S.C.C. 01640

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

Macdonald, Pace and Matthews, JJ.A.

BETWEEN:

HER MAJESTY THE QUEEN (appellant) -and- HUGH JOSEPH CASEY (respondent)	)	John D. Embree for the appellant Christopher Manning for the respondent Appeal Heard: October 1st, 1987 Judgment Delivered: October 9, 1987

THE COURT: Appeal allowed, acquittal set aside and new trial ordered per reasons for judgment of Macdonald, J.A., Pace and Matthews, JJ.A. concurring.

MACDONALD, J.A.:

This is a Crown appeal against the acquittal of the respondent by His Honour Judge William J. C. Atton in Provincial Court on a charge of causing bodily harm to Ken Dixon in committing an assault upon him contrary to Section 245.1(1)(b) of the Criminal Code.

The alleged offence occurred on January 29, 1987. The respondent was arraigned on the charge on January 30, 1987. He elected trial in Provincial Court and pleaded not guilty. The trial was set for February 12, 1987 and the respondent was remanded into custody until that time.

On February 12, 1987 when the case came on for trial it became evident that the alleged victim of the assault Ken Dixon was not present although he had been served with a subpoena compelling his appearance. Crown counsel then requested a warrant for Mr. Dixon's arrest (see Code s. 633(1)) and asked for an adjournment of the trial. Judge Atton issued a warrant for Mr. Dixon's arrest but refused to adjourn the trial and dismissed the charge against Mr. Casey. In doing so he said:

> "Well, the defence is here and its ready for trial. I'm going to dismiss the matter, but I'm going to issue a warrant for Mr. Dixon and have him brought to court to explain his absence. I don't think it's proper to bind Mr. Casey over any further in these set of circumstances. I'm going to dismiss the matter against Mr. Casey and issue a warrant for Mr. Dixon."

The sole issue on this appeal is whether Judge Atton acted judicially in exercising his discretion to refuse to adjourn

the case.

At the outset it must be remembered that "the Crown as well as the accused is entitled to a trial and a fair trial" -- R. v. Viger (1958), 122 C.C.C. 159 at p. 161 (Ont.C.A.).

The law is clear that the "decision whether or not to grant an adjournment of a trial is a matter for the discretion of the trial judge, and that discretion will not be interfered with by an appellate court unless it is clear that it was exercised otherwise than judicially, or without regard for proper principles..." -- R. v. Johnson (1973), 11 C.C.C. (2d) 101 at p. 105 (B.C.C.A.).

In Barrette v. The Queen, [1977] 2 S.C.R. 121, 29 C.C.C. (2d) 189 Mr. Justice Pigeon speaking for the majority of the Court stated (p. 125 S.C.R., p. 193 C.C.C.):

> "It is true that a decision on an application for adjournment is in the Judge's discretion. It is, however, a judicial discretion so that his decision may be reviewed on appeal if it is based on reasons which are not well-founded in law. This right of review is especially wide when the consequence of the exercise of discretion is that someone is deprived of his rights, whether in criminal or in civil proceedings."

In Sharp v. Wakefield et al, [1891] A.C. 173 Lord Halsbury expressed what is meant by the judicial exercise of discretionary power in the following terms (p. 191):

> "An extensive power is confided to the justices in their capacity as justices to be exercisesd judicially; and 'discretion' means when it is said that something is to be done within the discretion of the authorities that that something is to be done according to the rules of reason and

> justice, not according to private opinion: **Rooke's Case** (1); according to law, and not humour. It is to be, not arbitrary, vague, and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man competent to the discharge of his office ought to confine himself."

In Darville v. The Queen (1956), 116 C.C.C. 113 (S.C.C.) Cartwright, J. said (p. 117):

> "There was no disagreement before us as to what conditions must ordinarily be established by affidavit in order to entitle a party to an adjournment on the ground of the absence of witnesses, these being as follows:
>
> (a) that the absent witnesses are material witnesses in the case;
>
> (b) that the party applying has been guilty of no laches or neglect in omitting to endeavour to procure the attendance of these witnesses;
>
> (c) that there is a reasonable expectation that the witnesses can be procured at the future time to which it is sought to put off the trial.
>
> In my respectful view, it was error in law on the part of the learned trial Judge to refuse an adjournment without having given the appellant an opportunity to show, if he could, that these conditions existed."

In the present case Mr. Dixon was obviously a material witness in the case and in my opinion the prosecution had taken adequate steps by means of a subpoena to have him in attendance at the trial. The third condition referred to by Mr. Justice Cartwright in Darville has **prima facie** at least been met when as here the absent witness has been served with a subpoena. In any event Crown counsel advises that Mr. Dixon is still in the area.

In light of the principles set forth in the authorities to which I have referred it is my opinion that Judge Atton did not exercise his discretion in a judicial way when he refused the prosecution's request for an adjournment. He thereby effectively deprived the Crown of it's right to a trial of the respondent on the merits.

Judge Atton seems to have been influenced by the fact that the respondent was in custody; however he surely could have permitted the prosecution time to ascertain why Mr. Dixon had failed to obey the subpoena. If a new trial date had to be set the release of the respondent on bail or on his own undertaking to appear or otherwise could have been considered. In any event it is my opinion on the facts of this case that Crown counsel should have been granted the adjournment he sought and no good and sufficient reason in law has been advanced to justify Judge Atton's refusal to grant the adjournment.

In consequence of the foregoing I would allow this appeal, set aside the verdict of acquittal and order that the matter be remitted to the Provincial Court for trial on the merits.

Angus L. Macdonald

J.A.

Concurred in:

Pace, J.A.

Matthews, J.A.