Date: 20011204
Docket: CAC171359

NOVA SCOTIA COURT OF APPEAL

[Cite as: *R. v. Small*, 2001 NSCA 173]

Bateman, Freeman and Saunders, JJ.A.

BETWEEN:

HER MAJESTY THE QUEEN
Appellant

- and -

ALLEN MARK SMALL
Respondent

REASONS FOR JUDGMENT

Counsel: Peter Rosinski, for the appellant
The respondent in person

Appeal Heard: November 20, 2001

Judgment Delivered: December 4, 2001

THE COURT: Leave is granted and the appeal is allowed, per reasons for judgment of Saunders, J.A.; Bateman and Freeman, JJ.A., concurring.

Saunders , J.A.:

[1] This case comes to us as an appeal by the Crown that Justice Charles E. Haliburton, sitting as a summary conviction appeal court, erred in refusing to grant a brief adjournment so as to permit retrieval of documentation establishing proof of service. This, in the Crown's submission, amounted to an error of law for which it now seeks leave to appeal pursuant to s. 839(1) of the **Criminal Code**.

[2] The facts are not in dispute. The respondent, Mr. Small, pled not guilty to a charge of imprudent driving contrary to s. 100(1) of the **Motor Vehicle Act**. He was acquitted after a trial in the Provincial Court on February 15, 2001.

[3] Mr. Lloyd B. Lombard, a Crown attorney for Digby County, appealed Mr. Small's acquittal by filing a notice of appeal with the Prothonotary at the Court House in Digby on March 14, 2001. On that same date, Mr. Lombard wrote to the clerk of the Provincial Court in Digby requesting a transcript of the trial in support of the Crown's appeal.

[4] On March 28, 2001, Mr. Lombard appeared before Justice Haliburton to fix a date for the Crown's appeal. The respondent, Mr. Small, was also in attendance. After the case was called, Justice Haliburton declared a short recess, saying:

> I think I'd better take a few minutes to have a look at the file and the rules.

Upon returning to court, he announced having formed the opinion that the Crown had failed to comply with Practice Memorandum 21 of the **Nova Scotia Civil Procedure Rules** by failing to personally serve Mr. Small with a copy of the notice of appeal and failing to file with the notice of appeal a copy of the letter (to the court of first instance) requesting a transcript of the trial. While, from the record before us, one cannot say what "file" Justice Haliburton was looking at, it is obvious that it lacked certain documentation he considered to be critical to the Crown's efforts to advance the appeal. He said, in part (after quoting from the Practice Memorandum):

> The appellant is required to file the notice of appeal in the Court of [sic] the prothonotary (which obviously was done) with proof of service thereof (which has not been done. There is no proof of service in the file.) . . . The Summary Conviction Court is to be notified that a transcript is required . . . Obviously that paragraph would be meaningless . . . if there is not also filed with the notice of appeal, a copy of the letter going to the Summary Conviction Appeal Court (sic) requesting the transcript. That document also is missing from this file.

[5] The Crown attorney immediately attempted to correct Justice Haliburton's misgivings. His protests proved unsuccessful as the following exchange reveals:

Mr. Lombard:	I filed a letter with the Court requesting that a transcript be provided and Mr. Small has been served. The police were supposed to provide that to the Court. The Court is indicating that's not been filed.
The Court:	There is neither document in the file, Mr. Lombard.
Mr. Lombard:	I can provide that to the Court within minutes.
The Court:	Well it's supposed to be filed within 30 days, it's now 45 days or 43 days, so you would have to apply for an extension of time, I would think would be the only – unless I dismiss the appeal. I could either dismiss the appeal now, which is what I'm inclined to do, or if you wish to have an opportunity to make argument about having an opportunity to extend the time –
Mr. Leonard:	We certainly do, Your Honour, because Mr. Small was served within the 30-day notice period. We did file a letter with the Court to request the transcript and we did, I believe, file the proper documentation for the appeal.
The Court:	Well you haven't filed the proper documentation for the appeal in terms of what the Civil Procedure –
Mr. Leonard:	Other than the –
The Court:	What the Practice Memorandum requires.
Mr. Lombard:	Yes.
The Court:	I think, Mr. Lombard, I've heard what Mr. Small had to say. I don't know how serious an offence the Crown thought this to be but I think I'm going to simply dismiss the appeal as having not been perfected.

[6] It is puzzling that after hearing the Crown attorney, an officer of the court, say he had effected personal service of the notice of appeal upon Mr. Small, had filed with the court a copy of his correspondence requesting the trial transcript and that such documentation could be provided "within minutes", that the Crown was not afforded such an opportunity. A simple recess of only a few minutes, at worst a slight inconvenience, was all that was necessary in order to retrieve the Prothonotary's file in the same building and demonstrate that the Crown's appeal had in fact been "perfected". As Mr. Lombard's affidavit, sworn September 19, 2001, makes clear, immediately after leaving court he examined the documents in the custody of the Prothonotary's office and therein located his letter dated March 14 requesting the trial transcript, together with an affidavit of service showing that the respondent had been served that day with the notice of appeal. That notice makes it clear that counsel would be appearing on March 28 to set down the appeal for hearing. As noted earlier, the respondent was present in court on March 28. Although the Crown did not bring a separate application before this court to introduce Mr. Lombard's affidavit, we are prepared in the circumstances of this case, to receive it in order to complete the record.

[7] In representing his own interests before this court, Mr. Small complained about the substantial legal fees and other costs he has been obliged to incur by virtue of his several appearances in Digby and in Halifax while the original charge against him moved from one court to another. He informed us that he can no longer afford a lawyer. He argued that "it was the prosecutor's fault" and not his, which led to his present predicament and forced his attendance before this court in Halifax. Mr. Small argued that Justice Haliburton "had the power" to refuse the adjournment and was right in doing so on account of the Crown's "failure" to ensure that the proper paper work was physically in the courtroom when his case was called.

[8] Whether to grant or refuse an adjournment is obviously within a judge's discretion. However, such a discretion must always be exercised judicially. See, for example, **R. v. Casey** [1987] N.S.J. No. 340 (C.A.); **R. v. Fletcher and Smith** (1990), 99 N.S.R. (2nd) 258 (C.A.); and **R. v. Ash** [1993] N.S.J. No. 395 (C.A.) .

[9] We are unanimously of the view that Justice Haliburton erred in law by failing to exercise his discretion judicially. He denied the Crown an opportunity to demonstrate its compliance with the requirements for perfecting an appeal, in circumstances where delay or inconvenience would have been minimal. For these reasons, leave is granted and the Crown's

appeal is allowed. The order dismissing the appeal is set aside. In light of the financial circumstances described by Mr. Small, it may be that notwithstanding the Crown's success on this appeal, it will choose not to proceed further. However, in the event that the Crown proceeds, it is our opinion that the appeal to the summary conviction appeal court ought to be heard by a judge other than Justice Haliburton.

Saunders, J.A.

Concurred in:

Freeman, J.A.

Bateman, J.A.