videos reveal the man wearing a grey hooded sweatshirt with a distinctive crest on the right sleeve. In addition, the man was also wearing a baseball cap with distinctive "piping" on the brim. The same distinct clothing was later found at 3068 Ireson Court during the execution of the search warrant.

13. Police obtained security footage from a Shell gas station across the road from the Royal Bank. During the relevant time period, the video reveals that the man who accessed Ms. J.B.'s account arrived and parked at the gas station minutes before the withdrawal. He was in a silver Honda Odyssey which subsequent police investigation revealed was rented by Jora Jassal prior to Ms. J.B.'s kidnapping. Cell phone tower records show Mr. Gunalingam's phone in the area of the bank machines at the relevant times.

14. On November 13, 2011 at 4:00a.m., police received a 9-I-1 call to attend 3068 Ireson Court in Malton. A male caller reported that he "saw something very bad at this house" and that he saw somebody with a gun. The caller then hung up and the phone was not answered when the call taker attempted to ring back. The 9-I-1 caller was later discovered to be calling from a cell phone registered to Mr. Gunalingam's girlfriend, Shalini Mahalingham.

15. Police arrived at 3068 Ireson Court at 4:06a.m. Officers observed a male in the backyard running away from the residence. The male was subsequently detained and identified as Jaswinder Singh Mr. G.S. advised police that he lives at 3068 Ireson Court with two other males that he identified as "Ashok" (Mr. Gunalingam) and Jora Jassal. Ms. J.B. was located by police within the house, bound hand and foot to a bed in a basement bedroom. She advised that her assailants fled approximately five minutes earlier. Ms. J.B. described her assailants as three to four Sri Lankan or East Indian males. Officers recovered a black balaclava and black toque on the main floor dining room table. A major DNA profile belonging to Mr. Jassal was subsequently found in the balaclava.

16. At 4:14 a.m. Jaswinder Singh was placed under arrest for kidnapping and extortion. When asked why they had found a woman tied up in the basement, Mr. G.S. responded with the name "Ashok" and "Jassal, Jora". Police showed G.S. the

"mugshot" of Jassal on the computer screen and G.S. indicated "that was the party and he was involved and resides at the Ireson address."

17. Police observed a white 2001 GMC Savana van in the driveway. Record checks by police identified the vehicle as registered to Nicholas Victorvalaratnam of 3420 Morningstar Drive, Unit #134 in the City of Mississauga. However, both Mr. Victorvalaratnam and Mr. Gunalingam later confirmed that Mr. Gunalingam was the principal driver of the van.

18. At 4:48 a.m., police attended 3420 Morningstar Drive, Unit #134 in the City of Mississauga. The distance between 3068 Ireson Court and 3420 Morningstar Drive is approximately 1.96 kilometres. Mr. Victorvalaratnam confirmed that he lived at the house with his wife, and that he was the registered owner of the white 2001 GMC Savana van. A second male present in the residence identified himself to police as Asogian Gunalingam. Mr. Gunalingam advised that he was the owner of 3068 Ireson Court in the City of Mississauga, and that he rents the basement to three other tenants. Mr. Gunalingam further advised that he was at 3420 Morningstar Drive because Mr. Victorvalaratnam was his surety on other charges.

19. Mrs. Victorvalaratnam later stated that she awoke shortly before the police arrived at 3068 Ireson Court to find Mr. Gunalingam at her back door. Mr. Gunalingam was wearing pants that were wet and dirty, as if he had just run through a field. Police subsequently seized Mr. Gunalingam's pants, which contained a Blackberry phone, one of Ms. J.B.'s cheques, Ms. J.B.'s Ontario driver's license and a "Notice of Eviction" for 3068 Ireson Court in Mr. Gunalingam's name. These pants were subsequently tested by the Centre for Forensic Sciences and the DNA profile identified within the pants was found to be that of Mr. Gunalingam.

20. At 4:55 a.m. both Mr. Victorvalaratnam and Mr. Gunalingam were arrested for kidnapping and extortion.

21. At the time of his arrest, Mr. Gunalingam was subject to a $20,000 surety bail (no deposit) in Newmarket for kidnapping, extortion, point firearm, unlawful confinement and utter death threat. The conditions of Mr. Gunalingam's Newmarket bail, dated July 26, 2010 were as follows:

    1) Reside with one of his three sureties, one being Nicholas Victorvalaratnam;

    2) Abide by and be amenable to the reasonable rules of the household;

    3) Abstain from communicating, directly or indirectly, with Selemularajah Selventhiran or any member of his immediate family;

    4) Not attend within 250 metres of the known place of residence, employment or education of Selemularajah Selventhiran or his immediate family;

    5. Not associate with anyone known by him/her to have Youth Court or Criminal Court record, including a record under the *Narcotic Control Act,* the *Food and Drug Act,* or the *Controlled Substances Act,*

    6) Be in the direct company of one of your sureties at all times except when you are inside your residence, or while at or within 50 metres of your place of

employment at 182 Limestone Crescent, Toronto or unless he is in the presence of counsel at court or while travelling to counsel's office or court;

7) Remain within the province of Ontario;

8) Not attend at or within 250 metres of Asia Gold, located at 5910 Steeles Avenue West in the City of Vaughan; and

9) No contact directly or indirectly with Navereethan Kanagaratnam, Maegan Drake, Roger Giffen, or Shaloumar Muthukumaru except through counsel.

22. On November 13, 2011, police obtained a warrant to search 3068 Ireson Court and executed the warrant that evening. Police located and seized the following items:

1) In the basement, a hooded jacket and baseball hat that match the clothing worn by the party who made withdrawals from Ms. J.B.'s bank accounts on November 11th. The baseball hat was linked through subsequent DNA analysis to Jora Jassal;

2) Ms. J.B.'s purse and various pieces of paper that contained her banking information;

3) A number of beer cans, which as a result of subsequent testing are now known to contain DNA of each of the accused parties, respectively;

4) The cloth ties that were used to bind Ms. J.B. to the bed. These ties were subsequently sent to the CFS for DNA analysis. The resulting DNA profile matched that of Jaswinder Singh;

5) Several cellular phones. Subsequent analysis of phone records links the collection of phones to each of the accused parties, including Vajinder Singh, throughout the course of the two-day period. This includes tower activity near the scene of the kidnapping and banks;

6) On the main floor of the house, a black balaclava containing a major DNA profile match to Mr. Jassal;

7) Numerous beer cans and glasses containing finger prints of all the accused;

8) A wallet containing a number of pieces belonging to Asogian Gunalingam;

9) A car rental agreement in the name of Jora Jassal was located in the kitchen area. The same company had rented Jora Jassal a silver Honda Odyssey minivan around the time of the kidnapping. This is the same car that was seen in the Shell gas station parking lot video when Ms. J.B.'s bank account was being accessed on November 11th; and

10) In one of the bedrooms, further items linking Mr. Gunalingam and the others to the house.

23. On November 14, 2011 at 9:30 p.m., Mr. Jassal surrendered to Peel Police, 21 Division.

24. On November 30, 2011, Mr. Jassal was granted bail in the amount of $10,000 (no deposit), subject to the following conditions:

1) Reside at 5699 Shillington Drive, Mississauga, ON, the address of both approved sureties, Shaillendar Piccaso and Agamjot Singh;

2) Notify the Officer in Charge at 21 Division Peel Regional Police in writing within 24 hours of any change in your address;

3) Abstain from communicating directly or indirectly with Jaswinder Singh, Asogian Gunalingam, Nicholas Victorvalaratnam, Vajinder Singh, V.B., J.B., G.S., I.K., Rupinder Brar and Mashinder Singh (AKA The Dentist) except through legal counsel;

4) Not attend within 100 metres of [text deleted by LexisNexis Canada], Brampton;

5) Not possess until dealt with according to law any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition or explosive substance or such items intended for use as a weapon as defined by the Criminal Code of Canada; and

6) Not possess or make application for any license or authorization present to the *Firearms Act.*

25. On December 14,2011, Mr. G.S. was released on $10,000 bail (no deposit) subject to the following conditions:

    1) Reside at 128 Tumbleweed Drive, Brampton, ON with his approved surety, Lakhvir Basnee;

    2) Report to 21 Division Peel Regional Police between the hours of 9 a.m.

    and 9 p.m. every Sunday and sign in as required commencing December 18, 2011;

    3) Notify Officer Rehan, badge #2513 at 21 Division Peel Regional Police within 48 hours of his release and 24 hours of any change in your address;

    4) Abstain from communicating directly or indirectly with V.B., G.S., J.B., I.K., Mashinder Singh, Asogian Gunalingam, Jora Jassal, Nicholas Victorvalaratnam, except through legal counsel;

    5) Not attend within 200 metres of [text deleted by LexisNexis Canada], Brampton and/or 3068 Ireson Court, Mississauga;

    6) Not attend the residence, place of employment, or school or any other place he may know V.B. to be;

    7) Any personal belongings to be removed from 3068 Ireson Court, Mississauga, to be on a one-time basis in the presence of Peel Regional Police;

    8) Attend court as required;

    9) Not possess until dealt with according to law any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition or explosive substance or such items intended for use as a weapon as defined by the Criminal Code of Canada; and Not possess or make application for any license or authorization present to the *Firearms* Act.

26. On January 6, 2012, Lakvir Basnee withdrew as surety for Mr. G.S. Mr. G.S. was remanded back into custody. He was unable to find another surety to replace Mr. Basnee.

27. On February 15, 2012, Mr. Gunalingam was denied bail, primarily on the secondary ground.

28. On November 20, 2012, Mr. G.S., Mr. Jassal and Mr. Gunalingam were committed to stand trial on charges of kidnapping, unlawful confinement, extortion and assault.

29. On November 26, 2012, the defence brought an application to vary the bail of Mr. G.S. from a surety bail to his own recognizance. Although this variation was opposed by the Crown, the Crown agreed to lower the surety bail from $10,000 to $1,000 in order to help facilitate his release from custody on suitable terms. Justice Andre held that the "appropriate" form of release was with a surety in the amount of $1,000.

30. On July 23, 2012, Mr. G.S. was able to meet the reduced surety bail of $1,000 (no deposit). He was subject to the following conditions, mostly mirroring his original bail:

    1) Reside at an address approved by surety or reside with surety;

    2) Report to 22 Division Peel Regional Police between the hours of 9 a.m. and 9 p.m. once monthly and sign in as required within seven days of your release and thereafter report once a month on the 1st of every month;

    3) Abstain from communicating directly or indirectly with Asogian Gunalingam, V.B., Nicholas Victorvalaratnam, G.S., J.B., I.K., Mashinder Singh, Jora Singh Jassal, Vajinder Singh except through legal counsel;

    4) Not attend the residence, place of employment, recreation, place of worship or any other place you know Asogian Gunalingam, V.B., Nicholas Victorvalaratnam, G.S., J.B., I.K., Mashinder Singh, Jora Singh Jassal, Vajinder Singh to be;

    5) Within 48 hours of your release notify by letter or by other means of communication Amar Rehman of 21 CIB and furthermore you should advise Constable Rehman of your release and change of address;

    6) Not possess until dealt with according to law any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition or explosive substance or such items intended for use as a weapon as defined by the Criminal Code of Canada; and

    7) Not possess or make application for any license or authorization pursuant to the *Firearms* Act.

31. On November 14, 2013, pre-trial motions began. Mr. Alexander Cornelius substituted for Mr. D'Iorio on behalf of the Crown, as Mr. D'Iorio was unavailable due to an unforeseen scheduling conflict.

32. On November 28, 2013, jury selection began. Mr. Cornelius appeared for the Crown, as Mr. D'Iorio was still unavailable .

33. On January 23, 2014, the trial began before Justice Skarica. Mr. Carson Coughlin replaced Mr. D'Iorio as Crown counsel.

34. On January 31, 2014, the existence of some undisclosed evidence came to light. The defence subsequently applied for a stay of proceedings, or alternatively, a mistrial.

35. On February 7, 2014, Justice Skarica ordered a mistrial in lieu of stay of proceedings. Justice Skarica held that both the Crown and police had been negligent in failing to provide the defence with material pieces of evidence. However, Justice Skarica did not find deliberate misconduct. Justice Skarica made the following orders:

    1) That a new trial date be arranged as soon as possible and that the date be expedited;

    2) That the Crown thoroughly review the file and address all outstanding disclosure issues;

    3) That Mr. Gunalingam be granted bail on reasonable terms pending a retrial;

    4) That pre-trial motions be re-litigated;

    5) That evidence given by Mr. Gunalingam and Mr. G.S. at prior pre-trial proceedings be inadmissible at any subsequent proceeding; and

    6) That costs be awarded against the Crown, to be determined at a subsequent hearing.

36. On February 10, 2014, Mr. Gunalingam was released on his own recognizance, subject to the following conditions:

    1) Remain within Ontario

    2) Reside at the following address: 183 Magnolia Street in Scarborough, Ontario and report any change in address to Constable Rehan #2513, 21 Division, Brampton by sending email to anar.rehan@peelpolice.ca and by fax 905-546-5872, 24 hours before moving into another address;

    3) Be within your residence daily, between the hours of 11 p.m. and 5 a.m.;

    4) Keep the peace and be of good behavior;

    5) Do not attend or be present in the City of Brampton, except to attend court as required;

    6) Abstain from communicating, contacting, or associating directly or indirectly with any witnesses in this prosecution except for Shaline Mahlingham or through counsel and to have no contact with V.B., or any immediate members of Ms. J.B.'s family and the following co-accused: Jaswinder Singh, Jora Jassal and Vajinder Singh except through counsel;

    7) Not to be within 100 metres of any place where s/ he lives, works, attends school or is known to you or be or frequent;

    8) Abstain from possessing or using any firearm or weapon; and

    9) Not apply for nor possess a firearm acquisition certificate or other form of gun license.

37. The Crown has fully complied with the Order of Justice Skarica made in the mistrial application. In addition, the Crown has obtained and provided all transcripts for the defence's 11(b) applications, and voluntarily assumed the cost of these transcripts.

38. On May 31, 2014, Mr. Gunalingam was arrested and charged with breaching the terms of his bail that Justice Skarica ordered.

39. On June 12, 2014, Mr. Gunalingam was again granted bail, subject to similar conditions. The only different condition is the addition of Shaline Mahlingam as surety ($5,000 no deposit). Accordingly, Mr. Gunalingam must now reside at 3 Allcroft Drive, basement apartment, Toronto, and not move from that address unless reporting it to Constable Rehan #2513, 21 Division Brampton by sending email to anar.rehan@peelpolice.ca and by fax 905-456- 5872, 24 hours before moving into another address.

40. The re-trial is scheduled to begin on September 9, 2014, and continue through December 9, 2014.

41. Vajinder Singh remains at large. A Canada-wide warrant for his arrest has been issued. It may be that he has fled the country.

42. Ms. J.B.'s vehicle has never been recovered.

43. When the re-trial dates were set, Mr. Paradkar indicated on the record that he would be unavailable for trial, but would arrange for other counsel to assist Mr. Jassal. Mr. Paradkar subsequently arranged for Mr. Fariborz Davoudi to replace him. However, no steps were taken by Mr. Jassal to retain Mr. Davoudi until June 18, 2014 when Justice Durno ordered Mr. Jassal to apply for Legal Aid by June 20, 2014. That application has since been denied, however two levels of appeal remain available to Mr. Jassal. Until Mr. Jassal exhausts these remedies, he will not be in a position to make an application pursuant to R. v. Rowbotham, *[1988] O.J. No. 271*

THE ANALYTICAL FRAMEWORK

4 Although all of the parties agree on the applicable analytical framework that governs this 11(b) application, it is important to set out those guiding legal principles prior to their application to the case at bar:

1. The onus is on the appellants to establish a violation of their s.11(b) rights;

2. The following factors are considered:

(a) The length of the delay;

(b) Waiver of time periods;

(c) The reasons for the delay:

- Inherent time requirements of the case;
- Actions of the accused;
- Actions of the Crown;
- Limits on institutional resources; and

- Other reasons for delay.

(d) Prejudice to the accused;

R. v. Morin, [1992] 1 S.C.R. 771; 71 C.C.C. (3d) 1 at 31 (S.C.C.); *R. v. Askov,* [1990] S.C.J. 106, 59 C.C.C. (3d) 449 at 19; *R. v. Godin,* 2009 SCC 26, [2009] 2 S.C.R. 3 at 18.

3. For the purposes of determining unreasonable delay under s. 11(b) of the *Charter,* the relevant period of assessment is the overall period beginning at the commencement of the proceedings to the end of the trial. *R. v. Nguyen,* 2013 ONCA 169, [2013] O.J. No. 1243 at 49;

4. Inherent time requirements are viewed as "neutral" in the s. 11(b) analysis. *Morin* at 41-43;

5. The "intake" period commences with the swearing of the Information and takes into account the time required to get the case ready to set trial dates. Generally, normal intake functions include conducting bail hearings, retaining counsel, collecting, providing and reviewing disclosure and conducting early pre-trial discussions with the Crown.

R. v. Lahiry; R. v. Carreira; R. v. Davidson; R. v. Shelson, 2011 ONSC 6780, [2011] O.J. No. 5071 at 7, 145, 151; *R. v. Tran,* 2012 ONCA 18, [2012] O.J. No. 83 at 32; *R. v. Nguyen* at 72.

6. A reasonable amount of time is required to schedule and conduct a judicial pre-trial and this time will be allocated as inherent time;

7. Systemic delay runs from the time that all parties are ready for trial. Institutional delay only begins once all parties are reasonably ready for trial and the Court cannot accommodate them;

R. v. Lahiry at 34; *R. v. Tran* at 32; *R. v. Stelle* at 19.

8. The time required to begin and conclude a trial is considered neutral on the condition that the court is reasonably available to complete the case and the matter proceeds as scheduled;

R. v. Morin at 41; *R. v. Schertzer,* 2009 ONCA 742, [2009] O.J. No. 4425 at 95; *R. v. Tran* at 54-56.

9. Where the Crown bears responsibility for a mis-trial the Crown will be responsible for all of the ensuing delay that would in the ordinary course be considered inherent;

10. The general proposition is that ordinarily delay caused by the actions of a co-accused is considered neutral in the s. 11(b) analysis;

R. v. Whylie, [2006] O.J. No. 1127; 207 C.C.C. (3d) 97 (C.A.) at 24; *R. v. L.G.,* 2007 ONCA 654, [2007] O.J. No. 3611 at 62-63; *R. v. Nguyen* at 71.

11. A finding that the Crown has consented to repeated delays caused by a co-accused could result in an allocation of the delay caused by a co-accused to Crown delay especially if a severance was a reasonable option available to the Crown;

12. There is a strong presumption in favour of joints trials;

13. The time limits set out in *Morin* can be either expanded or reduced by several months in either direction depending on the presence or absence of prejudice;

14. Prejudice in the 11(b) analysis is concerned with the following three interests of the accused:

- Liberty
- Security of the person
- The right to make full answer and defence.

The onus is on the accused to adduce evidence of any actual prejudice suffered. *R. v. Godin* at 30-31;

15. Failure to mitigate prejudice by the accused is a relevant factor in assessing the degree of prejudice;

R. v. Morin at 62; *R. v. Kovacs- Tatar,* [2004] O.J. No. 4756, 192 C.C.C. 3d) 91 C.A.) at 36-39

16. The Court must conclude its analysis by balancing all of the relevant factors. As the seriousness of the offence increases the societal demand that the accused be tried is high.

APPLICATION OF LEGAL PRINCIPLES TO THE CASE AT BAR

The Length of Delay

5 The total delay in this case from the date the information was sworn (November 13, 2011) to the anticipated completion of trial (December 9, 2014) is approximately 37 months. The Crown concedes that this time period warrants further scrutiny.

Waiver

6 The Crown does not allege any waiver by the Applicants.

REASONS FOR DELAY

Ontario Court of Justice

(a) Inherent/Intake Periods November 13, 2011 - April 27, 2012 (5 months 17 days)

7 The Information was sworn on November 13, 2011 and the judicial pre- trials were completed on April27, 2012.

8 The Crown submits that all of this period is properly allocated to inherent/intake time.

9 In support of that position the Crown sets out the following factors:

* This was a complex case involving voluminous and intricate evidence, as well as multiple accused persons. Moreover, the initial investigation involved 79 police officers across various bureaus within the police department. Critically, none of the material evidence was in the possession of the police prior to the Applicants' arrests. The police had to draft and apply for a search warrant, as well as obtain statements from the many civilian witnesses. While much of the complex evidence,

* such as DNA results, was not physically provided until August, 2012, the intake period was nonetheless used to collect samples and make extensive submissions to the Centre for Forensic Sciences. Further with respect to the DNA samples, none of the applicants consented to providing DNA samples. The police were therefore required to obtain DNA warrants, further prolonging the intake period.

* A significant amount of time was required to collect, analyze, organize and disclose the above evidence to multiple co-accused, as well as to make arrangements for future disclosure. A reasonable period of time was thereafter necessary to allow the parties, both Crown and defence, to review the disclosure and be in a position to speak knowledgeably about it at a judicial pre-trial.

* The defence also required a longer intake period for other "intake purposes" such as retaining counsel and arranging bail hearing. On this point the following factors are relevant:

1) 44 total court appearances took place between the arrests on November 13, 2011 and the confirmation of preliminary hearing dates on April 27, 2012. Of those 44 appearances, the Crown did not request any. At the very least, no adjournments were beneficial solely to the Crown or granted in the face of resistance by the defence.

2) The last show cause hearing (Mr. Gunalingam) did not take place until the 36th court appearance on February 15, 2012 - more than 3 months after the Applicants' arrest;

3) Mr. Gunalingam changed counsel three times (Mr Lepore to Mr. Batasar to Mr. Abrams to Mr. Lepore);

4) Three and a half months and 37 court appearances passed before a JPT could be scheduled on March 1, 2012;

5) Mr. G.S. switched counsel from Mr. Rob Christie to Mr. Razaqpur;

6) Mr. Christie failed to appear without explanation on 9 occasions; and

7) Approximately 17 adjournments were requested by various defence counsel in order to arrange sureties, firm up retainers or prepare for bail hearings.

* The initial delay in providing disclosure did not impact the defence, as various accused were still in the process of retaining counsel and arranging bail hearings until February 15, 2012.

* After primary disclosure was provided on February 21, 2012, a reasonable period was necessary for the defence to arrange for a judicial pre-trial, which was

scheduled on March 1, 2012 to take place on March 14, 2012. The matter was subsequently unable to move forward to complete the judicial pre-trial and confirm preliminary hearing dates until April27, 2012 because Mr. Paradkar failed to appear on March 19, Apri113 and Apri120, 2012.

* The Respondent submits that the entire 57 day period from March 1, 2012 to April 27, 2012 was a reasonable amount of time to schedule and complete a judicial pre-trial *(Sidoro, supra).* Therefore, the entire period should be considered part of the intake requirements of this case.

* Alternatively, any delay associated with completing the judicial pre-trial was not the fault of the Crown, as Mr. Paradkar failed to attend on three consecutive occasions. Accordingly, the period of March 1, 2012 to March 14, 2012 should be considered neutral intake, while the delay between March 19, 2012 and April27, 2012 should fall to the defence. Under either scenario, the overall period of unreasonable delay remains the same.

10 The Crown also relies on the following decisions to support his position:

R. v. Konstantakos, 2014 ONCA 21, [2014] O.J. No. 156 at paras. 7-8

The application judge characterized the entire period from January 24, 2011, when the pre-trial was first scheduled, to May 10, 2011 when it was completed -- a total of 3 1/2 months -- as Crown delay . This was in spite of uncontested evidence that the adjournment from February 23 to April 5, 2011 (6 weeks) was the result of a joint request by the Crown and defence, both of whom wanted to obtain additional information pertinent to their discussions - information that could have resulted in a resolution. The application judge attributed all this delay to the Crown because he found the request was occasioned, at least in part, by the Crown's failure to provide the required disclosure earlier.

In our view, this was a mischaracterization of the delay, which should have been described as inherent. Pre-trial conferences are necessary case management tools, conducive to the efficient use of resources, and reasonable delays to conduct them should be treated as inherent. Absent exceptional circumstances, which were not present here, adjournment of a pre-trial, pursuant to a joint request, should be regarded as reasonable and characterized a.s inherent delay.

R. v. Sidoro 2013 ONSC 6010, [2013] O.J. No. 6133 at para. 32:

On May 25, 2009 the parties scheduled the pretrial for July 9, 2009. This 44 day period to schedule an important part of the proceeding seems to me to be a relatively short and entirely appropriate period of time in which to obtain a pretrial in this very busy jurisdiction. Given the relatively brief period involved to schedule such an important step I see this as part of the inherent time requirements of the case: *Nguyen.* Had it taken appreciably longer to obtain a pretrial date I would have assessed at least a portion of the time as institutional delay. However, it seems to me to be entirely reasonable that it would take 44 days to have a judge available to conduct a pretrial.

11 At paragraph 63 of his Factum the Crown summarizes some of the cases and their time allocation as follows:

> The Ontario Court of Appeal has concluded that a reasonable neutral period of time for such "intake" matters at the Ontario Court of Justice can vary between two months and eleven months in duration, depending on the nature of the case and the degree and nature of the "intake" functions that must be completed. There is also the practical reality that, in most complex matters, the investigation continues well past the point of arrest. For example, see: *R. v. Sharma, (1992), 71 C.C.C. (3d) 184* S.C.C. [3 months]; *R. v. Kovacs-Tatar, supra* at 46-47 [4 months]; *R. v. Nadarajah,* [2009] O.J. No. 493 (C.A.) at 19 [4.5 months]; *R. v. Seegmiller, supra*, [2004] O.J. No. 5004 at 14 [5 months]; *R. v. Steele,* 2012 ONCA 383 at 16-17 [5 months]; *R. v. J.G.B.* (1993), 85 C.C.C. (3d) 112 (C.A.) [7 months]; *R. v. Khan, supra* [7.5 months]; *R. v. Qureshi, supra*, [2004] O.J. No. 4711 at 27, 32, 37 [8 months]; *R. v. Cranston, supra*, [2008] O.J. No. 4414 at 46 [9 months]; *R. v. Nguyen, supra* at 76-78 [9.75 months]; and *R. v. Schertzer,* [2009] O.J. No. 4425 (C.A.) at 77-80 [11 months].

12 I am satisfied that a proper and reasonable allocation of time for the inherent/intake period is 5 months.

13 I cannot agree with the Applicants' characterization of this case as simple. The case was complex and involved voluminous disclosure. The initial investigation involved 79 police officers. The case involved the preparation of search warrants. A reasonable period of time is necessary for the Crown and the defence to review this disclosure and properly prepare for a judicial pre-trial. The position of G.S. that he could have been ready to proceed with a JPT as early as March 1, 2012 is possible, however, that position is somewhat undermined by the detailed and extensive disclosure request made by G.S. in his March 13, 2012 letter to the Crown. In that letter G.S. requests the following:

> March 13, 2012
>
> Office of the Crown Attorney
>
> 7755 Hurontario St. Suite 100
>
> Brampton, ON L6W 4T6
>
> Telephone: (905) 456-4777
>
> Facsimile: (905) 456-4780
>
> BY FACSIMILE- 3 Pages
>
> Dear Sir or Madam:
>
> **Re: R. v. Jaswinder Singh- Occurrence #11-367038**
>
> **Next Court Date: March 14, 2012**
>
> **REQUEST FOR FURTHER DISCLOSURE**
>
> We represent the above noted accused.

We are in receipt of initial disclosure. There is a judicial pre-trial scheduled on this matter for March 14, 2012. We request the following further disclosure:

* Review of the disclosure indicates over 50 officers are involved in the investigation of this case, however the witness list provides only 11 officers named as witnesses, and only one civilian name. Accordingly, we request an updated witness list including all officers involved in the investigation, and all civilians involved in this case, irrespective of whether the Crown intends to call them at trial.
* We request DVDs of all video statements taken from any and all witnesses and/or accused persons in this matter.
* We request transcripts of all video statements taken from any and all witnesses and/or accused persons in this matter.
* We request will say statements of any civilian witnesses not already provided.
* We request the audio recording of the call to police on November 13 indicating "something bad" happening at 3068 Ireson Court.
* We request the ICAD reports in relation to the call to police on November 13.
* We request criminal records (CPIC) and synopses of any outstanding charges for the other co-accused in this matter, as well as the complainant, and any civilian witnesses.
* We request a legible copy of the notes of Officer Forgette #2821 as the photocopy is too pale to read.
* Some officers appear to be involved in the investigation but copies of any entries in their notebooks or elsewhere have not been provided. Accordingly, we request copies of any notes of the following officers in relation to this matter:
* HAGEMAN #2693
* HENDERSON #2929
* O'CONNOR #2958
* KERFOOT #2849
* CLARKE #1538
* BIRNIE #2946
* CUTLER #2752
* BITMANIS #2128
* RICCI #2726
* MARLING #2688
* ASHBY #2175
* REHAN #2513

* UNKNOWN OFFICER - BADGE #2854

* **NOTES OF ANY OTHER OFFICER INVOLVED IN THIS INVESTIGATION THAT HAVE NOT ALREADY BEEN DISCLOSED**

Without restricting the generality of the foregoing, we request any and all other disclosure in relation to this matter in possession of the Crown or the police.

With respect to notes of police officers, we are satisfied that any such notes produced constitute disclosure of the information in the possession of the respective police officers provided that:

a) the notes are legible

b) the notes fully disclose the anticipated evidence of the officer in question.

If the notes are not legible or do not fully disclose the anticipated evidence of the officer in question, a transcription of the notes or a supplementary statement of the officer's anticipated is required in addition to the notes.

In the event that you are in possession of any information that may be of interest to the defence, but which you have chosen not to disclose for any reason, please advise us of the existence of any such information and your reasons for refusing to disclose it, so that any appropriate application may be made to the trial judge for a determination as to the appropriateness of the decision not to disclose the information.

The accused asserts his/her right pursuant to s. 11(b) of the Canadian Charter of Rights and Freedoms to be tried within a reasonable period of time.

Please contact me at (416) 309-1970 should you have any questions or concerns.

Yours very truly,

Jesse Razaqpur

EDWARD H. ROYLE & ASSOCIATES

14 In addition to that G.S. acknowledges that co-accused counsel were not available until March 14, 2012 for the scheduling of the JPT.

15 I agree with the Crown that the period from March 1, 2012 to April 27, 2012 was a reasonable period of time to schedule and complete a JPT.

16 In all of the circumstances, therefore, a period of five months from the date of the information being sworn to completion of the JPT in the Ontario Court of Justice is properly allocated as neutral/inherent time.

Result: 37 months Jess 5 months = 32 months

April 28 -June 28. 2012 - 2 months

I am satisfied that there are inherent preparation requirements for the preliminary hearing. Institutional delay only begins once all parties are reasonably ready. The following cases are relevant and informative on this issue:

In *Lahiry* Justice Code sets out the following at para. 34:

> Finally there is no place for fictions when seeking to prove Charter violations. It is rarely true that counsel is immediately available for trial, when setting a date. Whenever counsel take on a new case they complete various preliminary steps during the intake period. Once they have taken these steps and are ready to set a date for trial, they need to set aside sufficient time in their calendars to prepare the new case for trial and to then conduct the trial. If the case is lengthy and complex, or if counsel are very busy, it may be some considerable period of time before counsel are ready for trial. To use a simple hypothetical, if counsel has no time in his/her calendar to prepare a new case for trial and to then try it until ten months in the future, and the earliest date that the Court has available for the trial is twelve months in the future, then systemic congestion in the Court is the cause of only two months of delay. The other ten months is delay that the accused needs, for entirely beneficial reasons, in order to allow his/her counsel of choice to prepare the case for trial and to accommodate it in an otherwise busy calendar. It is good and necessary delay that would have occurred in any event, even if the Court had earlier available dates. It is a fiction to characterize this kind of useful delay as unwarranted or unreasonable or prejudicial.

Further in *Tran* the Ontario Court of Appeal stated the following at paras. 32 and 38-46:

> 32 Second, parties should not be deemed automatically to be ready to conduct a hearing as of the date a hearing date is set. Counsel require time to clear their schedule so they can be available for the hearing as well as time to prepare for the hearing. These time frames are part of the inherent time requirements of the case. Institutional delay begins to run only when counsel are ready to proceed but the court is unable to accommodate them. See *Morin,* at pp. 791-2, 794-5, 805-806. See also *Lahiry,* at paras. 25-37, citing *Morin, R. v. Shanna, [1992] 1 S.C.R. 814*, *R. v. M. (N.N.)* *(2006), 209 C.C.C. (3d) 436* (C.A.), *Schertzer, R. v. Meisner* *(2003), 57 W.C.B. (2d) 477* (Ont. S.C.), and *R. v. Khan,* *2011 ONCA 173*, *277 O.A.C. 165*.
>
> ...
>
> 38 Turning to the approximately eight-month delay between the judicial pretrial and the commencement of the trial, once again, the trial judge failed to take account of the time required for counsel to clear their calendar and prepare. Defence counsel did not put their first available dates for even a two-and-a-half day trial on the record when target trial dates were set at the judicial pre-trial. They were not available for the early trial dates offered by the court in March 2010; nor were they available on dates offered in early August. A little more than two months later, on March 31, 2010 at the pre-trial continuation, defence counsel did not have a single day available in April or May to conduct the s. 11(b) *Charter* motion. Although this is entirely understandable in terms of counsel's busy schedules, institutional delay does not begin to run until counsel are in a position to proceed with the trial.

39 Because of defence counsel's failure to put their first available trial dates on the record at the judicial pre-trial in January 2010, it is difficult if not impossible to determine exactly how the delay between the pre-trial and the commencement of the trial should be allocated. In the circumstances, and in the light of defence counsel's unavailability on March 31, 2010 for a one-days. 11(b) motion in April or May 2010, it is unrealistic to assume that they could have co-ordinated their calendars to schedule even a two-and-a-half-day trial within even a few months of the pre-trial date.

40 It must also be remembered that counsel had to prepare and serve their various *Charter* motions and make time to prepare for trial. In all the circumstances, I would attribute no more than three months of this eight-month time frame to institutional delay.

41 Turning to the delay caused by the adjournment of the trial, in my view, the trial judge made two errors in his approach to this period.

42 First, he failed to allocate responsibility for the delay specifically. Although it is apparent from his reasons that he allocated some portion of the delay to both the Crown and the defence, it is not clear what time frame he allocated to each party. Further, it is not clear whether he allocated any portion of this time frame to institutional delay. Failure to allocate lengthy periods of time to any category in the *Morin* framework is an error in principle: *Schertzer,* at para. 72.

43 Second, the trial judge made a palpable and overriding error in holding that trial time that was lost due to late disclosure by the Crown and unavailable Crown witnesses should impact the s. 11(b) analysis.

44 It is not -clear to me whether the trial judge concluded that trial time lost due to Crown action was a material factor in causing the adjournment of the trial beyond September 16, 2010 or whether he concluded that Crown conduct that caused any delay in the trial was enough to "tip the balance" in favour of the respondents. Either way, in my view, the trial judge erred.

45 Although the Crown provided four pages of additional disclosure from its first witness on September 10, 2010, this did not cause any appreciable delay in the trial. Counsel agreed to defer the witness's cross-examination to the following Monday and to proceed with another witness in the meantime.

46 As for the unavailability of Crown witnesses, the issue arose only because the Crown and the defence entered into an Agreed Statement of Facts on September 10, 2010. The Agreed Statement of Facts dispensed with the necessity of calling some Crown witnesses scheduled for September 10, 2010. The witnesses the Crown anticipated calling on September 13, 2010 were not available to fill in the balance of the day on September 10, 2010.

In *R. v. Florence* 2014 ONCA 443, [2014] O.J. No. 2702 para. 67 the Court noted:

From April 1, 2010 forward, I would, in accordance with the reasoning of this court in *Ralph,* make the same three-month and one-month adjustments as I made in the analysis of the delay incurred in Mr. Florence's matter. That is, the three months from April 1, 2010 until July 1, 2010 are neutral preparation time forming part of the

> inherent time requirements of the case, as is the month following the assignment, on July 8, 2011, of Mr. Carder's trial date.
>
> In *R. v. McShane* 2013 ONSC 5645, [2013] O.J. No. 4021 Justice Gray set out the following in his reasons:
>
> 43 Common sense would suggest that on the date the preliminary inquiry is scheduled, it is unlikely that the parties are able to start the preliminary inquiry immediately . I expect that if the Court were to offer the next day to commence the preliminary inquiry, none of the parties would be ready. In most cases, some preparation and normal scheduling will be required.
>
> ...
>
> 47 In *R. v. Sikorski,* [2013] O.J. No. 1654 (S.C.J.), Nordheimer J. expressed some disagreement with this approach. Commencing at para. 87, he outlined his reasons for disagreeing with the approach of Code J. in *Lahiry.* At para. 98, he stated "It seems to me to be preferable, therefore, to clearly delineate the full period of time for which the courts are unable to provide dates for preliminary hearings or for trials and to characterize that delay in the s. 11(b) analysis for What it is, institutional delay."
>
> 48 With respect, I prefer the approach of Code J. in *Lahiry.* First of all, as noted b Code J., his approach appears to be mandated by appellate authority. Second, as noted, it defies common sense to assume counsel and the parties would be able to commence the preliminary inquiry or the trial immediately. Some period is required for normal scheduling and preparation.
>
> 49 In this case, the Crown suggests that two months should be allocated to the inherent time requirements of the case. I think that suggestion is reasonable.
>
> In *R. v. Sidoro,* Justice Dawson stated the following at para. 74:
>
> 74 The applicants have not led any evidence as to the preparation time that was required. It therefore falls to the court to assess a period of preparation time. I conclude that one month of this eight month period would be required for preparation for the first phase of the preliminary inquiry. The preparation time required would not consume an entire month but would have to be worked into counsels' schedule. It. is on that basis that I conclude one month of this time period should be earmarked as inherent time required to prepare. It follows that the balance of seven months must be regarded as institutional delay.

17 Mr. Razaqpur, counsel for G.S., submits that he would have been able to start an eight-day preliminary hearing as early as March 26, 2012. The Crown contends that Mr. Razaqpur could not have realistically been able to do so. Mr. Razaqpur's firm first appeared for G.S. on February 21, 2012. At that time voluminous disclosure was provided to his agent, Ms. Lazed.

18 In addition on March 13, 2012, Mr. Razaqpur made a substantial disclosure request. Over the next six weeks or so multiple letters are exchanged between Mr. Razaqpur and the Crown's office relating to these disclosure requests.

19 I am satisfied that Mr. Razaqpur would have required time to receive and review this disclosure and prepare for his cross-examination of the Crown witnesses.

20 A period of two months to accomplish all of this is not, in my view, unreasonable. The period from April 28, 2012 to June 28, 2012 is properly allocated as neutral preparation time for all parties to be ready to conduct an eight-day preliminary inquiry.

Result: 32 months less 2 months = 30 months.

July 17, 2012- November 20, 2012

Conducting and completing the Preliminary Hearing (4 months 4 days).

21 In *Morin,* Justice Sopinka noted at para. 41 that "the more complicated a case, the longer it will take ... for the trial to be concluded once it begins."

22 In *Schertzer* a total of 4 months and 22 days was scheduled to complete the 45 day preliminary inquiry. At para. 95 the Court stated:

> 95 This time period was taken up with the preliminary inquiry. Once the preliminary inquiry began, it proceeded as scheduled, except for four days when court adjourned early owing to disclosure issues. While the defence complained on many occasions about disclosure being made during the preliminary inquiry, the pace of disclosure did not otherwise affect the pace of the preliminary inquiry.
>
> To the contrary, the preliminary inquiry started and finished within the anticipated time frame. Moreover, many of the disclosure issues about which the defence complained were not by any means clear cut. There were serious questions on grounds of relevancy and privilege about whether or not disclosure of certain materials was required. In accordance with *Stinchcombe,*, *[1991] 3 S.C.R. 326* these questions would have to be resolved by the trial judge. Many of the disclosure issues were a direct result of continuing, extensive demands from defence counsel. This time period was part of the inherent time requirements of the case.

23 In *R. v. Faulkner, 2013 ONSC 2373*, *[2013] O.J. No. 2315*, Justice Code Stated the following at para. 33:

> 33 I am satisfied that two months was a reasonable period of time in which to complete the five day preliminary inquiry, in the particular circumstances of this case. The case was originally scheduled as a three week trial and was to be completed in the months of September and October. Although Faulkner changed counsel twice, after these initial dates had been set, and his election changed, the court was able to keep the case on essentially the same two month schedule. Some of the dates originally set were lost when there were changes of counsel and when new counsel were not available on most of the scheduled dates. In spite of this complication, the court managed to keep some of the dates and managed to find other dates in the same general time frame. A further complication was the constructive discharge of Faulkner's third counsel on the first day of

the preliminary inquiry, the appointment of s. 486.3 counsel, and the need for her to get ready to cross-examine the complainant on short notice.

24 The Applicants submit that the Court did not give priority to the liberty interests of the accused and put the previously scheduled police leave dates ahead of the interests of the accused. The Applicants argue that the police witnesses should have been forced to alter or cancel their vacation plans to accommodate earlier preliminary inquiry dates. On this issue it is important to look at the transcripts of what transpired on March 19, 2012 and April13, 2012:

25 March 19, 2012 transcript

MR. LEPORE: Your Honour, I guess I should put on the record that apart from the dates that we - we have been offered, I had - I had available dates to conduct the trial in this matter starting as early as March 30th. I have also dates - multiple dates - I have multiple dates available in April of 2012. I have multiple dates in May of 2012. Likewise, for June, July, August, September and October of 2012.

...

MR. LEPORE: No, this is for trial on the - on the sex assault.

...

THE COURT: Am I to understand prelim dates have been set for, as I indicated, July 17 to 18, October 12, 25, 26 in 409?

MR. HOPE: Yes. Your Honour, there's, as my friend said, those dates are somewhat controversial. Respectfully, the officers' vacation dates basically cancel out, other than those dates in July and June, the entire summer and September. So basically all of June, July, August and September. And I would respectfully submit that the - an in custody trial or prelim in this case, has to be given some priority over the summer months and cannot simply await the vacation of 10 or 12 separate officers that are required

...

I think the reasons for our request are self-evident. These gentlemen are in custody and you can't wait for vacation deadlines. We don't take witnesses' availability into account that way, and these are just essentially witnesses, albeit government ones.

MR. RAZAQPUR: I would - I would echo most of my friend's comments. Certainly from Mr. G.S.'s perspective he is in custody. The defence would be available any of the dates offered, any of them, and the first ones were in June. We'd be prepared to go ahead as early as next week and we would like to get this matter moving as quickly as possible. He's certainly not waiving his 11(b) rights. And I agree with my friend that officer vacation dates can't be paramount. So any week that we could do, from next week forward, the defence would be available for Mr. G.S.

...

MR. LEPORE: Likewise, Your Honour. Your Honour, I would like to point out that come October, these gentlemen will have been in custody close to 10 months, but I - I echo my friend's comments.

...

THE COURT: Okay. Well, this is what I'm going to do. I am - because things change all the time in - in this court. Today I cancelled probably five in custody days, or out of custody days that were originally set and that we've whittled away at, and I'm going to be bringing this matter back anyhow, because I want to number one, have and confirm that Mr. Paradkar, who I understand is also included in this, is available on those days or will make counsel available on the days that have been set.

...

And three, to see if there are any earlier dates available. So this is not the end of this discussion, we'll have another discussion in a very short period of time, we'll see if we can't find earlier dates as well. But we'll keep the hope alive that we can get earlier dates in October.

So I'm not going to order that the Crown vacate officers' leave dates at this point in time or make those efforts because I don't know if Mr. Paradkar is going to be available, and I don't know what his availability is because he omitted to provide Mr. Hope, as agent for today, later dates. So I want a date when everyone is coming back and we'll have a discussion about where we are.

26 April 13/12 transcript

MR. HOPE: Mr. Paradkar sent me, or his - Mr. Paradkar sent me a message saying they'd have an agent here, as the October dates weren't agreeable with Mr. Paradkar's availabilities, so they would like to set some new dates.

MR. LEPORE: Well...

THE COURT: Mr. Lepore doesn't look happy.

MR. LEPORE: No, I'm not happy, and my client will be even less happy. He's in custody.

...

THE COURT: Where's Mr. Paradkar? Do we know?

MR. HOPE: If I can just have a brief indulgence, I'll pull up the message and see exactly - it just says we have an agent covering it today. His name is..

MR. D'IORIO: Colin.

MR. HOPE:...Colin. He's to set new date as Deepak isn't available on October 12th or 25th. I'm not sure - I, as you recall, Mr. Deepak - Mr. Paradkar, sorry now I'm sounding like his clients - Mr. Paradkar ...

...

MR. D'IORIO: I suppose I'll repeat this when everyone's here again, but this is a, a case that was sitting on the shelf in Your Honour's court last night, but I checked in anticipation of looking for Your Honour's seized matters. That being the case, I, prior to about 6:30 last night, had no knowledge of the case's existence. I've since become fully assigned and I now will be the Crown responsible for this case in all respects ...

...

MR. D'IORIO: So we would have 17, 26, July 17 and 18, and then November dates, four of them.

THE COURT: So October - excuse me, 12 and 25 are being vacated.

MR. D'IORIO: 'Cause they're not available to Mr. Paradkar.

...

27 It is clear from these exchanges that Justice Mcleod considered vacating officers' leave dates but only on the condition that Mr. Paradkar would be available. I do not agree with the Applicants' characterization of this exchange being such that the officers' schedule took on a higher priority than the rights of the Applicants. Justice Mcleod clearly stated: **"So I'm not going to order that the Crown vacate officers' leave dates at this point in time or make those efforts because I don't know if Mr. Paradkar is going to be available"** [emphasis added].

28 With respect to the time it took to complete the eight-day preliminary inquiry, plus two days of Discovery, namely 4 months and 4 days, I am satisfied that this was not an unreasonable time considering that three lawyers' schedules had to be considered. The Preliminary Inquiry was also completed as scheduled.

29 At Tab 5 of the Crown's Application Record the Notification of Trial Date provided by the Trial Co-ordinator sets out the following dates to begin the Preliminary Inquiry:

Dates Suggested June 27/12

June 28/12

July 4/12

July 16/12

July 17/12

July 18/12

July 27/12

Aug 20/12

Aug 21/12

Aug 24/12

Aug 28/12

Aug 29/12

Aug 30/12

Aug 31/12

30 The July 27, 2012 to August 31, 2012 time period was not available due to previously scheduled officer vacations. However, as the transcripts set out and as Mr. Paradkar was not available, a reasonable reading of the entire exchange demonstrates that Justice Mcleod was open to vacating officers' leave dates if all counsel were available. After the initial dates to

commence the Preliminary Hearing in July 2012, namely July 17 and 18, 2012, the continuation of the Preliminary Inquiry could not continue until October 26, 2012, the first date that Mr. Paradkar was available.

31 In all of those circumstances, I am satisfied that the time period of 4 months and 4 days to complete the Preliminary Inquiry is reasonable.

Result: 30 months less 4 months 4 days = 26 months

- I am rounding this period off by deducting the 4 days.

Superior Court of Justice

November 21, 2012 to January 11, 2013 (1 month 22 days)

32 During this time period the Applicants were committed to stand trial, the matter appears in the Superior Court of Justice and a Judicial Pre-Trial is held before Justice Durno and trial dates are set. I am satisfied that this time period is properly and reasonably allocated as inherent intake time.

Result: 26 months less 1 month 22 days = 24 months 9 days

January 12. 2013 to September 30, 2013 (8 months 19 days)

33 Institutional delay begins at the point where the parties are ready to conduct the trial but the system is unable to accommodate them, *Tran* at 32; *Morin* at 47; and *Lahiry* at 25-37.

34 In *Sidoro* Justice Dawson set out the following at paras. 39 and 41:

> **39** On May 18, 2012 the March 18, 2013 trial date was set. As already mentioned, when the applicants were offered a February 11, 2013 trial date their counsel advised the court that they would not be able to do a continuous six week trial until March 2013. This necessarily means, to use the words of Sopinka J. in *Morin,* that the applicants' counsel could not "clear their schedules" in order to do this trial until March 2013, assuming for the moment that the trial required six weeks.
>
> ...
>
> **41** I will deal with this aspect of the matter further when I deal with the conduct of the Crown. For now I will simply say that if something approximating a six week trial was required there was no institutional delay associated with the time period from May 18, 2012 when the trial date was set until the March 18, 2013 start date because the applicants' counsel could not clear their schedules to accommodate this trial until March 2013. As soon as counsel were available for trial the court was able to accommodate them. Based on how trial dates are fixed in the Superior Court in this jurisdiction it would

not have made a difference to scheduling if the trial was somewhat shorter. I note that counsel for the accused have produced no evidence that they would have been available significantly earlier for a slightly shorter trial.

35 On January 11, 2013 the following exchange takes place and it becomes clear that Mr. Paradkar is unavailable until October 2013:

THE COURT: All right. With respect to G.S., Gunalingam and Jassal, well, first of all, they will be here in two minutes but we can do the date right- while we're waiting, I think. Mr. Paradkar, you said your first availability is October?

MR. PARADKAR: That's right, Your Honour. He's- my client is right here, Your Honour.

THE COURT: How about November 4th after our conference and then just go right through.

MR. PARADKAR: That's fine, Your Honour.

MR. LEPORE: Just have a moment. That's fine.

MR. RAZAQPUR: Your Honour, just on behalf of Mr. G.S., we'd be available earlier, and just put on the record that we'd like the earliest available trial date.

THE COURT: All right. Well, we could look for earlier dates, but given Mr. Paradkar's - and he's not available until October, and the length of this trial, I'll say six weeks ...

MR. D'IORIO: With respect to November 4th, Your Honour, I'm a little bit concerned, I'm starting on October 1st a four week long or - I think it's four or five week long murder trial in the matter of Bal and Sidhu, which is before the court today. And if it's possible to have even an extra- start even a week later that would alleviate some of my concern about the two trials overlapping.

THE COURT: All right. So you would start on the 12th because the- the next Monday is a holiday.

MR. RAZAQPUR: Your Honour, just so the record reflects, we - we are asking for an earlier date, we're not waiving 11(b), reserving our rights.

THE COURT: All right. Would you like me to - what are you asking me to do, to adjourn Mr. Paradkar's other trials or...

MR. RAZAQPUR: No, I'm just putting forward that we're available earlier and we'll be relying - we may well raise an 11(b) argument, that's all I'm saying.

THE COURT: Do you want a return date in March to confirm ...

MR. PARADKAR: Sure.

THE COURT: Do you want to stay away from March break, I assume?

MR. PARADKAR: Sorry ...

THE COURT: Stay away from March break. MR.

PARADKAR: Yes.

THE COURT: So March 21st at 9.

MR. LEPORE: That's agreeable.

MR. PARADKAR: That's fine, Your Honour.

MR. D'IORIO: Yes, thank you, Your Honour.

THE COURT: The other thing I want to do in March is to get a little better handle on what motions are going to be brought because we'll have to bring a special panel in, so when throughout that whole time period we'll need to know. So you'll be giving those issues some consideration.

MR. LEPORE: Thank you, your Honour.

MR. PARADKAR: Thank you, Your Honour.

THE COURT: All right. When the two in custody come up, and that is Gunalingam and G.S...

...INTERRUPTION RE UNRELATED MATTER

MR. PARADKAR: Your Honour, just want to re-address Jassal, I forgot to indicate we need an interpreter, both a Punjabi and a Tamil interpreter for that trial. Punjabi for my client, Tamil for Mr. Lepore's client.

THE COURT: Thank you.

MR. D'IORIO: I don't know if this requires more than one interpreter, it may, Your Honour. But I think Mr. Salsberg's client also needs a Punjabi speaking interpreter.

THE COURT: It would be at least two Punjabi and at least two Tamil. Okay. Thanks very much for bringing that to my attention.

...INTERRUPTION RE UNRELATED MATTER

THE COURT: Just a moment, the gentleman who is out of custody, that's Mr. - just leaving. Mr. Jassal - Mr. Jassal, you haven't actually been - you're remanded to March 21st at 9 o'clock.

MR. PARADKAR: Thank you, Your Honour.

THE COURT: All right.

...

THE COURT: If we could deal with the gentlemen in custody, I assume ...

MR. D'IORIO: This is Mr. Jaswinder Singh, and...

THE COURT: Pre-trial held, trial date November 12, 2013, sittings, six weeks, with a jury, challenge for cause. Trial readiness court October 25th at 10. All accused are remanded to March 21st at 9 o'clock to continue the pre-trial and set date for jury selection. And

these two gentlemen are remanded in custody. Two Punjabi and two Tamil interpreters required for trial. Thank you.

36 I agree with the Crown's position that all parties were not in a position to conduct the trial prior to October 1, 2013. The trial was scheduled to commence November 12, 2013 and actually started on November 14, 2013.

37 I am satisfied that the 8 months and 19 days is, therefore, properly and reasonably allocated to neutral delay.

Result: 24 months 9 days less 8 months 19 days = 16 months and 10 days

October 1, 2013 to November 13, 2013

38 As Mr. Paradkar's presumed first available date in October is October 1, 2013 all parties were ready by then so the time period from October 1, 2013 to the start of the trial is institutional delay.

November 14, 2013 to December 20, 2013 (1 month 7 days)

39 During this time pre-trial motions were heard. There was a break at Christmas from December 21, 2013 to January 5, 2014 (16 days). The jurisprudence is clear that the time spent on pre-trial motions is considered inherent time. In *Schertzer* the Court stated at paras. 114-117:

> **114** Ordinarily, the time taken to complete the trial, including resolution of pretrial motions, the hearing of evidence and, in a judge-alone case, time while the decision is under reserve, is part of the inherent time requirements of the case. It is neither Crown delay because the Crown seeks to adduce certain evidence nor defence delay because the defence objects.
>
> **115** Exceptionally, the time taken at trial will lead to a finding of unreasonable delay. *R. v. Rahey,* [*[1987] 1 S.C.R. 588*](), was such a case. There the trial judge reserved for 11 months to resolve a motion for a directed verdict, a matter that should have been resolved in a few days. We can also envisage circumstances where time spent during pre-trial motions could be attributed to either the Crown or the defence. If the trial judge concluded that defence motions were frivolous and served no legitimate purpose, the time to deal with those motions might be attributed to the defence. Similarly, if the trial judge was of the view that, for example, the Crown acted arbitrarily or in bad faith in refusing to make disclosure or unnecessarily delayed the proceedings by failing to accept reasonable admissions from the defence, the resulting delay could be attributed to the Crown.
>
> **116** The trial judge here was obviously concerned with the pace of disclosure. He also made rulings that indicate he disagreed with the Crown's overall approach to disclosure. For example, he held that the Crown had not satisfactorily explained many of the passages that had been edited out or vetted. It is also apparent that the trial judge considered that the time taken to make disclosure prior to trial was unsatisfactory . That view may have been coloured in part by the trial judge's erroneous finding that disclosure should have been prepared as the police found they had reasonable and probable

grounds to lay a charge, a matter to which we will return shortly. That aside, we have not been persuaded that the time taken to resolve the disclosure issues during the pre-trial motions was due to arbitrary or bad faith conduct by the Crown.

117 We would consider the five months spent on pre-trial motions part of the inherent time requirements. We acknowledge that not every day of that time was used for argument. At different times the Crown or defence requested adjournments to prepare their materials. Some time was lost because counsel for Correia had to conduct another trial. It will also be recalled that the trial proper was to commence on January 8, 2008, but the start date was pushed back to February 19 to allow more time for pre-trial motions. The respondents submit that this time was caused by the Crown's failure to make adequate disclosure. In our view, this is not a reasonable characterization of this period. For various reasons the pre-trial motions took longer than expected. Those reasons are complex and not by any means due solely to disclosure issues.

(See also *R. v. NNM,* [2006] O.J. No. 1802, 2009 C.C.C. (3d) 436, (C.A.) at 65; *R. v. Hape,* [2005] O.J. No. 3188, 2001 O.A.C. 126, (C.A.) at 25- 28.)

40 The pre-trial motions included the following:

- Applications to exclude statements re: G.S. and Gunalingham;
- Application to exclude the contents of the black pants alleged to belong to Mr. Gunalingham;
- An application by G.S. to exclude the Indian driver's licence in his own name;
- A stay of proceedings brought by Gunalingham for lost evidence.

41 I am satisfied that the period of 1 month 23 days is inherent time.
Result: 16 months 10 days less 1 month 23 days = 15 months 13 days

January 6, 2014- January 12, 2014

42 For the reasons set out by the Crown at para. 111 of his Factum I am satisfied that this 7 day period is neutral time.
Result: 15 months 13 days less 7 days = 15 months 6 days

January 13, 2014 to January 31. 2014 (19 days)

43 During this time the trial proper commences. This period of 19 days is therefore inherent time required for the trial.
Result: 15 months 6 days less 19 days = 14 months 27 days

February 1, 2014 to February 7, 2014 (6 days)

44 On January 31, 2014 and as a result of numerous disclosure issues that came up, defence requested time to consider a stay application or in the alternative a mis-trial application. The

application was argued over two days, February 3 and 4, 2014. On February 7, 2014 Justice Skarica did not stay the charges, however, he did grant a mis-trial.

45 I am not satisfied that this period of 6 days is inherent time. In my view this delay is attributed to the Crown as the stay/mis-trial applicants were required because of the disclosure issues. Justice Skarica was clear that the disclosure issues arose as a result of the actions of the Crown and the investigating officers.

February 8, 2014 to December 9, 2014 (9 months 29 days)

46 I am satisfied that all of this period is properly allocated to Crown delay.

47 On February 13, 2014 Justice Skarica ordered that a new trial date be arranged as soon as possible and that the date be expedited. It is not necessary in my view to conduct a detailed analysis of what transpires at the attendances before Justice Durno in order .to arrange a new trial date. I am satisfied that none of that discussion would have been necessary but for the mis-trial. Defence counsel had to now look at their calendars to arrange for a new trial date. Again Mr. Paradkar's busy scheduled posed problems in having the matter heard quickly. Mr. Paradkar initially stated he would not be available until March 2015. Mr. Razaqpur strongly urged an early date stating he was available in February 2014 or March 2014. Mr. Lapore stated his earliest availability was September 9, 2014.

48 Crown Attorney Coughlin stated that the Crown would be prepared to begin the trial as early as May 1, 2014.

49 The Applicants wished to proceed with their s. 11(b) Application and therefore transcripts would be required and proper application material would have to be filed. As a result the September 9, 2014 date was agreed to for the commencement of the trial.

50 In *R. v. Khan,* *2011 ONCA 173*, *[2011] O.J. No. 937*, Justice Karakatsanis stated the following at paras. 69-71:

> **69** I agree with the application judge that defence counsel cannot be faulted for not being available on the first available trial date. In *Godin,* the Supreme Court of Canada stated at para. 23: "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." The court agreed that, in circumstances where the Crown was responsible for the case having to be re-scheduled, it was not reasonable to hold that the delay clock stops as soon as a single available date is offered to the defence and is not accepted. The court noted at para. 5 that the case was straightforward; virtually all of the delay was attributable to the Crown and was unexplained; and the defence had attempted unsuccessfully to move the case ahead faster.
>
> **70** However, the circumstances in this case are very different from those in *Godin.* In this case, the Crown was not responsible for the mistrial and therefore was not responsible for the delay resulting from the need to re-schedule the trial date. No

> periods of delay were attributable to the conduct of the Crown. Furthermore, although the application judge found that this was not a case where the defence was impeding the trial's progress, the defence appeared to be content with the pace of this litigation until the mistrial was declared. Finally, it is clear that the Crown, mindful of the issue of delay, made every effort to find an early trial date and advised that the Crown witnesses were available at any time.
>
> **71** While there are special scheduling challenges for counsel when a matter is rescheduled, it is wrong to attribute delay to the system when, in fact, the system could have accommodated an expeditious trial: *J.J.*, *[2008] O.J. No. 663* at para. 3. In this case, the mis-trial was the fault of neither party and resulted in some inherent neutral delay. Although, defence counsel's first available date for trial appears to have been almost eight months after the mis-trial, it is not necessary to determine whether some part of that delay is attributable to the defence rather than to the inherent requirements of the case. In the circumstances of this case, the time between the first available date and the retrial date is neutral. As a result, I conclude that the application judge erred in treating the period after the mistrial as Crown or systemic delay.

51 The distinction with the *Khan* analysis is this. In the case at bar the Crown was responsible for the mis-trial. As a result of the Crown and police conduct as characterized by Justice Skarica, the Crown was responsible for the need to reschedule the trial date.

52 Further the decision to proceed with the s. 11(b) Application also falls at the feet of the Crown. In any event as all parties could not start this trial prior to September 9, 2014 proceeding with the s. 11(b) applications in July did not impact on that start date.

53 I also wish to comment on the Crown's position that they could have commenced the trial on May 1, 2014. In order to provide context to that analysis it is necessary to review the testimony of Det. John Doran at the s. 11(b) hearing.

Testimony of Detective John Doran

54 In addition to testifying at that hearing Det. John Doran also swore an Affidavit on June 26, 2014. At paragraphs 2 to 8 he sets out the following:

> 2. Following the mistrial of this case in February 2014, I was transferred to the Criminal Investigation Bureau at 21 Division and was assigned as the officer-in-charge of this case. I am working on this case with a team of officers.
> 3. My role on this case is to act as one of the lead investigators - analysing the evidence previously gathered, and taking further investigative steps as deemed necessary.
> 4. I have been informed that the Applicants were each asked to provide DNA samples on consent. None of them agreed to do so and DNA warrants had to be drafted and executed for each party.

5. Having been made aware of the circumstances surrounding the mistrial, one of my initial tasks upon receiving this assignment was to ensure that the prosecution team complied with Justice Skarica's order of February 7th, 2014. Specifically, make sure that everything obtained/generated during the initial investigation (i.e. prior to the mistrial) had been disclosed.
6. The Crown's case, as it existed at the time of the first trial, relied on the notes of approximately 79 different police officers, many civilian witness statements, forensic evidence (fingerprint and DNA) and surveillance evidence.
7. An electronic copy of the entire brief as it existed at the time of the mistrial (including any of the items that had been inadvertently not disclosed) was put together for ease-of-reference and was provided to defence counsel on April 10th, 2014.
8. The investigation has continued and we have provided new disclosure to defence counsel from time-to-time over the past few months.

55 With that context in mind it is important and informative to set out some of Det. Doran's testimony. In Cross-examination by the defence the following evidence Was given:

1. Det. Doran confirmed that there were 17 officers' notes that were not originally disclosed prior to the first trial on this matter;
2. Exhibit 4 for this is the April 10, 2014 disclosure;
3. Subsequent to April 10, either his office or the Crown provided further substantial disclosure to the defence. It was disclosure in regards to the investigation that they had done after preparing the April 10 disclosure to reinvestigate essentially the entire case.
4. On or about May 15 the defence was provided a disclosure index and an electronic disclosure in the form of a disc. The disc entitled Electronic Disclosure is dated May 6, 2014. The index is eight pages in length. This was all disclosure the defence had. It was just being given to the defence in a format that they could access from a computer. Det. Doran stated this:

A What we did was we got authorization through our, our supervisors to utilize what's called supertext. It's a scanning system that scans paper documents. It puts it into a, an electronic discloseable (ph.) disc for the purposes of easier access via a computer just solely to assist in - - because the, the actual volume of the paper that you would've had to have gone through, this is just a more readily, easily accessible way to read your disclosure.

The following exchange is also relevant on this point:

Q. Perfect. Are you aware of whether or not that disc and the index included the disclosure that was - - I was going to way withheld, but that might not be appropriate - - the disclosure that wasn't disclosed prior to the original trial date?

A. If I can just take a quick moment to ...

Q. Sure.

A. ...review it?

Q. Sure. Sure. Sure.

A. Yes, it does appear to contain the officers' notes and that production order results that I had referenced to earlier and then some of the other stuff, other things that we had found that hadn't been disclosed previously, yes.

Q. Alright. So as of May 15th you have a consolidation of the disclosure that was and wasn't disclosed prior to the trial date and you have some disclosure that is new. Is that correct?

A. That's correct, sir.

5. A CD entitled Blackberry Bold 9000 with a date of May 22, 2014 was given to the defence. Twelve CDs that appear to be for the most part witness statement interviews all dated in April and May 2014 were also provided. With respect to the discs the following detailed summary is provided by Det. Doran:

A. Okay. The first one is the one I've just said with Constable Schertzing. The second is Blackberry Bold 9000, 647-893-3175. It is dated the 22nd of May, 2014. The next is a interview video with a witness G.S., last name is G.S., S-I-N-GH. The, the created date on the disc is the 13th of May, 2014. The next is another video interview of a witness with the name, the first name is I.K., I-S-H-N-A-N, the surname is I.K., K-A-U-R, with a created date of the 5th of May, 2014. The next is another video interview is listed as the victim, V.B., and it's V-E-E-R-P-A-L, the surname is V.B., B-R-A-R, with a created date of the 15th of May, 2014.

A. That's fine. Okay. The first name is Judedenniex, and it's J-U-D-E-D-E-N-N-I-EX, with the surname of Masilamany, M-A-S-I-L-A-M-A-N-Y, with a created date of the 8th of May, 2014. The next is another video statement of a witness. The first name is Deiver, D-E-I-V-E-R, with a surname of Gamboa-Gamboa, G-A-M-B-O-A, with a space, and then G-A-M-B-O-A, with a created date of the 28th of April, 2014. The next disc is another witness it's Y-O-G-E-S-H-, and a surname of G-E-R-A, and it's G-E-R-A It has a created date of the 15th of April, 2014. There's another video disc of a statement of a witness. The first name is Mahesh, M-A-H-E-S-H, with a surname of G.S., S-I-N-G-H . It was created on the 5th of May, 2014. The next is another video disc of a witness statement. The witness name is Lakhvir, L-A-K-H-V-I-R, with a surname of Dagree, D-A-G-R-E-E-. It was created on the 15 of April, 2014. The next disc is a video disc of a statement taken by-- or sorry, from Moises, M-O-I-S-E-S, Gallardo, G-A-L-L-A-R-D-O, which was created on the 28th of April, 2014. The next disc is a witness statement taken from Anson, A-N-S-O-N, with a surname of Tharsious, T-H-A-R-S-I-O-U-S . The disc was created on the 8th of May, 2014. There is another video disc of a statement taken from the victim, V.B., and it's V-E-E-R-P-A-L, V.B., B-R-A-R. This disc was created on the 6th of February - - or sorry- 0 no, I'm sorry, it was the 7th of June, 2014. The next is a disc of a audio statement taken by a witness with the first name Joga, J-O-G-A, with a surname of Bagree, B-A-G-R-E-E-. The only date given on the disc is April the 10th, 2014. The next disc is a video disc of a statement taken from a witness by the name of Jagdish, and it's J-A-D-I-S-H, with the surname of Grewal, G-R-E-

W-A-L. It was created on the 27th of May, 2014. Another disc is a video statement taken from a witness whose name you already have, but it's Judenniex, and its J-U-D-E-D-E-N-N-I-E-X, with a surname of Masilamany, M-A-S-I-L-A-M-A-N-Y, with a created date of the 8th of May, 2014. The next video disc is the same person, another video statement taken Judedenniex Masilamany that was created on the 8th of May, 2014. The final disc that I have is another video statement taken from a witness with the first name of Amandeep. A-M-A-N-D-E-E-P, with a surname of Benipall, and it's B-E-N-I-P-A-L-L, that was created on the 6th of May, 2014

6. Six officers' notes were sent to the defence on June 10, 2014. On this point the following exchange is relevant:

   Q. Alright. Do you know roughly how many officers' notes are in this package?

   A. If I can just take a look at the ...

   Q. Sure.

   A. It appears to be six.

   Q. And this is new disclosure?

   A. That is correct. This would've been the investigative team that was assigned to me to essentially reinvestigate this event.

   Q. Alright. Okay. I'm going to suggest that there is other disclosure that was also forthcoming from the Crown's office in June of this year, namely, reports from the Centre of Forensic Sciences with respect to DNA evidence. Are you aware of that?

   A. They, they -- yeah, they would've been disclosed to you as soon as we had gotten them I believe that was at the end of May and perhaps in June.

7. Up to June 10, 2014 the Crown and the police were still in the process of providing substantial disclosure with respect to this matter. Det. Doran acknowledged that not only was it substantial but it was material disclosure that was necessary for the prosecution of the case and for allowing for the proper defence of this case.

56 In re-examination by the Crown Det. Doran set out the following:

- The inventorying of the existing evidence and putting together any missing disclosure was contained in the April10, 2014 receipt;

- The role that his team undertook was to reinvestigate the entire offence;

Q: And what was your purpose in doing that?

A: To ensure that we had not missed anything and to do a thorough evaluation and investigation of the offence to try and locate anything that had been missed or any persons that had possibly been missed in the initial investigation

- The April 10, 2014 disclosure package was complete compliance with Justice Skarica's order;

- With respect to the additional disclosure the following exchange is relevant:

Q. And the items that you say, the couple of items that were not done by the end of May, when were those completed by, roughly?

A. By the middle of June.

Q. Now, Mr. Lepore was asking you about the Crown and the defence still receiving disclosure as of June the 10th. Do you remember him asking you about that in cross-examination?

A. Yes.

Q. And was that disclosure that existed at the time of the first trial?

A. No.

Q. What was that?

A. That was our additional investigation that we had done.

Q. After April 10th, 2014, after that disclosure package, was any of the disclosure provided after that date disclosure that existed at the time of the first trial?

A. Off the top of my head, no, it was not.

Q. What was it?

A. It was all additional, our additional investigation.

57 In light of Det. John Doran's testimony I cannot find and conclude that the Crown would have been able to begin the new trial May 1, 2014. In any event, however, all parties could not start the new trial until September 9, 2014.

58 I am satisfied that the entire period from February 7, 2014 to December 9, 2014 is properly attributed to Crown delay.

CONCLUSION

59 Total Delay attributed to Crown delay and institutional delay = 14 months 27 days

PREJUDICE

60 It is important to state at the outset of this analysis that prejudice under s. 11(b) relates solely to the prejudice caused from the delay not the prejudice suffered as a result of having been charged.

61 The onus is on the Applicants to establish prejudice. In *Lahiry*, Justice Code noted that prejudice can be inferred, without extrinsic evidence, from a "very long and unreasonable delay."

62 I will deal with each of the Applicants separately as it relates to the issue of prejudice.

G.S.

63 G.S. submits that he has suffered both inferred and actual prejudice as a result of the delay in this matter. In support of that submission G.S. points to the following factors:

- The extended and significant amount of pre-trial detention;
- Once released he was placed on strict bail terms;
- G.S. spent from November 13, 2011 to December 14, 2011 in custody.
- On January 4, 2012 he returned to bail court as a result of a surety's withdrawal. He then remained in custody until July 23, 2013 (20 months and 19 days). On July 23, 2013 he was again released on bail;
- Pre-sentence detention is relevant as it relates to enhanced credit. G.S. relies on *R. v. Summers,* *[2011] O.J. No. 6377* on this point;
- Whether G.S.'s prejudice is assessed based on the harsher conditions associated with pre-trial detention or on the loss of remission or parole resulting in enhanced credit, it is clear that the prejudice is real and significant to G.S.
- he was initially granted bail and released, only to subsequently have his surety withdraw. On November 26, 2012, after the conclusion of the preliminary inquiry, Mr. Razaqpur brought an application before Justice Andre, the judge who presided over the preliminary inquiry. At that hearing, the defence sought to have Mr. G.S. released on his own recognizance. Although the Crown did not consent to that proposal, the Crown agreed to lower the surety amount from $10,000 to $1,000 to assist in facilitating his release. Justice Andre held that the "appropriate" form of release was with a surety in the amount of $1,000. While it is unfortunate that Mr. G.S. ultimately spent 21 months and 20 days in pretrial custody, the Respondent submits that reasonable efforts were nonetheless made to limit the prejudice suffered. His current bail conditions are very relaxed, as there are no work or mobility restrictions, or house arrest.

64 I cannot agree with the defence position with respect to G.S. The principles relating to enhanced credit for pre-trial custody applies after trial and after conviction and is relevant at the sentencing hearing.

65 The prejudice G.S. refers to is directly related to the charges and not the delay in getting this matter to trial. The difficulties G.S. had with his sureties cannot fall at the feet of the Crown. Further once G.S. was released his bail conditions were not onerous.

66 During the course of the s. 11(b) Application, G.S. did not testify with respect to the security of the person issue.

67 With respect to the issue of full answer and defence I cannot find that G.S. has suffered any

prejudice to his fair trial rights. In *R. v. Ignagni,* 2013 ONSC 5030, [2013] O.J. No. 3531, the Court stated the following at paragraph 79:

> **79** Similarly, the respondent has suffered no discernible prejudice to his fair trial interests. In his affidavit, the respondent indicated that his memory of the relevant events was better at the time of the alleged offences than it was at the time of the scheduled trial proceedings. That is, however, little more than a statement of the obvious - memories get worse, not better, over time. Moreover, the parties agreed that as soon as the respondent retained counsel, relatively close to the time of the events in question, detailed notes were made about what happened, and these notes could be used to assist the respondent in refreshing his memory.

GUNALINGHAM

68 Gunalingham was on bail for similar charges at the time of these offences. As such he has been in custody since his arrest.

69 Gunalingham relies heavily on the fact that there has been delayed disclosure and that as a consequence of that he has suffered actual prejudice.

70 Gunalingham argues that the failure to provide disclosure in a timely manner was particularly egregious in light of the fact that the disclosure was potentially exculpatory and he remained in custody, in part, on the strength of the Crown's case.

71 The Crown, on the other hand, submits that the disclosure in question would not have exculpated Gunalingham in any way. The Crown points to the following in support of that argument:

1) The Blackberry phone found in the black pants:

* The Blackberry is registered to Ms. Shalini Mahalingam, Mr. Gunalingam's girlfriend. Ms. Mahalingam told police and testified at the preliminary inquiry that Mr. Gunalingam is the user of the phone and that the above number is the number she calls him on.
* Subsequent analysis of the phone records for November 11, 2011 (the day of the kidnapping) reveals that the phone originated in Scarborough at approximately 6:21 a.m. and travelled west towards Malton, pinging several cell towers along the way.
* Further analysis of these records shows that the phone appears to be turned off for the entire period of 7:34 a.m. through 9:45a.m. This period coincides with the initial kidnapping.
* The same records then place the phone in the areas of both banks, at the relevant times that Ms. J.B.'s account was accessed by the man on the surveillance footage. The phone then returns to the Malton area where Ms. J.B. was confined.
* In summary, a review of the phone records suggests that Mr. Gunalingam's Blackberry phone was in contact with one of the "known kidnappers" shortly

before the kidnapping occurs in the morning (in Peel Region) and then is in the area where the ATM's are accessed in the afternoon (at the relevant times). The phone then returns to the Malton area where Mr. Gunalingam lives and Ms. J.B. was confined.

2) The wallet with a Visa card in the name of "Ramandeep Rana":

* On March 18th, 2014, Brampton police learned that in 2011 Vajinder Singh applied for a driver's license in the name of "Ramandeep Rana". The licence was not issued because "facial recognition software" determined that the person applying as "Rana" was, in fact, identical to Vajinder Singh

72 Of course it is difficult to make any findings of fact at this application as it relates to the disclosure in question. Whether this evidence is exculpatory or not is for the jury to determine after hearing all the evidence. I am not the trier of fact and I do not have before me the entire body of evidence that will be called at trial. It will be for the jury to assess that evidence taking into account all of the trial evidence.

73 Gunalingham's position, therefore, that the delayed disclosure is a significant factor constituting prejudice cannot be established.

74 Gunalingham was not released on bail for legitimate and cogent reasons. None of that relates to delay, but rather is a direct result of the charges being laid.

RE: JORA JASSAL

75 In order to provide an evidentiary context to access prejudice relating to Jassal it is necessary to review the testimony of Jassal and his wife called at this Application.

JORA JASSAL

76 Jora Jassal filed an Affidavit in support of his position sworn June 9, 2014 and filed as Exhibit 1 to this Application. The relevant portions of this Affidavit are as follows:

- Jassal is 30 years old.
- He is a Canadian Citizen having landed in Canada in 1995.
- He is married to Savinder Maingi.
- He has been a self-employed truck driver since 2004.
- He currently lives with his wife, his mother and his two sisters.
- The delay caused by the mis-trial has impacted negatively on all areas of his life and the life of his wife.

77 In his Affidavit he sets out the following adverse effects that this delay has caused:

- In 2011 his wife was forced to put her plans to continuing her schooling on hold until these charges were dealt with.

- His wife often has emotional breakdowns and he feels responsible for this because of these ongoing proceedings.
- He worries about whether he will be convicted and how he may have to spend time in jail. This is particularly worrisome as he is the primary financial provider for his household.
- His wife continually worries about what may happen to him.
- He is unable to expand his operations as a self-employed truck driver.
- The immense legal costs has caused him to sell his home.
- His entire family, mother and two sisters had to move out of the home with him.
- He has not told his in-laws who reside in India about these charges and it is increasingly difficult to keep it from them.
- He has difficulty sleeping.
- He is experiencing general lack of motivation and depression which is worsening.
- A recent on-line Toronto Sun article about the recent cost award contained his picture as well. This continued media attention is embarrassing and the shame and embarrassment has increased considerably.
- His employment at Kerry Bros. was terminated after it found out about his charges.
- The delay has prevented him from assisting his sister in her plans for her wedding and his worries about the case prevented him looking forward to such a great event in his sister's life.
- His memory is not as clear today with respect to the allegations and he is experiencing anxiety that he has to do this trial again.
- Although not mentioned in his Affidavit, in his oral testimony he stated that six months after this case started his wife became pregnant and thereafter had an abortion.

78 In Cross-examination by the Crown, Jassal confirmed and acknowledged the following:

- He was arrested November 14, 2011.
- Since November 14, 2011 he has been upset at the charges and he has been emotional about being charged.
- He spent 16 days in custody and then he was released on bail. The bail order had few restrictions. There was no house arrest term; there was no curfew; 'there was no restriction on his employment, and there was no requirement that he remain in Brampton or even the Province of Ontario.
- His wife's abortion was done even before the Preliminary Inquiry was completed in this matter. His wife became pregnant about six months after the case was filed in November 2011, so about May 2012 or so. The abortion decision therefore was related to the charges being laid and not any delay.

- As early as November 2011, when this case first started there was a great deal of publicity about the case and him as well. Jassal was taken through numerous articles set out in Tab XYZ of the Respondent's Record.
- Jassal acknowledged there was considerable publicity since November 2011.
- With respect to his self-employment as a truck driver, as recently as a week before this hearing started, namely early July, 2014, Jassal paid $3,500 for the truck and is paying $200 per month.
- With respect to being fired at Kerry Bros. in the summer of 2012, he was fired long before the mis-trial was declared in February, 2014. Further he acknowledged that he was able to find a new job within two to three weeks of being fired. He has worked continually since.
- His home was sold in the summer of 2012 long before the Preliminary Inquiry was completed.
- The concerns raised at paragraph 18, 19 and 21 of his Affidavit were all present since the date of his arrest.
- At no time did he seek out medical assistance to deal with any of these issues.

SAVINDER MAINGI

79 Ms. Maingi also filed an Affidavit sworn June 9, 2014 and it has been marked as Exhibit 3.

80 A significant portion of Ms. Maingi's Affidavit mirrors the language and concerns raised by Jassal in his Affidavit.

81 The Crown cross-examined both Jassal and Ms. Maingi as to whether they had spoken to each other about what they would say in their respective Affidavits. They were also both extensively cross-examined about whether the words used were in fact their own words or were they the words of the lawyer who prepared the Affidavits.

82 Jassal and Maingi denied that they had spoken to each other about what to say.

83 Jassal testified that his first language is Punjabi, although he also speaks and reads English. Initially he stated that he told the lawyer what to write down and no one told him what to say. He later acknowledged that he may have said these things in a simpler way but the exact wording was left to the lawyer.

84 Ms. Maingi testified that she read her Affidavit before signing it and it is accurate and the contents of the Affidavit are fine. She indicated that the words used are her words.

85 For the purposes of the s. 11(b) analysis it is not necessary to go through a detailed paragraph by paragraph comparison of each of the Affidavits. I am satisfied that as aptly demonstrated by the Crown's cross-examinations Jassal and Maingi, that there are almost

twenty instances where similar and at times identical language is used in their respective Affidavits.

86 I cannot say with certainty that they spoke to each other about what the contents of the Affidavit would be.

87 I am satisfied, however, that counsel who prepared the Affidavits used similar or identical language for both Jassal and Mairji's Affidavit.

88 Having said that, I am satisfied that both Jassal and Maingi experienced some of the concerns raised by them. It is clear, however, from the cross-examination that the problems and concerns they identified relate to the charges being laid and not any delay. I acknowledge that the delay has expanded the timeframe of those problems but the delay was not the genesis of those concerns. For example:

- They both experienced stress from the start of these proceedings.
- They both were emotionally compromised from the start of these proceedings.
- Although Maingi was not able to return to school in November, 2011 she had no difficulty continuing with her employment. Not being able to go back to school in November, 2011 related to the charges being laid and not any delay.
- The home was sold in 2012 for reasons not related to the delay caused by the mis-trial. In the summer of 2012 the Preliminary Inquiry had not yet been completed .
- Their lack of motivation and depression existed from the start of the proceedings in November, 2011.
- The pregnancy and eventual abortion took place in 2012 with the abortion taking place in the summer of 2012. Again, this is before the completion of the Preliminary Inquiry and long before the mis-trial application.

89 As I indicated the delay caused by the mis-trial has extended these issues, however, all of these issues existed from the outset.

90 Neither Jassal or Maingi sought any medical intervention to assist in dealing with the stress, anxiety or emotional fragility.

91 In conclusion, although Jassal has suffered some actual prejudice as a result of the delay it does not rise to the level of constitutional infringement.

92 The Crown submits that none of these concerns and issues were caused by the delay. All of them occurred as a result of the charges being laid. I agree .

FINAL BALANCING OF ALL THE RELEVANT FACTORS

93 In his ruling Justice Skarica made the following comments with respect to the offences before the Court:

I have reviewed the preliminary transcript of the evidence of the victim, V.B., given on July 17 and 18, 2012. A very brief review of her evidence reveals just how serious these charges are. On November 11, 2011, Ms. J.B. sent her daughter off to school after making her breakfast. Her partner had left for work. Ms. J.B. was in the house alone. At about 8 a.m., Ms. J.B. was getting ready for work and heard the doorbell ring. She thought it was her daughter and she opened the door. A strange man was there. After a brief conversation, he put his arm around her neck and mouth. A second man arrived. She thought he was a neighbour coming to help her. She was wrong. The second man also came in and the door was locked. The second man was Vajinder Singh who she knew. Vajinder Singh pushed her down into the basement so no one could see what was happening. The strange man ("strange man") demanded money and jewellery from her. They also demanded information regarding her cousin who was a dentist. They took $800 from her purse. The strange man said they were taking too long and said they needed to take pictures so she doesn't open her mouth. The strange man took pictures but Ms. J.B. was too upset to testify regarding further details because II I feel ashamed every day of that. The strange man said he wants a hundred thousand dollars. She told him she did not have it. The strange man said that she was not going to talk here and that they had to take her away and that she would never see her house again. Her arms were tied with cloth. She heard two or three other voices upstairs. Cloth was put over her mouth and eyes. She was told she was never going back to her house. They took her upstairs and put her in a vehicle on the floor. She was told that if she tried to move, she is dead. After 20-30 minutes of driving, they arrived at a home and she was taken downstairs into a room in the basement. They took all her bank cards and she wrote out the PIN numbers. She saw another man there in a mask who hit her in the face and asked her for information about her accounts. The man in the mask tied her up to a bed, tying her arms and feet to the corner of the bed. Vajinder Singh told her there were men upstairs with guns and he couldn't let her go. Eventually the strange man and the man in the mask returned and told her that she had more money in the bank than she said. The man in the mask told her they wanted $300, 000 or she would never see her daughter and never go back to her house. She was told she was done; she was gone. He started to hit her. She was terrified. She was crying and begged him to let her go. The man in the mask returned periodically to ensure that she was tied up properly and would hit her and threaten her. Vajinder Singh brought her water and slept on the other bed. She constantly asked for more water. The second day she heard fighting and yelling upstairs and she was very, very scared. The strange man brought her tea and a bagel in the morning of the second day. Around mid-day the man in the mask came in and tied her up very tightly and closed the door. He then started to touch her legs and it "was the most terrifying moment of my life." She begged him not to touch her and told her to take her life instead. The strange man then opened the door and told the masked man to leave. After an argument that she heard, the strange man returned and told her that he wanted to let her go but his partners are not agreeing to it. She was told that they went back to the house and they have her daughter too. Near the end, the strange man told her that they had her boyfriend upstairs and that they were beating him. About twenty minutes after the strange man leaves on the morning of the third day, the police arrive and rescue her.

...

> This is an offence of stark terror inflicted on a totally innocent person. Ms. J.B. and the public at large deserved better than the sloppy investigation that was to follow.
>
> Balancing all the factors as outlined above and given that there was no deliberate misconduct and the very extreme seriousness of these charges, I do not believe that this is one of those rare "clearest of cases" where a stay is appropriate.

94 I am satisfied that the societal interest in a trial on its merits is very high.

95 The amount of Crown and institutional delay in this matter is calculated by me is 14 months and 27 days. This is within the *Morin* guidelines of 14 - 18 months. I acknowledge some prejudice has been occasioned to the Applicants but none of that prejudice rises to a level of constitutional concern and none of it rises to a level that would enlarge the delay I have determined to be the case.

G.S.'S SEVERENCE ARGUMENT

96 Although I did deal with the delay caused by a co-accused earlier in these reasons I do wish to add to those reasons under this separate heading as it forms a significant part of the position put forward by G.S. as to why the charges against him should be stayed.

97 G.S.'s position is that the Crown should have voluntarily severed him so that G.S. could have had an earlier trial date.

98 The Crown submits that G.S.'s position at this Application should be treated the same as Gunalingam and Jassal and as such the s. 11(b) application should be dismissed as against all three. The Crown points to the following factors in support of his position:

- At no time did G.S. apply for severance prior to the first trial date in November, 2013.
- At no time did G.S. bring a s. 11(b) application prior to the first trial in November, 2013.
- This is not a case where the Crown repeatedly acquiesced to unreasonable scheduling delays caused by Mr. Paradkar, counsel for Jassal or Mr. Lepore, counsel for Gunalingam.
- Any delay caused by the co-accused was not unreasonable in the context of these proceedings.

99 The Crown summarizes some of the jurisprudence on this issue at paragraphs 185 to 188 as follows:

> 185. In *R. v. Whylie* the Ontario Court of Appeal accepted the general proposition that "ordinary delay caused by the actions of a co-accused is considered neutral in the s. 11(b) analysis." The Court recently elaborated on the reasoning behind this proposition in *R. v. L.G.*:
>
> This is because, generally speaking, it is in the interests of justice that individuals charged jointly with an offence be tried together. "A single trial for two or more

accuseds generally conserves judicial resources, avoids inconsistent verdicts, and avoids witnesses having to testify more than once": *Whylie* at para. 24. As was noted in *Whylie,* severance will rarely be granted. Given these principles, delay caused by the actions of a co-accused ordinarily will not be attributable to the Crown or to the absence of institutional resources. [Emphasis added].

186. Most recently in *Nguyen.* Justice Watt for a unanimous Court of Appeal affirmed the principles in *Whylie:*

Nothing documented in the record of proceedings suggests that the investigative and prosecutorial decision to undertake prosecution of the joint accused constituted an inappropriate exercise of prosecutorial discretion or amounted to an abuse of process. The allegations concerned a joint enterprise carried out by members of a criminal organization for gain. In such cases, the Crown's prima facie route of proceeding is one of joint venture, joint indictment, and joint trial. It is commonplace that the roles of the alleged participants may differ. We should be reluctant to second-guess prosecutorial decisions about joinder, both with regards to whether and when to remove some accused from the larger prosecution and to proceed against them separately; *Khan,* at para. 30.

187. A finding that the Crown consented to repeated delays caused by a coaccused may change the situation, as the Court of Appeal accepted was the case in *R. v. Topol.*, [2008] O.J. No. 535 Similarly, an application for severance, or an 11(b) application may also change the situation. However, the onus should be on the co-accused to raise this possibility. First, only the co-accused will know the point at which his interest in a speedy trial may outweigh his interest in a joint trial. Secondly, given the strong presumption in favour of joint trials, for valid policy reasons, it would be inappropriate to place any onus on the Crown to sever the counts in the context of multiple defendants, absent exceptional circumstances. The Supreme Court affirmed the decision of the Alberta Court of Appeal in *R. v. Koruz,*, [1992] A.J. No. 490 which included the following comments:

[I]f the suggestion is that every time a number of defendants are charged with conspiracy, the Crown should be required to sever charges if and when timing problems arise, the implications for prosecuting these kinds of cases could be profound. Although the right to trial within a reasonable time is an individual right, one cannot ignore the practicalities of what is involved in the Crown's prosecution of a conspiracy case. The mere fact that an accused has been charged with conspiracy does not confer upon him some inherent advantage in asserting a claim for a s. 11(b) breach if and when one of his co-defendants causes a delay in the proceedings. To suggest severance as a simple solution ignores the very real cost to the Crown and the public involved in prosecuting separate actions. In the end, this kind of approach will only serve to contribute to further delays in the administration of justice. Again, I do not disagree that there may well be cases where severance is in order. But what is significant in the context of this case is that none of the defence counsel applied for severance on behalf of any of these defendants. They were free to do so.. They chose not to take this step. [Emphasis added]

188. In *R. v. Dieckmann,*, [2012] O.J. No. 1344 the accused was one of six people charged with seven counts of fraud. The total delay was 85 months. The defence argued that it was prejudiced by the time taken by other co-accused to retain counsel. In dismissing the application, Justice Reilly held:

> Mr. Bains has submitted that some of the time occupied in ensuring the co-accused were adequately represented by counsel, could have been resolved if the prosecution had severed his client from the co-accused, particularly those who were not represented. That may be true, but his position is not well based in law. The prosecution, in my view, has an absolute discretion to proceed jointly against multiple accused, when it is alleged that those accused are involved in a common enterprise. I need cite only *R. v. Crawford; R. v. Creighton,* [1995] 1 S.C.R. 858 (S.C.C.). In that case, Justice Sopinka stated at para. 19:
>
> > A fourth solution would be to sever the trial whenever the conflict occurs, but no one in this appeal advocates such a solution and it would run counter to a uniform stream of authority in this country in favour of joint trials. No application for severance was made at the trial and the issue was not raised or commented on in the Court of Appeal ...

100 I agree with the position of the Crown on this issue and that position is supported by the jurisprudence. Mr. Razaqpur at no time applied for a severance. It is important to note that the issue of severance is first raised by Mr. Razaqpur on October 22, 2013. The trial date had been set to commence November 12, 2014. The exchange that takes place on October 22, 2013 with Justice Dumo is relevant and informative on the issue:

> THE COURT: Well, if there's a possibility of this trial starting on the 18th, it would then start four days later than it's currently scheduled. The Crown say they're ready to go on the 18th with another Crown. And while I will take into consideration other trials, I'll ask Mr. Paradkar when he gets here, is hesometimes with four - four accused and *Garofoli* somebody takes the lead, but if there's going to be a gap it may be that if this case doesn't end before Christmas it goes into the gap to finish it. And I know that creates scheduling problems but I am not certain that just saying, well, I'm on a four accused case so you have to schedule around me necessarily does it.
>
> ...
>
> THE COURT: Okay. I'm prepared to dictate reasons why we're in this situation. Bearing in mind this trial is starting four days late and counsel thought it could get done by Christmas. So if counsel underestimate then, you know, that's something that has to be taken into consideration.
>
> MR. RAZAQPUR: As I understand it, it's scheduled now to conclude on December 13th, that was my understanding.

THE COURT: Right.

MR. RAZAQPUR: Certainly if it was a matter of bumping the trial a mere four days I could likely work around that. The real concern in this case from my perspective is obviously there's an 11(b) concern already, we tried to move it up before. Four days -I'd rather bump it four days than have it bumped into the new year or whatnot. So I would work around it.

THE COURT: It won't be early in the new year. That's the - that's the other thing we don't know, is if it is adjourned, to be really blunt, what year is it going to be heard?

MR. LEPORE: That's a real issue, Your Honour, I'd like my friend- if we're only talking about four days I'd rather wait the four days than come back in June or July of next year .

...

THE COURT: No, no. Maybe I'm misunderstanding. As I understand it, the Crowns are prepared to have *voir dires,* okay. So the trial will start four days later, and it will continue. Mr. D'lorio will simply pick up the case and it will continue until it's finished.

MR. RAZAQPUR: Okay. Well, that's certainly- obviously it sounds like one of the better options then for us at this point.

MR. SHERRIFF: Your Honour, you're absolutely right about that. I've tried to come up with something that might work in this difficult log jam . What I'm expecting is that Mr. D'lorio would able - be able to do the opening and call the evidence but the pre-trial motions would be done by another Crown. And that's - I came up with that in desperation because it's it's tough logistically.

...

THE COURT: ...it would be ideal if we could target for jury selection 25th, 26th, but if it is five to seven days we'd be better to start on the 14 .

MR. SHERRIFF: Sure.

THE COURT: Which would be a two day delay in the trial.

...

THE COURT: As I understand from our discussions earlier today, the Crowns are prepared to have another Crown start the motions on the 14th. The original estimate was five to seven days for the motions. If I could just- there are two accused statement *voir dires,* is that right?

...

THE COURT: My notes show three to four weeks for the trial itself and then that's scratched out and it's four to five.

MR. D'IORIO: I think the four to five may reflect the possibility of defence evidence from one or more of the defendants.

...

THE COURT: Okay. As I understand what Mr. Paradkar's saying is the week of- well, I guess you could start the 2nd or 3rd of January, but Jet's realistically talk about the week of the 6th of January, and then it would to the 27th of January, February 3rd and February 10th are also available, because the jury is not selected till the 18th in Oshawa.

...

THE COURT: Okay. Let me wait and see where- what the trial is looking like, it may be that there - accommodations can be made for you on that with - with the trial judge. I think it's a little premature. If you want some reasons as to what's happened and why the matter is going to proceed in this fashion - it's either attempt to proceed in this fashion or multiply the proceedings because of the various additional issues that counsel are going to raise. And I hope that counsel will work together to make this work. No one has suggested when the trial might take place if everything is adjourned, and assume it's - when are all defence counsel available for a month in 2014, four to five weeks, six weeks?

MR. RAZAQPUR: I - I can make arrangements to be available whenever the court would want. I would reschedule ...

THE COURT: All right. Mr. Lepore, when are you available for about six weeks?

MR. LEPORE: I have a gap in March, but then I start - I'm starting up I think a five week matter here in April.

THE COURT: Mr. Paradkar?

MR. PARADKAR: I think I trump everybody, I'm jammed with jury trials up to the middle-end of June actually so - and that matter that I scheduled here in this courthouse is the second time up, Superior Court trial. So the first availability that I would have to go with this is the first week of July for five weeks.

THE COURT: Which for that length of trial means September.

MR. RAZAQPUR: Unless the Crown would consider severing individuals and proceeding separate trials?

THE COURT: Well, given the -I mean, I should keep quiet, I don't hear the Crowns jumping up and accepting that suggestion ...

MR. SHERRIFF: Your ears are finely tuned. We're not saying ...

> THE COURT: The other- I understand that in a practical way that would assist some people, doing trials twice isn't my idea of efficiency. So we'll leave it - the accused are all, I assume, remanded to the 12th.

101 I am satisfied that this is the type of case that strongly favours a joint trial and not severance. There is nothing before me to suggest that the Crown's decision to proceed with a joint trial was exercised improperly. The circumstances of this case as it relates to G.S. did not favour a severance as it related to him.

102 The comment by Mr. Razaqpur regarding severance was made only after lengthy discussions took place on the record on October 22, 2013 relating to the scheduling concerns of the pre-trial motions and the trial and only in response to Mr. Paradkar advising the court that if the trial had to be adjourned he would only be available in July 2014.

103 In all of these circumstances, therefore, G.S.'s position at this s. 11(b application is on the same footing as Gunalingham and Jassal.

DISPOSITION

104 The s. 11(b) applications for G.S., Gunalingham and Jassal are dismissed.

J.M. FRAGOMENI J.
