
CANADA / JUDGMENT

R. v. Bercea

2016 BCSC 606

COURT

Supreme Court of British Columbia

DECIDED

31 March 2016

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2016 BCSC 606 R. v. Bercea

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Bercea,

2016 BCSC 606

Date: 20160331

Docket: 26451

Registry: Vancouver

Regina

v.

Nicolae Bercea and Vivien Beatrice Bercea

Before: The Honourable Mr. Justice McEwan

Oral Reasons for Judgment

Counsel for the Crown:

B. Girn

T. Warren

Counsel for the accused, Nicolae Bercea:

J. Michaels

Counsel for the accused, Vivien Beatrice Bercea:

J. Reveley

Place and Date of Trial/Hearing:

Vancouver, B.C.

January 11-13, 15, 18-22,

26 and 27, 2016

Place and Date of Judgment:

Vancouver, B.C.

March 31, 2016

I

- [1] The accused Nicolae Bercea and Vivien Beatrice Bercea are charged on a two-count indictment, that on or about the 11th day of February, 2011 at or near the City of Burnaby, they
- (1) did unlawfully produce a controlled substance, to wit: cannabis (marihuana) contrary to Section 7(1) of the Controlled Drug and Substances Act, and
- (2) did unlawfully possess a controlled substance, to wit: cannabis (marihuana) in an amount exceeding 3 kilograms, for the purpose of trafficking, contrary to Section 5(2) of the Controlled Drug and Substances Act.
- [2] It was acknowledged in written admissions that the material seized pursuant to a search warrant executed February 11, 2011 was marihuana and that the quantity was consistent with possession for the purpose of trafficking.
- [3] Possession remains in issue.
- [4] At about 4:15 p.m. on February 10, 2011, police surveillance commenced at a house located at 7206 Braeside Drive, Burnaby, B.C. It was owned by Maurizio and Luana Gina Mastronardi.
- [5] At 5:35 p.m. police observed a Dodge caravan pull up to the house. A woman got out of the vehicle and appeared to unlock the front door. She went inside.
- [6] At 5:48 p.m. a red Grand Prix appeared and parked in the garage attached to the house. A man emerged carrying a knapsack. He entered the house without apparently needing a key.
- [7] At 7:05 p.m. a male left the building and drove the van away, southbound on Duthie Avenue. The vehicle returned at 7:12 p.m. and two men got out, one carrying a duffel bag, and went into the house.

- [8] At 1:46 a.m. three men left the house on foot. They were followed by the police and subsequently arrested. One of the three was Maurizio Mastronardi, one of the owners of the house. The other two were Paul Reino and Marius Alexandru. Mr. Mastronardi's case eventually severed from this proceeding. The other two accused were acquitted following a Crown submission during the course of this trial.
- [9] The police executed a search warrant of the house at 4:14 a.m. There had been no further comings and goings. The accused were the only two people in the house. They were detained and taken outside in the custody of two officers. A short time afterwards, once the police established that the house contained a grow op, the Berceas were arrested.

II

- [10] The arrest gave rise to a voir dire on the question of whether at the time the Berceas were arrested there were reasonable and probable grounds for the arrest, or whether all the police really had was evidence of the presence of the Berceas in the house.
- [11] The evidence on the voir dire included a tip from an informant of unknown reliability that the house contained a grow op, and information from a police officer that he was able to associate a smell of marihuana with the residence. Surveillance established the attendance of a man and a woman in the late afternoon arriving in two different vehicles. Both vehicles were associated to Nicolae Bercea. The three males who emerged smelled heavily of marihuana. When the search warrant on the house was executed the Berceas were briefly detained and upon a cursory review of the inside of the residence officer Aiken determined that the house contained an active grow op and directed their arrest. The Berceas themselves smelled of marihuana.
- [12] In reviewing this issue I have considered *R. v. Storrey*, [1990] 1 S.C.R. 241, 53 C.C.C (3d) 316 at pp. 250-251 where the court set out a two-part test to justify a warrantless arrest:

In summary then, the Criminal Code requires that an arresting officer must subjectively have reasonable and probable grounds on which to base the arrest. Those grounds, must, in addition, be justifiable from an objective point of view. That is to say, a reasonable person placed in the position of the officer must be able to conclude that there were indeed reasonable and probable grounds for the arrest. On the other hand, the police need not demonstrate anything more than reasonable and probable grounds. Specifically, they are not required to establish a *prima facie* case for conviction before making the arrest.

- [13] Here, there were reasonable and probable grounds to believe that the house was used as a grow op, and given the time the Berceas were apparently in the house, and the smell about their persons, there were both objective and subjective grounds for the arrest. A reasonable person placed in the position of the arresting officers would be able to conclude that there were reasonable and probable grounds for arrest. The arrests were, in the circumstances, lawful.

III

[14] This case was run on the basis that the Crown would put in its whole case at once and the evidence on the voir dire to the extent it was admissible, would be the evidence on the trial. This would exclude certain hearsay informing the police decision leading to the arrest. Conversely, the evidence in the trial includes material acquired after the arrest which was irrelevant to the evidence pertinent to the arrest.

[15] The Berceas have denied possession (count 2) and have denied any involvement in production (count 1).

[16] The Crown submits that the case is circumstantial, but that, on the evidence, there is no other rational conclusion than that the accused are guilty on both counts.

[17] It is clear on the evidence that the Berceas may not be the only participants in the grow op. The house is half owned by Maurizio Mastronardi, who was arrested after leaving the house on February 11, 2011, before the search warrant was executed. The circumstances require consideration of s. 21:

21 (1) Everyone is a part to an offence who

- (a) actually commits it;
 - (b) does or omits to do anything for the purpose of aiding any person to commit it; or
 - (c) abets any person in committing it.
- (2) Where two or more persons form an intention in common to carry out any unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence.

[18] The Berceas have no apparent nexus to the property. There is no evidence of any lease or rental arrangement or license. They have their own residence in Maple Ridge. The house under surveillance was given over to the grow op on the lower level. The upstairs showed signs of temporary but not permanent occupation. The bedding was suitable for overnight stays but was not indicative of longer term use. There was a small amount of food and some liquor in the house suggestive of temporary rather than long term occupation.

[19] The basement contained recently harvested marihuana together with the cuttings from the recently harvested plants. In another part of the basement there were growing plants at different stages of development. The whole area was insulated and equipped with lights and filters and other equipment indicative of a fully installed and somewhat sophisticated grow op. The basement area was open to the upstairs. Every police officer who testified about the premises said that there was a strong smell of marihuana emanating from it. Some police officers detected a masking agent. Some said the smell was "overpowering". The three men

who were arrested earlier, including Mr. Mastronardi, the owner, smelled heavily of marihuana about their persons, as did the two accused. There is no possibility that anyone could be in that house for any length of time and not know of the presence of a marihuana grow op.

- [20] Apart from the manifest presence of marihuana in the house, there was a video surveillance system on a table in the living room/dining room area of the house. There was clear evidence of recent harvesting activity on the lower floor including bagged "bud" and bagged cuttings. Mr. Bercea had vegetative marihuana on one of his socks.
- [21] The Berceas were at the house for over 10 hours. Mr. Mastronardi was there for the better part of that period, and perhaps longer, depending on whether he was in the house before the Berceas arrived or was the man observed to be picked up shortly after the Berceas arrived using the Bercea van.
- [22] There were bags of soil in the car parked in the garage. There were receipts for purchases relative to the grow op that had been made at outlets in Maple Ridge. Among the known occupants of the house on February 10 and 11 the Berceas were the only ones who lived in Maple Ridge.
- [23] The fact that the Berceas had keys to the house, arrived independently of the owner, were present while the owner was present and remained after the owner left suggests a connection to the premises beyond that of visitors. The pervasive smell, the evidence of recent harvesting activity, and the presence of surveillance equipment, suggests a grow op valuable enough to warrant protection, that is, persons present to guard the material until it was taken away. There is no direct evidence that the Berceas were involved in the harvest, but the circumstantial evidence is very strong. There are no facts that lead away from the inference that, at the very least, the Berceas were protecting the grow op. The fact that the two of them stayed as long as they did when they had their own home to go to is simply inconsistent with any other rational conclusion than that they occupied the house, and were in possession of the marihuana.
- [24] The evidence of "control", considered cumulatively, is also strong. There is no circumstantial evidence that weighs against it. There is only a question of whether on the evidence that does exist, a conclusion of guilt beyond a reasonable doubt follows.
- [25] In *R. v. Lepage*, [1995] 1 S.C.R. 654, [1995] S.C.J. No. 15, the Supreme Court of Canada considered the inference to be drawn from circumstantial evidence, in that case, a fingerprint. The court quoted the following passage from *R. v. Johnson* (1993), 12 O.R. (3d) 340 at 345-348:

No adverse inference can be drawn if there is no case to answer. A weak prosecution's case cannot be strengthened by the failure of the accused to testify. But there seems to come a time, where, in the words of Irving J.A. in *R. v. Jenkins* (1908), 14 C.C.C. 221 at p. 230, 14 B.C.R. 61 (C.A.), "circumstantial evidence having enveloped a man in a strong and cogent network of inculpatory

facts, that man is bound to make some explanation or stand condemned". That point, it seems to me, can only be the point where the prosecution's evidence, standing alone, is such that it would support a conclusion of guilt beyond a reasonable doubt. Viewed that way, it would be better said that the absence of defence evidence, including the failure of the accused to testify, justifies the conclusion that no foundation for a reasonable doubt could be found on the evidence. It is not so much that the failure to testify justifies an inference of guilt; it is rather that it fails to provide any basis to conclude otherwise. When linked in that fashion to the strength of the Crown's case, the failure to testify is no different than the failure to call other defence evidence. ... If the Crown's case cries out for an explanation, an accused must be prepared to accept the adverse consequences of his decision to remain silent: *R. v. Boss* (1988), 1988 CanLII 190 (ON CA), 46 C.C.C. (3d) 523, 68 C.R. (3d) 123 (C.A.), at p. 542 C.C.C., p. 42 [sic] C.R. But the failure to testify cannot be used as simply one of the circumstances from which the guilt of the accused can be inferred: *R. v. Armstrong* (1989), 52 C.C.C. (3d) 190 ... As Doherty J. pointed out in *R. v. Manchev*, [1990] O.J. No. 2123, an unreported judgment of the Ontario High Court, August 23, 1990, the accused's failure to testify is not an independent piece of evidence, to be placed on the evidentiary scale. It is rather a feature of the trial which may assist in deciding what inferences should be drawn from the evidence adduced.

[26] There is no basis in the evidence in the present case to conclude that the Berceas were not in control of the grow op from at least the point when the owner left the house until their arrest.

[27] The next question is whether, in the circumstances of the case, the Berceas' possession implicates them in the production of marihuana as set out in count 1 of the indictment. In *R. v. Pavalaki*, 2013 BCSC 990, Jenkins J. addressed productions as follows:

[38] In *R. v. Ngo* [2009 BCCA 301], Rowles J.A. stated:

[52]. . . [A]n individual may be found guilty of production as either a principal, or as a party who aids or abets the principal: *Hubble*, 2002 BCCA 561, at paras.10, 15; Criminal Code s.21. In a grow op case, an accused may be found to have aided or abetted in the production of marijuana by maintaining the environment in which the marijuana is produced, with the purpose or intent to assist in the crime.

[39] The Crown acknowledges the case against Mr. Pavalaki is based upon circumstantial evidence and submits that Mr. Pavalaki was engaged in "aiding and abetting" others who had planned and were operating the grow operation. What facts could constitute "aiding and abetting" and "maintaining the environment in which the marihuana was produced?"

[40] Section 21(1) of the Criminal Code provides:

21.(1) Every one is a party to an offence who

- a) actually commits it;
- b) does or omits to do anything for the purpose of aiding any person to commit it;

c) abets any person in committing it.

[41] "Aiding" and "abetting" are often referred to collectively but these acts are independent of each other. "Aiding" in s. 21(1)(b) involves assisting or helping a principal to commit an offence whereas "abet" in s. 21(1)(c) includes encouraging, instigating, promoting or procuring the commission of a crime: see *R. v. Greyeyes*, [1997] 2 S.C.R. 825 at para. 26; and *R. v. Briscoe*, [2010] 1 S.C.R. 411 at para. 14.

[42] In the case at bar, section 21(1)(b) is the applicable subsection.

[43] Abetting in the commission of the offence requires at least encouragement; there must be, at minimum an act to facilitate the commission of the offence, not passive acquiescence or mere presence. The fact of the accused's presence at the property must be bolstered by circumstances which show that the only rational inference to be drawn is that the accused was aiding or abetting in the production of the marihuana.

[44] In order to aid or abet a person in the carrying out of an offence, there must be an offence that has been committed. In this case, it is apparent that the offence of producing marihuana contrary to s. 7(1) of the Controlled Drugs and Substances Act had been committed, although it was not certain who had committed that offence. In *R. v. Isaac*, [1984] 1 S.C.R. 74, the Supreme Court of Canada adopted the passage below from Martin, J.A. in *R. v. Sparrow* (1979), 51 C.C.C. (2d) 443 at 458 (Ont. C.A.):

I am of the view that it is also appropriate, where an accused is being tried alone and there is evidence that more than one person was involved in the commission of the offence, to direct the jury with respect to the provisions of S. 21 of the Code, even though the identity of the other participant or participants is unknown, and even though the precise part played by each participant may be uncertain.

[45] Further, in *R. v. Dooley*, 2009 ONCA 910, Doherty J.A. stated:

[123] Any act or omission that occurs before or during the commission of the crime, and which somehow and to some extent further, facilitates, promotes, assists or encourages the perpetrator in the commission of the crime will suffice, irrespective of any causative role in the commission of the crime. The necessary connection between the accessory's conduct and the perpetrator's commission of the crime is captured by phrases such as "actual assistance or encouragement" or "assistance or encouragement in fact" or as the appellants argue, conduct that "has the effect" of aiding or abetting."

[46] In addition to the act of aiding, section 21(1)(b) requires proof that the accused has performed the act "for the purpose of" aiding the principal to commit the offence.

[47] In *R. v. Briscoe* the Court considered the word "purpose" found in section 21 (1)(b) and stated:

- [16] The mens rea requirement reflected in the word "purpose" under s. 21(1)(b) has two components: intent and knowledge. For the intent component, it was settled in *R. v. Hibbert*, [1995] 2 S.C.R. 973, that "purpose" under s. 21(1)(b) should be understood as essentially synonymous with "intention". The Crown must prove that the accused intended to assist the principal in the commission of the offence. The Court emphasized that "purpose" should not be interpreted as incorporating the notion of "desire" into the fault requirement for party liability. It is therefore not required that the accused desired that the offence be successfully committed (*Hibbert*, at para.35.)
- [48] The issue on this count is whether the Crown has proven beyond a reasonable doubt that Mr. Pavalaki did knowingly aid the "others" who were clearly involved in the establishment and operation of the grow operation, (i.e. the production) and that he did so intending to assist the principal in the commission of the offence.
- [28] Here, the Berceas' possession is coincident with at least "maintaining the environment in which the marihuana is produced," as Rowles J.A. said in *Ngo*. There is circumstantial evidence of an active harvesting operation shortly before the arrest but insufficient evidence of participation in that activity to support a conclusion that the Berceas were direct participants in manipulating the plants. There was some evidence of receipts for purchases of material used in production, which point toward the accused but not to the standard of proof beyond a reasonable doubt. The evidence implicating the accused in production is essentially the evidence supporting their conviction for possession. That evidence suggests that the accused were, for at least part of the time the house was under surveillance up to the arrest, in sole possession of the grow op and harvest, acting in the capacity at least of guardians of the material in the house.
- [29] The question is whether this implicates them in production as parties, and specifically, in the terms of s. 21(1) of the Criminal Code, whether they did or omitted to do anything "for the purpose of aiding any person to commit [the offence]".
- [30] It is clear that an offence had been committed in this case, although it was not clear who had committed the offence. The Berceas' participation must be considered in light of the broad test in *Dooley*, quoted above by Jenkins J.: "Any act of omission which somehow or to some extent furthers, facilitates, promotes, assists or encourages the perpetrator will be sufficient to make a party a participant." [emphasis added.]
- [31] The question is whether watching over or guarding the crop and harvest was, in the circumstances, such an act of assistance as to tender the Berceas guilty of "production".
- [32] In *R. v. Janzen*, 2012 BCSC 547, Saunders J. dealt with a contention that an occupant of a house searched for a grow op was there only casually. Saunders J. observed:
- [42] I can think of no possible reason in these circumstances for the operators of a grow op with a value of at least half a million dollars to allow someone sole casual access to the premises if that someone was not someone to be trusted. I can think of no possible reasonable

purpose or explanation for Mr. Janzen being there in that house consistent with the facts other than him fulfilling the role of a caretaker and being an active and knowing participant in the operation. I am satisfied beyond a reasonable doubt that the accused is guilty on both counts and convictions will be entered.

- [33] I think it clear that the accused were similarly present and in control of the marihuana in the house such that they are liable to convictions for possession, and that that is, in turn, evidence of trust on the part of the owner or owners of the grow op. The accused's presence in the house, in a position to monitor the surveillance equipment and to protect the grow op by having control over the premises, makes them not only in possession of the marihuana, but in possession as an act of assistance in the production of marihuana. They are liable to conviction on that basis as well. The evidence accordingly supports convictions beyond a reasonable doubt of both accused on both counts.

IV

- [34] There is one more matter that must be addressed. At the outset of the case the accused each raised an issue about whether their right to be tried within a reasonable time, as provided by s. 11(b) of the Charter, has been infringed, and whether the remedy of a stay should be applied. I put the ruling over to the end of trial. It required a review of a large number of appearances over a span of almost five years.
- [35] On February 11, 2011 the accused were arrested and released on a promise to appear for April 11, 2011. At the time, the Berceas were co-accused with Maurizio Mastronardi, Marius Alexandru, and Paul Reino.
- [36] On April 11, 2011 the parties appeared in provincial court. All the accused, except Mr. Reino, were represented. The Berceas appeared, represented by the same lawyer. The matter was adjourned for Mr. Reino to obtain counsel.
- [37] On April 26, 2011 the matter was again adjourned for Mr. Reino to get counsel.
- [38] On May 10, 2011 the matter was again adjourned for Mr. Reino to obtain counsel.
- [39] On July 28, 2011 counsel appeared for Mr. Reino. The matter was adjourned for a pre-trial conference and arraignment hearing on September 16, 2011.
- [40] On September 16, 2011 the Crown and all accused appeared and elected to be tried in provincial court. Dates were set for a pre-trial conference, a trial confirmation hearing, and a voir dire was scheduled for October 3-5, 2012, with a trial to follow on December 11-14 and 17, 2012.
- [41] At the pre-trial conference held April 10, 2012, the Crown raised a concern about the Berceas' representation:

MS. LODA: Your Honour, this is scheduled for a trial confirmation hearing September 6th, a voir dire October 3rd to the 5th and then a trial pending the outcome of that voir dire December 11th through the 14th and also the 17th.

I think that the first thing that should be likely said at this pre-trial conference is that I note that Mr. Beatch represents both Nicolae and Vivien Bercea. I would ask that it be conveyed to Mr. Beatch that he should consider whether he is in a conflict representing both of those people who were found inside this house containing a marihuana grow operation.

MR. REVELEY: I can convey that.

THE COURT: Actually it's a very important issue. This has cropped up much more frequently recently with one counsel acting for two people inside a house and it's not always had the best results, if one person can't take the witness stand without harming the other. So I would very much appreciate that this issue be looked at very carefully.

MR. REVELEY: Yes, Your Honour.

[42] On April 23, 2012 the issue was raised again:

MS. LODA: You'll recall, Your Honour, that we appeared on April 10th at a pre-trial conference at which the issue was raised as to whether Mr. Beatch is in conflict by representing two of the accused. You asked that this pre-trial conference come back before you with the relatively short turnaround so that Mr. Beatch could come and address that issue before you.

MR. BEATCH: Well, I don't -- I don't think I have a conflict. I mean I've gone through the file. I've interviewed my clients. I've told them that I can't -- if one of them has an interest as it relates to the other I can't represent them. I mean, I'm not -- I've spoken to Crown about this on Friday. They raised a general concern. They couldn't refer to anything specific when I asked them what exactly are you worried about so

THE COURT: Well, actually those -- these worries are quite common these days because the representation of two parties. One of the more recent ones I did was a husband and wife and in the end one who might have taken the witness stand, if one looked at the particulars, to assert innocence couldn't do so without pointing the finger at the other, and that created an obvious conflict of interest.

MR. BEATCH: Right. And if that were the case I wouldn't be representing both of them, but my instructions are such that there is no finger-pointing.

THE COURT: All right. I have to accept it. Is there so basis upon which you were concerned?

MS. LODA: I do -- I do think that it would be appropriate that at least the -- both of the accused get independent legal advice and sign explicit waivers with respect to conflict.

The case law is relatively clear and I don't have the case law here, the Crown isn't intending to apply today certainly for an order the Mr. Beatch be removed as counsel of record.

The Crown's concern is that the case law is very clear that a statement on the part of a defence counsel amounting to trust me, there's no conflict, is not enough to satisfy what appears on its face to be a troubling situation. And that for Mr. Beatch to assert that there is no conflict essentially amounts to a promise on behalf of his client that they will not advance a defence that might be available to them in the future.

Circumstances could change, their positions vis-à-vis the evidence could change, and Mr. Beatch cannot and should not be able to promise to this court that one or the other will not finger-point as part of their defence, which he -- he really has to do in order to satisfy the court that he's not in a conflict.

I also mentioned to Mr. Beatch on Friday that the Crown is not conceding standing with respect to their ability to challenge the search of the house at which the grow operation was located, and that to establish an evidentiary basis for an expectation of privacy, one or both of them may have to testify, which may require them to give evidence about their own and the other's historical use of that property and their expectation of privacy in it, which is, I think, a specific concern and a specific conflict that the Crown can point to.

I'm raising it now so that my friend is aware, so that the court is aware, but I do think that it's incumbent upon my friend to, at least, have his client explore the issue with independent legal counsel and explore the possibility of signing a waiver.

MR. BEATCH: Well, there are practical problems with that. The biggest practical problem that leaps forward is my clients don't have the -- the reality is that they don't have the money to go out and hire other counsel to review all the particulars and give independent legal advice in the way my friend wants.

My friend is -- it's open to my friend to bring an application to have me removed as counsel, at least on both of them, and we can certainly deal with all those matters at that time, if the Crown seeks to do that. But I can tell Your Honour I quite often represent two people, husband and wife. I've never run into this problem before.

THE COURT: I have seen it often --

MR. BEATCH: Yes

THE COURT: and as the cases have unfolded I've said to myself this is a mistake.

MR. BEATCH: It certainly in some cases it is.

THE COURT: One can see it happening.

MR. BEATCH: Certainly in some cases it is. I mean my friend's quite correct. I can't bind my client to a defence, but having said that -- I've interviewed my clients and we're prepared -- we know where we're going with this case. So -- so the defence is already set, so to speak.

THE COURT: It's never set in stone.

MR. BEATCH: But if my friend could refer to something specific then -- then make sense that she -- we would go to this extra mile, but absent -- absent something specific she's only raised a general concern. If she is -- if she is concerned that this might derail the trial then I invite her to bring an application as soon as possible to have me removed and then deal with it that way, deal with it in an appropriate way, with case law, with affidavit, if need be, with formal waivers, if need be, with formal waivers, if need be.

MS. LODA: I'm --

THE COURT: I accept that this is a somewhat casual approach to the issue from Mr. Beatch. That's my impression here but if-- if his clients are not prepared to go out and get independent legal advice, which is the preferable route so that they have two separate lawyers talking to them privately about what they can or cannot do in terms of their own defences or challenges or testifying on voir dires. I mean the fact that they can't afford it is not a terribly good explanation for not ensuring that they do something in that regard.

Counsel frequently do that for one another, providing independent legal advice where appropriate with respect to -- for example, a complainant coming in and wanting to talk to defence counsel and being sent off and other lawyers, do that free, either as a -- on a quid pro quo sort of basis.

If your concerns -- if you wish to raise your concerns -- at this point in time I'm going to have to accept counsel's assertions that his clients are not in a conflict of interest position vis-à-vis having one lawyer. I don't have enough information in front of me to determine whether that's a correct appraisal, so if you want to bring on a full application in that regard out of concern that the trial not be derailed as soon as it gets started.

[43] The court seems to have left further action on the issue to the Crown.

[44] On August 28, 2012 Ian Donaldson, the lawyer for the accused Mastronardi, wrote a letter setting out his client's intentions to re-elect a trial before a Supreme Court Judge and Jury following a preliminary hearing.

[45] On September 6, 2012 at the trial confirmation hearing, Mr. Mastronardi's re-election was entered and all other co-accused were deemed to have re-elected as well. The October voir dire dates were canceled except for a brief opportunity to appear for a "focus" hearing on October 3, 2012. The December trial dates were maintained, but converted to a preliminary hearing. Mr. Donaldson, for Mr. Mastronardi, had submitted that two days would be sufficient. The Crown went along.

[46] On December 11 and 12 the preliminary hearing began but did not finish. May 6 and 7, 2013 were set for hearing and May 28, 2013 was set for argument.

[47] On April 25, 2013 Mr. Beatch, counsel for the Berceas, notified the Crown that he would not be available to continue the preliminary hearing on the dates set for continuation.

[48] On May 3, 2013 tentative new dates were set for June 20 and 21, 2014. The court expressed serious concern about the way the case was going:

THE COURT: Well, I can't -- I'm not going to be able to make a decision, Ms. Murray, unless I have some more information. This is a matter that -- could I have the information, please. This is a matter that unfortunately has had -- that have a tortured history, including the fact that four days were set last December, and counsel literally swore up and down that it would be finished in a day.

I insisted on keeping two of the four days and then we didn't finish, which is what ended up leading to this continuation. This is a matter from February -- where the offence was February 11th -- alleged offence, February 11th, 2011, and the information was sworn on the 16th. I don't know when the first appearances were, but we're now looking at two days and we still haven't completed the preliminary inquiry.

I'm really concerned, and I need a little more information about how -- the name of this case, how it came to be set, whether the Supreme Court judge was made aware of the fact that Mr. Beatch was to be counsel, or was already scheduled in Provincial Court for this matter which is -- involves four other counsel -- or three other counsel because there's four -- have I got it right -- yes -- plus Crown, and what attempts, if any, were made to have someone else assist in this matter given that it is a preliminary inquiry.

I know that there's going to be a question about committal, so there's that. I'm also -- I also want to know what instructions you have about whether a delay will be waived, there's all of those issues, and I don't know if you're in a position to speak to it at the moment.

MS. MURRAY: I am not.

[49] On May 6, 2013 counsel for the Berceas could see he was going to be unavailable for the June dates, and the preliminary hearing continuation was set over to October 8 and 10.

[50] On October 8, 2013, after a brief session, the preliminary hearing completed.

V

[51] On October 30, 2013 the parties made their first appearance in the Supreme Court of British Columbia. The matter was put over to November 20, 2013 because Mr. Beatch, for the Berceas, did not attend.

[52] On November 20, 2013, counsel appeared as agent for Mr. Beatch on behalf of the Berceas. The earliest date he was said to be available was June 17. An eight-day trial was set before a judge alone for that date with a pre-trial set for March 25, 2014. The Crown put on record that it had had earlier dates available.

[53] On March 25, 2014 the matter was put over to April 10, 2014.

[54] On April 10, 2014 Mr. Donaldson, for Mr. Mastronardi, sought an adjournment of the trial. The record suggests he had known that he would not be available since January 2014, but that nothing had been done about it. The judge said the following:

THE COURT: I don't need to hear from you any further, Mr. Donaldson. I'm satisfied that because of your unavailability, that all counsel take no position with respect to the adjournment application, that nobody's in custody, and the Crown, while preserving its concern and interest should there be some sort of future application as a result of the delay, also doesn't take a position. that therefore it's appropriate the adjournment be granted. And consequently, the June 17th trial date is hereby adjourned.

What do we do next?

MR. DONALDSON: Suggesting 16th of April, 2:00 p.m., to fix dates, and as I brought this application, I've volunteered to assemble dates from all other counsel and to attend on everybody's behalf from the defence side, and try to sort out a new trial date in advance of that appearance.

[55] On April 16, 2014 new dates were set for February 5, 2015 with jury selection April 2, 2015 (notwithstanding that the date fixed for June 17, 2014, was said to be for a trial by judge alone). The Crown notes that there was no mention by any of the accused that delay would be an issue.

[56] On April 23, 2014 the trial dates were confirmed.

[57] On February 26, 2015 a pretrial was held before me as the assigned trial judge. It was held by teleconference. There was a suggestion that four weeks might be necessary. Mr. Donaldson for Mr. Mastronardi suggested that that would not be possible to accommodate, and that the jury selection date be postponed. Mr. Cooper, for Mr. Reino, and Mr. Doust, for Mr. Alexandru, said they would make delay applications. Mr. Donaldson suggested that he would be applying for severance on behalf of Mr. Mastronardi.

[58] On March 12, 2015 before this court, again by teleconference, Mr. Donaldson made an application for severance on behalf of Mr. Mastronardi. The Crown consented. The matter is put over for all other accused to elect mode of trial.

[59] On March 18, 2015, before Cullen ACJ, Mr. Reino elected trial by judge alone.

[60] On April 1, 2015, before Cullen ACJ, Mr. Alexandru and the Berceas elected trial by judge alone.

[61] On April 13, 2015 before this court, the trial was scheduled to begin. Mr. Cooper said he is unable to begin his delay argument because he did not have transcripts. Counsel for Mr. Alexandru raised the issue of Berceas having joint representation by Mr. Reveley.

[62] In the two previous telephone conferences held before me on February 26, and March 12, 2015 the fact that the Berceas were jointly represented simply did not come to my attention, and the discussions had gone on to other matters. In my own defence, on both occasions, as I recall, various parties were represented by others as agents. When it came to my attention on April 13, 2015 I was immediately concerned. The lawyers were invited to make submissions:

THE COURT: Who wants to go first? I'll give you the option.

MR. REVELEY: Well, I would suggest perhaps the Crown, seeing as how she does have the -- she does carry the burden, perhaps [indiscernible] issue.

MS. GIRN: Well

THE COURT: Carry the burden?

MS. GIRN: I don't know if it's really --

THE COURT: I mean, it's your problem.

MS. GIRN: Yes.

MR. REVELEY: Well -- well, my Lord, I think that, having read Cocks, there has to be real risk.

THE COURT: Yes.

MR. REVELEY: And I would suggest that in order to establish that perhaps the Crown ought to suggest what evidence --

THE COURT: Well, look just let me know this, then. Your position is you-re -- you're fine, you can keep going.

MR. REVELEY: That would be our position --

THE COURT: All right.

MR. REVELEY: -- My Lord.

THAT COURT: What do you see as the risks?

[63] There followed a detailed submission by the Crown and some colloquy with counsel. It ended:

THE COURT: Well, I have no desire to prolong this either. I mean, you can't give me an assurance that that just isn't going to be a problem.

MR. REVELEY: I can't do that.

THE COURT: Then all you're telling me is you're prepared to take the risk --

MR. REVELEY: I suppose that's the --

THE COURT: -- that one or the other of them would turn on you.

MR. REVELEY: I suppose so.

THE COURT: And then that just means that, in terms of me running the trial, I'm riding on the back of that assurance, or non-assurance.

MR. REVELEY: It looks that way.

THE COURT: How long is it likely to take to get another lawyer involved in this matter? I mean, we've got -- is that a legal aid approval? That's sort of forever, isn't it?

MR. REVELEY: Well, my thought would be the question that's relevant is how long would it take for a lawyer to catch up.

MS. GIRN: It's not a complicated file, it's a simple marihuana grow operation with --

THE COURT: I know, I know.

MS. GIRN: -- three days of surveillance and very -- it's not a complicated file, My Lord.

THE COURT: No, but I mean, seriously, I don't know. It's none of my business when it's a legal aid case either, except in terms of how long it will take to get somebody up to speed.

MR. REVELEY: Yes.

* * *

THE COURT: All right. Well, I mean, my problem is I have no idea whether this is a completely abstract issue or whether it's something that might be material ultimately. I just have to guess.

What's the Crown's suggestion? Should I accede to this -- I don't suppose it's even a motion, but to this consideration that there should be two lawyers for the --

MS. GIRN: My Lord --

THE COURT: -- The husband and wife here?

MS. GIRN: My Lord, my position I, is that there ought to be separate counsel.

THE COURT: Yes. What do we do from here, is what I'm asking.

MS. GIRN: Unfortunately, I'm going to say the word that nobody else wants to say, is we're not going to be able to start the trial.

THE COURT: Well right. So we adjourn to a date to fix a date? Is that what --

MS. GIRN: Yes.

THE COURT:-- we do?

[64] The matter was put over to April 22, 2015 to fix a date. On April 29, January 11-26, 2016 dates were fixed for trial, with separate counsel for the Berceas.

[65] The trial proceeded on January 11, 2016.

[66] The time elapsed from arrest and promise to appear to trial (February 11, 2011-January 11, 2016) was one month short of five years.

VI

[67] The approach a court must take to a delay application is set out in *R. v. Godin*, 2009 SCC 26 (citing *R. v. Morin* [1992] 1 SCR 771) at para. 18:

[18] The legal framework for the appeal was set out by the Court in *Morin*, at pp. 786-89. Whether delay has been unreasonable is assessed by looking at the length of the delay, less any periods that have been waived by the defence, and then by taking into account the reasons for the delay, the prejudice to the accused, and the interests that s. 11(b) seeks to protect. This often and inevitably leads to minute examination of particular time periods and a host of factual questions concerning why certain delays occurred. It is important, however, not to lose sight of the forest for the trees while engaging in this detailed analysis. As Sopinka J. noted in *Morin*, at p. 787, "[t]he general approach is not by the application of a mathematical or administrative formula but rather by a judicial determination balancing the interests which [s. 11(b)] is designed to protect against factors which either inevitably lead to delay or are otherwise the cause of delay."

[68] There is no question that five years is an unconscionably long time to get a relatively simple matter to trial. The number of co-accused was always a complicating factor, in that the calendars of several lawyers had to be considered, and some delay related to scheduling issues might be anticipated.

[69] The case began by moving reasonably quickly towards a provincial court trial in December 2012. Between April 11, 2011, the date of first appearance and September 16, 2011, where dates were set for the following year, the matter moved with reasonable dispatch, only slowing up briefly while the approval of legal aid for Mr. Reino was outstanding.

[70] Matters began to go sideways when a year after the provincial court trial dates had been set, Mr. Donaldson for Mr. Mastronardi re-elected to a trial by judge and jury in Supreme Court. This had the effect of a deemed re-election for all accused. For reasons that are not clear to me, October preliminary hearing dates were vacated and new preliminary hearing was scheduled on the December dates originally scheduled for trial. No one objected or made an application for severance. The number of days required was reduced from four to two.

[71] The preliminary hearing did not complete in two days. The record does not show if it was possible to simply continue or not. In any event, new dates were set for May 6, 7 and 28, 2013 and subsequently, on May 3, 2013 for June 20 and 21, 2013 because Mr. Beatch, on behalf of the Berceas, was unavailable. On May 3, 2013, all counsel appeared by one agent to speak to an application to adjourn. The court queried the nature of the other trial that was preventing Mr. Beatch from appearing. The Crown noted that it was ready to go. The court observed:

- [4] I am cognizant of the fact the court has to consider an accused's right to be represented by counsel, including where possible, counsel of choice. However, a trial judge also has the responsibility to control the trial process. Therefore, there is a broad discretion to grant and refuse adjournments.
- [5] This case, as I have indicated, has gone down a torturous road to get to this point. The fact there are four defence counsel plus Crown counsel has made scheduling very difficult. In fact, this continuation was set approximately last December so we have had two days of a preliminary hearing.

- [19] It is Friday afternoon at 3:30 p.m. There is no point in depriving Mr. Beatch's clients of their right to have a lawyer for a situation that is not their fault. I am not sure if it is Mr. Beatch's fault either. I am not going to prejudge that. At the moment, all I can say is that Mr. Beatch was not very thoughtful or respectful about this court's time. However, that is neither here nor there. I do not know what else he has on his plate. I do not want to rush to judgment in that regard. However, the more advance notice we get, the easier it is to consider an adjournment request by counsel.
- [72] As it happens, the preliminary completed in one day on October 8, 2013, some 30 months from committal.
- [73] The matter took two years in Supreme Court following committal. The first appearance on October 30, 2013 was adjourned because counsel for the Berceas did not attend. On the following occasion, November 20, 2013 trial dates were set for June 19-20 for voir dire and June 23-27, for trial. This turned out to be inconvenient for Mr. Donaldson, acting for Mastronardi and on April 10, 2014 the matter was adjourned. No one took a position against the adjournment. On April 16, 2014 jury selection was fixed for April 2, 2015 with trial set for April 13-29, 2015.
- [74] On March 12, 2015 Mr. Donaldson for Mr. Mastronardi applied to sever. The Crown consented. Thereafter the other accused re-elect trial by judge alone.
- [75] On the day set for trial the issue of one counsel representing both Berceas was raised by counsel for Mr. Alexandru. There had been two telephone pre-trial conferences with this court during which I did not advert to the issue. Faced with it, it seemed unacceptable to me to embark on a trial on the faith that no issue would arise and the trial went off for another nine months.

VII

- [76] Looking back over the whole time line, there is no specific responsibility for delay up to the date set for the provincial court trial. Although, by then, the matter as 18 months old, considering the calendars of several counsel and the availability of court time, the delay would not have been unreasonable, had the trial proceeded.
- [77] In retrospect it would have been better had the court dealt more decisively with Mr. Beatch's conflict issue at the hearings in April of 2012, although it was not immediately the cause of delay. It was not the Crown's problem, or its duty to make submissions on the subject. It was Mr. Beatch's problem, and it is difficult to see how any assurance he could give would be worth the risk to the trial of one or the other of his clients changing their mind about whether this manner of proceeding was in their best interests. In such circumstances I do not think the court was ever bound to accept such assurances. This issue ultimately caused the delay from April 15, 2015 to January 2016 directly, although it is very hard to say what difference separate representation might have had on the delay from May 2013 to October 2013.
- [78] The matter was complicated by the involvement of Mr. Mastronardi, whose re-election at a stage where considerable time had gone by ousted the trial, and led to underestimations by both Crown and the defence as to the time it would take to complete the preliminary hearing, followed by the 10-month gap.
- [79] There is an aspect to this which is, I think, properly described as systemic. That is, that it appears that estimates of time in provincial court are treated as limitations, such that if the time required for a hearing is under-estimated the result is not that it goes over an additional day for completion, but that it is months before the matters can regain a place in the system. The fact is that for want of the dates that had previously been available (December 13 and 14) but vacated October 3, 2012, this matter was ultimately delayed for 10 months, in order to fit in one day of testimony.
- [80] Throughout the case there was not very much discussion of delay. None of the defence lawyers ever raise objection to any adjournment. The Crown raised the issue of delay, in a manner of speaking on May 3, 2013:

MS. LODA: Thank you. Your Honour, I know that my friend wasn't in a position to state on the record whether any accused at all waive delay. The Crown was prepared to proceed, the court was prepared to proceed.

THE COURT: Thank you for putting that on the record. This is definitely -- it's a defence request --

MS. LODA: Yes.

THE COURT: -- for an adjournment. The other counsel took no position.

MS. LODA: Yes.

THE COURT: I'm not going to, again, prejudge that issue, if there is a delay argument made, but I am going to be ordering a transcript -- not a transcript -- a transcript of my ruling which would include these comments, and of course, counsel is always at liberty to order a transcript of the proceedings, but I'm going to order the ruling. I'm not going to do it on an expedited basis, we'll get it soon enough.

MS. LODA: Thank you.

[81] There was no mention of delay when the matter was put over on May 6, 2013 to October 2013.

[82] On that occasion the court effectively observed that the case was in peril:

THE COURT: All right, well why don't we just herd them all in here. It's been -- well, it's been almost a year since I saw you formally in the preliminary inquiry phase, so I'm very anxious to get started. There's been so many delays in this matter that I'm quite in shock. And maybe I -- I shouldn't be saying that, I don't want to jinx it, but we're ready to go and to continue.

[83] In Supreme Court in April 2014, when the trial was set for April 2015, the Crown noted for the record:

I note for the record that the Crown has dates available through July, but then not again until December and January, not in February, for sometime in March, and then all of April.

THE COURT: Right.

MR. OWENS: But April appears to be the only date where all counsel and the court have a clear two weeks.

THE COURT: I take it all accused are out of custody, are they?

MS. MCLEOD: Yes, My Lord.

[84] On February 26, 2015 the Crown advised the court of an anticipated delay argument:

I, just yesterday, received from Mr. -- counsel on behalf of Mr. Alexandru and counsel for Mr. Reino that they will be bringing in an application for a delay -- they will be making a delay application, as I understand, at the outset of the trial. SO that's another aspect that we will have to deal with as well.

[85] There are no other discussions of delay before the trial began on January 11, 2016.

VIII

[86] The Berceas, through their separate counsel submit that some seven months of delay are attributable to them: the periods between May 2013 and October 8, 2013 when their counsel Mr. Beatch was unavailable due to another commitment and a period of one month from October 30, 2013 to November 2013 when Mr. Beatch was also unavailable. They do not mention the delay from April 2015 to January 2016 occasioned by their then lawyer

purporting to represent both of them. They submit that, somehow, this was the Crown's responsibility. They go further in suggesting that the Crown failed to deal with the matter after raising the issue on April 12 and April 23, 2012. The Crown made specific submissions about the dangers of proceeding in that manner on that occasion and it is clear that the court was alive to the dangers as well. It nevertheless left the matter to the Crown to follow up on it. It was, in my opinion, as clear then as it was before this court on April 13, 2015, that joint representation was untenable simply as a matter of protecting the administration of justice. I do not think the Crown bears the responsibility for this.

- [87] In retrospect, the involvement of Mastronardi to first of all, re-elect, and by deemed re-election to eliminate the December trial date for the co-accused was a factor in the delay.
- [88] Except for the at-trial adjournment, occasioned by the Berceas' joint representation, matters moved reasonably through the Supreme Court.
- [89] The Crown and the Berceas essentially submit that there was no point, appearance by appearance, in making a complaint of delay since the adjournments for one reason or another appeared to be inevitable. The Berceas, of course, also assert that there was no duty or obligation on them to object, and that they can make the argument presently notwithstanding a passive acceptance of what happened.
- [90] On the other hand, none of the delay was specifically occasioned by the Crown.
- [91] I do think it incumbent on the Crown, however, to note the lapse of time and to seek either waivers or the cooperation of the court in securing earlier dates or some recognition of the responsibility for delay as it occurs. It is clear that the provincial court was ultimately concerned with what had happened on the final occasion when it had anything to do with it. Neither the Crown nor the Court asserted the degree of control that should have prevented the lapses that occurred. The lawyers for the accused were basically unfettered in setting priorities inconsistent with moving this matter along.
- [92] I think the question for the Berceas is not the degree to which any of the participants is to blame but whether five years is simply too long for a matter of this kind to be before the courts.
- [93] The particular interest s. 11(b) of the Charter protects was set out in *R. v. Askov*, [1990] 2 S.C.R. 1199 at p. 1219:
- s. 11(b) explicitly focusses upon the individual interest of liberty and security of the person. Like other specific guarantees provided by s. 11, this paragraph is primarily concerned with an aspect of fundamental justice guaranteed by s. 7 of the Charter. There could be no greater frustration imaginable for innocent persons charged with an offence than to be denied the opportunity of demonstrating their innocence for an unconscionable time as a result of unreasonable delays in their trial. The time awaiting trial must be exquisite agony for accused persons and their immediate family. It is a fundamental precept of our criminal law that every individual is presumed to be innocent until proven guilty. It follows that on the

same fundamental level of importance, all accused persons, each one of whom is presumed to be innocent, should be given the opportunity to defend themselves against the charges they face and to have their name cleared and reputation re-established at the earliest possible time.

[94] While some 14 months of delay are basically attributable to their counsel, I find it difficult to visit responsibility for delay on them personally. The delays in this case arose from multiple sources and overlapped significantly. Had one more day been available for the preliminary inquiry in December 2015, the next 10 months of delay would have been avoided.

[95] Much of what happened to the Berceas came from outside, from the strategic decision of Mr. Mastronardi to re-elect, to several instances where submissions made by counsel for other accused influenced the course of the case. It was complicated by a large number of appearances where agents were involved. The involvement of counsel for co-accused was considered in *R. v. Topol*, 2008 ONCA 113 at paras. 13-14:

13 The single largest cause of the delay in this case, as the application judge observed, was the busy schedules of counsel for the other accused. He rejected the Crown's position that the delay due to the unavailability of counsel for the co-accused should be considered neutral time. He found on the facts of this case, the Crown consistently consented to delays in setting a trial date in order to accommodate the schedules of counsel for two of the other accused. He found that the Crown had failed to consider the impact of delays on the appellant equally with its consideration of the schedules of counsel for the other accused. He stated that as the time period lengthened, the Crown had to decide between ceasing its practice of accommodating those counsels' schedules or proceeding with the appellant separately from those other accused. We see no error in the application judge's approach.

14 Nor do we agree that the application judge erred by failing to properly weigh and assess the compelling societal interest in this large case proceeding to trial. In our view the application judge carefully applied the proper legal principles, balanced the appropriate factors including the inferred and actual prejudice suffered by the respondent. In the end, and apart from the specific causes of this or that delay at various points in time, the matter must be viewed globally and even on the appellant's argument, there remains a significant period of unreasonable delay.

[96] The Berceas were charged with three other co-accused. Two of them played little role in what happened pre-trial except to go along. I would be loathe to suggest that the Crown should have considered severance of its own motion earlier, since multiple trials carry their own hazards. I do think, however that when several co-accused are represented in one case, particular care must be taken by the Crown, enforced by the judge as necessary, to see that unreasonable delay is avoided. Here, matters simply took their wayward course, until the preliminary inquiry judge was moved to say that the delays left her "in shock".

- [97] In summary, in light of the criteria I must apply, the length of the delay, some 58 months, is on its face unreasonable for a case involving accused found at a grow op. There were no explicit waivers by the defence. The periods of time for which counsel for the Berceas was responsible are interrelated with systemic issues that should have been minimized by a little better organization on the part of the court. The inherent time requirements of the case were modest and it was inaction on all parts that allowed the case to wander.
- [98] Counsel in various ways submitted that there is little point, where an adjournment appears inevitable, in making fruitless protests. It would be better, however, if, as a preface to an adjournment, the party responsible was identified, waivers were taken formally on the record, and the accumulated time from the commencement of the file was noted. It might prompt more timely intervention from the institutional participants than occurred in this case.
- [99] In the present case the Berceas have now been before the courts on a simple charge for over five years. The overall delay was often related to matters beyond their control, but amounted to a failure of the component parts of the criminal justice system to work together effectively. The fundamental precept of law that individuals are presumed to be innocent until proven guilty is effectively negated if they are not afforded an opportunity to defend themselves at the earliest possible time, which is the standard articulated in Askov. This case is so far off that mark, that, although the evidence otherwise supports conviction of both accused on both counts, I must direct a stays on all counts against them.

"McEwan J."

The Honourable Mr. Justice McEwan

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/16/06/2016BCSC0606.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/r-v-bercea-2016>

Prepared on 27 October 2026 · Esheria