C.A.C. No. 02903

NOVA SCOTIA COURT OF APPEAL

Freeman, Roscoe and Pugsley, JJ.A.

Cite as: R. v. Ash, 1993 NSCA 190

B E T W E E N:

HER MAJESTY THE QUEEN **appellant** **- and -** **WILFRED HENRY ASH and AYLEEN JOANNE EATON** **respondents**	**Robert E. Lutes, Q.C. for appellant** **Respondents in person** **Appeal Heard: October 14, l993** **Judgment Delivered: October 14, l993**

THE COURT: Appeal allowed and matter remitted to Provincial Court for trial when charges were dismissed because of non-appearance of subpoenaed witness and Crown afforded no opportunity to show entitlement to adjournment; dismissal of charges against absent co-accused who had not been arraigned a nullity; per oral reasons for judgment by Freeman, J.A.; Roscoe and Pugsley, JJ.A., concurring.

The reasons for the judgment of the Court were delivered orally by:

FREEMAN, J.A.:

This is a Crown appeal from dismissal by a trial judge in Provincial Court of charges of theft,

threatening and assault against the respondent Wilfred Henry Ash when the Crown was unable to proceed immediately because the victim, a crown witnesses under subpoena, had not appeared.

Mr. Ash had been arraigned and had elected trial in Provincial Court, which was scheduled for 2:00 p.m. on June 7, 1993, before Judge Hughes Randall. The Crown prosecutor advised the court that the complainant, who had been served with a subpoena to attend, was not in court. He asked for "a couple of more minutes" to attempt to locate him by telephone. The Court replied: "We are now ready to proceed, it is now twelve minutes after 2:00. You're not offering any evidence?"

The prosecutor replied: "The Crown is not ready to proceed at this moment, your honour, no."

Judge Randall stated: "The matter's dismissed. I'm not going to put up with this any more."

The information, dated February 4, 1993, named Ayleen Eaton as a co-accused with Mr. Ash. She apparently did not appear for arraignment and a warrant for her arrest was issued February 9, 1993. It was never executed and has since been rescinded. She has never pleaded and she was not scheduled for trial, nor present, on June 7, 1993. The order of dismissal signed by the clerk of the court on June 7, 1993, purported to apply to both Mr. Ash and Ms. Eaton. The order of dismissal is a nullity insofar as it relates to Ayleen Eaton and the proceedings involving her. She was not present before the court and her case was not on the docket. Until she was arraigned, the court had no jurisdiction over the offenses with which Ms. Eaton was charged.

In **R. v. MacAskill** (1981), 45 N.S.R. (2d) 181 (N.S.A.D.) Hart J.A., considering circumstances in which jurisdiction can be lost, observed that courts can only become seized with jurisdiction over the offence "when the accused has presented himself to the court and made his election or plea . . . . "

With respect to Mr. Ash, the law is well settled that while a trial judge has a discretion whether to grant an adjournment, that discretion must be exercised judicially. See **R. v. Casey** (1987), 80 N.S.R. (2d) 247.

In **Casey**, Macdonald J.A. quoted Cartwright J. in **Darville v. R**. (1956), 116 C.C.C. 113 (S.C.C.) at p. 117 as to what a court is to consider in the judicial exercise of its discretion:

> "There was no disagreement before us as to what conditions must ordinarily be established by affidavit in order to entitle a party to an adjournment on the ground of the absence of witnesses, these being as follows:
>
> > (a) that the absent witnesses are material witnesses in the case;
> >
> > (b) that the party applying has been guilty of no laches or neglect in omitting to endeavour to procure the attendance of these witnesses;
> >
> > (c) that there is a reasonable expectation that the witnesses can be procured at the future time to which it is sought to put off trial.
>
> In my respectful view, it was error in law on the part of the learned trial judge to refuse an adjournment without having given the appellant an opportunity to show, if he could, that these conditions existed."

In this case the brief transcript discloses that a similar error occurred in the present trial. The trial judge did not give the appellant an opportunity to show, if he could, that the three conditions existed. When the witness was not present at 2:12 p.m., twelve minutes after the trial was scheduled to have begun, the trial judge dismissed the charges on his own motion. His discretion was not exercised judicially.

As Macdonald J.A. said in **The Queen v. Fletcher and Smith** (1990), 99 N.S.R. ((2d) 258 at p. 260, the actions of the judge were contrary to the principles of natural justice.

The appeal is allowed with respect to the dismissal of the charges against the respondent Wilfred Henry Ash. The order for dismissal is quashed and the matter is remitted to the Provincial Court for trial. The purported dismissal of charges against the respondent Eaton is a nullity over which we recognize no jurisdiction.

Freeman, J.A.

Concurred in: Roscoe, J.A.

Pugsley, J.A.