NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Brown*, 2018 NSCA 62

Date: 20180717
Docket: CAC 468216
Registry: Halifax

Between:

Michael Anthony Brown

Appellant

v.

Her Majesty the Queen

Respondent

Judges:	Beveridge, Bryson and Derrick, JJ.A.
Appeal Heard:	May 8, 2018, in Halifax, Nova Scotia
Held:	Appeal allowed in part; appeal against conviction for marihuana production allowed; appeal against dismissal of stay of proceedings due to delay dismissed; convictions for assault and uttering threats upheld; per reasons for judgment of Derrick, J.A.; Beveridge and Bryson, JJ.A. concurring.
Counsel:	Nicholaus S. Fitch, for the appellant Rachel M. Furey, for the respondent

Reasons for judgment:

Introduction

[1] Mr. Brown appeals his convictions for assault under section 266 of the *Criminal Code of Canada*, R.S.C. 1985, c. C-46; uttering threats under section 264.1 of the *Criminal Code*; and production of marihuana contrary to section 7(1) of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 (*CDSA*).

[2] The focus of Mr. Brown's appeal are rulings by the trial judge, Judge Paul Scovil of the Provincial Court, that dismissed his *Charter* challenges under section 8 against unreasonable search and seizure and section 11(b) which protects the right to be tried within a reasonable time.

[3] Mr. Brown's conviction for marihuana production rests on a seizure of marihuana following the execution of a search warrant at his home. Mr. Brown argues the trial judge was wrong to uphold the validity of the search warrant, saying that the information in the Information to Obtain the Warrant (ITO) was insufficient to establish reasonable grounds for authorizing it. He also argues that all his charges should have been stayed due to the unreasonable delay in getting him to trial.

[4] Mr. Brown's convictions arose out of a dispute with a neighbour on November 14, 2014 about some trespassing pigs. The police were called, and their investigation into the neighbour's complaints of assault and threats led to seizure of marihuana at Mr. Brown's property. It was inquiries into Mr. Brown's whereabouts that set the application for a search warrant into motion. Armed with a search warrant issued by a Justice of the Peace on November 15, police found the marihuana grow- operation at Mr. Brown's they had come to suspect was there.

[5] Mr. Brown was arrested and charged on November 14, 2014. His trial proceeded almost thirty months later on May 1 and 2, 2017.

[6] As the reasons that follow will explain, I have concluded the trial judge was in error in dismissing Mr. Brown's *Charter* challenge to the warrant and, in the circumstances, find that the seized marihuana should have been excluded from his trial. This evidence was dispositive of the Crown's case on the production charge and its exclusion leaves nothing to sustain that conviction. I would allow Mr.

Brown's appeal to the extent of overturning his conviction for production of marihuana and entering an acquittal on this charge.

[7] However, Mr. Brown's appeal on the basis of delay fails. I find the trial judge made no error in concluding that Mr. Brown did not establish a violation of his constitutional right to a trial within a reasonable time. As I am dismissing this aspect of the appeal, Mr. Brown's convictions for assault and uttering threats stand.

Overview of the Facts Relating to the Search Warrant

[8] Problems with the police investigation started when Constable Charlton and Corporal Smith of the RCMP attended at Mr. Brown's home to arrest him. Mr. Brown was not there. The officers spoke with a woman standing in the open doorway of the garage. Cpl. Smith testified that he was just inside the garage when speaking with the woman.

[9] While speaking with the woman, both Cpl. Smith and Cst. Charlton detected a strong smell of fresh marihuana. Believing Mr. Brown was still on the property despite being told he had left, Cpl. Smith had suspicions about a closet in the garage that was emanating light. Entering the garage to search the closet he found 42 marihuana seedlings but not Mr. Brown.

[10] The police decided against charging Mr. Brown with possession of the seedlings because they recognized the search of the garage may not have been lawful. This was later the view of the Justice of the Peace who issued the warrant but did not consider the illegally seized seedlings as grounds for doing so.

[11] The seized seedlings did figure into the ongoing investigation. Cst. Charlton advised the lead investigator, Cst. Munro, that what he had smelled at the garage was "much stronger" than the odour coming from the seedlings. This prompted a continuation of the investigation as the police believed there were other plants still in Mr. Brown's residence.

[12] Cst. Munro prepared the ITO. In it he referred to Cpl. Smith and Cst. Charlton detecting the odour of fresh marihuana when they were at Mr. Brown's.

[13] The Justice of the Peace provided Cst. Munro with a letter dated November 15, 2014 setting out the basis for her decision to issue the warrant. She expressly did not consider the seizure of the 42 seedlings as she was not satisfied the garage

search had been lawful. She said what remained was the following information contained in the ITO:

> The remaining information is that when the police attended the residence they observed a strong smell of fresh Marihuana and that a CPIC check revealed that the suspect has a criminal record for possession of drugs and previously had an indoor Marihuana grow op.
>
> This information provides me with the requisite grounds to believe that an offence has been committed and that you will find the items to be searched for in the residence.

[14] The ITO contained information from the police CPIC and PROS databases. The ITO explained that CPIC (Canadian Police Information Centre) is "a computer database system" containing criminal record information and PROS (Police Reporting & Occurrence System) is an RCMP maintained "computerized database repository" containing information about investigations. From CPIC Cst. Munro learned of Mr. Brown's *CDSA* conviction on June 2, 2009 for possession of a Schedule II Substance (Marihuana is a Schedule II substance). This conviction was included in the ITO.

[15] In the ITO Cst. Munro recited as follows the PROS' entries attached to Mr. Brown's name:

> 19.1 PROS file number 2007932394 refers to an investigative file from Enfield RCMP Detachment wherein information was received of a residence suspected of containing a marihuana growing operation in the basement. The owner of the residence is listed as Michael Anthony Brown (D.O.B. 1964-11-15).
>
> 19.2 PROS file number 20071257086 refers to an investigative file from Lunenburg County Street Crime Enforcement Section wherein information was received of an indoor marihuana grow operation. A Search Warrant was obtained and marihuana, firearms and explosives were seized. This file relates to the CPIC Conviction for Possession of Schedule II in 2009.

[16] In short, the search warrant for Mr. Brown's residence was authorized on the basis of a strong smell of fresh marihuana, Mr. Brown's 2009 conviction for possession of marihuana, and the information in PROS that Mr. Brown had previously been suspected of cultivating marihuana. The execution of the warrant led to the police finding eight marihuana plants and some dried marihuana in Mr. Brown's home.

The Standard of Review at Appeal

[17] The standard of review at appeal is one of correctness. The reviewing judge must have applied the correct legal principles in deciding that the ITO was sufficient to justify the authorization of the warrant. An appeal court does not approach the issue of validity as a question of whether it would have issued the warrant. As this Court held in *R. v. Liberatore*, 2014 NSCA 109:

> The issue is not whether the Court of Appeal would issue the warrant. Rather it is whether the reviewing judge erred in law by interpreting and applying the standard to determine whether the issuing judge properly issued the warrant…(at para. 14)

[18] The ITO the reviewing judge considered had to contain "sufficient credible and reliable evidence" to permit the issuing judge to find reasonable and probable grounds to believe there would be evidence at Mr. Brown's residence of a marihuana grow-operation. (*R. v. Morelli*, 2010 SCC 8, at para. 40; *R. v. Campbell*, 2011 SCC 32, at para. 14)

[19] Fichaud, J.A. succinctly articulated the test in the context of a drug case in *R. v. Shiers*, 2003 NSCA 138:

> …was there material in the [ITO] from which the issuing judge, drawing reasonable inferences, could have concluded that there were reasonable grounds to believe that a controlled substance, something in which it was contained or concealed, offence-related property or any thing that would afford evidence of an offence under the *CDSA* was in Mr. Shiers' apartment? (at para. 15)

[20] Where there is no basis upon which the authorization of the warrant can be justified, the reviewing judge's determination that the warrant was validly issued will have been in error (*R. v. Garofoli*, [1990] 2 S.C.R. 1421, at para. 55).

[21] Search warrants enjoy a presumption of validity (*R. v. Campbell*, 2010 ONCA 588, at para. 45). It is Mr. Brown's burden to establish that the warrant executed at his residence was invalid. I am satisfied he has met that burden. The grounds relied on by the issuing Justice of the Peace could not support the issuance of a warrant and the trial judge was in error when he found otherwise.

[22] In his decision (reported as 2017 NSPC 27), the trial judge recited the correct legal test that governed his examination of the ITO. He then found the warrant to have been validly issued, stating that:

> Here the justice based her authorization on the fact that the officer observed a strong smell of fresh marijuana together with a CPIC check revealing that the accused had a criminal record for possessing drugs and had in the past had an indoor marijuana grow op. (at para. 16)

[23] An examination of the ITO shows this information was inadequate and unreliable. I will now explain why I have concluded that it fell far short of establishing reasonable and probable grounds that a marihuana grow-operation was in Mr. Brown's residence.

The Inadequacy of the Grounds Supporting the Search Warrant

[24] The Justice of the Peace issued the warrant on the basis of the strong smell of marihuana, Mr. Brown's 2009 conviction for possession of marihuana, and the allegations in the RCMP database that he previously had been producing marihuana. These grounds had to be sufficient in their totality to justify the belief that Mr. Brown had a marihuana grow-operation in his residence on November 15, 2014.

[25] I have had to satisfy myself that the strong smell of marihuana relied on by the Justice of the Peace stands on its own as a ground and did not derive its significance from any comparison to the seized seedlings. The seedlings, having come into the possession of the police as a result of an unlawful search of Mr. Brown's garage, cannot have been used for any purpose associated with obtaining a search warrant.

[26] It does not appear that the issuing Justice of the Peace took into account any comparison with the smell from the seedlings. Cst. Charlton and Cpl. Smith both detected a strong smell of fresh marihuana while they were talking to the woman at Mr. Brown's property. It was this smell along with the police database information that the issuing Justice of the Peace relied on. She said this in her November 15 letter to Cst. Munro: "…when police attended the residence they observed a strong smell of fresh marijuana…" (at para. 62).

[27] The strong smell of marihuana can be one of the grounds for obtaining a search warrant for a residence. For example, the Crown relies on the Ontario Court

of Appeal decision in *R. v. Lao*, 2013 ONCA 285, that upheld the issuance of a warrant where an ITO included evidence of the smell of fresh marihuana noted by a police officer from the sidewalk. The *Lao* ITO contained considerably more than the marihuana smell:

> The house at 39 Patricia Ave. showed the textbook signs of being a marijuana grow-operation. It looked uninhabited but consumed large quantities of electricity. It drew that power in a classic, repeated cycle consistent with mechanically timed high-intensity marijuana grow lights. The windows were all covered and the shingles were peeling (a common side-effect of the excess heat and humidity). And, perhaps most tellingly, the odour of fresh marijuana could be smelled from the sidewalk. (at para. 62)

[28] The Court's "most tellingly" reference to the significance of the smell of fresh marihuana does not take away the fact of there being substantially more indicators of a grow-operation than just odour. And that is true of the Supreme Court of Canada cases cited by the Crown as the governing authorities in determining the sufficiency of information for the issuance of a search warrant – *R. v. Wiley*, [1993] 3 S.C.R. 263; *R. v. Grant*, [1993] 3 S.C.R. 223; and *R. v. Plant*, [1993] 3 S.C.R. 281. Each of these cases involved information provided by tipsters, aspects of which the police were able to corroborate. In *Wiley*, police surveillance confirmed the presence of a concrete bunker. In *Plant*, the residence which had been identified through an anonymous Crime Stoppers tip was found by police to have elevated electricity usage. And, in *Grant*, at a routine roadblock the police found evidence consistent with a marihuana grow operation which a previously reliable confidential informer indicated was being transported for that purpose. An address that police observed Mr. Grant entering was determined to have unusually high electrical consumption.

[29] In *R. v. Durling*, 2006 NSCA 124, this Court was satisfied on very similar grounds that the issuing Justice could have authorized the search warrant: detailed tipster information the police were able to corroborate, covered basement windows, and heightened heat emissions from the basement of the home.

[30] The police in Mr. Brown's case had nothing close to what *Wiley*, *Grant*, *Plant*, and *Durling* found was sufficient to justify a search of a residence. The search warrant was issued here solely on the basis of the smell of fresh marihuana and the information mined from the police databases. That information indicated only that Mr. Brown had a dated *CDSA* conviction from June 2009 for simple possession of marihuana, and had been suspected of indoor marihuana cultivation

in the past. (The PROS database referenced, without date, an investigative file from the Enfield RCMP. The other PROS entry, for the investigative file from the Lunenburg County Street Crime Enforcement Section related to Mr. Brown's 2009 conviction for marihuana possession.) It is relevant to note that the PROS description of the 2009 seizure does not indicate the police taking possession of anything associated with a grow-operation – no lights, potting soil, ballast, or fans. And although marihuana was seized, there is no indication that it was plants and not dried marihuana.

[31] I do not agree with the Crown that the Justice of the Peace had sufficient grounds in their totality to justify the issuance of a search warrant for Mr. Brown's residence. Consequently, I find the trial judge was in error in determining there was no breach of Mr. Brown's section 8 *Charter* right to be protected against unreasonable search or seizure.

The Application of section 24(2) of the Charter

[32] The trial judge's finding that Mr. Brown's section 8 *Charter* rights had not been violated meant there was no reason for him to deal with whether the evidence should be excluded under section 24(2). I find the record before this Court is sufficient to enable me to make a ruling on this issue.

[33] I have concluded that the evidence seized from Mr. Brown's home should be excluded. The test to be applied is found in *R. v. Grant*, 2009 SCC 32. The fundamental question is whether the admission of the evidence would bring the administration of justice into disrepute, thereby undermining public confidence in the justice system.

[34] There are three factors to be weighed in the section 24(2) analysis:

(1) the seriousness of the *Charter* violation;

(2) the impact on the accused person's *Charter*-protected interests; and

(3) society's interest in the case being decided on its merits.

[35] The grounds underpinning the warrant authorizing the search of Mr. Brown's home were seriously defective. While I do not find that the police acted in bad faith or negligently, I am satisfied they should have been more rigorous in assessing what information would be sufficient for the ITO. They over-valued the

information from the databases without subjecting it to more careful scrutiny. This lack of scrutiny is evidenced in Cst. Munro's statement under his "Conclusion" in the ITO that, "It is evident that Michael Anthony has a long history involving illicit drugs, in particular marihuana, dating back nearly 20 years." This is misleading. Mr. Brown's criminal record dated back to 1985 but, according to CPIC, his one and only *CDSA* conviction was in 2009. I find the *Charter*-breach to have been serious.

[36] Before I conclude the issue of the seriousness of the *Charter* breach I want to comment on the seizure by police of the seedlings which was undertaken without a warrant approximately 40 minutes after Cpl. Smith's and Cst. Charlton's initial visit to Mr. Brown's. It should have been apparent to police that, in the absence of a warrant, the seizure was as unlawful as their original entry into the garage.

[37] The intrusion upon Mr. Brown's *Charter*-protected rights was also serious. This was a search of his home in which he enjoyed a high expectation of privacy from the state. The seriousness of the breach and the impact on Mr. Brown's right to enjoy a high level of protection from state intrusion favour exclusion of the evidence.

[38] There is a societal interest in proceeding with the *CDSA* charges against Mr. Brown and determining them on the merits. The evidence seized under the warrant is vital to the Crown's case. As the Crown notes, it is indicative of Mr. Brown's guilt. Excluding it will presumably be fatal to the drug prosecution. This is an important consideration in the section 24(2) analysis.

[39] The section 24(2) analysis is not an algorithmic exercise. A careful balancing of all the factors has led me to conclude that the evidence seized from Mr. Brown's home under the warrant should be excluded. The *Charter* violation and its impact on Mr. Brown's rights were significant and, notwithstanding the effect of exclusion on the Crown's case, I find the use by the Crown of the seized evidence would undermine public confidence in the administration of justice.

Conclusion on the Search Warrant Issue

[40] The issuing Justice of the Peace did not have sufficient grounds for authorizing the search of Mr. Brown's house and the evidence seized pursuant to that search should be excluded under section 24(2) of the *Charter*.

The Trial Delay Issue - Introduction

[41] Section 11(b) of the *Charter* entitles accused persons to a trial within a reasonable time. Mr. Brown says his right to a timely trial was violated which should have led to his charges being stayed under section 24(1) of the *Charter*.

[42] The governing case is the Supreme Court of Canada's decision in *R. v. Jordan*, 2016 SCC 27, which set a ceiling of 18 months for trials conducted in provincial court. The determinative calculation is the delay that is net of any defence delay. Net delay of more than 18 months after charges are laid presumptively violates section 11(b), entitling the accused to a stay of proceedings.

[43] Where the presumptive ceiling has been exceeded it becomes the Crown's burden to show that the delay is justified on the basis of "exceptional circumstances", including the transitional exceptional circumstance.

[44] Mr. Brown's case is a "transitional" case. The Supreme Court of Canada recognized that some flexibility was required for cases in the system when *Jordan* was decided. The Court acknowledged it was not fair "to strictly judge participants in the criminal justice system against standards of which they had no notice" (at para. 94).

The Standard of Review

[45] The trial judge's ultimate conclusion on delay is entitled to considerable deference as long as he or she "…correctly identified the appropriate approach and considered the relevant factors…" (*R. v. R.E.W.*, 2011 NSCA 18, at para. 33; *R. v. Mouchayleh*, 2017 NSCA 51, at para. 57).

[46] The majority in both *Jordan* and *R. v. Cody*, 2017 SCC 31, made repeated references to the expertise of trial judges in assessing and categorizing delay (*Jordan*, at paras. 65, 79, 91; *Cody*, at para. 31).

The Delay in Mr. Brown's Case

[47] Mr. Brown was charged on November 14, 2014. Crown and Defence agreed that May 1, 2017, the last day evidence was heard, would be used as the end date for the *Jordan* analysis. The trial judge found that the case took 29.57 months or 899 days to complete. He deducted defence delay of 6.8 months or 208 days. He also deducted 3.5 months for what he characterized as a discrete event. This

brought the net delay down to 19.2 months which the trial judge found did not justify a stay of the proceedings. He held that,

> …To do so in this transitional case over a delay of about a month and half (sic) over the 18 month ceiling would clearly bring the administration of justice into disrepute. (at para. 35)

[48] Mr. Brown takes issue with the trial judge's assessment of defence delay, his characterization of 3.5 months as a discrete event, and the application of the transitional exceptional circumstances where the delay exceeded the presumptive ceiling.

[49] I am satisfied that Mr. Brown's appeal against the dismissal of his stay application should fail although my assessment of certain aspects of the delay calculations differs from those of the trial judge.

Calculating Defence Delay

[50] It took some time for Mr. Brown to obtain a lawyer to represent him on the charges. He was finally able to do so after a successful appeal to Legal Aid. Mr. Fitch appeared with him on September 2, 2015 and entered a not guilty plea to all the charges.

[51] Mr. Fitch conceded in this appeal, as he had before the trial judge, that the period between January 14, 2015 and September 2, 2015 when Mr. Brown was endeavouring to secure representation should not be calculated into the net delay as it constituted implicit waiver by him. Mr. Brown appeared twice before the Court prior to January 14: November 17, 2014 for duty counsel to deal with the matter of his release from custody, and December 17, 2014, a date which had been set to allow Mr. Brown time to retain and instruct private counsel. On December 17 Mr. Brown indicated he had made an appointment with Legal Aid "about a week ago" but had yet to meet a lawyer. At that time the return date of January 14, 2015 was set.

[52] The trial judge calculated the delay from Mr. Brown's first appearance (November 17, 2014) to his election and plea (September 2, 2015) as 8.3 months. He observed that it took an "unreasonably long time to get to a place where plea could be entered." Noting that disclosure was "immediately available" to Mr. Brown as it had been provided to duty counsel on November 17, he found that Mr. Brown should have been in a position to enter a plea after at most 45 days from

that first appearance. He did not count the period of November 17, 2014 to January 14, 2015 – actually slightly more than 45 days – as defence delay. He calculated the remainder of the delay to be 6.8 months.

[53] As the Crown correctly notes in its factum, the trial judge's calculation of 8.3 months for the period of November 17, 2014 to September 2, 2015 was an arithmetic error. This was actually 9.5 months. Excluding the 45 days identified by the trial judge as a reasonable amount of time for entering a plea, the correct amount of time attributable to defence delay in entering a plea should have been 8.2 months.

[54] The error does not alter the fact that Mr. Fitch conceded the period of January 14 to September 2, 2015 as implicit defence waiver. It is apparent from the trial judge's decision that he would have attributed this delay to Mr. Brown even without the concession. I do not necessarily agree with the trial judge's view that, with disclosure, 45 days is a reasonable period of time for election and plea but I do not see any basis for interfering with the determination he made in this case.

[55] Furthermore in the context of this being a transitional case, under the *Morin* regime, applying for Legal Aid is properly considered as an inherent time requirement of the case (*R. v. Picard*, 2017 ONCA 692, at para. 90; *R. v. Morin*, [1992] 1 S.C.R. 771, at para. 42).

[56] *Jordan* requires every participant in the justice system to assume responsibility for minimizing delay (at para. 116). The record does not reveal how diligently Mr. Brown pursued the goal of securing representation between January and September 2015. During those months he was making repeated requests for adjournments.

[57] The record discloses it was the Crown who expressed concern about the delay, not Mr. Brown. There is no indication of Mr. Brown being anxious to get his trial underway. He did not make "repeated efforts to expedite the proceedings" (*R. v. Williamson*, 2016 SCC 28, at para. 29).

[58] As I noted earlier, the total delay in this case was 29.57 months. Subtracting defence delay of 8.2 months – the arithmetically correct calculation – leaves a net delay of 21.3 months, which exceeds the presumptively unconstitutional 18-month ceiling.

[59] Exceeding the ceiling obliges the Crown to justify the delay on the basis of this being a transitional case.

[60] Before I proceed further however, I will address the trial judge's determination that 3.5 months of delay should be characterized as a "discrete event".

The 3.5 Month "Discrete Event" Delay

[61] After subtracting defence delay, the trial judge thought he was dealing with a delay of 22.77 months. He attributed 3.5 months of it to a discrete event, an over-crowded docket due to extraordinary pressures on available judicial resources. He found this reduced the delay to 19.2 months, just above the 18-month *Jordan* ceiling and, in this transitional case, not constituting a violation of Mr. Brown's section 11(b) *Charter* right.

[62] With respect, I do not think the trial judge's characterization of the 3.5 months should be accorded deference, although, as I will explain, I am satisfied he was correct to have ultimately dismissed Mr. Brown's application for a stay.

[63] The 3.5-month delay was due to the court adjourning the scheduled search warrant *voir dire* from January 22, 2016 to May 9, 2016 as a consequence of an over-taxed docket.

[64] The reason for the state of the docket was the loss, from the two-judge Bridgewater Provincial Court, of one judge to cover Yarmouth as the incumbent judge there was absent due to illness. The Bridgewater Court had also absorbed cases that previously were being heard in a neighbouring community. The trial judge described the circumstances that he viewed as a "discrete event" as follows:

> 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 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.

[65] *Jordan* held that a discrete event, that is, an exceptional circumstance lying outside of the Crown's control, "must be subtracted from the total period of delay for the purpose of determining whether the ceiling has been exceeded" (at para. 75). *Jordan* notes that exceptional circumstances are reasonably unforeseen or reasonably unavoidable and cannot be reasonably remedied by the Crown (at para. 69). The determination of whether there is an exceptional circumstance caused by a discrete event is left to a trial judge's "good sense and experience" (*Jordan*, at para. 71).

[66] The trial judge's view of the 3.5 month delay as a discrete exceptional circumstance was comprehensible. The illness of a judge can constitute a discrete event. A number of courts have made this determination, deducting the delay occasioned by the judge's unavailability from the presumptive ceiling. The Crown noted examples in its factum of such determinations – *R. v. Riley*, 2017 ONSC 4448; *R. v. Belfour*, 2017 SKQB 158; and *R. v. Colpitts*, 2018 NSSC 41. In all of these cases, it was the judge hearing the case who was ill or unavailable. That was not the circumstance here.

[67] The reason I disagree with the trial judge's characterization of the 3.5-month delay as a discrete exceptional circumstance is that it conflicts with the emphasis in *Jordan* and *Cody* that ensuring timely trials is a collective responsibility.

[68] In *Cody* the Supreme Court referred to the justice system having a role in mitigating exceptional circumstances:

> …The delay caused by discrete exceptional events or circumstances that are reasonably unforeseeable or unavoidable is deducted to the extent it could not be reasonably mitigated by the Crown *and the justice system*. (at para. 48) [emphasis added]

[69] This statement echoes the message in *Jordan* that "…all participants in the justice system must work in concert to achieve speedier trials…" (at para. 116). *Jordan* noted that the "justice system" must be prepared to mitigate the delay associated with a discrete exceptional circumstance (at para. 75).

[70] I am of the view that the deployment of a Bridgewater judge to cover the Yarmouth Court does not qualify as a "discrete event." The over-burdened Bridgewater docket was a resource problem. And while it was not within the power of the trial judge, the Crown, or the defence to mitigate a situation that needed the provision of additional judicial resources, it was a problem that the

justice system had a responsibility to address. That is one of the directives to come out of *Jordan* and *Cody*. It is not only justice participants who have to respond to a new delay-sensitive regime, the justice system itself has to change. If docket problems arise because judicial resources have been stretched too thinly then additional judges need to be brought in to alleviate the problem.

[71] I find that the 3.5-month delay from January 22 to May 9, 2016 should not have been deducted from the total delay.

[72] Without the 3.5-month deduction, the delay calculation would stand at 21.3 months. There is however, as the Crown has pointed out, a further relevant factor to be taken into account in assessing the delay in Mr. Brown's case - the time taken by the trial judge to produce his decision on the validity of the search warrant. This was not addressed in the court below but should be on this appeal.

[73] The trial judge adjourned the matter from May 10, 2016 to July 15, 2016 to afford him time to decide the search warrant issue. *Jordan* was only released on July 8, 2016 and makes no reference to judicial decision-rendering being a factor in the determination of unreasonable delay. Under a *Morin* analysis, this time would be excluded as part of the inherent time requirements of a case (*R. v. K.G.K.*, 2017 MBQB 96, at para. 30). That said, an inordinately delayed decision can provide a stand-alone basis for a stay of proceedings (*R. v. Rahey*, [1987] 1 S.C.R. 588).

[74] Moving past *Morin*, there are compelling reasons for not including in the section 11(b) analysis under the *Jordan* framework the time it takes for a judge to render a decision. (See, for example: *R. v. K.G.K.*; *R. v. Gambilla* (*appeal by Mamouni*), 2017 ABCA 347, at paras. 88 – 93.) As Slatter, J.A. of the Alberta Court of Appeal has said (concurring in the result):

> …The *Charter*, including s 11(b), do (sic) not require a trial judge to rush to judgment or cut corners in rendering a decision. The time it takes for a reserved decision to be rendered is not "delay", and should not be counted in the s 11(b) analysis at all…(*Gambilla*, at para. 88)

[75] I am satisfied that the two months it took the trial judge to determine the search warrant issue should not be considered in calculating the delay. I find the net delay in Mr. Brown's case to have been only 19.3 months.

A Stay of Proceedings is Not Justified in this Case

[76] Moldaver, J. held in *Jordan* that,

> …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…(para. 96)

[77] I find there is no justification for entering a stay of proceedings in Mr. Brown's case where the delay was 19.3 months. I note that the transitional exceptional circumstance, applicable in this case, "…recognizes that change takes time, and institutional delay – even if it is significant – will not automatically result in a stay of proceedings" (*Jordan*, at para. 97).

[78] Mr. Brown's case unfolded over many months before *Jordan* was released on July 8, 2016. The participants were operating in the absence of a presumptive ceiling of 18 months. As it is a transitional case, the *Jordan* analysis must be applied "contextually" and "flexibly" (*Jordan*, at para. 94). Resort to the *Morin* principles, including whether the accused suffered prejudice and the seriousness of the offences, assists in assessing transitional cases (*Jordan*, at para. 96).

[79] Although the trial judge observed that Mr. Brown, "like all those" with matters before the courts, "faced prejudice from the delay to have his matter heard", the record does not indicate any particular prejudice experienced by Mr. Brown as a result of the 19.3-month delay. He was released on bail on November 17, 2014 after spending only two days in custody. His bail conditions were not unduly restrictive. As for the charges - assault, threats, and unlawful marihuana production - they were serious, a factor that weighs in favour of the societal interest in bringing an accused person to trial (*Morin*, at para. 30).

[80] A determination in Mr. Brown's case that the delay should entitle him to a stay of proceedings would constitute an excessively strict and unreasonable application of *Jordan*. It would completely ignore the analysis to be applied to transitional cases.

Conclusion on the Delay Issue

[81] Once defence delay is accounted for, and allowing for the time required by the trial judge to rule on the search warrant issue, the delay in Mr. Brown's case stands at 19.3 months. Although above the presumptive ceiling of 18 months for Provincial Court trials, as a transitional case, this delay does not warrant a stay of proceedings.

Disposition of the Appeal

[82] I would allow appeal against the issuance of the search warrant and would exclude the evidence seized pursuant to that warrant. This determination relates solely to the *CDSA* charges.

[83] I would dismiss appeal from the trial judge's decision on the delay issue and uphold the convictions for assault and threats. A stay of proceedings is not justified in this transitional case.

Derrick, J.A.

Concurred in:

Beveridge, J.A.

Bryson, J.A.