SUPREME COURT OF NOVA SCOTIA
Citation: *R.* v. *Quesnel,* 2018 NSSC 221

Date: 2018-10-10
Docket: Ant No. 448594
Registry: Antigonish

Her Majesty the Queen

v

Manuel Robinson Joseph Quesnel

Judge: The Honourable Justice N. M. Scaravelli

Hearing: Antigonish, Nova Scotia, May 29th, 2018

Decision: October 10th, 2018

Counsel: Rachel Furey for the Federal Crown

Wayne MacMillan for the Federal Crown

Peter Ghiz for Mr. Quesnel

Orally by the Court:

[1] Manuel Robinson Joseph Quesnel is charged with possession of M.D.M.A., psilocybin and cannabis resin for the purpose of trafficking contrary to the *Controlled Drug and Substances Act*.

[2] Mr. Quesnel has made an application seeking a stay of proceedings on the grounds that he has been denied trial within a reasonable time guaranteed by section 11(b) of the *Charters of Rights and Freedoms.* Specifically that his trial has not been held within 30 months as set out in *R. v. Jordan*, 2016 SCC 27.

This Voir Dire was heard on May 29th, 2018. With the consent of the applicant and crown, this charter hearing was blended with the applicant's other *Charter* application under sections 8, 9 and 10 of the *Charter.* Subject to the section 11 matter, the applicant and the crown agreed that the evidence adduced on the other applications will be the evidence at trial. For purposes of the section 11 application, the applicant agreed that in the event all matters were not concluded on May 29th, the defence would be responsible for the delay required for trial completion.

Section 11 Charter - Delay

[3] In *R. v. Mouchayleh* 2017 NSCA 51, the Court of Appeal succinctly set out the *Jordan* analysis:

> *Jordan* replaces the *Morin* analysis with fixed periods for delay, beyond which delays are presumed unreasonable. The presumptive period for proceedings in the provincial courts is 18 months, in superior courts, 30 months. *Jordan requires:*
>
> 1. First, calculate the total delay.
> 2. Deduct from the total delay any delay waived or caused by the defence.
> 3. Where the net total exceeds the presumptive ceiling, the onus shifts to the crown to rebut the presumption of unreasonable delay by demonstrating that there are exceptional circumstances . If the crown fails to do so, a stay must follow.
> 4. Where net delay is within the presumptive ceiling, the defence has the onus of showing that the delay is unreasonable. The defence can do this by showing that it took "meaningful steps that demonstrate a sustained effort to expedite proceedings; and the case took markedly longer than it should have".
>
> [7] Where, like here, the charges pre-date the release of *Jordan*, there many be an exceptional transitional circumstance for cases exceeding the ceiling.

[4] The crown and applicant disagree on the total amount of delay. The applicant was arrested on July 9, 2015 and was issued a Promise to Appear in Provincial Court on a specified date. The Information was sworn on September 2nd, 2015. The trial commenced on May 29th, 2018. The applicant submits the time frame begins when the accused is arrested and issued a Promise to Appear. As the Promise to Appear threatens charges for failure to appear on the specified date, his liberty was subject to restraint. The applicant refers to several provincial

and superior court decisions in support of his submission that an accused is effectively "charged" under these circumstances.

[5] The crown submits the timeframe begins when the applicant is "charged with the offence" as expressed in section 11(b) of the *Charter*. That total delay is calculated from the date the information is sworn to the completion of the trial as confirmed in *Jordan* and in *R. v. Hunt*, 2017 SCC 25 affirming the court's decision in *R. v. Kalanj* [1989] 1 S.C.R. 1594.

[6] Clearly it is well settled that the pre-charge period is not considered on a section 11(b) application. As stated by the court in *Kalanj*:

> Section 11 affords its protection after an accused is charged with an offence. The specific language of s. 11 should not be ignored and the meaning of the word "charged" should not be twisted in an attempt to extend the operation of the section into the pre-charge period. The purpose of s. 11(b) is clear. It is concerned with the period between the laying of the charge and the conclusion of the trial and it provides that a person charged with an offence will be promptly dealt with.

[7] The court went on to state that complaints regarding pre-charge delay should be assessed under section 7 of the *Charter*, not section 11.

[8] In *Mouchayleh*, the Nova Scotia Court of Appeal used the date the charge was laid as the starting point for calculating Jordan timelines.

[9] In this case the crown submits the amount of delay to May 29th, 2018 is 33 months which exceeds the presumptive ceiling of 30 months. As a result, the court must discount any delay attributable to the defence.

[10] The crown submits there is 12 months delay attributable to the defence. The defence submits there was no defence delay.

[11] In *Jordan,* the court set out non-exhaustive examples of defence delay. Defence delay can be determined by waiver, either explicit of implicit, but the waiver must be clear and unequitable. Defence conduct where defence is not ready to proceed or unavailable where the crown and court are available is attributable to the defence.

[12] Having reviewed the chronology of events, I am satisfied the overall delay attributable to the defence and/or discrete event reduces the total delay well below the 30 months ceiling established by Jordan.

March 2nd, 2016 – April 5, 2016 – One Month

[13] At the conclusion of the preliminary inquiry the Provincial Court offered the date of March 1st, 2016 for appearance in Supreme Court to set the matter for trial. Defence counsel was not available on that date and the crown was available. As a result, the court set the matter for April 5th, 2016.

February 25th, 2017 – April 28, 2017 – Two Months

[14] Following a January 16th, 2017 unrecorded telephone conference with crown and defence, I directed a letter to the parties indicating that the February 20 - 24, 2017 trial was rescheduled to April 25th-April 28th, 2017 "with agreement of crown and defence". Defence counsel did not argue that the correspondence did not constitute defence waiver. At a minimum the circumstances gave rise to a inference of waiver.

April 29th, 2017 – September 26th, 2017 – Five Months

[15] During a March 7, 2017 appearance before Justice Rosinski, the defence counsel re-elected Trial by Jury to Judge Alone. The April 25th – 28th jury term trial dates were changed to September 25-26 Judge Alone. There were no discussions or concerns expressed regarding the five month delay. Defence counsel expressed that the new dates were fine. The decision by defence counsel to re-elect caused the removal of the case from the scheduled district jury term.

February 7th, 2018 to May 29th, 2018 – Four Months

[16] Trial dates scheduled for January 30th, 31st were rescheduled at the request of defence. Counsel indicated he was unable to travel from Charlottetown to Antigonish due to winter storm conditions. Whether characterized as a discrete

event or defence delay, the time is ultimately deducted from the ceiling. Further, the court offered to reschedule the trial one week later. The crown was available but defence counsel was not available.

[17] As indicated the defence is responsible for delay from May 29th to the completion of trial, therefore, the net delay of 18 months is well below the presumptive ceiling, the burden is on the defence to show the delay is unreasonable. In this regard, the defence submits the crown was not diligent in obtaining early dates. This submission is not borne out on the record.

[18] As a result, I find the applicant's right to be tried within a reasonable time under section 11(b) of the *Charter* was not infringed and the application is dismissed.

Section 8, 9. and 10 Charter

[19] Mr. Quesnel's vehicle was searched incidental to his arrest for possession of marijuana. The search resulted in the discovery of other prohibited drugs and drug paraphernalia. Mr. Quesnel challenges the legality of his arrest and search pursuant to sections 8 and 9 of the *Charter* and seeks to exclude the seized items from evidence. Moreover, Mr. Quesnel seeks to exclude statements made to the police in violation of his section 10 *Charter* rights.

[20] On evening of July 9, 2015, Cst. Robert Kavanaugh was conducting mobile vehicle checkpoints near Heatherton, Nova Scotia for the purpose of vehicle inspections and sobriety. He was aware that there was a music concert scheduled in the area that weekend. Mr. Quesnel's van was his second check of the evening at approximately 9:35 pm. As Cst. Kavanaugh approached the vehicle with his flashlight he observed camping gear in the back of the van.

[21] Mr. Quesnel was the driver of the van and Mr. Rice in the front passenger seat of the van. Both front windows of the van were open at the time. Cst. Kavanaugh observed Mr. Quesnel to be nervous as he was checking for licence, inspection and sobriety. Quesnel's hands were shaking, his neck artery was pulsating and his voice was cracking when he spoke. Cst. Kavanaugh also smelled an odor of fresh marijuana.

[22] Cst. Kavanaugh went back to the police vehicle to check for outstanding warrants or violations. Finding none, he returned to the Quesnel vehicle and observed both Mr. Quesnel and Mr. Rice smoking cigarettes. He made the same observations regarding Mr. Quesnel's nervousness and again smelled fresh marijuana. According to Cst. Kavanaugh this confirmed to him that he was right the first time he smelled fresh marijuana.

[23] Acting on his belief that there was marijuana in the vehicle, Cst. Kavanaugh arrested Mr. Quesnel for possession of marijuana. He was handcuffed and placed in the police vehicle. Cst. Kavanaugh read Mr. Quesnel his *Charter* rights from a *Charter* card and informed him of his right to counsel. Mr. Quesnel responded that he understood and that he wanted to speak to a lawyer.

[24] Cst. Kavanaugh returned to the van to speak with Mr. Rice. He observed Mr. Rice was shaking. Cst. Kavanaugh arrested Mr. Rice for possession of marijuana and read him his *Charter* rights. Mr. Rice was handcuffed and told to stand in front of the police vehicle. Cst. Kavanaugh then called for RCMP assistance.

[25] Cst. Kavanaugh asked Mr. Rice what he owned in the vehicle. Mr. Rice responded he only owned the black bag in the van. Cst. Kavanaugh then asked Mr. Quesnel what he owned. Mr. Quesnel indicated that he owned everything else in the van except the bag belonging to Mr. Rice. Cst. Kavanaugh found both Mr. Quesnel and Mr. Rice to be fully cooperative and non-threatening.

[26] Cst. Kavanaugh searched the van. In addition to camping gear, he found and removed a zipped black nylon bag. Inside the nylon bag was a ziplock bag containing 3 g of fresh marijuana. Cst. Kavanaugh testified he did not smell anything coming from the bag when he removed the bag outside of the vehicle.

[27] Cst. Kavanaugh also located a plastic bag containing a substance which appeared to be MDMA residue, four 1 g bags of MDMA, a digital scale and several empty 1 g baggies. Cst. Kavanaugh also found a Rubbermaid container. Inside were further ziplock bags containing MDMA capsules. Following this search, Cst. Kavanaugh again arrested both suspects for possession for the purpose of trafficking and again read them their *Charter* rights. Mr. Quesnel again stated he wished to speak to a lawyer.

[28] Cst. Meisner arrived on the scene and watched the suspects while Cst. Kavanaugh continued to search the van. Cst. Rehill arrived and assisted Cst. Kavanaugh in searching the vehicle. They found an additional 293 MDMA capsules, 36 g MDMA powder, 146 heat sealed capsules of cannabis resin, and 470 g of psilocybin or mushrooms.

[29] Mr. Quesnel and Mr. Rice were charged and released roadside.

[30] Cst. Kavanaugh testified, from his experience, he could detect a smell of fresh raw marijuana and could detect the difference between the smell of burnt marijuana and fresh marijuana. He acknowledged that he did not receive any training in identifying these drugs as an RCMP officer and was not qualified as an expert in this area.

[31] As a highway patrol officer in Alberta from 2007 to 2010 he came in regular contact with freshly burnt and raw marijuana through traffic stops. He attended approximately five cannabis grow-operations involving the seizure of raw marijuana. His regular contact with burnt and raw marijuana continued in the Artic from 2010 to 2013. Further contact with marijuana through traffic stops occurred following his transfer to Nova Scotia in 2013. Prior to jointing the RCMP, Cst. Kavanaugh testified he was exposed to marijuana as a traffic enforcement officer in Iqaluit and as a fishery observer in the Artic.

[32] As a member of the RCMP in Alberta he received training in identifying concealment methods and body language regarding movement of contraband by travelling criminals. Cst. Kavanaugh acknowledged that the observations he made of Mr. Quesnel alone would not be sufficient grounds for arrest. The combination of his observations and the smell of raw marijuana caused Cst. Kavanaugh to believe an offence was being committed.

[33] Under cross-examination, Cst. Kavanaugh acknowledged there was food in the van, specifically a container of "warm ribs" and a container of soup. Cst. Kavanaugh denied he could smell the food while at the window of the van. He stated the ribs were covered with cellophane and the soup had a cover on top.

[34] Cst. Kavanaugh stated the odor of marijuana he smelled was neither strong nor faint. When questioned on why he did not make an arrest on the first smell, Cst. Kavanaugh stated he wanted to remove himself from the vehicle to determine if he could smell marijuana when he returned.

[35] Cst. Kavanaugh stated that the 3 g of marijuana located in the ziplock bag which was inside the sealed nylon bag would be comparable to a "toonie" in size. He stated he did not know if the ziplock bag was opened or closed. He did not check the vapor lock on the ziplock bag even though he handled the bag on more than one occasion. Cst. Kavanaugh stated he would have been involved in over 1000 matters involving the smell of marijuana. He acknowledged that the minority of these situations resulted in criminal charges being laid.

[36] Cst. Kavanaugh confirmed Mr. Quesnel requested to speak to a lawyer after receiving his first and second *Charter* cautions. Cst. Kavanaugh then asked Mr. Quesnel "who owned the vehicle" and "what items in the vehicle belonged to you". Mr. Quesnel responded to these questions.

[37] Cst. Kavanaugh stated the questions were safety issue questions. In the event he discovered weapons or needles he would know who to talk to.

[38] Mr. Rice testified at the Voir Dire. Mr. Rice was the front seat passenger in the van at the time of the stop by Cst. Kavanaugh. He testified that the nylon bag containing the 3 g of marijuana belonged to him and it was the only item in the van that he owned. Mr. Rice stated the marijuana was in a snapped shut ziplocked bag inside a closed pocket of the nylon bag containing his belongings. The purpose of sealing the ziplock bag was to avoid spillage and odor. He described 3 g of marijuana as being about "two fingers". He was unaware of any other drugs in the van. Under cross examination Mr. Rice confirmed there was a smell of food in the van.

[39] During summation the crown acknowledged that Mr. Quesnel's section 10(b) rights would have been violated thereby acknowledging that Cst. Kavanaugh failed to refrain from eliciting responses from Mr. Quesnel until he had a reasonable opportunity to exercise his right to counsel.

[40] The remaining issue for this court is whether the arrest of Mr. Quesnel was lawful in the circumstances. As the initial arrest was for a summary conviction matter, Cst. Kavanaugh would have had to "find" Mr. Quesnel possessing marijuana under section 495(1)(b) of the *Criminal Code*. An unlawful arrest results in an unlawful search.

> **Section 495(1) –** A peace officer may arrest without a warrant . . .

(b) a person whom he finds committing a criminal offence.

[41] The burden is on the crown to establish the arrest of Mr. Quesnel was authorized under section 495(1)(b) of the *Code*. In *R. v. S.T.P.*, 2009 NSCA 86, the court reviewed the test for determining the "finds committing standard",

1. The police officer's knowledge must be contemporaneous to the event.
2. The officer must actually observe or detect the commission of the offence.
3. There must be an objective basis for the officer's conclusion that an offence is being committed. That is, "it must be apparent to a reasonable person placed in the circumstances of an arresting officer at the time".

[42] The crown acknowledged the physical observations of the occupants alone would be insufficient to establish grounds for arrest. However, the crown submits that when viewing the circumstances of the arrest through the lens of Cst. Kavanaugh's observations and experience, he had an objective basis to believe the offence of possession of marijuana was being committed.

[43] Mr. Quesnel submits that the circumstances failed to establish that Cst. Kavanaugh could have subjectively or objectively made that conclusion. That it is

unlikely he detected such an odor of such a small amount of marijuana contained in a ziplock bag inside a sealed nylon bag.

[44] In *S.T.P.* the court confirmed the detection of an offence while acknowledging smell alone may not justify an arrest. However, in that case the indicators were:

1. Three young men in a vehicle and one of them appearing nervous upon seeing the police vehicle;
2. The car immediately turned of the road into MacDonald's parking lot;
3. The computer check of the vehicle revealed bail violations and references to cannabis;
4. There was a strong smell of marijuana;
5. The smell was confirmed by a fellow officer.

[45] The crown's brief references *R. v. Harding* 2010 ABCA180 for the proposition that odor alone could be sufficient grounds for arrest. However, in *Harding* the officer detected a "very strong odor of marijuana". In that case there were 56 lbs of marijuana located in two hockey bags that were placed in the trunk

of the accused vehicle. Further, the officer had 14 years experience in destroying marijuana.

[46] The recent decision of *R. v. Hussey* 2017 NSPC 59 contained facts similar to the present case. The officer pulled over the accused for the purpose of checking sobriety. The officer detected "a strong odor" of fresh marijuana emanating from inside the vehicle. The officer also noted the smell of "air fresher". He knew each occupant from a prior occasion. A search incidental to arrest revealed two bags of cannabis weighing 259 g and 350 g.

[47] The officer testified that he was capable of distinguishing the smell of fresh and burnt marijuana. He testified that he encountered marijuana more than 300 times in his career and that approximately 75 of these resulted in searches. The officer had been qualified as an expert witness a number of time with respect to drug trafficking, although such opinion evidence did not deal with smell. The officer also took two courses in which he was exposed to fresh and burnt marijuana in order to distinguish them.

[48] Judge Ross recognized that police officers can give reliable evidence of what they smell but where the smell forms that basis for belief of possession, that opinion "must have substantial underpinnings and training and/or experience, and even then should be treated with caution". Judge Ross observed that "in many of

the cannabis smell cases where the arrest has been ruled lawful, the opinion of the arresting officer has been corroborated by the opinion of another". There was no available corroboration in *Hussy*. Ultimately Judge Ross found the arrest was unlawful.

[49] In cases such as the present one where there is absence of corroborating evidence, there must be very cogent evidence of the officer's ability to smell and identify marijuana.

[50] In the circumstances of this case, I find Cst. Kavanaugh's conclusion that an offence was being committed to be unstainable. In doing so I have considered the whole of the evidence including the following factors:

1. Cst. Kavanaugh's experience of smelling and distinguishing fresh from burnt marijuana is based on his personal experience and experience as a police officer mainly from motor vehicle check stops and searches in the past. He has no special training in this regard. His evidence is that in the majority of stops where the smell of marijuana was involved, a small percentage resulted in charges.

2. Cst. Kavanaugh acknowledged the smell of marijuana was not strong.

3. The marijuana in question amounted to only 3 g and was contained in a snapped shut ziplocked bag inside a sealed nylon bag in the vehicle.

4. Cst. Kavanaugh could not smell marijuana when the bag was removed from the vehicle.

5. Cst. Kavanaugh could not confirm the ziplock bag was sealed despite having handled the bag on more than one occasion including sending samples for forensic analysis.

6. The windows of the vehicle were open and there was warm food inside the van. Moreover, both occupants were smoking cigarettes when Cst. Kavanaugh returned to the vehicle a second time to "confirm" that he could smell marijuana.

7. There was no corroborating opinion evidence by another officer.

[51] As a result I find that Cst. Kavanaugh did not have an objectively reasonable belief that both Mr. Rice and Mr. Quesnel were in possession of marijuana and therefore committing the offense of possession. The arrest infringes on Mr. Quesnel's section 9 *Charter* rights.

[52] As the arrest was unlawful, Cst. Kavanaugh could not rely on the search incident to arrest power. The search, therefore, was unreasonable and in violation of Mr. Quesnel's section 8 *Charter* rights.

Section 24(2) of the Charter – Exclusion of Evidence

[53] The onus is on the applicant to establish, on a balance of probabilities that the admission of evidence obtained in breach of a *Charter* right would bring administration of justice into disrepute having regard to all the circumstances.

[54] In *R. v.* Grant 2009 SCC 32, the Supreme Court of Canada has stated three questions should be considered in determining whether admission of evidence would bring the administration of justice into disrepute.

1. The seriousness of the *Charter* – infringing state conduct;
2. The impact of the breach and the *Charter* protected interests of the accused; and
3. Society's interest in the adjudication of the case on it's merits.

Seriousness of the Breach

[55] Cst. Kavanaugh was aware that there was a weekend music festival to be held in the area. He logically assumed that there would likely be drugs and alcohol

involved. When Cst. Kavanaugh stopped the vehicle, he first observed camping gear in the back of the van. It appears he was motivated more by suspicion than compelling investigative reasons. He did not request a consent based search nor did he seek a warrant even through the possibility existed after 9:00 pm.

[56] Further, Cst. Kavanaugh infringed upon Mr. Quesnel's section 10 (b) rights. The combination of the section 8, 9 and 10 breaches point toward a complete disregard for Mr. Quesnel's *Charter* rights.

Impact of the Breach

[57] There is a significant impact on the liberty interests that section 9 is intended to protect against. Cst. Kavanaugh arrested Mr. Quesnel in order to search his vehicle. Mr. Quesnel was handcuffed and placed in the police vehicle for over an hour. Although there is a reduced level of expectation of privacy in a motor vehicle, I am not satisfied the drugs would have been discovered in any event.

Society's Interest in Adjudication

[58] The physical evidence is reliable which militates against exclusion. Exclusion would effectively terminate the crown's case. The illegally obtained inculpatory statement does not militate against exclusion.

[59] Balancing the assessments under each line of inquiry I find the admission of evidence would bring the administration of justice into disrepute. It is essential that the public maintain confidence in the justice system.

[60] Therefore, the evidence is excluded.

[61] As a result, the crown has failed to prove the charge beyond a reasonable doubt and I find Mr. Quesnel not guilty.

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Scaravelli, J.