C.A.C. No. 113334

NOVA SCOTIA COURT OF APPEAL

Cite as: R. v. Sherman, 1995 NSCA 188
Hallett, Freeman and Flinn, JJ.A.

BETWEEN:

ARTHUR EBER SHERMAN Appellant - and - HER MAJESTY THE QUEEN Respondent	Appellant in Person William D. Delaney for the Respondent Appeal Heard: September 26, 1995 Judgment Delivered: September 29, 1995

THE COURT: Appeal dismissed per reasons for judgment of Hallett, J.A.; Freeman and Flinn, JJ.A. concurring.

HALLETT, J.A.:

The appellant was charged with assault and leaving the scene of a motor vehicle accident contrary to the provisions of the **Criminal Code of Canada**, R.S.C. 1985, c. C-46. The appellant is a 76 year old American lawyer who resides in Nova Scotia from time to time. On November 9th, 1994, the appellant appeared in Provincial Court at Halifax. The Crown advised the Court it would proceed summarily on the Information. The taking of a plea was adjourned to December 5th, 1994. On that date the appellant requested a further adjournment. As a result the taking of the plea was adjourned to January 23rd, 1995.

On January 12th, 1995, a judge of the Supreme Court of Nova Scotia heard the appellant's application for an order in the nature of *certiorari* with respect to the charges. Justice Richard dismissed the application. He stated that the application was frivolous and any defects in the Crown's proceeding against the appellant were strictly clerical. This appeal is from that decision.

On January 23rd, 1995, the appellant pleaded not guilty to the charges and the matter was adjourned to January 30th, 1995 for the purpose of setting a trial date. On January 26th, 1995, the appellant filed a notice of appeal from the decision of Justice Richard. The appellant asserts that as he lives in Hants County and was served in Hants County that the Provincial Court judge sitting in Halifax did not have jurisdiction notwithstanding the fact that the accident took place in the City of Halifax in the County of Halifax.

On January 30th, 1995, the matter was set for trial on May 2nd, 1995.

On February 28th, 1995, the appellant applied to a Provincial Court judge in Halifax for an order quashing the Information on the ground that the Information was insufficient in detail. That application was dismissed.

On April 27th, 1995, the appellant made two applications in the Supreme Court pertaining to the charges. One application was for an order in the nature of *mandamus*; the other for an order in the nature of prohibition. These applications were dismissed by Associate Chief Justice Palmeter who ordered the appellant to pay costs in the amount of $300 with respect to each application.

The appellant has filed a notice of appeal to this Court with respect to the orders of Associate Chief Justice Palmeter.

On May 29th, 1995, the proceedings in the Provincial Court were adjourned until October 2nd, 1995, for the purpose of setting a date for trial.

The appellant, in his factum, refers to 17 issues including a constitutional challenge to four relevant sections of the **Criminal Code**.

Counsel for the respondent submits that the appeal to this Court from Justice Richard's decision may be resolved through a consideration of two points:

> "1. Did Richard J. err in law in dismissing the Appellant's application for an order in the nature of certiorari?
>
> 2. What is the appropriate forum for the determination of the constitutional issues raised in the factum of the Appellant?"

Disposition of the Appeal

The appellant relies on a decision of the Ontario Court of Appeal in **R. v. Simons** (1976), 30 C.C.C. (2d) 162 in support of his argument that the Provincial Court judge sitting in Halifax was without jurisdiction as the appellant was served with an appearance notice in Hants County. In my opinion the **Simons** decision does not have application to these facts. In **Simons** the accused lived in the County of Peterborough, the offence was committed in that County but the appearance notice required the accused to appear in Northumberland County. The Court held that the jurisdiction of the officer who issued the Appearance

Notice, in designating the place at which the accused was to attend court, was limited to requiring the accused to appear in a court within the territorial jurisdiction within which the accused was arrested. The court went on to hold that the presence of the accused before the justice pursuant to a direction which the officer had no jurisdiction to make could not confer territorial jurisdiction on the justice.

While on its face the **Simons** case might appear to support the appellant's position, it is clear that that is not what the court had in mind. That the **Simons** case does not stand for the proposition put forward by the appellant is evident from the following passage from the judgment:

> "Although what is now pending before the Provincial Court Judge sitting in Port Hope is a preliminary inquiry and not a trial, those proceedings are an important step in the criminal process. There is nothing in the record to disclose why the preliminary inquiry is being conducted in Port Hope, a place which has no connection with the offence nor with the accused. If Crown counsel's contention were correct, an accused person could be directed to appear at any place in Ontario, no matter how distant from the place of his arrest or from the place where the offence was committed, and be expected to defend himself separated from those persons who could assist him. Although there is no suggestion of bad faith in this case, as is pointed out by MacLaren, J.A., in the *O'Gorman* case, *supra*, to condone the procedure adopted here, 'the criminal law might become an engine of oppression and injustice'."

Clearly a Provincial Court judge sitting in the place where the alleged offence was committed has jurisdiction. The appellant's argument on this issue fails.

Apart from the fact that nothing has been done, except to take a plea from the appellant and set a date to fix a date for trial, any review by Justice Richard as to the validity of the Information was premature as there has not yet been a trial in the Provincial Court. In **R. v. Jarman** (1972), 10 C.C.C. (2d) 426 Schroeder J.A. stated at p. 429:

> "A clear distinction must be drawn between a case in which the offence charged in the information is one which is beyond the Court's jurisdiction to entertain and a case which lies within its

> jurisdiction. With the former situation we are not here concerned. Where the information falls within the latter category the Judge before whom the matter comes on for trial has exclusive jurisdiction to determine its validity, and no appeal lies from his decision until the case has been finally made by him. Before this stage is reached any decision made by him in the course of the hearing is not subject to review either on appeal or before another Court on a motion to quash, or in other proceedings in which an extraordinary remedy is invoked. An error by the trial Judge as to the validity of an information does not deprive him of jurisdiction - the sole basis on which an extraordinary remedy can be granted on an application of this nature. Nor, except on an appeal from a final disposition, is it arguable that the trial Judge lacked jurisdiction on account of the invalidity of the information."

(See also: **R. v. Webster** (1993), 78 C.C.C. (3d) 302 (S.C.C.).

Pursuant to the **Criminal Code**, the Crown having elected to proceed summarily, the Provincial Court judge has jurisdiction respecting the validity of the Information. The jurisdiction of the Provincial Court as to the validity of the Information is exclusive in these circumstances. There could only be a review or appeal from a final disposition by the Provincial Court judge after trial of the appellant on the charges he is facing.

The appellant has argued that by filing a petition for *certiorari* on November 14th, 1994, the Provincial Court judge no longer had jurisdiction. That argument must fail because the Provincial Court judge sitting in Halifax where the alleged offences occurred had jurisdiction and with respect to the validity or invalidity of the Information there can be no review or appeal until the Provincial Court judge has made a final disposition of the Information (**Jarman**, supra).

The simple fact is that there was virtually nothing for Justice Richard to review on January 12th, 1995, as the only step that had been taken in the proceedings, prior to the filing of the application for an order in the nature of *certiorari*, was the appellant's appearance in Provincial Court on November 9th at which time the Crown advised the Court that it would be proceeding summarily on the Information and the taking of a plea was

adjourned to December 5th and on that date further adjourned to January 23rd, 1995.

The appellant also asserts that the learned Chambers judge erred by refusing to hear oral argument. We do not have the record of the proceedings before Justice Richard. However, on the basis of the arguments presented to this Court, the appellant could not have succeeded even if his assertion is correct. Therefore, this issue is irrelevant.

As a general rule, it is at trial that the appellant ought to raise submissions that there have been **Charter** violations and that certain sections of the **Criminal Code** are unconstitutional (**R. v. Seaboyer** (1991), 66 C.C.C. (3d) 321 (S.C.C.) at p. 413). It is premature for this Court to consider the appellant's assertion of **Charter** violations as not even trial dates respecting the charges have yet been set let alone a trial held.

The appeal from Justice Richard's decision ought to be dismissed.

Hallett, J.A.

Concurred in:

Freeman, J.A.

Flinn, J.A.

C.A.C. No. 113334

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

ARTHUR EBER SHERMAN

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT BY:

HALLETT, J.A.