NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Matthews,* 2015 NSCA 31

Date: 20150409
Docket: CAC 430604
Registry: Halifax

Between:

William Kenneth Charles Matthews

Appellant/Respondent on Motion

v.

Her Majesty the Queen

Respondent/Applicant on Motion

Judges:	Fichaud, Farrar and Bryson, JJ.A.
Motion Heard:	March 26, 2015, in Halifax, Nova Scotia
Held:	Appeal dismissed per reasons for judgment of Farrar, J.A.; Fichaud and Bryson, JJ.A. concurring.
Counsel:	Appellant/Respondent on motion, in person Marian Fortune-Stone, Q.C., for the Respondent/Applicant on motion

Decision:

Overview

[1] On July 21, 2014, the appellant was convicted by Provincial Court Judge Paul Scovil of dangerous operation of a motor vehicle and flight from police pursuit (reported at 2014 NSPC 84).

[2] He was sentenced by Judge Scovil to two months custody on the two charges, to be served concurrently, a one year driving prohibition and a fine of $1,262.41 (reported at 2014 NSPC 85).

[3] On August 14, 2014, the appellant, self-represented, filed a Notice of Appeal from both conviction and sentence.

[4] On January 16, 2015, the Crown brought a motion to this Court seeking to dismiss the appellant's appeal for lack of jurisdiction, arguing that his appeal was to the Summary Conviction Appeal Court and not to this Court.

[5] As the judge sitting in Chambers on that date I referred the matter to a panel to determine the jurisdictional issue (reported at 2015 NSCA 4).

[6] The matter was heard by a panel of this Court on March 26, 2015. After hearing argument the decision of the Court was reserved.

[7] For the reasons that follow, I would dismiss the appeal.

Background Facts

[8] The appellant, William Matthews, was charged in an Information sworn August 22, 2013, with two **Criminal Code** offences, s. 249(1)(a) (dangerous operation of a motor vehicle) and s. 249.1(1) (flight from police pursuit). The charges arose from a single incident alleged to have occurred at Springhill, N.S. on July 4, 2013. At that time Mr. Matthews was alleged to have been driving a motorcycle which was driving at speeds of up to 100 km in a 50 km zone. The police attempted pursuit of the vehicle but called off the chase when the speeds became dangerously high.

[9] On September 9, 2013 the appellant appeared, with counsel, before MacDougall J.P.C., to answer to the July 4, 2013 charges. At that time his counsel "waived reading the charges"

[10] Also, on September 9, 2013, a summary offence ticket which had been issued to Mr. Matthews under s. 287(2) of the **Motor Vehicle Act**, R.S.N.S. 1989, c. 293, as amended (driving while suspended), was also on the docket, as was an application by Mr. Matthews to serve default time in lieu of a fine that had issued for a s. 254 **Criminal Code** conviction, (refusal of the breathalyzer demand). At the request of defence counsel, all matters were put over to September 30, 2013.

[11] The matter was called on September 30, 2013 before Lenehan, P.C.J., the endorsements on the Information for that date read: "Matthews present. Not guilty plea entered to both counts. Adjourned for trial (2 hrs.) to 27 November 2013 at 1:30 p.m.".

[12] On the November 27, 2013 date, the appellant's counsel appeared in the morning before Scovil, P.C.J. seeking an adjournment of the trial scheduled for that afternoon.

[13] By way of background to the request for an adjournment, it appears the only issue for trial was identification; was Mr. Matthews driving the motorcycle at the time of the offence? Defence counsel advised the Crown and the Court of the appellant's intention to call alibi evidence, presumably to show it could not have been Mr. Matthews. The request for an adjournment was opposed by the Crown. Judge Scovil granted the adjournment and the trial was re-scheduled to April 16, 2014.

[14] The Information was endorsed with the new trial date together with notes detailing the reason for the adjournment request and the Crown's readiness to proceed to trial on that date.

[15] On March 18, 2014 the appellant was, again, before Judge Scovil on unrelated charges. The Crown and defence counsel addressed interim release on the unrelated matters as well as the appellant's continuing release on the July 4, 2013 offences.

[16] During those proceedings, the Crown indicated that he needed to consider the Crown's election on the new unrelated matters and sought an adjournment of that election to March 31, 2014.

[17] On April 16, 2014 the appellant was in custody on other matters and defence counsel, again, sought an adjournment of the trial on the July 4, 2013 offences. Judge Scovil granted the request and scheduled April 22, 2014 for setting new trial dates. The Information was endorsed accordingly.

[18] On April 22, 2014 the appellant returned before Judge Scovil on the unrelated matters, as well as, to set a new trial date on July 4, 2013 offences. The trial date was set for May 21, 2014. The Information was endorsed with the new trial date.

[19] On May 21, 2014 the trial began before Judge Scovil. The trial continued on June 3 and on June 13, 2014 when it concluded. Judge Scovil, first, reserved his decision to June 23, 2014, and then to July 21, 2014. On July 21, 2014, he convicted the appellant of the offences.

[20] On August 7, 2014, he accepted a joint recommendation and sentenced Mr. Matthews to two months in custody, concurrent on the s. 249(1)(a) and s. 249.1(1) offences. Additionally, Judge Scovil imposed a one year statutorily mandated driving prohibition pursuant to s. 259(2)(c) of the **Criminal Code** and imposed a one year driving prohibition.

[21] By Notice of Appeal dated August 14, 2014 the appellant appealed his conviction and sentence to this Court pursuant to s. 675(1) of the **Criminal Code**.

Issue

[22] The only issue to be determined is whether this Court has jurisdiction to hear and decide the appellant's appeal of conviction and sentence.

[23] During oral argument on this motion the Crown indicated that if we were to find this Court did not have any jurisdiction it would not object to Mr. Matthews refiling his appeal in the Summary Conviction Appeal Court nor would it argue that he was out of time to do so.

Analysis

[24] The appellant was charged with two hybrid offences, ss. 249(1)(a) and 249.1(1) which can be prosecuted by indictment or on summary conviction.

> **249.** (1) Every one commits an offence who operates

(a) a motor vehicle in a manner that is dangerous to the public, having regard to all the circumstances, including the nature, condition and use of the place at which the motor vehicle is being operated and the amount of traffic that at the time is or might reasonably be expected to be at that place;

249. (2) Every one who commits an offence under subsection (1)

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or

(b) is guilty of an offence punishable on summary conviction.

…

249.1 (1) Every one commits an offence who, operating a motor vehicle while being pursued by a peace officer operating a motor vehicle, fails, without reasonable excuse and in order to evade the peace officer, to stop the vehicle as soon as is reasonable in the circumstances.

(2) Every one who commits an offence under subsection (1)

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or

(b) is guilty of an offence punishable on summary conviction.

[25] For offences characterized as hybrid, the Crown elects whether to proceed by indictment or by summary proceedings. Until the Crown elects, the offence is deemed indictable by operation of section 34(1) (a) of the federal **Interpretation Act**, R.S.C. 1985, c. I-21.

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;

…

[26] Section 34(1) (a) applies until the presumption it creates is rebutted. The Supreme Court of Canada in **R. v. Dudley**, 2009 SCC 58 stated:

[18] Pursuant to s. 34(1) (a) of the *Interpretation Act*, R.S.C. 1985, c. I-21, an offence is presumed indictable "if the enactment provides that the offender may be prosecuted for the offence by indictment". Hybrid offences are therefore treated as indictable - unless the Crown elects, or is deemed to have elected, to try them summarily:

In these cases, it is the prosecution that first decides how to proceed. If it chooses to proceed by indictment, the offence is treated in all respects as

> an indictable offence and the accused has the normal rights of election; if it chooses otherwise, the case proceeds in all respects as a summary conviction offence.
>
> (Manning, Mewett & Sankoff: Criminal Law (4th ed. 2009), at p. 44)
>
> .....
>
> [20] In the absence of an express election, it will in any event be presumed that the Crown has elected to proceed summarily where a hybrid offence "is proceeded with through trial to a verdict in a court having jurisdiction to hear a summary conviction proceeding": *R. v. Mitchell* (1997), 1997 CanLII 6321 (ON CA), 121 C.C.C. (3d) 139 (Ont. C.A.), at para. 4. Similarly, the Crown will be deemed to have elected to proceed by indictment where the accused has been put to the election as to mode of trial required, for example by s. 536 of the Criminal Code, so long as the proceedings take place in a court having jurisdiction over the alleged offence. [Emphasis added]

[27] The application of s. 34(1)(a), therefore, can be displaced either by an express election of the Crown or a deemed election based on the manner in which the proceedings were conducted. When the Crown does not explicitly elect, then an election is attributed to the Crown after a review of the record of proceedings (**Matthews**, ¶12-14; **R. v. F. (R.)**, 2011 NSCA 71,¶14 - 15, ¶31 - 33; **R. v. Paul-Marr**, 2005 NSCA 73, ¶18 - 21, 25, 28; **R. v. Shea**, 1976 CarswellNS 99, ¶10 - 11).

[28] In **Paul-Marr**, Justice Cromwell observed:

> [32] It is sensible and just to infer or deem the Crown to have made a particular election when that election is clear from what actually happened.

[29] The Court in **Dudley** also noted that particularly important to an expressed or attributed summary election is that the proceedings must have been instituted within six months under s. 786(2) of the **Code**, unless the parties agree otherwise (¶3).

[30] When the Information is sworn outside the limitation period and hybrid offences proceed summarily without consent, such circumstances could rebut the presumption that the Crown intended to proceed in that manner (**Paul-Marr**, ¶15, ¶28 - 30).

[31] Justice Cromwell's view in **Paul-Marr** (¶27) that substance should triumph over form when the intended election is clear from the conduct of the participants applies to these circumstances. The Crown's failure to elect expressly should not

undo the fact that everyone acted as if the Crown had elected to proceed summarily.

[32] In the present case the Crown acknowledges that it did not expressly elect the mode of proceedings on the hybrid offences. However, it is apparent to me from a review of the record in the context of the case law, the Crown proceeded summarily.

[33] The appellant's first Provincial Court appearance on the Information charging the ss. 249(1)(a) and 249.1(1) offences, was September 9, 2013. On that date the appellant's counsel "waived reading of the charges". The endorsement on the Information records the matter as having been put over to September 30, 2013 for election and plea. The election would be for the hybrid offences and the plea related to the **Motor Vehicle Act** offence that was also docketed that day.

[34] At the next appearance on September 30, 2013 the presiding judge specifically referred the Crown and the appellant's counsel to the need for an election or plea on the **Criminal Code** offences (Mr. O'Neil is Mr. Matthews' counsel and Mr. Baxter is Crown counsel).

> .....
>
> MR. O'NEIL: I'm aware of those charges, yes.
>
> THE COURT: **Those were for election or plea.**
>
> MR. BAXTER: Okay.
>
> [Emphasis added]

[35] Moments after the Crown acknowledged the judge's reminder, the appellant's counsel pled not guilty to those charges.

> .....
>
> 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]

[36] After a very brief discussion concerning the appellant's unrelated matter, the collective minds of the Judge and counsel returned to the **Criminal Code** offences to which pleas had just been entered.

……

MR. O'NEIL: Yeah, I'd like to have a chance to talk … this catches me by surprise. I'm a little awkward to have him dealing directly, if we could come back. And I want to make sure he knows what he's doing and so on.

THE COURT: All right. **Okay, not guilty pleas on the matters that were for plea today.**

MR. O'NEIL: Yes.

THE COURT: **And set trial dates. How much time do you anticipate for the trial?**

MR. O'NEIL: **I think we're going to need at least two hours for that, Your Honour.**

THE COURT: It all arises out of the one incident.

MR. O'NEIL: Yes, they're all connected, Your Honour.

THE COURT: Okay.

THE CLERK: **November 27th at 1:30?**

MR. O'NEIL: 27th at 1:30? **That's fine with Defence, Your Honour.**

THE COURT: **Mr. Baxter?**

MR. BAXTER: I hear 27th …

THE COURT: **November 27th at 1:30?**

MR. BAXTER: **November? Okay.**

MR. O'NEIL: November 27th, yeah, at 1:30.

THE COURT: All right, Mr. Matthews, we'll put your trial for November 27th at 1:30 in the afternoon.

[Emphasis added]

[37] On the date set for trial, November 27th, the Crown clearly continued the proceedings in a manner that demonstrated a summary election and an intention to have the trial on the scheduled date. The appellant's counsel sought an adjournment to be able to present alibi evidence and the Crown opposed the request saying "…we are prepared to go…". Judge Scovil granted an adjournment to April 16, 2014.

[38] The trial was again adjourned on April 16, 2014, returning on April 22, 2014 to set another date and to deal with new unrelated matters.

[39] On April 22, 2014, the Court and counsel worked their way through the various offences, taking pleas, reading an election address and setting dates. The Crown specifically raised the July 4, 2013 offences.

> …….
>
> MR. BAXTER: All right. So Mr. O'Neil was already present back on September 13 on the … The first, the oldest matter I see is from the 4th of July, a 249.1 and a 249(1), which pleas were already entered. So I'm going to suggest we start with the oldest one first, then. So that's from the 4th of …
>
> THE COURT: July.
>
> MR. BAXTER: July, 2013. Pleas already entered there.
>
> …….

[40] Mr. Baxter then carefully moved through the appellant's remaining matters seeking elections on indictable matters and proceeding summarily on unrelated hybrid offences when an election was required.

[41] On the rescheduled trial date, May 21, 2014, the trial began with the calling of evidence. It continued on June 3rd and ended on June 13th. As noted earlier, on July 21, 2014, Judge Scovil found the appellant guilty on both the driving related counts and on August 7, 2014 he sentenced the appellant.

[42] On the whole of this record, it is clear the parties proceeded throughout as if the Crown had elected summarily.

[43] Particularly telling is the September 30th appearance. After Judge Lenehan raised the fact that the offences were for "election or plea" and the Crown acknowledged that statement, the appellant's counsel pled him not guilty and sought trial dates which were then set. Judge Lenehan proceeded as if there had been an election and recapped that pleas had been entered and inquired about time needed for trial.

[44] The Crown, who was present when pleas were entered on September 30, 2013, spoke on numerous occasions to the offences when they were docketed, including appearances when he specifically reiterated that pleas had been entered on September 30, 2013. The same Crown also demonstrated on other occasions, when dealing with unrelated matters, the need for a Crown election or when an offence was indictable, the need for the appellant to elect.

[45] It can reasonably be inferred from the complete record that the Crown simply forgot to formally state an election on the sections 249(1) and 249.1 offences and, that it, always intended to proceed summarily.

[46] Other additional factors that support the conclusion the Crown proceeded summarily are:

i. The offences were not statute barred from proceeding and, therefore, the trial judge had jurisdiction to hear the trial.

ii. The Information makes no reference to the offences being by indictment. (Although not determinative or binding on the Crown, it can be a relevant consideration.)

iii. The parties went through the various court dates appearing to understand that the matters had proceeded summarily.

iv. The appellant was represented by counsel throughout. He raised no objection to the procedure that was followed.

Conclusion

Based on the totality of the circumstances of the proceedings in the Provincial Court I conclude that the matters proceeded summarily and this Court is without jurisdiction to hear this appeal pursuant to s. 675(1) of the **Criminal Code**. The appeal should be dismissed.

Farrar, J.A.

Concurred in:

Fichaud, J.A.

Bryson, J.A.