

NOVA SCOTIA COURT OF APPEAL

Citation: *R. v. Kelly*, 2002 NSCA 164

Date: 20021212

Docket: CAC 178561

Registry: Halifax

Between:

Wayne Charles Kelly

Appellant

v.

Her Majesty the Queen

Respondent

Judges: Glube, C.J.N.S.; Chipman and Roscoe, J.J.A.

Appeal Heard: December 12, 2002, in Halifax, Nova Scotia

Written Judgment: December 13, 2002

Held: **Appeal allowed and a new trial ordered per oral reasons for judgment of Chipman, J.A.; Glube, C.J.N.S. and Roscoe, J.A. concurring.**

Counsel: Philip J. Star, Q.C., for the appellant
Peter Rosinski, for the respondent

Reasons for Judgment:

[1] This is an appeal from a decision of Stewart, J. sitting as a summary conviction appeal court judge on an appeal brought under s. 813 of the **Criminal Code of Canada**, R.S.C. 1985, c. C-46 as amended.

[2] The appellant was convicted by The Honourable Judge Robert M. J. Prince in Provincial Court on a charge of failure to comply with a breathalyzer demand. He appealed to the summary conviction appeal court on three grounds including that the evidence did not establish reasonable and probable grounds upon which to give a demand. Stewart, J. concluded that the trial judge failed to deal with this issue. She, therefore, allowed the appeal, quashed the conviction and remitted the matter to the trial judge to determine the issue. In so doing she referred to the decision of this Court in **R. v. Mood** (1987), 85 N.S.R. (2d) 178; N.S.J. 438 (Q.L.).

[3] The appellant's position in this Court is that Stewart, J. erred in remitting the matter to the trial judge for a continuation of the trial rather than remitting it to the Provincial Court for a new trial.

[4] The respondent contends that this Court has no jurisdiction to hear this appeal.

Issue 1 - Jurisdiction of this Court:

[5] This appeal is brought under s. 839 of the **Criminal Code**, Part XXVII - Summary Convictions, which deals with appeals from a summary conviction appeal court:

839. (1) Subject to subsection (1.1), an appeal to the court of appeal as defined in section 673 may, with leave of that court or a judge thereof, be taken on any ground that involves a question of law alone, against

(a) a decision of a court in respect of an appeal under section 822; or ...

[6] We are satisfied that the disposition made by Stewart, J. is a decision of a court in respect of an appeal under s. 822 and that this Court has jurisdiction to hear the present appeal.

Issue 2 - Merits of the Appeal:

[7] It is necessary to refer to the powers of the summary conviction appeal court found in the **Code** in s. 822(1), Part XXVII, Summary Convictions:

822. (1) Where an appeal is taken under section 813 in respect of any conviction, acquittal, sentence, verdict or order, sections 683 to 689, with the exception of subsections 683(3) and 686(5), apply, with such modifications as the circumstances require.

[8] Sections 683 to 689 are found in Part XXI - Appeals - Indictable Offences and are the sections dealing with the powers of the court of appeal for a province or territory in appeals respecting indictable offences. Among the powers of the court of appeal are those dealing with what it can do when an appeal from a conviction is allowed:

686. (1) On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal

- (a) may allow the appeal where it is of the opinion that
 - (i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,
 - (ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or
 - (iii) on any ground there was a miscarriage of justice; ...

[9] If the appeal is allowed, s. 686(2) states what must be done next:

686 (2) Where a court of appeal allows an appeal under paragraph (1)(a), it shall quash the conviction and

(a) direct a judgment or verdict of acquittal to be entered; or

(b) order a new trial.

[10] Thus, in allowing an appeal the court of appeal (and in summary conviction matters the summary conviction appeal court) can only do one of two things after quashing the conviction: (a) direct an acquittal; or (b) order a new trial. It follows that there is no third option of remitting the matter to the trial court for continuation of the trial. See also **R. v. Nickerson** (1996), 106 N.S.R. (2d) 300 (S.C.A.D.) per Hallett, J.A. at para. 12.

[11] We do not consider that s. 822(2) of the **Code**, authorizing the directing of a new trial before the same court that tried the matter in the first instance, authorizes remitting a matter for the continuation of a trial. That section reads:

822. (2) Where an appeal court orders a new trial, it shall be held before a summary conviction court other than the court that tried the defendant in the first instance, unless the appeal court directs that the new trial be held before the summary conviction court that tried the accused in the first instance.

[12] In making the order that she did, Stewart, J. relied on the fact that this Court in **Mood, supra**, in exercising its powers under Part XXI of the **Criminal Code** remitted the matter to the trial judge for a continuation of the trial. In **Mood** the Court obviously assumed that it had jurisdiction to do so, but it is apparent from reviewing the decision that the question of its jurisdiction was not expressly drawn to the Court's attention and it, thus, made no pronouncement on its jurisdiction to make such an order.

[13] We allow the appeal and order a new trial to be held in the Provincial Court before a different judge.

Chipman, J.A.

Concurred in:

Glube, C.J.N.S.

Roscoe, J.A.