NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Matthews*, 2015 NSCA 4

Date: 20150116
Docket: CAC 430604
Registry: Halifax

Between:

William (Kenneth) Charles Matthews

Appellant

v.

Her Majesty the Queen

Respondent

Judge: Farrar, J.A.

Motion Heard: January 14, 2015, in Halifax, Nova Scotia in Chambers

Held: Motion to determine the Court of Appeal's jurisdiction to hear this appeal referred to a Panel of the Court.

Counsel: Appellant in person
Kenneth W.F. Fiske, Q.C., for the respondent
Peter Mancini, Q.C., for Nova Scotia Legal Aid

Decision:

[1] This matter was on the docket in teleconference Chambers on December 3, 2014. At that time an issue was raised about the jurisdiction of this Court to hear the appeal. The matter was adjourned on that date and on one other occasion to address the issue, eventually coming back to the Court on January 14, 2015, at which time I determined that the matter should be sent to a panel of the Court to determine whether this Court has jurisdiction.

[2] I advised the parties that I would provide short written reasons for doing so. These are those reasons.

[3] The appellant was charged on an Information sworn August 22nd, 2013, with one count of flight from police pursuit contrary to s. 249.1(2) of the **Criminal Code of Canada**, R.S.C. 1985, c. C-46, and one count of dangerous operation of a motor vehicle contrary to s. 249(1) of the **Code**. Both offences were alleged to have been committed at Springhill on July 4, 2013. The appellant pleaded not guilty to the charges. A trial was held in Provincial Court at Amherst and extended over three days (May 21st, June 3rd and June 13th, 2014). At the conclusion of the evidence Judge Paul Scovil reserved decision.

[4] On July 21st, 2014, Judge Scovil found the appellant guilty on both counts. On August 7, 2014, Judge Scovil sentenced the appellant to two months custody concurrent on each count, with the sentence to run consecutive to time already being served. A one year driving prohibition was ordered in respect to the dangerous driving count.

[5] A Notice of Appeal dated August 14, 2014, was filed in this Court. The appellant appealed from both conviction and sentence.

[6] The offences created by s. 249(1) and 249.1(2) of the **Criminal Code** are hybrid in nature. The question is: What was the Crown's election? Did the Crown elect to proceed by summary conviction or Indictment on the two charges?

[7] Although the Appeal Book has not yet been filed, the transcript of the entire proceedings have been provided to me together with a copy of the Information.

[8] The endorsements on the Information do not provide any indication as to the Crown's election.

[9] The appellant's first appearance in court in respect of the two charges under review was September 9, 2013. The endorsement on the Information with respect to this appearance states:

> "Adj'd for Crown election and plea to September 30, 2013 @ 9:30 am."

In the course of the appearance on September 30, the following exchange took place:

THE COURT:	There's a summary offence ticket under Section 287(2) of the **Motor Vehicle Act** …
MR. BAXTER:	Yes.
THE COURT:	… for driving while his license … or privilege of retaining a license was revoked. There's also a two-count Information under Sections 249.1(2) and 249(1) of the **Criminal Code**.
MR. O'NEIL:	I'm aware of those charges, yes.
THE COURT:	Those were for election or plea.
MR. BAXTER:	Okay.
THE COURT:	And then there's a Fine Order here indicating that as of the 14th of May 2012, Mr. Matthews was in default of a fine under Section … that was issued pursuant to a conviction under 254(5) of the **Criminal Code** for refusal of the breathalyzer, and there's 15 days of default time listed for that.
MR. O'NEIL:	I wonder if we could do this Your Honour. ***The plea is going to be not guilty on the 249s and the 287(2)***. They arise from the same … I can do that this morning. If we could set a trial date. And I need to come back on the 254. He's not aware of it, and so we can see what we're doing. [Emphasis added]

[10] Judge Scovil acknowledged the not guilty pleas on the charges scheduled for plea that day, and the judge scheduled the trial for the afternoon of November 27, 2013. The endorsement on the Information for September 30 similarly notes the not guilty pleas and the date scheduled for trial. On November 27, 2013, counsel

for the appellant sought an adjournment of the trial which was granted. The trial was re-scheduled for April 16, 2014.

[11] Neither the record of the proceedings nor the endorsements on the Information reveal any Crown election in respect of the two hybrid offences.

[12] The Crown correctly identifies that the analytical starting point is the **Interpretation Act**, R.S.C. 1985, c. I-21 and, in particular, s.34(1)(a) which provides:

> 34(1) Where an enactment creates an offence,
>
> (a) The offence is deemed to be an indictable offence if the enactment provides that the offender may be prosecuted for the offence by indictment; …

This provision means that, in the case of a hybrid offence, the offence is deemed to be indictable until the Crown elects to proceed by summary conviction: **R. v. Paul-Marr**, 2005 NSCA 73, ¶20.

[13] In **Paul-Marr** this Court considered the relevant principles – which may be summarized as follows – the Crown's election can be either expressly made (and noted on the Information) or deemed made by virtue of the way in which the pleadings were conducted. The offence can be characterized in two ways. The first depends on the application of s. 34 of the **Interpretation Act**. The second depends on the law relating to when an election can be attributed to the Crown because of the manner in which the case actually proceeded.

[14] The presumption in s. 34 of the **Interpretation Act** can be displaced by express election or where it is clear from what happened that the Crown intended to proceed summarily and the parties acted accordingly.

[15] With these principles in mind, the Crown asks that I review the circumstances of this case and find that the Crown proceeded summarily and that this Court is without jurisdiction to hear the appeal.

[16] This would amount to a dismissal of Mr. Matthews' appeal and require him to refile his appeal in the summary conviction appeal court and seek an extension of time for filing the appeal.

[17] Although the Crown makes a compelling argument that the Crown proceeded by way of summary conviction, in my view, it is not for a judge sitting

alone in Chambers to make that determination. The principles from **Paul-Marr** were considered by this Court in **R. v. R.V.F.**, 2011 NSCA 71. Beveridge, J.A. reviewed the authorities in some detail and, although it is generally accepted that the silence of the Crown as to election followed by a plea leads to the conclusion that the Crown proceeded summarily, that is not always the case. In fact, in **Paul-Marr**, Cromwell, J.A. (as he then was) held:

> 33 I conclude that it is not appropriate to attribute an election of summary procedure to the Crown in the circumstances of this case. The characterization of the charges is, therefore, governed by the **Interpretation Act** provision: all of the counts are to be considered indictable offences. The appellant, therefore, had a right of election on all of the counts on which the judge entered convictions. No such election was put to the appellant. It is not suggested (nor in my view could it be) that the appellant waived that right.

[18] As a result, all of the convictions were quashed as nullities.

[19] The Crown cannot point to any authority that would permit me, as a judge sitting alone in Chambers, to review the record and to make findings that the Crown proceeded summarily. Nor am I aware of any such authority.

[20] This is not the first time an issue like this has come before this Court and on each occasion the issue was determined by a panel of this Court (see **R. v. R.V.F., supra** and the authorities cited therein).

[21] The appropriate manner of proceeding in this matter is to set the matter down before a panel of this Court for a determination of our jurisdiction.

[22] As I indicated in telephone Chambers, the Appeal Book will be filed by the Crown by January 30, 2015, Mr. Matthews' submissions on the jurisdictional issue will be filed by February 13, 2015, the Crown's submissions by February 27, 2015. The matter will be heard before a panel of this Court on March 26, 2015, at 2:00 p.m.

Farrar, J.A.