NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. Deveau***, 2011 NSCA 85

Date: 20110922
Docket: CAC 342885
Registry: Halifax

Between:

Tina Deveau

Appellant

v.

Her Majesty the Queen

Respondent

Judges:	Fichaud, Beveridge and Bryson, JJ.A.
Appeal Heard:	September 19, 2011, in Halifax, Nova Scotia
Held:	Leave to appeal granted and appeal dismissed per reasons for judgment of Fichaud, J.A., Beveridge and Bryson, JJ.A. concurring.
Counsel:	Wayne Bacchus for the appellant Mark Scott for the respondent

Reasons for judgment:

[1] At the conclusion of the hearing the Court granted leave to appeal but dismissed the appeal with reasons to follow. These are the reasons.

[2] On August 12, 2009, Ms. Deveau was charged with impaired driving and with driving having blood alcohol over the legal limit, contrary to ss. (a) and (b) of s. 253(1) of the *Criminal Code*. The Crown proceeded summarily. Ms. Deveau pleaded not guilty.

[3] On November 23, 2009, Ms. Deveau filed a pre-trial motion that her *Charter* rights under ss. 10(a) and (b) had been denied upon detention, there had been an unreasonable search contrary to s. 8, there was no reasonable basis for a breath demand, and that the Crown's evidence should be excluded under s. 24(2) of the *Charter*. Provincial Court Judge Castor Williams heard the motion in a *voir dire* on June 9 and 11, 2010.

[4] At the *voir dire*, the parties disagreed as to the procedure. The defence insisted that the Crown had to call evidence and establish a *prima facie* case before Ms. Deveau was required to call evidence in support of her *Charter* motion. The Crown's view was that the Defence had to lead evidence first to establish a *Charter* breach on the balance of probabilities. Ultimately, the Defence began by calling its lone witness, Ms. Deveau. Then the Crown elected to call evidence. The defence objected. Defence counsel's position on the objection was:

> So I would submit that the Crown is estopped because they were ... they were want of prosecution with respect to giving notice for their can-say of their witnesses. They in turn have to say who they're relying on to rebut our assertion that there was a violation.

The Crown had provided a disclosure package and "can-says" of the police officers who would testify on the charges. The Crown's position on the objection was that the Crown could decide whether or not to call evidence on the defence motion after hearing the defence evidence for the motion.

[5] Judge Williams held that the Crown's failure to file a brief before the motion precluded the Crown from calling evidence at the *voir dire*. The judge characterized the defence's submission:

> So therefore, at this point in time, having heard the Defence's evidence, the Crown ought to be estopped from calling evidence, viva voce evidence, on the matter.

[6] The judge said:

> So the Crown, having heard what the Appellant had to say, in my view, having not given the Applicant any notice of what its position was through a brief cannot now call a witness to present its position. To me that would be procedurally unfair, and I will not admit that.

The judge allowed the defence's *Charter* motion, excluded the evidence under s. 24(2), and acquitted Ms. Deveau.

[7] The Crown appealed to the Supreme Court of Nova Scotia, as the Summary Conviction Appeal Court (SCAC). Justice Hood heard the appeal on December 16, 2010, issued an oral decision on that day, and a written decision on January 27, 2011 (2010 NSSC 475). The SCAC allowed the appeal, overturned the acquittal, and ordered a new trial before another judge. Justice Hood ruled that the Provincial Court judge had erred in law by preventing the Crown from calling evidence at the *voir dire*.

[8] Ms. Deveau applies for leave to appeal to the Court of Appeal under s. 839 of the *Criminal Code*.

[9] I agree with the SCAC judge's ruling that the Provincial Court judge erred in law by denying the Crown the opportunity to call evidence in response to Ms. Deveau's evidence for her *Charter* motion at the *voir dire.* Ms. Deveau's submissions, written and oral, say nothing to persuade me that the SCAC judge made any mistake in her analysis or conclusion.

[10] The Crown had provided disclosure of its evidence for the prosecution proper. The Crown had made it clear that the Crown would decide whether or not to call evidence on Ms. Deveau's *Charter* motion after the Crown heard Ms. Deveau's evidence for that motion. The Crown was entitled to take that position. The Provincial Court judge's view was that, before the respondent to a motion hears the applicant's evidence, the respondent must file a pre-motion brief which

commits the respondent to particular evidence for the motion. Failure to comply, according to the judge, precludes the respondent from calling evidence. That view is not a principle of law. No authority for such a preclusion or estoppel has been cited. Had the Crown been permitted to lead evidence in response to the defence motion, the defence would have been entitled, in appropriate circumstances, to an adjournment or to lead rebuttal evidence.

[11] I would grant leave to appeal but dismiss the appeal.

Fichaud. J.A.

Concurred: Beveridge, J.A.

Bryson, J.A.