PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. George*, 2017 NSPC 1

Date: 2017-01-10
Docket: 2839603
2839604
2839605
2839606
2910825
Registry: Bridgewater

Between:

Her Majesty the Queen

v.

Michael David George

Judge: The Honourable Judge Paul Scovil

Decision: January 10, 2017

Charges: Section 4(1) Controlled Drugs and Substances Act
Section 4(1) Controlled Drugs and Substances Act
Section 86(2) Criminal Code of Canada
Section 91(1) Criminal Code of Canada
Section 5(1) Controlled Drugs and Substances Act

Counsel: Joshua Bryson for the Public Prosecution Service of Canada
David Hirtle for the Accused

By the Court:

[1] On February 26th, 2015, Michael George was charged that on or about the 23rd day of February 2015, at or near Bridgewater, Nova Scotia that he did possess a controlled substance included in Schedule I to wit cocaine for the purpose of trafficking contrary to Section 5 (2) of the **Controlled Drugs and Substances Act**.

[2] Further, that on or about the 23rd day of February, 2015 at the Town of Bridgewater in the Province of Nova Scotia, that he did unlawfully possess a substance included in schedule II to wit cannabis (marijuana), a quantity not exceeding 30 g, contrary to Section 4 (1) of the **Controlled Drugs and Substances Act**.

[3] Further, that he on or about the 23rd day of February, 2015, at the Town of Bridgewater in the Province of Nova Scotia, that he did not store a firearm in a container, receptacle or room that is kept securely locked and that is constructed so that it cannot readily be broken open or into, thereby contravening Section 5 (1) (a) (iii) of the Storage, Display, Transportation and Handling of Firearms by Individuals, contrary to Section 86 (2) of the **Criminal Code.**

[4] Further, that he on or about the 23rd day of February in the year 2015 at the Town of Bridgewater in the Province of Nova Scotia, did possess a firearm to wit: Savage arms 7 mm rifle, without being the holder of a license under which he may possess it contrary to Section 91 (1) of the **Criminal Code**.

[5] Mr. George's counsel argues that the Crown should be deemed to have proceeded with the weapon charges by summary conviction as he argues there had been no Crown election made in relation to them.

[6] Mr. George first appeared on these charges on May 6th, 2015. He appeared with Mr. Feindel. He is currently represented by Mr. Hirtle. Mr. Feindel, at that time his counsel, indicated the Crown was "still looking for the ITO" and was unsure of the timeframe required to find that. The Federal Crown indicated that an unsealing order had been written for but it would require a month to ensure that the same had been obtained.

[7] The Crown further advised that he would be proceeding on the lesser but included offense of Section 4 (1) under the **Controlled Drugs and Substances Act** rather than the charge contained in the information under Section 5 (2). This Court then dismissed the Section 5 (2) charge ordering that the lesser but included

offense of 4 (1) be proceeded with. The matters were then set over to May 20th, 2015.

[8] On May 20th, 2015, Mr. Feindel again appeared for Mr. George. Mr. George himself was not in attendance. Mr. Feindel set out on the record that he was unable to communicate with his client and that he had further advised his client that if he did not hear from Mr. George then he would asked to be removed as solicitor of record. Accordingly, Mr. Feindel was removed as solicitor of record. A warrant was then issued for Mr. George.

[9] Mr. George next appeared on June 5th, 2015. His appearance again was with Mr. Feindel who was back on record as Mr. George's solicitor. Mr. Feindel indicated that in relation to these charges he had received from the Federal Crown the ITO and needed to review that with Mr. George. Mr. Feindel asked that the matters go over to June 17th, 2015. No Court was set for June 17th so the matter was set to July 8th, 2015.

[10] The Federal Crown expressed concern as he appeared to believe that Mr. George was not in Court that day. He asked that a warrant be issued and that it be held to maintain jurisdiction. The Federal Crown indicated that he was concerned

due to the history of the matter and that the matters before the Court were indictable charges as well.

[11] Court staff pointed out that the accused was present and based on that the Crown withdrew its request for a warrant.

[12] On July 8th, 2015, the accused through his counsel Mr. Feindel, entered not guilty pleas and sought a trial date. Trial was then set for December 3rd, 2015 at 1:30 p.m.

[13] On November 18th, 2015, new charges against Mr. George were before the Court. Mr. George requested that the trial then set for December 3rd, 2015 be adjourned. This was agreed to by the Crown. Mr. Feindel, on behalf of Mr. George, asked that the matters go to January 6th, 2016 in order to have time to meet with his client. January 6th, 2016 was to set a further date for trial.

[14] On January 6th, 2016 Mr. Feindel, on behalf of Mr. George, appeared on all charges, waived reading of the election on the new charges and elected Provincial Court. He then asked for trial date on all charges. Notably, the Crown asked if the accused himself was present, “where it’s indictable”. Mr. Feindel indicated that he had filed a designation of counsel before. The Court clerk could not find a

designation of counsel on file and therefore bench warrants were issued on all matters to maintain jurisdiction. Matters were then set to June 6th, 2016 for trial.

[15] On May 11th, 2016, Mr. Feindel appeared to again requested that he be removed as Mr. George's solicitor of record. As he had not been able to make any contact with Mr. George the Court allowed him to withdraw as solicitor record. The trial date was still set for June 6th, 2016.

[16] On May 18th, 2016, Mr. Hirtle appeared for Mr. George for the first time. Mr. Hirtle indicated a designation of counsel would be filed in due course. In fact, Mr. Hirtle filed a designation of counsel for all the charges before the court on that very day. Mr. Hirtle indicated Mr. George wished to enter a re-elections. When asked by the Court, the Provincial Crown indicated that the rest of the matters are being proceeded with by indictment. The Federal Crown indicated that they were proceeding indictably as well at that point. Mr. Hirtle stated the Crown was now proceeding indictably and asked if that had been the original Crown election. The answer to that was set off to a later date to review the record and a date was set for a preliminary hearing in January 2017. That was the first time the question of crown election was put before this Court.

ISSUE:

[17] Mr. Hirtle argues that no election was ever made by the Crown regarding the first set of charges that had been laid. He further argued, that only after a second set of charges being laid, were the Crowns involved seen to be making elections that were to have all charges proceeded with by indictment. Mr. Hirtle argues that the provincial matters laid under the **Criminal Code** are therefore deemed to have been proceeded with summarily. The Crown argues that all matters were to be proceeded with by indictment.

LAW:

[18] The accused cites two cases to support his argument that the weapons charges should be considered by this court as having been proceeded with by way of summary conviction. Those cases where the decision in *R. v. Matthews*, 2013 NSCA 31 and *R. v. F.*, 2011 NSCA 71.

[19] In *Matthews*, Justice Farrar stated at paragraphs 25 to 31 as follows:

> [25] For offenses characterized as hybrid, the Crown elects whether to proceed by indictment or by summary proceedings. Until the Crown elects, the offense is deemed indictable by operation of section 34 (1) (a) of the Federal **Interpretation Act**, R.S.C. 1985, c. I-21.
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> 34. (1) Where an enactment creates an offense,

> (a) the offense is deemed to be an indictable offense if the enactment provides that the offender may be prosecuted for the offense by indictment;

[26] Section 34 (1) (a) applies until the presumption it creates is rebutted. The Supreme Court of Canada in **R. v. Dudley**, 2009 SCC 58 stated:

> [18] Pursuant to s. 34 (1) (a) of the *Interpretation Act*, R.S.C. 1985, c. I-21, an offense is presumed indictable "if the enactment provides that the offender may be prosecuted for the offense by indictment". Hybrid offenses are therefore treated as indictable- unless the Crown elects, or is deemed to have elected, to try them summarily:
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> > In these cases, it is the prosecution that first decides how to proceed. If it chooses to proceed by indictment, the offense is treated in all respects as an indictable offense and the accused has the normal rights of election; if it chooses otherwise, the case proceeds in all respects as a summary conviction offense.
> >
> > (Manning, Mewett & Sankoff: Canada Law (4th ed. 2009), at p. 44)
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> [20] In the absence of an express election, it will in any event be presumed that the Crown has elected to proceed summarily where hybrid offense "is proceeded with through trial to a verdict in a court having jurisdiction to hear a summary conviction proceeding": *R. v. Mitchell* (1997), 1997 Can LII 6321 (ON CA), 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 offense. [Emphasis added]

[27] The application of s. 34 (1) (a), therefore, can be displaced either by an express election of the Crown or deemed election based on the manner in which the proceedings were conducted. When the Crown is not explicitly elect, then an election is attributed to the Crown after a review of the record of proceedings (**Matthews**, p. 12-14; **R. v. F.(R.)**, 2011 NSCA 71, p. 14-15, p. 31-33; **R. v. Paul-Marr**, 2005 NSCA 73, p. 18-21, 25, 28; **R. v. Shea**, 1976 Carswell NS 99, p. 10-11)

[28] In **Paul-Marr**, Justice Cromwell observed:

> [32] It is sensible and just to infer or deem the Crown to have made a particular election when that election is clear from what actually happened.

> [29] The Court in **Dudley** also noted that particularly important to an expressed or attributed summary election is that the proceedings must have been instituted within six months under s. 786 (2) of the **Code** unless the parties agree otherwise (p. 3).
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> [30] When the Information is sworn outside the limitation period and hybrid offenses proceed summarily without consent, such circumstances could rebut the presumption that the crown intended to proceed in that manner (**Paul-Marr**, p. 15, p.28-30)
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> [31] Justice Cromwell's view in **Paul-Marr** (p. 27) that substance should triumph over form when the intended election is clear from the conduct of the participants applies to the circumstances. The Crown's failure to elect expressly should not undo the fact that everyone acted as if the crown had elected to proceed summarily.

[20] Likewise, here the Crown's failure to elect expressly should not undo the fact that everyone acted as if the Crown had elected to proceed indictably.

[21] Again, in **R. v. Mitchell** [1997] O. J. No. 5148, Justice Doherty of the Ontario Court of Appeal stated at paragraphs 4 to 6 as follows:

> 4. Dual procedure offenses are deemed to be indictable unless, and until, the Crown elects to proceed summarily: Interpretation Act, R.S.C. 1985, chap. 1-21, s. 34 (1) (a); *R. v. Gougeon* (1980), 55 C.C.C. (2d) 218 (Ont. C.A.). The Crown election should be made expressly and recorded on the information. Where no express election is made by the Crown, and a dual procedure offense is proceeded with through trial to a verdict in a court having jurisdiction to hear a summary conviction proceeding, it will be presumed in the absence of any indication to the contrary, that the Crown chose to proceed summarily: *R. v. Robert* (1973), 13 C.C.C. (2d) 43(Ont. C.A.); *R. v. Marcotullio* (1978), 39 C.C.C. (2d) 478 (Ont. C.A.); *R. v. Dosangh* (1977), 35 C.C.C. (2d) 309 (B.C.C.A.); *R. v. Ashoona* (1985), 19 C.C.C. (3d) 377 (N.W.T.S.C.); *R. v. Kapoor* (1989), 52 C.C.C. (3d) 41 (Ont. H.C.). This "presumption" is best understood as a somewhat strained application of the "rule" that in applying the criminal law, ambiguities should be resolved in favor of the accused. Summary proceedings expose the accused to a lesser penalty then do proceedings by way of indictment; *R. v. Dosangh*, supra, at p. 312; *R. v. F.M.H. and The Queen* (1984), 14 C.C.C. (3d) 227 (Man. Q.B.).
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> 5. The appellant was tried by a judge of the Ontario Court (Provincial Division). Judges of that court can sit as a summary conviction court under Part XXVII of the **Criminal Code**. Since the crown made no express election, the presumption in favor

> of summary proceedings applies "in the absence of evidence or any other indication to the contrary": *R. v. Ashoona*, supra, at p. 379.
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> 6 In this case, there is a strong indication to the contrary. After an appearance on February 28, 1995, Crown counsel observed that there had been no election made by the appellant and asked that he be put to his election. Defence counsel said "trial by provincial court judge" and the proceedings were adjourned to the next date. The effect of defence counsel's purported election for trial by provincial court judge will be considered under the second ground of appeal. The significance of this exchange, for present purposes, rest in the Crown counsel's request that the appellant be put to his election. The appellant has no election at the crown chooses to proceed summarily. The Crown counsel's request that the appellant be put to his election and that it be endorsed on the information a clear indication that the Crown was proceeding by indictment.

[22] Here while no specific mention of Crown election was originally made on June 5th, 2015, the Crown expressly had concerns regarding the accused not being present and asked that a warrant be issued and held. The Crown further that "there are our indictable charges here". This would be a clear indication to the accused that the Crown intended to proceed indictably and that Mr. Feindel could not appear as agent as he might on summary matters.

[23] Mr. George entered not guilty pleas by counsel on July 8th, 2015 and matters were set for trial on December 8th, 2015. That date was later adjourned.

[24] New charges were before the court on January 6th, 2016 and Mr. George, through counsel, waived reading of the election address on the new charges and again elected Provincial Court. Once again, the Crown was concerned and that the accused be present, "where it's indictable". Mr. Feindel indicated that a

designation of counsel on charges had been filed. As no such designation could be found on file, warrants were issued on all matters and held. This, of course, would not be required on any matters that were being proceeded with summarily.

[25] It would appear in regard to these matters they were all dealt with by counsel as if indictable.

[26] Mr. Hirtle appeared for the first time on May 18th, 2016. He filed a designation of counsel covering all charges. This, again, appears consistent with the accused acting on all matters as if they were proceeded with by indictment. Mr. Hirtle went on to make at re-elections. All Crowns indicated matters were proceeding indictably and only then did Mr. Hirtle question the manner in which the Crowns were proceeding.

[27] In review, all matters were clearly indicated as being tried together. This as well argues that all matters were being proceeded with by indictment. As well, even Mr. Hirtle agreed that before this court that all matters were set for preliminary hearing. If all matters were set for preliminary hearing it would make sense that they were all being proceeded with by indictment.

Conclusion:

[28] With the backdrop as set out above, I find that all matters were intended to be proceeded with by indictment. While matters at one point were set by the accused under previous counsel for trial the matters all before the court, will now be set for preliminary hearing. This will provide the accused with the most flexible ability to deal with these matters now that new counsel is involved.

[29] The accused can re-elect prior to hearing if he so desires and have the matter heard in provincial court.

Paul P. Scovil, JPC