S.C.C. No. 02646

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

Jones, Matthews and Roscoe, JJ.A.
Cite as: R. v. Henderson, 1993 NSCA 31

BETWEEN:

KEVIN WILLIAM HENDERSON	)	Brian V. Vardigans
	)	for the appellant
appellant	)	
	)	W.D. Delaney
- and -	)	for the respondent
	)	
HER MAJESTY THE QUEEN	)	Appeal Heard:
	)	January 18, 1993
respondent	)	
	)	Judgment Delivered:
	)	January 18, 1993

THE COURT: Appeal dismissed per oral reasons for judgment of Matthews, J.A.; Jones and Roscoe, JJ.A. concurring.

MATTHEWS, J.A.:

The principal issue on this appeal is whether the trial judge should have admitted into evidence the contents of two separate statements given by the appellant to the police in relation to a previous criminal investigation. The statements had been tendered by the Crown at a previous trial and the appellant was cross-examined on them. The appellant alleges that admitting these statements into evidence at this trial was in violation of s. 13 of the **Charter**.

On February 20, 1990, an R.C.M. Police constable interviewed the appellant in the course of an investigation into an alleged theft of a jacket. At that time, the appellant verbally made an inculpatory statement to the constable in which he admitted taking that jacket which, he said, he subsequently sold to Steven Crouse.

Because of that statement the appellant was charged with theft and the investigation ceased.

On July 24, 1990, the appellant verbally made an exculpatory statement to the same constable stating that Crouse had concocted the earlier statement which the appellant then gave to the police for the purpose of diverting suspicion from Crouse.

On September 11, 1990, the appellant testified on his trial for the theft charge. He was acquitted.

On September 17, 1990, the appellant was charged with having wilfully attempted to obstruct justice on or about February 20, 1990, contrary to s. 139(2) of the **Code**.

On November 22, 1991, the appellant was tried on the charge under s. 139(2). The Crown called the constable who had obtained the two statements as its only witness.
Through the constable and after objection by appellant's counsel, the Crown adduced into evidence the two statements and then closed its case. The appellant called no witnesses. He was convicted.

In argument, appellant's counsel before the trial judge and now before this court, objects to the introduction of the statements into evidence as violating the appellant's rights guaranteed under s. 13 of the **Charter**.

Section 13 states:

> "A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence."

The **Charter** does not confer a broad privilege against self incrimination but confers specific protection under s. 11 and s. 13. **R. v. Altseimer**(1982), 1 C.C.C. 93d) 7 (Ont. C.A.).

The operative words in this matter in respect to s. 13 are: "...who testifies in any proceeding...". Here the Crown, in tendering the two statements did not tender evidence from the appellant's testimony in any other proceeding or indeed anyone's previous testimony.

This is not the situation found in **Dubois v. R.** (1985), 22 C.C.C. (3d) 513 (S.C.C.). There the Supreme Court of Canada by majority, held that a retrial of the same offence or one included therein is "another proceeding" within the meaning of s. 13. Thus, the transcript of the accused's testimony at an earlier trial should not be admitted into evidence.

The right guaranteed by s. 13 inures to the benefit of the witness when an attempt is made to use previous testimony to incriminate him.

Nor do we have like facts as in **R. v. Skinner** (1988), 42 C.C.C. (3d) 545 (Ont. C.A.). In that case a police officer was only able to identify the accused as the driver of a motor vehicle after he heard the accused testify at his brother's trial on a speeding charge. It was held that the provisions of s. 13 prevented the officer from using that previous testimony at the accused's subsequent trial.

See also, among others, **Knutson v. Saskatchewan Registered Nurses' Association** (1990), 75 D.L.R. (4th) 723 (Sask.C.A.).

Here two voluntary statements were taken by the constable prior to both trials. It is that evidence, not any testimony of the appellant or anyone else in the other proceeding which the trial judge permitted into evidence.

In addition, the entire record from the trial courts was not produced before this court for

consideration.

It is trite law to say that the burden is upon the appellant to establish by a preponderance of evidence that there has been a breach of his **Charter** rights. He has not done so. Apart from that, the facts of this case do not permit the application of s. 13 to prevent the introduction of the statements into evidence.

We dismiss the appeal.

J.A.

Concurred in:

Jones, J.A.

Roscoe, J.A.