

NOVA SCOTIA COURT OF APPEAL

Citation: *R. v. Kelly*, 2002 NSCA 164

Date: 20021212

Docket: CAC 178561

Registry: Halifax

Between:

Wayne Charles Kelly

Appellant

v.

Her Majesty the Queen

Respondent

JUDGE: Chipman, J.A. (Orally)

HEARD: December 12, 2002

WRITTEN DECISION: December 13, 2002

SUBJECT: **Criminal Law - Summary Conviction Appeals - whether summary conviction appeal court on setting aside a conviction has power to order a continuation of the trial before the trial judge**

SUMMARY: The appellant was convicted in Provincial Court of failing to comply with a breathalyzer demand. He appealed to the summary conviction appeal court. The appeal court judge held that the trial judge had failed to address an essential issue and quashed the conviction and remitted the matter to the trial judge for determination of that issue. The appellant appealed to the Court of Appeal contending that the summary conviction appeal court judge acted without jurisdiction. The Crown contended that the appellant had no appeal to the Court of Appeal.

ISSUE:

1. Whether the appellant had a right of appeal to the Nova Scotia Court of Appeal.

2. Whether the summary conviction appeal court judge erred in quashing the conviction and then remitting the matter to the trial judge for a continuation of the trial.

RESULT:

1. The Nova Scotia Court of Appeal held that it had jurisdiction to hear the appeal by virtue of s. 839(1)(a) of the **Criminal Code of Canada**, R.S.C. 1985, c. C-46.
2. The Nova Scotia Court of Appeal held that the summary conviction appeal court did not have the power upon setting aside the conviction to remit the matter to the trial judge for a continuation of the trial. The summary conviction appeal court judge relied on a decision of this Court in **R. v. Mood** (1987), 85 N.S.R. (2d) 178; N.S.J. 438 (Q.L.). The Court of Appeal pointed out that in that case the issue of jurisdiction was not raised and this Court did not on that occasion make any pronouncement on its jurisdiction to make an order such as the summary conviction appeal court judge made here.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 5 pages.