

Date: 19971121

Docket No. CAC 139419

NOVA SCOTIA COURT OF APPEAL  
Cite as: R. v. Wilson, 1997 NSCA 204

**Roscoe, Jones and Flinn, JJ.A.**

**BETWEEN:**

HER MAJESTY THE QUEEN

Appellant

)  
)  
) Denise C. Smith  
) for the Appellant  
)

- and -

KRISTA DAWN WILSON

Respondent

)  
)  
) No one appearing on  
) behalf of the Respondent.  
)  
)

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)  
)  
) Appeal Heard:  
) November 21, 1997  
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) Judgment Delivered:  
) November 21, 1997  
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**THE COURT:**

The appeal is allowed, the order staying the proceedings is set aside and the matter is remitted to the Provincial Court as per oral reasons for judgment of Roscoe, J.A.; Jones and Flinn, JJ.A., concurring.

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

**ROSCOE, J.A.:**

This is an appeal by the Crown from a decision of Judge David E. Cole of the Provincial Court in which he stayed proceedings against the respondent because she was unable to obtain representation by Legal Aid. The appeal is pursuant to s. 676(1)(c) of the **Criminal Code**. The respondent was charged with two counts of theft of property exceeding the value of \$5,000 (s.334(a)) and one charge of theft of property of a value not exceeding \$5,000 (s.334(b)(i)). A charge of break, enter and theft was withdrawn by the Crown.

At the first appearance before Judge Cole on January 27, 1997, the respondent indicated she needed time to get a lawyer, and the matter was adjourned to March 10, 1997. At the next appearance, the respondent advised the court that she had been denied Legal Aid because “they don’t think I’m going to jail”. Judge Cole directed her to appeal the refusal to provide her with legal aid and granted a further adjournment to April 21, 1997. On that date she had not heard the outcome of the appeal, so the matter was further postponed to May 26, 1997. On May 26, 1997, the respondent advised Judge Cole that her appeal had been denied. Legal Aid counsel, apparently in court for another matter, on being questioned by Judge Cole, informed the court that “... at one time we did provide representation on all

indictable matters, but because of cutbacks, like I say, it's a policy of Legal Aid now that unless there is a substantial likelihood of imprisonment, people are not represented." After Judge Cole indicated that the break and enter charge was quite serious, Crown counsel indicated that the break and enter charge would be withdrawn, as had been done with a co-accused who had pled guilty to the lesser offence of theft. Judge Cole, reading from the letter to the respondent from Legal Aid said:

. . . Anyway, the rest of the letter says,

'Due to the remote likelihood of incarceration in this matter ...'

I don't know what crystal ball this individual has of what a judge is going to do in any given case.

. . .

The same people that pay Legal Aid pay the crown, and until the crown finds this individual a lawyer on these charges . . . before I pronounce what I'm about to pronounce, do you have a job?

After the respondent answered that she worked part-time and received social assistance, Judge Cole concluded:

Do you have any dependents? No, but you're living on social assistance. I'm going to stay this matter until such time as somebody finds the money to have this young lady represented in court, on the basis that it's a violation of her Charter rights. She has no hope of making full answer in defense to these charges in her circumstances. And they are

serious. Okay, you can leave until you hear further. I've stayed the charges, which means they don't go ahead until somebody finds the money to supply you with a lawyer.

The respondent was never arraigned on the charges. The issue on appeal is whether the Provincial Court judge erred in ruling that the respondent's right to a fair trial under s.11(d) of the **Charter** had been infringed or denied and whether he erred in ordering a conditional stay of proceedings as a remedy under s.24(1) of the **Charter**.

Since the charges pursuant to s. 334(a) of the **Criminal Code** were indictable and the respondent had never been put to her election, the Provincial Court judge was not the trial judge and therefore was not a court of competent jurisdiction to grant any **Charter** remedy in regard to those charges. (See **R. v. Mills**, [1986] 1 S.C.R. 863). Even if it were assumed that there was jurisdiction to make the order, the Provincial Court judge erred by failing to properly apply the test for determining whether an accused person would be denied the right to a fair trial in the absence of state funded legal assistance.

Although in certain circumstances, the assistance of counsel may be found to be necessary to ensure a fair trial, clearly an accused does not have a constitutional right to a state funded counsel at trial. (See **Re Ewing** (1973), 18

C.C.C. (2d) 356, (B.C.C.A.); **R. v. Rowbotham** (1988), 41 C.C. C. (3d) 1; and **R. v. Rockwood** (1989), 91 N.S.R. (2d) 305, (C.A.)). Before ordering a stay, the trial judge must first determine whether because of the seriousness and complexity of the case, the accused is incapable of representing herself. (See **Rockwood, supra** and **R. v. Taylor** (1996), 154 N.S.R.(2d) 379 (C.A.)) That determination must include at the minimum, an inquiry into: (a) the personal abilities of the accused such as her educational and employment background and whether she is able to read, understand the language, and make herself understood; (b) the complexities of the evidence and the law on which the Crown proposes to rely and; (c) whether there are likely to be any complicated trial procedures such as a *voir dire*. The assessment should be undertaken in the knowledge that it is the duty of the Crown to disclose its case to the accused and the duty of the trial judge to assist an unrepresented accused. (See **R. v. Keating** (1997), 159 N.S.R.(2d) 365 (C.A.)

If this inquiry results in a finding that it is necessary that the accused be represented by counsel in order to have a fair trial, the second part of the test must be an inquiry into whether the accused can afford to pay her own legal fees. While the accused did indicate that she worked part-time and was in receipt of social assistance, the inquiry as to her means and assets was clearly deficient. See **Keating, supra**, for a detailed list of matters that should be canvassed, depending on the circumstances.

In this case, neither the inquiry into the complexity of the matter, nor the investigation of the means of the accused were sufficient. The Provincial Court judge therefore erred by entering a stay of proceedings. The appeal is allowed. The order staying the proceedings is set aside and the matter is remitted to the Provincial Court.

Roscoe, J.A.

Concurred in:

Jones, J.A

Flinn, J.A.