SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Nassar*, 2023 NSSC 379

Date: 20231114
Docket: CRH-526360
Registry: Halifax

Between:

His Majesty the King

v.

Ahmad Belal Nassar

DECISION ON CROWN RE-ELECTION APPLICATION

Judge:	The Honourable Justice Joshua Arnold
Heard:	November 14, 2023, in Halifax, Nova Scotia
Counsel:	Jennifer Crewe, for the Crown Ahmad Nassar, self-represented Accused

Overview

[1] Ahmed Belal Nassar is charged with multiple hybrid offences. The Crown initially elected to proceed by way of indictment. Mr. Nassar elected to be tried in the Supreme Court with a judge and jury. The Crown now wishes to re-elect to proceed summarily. Mr. Nassar is opposed to the Crown's re-election. Because Mr. Nassar is remanded and time is of the essence, I provided the parties with a bottom-line decision at the conclusion of the hearing, allowing the Crown's application to re-elect, with written reasons to follow. These are my written reasons.

Facts

[2] Mr. Nassar is alleged to have committed the crimes between August 15-21, 2023, and is charged according to the following *Criminal Code* sections: 266 (two counts), 267(c), 145(5)(a) (six counts), and 279(2).

[3] According to the file materials, Mr. Nassar was arrested on August 23, 2023. During his arraignment on August 24, 2023, he advised the court that he would be self-represented. Mr. Nassar was in custody, did not wish to proceed to a bail hearing, and was remanded into custody. The Crown elected to proceed by way of indictment. None of the offences for which he is charged fit within the criteria for a preliminary inquiry as set out in s. 536(2), (3) and (4) of the *Criminal Code*, which states:

> **536 …**
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> **Election before justice — 14 years or more of imprisonment**
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> **(2)** If an accused is before a justice, charged with an indictable offence that is punishable by 14 years or more of imprisonment, other than an offence listed in section 469, the justice shall, after the information has been read to the accused, put the accused to an election in the following words:
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> You have the option to elect to be tried by a provincial court judge without a jury and without having had a preliminary inquiry; or you may elect to be tried by a judge without a jury; or you may elect to be tried by a court composed of a judge and jury. If you do not elect now, you are deemed to have elected to be tried by a court composed of a judge and jury. If you elect to be tried by a judge without a jury or by a court composed of a judge and jury or if you are deemed to have elected to be tried by a court composed of a judge and jury, you will have a preliminary inquiry only if you or the prosecutor requests one. How do you elect to be tried?

Election before justice — other indictable offences

(2.1) If an accused is before a justice, charged with an indictable offence — other than an offence that is punishable by 14 years or more of imprisonment, an offence listed in section 469 that is not punishable by 14 years or more of imprisonment or an offence over which a provincial court judge has absolute jurisdiction under section 553 —, the justice shall, after the information has been read to the accused, put the accused to an election in the following words:

You have the option to elect to be tried by a provincial court judge without a jury; or you may elect to be tried by a judge without a jury; or you may elect to be tried by a court composed of a judge and jury. If you do not elect now, you are deemed to have elected to be tried by a court composed of a judge and jury. How do you elect to be tried?

Procedure where accused elects trial by provincial court judge

(3) Where an accused elects to be tried by a provincial court judge, the justice shall endorse on the information a record of the election and shall

> **(a)** where the justice is not a provincial court judge, remand the accused to appear and plead to the charge before a provincial court judge having jurisdiction in the territorial division in which the offence is alleged to have been committed; or
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> **(b)** where the justice is a provincial court judge, call on the accused to plead to the charge and if the accused does not plead guilty, proceed with the trial or fix a time for the trial.

Request for preliminary inquiry

(4) If an accused referred to in subsection (2) elects to be tried by a judge without a jury or by a court composed of a judge and jury or does not elect when put to the election or is deemed under paragraph 565(1)(a) to have elected to be tried by a court composed of a judge and jury, or if an accused is charged with an offence listed in section 469 that is punishable by 14 years or more of imprisonment, the justice shall, subject to section 577, on the request of the accused or the prosecutor made at that time or within the period fixed by rules of court made under section 482 or 482.1 or, if there are no such rules, by the justice, hold a preliminary inquiry into the charge.

[4] The Indictment is dated August 30, 2023. On August 31, 2023, Mr. Nassar was advised during Crownside that the Crown wanted to re-elect and proceed by way of summary conviction. Mr. Nassar opposed the re-election. The matter was adjourned to Crownside on September 14, 2023, then September 21, and finally to October 5, when the Crown reiterated its intention to re-elect to proceed summarily. Mr. Nassar maintained his opposition to the re-election. His judge and

jury trial was scheduled for March 25-28, 2024, and November 14, 2023, was scheduled as the date for hearing the Crown's motion to re-elect.

[5] On November 3, 2023, I had a recorded Teams conference with the parties, during which Mr. Nassar confirmed that he would be self-represented, and that he was not yet in receipt of the Crown's materials regarding re-election. The Crown agreed to ensure the materials were delivered to him. The Crown was questioned as to whether it could simply re-lay an information in Provincial Court, proceed by way of summary conviction and withdraw the indictment, as opposed to having a hearing regarding re-election. Ms. Crewe advised that because Mr. Nassar is self-represented and has been remanded, the Crown felt it more fair to Mr. Nassar to have the court decide the re-election issue.

[6] On November 9, 2023, Crown Attorney Jennifer Crewe sent the following e-mail to the Court:

> I write following the pre-hearing conference held on Friday, November 3, 2023, in relation to the Crown's application regarding a ruling as to its authority to re-elect without the accused consent.
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> At that hearing, Your Lordship inquired about whether the Crown had considered withdrawing the information and having a new information laid.
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> I can advise that, the Crown has given this consideration, specifically with the circumstances of this matter in mind, and would prefer to continue with the Application as set out before the Court as it appears to be most appropriate in light of these circumstances.

[7] During the hearing on November 14, Mr. Nassar confirmed that he was in receipt of the Crown materials, maintained his right to be self-represented, and made no submissions on the application.

Analysis

[8] In *R. v. Sheehan*, 2010 NLTD(G) 167, Goodridge J. (as he then was), undertook a thorough review of the law regarding the Crown's discretion to re-elect to proceed by way of summary conviction following an original Crown election to proceed by way of indictment. Justice Goodridge said variously:

> [8] I do not agree with this logic and find that all that occurred here was a proper exercise of Crown discretion. The election that the Attorney General makes on the hybrid offences to prosecute by way of summary conviction or by

way of indictment is part of this discretion and arises from the common law. The discretion of the Attorney General to elect the mode of prosecution as he sees fit was part of the British and Canadian conception of equality before the law: **R. v. Smythe**, [1971] S.C.R. 680 at paragraph 11. The *Criminal Code* is silent on this subject. The *Code* is also silent on any entitlement that the Crown might have to change its election. But Crown counsel still has the discretion. The Crown acts as agent for the Attorney General, performing a function inherent in that office when making the election to proceed by indictment and again when making re-election to proceed summarily.

[9] Several of the authorities filed by counsel recognize the Crown's discretion at common law to re-elect.

[10] In **Abarca v. R.**, 57 C.C.C. (2d) 410, 1980 CarswellOnt 1278 (C.A.), the Crown initially elected to proceed summarily but later re-elected to proceed by indictment. At paragraph 17 the court found that the discretion of the Crown to proceed summarily or by indictment was not a matter reviewable by the courts:

> The Crown Attorney, when exercising the discretion to prosecute by way of indictment, is acting as an officer of the Crown and performing a function inherent in the office of the Attorney-General whose agent he is for that purpose. He is not acting pursuant to a statutory power and is not exercising a statutory discretion and accordingly his decision is not subject to review by the courts.

[11] The court did acknowledge the possibility of an exception if there was an abuse of process. There is the inherent and residual discretion to prevent an abuse of the court's process. No such abuse was found to be present in **Abarca**.

[12] **R. v. Graetz,** 2007 QCCS 309, 2007 CarswellQue 776 (Sup. Ct.) recognizes the Crown's right to re-elect from indictable to summary at paragraphs 16 and 17:

> 16 … up to the point of the holding of the preliminary inquiry, the Crown in this case could have re-elected to proceed by summary conviction without the need to obtain the accused's consent.
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> 17 … the Crown could, in the absence of oblique motives, re-elect to proceed by summary conviction notwithstanding the accused's opposition.

[13] **R. v. Linton** [1994], 90 C.C.C. (3d) 528, 18 O.R. (3d) 647 (Gen. Div.) implies that the Crown's right to re-elect from indictable to summary, even without the accused's consent, would continue up until the commencement of the preliminary inquiry:

> I see no reason why, during the course of a preliminary hearing, the Crown cannot seek to re-elect to proceed summarily. I would qualify this, as did the court in Hancock, by observing that such re-election ought not

> to be permitted once the preliminary hearing has commenced, absent the consent of the accused.
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> [14] Looking at the *obiter* in these various decisions, I note that the Crown's freedom to re-elect to proceed summarily might be lost if the preliminary inquiry has begun, the trial has begun, six months has expired, or there is an abuse of process (e.g. oppression, prejudice or hardship to the accused). I find that none of these factors is at play in this case.
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> [15] I do not accept Mr. Malone's argument that section 535 limits the authority of the Provincial Court Judge to accept the Crown's re-election. I find that it is a matter within the Crown's discretion and the Provincial Court Judge was correct to accept the re-election in this situation. There is good discussion in **R. v. Power**, [1994] 1 S.C.R. 601 at paragraphs 28 to 42 of the dangers that arise when courts interfere in matters that are within the Crown's discretion. At paragraph 33 of **Power**, L'Heureux-Dubé J. cites with approval the comments of J. A. Ramsay in his article "Prosecutorial Discretion: A Reply to David Vanek" (1987-88), 30 Crim. L.Q. 378, at pages 378 - 380: "If the court is to review the prosecutor's exercise of his discretion the court becomes a supervising prosecutor. It ceases to be an independent tribunal".
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> [16] In this case the Provincial Court Judge, in accepting the Crown's discretion to re-elect, also found that re-election would not prejudice the accused. I know that Mr. Sheehan may disagree because he prefers to have the preliminary inquiry and a jury trial. There are many legal and tactical considerations in play, and I acknowledge that Mr. Sheehan made decisions based on the Crown's initial election and now feels he has been prejudiced. But this is not enough for the Court to override the Crown's discretion. The Crown advised Mr. Sheehan of its decision to re-elect at a very early stage in proceeding and before commencement of the preliminary inquiry. There is no indication of any abuse of process by the Crown. I agree with the Provincial Court Judge and find that there is no degree of prejudice here that would justify denying the Crown's discretion to re-elect. [Emphasis added]

[9] In John L. Gibson and Henry Waldock, *Criminal Law Evidence, Practice and Procedure* (Thomson Reuters: online) the authors note at § 28:64:

> On hybrid matters, after electing to proceed by indictment, the Crown may re-elect to proceed summarily, so long as:
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> (a) the information was sworn within the limitation period for summary proceedings; *R. v. Kalkhorany*, 1994 CarswellOnt 71, 29 C.R. (4th) 379, 89 C.C.C. (3d) 184 (Ont. C.A.); R. v. E. (D.M.), 2014 CarswellOnt 8573, 12 C.R. (7th) 406, 313 C.C.C. (3d) 70, 2014 ONCA 496 (Ont. C.A.); and

(b) the defence is not prejudiced; *R. v. Sheehan*, 2010 CarswellNfld 345, 2010 NLTD(G) 167 (Nfld. T.D.).

In *R. v. Hancock*, 1992 CarswellOnt 786 (Ont. C.A.), the prosecution re-elected to proceed by indictment after the accused pleaded not guilty, and after the first witness began to testify. The court found that the prosecution required the consent of the defence to change the proceedings so greatly at that late stage.

Crown's re-election recommences the proceedings. Pleas should be taken anew before a court which has jurisdiction, and any evidence previously presented must be formally accepted into the record in the new proceeding. *R. v. Kalkhorany*, 1994 CarswellOnt 71, 29 C.R. (4th) 379, 89 C.C.C. (3d) 184 (Ont. C.A.); R. v. E. (D.M.), 2014 CarswellOnt 8573, 12 C.R. (7th) 406, 313 C.C.C. (3d) 70, 2014 ONCA 496 (Ont. C.A.).

[10] Similarly, Alan D. Gold states, in *Halsbury's Laws of Canada – Criminal Procedure* (2020 Reissue), at §HC2-399:

Application of Part XXVII.

Except where otherwise provided by law, Part XXVII of the Code applies to proceedings as defined in s. 785.

Crown election. Part XXVII applies to a hybrid offence only after the prosecutor has elected to proceed by way of summary conviction. It does not apply if the accused elects summary trial of an indictable offence before a provincial court judge. The Crown's power of election is constitutionally valid. A reference to a section of the Code that describes an offence or provides the punishment imposed on summary conviction does not constitute the prosecutor's election to proceed by way of summary conviction. The prosecutor is not barred thereafter from electing to proceed by indictment. After the prosecutor has elected to proceed by way of summary conviction, and a plea has been taken and evidence given, the prosecutor cannot thereafter elect to proceed by indictment. Where the prosecutor fails to elect and the case proceeds in a summary conviction court, the prosecutor is deemed to have elected to proceed by summary conviction. The Crown can, in the absence of oblique motives, re-elect to proceed by summary conviction even after a date has been set for a preliminary inquiry pursuant to the Crown and the accused's initial elections.

After plea. If the accused was charged with an indictable offence, and pleads guilty to a lesser included offence that is a hybrid, the accused must be taken to plead guilty to the indictable offence. There is no provision for the prosecutor to elect to proceed by way of summary conviction after plea.

[11] In *R. v. Hancock* (1992), 60 O.A.C. 322 (Ont. C.A.), the appellant was charged with the hybrid offence of assault. The Crown elected to proceed by

summary conviction. During the trial, the judge, over defence objections, allowed the Crown to change its election from summary conviction to indictment. In relation to the re-election issue, the Court of Appeal said:

> 5 There is no statutory authority which entitles the Crown to change its election from summary conviction to indictment after an accused has been arraigned, has pleaded and the trial has begun. No case was cited to us where the issue to be decided was whether or not the Crown, in the absence of the accused's consent, has the right to change its election in such circumstances. We think that the acknowledged right of the Crown to make an election does not carry with it the right to change that election, without the consent of the accused, after the accused has been arraigned, has pleaded and the trial has begun.
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> 6 It is our opinion that the purported change of election was ineffective to change properly constituted summary conviction proceedings into proceedings by indictment. The proceedings were, therefore, summary conviction from the moment of election until judgment. With her usual skill Ms Van Overbeek submitted that this appeal should be dismissed because there has been no substantial wrong or miscarriage of justice. She contended that the Crown would have been entitled to withdraw the charge during the trial and start anew with a new information or indictment. It is unnecessary for us to examine that interesting submission because that is not what happened in this case. Here the proceedings were summary conviction from election to judgment.

[12] The facts in *Hancock* are distinguishable from Mr. Nassar's situation, in that his trial has not commenced and no evidence has yet been called. Instead, the facts are similar to those in *Sheehan.* I agree entirely with the analysis of Goodridge J. and adopt his reasons in that case.

[13] In the instant case, I do not know why the Crown initially proceeded by way of indictment and then, within a month, after Mr. Nassar elected to be tried by judge and jury, changed its position and announced the intention to re-elect and proceed by way of summary conviction. Otherwise, little has changed in the interim:

- The facts have not changed;
- There was no preliminary inquiry;
- No plea has been entered because of the judge and jury election;
- The jury trial is not scheduled to commence for several months;
- Mr. Nassar has been remanded since his arrest on August 24, 2023;

- The Crown announced its intention to re-elect within a month of Mr. Nassar being charged, and it is now almost three months since his arrest on these charges due to Mr. Nassar's opposition to the re-election and the subsequent process of obtaining a hearing date for this application;
- The limitation period for a summary proceeding has not expired (approximately three months since the offence date);
- Had the Crown simply withdrawn the indictment and re-laid an information in Provincial Court proceeding by way of summary conviction, the process could have been completed in September, trial dates set in Provincial Court, and potentially saved Mr. Nassar two months on remand;
- The Crown says that the trial of Mr. Nassar would be completed in Provincial Court much efficiently than in Supreme Court, and he will be exposed to less potential jail time if convicted of a summary conviction offence:

> The Crown submits that Mr. Nassar will suffer little to no prejudice as a result of this re-election. The Crown made its intention to re-elect known at a very early stage in the proceeding, having conveyed its position at the first Crownside appearance (the second court appearance on this matter in total) and less than a week after the initial elections were made. The Application date was formally set at a Crownside appearance on October 5th, 2023. The re-election to a summary proceeding subjects Mr. Nassar to lesser penalties than those if the matter proceeded by indictment. The Crown submits that a trial in provincial court could be completed in a lesser amount of time and use lesser court resources than a judge and jury trial. Additionally, no appearances equivalent to a preliminary inquiry or a trial have commenced in this matter, with trial dates presently set for March 25-28, 2024.
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> [Emphasis added.]

- Mr. Nassar's jury trial is currently scheduled in Supreme Court for March 24-28, 2024. No likely dates for his trial in Provincial Court were provided during the hearing.

[14] There is no abuse of process in this case. However, there is some prejudice to Mr. Nassar in that he is remanded in custody and there is no clarity as to whether he will be able to get an earlier trial date in Provincial Court.

[15] Nonetheless, the Crown has discretion to re-elect in these circumstances. The principles outlined in *Sheehan* entirely support the Crown motion. Re-election is permitted.

[16] That said, the parties should keep in mind the clear exhortations from the Supreme Court of Canada in *R. v. Jordan*, 2016 SCC 27, and *R. v. Cody*, 2017 SCC 31, directing all justice participants, including the Crown, to examine their own practices in an effort to find ways to avoid historically tolerated delays. In *Jordan*, the majority emphasized the Crown's responsibility to exercise its prosecutorial discretion in a manner that conforms to an accused's s. 11(b) right, and stated:

> [79] It bears reiterating that such determinations fall well within the trial judge's expertise. And, of course, the trial judge will also want to consider whether the Crown, having initiated what could reasonably be expected to be a complex prosecution, developed and followed a concrete plan to minimize the delay occasioned by such complexity (*R. v. Auclair*, 2014 SCC 6, [2014] 1 S.C.R. 83, at para. 2). Where it has failed to do so, the Crown will not be able to show exceptional circumstances, because it will not be able to show that the circumstances were outside its control. In a similar vein, and for the same reason, the Crown may wish to consider whether multiple charges for the same conduct, or trying multiple co-accused together, will unduly complicate a proceeding. While the court plays no supervisory role for such decisions, Crown counsel must be alive to the fact that and delay resulting from their prosecutorial discretion must conform to the accused's s. 11(*b*) right (see, e.g., *Vassell*). As this Court said in *R. v. Rodgerson*, 2015 SCC 38, [2015] 2 S.C.R. 760:
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> > Certainly, it is within the Crown's discretion to prosecute charges where the evidence would permit a reasonable jury to convict. However, some semblance of a cost-benefit analysis would serve the justice system well. Where the additional or heightened charges are marginal, and pursuing them would necessitate a substantially more complex trial process and jury charge, the Crown should carefully consider whether the public interest would be better served by either declining to prosecute the marginal charges from the outset or deciding not to pursue them once the evidence at trial is complete. [para. 45]
> >
> > [Emphasis added]

[17] As the court discussed in *R. v. Hanan*, 2019 ONSC 320, affirmed 2022 ONCA 229, and affirmed 2023 SCC 12, there are times when the Crown's exercise of discretion in relation to re-election can have a bearing on the s. 11(b) analysis. In *Hanan*, the court determined that, while the Crown has unfettered discretion as to whether to refuse to consent to a judge-alone re-election request by

the accused in a murder case, the impact of the exercise of such discretion is a consideration in the overall delay analysis.

Conclusion

[18] The Crown's application to re-elect from the original election to proceed by way of indictment to now proceed by way of summary conviction is allowed. As noted during the hearing on November 14, the Crown is responsible for having the matters transferred back to the Provincial Court by Friday, November 17, 2023.

Arnold, J.