Date: 20000119
Docket: CAC 156732

NOVA SCOTIA COURT OF APPEAL

[Cite as R. v. Whynot, 2000 NSCA 16]

Chipman, Bateman and Flinn, JJ.A.

BETWEEN:		)	
		)	
HER MAJESTY THE QUEEN		)	Dana W. Giovannetti, Q.C.
		)	for the Appellant
	Appellant	)	
		)	
- and -		)	
		)	
WALTER STEVEN WHYNOT		)	David R. Hirtle
		)	for the Respondent
	Respondent	)	
		)	
		)	
		)	Appeal Heard:
		)	January 19, 2000
		)	
		)	
		)	Judgment Delivered:
		)	January 19, 2000

THE COURT: The appeal is allowed, the acquittal is set aside and a new trial is ordered as per oral reasons for judgment of Chipman, J.A.; Bateman and Flinn, JJ.A., concurring.

The reasons for judgment of the Court were delivered orally by:

CHIPMAN, J.A.:

[1] This is an appeal by the Crown from a decision of Hood, J. withdrawing from the jury, and acquitting the respondent on, a count in an indictment charging the respondent with possession of property on or about September 11, 1998, at or near Milton, Nova Scotia, knowing that the same was obtained by the commission of an offence punishable by indictment contrary to s. 355(b) of the **Criminal Code**.

[2] At the trial, there was evidence that the respondent was in possession of property within the description of the charge both on or about September 11, 1998, at Liverpool, Nova Scotia and on or about September 12, 1998, at Milton, Nova Scotia. In short, the trial evidence of the time and place was not fully consonant with the time and place particularized in the indictment.

[3] Section 601(4.1) of the **Code** provides:

> 601(4.1) A variance between the indictment or a count therein and the evidence taken is not material with respect to
>
> (a) the time when the offence is alleged to have been committed, if it is proved that the indictment was preferred within the prescribed period of limitation, if any; or
>
> (b) the place where the subject-matter of the proceedings is alleged to have arisen, if it is proved that it arose within the territorial jurisdiction of the court.

[4] In **R. v. B. (G.)**, [1990] 2 S.C.R. 30, the offence in question was alleged to have

occurred in December, 1985 and the evidence at trial suggested a much earlier date. The Supreme Court of Canada rejected the argument that, if the time specified in the information conflicts the evidence, the information must be quashed. Wilson, J. said at pp. 49 - 50:

> From the foregoing, it is clear that it is of no consequence if the date specified in the information differs from that arising from the evidence unless the time of the offence is critical and the accused may be misled by the variance and therefore prejudiced in his or her defence. It is also clear from *Dossi* and other authorities that the date of the offence need not be proven in order for a conviction to result unless time is an essential element of the offence. Accordingly, while it is trite to say that the Crown must prove every element of the offence in order to obtain a conviction, it is, I believe, more accurate to say that the Crown must prove all the essential elements. The Crown need not prove elements which are, at most, incidental to the offence. What the Crown must prove will, however, of necessity vary with the nature of the offence charged and the surrounding circumstances. Time may be an essential element of the offence in some circumstances and it may be instructive therefore to look at a few cases where this was held to be so in order to respond to the appellant's third submission.

[5] We have fully reviewed the record and have heard submissions of counsel respecting it. In the present case, neither time nor place was an essential element of the offence nor crucial to the defence. The defence offered at trial was a simple denial. The respondent did not testify and did not make a motion at any time seeking an order quashing the count. The trial judge acted on her own motion in doing so.

[6] The appeal must, therefore, be allowed, the acquittal set aside and a new trial ordered.

Chipman, J.A.

Concurred in:

Bateman, J.A.

Flinn, J.A.