

NOVA SCOTIA COURT OF APPEAL
Cite as: R. v. Curragh Inc., 1995 NSCA 228

Clarke, C.J.N.S., Hallett and Chipman, J.J.A.

BETWEEN:

HER MAJESTY THE QUEEN	)	Craig M. Garson
	)	for the Appellant
Appellant)	
)	
- and -)	
	)	Gordon R. Kelly
	)	N. Kent Clarke
	)	for the Respondent
CURRAGH INC., GERALD JAMES PHILLIPS,	)	Gerald James Phillips
and ROGER JAMES PARRY)	
)	
Respondents	)	Anne MacL. Malick, Q.C.
	)	Frank E. DeMont and
	)	John A. McKinlay
	)	for the Respondent
	)	Roger James Parry
)	
	)	Appeal Heard:
	)	November 29, 30 and
	)	December 1, 1995
)	
	)	Judgment Delivered:
	)	December 1, 1995
)	
)	
)	

THE COURT: Appeal allowed, stay of proceedings set aside and a new trial ordered per oral reasons for judgment of Hallett, J.A.; Clarke, C.J.N.S. and Chipman, J.A. concurring.

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

HALLETT, J.A.:

This is an appeal from a decision of a trial judge staying charges of manslaughter and criminal negligence against the respondents. We are of the opinion the appeal should be allowed.

Part way through the trial the trial judge telephoned the Deputy Director of the Public Prosecution Service for the Province of Nova Scotia complaining about the manner in which the lead Crown prosecutor was conducting the trial. The learned trial judge advised him that if he did not remove the lead Crown prosecutor from the case he, the trial judge, would take steps to attain that end. The Crown then brought a motion that the trial judge remove himself from the case on the grounds of reasonable appearance of bias. The motion was supported by counsel for the respondent Parry.

The trial judge in a short decision, without reasons, dismissed the motion. The trial, which had begun on February 6th, 1995, continued.

On May 10th, 1995, defence counsel brought an application to stay proceedings on the ground of non-disclosure or late disclosure of evidence. The learned trial judge granted the motion.

We are of the opinion the appeal should be allowed for the following reasons: (i) in calling Mr. Herschorn and making the remarks to which we have referred the learned trial judge exhibited an appearance of bias that incurably infects his decision on the stay; (ii) the learned trial judge failed to make an inquiry and a proper determination whether evidence that had not been disclosed or was disclosed late was material to the respondents' ability to make full answer and defence as the trial judge was required to do. (**R. v. O'Connor** (1994), 89 C.C.C. (3d) 109 (B.C.C.A.)) In fact, the learned trial judge outrightly refused to consider evidence the Crown wished to tender on this issue. Without having decided if the evidence was material, the learned trial judge failed to exercise his power to grant a stay in a judicial

manner. (iii) stays of proceedings are only granted in the clearest of cases. (**R. v. Power**, [1994] 1 S.C.R. 601; **R. v. Burlingham**, S.C.C., November 9, 1995) This was not such a case.

There was substantial disclosure by the Crown; the instance of non or late disclosure related to evidence that was not shown by the respondents to be material to the respondents' ability to make full answer and defence. Rather than staying the proceedings, the learned trial judge ought to have either declared a mistrial or granted an adjournment of sufficient duration to allow the defence to peruse the newly discovered or previously undisclosed evidence, including the so-called administrative files, the Claude White notebooks, the envelope found in Fred Doucette's office at Stellarton and other relevant Department of Labour files and ought to have ordered that any witnesses who had already testified be recalled if defence counsel wished to further cross-examine them on issues arising out of the perusal of the new evidence.

We are also of the opinion the Crown's conduct of this case was not an abuse of the Court's process.

Accordingly, the appeal is allowed, the order of the trial judge staying the proceedings is set aside, including the order for costs. There will be no costs on the appeal. A new trial is ordered.

Hallett, J.A.

Concurred in:

Clarke, C.J.N.S.

Chipman, J.A.

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HER MAJESTY THE QUEEN

Appellant

- and -
FOR

BY:

CURRAGH INC., GERALD JAMES
PHILLIPS and ROGER JAMES PARRY
HALLETT, J.A.

Respondents

)
)
) REASONS

) JUDGMENT

) (Orally)

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