IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. Hayes, 2005 NSPC 21)

Date: 2005/06/28
Docket: C#1406581
Registry: Digby, N.S.

Between:

Her Majesty The Queen

v.

Keith Jerome Hayes

Revised Decision:	**The text of the original decision has been corrected as of this date, May 11th, 2006 and replaces the previously distributed decision.**
Judge:	**The Honourable Judge Jean-Louis Batiot, J.P.C.**
Heard:	**May 11th, 2005 at Annapolis Royal, Nova Scotia**
Charge:	**Contrary to section 253(a) of the Criminal Code**
Counsel:	**Mr. David Acker, for the Crown**
	Mr. Curtis Palmer, for the defence

1. The Defendant is charged contrary to ss. 253(a) and (b) of the **Criminal Code of Canada, R.S.C. 1985, Chap. C-46,** on two different informations, sworn under one oath before a Justice of the Peace. The Crown has proceeded to trial at this stage on the first information only (s. 253(a)).

2. The Defence argues this information is a nullity, as it was sworn in one oath with the companion information. It refers to **R. v. Sarty** (1991), 112 N.S.R. (2d) 113 (N.S. Co Ct), applying the decision of the Supreme Court of Canada in **R. v. Phillips** (1983), 8 C.C.C. (3d) 118. **Phillips** had held, based on English practice and the **Criminal Code** as it then was, that there could not be a joint trial on two different informations, one of assault causing bodily harm, the other of assault, arising some two days apart, between the same parties, even with the consent of the Defendant, in light of the provisions of the **Code** respecting the singularity of *information*, or *indictment*, the potential prejudice to the accused, and the well established practice at common law. Thus, since a trial Judge *could not have proceeded to hear the two informations at one trial,* a Justice could not accept two different informations on the same oath (**Sarty, supra,** at para. 19).

3. Crown counsel also argues whether the swearing of an information amounts to giving evidence or not. I note that, pursuant to s. 507(1)(a), an information is described as an allegation, which, if sufficient, in the opinion of the Justice, need not be buttressed by evidence of a witness, and as long as it is in due and solemn form, must be *received* by the Justice (s. 504 (a)). Furthermore, the main purpose of an Information is to provide notice to the accused of the case he has to meet (see Ewaschuk, **Criminal Pleadings & Practice in Canada,** 2d Ed. Chap. 9). At any rate, this matter can be disposed of by resolving the issue above.

THE EVIDENCE

4. Constables Harris and MacEachren of the Annapolis Detachment were on patrol at 3:10 a.m. in the same car, heading east on highway 201 in Nictaux, in the county of Annapolis, when they came upon a snowmobile heading west, but stopped, in their own lane of traffic. They investigated. The snowmobile had no lights on, the engine was running, and a person was

slumped over the handlebar and windshield. There was a helmet and a mitt to the left side of that person, on the ground, and a cigarette butt.

5. They attempted to wake up the person and it took them some ten to fifteen seconds, calling onto him. Eventually that person, the accused, opened his eyes and appeared confused in his responses. There was a strong smell of alcoholic beverage emanating from his breath. It was about -8 to -10 Celsius, chilly enough for the officers to ask the accused to accompany them to the police car. They each had to hold onto him - had they not they feared he would have fallen - and placed him in the back seat of the police car where the smell of alcohol followed him. There were no apparent injuries and he was quite cooperative. In their opinion he was drunk and had fallen asleep, having smoked a cigarette, sitting on his snowmobile, on the driver's seat. Officer MacEachren *killed* the engine and both officers waited for a tow truck to remove the snowmobile.

6. Later that same day, Constable Harris presented both informations (s. 253(a); s. 253(b)) to Justice of the Peace Rodgers and swore to them in one oath. The sole informant had knowledge of the evidence pertaining to both counts: an alleged impaired driving charge, and one of being over the breathalyzer limit, arising from one incident earlier that same day. It is usual to charge an accused with both counts, in one information. The evidence is intrinsically related.

THE CASE LAW

7. The Supreme Court of Canada has revisited this issue of joinder, at the instance of the trial court or by the Crown and Defence, in **R. v. Clunas**, [1992] 1 S.C.R. 595. There, the appellant was convicted of assaulting his ex-girlfriend two days apart. Both informations came before the same trial judge. The defence wished to proceed in one trial for the sake of economy, and to avoid the defence witnesses having to testify twice. The Crown agreed.

8. For the majority, Chief Justice Lamer took this opportunity to revisit **Phillips, supra**, and **R. v. Khan**, [1990] 2 S.C.R. 531. He held that different counts, or accuseds, on different informations, whether indictable or not (as long as the same criminal procedure has been

chosen) can be tried in one trial, but then the Crown loses its right to call one accused against another (at para.. 30)). More specifically, at para. 33:

> *...when joinder of offences, or of accuseds for that matter, is being considered. the court should seek the consent of both the accused and the prosecution. If consent is withheld. the reasons should be explored. Whether the accused consents or not, joinder should only occur when, in the opinion of the court, it is in the interests of justice and the offences or accuseds could initially have been jointly charged.*

9. In effect **Phillips** has been overruled. The presumption is for matters that could be tried in a single trial to proceed in that single trial. The main reasons for not doing so is where the defence wishes to present evidence on one, and not the other count(s), or if the interests of justice so dictate.

CONCLUSION

10. Ss. 507 and 789 (Summary convictions) provides for the swearing of "an" or "the" information. In accordance with the **Interpretation Act,** R.S.C. 1985, I-21, s. 33(2), *words in the singular include the plural, and words in the plural include the singular.* The Justice had jurisdiction to hear both matters at once, from the same deponent, particularly as they related to the same transaction. Further, there was no issue, at that stage, of different trials, as it was an **ex parte** proceeding. Simply put, these concerns did not arise then, and one trial was the likely outcome.

11. On the evidence, I find the Constable had knowledge of the evidence supporting both informations; one oath is sufficient to bind his conscience. He exhibited the *necessary care and attention* (**Sarty, supra,** at para. 21) required in this first step in the initiation of a criminal proceeding. The information before me is valid.

Dated this 22nd of June, 2005, at Annapolis Royal.

Jean-Louis Batiot, J.P.C.