

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

CLARKE, C.J.N.S.:

The appellant was charged with two indictable offences contrary to the **Customs Act** (Canada).

The charges were adjourned until April 29, 1996 for plea in the Provincial Court in Glace Bay. On that day the appellant appeared with his counsel. There was no judge because he was ill. Also, due to an unexpected illness, Crown counsel was delayed. A justice of the peace was present to deal with the daily log sheet.

Counsel for the appellant moved for the dismissal of the charges for want of prosecution. The presiding justice of the peace adjourned both the motion and the taking of plea to May 30, 1996.

Counsel for both the appellant and the Crown appeared before Judge Matheson on May 30, 1996. Counsel for the appellant renewed his April 29, 1996 motion to dismiss for want of prosecution.

After hearing the submissions of both counsel, Judge Matheson accurately reviewed the circumstances which have been briefly outlined above. He concluded his oral decision by saying:

... when a situation such as this arises the person making the motion for dismissal has the same right on reappearing as he had at the time of the original motion. So that Mr. Ripley's motion is in order. I now consider it on the merits and when I reflect on reasons that have been given for adjournments when a Peace Officer is sick or an officer of the court is sick these are usually good reasons to grant the adjournment and that is what I propose to do in this case. The charges continue to stand.

The appellant appeals alleging that the trial judge erred in law by failing to deal with his motion to dismiss for want of prosecution and instead treated it as an application for an adjournment to enter a plea.

A review of the oral decision given by Judge Matheson persuades us that he was alive to the main issue, namely, the disposition of the motion to dismiss. That was at the core of his remarks. Although in his concluding words he referred to an adjournment, he closed by saying, "The charges continue to stand." That means that the motion to dismiss for want of prosecution was being denied.

In **R. v. Fletcher and Smith** (1990), 99 N.S.R. (2d), 258, Justice Macdonald, of this Court, said at p. 260, para. 7:

A trial judge has, of course, a discretion to grant or refuse a non-suit motion, an application for an adjournment, or an application to dismiss a charge for want of prosecution. Such discretion, however, is not absolute but must always be exercised judicially.

On the facts and circumstances involving this appeal, it is our opinion that Judge Matheson exercised his discretion judicially. Therefore, the appeal is dismissed.

C.J.N.S.

Concurred in:

Hart, J. A.

Matthews, J.A.