<u>IN THE YOUTH JUSTICE COURT FOR THE PROVINCE OF NOVA SCOTIA</u>

Citation: R. v. R.F., 2010 NSPC 88

DATE: November 5 2010
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HER MAJESTY THE QUEEN

versus

R.F.

ORAL DECISION

HEARD BEFORE: The Honourable Judge Timothy Gabriel

PLACE HEARD: Youth Justice Court
Halifax, Nova Scotia

DATE HEARD: November 5, 2010

COUNSEL: Gary Holt, Q.C. Crown Attorney
Rickcola Slawter Defence Attorney

RESTRICTION ON PUBLICATION

Section 110(1) of the *Youth Criminal Justice Act*

Subject to this section, no person shall publish the name of a young person, or any other information related to a young person, if it would identify the young person as a young person dealt with under this *Act*.

GABRIEL, J.P.C. (Orally):

[1] By information sworn on May 28th, 2010, the accused, R.F., was charged on a six-count information as follows: Section 244, discharge of a firearm with intent to cause bodily harm; section 87(1), pointing a firearm; section 86(1), careless use of a firearm; two counts under section 94(1), occupying a motor vehicle in which there is a firearm or restricted weapon; and section 267(a), assault with a weapon. He was remanded into custody and has been in custody since.

[2] Subsequently, the information was amended with the consent of the parties. Nothing flows from the fact of that amendment, at least insofar as the matters that bring us here today.

[3] On July 29th, the parties appeared. It is common ground between counsel, both of whom had opportunity to review the tapes of this and other (earlier) court appearances, that Crown counsel, while indicating that the Crown was "probably" proceeding by indictment, did not formalize that in any way. The accused appears to have subsequently entered a plea of not guilty on July 29, 2010, to all charges.

[4] On the next appearance, the matter was adjourned. On October 7th, trial dates of November 2nd and 3rd were agreed upon. The Crown never, as I indicated, proceeded to say anything more with respect to its election.

[5] Ultimately, trial dates were selected, and on or before November 2nd, discussions ensued between counsel as to attempts to resolve the matter. While a global resolution was not achieved, they did reach a point where the accused appeared on November 2nd, entered a plea of guilty to the fourth count under section 94(1).

DECISION

[6] Now, the relevant portions of section 94(1) are sufficient to indicate that this is a hybrid offence, and this is made explicit under subsection (2). I should add at this point that the other five counts that were on the information were all either hybrid or straight indictable offences.

[7] In any event, on November 2nd the accused's plea was accepted. The Crown provided the court with a statement of facts. The defence offered no dispute as to what was asserted with respect to those facts. A section 36(1) finding was made. The Crown at one point indicated it was offering no evidence on the other counts in the information.

[8] Certain consequences flow from this. First, of course, a finding of guilt has been entered in the 94(1) count and the Crown elected to call no evidence on the remaining counts in the information. That would appear to constitute the extent of the agreement that the parties were able to reach before coming to court. They never were able to agree to sentence so a sentencing hearing was commenced.

[9] The Crown spoke first. Counsel pointed to the fact that the accused was wearing a bulletproof vest while riding in a motor vehicle, that he was also found in possession of a balaclava or mask, that the vehicle in which he was situate was involved in a speedy chase of another, and that the other vehicle was penetrated four times by bullets or ammunition fired from the accused's vehicle. It is clear that, although it does not appear that the accused was the operator of the pursuing vehicle, or at the very least we can't conclude that he was, his choice of attire while carrying a balaclava or a mask with him shows that he went into the car expecting

serious trouble and an exchange of gunfire. It's also clear that the Crown further feels that this was no passive or peripheral involvement, even if he was not, as I say, shown to be the driver or that he actually carried or fired the weapon that was used.

[10] Moreover, the Crown goes on to point out that the accused, who is presently about two weeks shy of his 18th birthday, has a lengthy youth record dating back to August 2007, including numerous breaches of undertaking, at large on undertaking, failures to comply with sentence or disposition, failures to comply with undertaking, at large on undertaking, together with a trafficking conviction, assault and assault with a weapon, assaulting a peace officer and resisting a peace officer.

[11] I emphasize that these are Crown submissions only at this stage, but they serve to contextualize the Crown's sentencing position, namely, that the purposes and objectives of the YCJA or *Youth Criminal Justice Act* cannot be achieved by any means other than a custody and supervision order under section 42(2)(n) of the act, consisting of 18 months in total, crediting the accused with the 160 days that he has served in custody at 1.5 times, with the remaining time to be approximately 300 days, 200 to be spent in custody and the remainder in community supervision.

[12] I am satisfied that Crown counsel did indicate to defence that this range would be sought prior to the accused having changed his plea to guilty and prior to the section 36 finding having been made.

[13] At the conclusion of the Crown's submissions, defence counsel then brought to the Court's attention that the Crown had never elected with respect to the 94(1) charge to which the accused had pled. Her argument, which was much lengthier than this, can be essentially boiled down to the following points. 94(1) is a hybrid offence. The second point is the Crown failed to elect. The most which can be said is that the Crown indicated the probability that it would be proceeding by indictment. Third, therefore, the Crown is deemed to have proceeded summarily. Summary offences carry a maximum term of six months under the *Criminal Code*. Fourth, although the sentencing provisions of the *Youth Criminal Justice Act* are a self-contained code by virtue of section 50 of the act, section 38(2), to a limited extent, brings the Criminal Code provisions back in again when it states:

[14] "A youth justice court that imposes a youth sentence on a young person shall determine the sentence in accordance with the principles set out in subsection (3) and the following principles:

> (a) The sentence must not result in a punishment that is greater than the punishment that could be appropriate to an adult who has been convicted of the same offence committed in similar circumstances."

[15] The fifth point the defence raises is that, since an adult convicted summarily of an offence under 94(1) would only face a maximum sentence of six months imprisonment, that is the maximum length of time to which the accused can be subject, notwithstanding the wording of section 42(2)(n) which specifics a maximum length of time for a custody and supervision order of two years.

[16] Mr. Holt for the Crown disputes the main tenet of the defence argument. In particular, he argues that there is no deemed election to proceed summarily with respect to the hybrid 94(1) offence that flows from a Crown failure to formally verbalize its election under the circumstances of this case. He maintains that the earlier indication given by the Crown to the court that it would likely proceed by indictment, coupled with the seriousness of the circumstances of the offence, coupled with the fact that counsel during settlement discussions had indicated that he would be seeking a sentence of 18 months under 42(2)(n) of the *Youth Criminal Justice Act*, would have made it clear to the accused the direction in which the Crown had proceeded prior to the accused's decision to plead under section 94.

[17] Without at this point commenting directly on the defence submission to the effect that the combination of section 38(2)(a) and section 787 of the *Criminal Code* serve to import a six month maximum into the summary offences under the *Youth Criminal Justice Act* (notwithstanding the provisions of section 50(2) of the act, which indicate that the six month maximum under the *Criminal Code* is not applicable), it is important to first consider the main thrust of the defence argument, namely, that the Crown is deemed to have elected summarily in these circumstances.

[18] I start, therefore, with the *Interpretation Act*, R.S.C. 1985, c. 47, and note that section 34(1)(a) provides that an offence is presumed to be indictable if the enactment provides that the offender may be prosecuted for the offence by indictment. Since the Crown may, but not must, elect to prosecute a hybrid offence by indictment, such offences, it would follow, are to be treated as indictable until the Crown elects otherwise.

[19] However, it's not as simple as that, and things rarely are. A Crown may make its election other than verbally. For example, under some circumstances it may be deemed to have made an election. This was stated by Justice Fish explicitly in writing for the majority of the Supreme Court of Canada in *R. v. Dudley* 2009 S.C.R. 570, where at paragraph 18 he states, and I quote:

> "Pursuant to s. 34(1)) of the *Interpretation Act*, an offence is presumed indictable 'if the enactment provides that the offender may be prosecuted for the offence by indictment.' Hybrid offences are therefore treated as indictable, unless the Crown elects, or is deemed to have elected, to try them summarily."

[20] Shortly thereafter, within the context of the same decision, at paragraph 20 Justice Fish provided some further elaboration on this when he stated, and again I quote:

> "In the absence of an express election, it will in any event be presumed that the Crown has elected to proceed summarily where a hybrid offence is proceeded with through trial to a verdict in a court having jurisdiction to hear summary conviction proceedings: *R. v. Mitchell* (1997), 121 C.C.C. (3d) 139 (Ont. C.A.) at para 4. Similarly, the Crown will be deemed to have elected to proceed by indictment where the accused has been put to the election as to mode of trial required, for example by s. 536 of the *Criminal Code,* so long as the proceedings take place in a court having jurisdiction over the alleged offence."

[21] I therefore conclude from what we've just indicated that silence on the part of the Crown coupled with acts consistent with the indictment process, such as the accused being put to election, would constitute a deemed election on the part of the Crown to proceed by indictment. However, silence coupled by participation in a process that is only compatible with the summary conviction process, such as failure to have the accused elect prior to trial, would seem to constitute a deemed election to proceed summarily.

[22] Cromwell J.A. (as he then was) states it this way in *R. v. Paul-Marr* at paragraphs 20 to 24:

> "This section means that, where an offence may be prosecuted by either indictment or summary conviction at the election of the Crown, the offence is deemed to be indictable until the Crown elects to proceed by way of summary conviction."

[23] And he quotes authorities for that.

> "All of the charges on this information fall under this category. Therefore, they are deemed by section 34 to be indictable until the Crown elects otherwise. Generally, the Crown will elect expressly and the election will be noted in the information. However, even if it does not expressly elect, the Crown may be deemed to have elected -- in effect, will have an election attributed to it -- by virtue of the way the proceedings were actually conducted."

[24] And I emphasize the last sentence.

> "So, for example, in *R. v. Robert* (1973), 13 C.C.C. (2d) 43 (Ont. C.A.), the Crown failed to elect as to the mode of procedure in the case of an offence which, at the Crown's election, could be proceeded with indictably or summarily. The case proceeded to trial without objection in the summary conviction court. The Ontario Court of Appeal held that, in these circumstances, the Crown should be deemed to have elected to proceed summarily. This principle from *Robert* was cited with approval by this court in *R. v. Shea* (1976), 116 N.S.R. (2d) 706, although it was found not to be applicable in the circumstances there present.
>
> The same principle may result in a deemed Crown election of indictable procedure. In *R. v. Tommy*, [1989] B.C.J. No. 2207 (Q.L.)(C.A.), the Crown did not expressly elect the mode of procedure but did not object when the presiding judge gave the accused her election as to mode of trial. <u>That step, of course, is consistent only with the Crown proceeding by indictment.</u> The accused elected trial by Provincial Court judge and then pleaded guilty. The court found that there should be a deemed Crown election of indictable procedure,..." (emphasis added)

[25] I will move on to paragraph 24 of *R. v. Paul-Marr* (supra) and continue with Justice Cromwell's quote.

> "I conclude, therefore, that section 34 of the *Interpretation Act* governs unless the Crown makes an election. That election may either be express

or implied from the way the proceedings unfold."

"The effect of section 34 of the *Interpretation Act* may be displaced, not only where there is an express Crown election but also where it is clear from what subsequently happens that the Crown intended to proceed one way or the other." (Emphasis added)

[26] It is notable, however, that these authorities all arose under the *Criminal Code*, which mandates a different procedure for indictable and summary conviction matters. Generally speaking indictable matters involve putting an accused to an election. Therefore, it is often easy to see which way a Crown will be deemed to have elected simply by referring to the presence or absence of an election by the accused.

[27] Proceedings under the *Youth Criminal Justice Act* are not quite so cut and dried. For example (and this is not exhaustive) we have the provisions of section 14, we have the provisions of section 50, we have the provisions of section 142, and we have a whole host of other provisions under the legislation. The effect is that the process adopted in Youth Court is a summary one. The accused is never put to an election save in the most serious of circumstances. (See, for example, sections 66 to 68 of the *Youth Criminal Justice Act*)

[28] Up to the date on which the plea was entered in this case (and the section 36 finding was made) nothing had been done that would be discernible from the process followed that could lead anyone to believe that the Crown had negated the effect of section 34(1) of the

Interpretation Act. This is consistent with the approach taken in cases like *Dudley, Mitchell, Paul-Marr, Coupland* and others. We don't adopt a rigid formalistic process when we're dealing with these things. We look at the entire circumstances of the case to determine whether an election should be imputed to the Crown based on what has happened to date.

[29] The rationale for this is obvious. We can't have an accused being misled or prejudiced by conduct of the Crown which is indicative of a summary process and then being blindsided by an attributed election of indictment.

[30] In this case, there is nothing about the process from which the accused or defence could have inferred or, to put it differently, by which the Crown should be deemed to have proceeded summarily. In these circumstances, it has therefore proceeded by indictment.

[31] Does this ruling create prejudice to the accused? I have concluded that it does not. The seriousness of the circumstances of the offence alleged, combined with Crown counsel having told the defence prior to plea that he would be seeking a sentence of 18 months, and the fact that it had been indicated to defence and the court at an earlier appearance that the Crown was "probably" proceeding by way of indictment, all support this conclusion. There was nothing from the process, the way it unfolded or from what was available or appears to have been available to the defence from which the accused could have concluded that the Crown was proceeding summarily. In short, there was nothing to displace the provision of section 34 (1)(a) of the *Interpretation Act***.**

[32] I have therefore concluded that this matter is before me by way of indictment. Since the maximum sentence under section 94(1) of the *Criminal Code* is 10 years under that circumstance, the difficulty to which the defence has referred (posed by section 38(2)(a) of the *Youth Criminal Justice Act*) does not exist. It is therefore not necessary for me to decide at this point whether section 38(2)(a) modifies the two year maximum for a custody and supervision order specified in 42(2)(n), and what the effect section 50 of the YCJA (which expressly stipulates that section 787 of the Code is not applicable to YCJA matters) might be if I had different circumstances before me. I don't have to determine it for the purposes of my decision here.

[33] However, I do add, perhaps gratuitously, that the particular interpretation of section 38(2)(a) urged by defence counsel in her submissions, appears to be inconsistent with the other sentencing principles contained in sections 38, 39, and 42 of the *Youth Criminal Justice Act*. I will now proceed to hear the remaining submissions with respect to sentence.

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Gabriel, J.P.C.