NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Mason*, 2003 NSCA 139

Date: 20031209
Docket: CAC 200571
Registry: Halifax

Between:

Ian Wallace Mason

Appellant

v.

Her Majesty the Queen

Respondent

Judge(s):	Glube, C.J.N.S.; Chipman and Fichaud, JJ.A.
Appeal Heard:	November 19, 2003, in Halifax, Nova Scotia
Held:	Leave to appeal is granted and appeal is dismissed as per reasons of Glube, C.J.N.S. and Fichaud, J.A.; Chipman, J.A. concurring.
Counsel:	A. Jean McKenna, for the appellant Kenneth W. F. Fiske, Q.C., for the respondent

Reasons for judgment:

[1] This is an appeal from the decision of a summary conviction appeal court judge, Justice Robert W. Wright, allowing a Crown appeal from a dismissal by Judge Flora Buchan where a witness failed to appear during the continuation of a trial.

[2] The facts are set out in the decision of Justice Wright, **R. v. Mason (I.)** (2003), 214 N.S.R. (2d) 35 (S.C.). Briefly, Mr. Mason was charged with sexual assault. A delay occurred during the trial while the complainant who was under subpoena was being cross-examined. On the adjourned trial date, she failed to re-appear. The Crown's request for an adjournment was denied and the charge was dismissed by Judge Buchan.

[3] Justice Wright recognized the wide discretion of the trial judge, but allowed the appeal when he found she had failed to consider the principles set out in **Darville v. The Queen** (1956), 116 C.C.C. 113 (S.C.C.), as followed in **R. v. Downey** (1991), 103 N.S.R. (2d) 174 (S.C.A.D.) and **R. v. Carvery** (1992), 110 N.S.R. (2d) 350 (S.C.A.D.) at ¶8.

[4] **Darville** sets out the criteria to obtain an adjournment when a witness is absent. Ordinarily an affidavit is filed setting out:

> (a) that the absent witnesses are material witnesses in the case;
>
> (b) that the party applying has been guilty of no laches or neglect in omitting to endeavour to procure the attendance of these witnesses;
>
> (c) that there is a reasonable expectation that the witnesses can be procured at the future time to which it is sought to put off the trial. [p. 117, **Darville**]

[5] Judge Buchan did not consider or apply the **Darville** criteria.

[6] A court of appeal can only review questions of law from the summary conviction appeal court (s. 839(1) of the **Criminal Code**). We are unable to find any error of law in the decision of Justice Wright.

[7] In his factum to this court, the appellant submitted that the adjournment should have been denied because there was a breach of s. 11(b) of the **Charter**.

[8] The appellant raised the issue of delay before Judge Buchan in the context of arguing that it would be difficult to pick up the cross-examination and to do an effective job if another adjournment was granted. The appellant did not mention s. 11(b) to Judge Buchan.

[9] Before Wright, J. the appellant again cited prejudice with respect to the delay and the difficulty of breaking up the cross-examination of the complainant. The appellant's "summary" at the conclusion of the written submissions to Justice Wright states:

> It is respectfully submitted that this Court must not narrowly and rigidly apply the principles in **Darville**, and in effect preclude the Trial Judge from considering any other significant element. Even if the Court is satisfied that the **Darville** elements have been met, the Trial Judge must, in the exercise of her discretion, consider the impact of further lengthy delay. She must also consider the absence of the Complainant in light of the fact that the matter was adjourned in the midst of her cross-examination, and at a point where she was about to be confronted with an inconsistent statement. Delay is a factor in any adjournment request, <u>even without a Section 11(b) application</u>. Delay is always prejudicial. It is therefore respectfully submitted that this appeal should be dismissed. [emphasis added]

[10] Wright, J. said although an inconvenience, the interruption was directed by the trial court and was made to allow time to deal with an evidentiary issue. He found there was no real prejudice such as to deny the accused the right to a fair trial. Justice Wright's decision deals with the **Darville** test for an adjournment, not with s. 11(b).

[11] The appellant's notice of appeal to the Court of Appeal did not mention s. 11(b).

[12] The appellant acknowledges that s. 11(b) was not raised before Judge Buchan, but submits that this was unnecessary. We disagree. As a general rule and barring exceptional circumstances an issue, including a **Charter** issue, should not be raised for the first time on appeal.

[13] In **Vickery v. Nova Scotia Supreme Court (Prothonotary)**, [1991] 1 S.C.R. 671 at ¶ 10-11, Justice Stevenson for the majority stated:

> 10 In the hearing before us the appellant sought to argue that the prohibition of access was an infringement of his rights under s. 2(b) of the Canadian Charter of Rights and Freedoms.
>
> 11 That point was not pursued in the courts below. While this Court undoubtedly has a discretion to entertain arguments not developed in the courts below, I would not extend that privilege to the appellant in this case. Had the point been raised in chambers, the parties would have had the right to lead evidence. We would have had the benefit of the reasoning of the courts below. If the issue had been clearly raised, interested parties might have sought to intervene even though no constitutional question in the technical sense of that term was raised.

[14] In **R. v. Trabulsey** (1995), 97 C.C.C. (3d) 147 (OCA), Justice LaBrosse for the court stated at p. 154:

> No Charter issued was raised at trial or at the first level of appeal and that argument is made for the first time in this court.
>
> The authorities are clear that as a general rule, a party cannot, on an incomplete record, raise on appeal an entirely new argument which has not been raised in the courts below. In such cases, it can only be speculated what the evidence might have been had the issues been explored factually at trial. Furthermore, it might have been necessary to adduce evidence at trial in relation to these issues: see **R. v. Perka** (184), 14 C.C.C. (3d) 385 at p. 391, 13 D.L.R. (4th) 1, [1984] 2 S.C.R. 232, and **R. v. Ryan** (1992), 12 C.R. (4th) 173 at p. 174, 54 O.A.C. 379, 15 W.C.B. (2d) 269 (C.A.). In **R. v. Brown** (1993), 83 C.C.C. (3d) 129 at pp. 133-4, 105 D.L.R. (4th) 199, [1993] 2 S.C.R. 918, Madame Justice L'Heureux-Dubé, dissenting, but not on this point, succinctly expressed the basis for the general prohibition against entertaining issues on appeal which were not raised at trial:
>
> > . . . the general prohibition against new arguments on appeal supports the overarching societal interest in the finality of litigation in criminal matters. Were there to be no limits on the issues that may be raised on appeal, such finality would become an illusion. Both the Crown and the defence would face uncertainty, as counsel for both sides, having discovered that the strategy adopted at trial did not result in the desired or expected verdict, devised new approaches. Costs would escalate and the resolution of

> criminal matters could be spread out over years in the most routine cases. Moreover, society's expectation that criminal matters will be disposed of fairly and fully at the first instance and its respect for the administration of justice would be undermined. Juries would rightfully be uncertain if they were fulfilling an important societal function or merely wasting their time. For these reasons, courts have always adhered closely to the rule that such tactics will not be permitted.

[15] In **R. v. Strickland (W.A.)** (1996), 148 N.S.R. (2d) 233 (C.A.), Justice Hallett for the court (at p.235, ¶ 6) expressed a similar view:

> In my opinion the appeal should be dismissed. If the appellant wished to raise the Charter issue he ought to have done so in the Provincial Court on proper notice to the Crown. He pleaded guilty to the offences. I see no reason to depart from the general rule that an issue not raised at trial will not be dealt with on appeal [citations omitted].

[16] This is not the exceptional case when a **Charter** issue may be raised initially on appeal. The course of these proceedings exemplifies why s. 11(b) should have been raised at the outset. The test under s. 11(b) differs from the **Darville** test for adjournment. Because it was not raised, neither of the courts below considered the test under s. 11(b). As a result the Court of Appeal has neither a record nor the benefit of the lower courts' views on the constitutional issue. Had the appellant raised s. 11(b) before Judge Buchan, the Crown could have adduced evidence of the anticipated length of delay to secure attendance of the witness, evidence clearly relevant to s. 11(b) and which is absent from the current record.

[17] In summary, Wright, J. found no demonstrable prejudice from the requested adjournment, and he overturned the dismissal. We would find that there was no error of law made by Wright, J. when he allowed the appeal.

[18] As to whether the order of Justice Wright should have been for a continuation of the trial rather than a new trial, we would agree with the submission of the respondent that dismissal of the charge by the trial judge is tantamount to an acquittal. Thus, the summary conviction appeal court judge, in allowing the appeal from the dismissal of the charge, has two choices, enter a conviction or order a new trial. Here, without all of the evidence being heard,

conviction was not an option. Therefore, remitting the case for a new trial was the correct decision. (See **R. v. Kelly**, [2002] N.S.J. No. 583 (C.A.); s. 839(1) and s. 686(4) **Code.)**

[19] In summary, we would find no error of law and we would grant leave to appeal but dismiss the appeal.

Glube, C.J.N.S.

Fichaud, J.A.

Concurred:

Chipman, J.A.