Date: 20021128
Docket: CAC No. 178324
Registry: Halifax

NOVA SCOTIA COURT OF APPEAL

[Cite as: *R. v. Smith* 2002 NSCA 148]

BETWEEN:

Her Majesty the Queen

Appellant

v.

David Thomas Smith

Respondent

Judges:	Glube, C.J.N.S., Bateman & Hamilton, JJ.A.
Appeal Heard:	November 18, 2002
Judgment Delivered:	November 28, 2002
Held:	Appeal is allowed as per reasons for judgment of Hamilton, J.A.; Glube, C.J.N.S. and Bateman, J.A. concurring.
Counsel:	Laurel Halfpenny-MacQuarrie, for the Appellant Terry E. Farrell, for the Respondent

Reasons for judgment:

[1] This is an appeal from the decision of Judge David E. Cole, dated February 26, 2001, wherein he determined that the laying of a second information against the respondent, dated December 5, 2001, for possession of stolen goods valued at less than $5000, constituted an abuse of process and granted a stay.

[2] The respondent was initially charged with the same offence, a hybrid offence, by an information laid June 22, 2001. The informant stated that he had reasonable grounds to believe that the respondent did:

> have in his possession property of a value not exceeding five thousand dollars, knowing that same was obtained by the commission in Canada of an offence punishable by indictment, contrary to Section 355(b) of the Criminal Code.

[3] Section 355(b) of the *Code* provides:

> Every one who commits an offence under section 354...
>
> (*b*) is guilty
>
> (i) of an indictable offence and is liable to imprisonment for a term not exceeding two years, or
>
> (ii) of an offence punishable on summary conviction, where the value of the subject-matter of the offence does not exceed five thousand dollars.

[4] Setting out s.355(b) in the information would usually give the appellant the option of proceeding indictably, pursuant to s.355(b)(i), or summarily, pursuant to s.355(b)(ii).

[5] The trial pursuant to that information commenced December 5, 2001. The appellant did not verbally indicate at the beginning of the trial if it was proceeding indictably or summarily. During the course of the trial, while the third Crown witness was giving his evidence, it was accepted by counsel and the trial judge that the June 22, 2001 information was laid beyond the six month limitation period provided for in s. 786(2) of the *Code*. We assume, without deciding, that was the case. That section provides:

> s. 786(2) No proceedings shall be instituted more than six months after the time when the subject matter of the proceedings arose, unless the prosecutor and the defendant so agree.

[6] The respondent then made a motion that the proceeding be declared a nullity since the Information was laid beyond the six-month limitation period. During the course of argument on the motion, the appellant asked the respondent if he was prepared to consent, pursuant to s.786(2) of the *Code*, to proceeding summarily, even though the information was out of time. He indicated that if the respondent did not consent, a new information would be sworn on the same charge which the appellant would prosecute indictably. The respondent did not consent. Once the respondent refused, the appellant joined the respondent's motion and the trial judge declared the proceeding a nullity.

[7] A new information was laid on December 5, 2001. There the informant stated that he had reasonable grounds to believe that the respondent did:

> have in his possession property of a value not exceeding five thousand dollars, knowing that same was obtained by the commission in Canada of an offence punishable by indictment, contrary to Section 355(b)(i) of the Criminal Code.

[8] By specifying s. 355(b)(i) the appellant indicated it was proceeding indictably, as it had indicated to the trial judge it would. The respondent made an application alleging that the laying of the second information on December 5, 2001, constituted an abuse of process by the appellant and seeking a stay as the appropriate remedy. The application was granted and that decision is the subject of this appeal.

[9] The grounds of appeal raised by the appellant are:

> 1. That the Provincial Court Judge erred in ruling the swearing of the new information beyond the six-month limitation in summary convictions proceedings constituted an abuse of the process of the court warranting a stay of the proceedings.
>
> 2. Such other grounds of appeal as may appear from a review of the record on appeal.

[10] We are satisfied the trial judge erred. The facts in this case distinguish it from *R. v. Boutilier (R.E.)* (1995), 147 N.S.R. (2d) 200 (CA), the case the trial judge relied on, and are similar to the facts in *R. v. Phelps* (1993), 79 C.C.C. (3d) 550 (Ont. C.A.), *R. v. Belair* (1988), 41 C.C.C. (3d) 329, 64 C.R. (3d) 179 (Ont. C.A.) and *R. v. Jans* (1990), 59 C.C.C. (3d) 398, 108 A.R. 324(C.A.).

[11] The facts in the *Boutilier* case are set out in paragraphs 1, 2 and 4 of that decision:

> 1. Following a crosswalk accident involving a pedestrian, on July 30, 1994, the respondent driver was charged, erroneously, with failing to stop after striking another vehicle, pursuant to s. 252(1)(b) of the Criminal Code. Section 252 creates hybrid offences, and the Crown elected to proceed with the matter as a summary conviction offence.
>
> 2. The Crown discovered its mistake too late to proceed again on summary conviction and proposed to proceed by indictment on a new Information. This appeal is from a stay of proceedings on that Information.
>
> 4. The Crown was aware from the Crown Sheet in its possession that the accident involved an injured pedestrian when it elected to proceed summarily on September 28, 1994. The erroneous Information was endorsed "summarily" by the court. The respondent pleaded not guilty and trial was set for April 27, 1995.

[12] Thus in *R. v. Boutilier*, supra, the first information was laid within the six month limitation period, but charged the wrong offence. On those facts the court was satisfied the second information was an abuse of process and that a stay was the appropriate remedy.

[13] The facts in this case are different. Here the first information was laid outside the six month limitation period. At paragraph 5 of *R. v. Boutilier*, supra, Freeman, J.A. relied on the *Phelps* case for the following principle:

> An election by the Crown to proceed by way of summary conviction on a hybrid offence is a nullity where the Information is laid outside the six-month limitation period; see R. v. Phelps (1993), 79 C.C.C. (3d) 550 (Ont. C.A.). Proceeding summarily on a new Information was no longer an option.

[14] Hence, in this case, as in *Phelps*, there was never an option available to the Crown to proceed summarily on the first information without the respondent's consent, since the first information was sworn outside the six month limitation period. This was also the case in the *Belair* and *Jans* cases that Freeman, J.A. distinguished in paragraph 27 of his decision:

> [27] In **R. v. Jans** (1990), 108 A.R. 324; 59 C.C.C. (3d) 398 (C.A.) and **R. v. Belair** (1988), 26 O.A.C. 340; 41 C.C.C. (3d) 329; 64 C.R. (3d) 179 (C.A.), the circumstances were significantly different from the present case in that the limitation periods for summary conviction offences had expired before the Crown purported to elect to treat the offences as such. Therefore, following **Phelps**, the purported elections were nullities and the system was not technically abused; I would distinguish those cases on that ground.

[15] In *R. v. Belair*, supra, the information was laid more than six months after the offence allegedly occurred. The Crown elected to proceed summarily. At trial the information was quashed because it was laid beyond the six month limitation period. A new information was immediately laid and the Crown elected to proceed indictably. The court was satisfied this was not an abuse of process and stated at page 339:

> I confess that I was initially attracted by the submission of respondent's counsel that Crown counsel had assessed the offence as not being sufficiently grave to warrant proceeding by indictment, and that his failure to notice, prior to electing to proceed by way of summary conviction, that proceedings by way of summary conviction were precluded by s. 721(2) (now s.786(2)), resulting in the laying of a second information, which had the potential effect of subjecting the respondent to

> an increased penalty. On more considered reflection, however, I have concluded that this argument is unsound. The offence charged was at all times triable by indictment, and indeed the information charged an indictable offence until the Crown elected to treat the offence as one punishable on summary conviction: see Re Arbaca and The Queen (1980), 57 C.C.C. (2d) 410 (Ont. C.A.) at 413-14. The respondent in this case was in no way prejudiced by the error of Crown counsel. If Crown counsel had noticed, prior to electing to proceed by way of summary conviction, that summary conviction proceedings were precluded by s. 721(2) (now s. 786(2)), he would, no doubt, have proceeded by indictment, as he ultimately did. The respondent in this case suffered no prejudice as a result of Crown counsel failing to notice prior to election that summary conviction proceedings were barred by s. 721(2). Furthermore, in the view of Mr. Justice Fauteux (with whom Mr. Justice Abbott concurred) in R. v. Karpinski, supra, the Crown's purported election, in the circumstances, to proceed by way of summary conviction proceedings was void and of no effect. **(Underlined reference to new Section, mine)**

[16] In *R. v. Jans,* supra, the Crown elected to prosecute summarily on an information that was also laid outside the six month limitation period. The Crown, when it realized it was outside the six month period, laid a new information upon which it proceeded by indictment. The accused was tried and found guilty. On appeal he raised the argument that the Crown was not allowed to change its election as it had because indictable proceedings are more onerous. The court was satisfied the election to proceed summarily was a nullity, so there was no question of re-electing or any impropriety in trying to do so.

[17] On the facts of this case, we are satisfied the law as set out in the *Phelps*, *Belair* and *Jans* cases applies and that the trial judge erred in relying upon *R. v. Boutilier* insofar as he found that the Crown's proceeding by indictment on the second information constituted an abuse of process. From the time of the laying of the first information, the six months having passed, the matter could only have proceeded indictably. There could have been no "deemed election" to proceed summarily. Accordingly, the jeopardy of the accused remained the same with the second information. He therefore did not suffer prejudice on account of the laying of the new information. Indeed, he had the option, at the first trial of consenting to the matter proceeding summarily. He chose not to do so, thus exposing himself to indictable proceedings.

[18] Accordingly the appeal is allowed and the matter is returned to the Provincial Court to proceed indictably.

Hamilton, J. A.

Concurred in:

Glube, C.J.N.S.

Bateman, J.A.