PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Joudrey*, 2017 NSPC 30

Date: 2017-07-07
Docket: 2799086
Registry: Bridgewater

Between:

Her Majesty the Queen

v.

Royce Nelson Joudrey

Judge:	The Honourable Judge James H. Burrill,
Heard:	March 10, 2017, in Bridgewater, Nova Scotia
Decision	Oral Decision: March 10, 2017 Written Decision: July 7, 2017
Charge:	267 CC
Counsel:	Lloyd Lombard, for the Crown Alan Ferrier, Q.C., for the Defendant

By the Court: (Orally)

[1] This is the case of Mr. Royce Joudrey who appears before the court charged with assault causing bodily harm. The charge arises out of an incident that occurred on September 10, 2014. The resolution of the matter revolves around an issue raised by the court as to whether continuing these proceedings is an abuse of process on the part of the crown.

[2] On September 10, 2014 Constable Ashley Levy was called to investigate a physical altercation that occurred between Royce Joudrey and Angela Rafuse. Royce Joudrey, a landlord, alleged that he was attacked by Angela Rafuse and Angela Rafuse, the tenant and complainant in these proceedings, alleged that she was attacked by Mr. Joudrey. Ms. Rafuse was injured in the altercation.

[3] An investigation ensued and Constable Levy laid two informations, one charging Ms. Rafuse with assault, and one charging Mr. Joudrey with assault causing bodily harm.

[4] In Nova Scotia it is the prerogative of the police to lay charges when they believe, on reasonable grounds, that a person has committed an offence. Based on

the theory of the crown presented in this case, and based on what they told me the theory of the crown was in the case against Ms. Rafuse (that has already been prosecuted), it appears that the crown is taking an inconsistent or an incompatible position with regard to each of the two cases. I'm told that in the case against Ms. Rafuse, the crown's position was that she was being untruthful when she said she was attacked. In the case against Mr. Joudrey, it's apparent from the evidence I've heard thus far, that the crown is taking the position that Ms. Rafuse is a credible witness telling the truth when she says she was attacked by Mr. Joudrey.

[5] In this case an argument is advanced by the crown that in any particular fact situation, more than one person, where there are two only, can be charged with an offence. There can be little doubt about that. There are clearly factual circumstances that exist and have been pointed to in the law where it can be said that it is entirely appropriate that charges be laid against both individuals. For example, in many cases of assault, it may be that the aggressor commits an assault initially and the individual who is attacked responds. They may respond with excessive force or respond in a way which does not amount to self-defence. In those situations, it may be appropriate that charges against both be pursued.

[6] In cases where it is established that an information has been laid improperly, a charge can be declared a nullity. The fact situation in the present case begs the

question of whether or not Constable Levy believed on reasonable grounds that an offence had been committed by both when she swore the information, or whether she simply "threw up her hands", to use that colloquial and said, "I don't know who to believe, I'm going to lay a charge against both and let the courts sort it out". If that's what she did, that was improper. In such a circumstance she would not have had the requisite belief to swear the informations.

[7] On the facts that I have before me I am unable to conclude that that is what happened. Constable Levy may very well have taken the position in her own mind, on these facts, that Ms. Rafuse was the aggressor and that Mr. Joudrey responded with excessive force in defending himself, which resulted in the injuries to Ms. Rafuse. That is not the crowns theory, but I cannot say what was in the mind of the officer when she swore the informations. As such I can not declare the information to be a nullity.

[8] This brings us to a consideration of the crown's pursuit of what appear to be inconsistent theories before the court in this particular case. The crown argues that their assessment is to be an assessment of the evidence to essentially determine whether or not there is available evidence on each of the elements of the offence to pursue the matter. The crown submits in their brief at paragraph 13 of their submissions that "the police are entitled to charge two different accused for

assaulting each other when they are unable to determine who was the aggressor". They say "the crown's responsibility is to place the facts before the court and for the trier of facts to determine what facts are accepted by the court." The crown has submitted that neither the crown nor police can or should usurp the function of the trier of fact. The defence in this case takes the position that it's impossible to take the position that you have reasonable and probable grounds to believe both are guilty and that there are reasonable prospects of convictions on both charges.

[9] Cases which the court considers to be significant to a resolution of this issue are first, *Krieger v Law Society of Alberta*, [2002] 3 S.C.R. 372. In that case, the Supreme Court of Canada cited with approval at paragraphs 31 and 32, an academic work called *Prosecutorial Discretion: A reply to David Vanek*, 1987-88, 30 Crim. L.Q, 378 at pp. 378-380, where J. A. Ramsey expands on the rationale underlying judicial deference to prosecutorial discretion, where he says:

> It is fundamental to our system of justice that criminal proceedings be conducted in public before an independent and impartial tribunal. *If the court is to review the prosecutor's exercise of his discretion the court becomes a supervising prosecutor. It ceases to be an independent tribunal.* [Emphasis in original]

[10] The Supreme Court of Canada says, after citing that reference:

> The courts acknowledgement of the Attorney General's independence from judicial review in the sphere of prosecutorial discretion has it's strongest source in the fundamental principle of the rule of law under our constitution. Subject to the abuse of process doctrine, supervising one's litigants decision-making process

> rather than the conduct of litigants before the Court is beyond the legitimate reach of the court. In *Hoem v Law Society of British Columbia*, [1985] B.C.J. No. 2300, S. and J.A. for the court observed at page 254 that:
>
> The independence of the Attorney General, in deciding fairly who should be prosecuted, is also a hallmark of a free society. Just as the independence of the bar within it's proper sphere must be respected, so must the independence of the Attorney General.

[11] The Supreme Court of Canada then says:

> We agree with these comments. The quasi-judicial function of the Attorney General cannot be subjected to interference from parties who are not as competent to consider the various factors involved in making a decision to prosecute. To subject such decisions to political interference *or to judicial supervision*, could erode the integrity of our system of prosecution. Clearly drawn constitutional lines are necessary in areas subject to such grave potential conflict. [Emphasis added]

[12] In a 2002 article found at 46 CR-ART 156, John Pearson in reviewing the decision of *Proulx c Quebec* [2001] 3 S.C.R. 9 referred to the role of the Attorney General and his prosecuting agents and I adopt this as a correct statement of the law and what was said by the majority in *Proulx*. He says:

> "The majority in *Proulx* defines reasonable and probable cause to prosecute as sufficient evidence for the prosecutor to believe that guilt could probably be proved beyond a reasonable doubt. The dissent in that case, and it was a dissent, however, defines reasonable and probable cause to prosecute as an honest belief in the guilt of the accused based upon a full conviction founded on reasonable grounds of the existence of a state of circumstances which assuming them to be true could reasonably lead an ordinary prudent and cautious person placed in the position of the accuser to the conclusion that the person charged was probably guilty of the crime imputed.

[13] *Proulx* made it clear that a prosecutor need not have a subjective belief in the guilt of the accused. They need to make a determination as to sufficiency of

the evidence and whether or not such evidence is available and could properly prove the guilty of the accused beyond a reasonable doubt if accepted by the court.

[14] As to the decision of the crown to prosecute, it's clear that in Nova Scotia the term "reasonable and probable cause to prosecute" is not the charging decision that has to be made. The publicly available directive of the Director of Public Prosecutions in Nova Scotia that was last revised on November 21, 2013, and last distributed on November 23, 2015, contains a directive which is some 14 pages in length that deals with the decision to prosecute and sets out the standard of realistic prospect of conviction, and deals with issues of sufficiency of the evidence which I'll not delve into it here, but clearly it is a guide any prosecutor in this province in making a decision to prosecute or not prosecute a case. As an aside, I do note that in difficult cases it does suggest to prosecutors that they widely consult with their colleagues and supervisors regarding appropriate conduct.

[15] In reaching my decision in this case, I note that the Supreme Court of Canada has made it clear that the court should not interfere in prosecutorial discretion unless in the exercise of that discretion it constitutes an abuse of process. In *R v. Nixon*, [2011] 2 S.C.R. 566, the court refers to *R. v. Jewitt*, [1985] 2 S.C..R 128 S.C.C. At paragraph 34 of the *Nixon* decision the court says,

> *Jewitt* put an end to the uncertainty by recognizing that a trial court judge had a "residual discretion" to stay proceedings to remedy abuse of process. The Court held that the common law doctrine could be applied in narrow circumstances "where compelling an accused to stand trial would violate those fundamental principles of justice" which underlie the community's sense of fair play and decency and to prevent an abuse of the court's process through oppressive or vexatious proceedings.

[16] It is also clear that a prosecution will only be stayed applying the doctrine of abuse of process in the clearest of cases.

[17] I have examined the particular facts that are alleged in this case. I've said this before while commenting on argument or questioning counsel. In over 32 years in the criminal justice system I have never seen a case where the crown has presented diametrically opposed theories to courts in prosecuting a particular fact situation. That, however, in no way determines the issue. I am guided by the Supreme Court of Canada's direction that the court should not be a supervisor of the exercise of prosecutorial discretion. In this particular case, I cannot conclude, on the facts that I have before me that for the crown to proceed against Mr. Joudrey constitutes an abuse of process. Although I raised the issue, I am thankful to counsel for their able arguments in responding to the court's concerns. Having concluded that an abuse of process is not made out the trial will continue.

James H Burrill, JPC