SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. MacDonald*, 2017 NSSC 191

Date: 2017-07-10
Docket: *Syd*. No. 461511
Registry: Sydney

Between:

Her Majesty the Queen

Appellant

v.

Jonus Lee MacDonald

Respondent

Decision on Summary Conviction Appeal

Judge:	The Honourable Justice Robin C. Gogan
Heard:	June 5, 2017, in Sydney, Nova Scotia
Written Decision:	July 10, 2017
Counsel:	John MacDonald for the Appellant Darlene MacRury for the Respondent

By the Court:

Introduction

[1] This is a decision on a summary conviction appeal.

[2] The Crown appeals the decision of the Honorable Judge Peter Ross dated February 22, 2017. On that date, Ross, J. dismissed an assault charge against the accused, Jonas Lee MacDonald ("**MacDonald**"). The Crown is now of the view that the Provincial Court had no jurisdiction to dismiss the charge.

[3] For the reasons that follow, I dismiss the appeal.

Background

[4] By information sworn May 17, 2016, MacDonald was charged that:

> On or about the 16th day of May, 2016, at or near North Sydney, Nova Scotia did in committing an assault on Joe Yorke, cause bodily harm to him, contrary to Section 267(b) of the Criminal Code of Canada.

[5] On June 16, 2016, MacDonald entered plea of not guilty to the charge. The trial was scheduled for February 22, 2017.

[6] On February 22, 2017, Crown and Defence counsel were present in the Provincial Court for the trial. The accused was in the courthouse but not in the

courtroom at the time the case was called. The proceedings were brief and the entirety follows:

> **Ross, J**.: Jonus MacDonald. Jonus Lee MacDonald.
>
> **Defence**: Here on behalf of Mr. MacDonald, Your Honour.
>
> **Ross, J**.: Trial on a charge of assault causing.
>
> **Defence**: Yes.
>
> **Ross, J**.: Ready to proceed.
>
> **Crown**: Ah Your Honour, the Crown was missing a few witnesses this morning. Perhaps if I could just call two names just to be certain. I don't believe that they're here. Joe Yorke and Diane Losiel. And if perhaps the sheriff could just check outside just to make sure that no one is left outside. I see we have a full courtroom here.
>
> **Sheriff**: No.
>
> **Crown**: No one left out there?
>
> **Crown**: In that case, Your Honour the Crown requires the missing witnesses to prove its case. We are not in a position to do so. The Crown would offer no evidence with a single count 267 charge from May 2016.
>
> **Defence**: Motion for dismissal, Your Honour?
>
> **Ross, J.**: Write that charge on. Mr. MacDonald is dismissed. He's no longer on conditions and he is free to go. Any witnesses on that matter may leave.
>
> **Defence**: That's my matter; thank you, Your Honour.
>
> **Ross, J**.: Yes, thank you then.

[7] The affidavit of MacDonald was admitted by consent. This evidence confirms that he was not present in the courtroom at the time his case was called

and dismissed. MacDonald was outside the courtroom waiting for his lawyer. There is no contest that he was in the courthouse but waiting on another floor. He was following instructions that his lawyer had given him the previous day.

[8] By Notice of Summary Conviction Appeal dated March 2, 2017, the Crown appeals the dismissal of the charge against MacDonald on the basis that the Court had no jurisdiction to grant it in the absence of the accused.

Issues

[9] The issue before this Court, as advanced by the Crown, is whether the Trial Judge had jurisdiction to grant the dismissal in MacDonald's absence.

Position of the Parties

The Crown

[10] The Crown submits that the Trial Judge had no jurisdiction to grant the dismissal in the absence of the accused. It argues that the relevant provisions of the *Criminal Code* require that the accused be present for his trial. Given that the Trial Judge acted without jurisdiction, the dismissal must be over turned, and the matter remitted to the Provincial Court for Trial.

The Defence

[11] The Defence strenuously contests this appeal. It submits that the *Criminal Code* does not require the accused to personally appear on summary conviction matters if Counsel is present. It further says that the Trial Judge had jurisdiction to enter the dismissal and there is now no basis to interfere.

[12] In making this submission, the Defence relies upon two things: (1) the fact that the Crown did not seek an adjournment to remedy the non-appearance of its witnesses, and (2) the Crown did not request the presence of the accused at the time or request the Trial Judge confirm the presence of the accused for any reason prior to offering no evidence.

Analysis

(a) *The Standard of Review*

[13] This is an appeal of a decision in a summary conviction matter. Part XXVII of the *Criminal Code* creates two separate avenues of appeal for summary conviction matters. It is open to an appellant to choose which route to pursue.

[14] The first avenue is under s. 813. That section creates a broad right of appeal. Historically, this avenue of appeal involved a trial *de novo*. As a result of changes effected by the *Criminal Law Amendment Act*, S.C. 1974-75-76, c. 93, s.

94, an appeal based on the record, as opposed to an appeal by way of trial *de novo*, is now the usual procedure for summary conviction appeals under s. 813 (See: ***R. v. Century 21 Ramos Realty Inc.***, (1987) 32 C.C.C. (3d) 353 (Ont. C.A.), at pp. 382-385).

[15] The second avenue of appeal is under s. 830. That section creates the right of appeal with the powers of the appeal court set out in s. 834. Section 830 is the successor to provisions providing for an appeal by stated case on questions of law or jurisdiction only (See: ***R. v. Kapoor***, [1989] O.J. No. 1887 (Ont. H.C.J.)). As a result of the *Criminal Law Amendment Act*, S.C. 1985, c. 19, s. 182, the appeal by way of stated case was replaced by a new procedure providing for an appeal based on the transcript or on an agreed statement of facts.

[16] Sections 829 to 838 permit a summary conviction appeal to be taken under s. 830 only on the ground that the decision is either: (a) erroneous in point of law; (b) in excess of jurisdiction; or (c) constitutes a refusal or failure to exercise jurisdiction. The routes of appeal under s. 813 and s. 830 are mutually exclusive. Pursuant to s. 836, an appeal under s. 830 is deemed to be an abandonment of all appeal rights under s. 813.

[17] In the present case, the Crown did not specify the avenue of appeal in its Notice of Summary Conviction Appeal. It did advance lack of jurisdiction as a

ground of appeal and this was the lone ground advanced in both written and oral argument. Therefore, it is appropriate to proceed on the basis of the appeal being brought under s. 830(1)(b). Section 834(1) sets out the powers of the appeal court in this case:

> When a notice of appeal is filed pursuant to section 830, the appeal court shall hear and determine the grounds of appeal and may
>
> (a) affirm, reverse or modify the conviction, judgment, verdict or other final order or determination, or
>
> (b) remit the matter to the summary conviction court with the opinion of the appeal court,
>
> and may make any other order in relation to the matter or with respect to costs that it considers proper.

[18] The Crown asks that the appeal be allowed, the dismissal set aside, and the matter remitted back to the Provincial Court for Trial.

[19] As to the appropriate standard of review, reference is made to the reasons in ***R. v. Ramalheira***, 2009 NLCA 4. In that case, the accused applied to a Provincial Court judge to adjourn his trial. He argued that he was unable to attend for medical reasons. The request was denied by the Trial Judge who ordered the trial to proceed as scheduled. This decision was upheld by the Superior Court. On further appeal, Rowe, J.A. (as he then was) concluded:

> 16 Whether or not it is open to a Provincial Court judge dealing with a summary conviction offence to conduct a trial in the absence of an accused who fails to appear after being notified of the time and place is a question of law; it is

> not a question of jurisdiction. If the trial results in a conviction, it could well constitute a ground of appeal, but it does not raise a jurisdictional issue such that the trial should be prohibited. Subsection 803(2) leaves no doubt as to the jurisdiction of the trial judge.

[20] Although the present case did not involve an adjournment request (and did not involve consideration of s. 803 *per se*), the reasons in ***Ramalheira*** involve similar considerations. I find the present case to involve a question of law. It is well settled that the standard of review is correctness (See: ***Housen v. Nikolaisen***, 2002 SCC 33).

(b) *The Criminal Code Provisions*

[21] It is the view of the Crown that several provisions of the *Criminal Code* operate cumulatively to require the presence of the accused at the trial of a summary conviction matter unless leave is granted. In contrast, the Defence says that the provisions result in no such mandatory appearance by the accused.

[22] The relevant provisions are as follows:

> **Section 650**:
>
> 650(1) Subject to subsections (1.1) to (2) and section 650.01, an accused, other than an organization shall be present in court during the whole of his or her trial.
>
> **Section 795**:
>
> 795. The provisions of Parts XVI and XVIII with respect to compelling the appearance of an accused before a justice, and the provisions of Parts XVIII.1,

> XX and XX.1, in so far as they are not inconsistent with this Part, apply, with any necessary modifications, to proceedings under this Part.
>
> **Section 800**:
>
> 800(1) Where the prosecutor and defendant appear for the trial, the Summary conviction court shall proceed to hold the trial.
>
> (2) A defendant may appear personally or by counsel or agent, but the summary conviction court may require the defendant to appear personally and may, if it thinks fit, issue a warrant in Form 7 for the arrest of the defendant and adjourn the trial to await his appearance pursuant thereto.

[23] The Crown did not provide any authority in support of its interpretation of the foregoing provisions. Nevertheless, it took the position that the Trial Judge acted without jurisdiction in proceeding with the matter in the absence of the accused.

[24] In response to the Crown's interpretation of the relevant provisions, the Defence makes two points. First, it raises that s. 650 of the *Criminal Code* operates subject to s. 650.01 which provides for designation of counsel of record. The effect of such a designation is set out in s. 650.01(3) and permits the accused to appear by designated counsel "for any part of the proceedings" other than, *inter alia*, "a part during which oral evidence of a witness is taken" (See: s.650.01(3)(a)(i)). The section further provides that an appearance of designated counsel "is equivalent to the accused's being present, unless the court orders otherwise" (See: s.650.01(3)(b)).

[25] Secondly, the Defence relies upon the permissive nature of s. 800(2) which permits the defendant to appear personally or by counsel or agent. The provision is not contingent upon leave of the summary conviction court although that court retains authority to require the defendant to appear personally.

[26] Although not specifically raised by either party, in the present circumstances one must also note s. 803(2) which permits the summary conviction court to proceed *ex parte* if the defendant does not appear for Trial.

(c) The Caselaw

[27] There does not appear to be a decided case supporting the Crown position.

[28] MacDonald relies upon the decision of the Supreme Court of Canada in ***R. v. Riddle,*** [1980] 1 S.C.R. 380, a case which dealt broadly with the concept of jeopardy. In discussing the principles, Justice Dickson concluded:

> [7] In short, when a criminal charge has been once adjudicated by a court having jurisdiction, the adjudication is final and will be an answer to a later information founded on the same ground of complaint…

[29] And later:

> [47] …There is no basis, in the *Code* or in the common law, for any superadded requirement that there must be a "trial on the merits". That phrase serves merely to emphasize the general requirement that the previous dismissal must have been made by a court of competent jurisdiction, whose proceedings were free from jurisdictional error and which rendered judgment on the charge.

[30] For jeopardy to attach, the summary conviction court must have jurisdiction to dispose of the matter before it. The parties to this appeal disagree about whether the Trial Judge had jurisdiction at the time of the dismissal.

[31] Reference is also made to the following cases which provide context and direction, although none are directly analogous: ***R. v. Meunier***, [1965] 48 CR 14 (Que QB); ***R. v. Hertich*** (1982), 137 DLR (3d) 400 (ONCA), ***R. v. Cloutier*** (1988), 27 OAC 246 (ONCA); ***R. v. Simon***, 2010 ONCA 754; ***R. v. Lucas***, 2014 ONCA 561; ***R. v. Schofield***, 2012 ONCA 120; ***R. v. E(FE)***, 2011 ONCA 783; ***R. v. Hurley***, 1997 NSCA 53; ***R. v. Barrow*** [1987] 2 SCR 694, 87 NSR (2d) 271; ***R. v. Cote*** [1986] 1 SCR 2; ***R. v. Okanee***, (1981), 9 Sask R 10, 59 CCC (2d) 149 (SKCA); ***R. v. Buckingham***, 2006 PEISCAD 18; and ***McLeod v. R.***, [1983] NWTJ No 35, 49 AR 321.

[32] Many of the foregoing cases involve conviction appeals where it is invariably alleged that prejudice occurred as a result of proceeding in the absence of the accused. In the present case, prejudice to the accused is not a factor.

(d) *Disposition of the Appeal*

[33] Despite the various submissions made by the parties, the only evidence before this Court is that on the trial date set for the matter both the Crown and

Defence counsel were present. The record reflects that two Crown witnesses did not appear, and the Crown offered no evidence. The Crown made no request for remedial action and made no inquiry as to whether MacDonald was personally present in the court room before proceeding. The charge was dismissed. During the proceedings, the accused was in the courthouse but not in the courtroom.

[34] There is no evidence before me as to what the Crown knew about the location of MacDonald at the time it offered no evidence. What is clear is that the Crown made no inquiry on the record as to the presence of the accused, nor did it seek an adjournment to investigate the absence of witnesses it had compelled to attend at Trial. Rather, it made the decision, in the absence of such inquiries, to offer no evidence. It is reasonable to infer that at the time of that decision; Crown counsel well knew the outcome of the matter would be a dismissal.

[35] I am not persuaded that any reasonable interpretation of the various provisions of the *Criminal Code* imposes a jurisdictional requirement on a summary conviction court that the accused be physically present in the court room at the time of Trial unless leave of the court is granted. And even if such an argument could be made, in my view, it is disingenuous to advance it in the circumstances of this case. MacDonald was available to be called into the courtroom if the Trial proceeded to the calling of evidence. No evidence was

called. And this was the decision made by the Crown without further inquiry about the location of MacDonald or its own witnesses.

[36] I find that the Trial Judge had jurisdiction to proceed in the absence of the accused. I further find that there was no error committed in dismissing the information upon the Crown offering no evidence.

Conclusion

[37] I find that the Trial Judge committed no error in dismissing the charge against MacDonald even though MacDonald was not physically present at the time. MacDonald's counsel was present and MacDonald himself was nearby waiting as directed by his lawyer. I see no basis to interfere with the disposition of the Trial Judge.

[38] The appeal by the Crown is hereby dismissed.

Gogan, J.