PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Brown*, 2017 NSPC 27

Date: 2017-06-19
Docket: 2802938
2802939
2802940
2802941
2802942
Registry: Bridgewater

HER MAJESTY THE QUEEN

v.

MICHAEL ANTHONY BROWN

Judge:	The Honourable Judge Paul Scovil
Heard:	May 1, 2017
Decision:	June 19, 2017
Charges:	Sections 266, 264.1(1) and 264.1(1)(a) of the **Criminal Code of Canada** And: Section 4(1) and 7(1) of the **Controlled Drugs and Substances Act**
Counsel:	Joshua Bryson, for the Federal Crown Attorney Nina Johnsen, for the Provincial Crown Attorney Nicholaus Fitch, Defence Attorney

By the Court:

INTRODUCTION

[1] Michael Brown stands charged with an assault on Barry Kelley, contrary to section 266 of the **Criminal Code**; threats to burn the property of Leith Dorey, contrary to section 264.1 of the **Criminal Code**; threats to kill Barry Kelley, contrary to section 264.1 and finally possession of cannabis for the purpose of trafficking, contrary to section 5(2) of the **Controlled Drugs and Substances Act** and unlawfully producing cannabis marijuana, contrary to section 7(1) of the **Controlled Drugs and Substances Act**. The 5(2) **CDSA** charge was proceeded with at the request of the Crown on the basis of the included offence of a 4(1) possession charge.

[2] At issue is Mr. Brown's Charter application for a Stay of Proceedings where he argued that his right to a trial within a reasonable time had been violated due to delay in getting the matter to trial. As well, Mr. Brown raised the issue if he could be found guilty of both the possession of cannabis charge and the charge of production of cannabis or whether one should be stayed following the principles set out in *R. v. Kienapple* [1975] 1 SCR 729. Also, at issue are the **Criminal Code**

charges which Mr. Brown argues he should be acquitted of on the facts before the court.

[3] I intend to deal with the delay argument first and thereafter with the issues at the trial proper.

FACTS ON DELAY APPLICATION

[4] Brown was charged on November 14, 2014. He was placed in custody by the arresting officer. It was a Friday evening and Brown was arraigned through the Nova Scotia Justice of the Peace Centre and held until Monday morning, November 17th, 2014.

[5] On Monday morning, he was represented by Legal Aid duty counsel. A release plan that was agreeable to both the Crown and Defense was put forward, accepted by this Court and Brown was released on a recognizance. While Mr. Brown had disclosure provided to him on that day, duty counsel chose to return it to the Crown. At Brown's request, the matter was set to December 17th, 2014. It should be noted that disclosure was immediately provided by the Crown. (three days from charge)

[6] On December 17th, 2014, Mr. Brown appeared and asked for more time. He indicated he applied for Legal Aid "about a week ago" and they had not yet given him an appointment date. The Court provided Mr. Brown with an option of January 7, 2015 or the 14th. Mr. Brown chose the 14th (32 days from charge; 30 days from the last date). He also indicated he wished disclosure in the Crown's hands to be forwarded to a lawyer at the firm of Waterbury Newton in Kentville.

[7] On January 14, 2015, Mr. Chipman of Nova Scotia Legal Aid indicated on Brown's behalf, that Ms. Benton, then of Legal Aid, would be representing Mr. Brown and had asked that the matter go over to February 11, 2015. (28 days since the last appearance; 60 days since the charge)

[8] On February 11, 2015, Brown was asked by the Court if he had instructions from counsel as to what was to occur on that date. Brown stated he had an appeal before Legal Aid and the appeal was set to March 19th, 2015. The Court inquired if Mr. Brown wanted to set the matter over to after that date. Brown replied that he did. Ms. Benton was suggested as possibly being Brown's lawyer. While not confirming or denying that Ms. Benton was representing him, Mr. Brown agreed to set the matter over to March 25, 2015. (28 days since the last appearance; 88 days since the charge)

[9] On March 28, 2015, Mr. Brown advised the Court his Legal Aid Appeal was adjourned from March 19, 2015 due to a storm. It had been reset to April 2, 2015. Mr. Brown asked for an adjournment until after the 2nd. The 22nd of April was proposed but court staff indicated there was some difficulty with the volume on the 22nd so the matter was set, with Mr. Brown's agreement, to April 29, 2017. (6 days since last appearance; 94 days since charge)

[10] On April 29, 2015, Brown indicated he had been successful with his appeal for Legal Aid representation. He had not heard back as to who was representing him and he requested "a little bit more time". The matters were set over to May 20, 2017. (35 days since the last appearance; 129 days since the charge)

[11] On May 20, 2017, Mr. Brown did not appear. Ms. Benton was asked by court staff if Legal Aid was representing the accused but she was unsure of the status. With the accused not present and no real solicitor on the record, the Crown requested that a Warrant be issued for Mr. Brown. The Court issued a Warrant and endorsed it for Mr. Brown's release. (21 days since his last appearance' 150 days since the charge)

[12] On May 25, 2015, Mr. Brown appeared on the warrant indicating he had written the wrong date down. The warrant was vacated and the matter was set to June 10, 2015. (5 days since the last appearance; 155 days since the charge)

[13] June 10, 2015, Mr. Chipman of Legal Aid appeared on Mr. Brown's behalf. He indicated that the file contained a great deal of disclosure and asked the matter to go over to July 15, 2015. (16 days since the last appearance; 171 days since being charged)

[14] On July 15, 2015, Mr. Brown appeared by way of counsel, Mr. Chipman. Mr. Chipman indicated he had not had an opportunity to meet with Mr. Brown and that an Unsealing Order relating to a Search Warrant would be presented to the Court soon. He asked to set it over to August 12, 2015. Federal Crown indicated concern over the time the matter was taking but recognized it took a period of time for Brown to secure representation. (35 days since last appearance; 206 days since being charged)

[15] On August 12, 2015, Mr. Brown reported that due to a conflict at the Legal Aid office that he would be represented by Mr. Fitch. Mr. Brown further advised that Mr. Fitch asked the matter to be set over to September 2, 2015 at 9:30 am.

The matter was set to September 2, 2015. (28 days since the last appearance; 234 days since being charged)

[16] On September 2, 2015, Mr. Fitch appeared with Mr. Brown. Mr. Fitch acknowledged that it had taken some time to get the matter to the point that it was. The Crowns indicated they were proceeding by way of indictment and that all charges could be heard together. When asked if the Charter challenge could be a blended hearing or heard first before trial, Mr. Brown was fine with a blended hearing while the federal Crown felt that the Charter challenge should be heard first was preferable as it would then determine whether a trial took place at all. Mr. Brown's counsel stated, "I think my friend wants to have it first, so we'll have it first." The matter was then set for the Charter application on January 22, 2016. (21 days since the last appearance; 255 days since the charge was laid)

[17] On December 9, 2015, the matter was brought back before the Court for purposes of a Court requested adjournment of the January 22 hearing date. Apparently, the matter was set over due to a crowded docket to May 9, 2016. (97 days since last appearance; 352 days since charged)

[18] On May 9, 2016, the trial commenced with a voir dire arising from Mr. Browns application to have a search warrant quashed and results of the search

excluded from the evidence. Witnesses on the voir dire and evidence were completed on May 9. Defence briefs were set for June 3 and Crown for June 12. The Court was to deliver a decision on July 20. (152 days since the last hearing; 504 since the charge was laid)

[19] On July 20, 2016, the Court gave a decision on the voir dire upholding the search warrant and admitting in the evidence obtained as a result of the search. Mr. Brown's counsel indicated a day and a half would be required for trial. The first available dates for consecutive days were May 1 and 2, 2017. (72 days from the last appearance; 581 days from the charge)

[20] On February 23, 2017, Mr. Brown made a request for a stay to be entered based on delay. Briefs were due from Mr. Brown on March 27, 2017 and Crown on April 10, 2017. Mr. Brown's brief was delayed but it was agreed that the trial would proceed on May 1, 2017 and any delay after that would be waived by the defence.

[21] May 1, 2017 and the morning of May 2, were taken up with the trial. Briefs were then requested on both the Charter application and the trial proper. (899 days from the charge; 29.57 months)

[22] Thus, in this matter there was a period of 29.57 months from the time of the charging of the offences to completion of trial.

DECISION ON DELAY

[23] The Supreme Court of Canada dealt with the issue of delay in *R. v. Jordan*, 2016 SCC 27. There, the Court set presumptive ceilings for trial completion after which any delay is presumptively unreasonable and a stay of proceedings must be entered. The Court also set out how matters should be handled that were commenced prior to their decisions. The principles set out in *Jordan* were affirmed by the Supreme Court of Canada in *R*. v. *Cody* 2017 SCC 31.

[24] In matters in the Provincial Court, the Supreme Court has stated there is a presumptive timeline of 18 months to complete a matter from when a charge is laid. In a Superior Court the limit is 30 months. For those cases already within the system, such as this one, the Supreme Court set out a framework to apply to these types of cases at paragraph 92 of J*ordan*.

[25] At paragraphs 95 to 101 of *Jordan* the Court stated:

> **95** The new framework, including the presumptive ceiling, applies to cases currently in the system, subject to two qualifications.

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

97 Moreover, the delay may exceed the ceiling because the case is of moderate complexity in a jurisdiction with significant institutional delay problems. Judges in jurisdictions plagued by lengthy, persistent, and notorious institutional delays should account for this reality, as Crown counsel's behaviour is constrained by systemic delay issues. Parliament, the legislatures, and Crown counsel need time to respond to this decision, and stays of proceedings cannot be granted *en masse* simply because problems with institutional delay currently exist. As we have said, the administration of justice cannot countenance a recurrence of *Askov*. This transitional exceptional circumstance recognizes that change takes time, and institutional delay -- even if it is significant -- will not automatically result in a stay of proceedings.

98 On the other hand, the s. 11(*b*) rights of all accused persons cannot be held in abeyance while the system

works to respond to this new framework. Section 11(*b*) breaches will still be found and stays of proceedings will still be entered for cases currently in the system. For example, if the delay in a simple case vastly exceeds the ceiling because of repeated mistakes or missteps by the Crown, the delay might be unreasonable even though the parties were operating under the previous framework. The analysis must always be contextual. We rely on the good sense of trial judges to determine the reasonableness of the delay in the circumstances of each case.

99 The second qualification applies to cases currently in the system in which the total delay (minus defence delay) falls *below* the ceiling. For these cases, the two criteria -- defence initiative and whether the time the case has taken markedly exceeds what was reasonably required -- must also be applied contextually, sensitive to the parties' reliance on the previous state of the law. Specifically, the defence need not demonstrate having taken initiative to expedite matters for the period of delay preceding this decision. Since defence initiative was not expressly required by the *Morin* framework, it would be unfair to require it for the period of time before the release of this decision. However, in close cases, any defence initiative during that time would assist the defence in showing that the delay markedly exceeds what was reasonably required. The trial judge must also still consider action or inaction by the accused that may be inconsistent with a desire for a timely trial (*Morin*, at p. 802).

100 Further, if the delay was occasioned by an institutional delay that was reasonably acceptable in the relevant jurisdiction under the *Morin* framework before this decision was released, that institutional delay will be a component of the reasonable time requirements of the case for cases currently in the system.

101 We note that given the level of institutional delay tolerated under the previous approach, a stay of

> proceedings below the ceiling will be even more difficult to obtain for cases currently in the system. We also emphasize that for cases in which the charge is brought shortly after the release of this decision, the reasonable time requirements of the case must reflect this high level of tolerance for institutional delay in particular localities.

[26] For all cases the inquiry starts with deducting defence delay either explicitly or implicitly waived from the entire length of time for the matter.

[27] In *Cody* the Supreme elaborated as follows:

> However , not all delay caused by defence conduct should be deducted under this component. In the presumptive ceilings, this court recognized that an accused person's right to make full answer and defence requires that the defence be permitted time to prepare and present its case. To this end, the presumptive ceilings of 30 months and 18 months have "already accounted for [the] procedural requirements" of an accused person's case (Jordan, at para. 65;see also 53 and 83). For this reason, "defence actions legitimately taken to respond to the charges fall outside the ambit of defence delay" and should not be deducted.(Jordan, at para. 65)

[28] I have found a total period from charge to the completion of the matter of 899 days or 29.57 months. The delay from Brown's first appearance to his election and plea, 253 days or 8.3 months. As indicated in both *Jordan* and *Cody* a period of time should be allowed for legitimate pre-plea preparation. This is already recognized by the Court in *Jordan* as being part of period of the 18 month presumptive ceiling. In calculating defence delay implicitly or explicitly waived I

have allowed that Brown should have been in a position to enter his plea in 30 to 45 days. Deducting that highest number from the time it took Brown to enter a plea I find defence delay at 208 days or 6.8 months. Again it should be noted that disclosure was available immediately to Brown. While Mr. Brown argues no delay should be attributable to the defence, the record shows an unreasonably long time to get to a place where plea could be entered.

[29] The time taken after election and plea to complete the defence's application to have the search warrant quashed was 7.5 months. Part of that was an institutional delay due to over crowned dockets.

[30] It should be noted, during that period of time the Bridgewater area was operating with only one sitting judge. In the past, two judges had been sitting in Bridgewater, however, due to illness of a third judge, we lost one judge to Yarmouth. Additionally, the docket in in Liverpool, Nova Scotia was folded into the Bridgewater docket after the Government closed Liverpool Court. The consequence of having these extra cases in Bridgewater resulted in delays. I find the delay due to the overcrowded docket a discrete event as discussed in Jordan at paragraphs 73 and 75 and Cody at paragraph 48. This amounted to 108 days or 3.5 months.

[31] Deducting Defence delay from the entire period (29.57 less 6.8 totals 22.77) and then deducting the period allowed for a discreet event of 3.5 months brings total delay to 19.2 months

[32] In this case, the trial exceeded the Provincial Court ceiling of 18 months by a little less than a month and a half once proper delay was accounted for. It should also be noted, the Crown proceeded by indictment on all matters. Had the defence not elected to proceed in Provincial Court, the presumptive ceiling would have moved to 30 months. As was stated by Justice Moldaver at paragraph 97 of *Jordan*, an institutional delay will not automatically result in a stay.

[33] I also recognize that Mr. Brown, like all those who await matters in Court to be dealt with, faced prejudice from the delay to have his matter hear.

[34] Having set out all of the above, I am also mindful of when Justice Moldaver stated the following in *Jordan*:

> **91** Determining whether the time the case has taken markedly exceeds what was reasonably required is not a matter of precise calculation. Trial judges should not parse each day or month, as has been the common practice since *Morin*, to determine whether each step was reasonably required. Instead, trial judges should step back from the minutiae and adopt a bird's-eye view of the case. All this said, this determination is a question of fact falling well within the expertise of the trial judge (*Morin*, per Sopinka J., at pp. 791-92).

[35] At the end of the day, I cannot find the delay in the matter is one which triggers a judicial stay. To do so in this transitional case over a delay of about a month and half over the 18 month ceiling would clearly bring the administration of justice into disrepute.

FACTS RELATING TO THE INDEX OFFENCES

[36] On November 14, 2014, a number of pigs belonging to the accused managed to escape and travel to a neighbour's property. That property was owned by Leith Dorey and residing there with her as well was the complainant, Barry Kelly.

[37] This pig Houdini escape had happened before and the pigs had caused some damage. Mr. Kelley testified that after becoming exasperated he had put a sign up at the end of the driveway indicated that if it happened again there would be a pig barbeque.

[38] Mr. Brown appeared at Mr. Kelly's door in the evening to speak to Mr. Kelley about the sign. This is where the evidence from Mr. Brown and Mr. Kelley differs.

[39] Mr. Kelley, in his testimony, indicated that Mr. Brown arrived at his home between five and six in the evening. Mr. Brown wanted to view whatever damage

his pigs had caused. Mr. Kelley escorted Mr. Brown to the side of his home where the pigs had rooted up his lawn. Mr. Kelley then stated Brown grabbed him by the throat and pushed him up against, and onto, a snow-covered trailer bed. Photos DSCN1376 and DSCN1377 of exhibit #1, shows a clear indentation in the snow where an individual was pushed back onto the bed with an arm out-stretched.

[40] Brown threatened Kelley at the same time saying that he would kill Kelley if he went to the police. Brown also stated he would come down and burn Kelley out.

[41] Mr. Kelley proceeded to go back into his house. Surprisingly Mr. Brown followed him in. Once in, Brown tapped Kelley in the chest and stated he had shot a man with a 357. Brown then told Kelley again not to contact police.

[42] Mr. Kelley went up-stairs and came back with a jacket decorated with sharp shooting badges and warned Brown that he too could shoot. Brown then left. Mr. Kelley called the police.

[43] About ten minutes later, Leith Dorey arrived home. Sometime thereafter Brown attended back at the residence pounding on the door. At that point, police were already on scene and arrested Brown.

[44] Mr. Kelley denied in cross-examination, that he struck Brown with a flashlight although he agreed he did own a flashlight.

[45] Mr. Brown testified that he saw the sign relating to a pig barbeque and felt that he should advise them that if there was any damage, “I’d make it right”. When shown the area rooted up by the pigs, Brown stated he snickered and asked Kelley why he did not talk to him about it. Brown testified that Kelley replied, “I own this property, this is my land.” According to Brown, Kelley then struck him in the face with a flashlight.

[46] Subsequent to being hit with a flashlight, Brown testified he then followed Kelly into Kelley’s residence. When he entered the residence, Kelley told him not to worry as he was not getting a firearm. Kelley then went upstairs and came back with a jacket with badges claiming he was a sharp shooter and could shoot him from Kelley’s home when Brown was at his home.

[47] Brown indicated his reply was that he would make this right and that he would deal with Leith. He then went home.

[48] Several hours later, he returned to talk to Dorey and saw the police vehicle in the yard of Kelley. Brown said he knocked on the door and Leith Dorey answered. She asked him what happened to his face as there was blood on it.

Brown said, until that point, he had not realized he was bleeding. The injuries, he testified, were the result of the blow to his face from Mr. Brown's flashlight. When asked by the Court if he had put his hand up to check for blood when Dorey advised him he was bleeding and saw blood on his fingers Mr. Brown stated that in fact he had done just that.

[49] In cross-examination by the Federal Crown, Mr. Brown admitted possessing both the marijuana plants that were found in his home and marijuana found in Brown's freezer.

[50] The Crown also called Cst. Ted Munroe. Cst. Munroe was one of the RCMP officers who responded to the complaint of assault on Mr. Kelley. The officer testified that he attended the scene and took a statement from Mr. Kelley. As that occurred, Mr. Brown appeared at the residence and was arrested for assault.

[51] Cst. Munro described Kelley as agitated and scared. Mr. Brown had consumed alcohol but apparently was not overly intoxicated. As well, Cst. Munro took photos of the scene. Mr. Brown had scratch marks on his face which the officer described as fresh with still dripping blood. Cst. Munro took photos of these injuries.

[52] On the matter of the drug charges, Cst. Munro was part of the search of Mr. Brown's residence. There, the police found a tray of marijuana in Mr. Brown's freezer. These were documented with photos as well.

CHARGES UNDER THE CDSA

[53] The evidence is very clear that Brown was producing marijuana and possessing it as well. The defence argues that while the accused can be found guilty of the production charge, A Judicial Stay should enter on the 4(1)-possession charge, presumably under the principle set out by the Supreme Court of Canada in *R. v. Kieinapple* [1975] 1 S.C.R. 729.

[54] The Federal Crown argues that the matter is not covered by *Kienapple* but given the facts they would be content with a conviction on the 7(1) **CDSA** charge and a Stay on the 4(1) charge. Given that, I will enter a conviction under 7(1) and Stay the 4(1) charge. I can say that I do not believe the law supports the *Kienapple* argument put forward by Mr. Brown.

CHARGES OF ASSAULTS AND THREATS

[55] On the charges under section 266 of the **Criminal Code**, as well as the two charges under 264.1 of the Code, credibility is a key issue. Mr. Kelley and Mr. Brown had very divergent testimonies regarding key aspects of their encounter.

[56] In all criminal trials the most fundamental rule is the presumption of innocence. The burden of proving an accused's guilt rests on the Crown and at the end of the day the trier of fact must be satisfied beyond a reasonable doubt of the existence of all the essential elements of the office. (see *R. v. Vaillancourt*, [1997] 2 SCR 636)

[57] That principle of reasonable doubt applies to issues of credibility as well as fact. (see *AY* (1995) 93 CCC (3D) 456)

[58] In cases such as this where only two individuals were the main witnesses, I must not view the matter as an "either/or" situation of choosing one version of events over another, but rather on the whole of the evidence, to determined if the charge has been proven beyond a reasonable doubt.

[59] I must also apply the test as set out in the *R. v. W(D)* [1991] 1 SCR 742. This test says that if I believe Mr. Brown, then obviously, I must acquit. If I cannot determine whether I believe the accused or the complainant, I must acquit. Even if I do not believe the accused but his evidence raises a reasonable doubt, I

must acquit. Finally, even if I disbelieve the accused and his evidence does not raise a reasonable doubt, I must find that on the whole of the evidence I am not left with a reasonable doubt on any essential element of the offence. If I have such a doubt, then I must acquit.

[60] In relation to Mr. Brown's evidence, where it conflicts with the testimony of other witnesses, I reject it. There are a number of key and critical issues in Mr. Brown's evidence which erodes his credibility.

[61] To start, I can not imagine that someone who was attacked with a flashlight, as Mr. Brown claims he was, would then follow his attacker into the attacker's home. Particularly given that Mr. Brown testified that as he followed Kelley into the house, Kelley said "don't worry, I'm not getting a firearm." With those chilling words why would anyone continue to follow their attacker? It makes no sense.

[62] Given my ability to view Mr. Kelley's demeaner and testimony on the witness stand, Mr. Brown's rendition of Mr. Kelley stating that he owned the property and it was his land and other comments does not ring true. I simply do not equate that rendition with what appeared to be Kelley's testimony, which I accept.

[63] Further, the photographic evidence showing the clear outline in the snow where Mr. Kelly was pushed on the trailer with an out-stretched arm is real physical evidence which puts to lie Mr. Brown's testimony regarding the encounters.

[64] Further, Cst. Munro's evidence that Mr. Brown's facial injuries appeared fresh and was dripping blood, would not support Brown's evidence that the injuries happened some lengthy period prior. Also, Mr. Brown agreed, he wiped his fingers in the blood on his face. That scenario is incongruent with the pictures of the injury. In short, we do not know if Mr. Brown's injuries were self inflicted or how they actually occurred but I do not accept that Mr. Kelley caused them. I find that Mr. Brown falsely alleged that they were inflicted by Kelley to mislead the police to detract from his own guilt.

[65] I reject Mr. Brown's evidence and it does not raise a reasonable doubt.

[66] On the whole of the evidence, I accept Mr. Kelley's testimony. It is corroborated by the photos. It makes rational sense given the entire evidence. I accept that Brown grabbed him by the throat and pushed him on the trailer. I accept that Brown threatened to kill him and burn his property. I accept that he did not strike Mr. Brown with a flashlight.

[67] As a result of the above, I convict Mr. Brown of all charges save and except the **CDSA** matter I previously Stayed.

Paul Scovil, JPC