

NOVA SCOTIA COURT OF APPEAL

Roscoe, Hart and Pugsley, JJ.A.
Cite as: R. v. Demont, 1993 NSCA 197

BETWEEN:

DONALD R. DEMONT

Appellant

)
)
) Walton W. Cook, Q.C.
) for the Appellant
)

- and -

HER MAJESTY THE QUEEN

Respondent

)
) James Martin
) for the Respondent
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) Appeal Heard:
) September 23, 1993
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) Judgment Delivered:
) September 23, 1993
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THE COURT:

The appeal is allowed, decision and order of Judge Carver is set aside and the matter is directed to a judge of the Supreme Court for hearing of the appeal as per oral reasons for judgment of Pugsley, J.A.; Hart and Roscoe, JJ.A., concurring.

The reasons for judgment of the Court were delivered orally by

PUGSLEY, J.A.:

The appellant was convicted on January 24, 1992 of unlawfully obtaining benefits from Canada Pension Plan by false pretences, by failing to disclose a major change in his circumstances,

contrary to s. 90 of the **Canada Pension Plan Act**.

On February 20, 1992, an appeal was filed from conviction.

On March 2, 1992, counsel appeared before the County Court judge to fix a time and place to hear the appeal. Dates at this time were agreed by counsel for both parties for the filing of written memoranda.

The Appellant's brief was to be filed by June 30, 1992. The Appellant's counsel did not meet this deadline. The date was extended by the court to August 15, 1992. Appellant's counsel, again, failed to meet this deadline.

On October 30, 1992, counsel for the Appellant appeared before the judge to seek a further extension. "With a great deal of reluctance", the judge granted a further extension to November 30, 1992 and advised Appellant's counsel that if his brief was not filed by that time, the appeal would be dismissed with costs.

On December 2, 1992, the judge, noting the Appellant's brief had not been filed, dismissed the appeal with costs.

The matter comes within the provisions of s. 830(3) of the **Criminal Code**:

"An appeal under this section shall be made within the period and in the manner directed by any applicable rules of court..."

The applicable rules at the time were the Summary Conviction Appeal Rules found in Practice, Notes and Orders for Proceedings in the County Court of Nova Scotia.

Section 4 of those rules clearly contemplate a hearing at which oral argument would be advanced.

Section 5(2) permits the court to dispense with a formal hearing, but only where both parties "submit written argument". This was not the case in this appeal.

The court had the authority to fix a time and place to "hear" the appeal pursuant to s. 4(2). This option was not taken.

We do not consider that the appeal has been abandoned pursuant to s. 825 of the **Criminal Code**, nor has the Appellant "failed to proceed" with the appeal as no date was set for the hearing.

One can understand the frustration of the learned trial judge as a consequence of the continual failure of Appellant's counsel to abide by his agreement to meet filing dates. Nevertheless, in our opinion, there is no authority contained in the rules to dismiss an appeal because of the failure of Appellant's counsel to file a written memorandum.

The appeal is accordingly allowed, we set aside the decision and order of Judge Carver, and the matter is directed to a judge of the Supreme Court for hearing of the appeal.

J.A.

Concurred in:

Hart, J.A.

Roscoe, J.A.