

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: R. v. Brown, 2005 NSSC 196

Date: 20050617

Docket: CR.Am. 231126

Registry: Amherst

Between:

Her Majesty the Queen

v.

Leon James Brown

DECISION

Judge: The Honourable Justice J.E. Scanlan

Heard: 17 June 2005, in Amherst, Nova Scotia

Written Decision: June 22, 2005

Counsel: Mr. Bruce Baxter, for the crown
Mr. Jim O'Neil, for the respondent

By the Court:

[1] This is an application wherein Leon James Brown has asked the court to stay the charges against his client based on an alleged breach of his right to a trial within a reasonable time. The application relies on section 11 (b) of the **Charter**. I suggested to Mr. O'Neil during his submissions relied on *Askov* and subsequent cases including the *Morin* case in 1992 from the Supreme Court of Canada in suggesting that there is a six to eight month time line following committal for a case to proceed to trial. He suggested any longer than that would offend the provisions of the **Charter** in terms of having a trial within a reasonable time. In my questioning of Mr. O'Neil I asked of him as to whether or not it would be appropriate to contextualize each and every case, not to slavishly apply anything that was stated either in *Askov* or in *Morin*. I am satisfied that in those cases the court intended there be a contextual application of the *Charter* rights. In other words there must be due regard to the entire history of the proceedings when considering the merits of the stay application.

[2] In that regard I refer to the history of the proceedings in this matter. It was pointed out by crown counsel in argument, and it's obvious as we look at the arraignment proceedings, that prior the committal there was a substantial delay in

the proceedings as a result of the fact Mr. O'Neil himself was not available. Some seven months and three weeks had elapsed from the date that Mr. Brown was first before the court and the preliminary inquiry was held.

[3] In terms of this application, the only thing which I really have to consider or should consider is post-committal delay. The preliminary inquiry was held September 7th, 2004 and the accused was committed to stand trial on that date. The matter was set for March 29 and 30th 2005 but had to be adjourned due to late notice by defence counsel in relation to a **section 276** application. The trial was the set for April 20th, 21st and 22nd, 2005. During the course of those proceedings defence counsel made a motion for mistrial, which motion was eventually granted. Crown counsel joined in the motion for mistrial. Based on the joint recommendation the trial judge declared a mistrial. On May 5 new trial dates were set for June 20 - 23, 2005.

[4] The briefs focussed largely on Justice Gruchy's rulings during the initial trial. This is not an appeal of his rulings. As I pointed out to Mr. Baxter during his submissions, I am in no way getting into the rulings that Justice Gruchy made at

any stage in the trial. The fact of the matter is there were motions for mistrial and the mistrial was granted.

[5] As noted when the matter came back to court to set new dates, and this court had offered up June 20th through the 23rd as trial dates. The court was ready to proceed but the court was subsequently informed that if the trial dates were set for June 20th to 23rd that it would be right in the middle of preparation for school exams for two of the main witnesses.

[6] The court, in setting new trial dates for October 11th through 14th, 2005 had to have taken into account the reasons offered up by the Crown in relation to the request for a delay from the June dates. The court was satisfied that in terms of the administration of justice, high school exams were important. The adjournment was granted. The trial dates are set.

[7] With any delay there is an inference that there is prejudice. In the present case there is also reference to actual prejudice of the accused as set out in the affidavits on file.

[8] In terms as to whether or not to grant the application by Mr. Brown wherein he requests that the matter be stayed because of the alleged breach of his *Charter* rights, there must be a contextualization, taking into account the circumstances which caused the delay. As I've already indicated, the matter could have proceeded in June but for the witnesses, and the hardship that it would have imposed upon them. The June dates would have been a very quick turn around time in terms of getting dates after the April mistrial but that would be a very unusual turn around time in this jurisdiction or probably anywhere else in the country. This court uses a term system in Cumberland County. The court does not sit continuously with juries. If the trial could not be held in June the next term is October. There are not many regions in this province, and indeed I suggest not many regions in the country where you could have had a jury trial throughout July and August. As noted the October term of course is the first term that we have following the summer months in Cumberland County.

[9] The total time from the laying of the charges to the completion of the trial will be 23.5 months if the matter proceeds in October. The delay from the date of committal to the date of trial will be about 12.5 months. I am satisfied that a proper reading of *Morin* and *Askov* and a contextual application of the principles as set out

in those cases, and an appropriate application of the *Charter* would suggest that the length of delay in this case is not unreasonable. The reasons for the delay go to the inherent requirements of the case in terms of the time that's required to put the trial on. It's a rather short trial, but even to fit in a three day trial, a jury trial in is difficult because of the term system.

[10] There are some limitations on institutional resources, in the sense, as I've said, we don't have jury trials in the summer and we don't have continuous jury trials in this jurisdiction. But in terms of the service that is provided in this jurisdiction and for this case, it is reasonable. I doubt that the trial could have been put on any faster in just about any other jurisdiction in the province, and probably even in the country.

[11] Even though the trial judge was critical of the Crown questioning when dealing with the issue of possible mistrial in the end both counsel motioned for a mistrial. Following that declaration of a mistrial I don't find fault in the Crown or the system that we have here in place as regards the delay. I simply state the delay is reasonable and I'm not prepared to grant the application for a stay as made by Mr. Brown.

MR. O'NEIL: There's two applications. One is *Askov*. The other is the abuse of process argument.

THE COURT: Anything further to say on the abuse of process, Mr. O'Neil?

MR. O'NEIL: I think I said it in my brief, My Lord.

MR. BAXTER: As did I, My Lord, thank you.

[12] In terms of the new trial the suggestion by Mr. O'Neil in his brief is that it would be unfair for Mr. Brown to have to undergo a second trial on the **section 276** application. There's nothing improper or unfair, or nothing that amounts to abuse of process in terms of the way the matter has proceeded. The section 276 application counsel, is a stand alone matter. The issue is to be heard by the trial judges just as any other application made in the course of the trial. Whether you make that application once or twice doesn't amount to an abuse of process in this case. It's simply the way that the matter unfolded. If the court were to hold that the initial ruling by Justice Gruchy is binding on the next trial judge it in essence removes it as an appealable aspect of the next trial. To require that matter to again be dealt with by the new trial judge does not amount to an abuse of process. The abuse of process would have been not to allow your motion for mistrial once you

raised the concern. With a new trial comes a retrial on all the issues of admissibility. An accused cannot cherry pick the beneficial rulings and say they are to be carried to the next trial. That would be an abuse of process.

J.