PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Hall*, 2022 NSPC 31

Date: 20221014
Docket: 8340031, 834033
Registry: Kentville

Between:

His Majesty the King

v.

Bailey Hall

Restriction on Publication: s.486.4

Judge:	The Honourable Judge Ronda van der Hoek,
Heard:	August 30, 2022, in Windsor, Nova Scotia
Decision	August 30, 2022 (oral), October 24, 2022 (written)
Charge:	Section 151 of the *Criminal Code*
Counsel:	Robert Morrison, for the Crown Zebedee Brown for the Defendant

By the Court:

[1] This is a Crown application to adjourn trial due to the absence of the accused and the complainant. While such applications are fairly common, the particular background of this application is somewhat unusual and likely to occur again in future. As such, the Court advised written reasons would following the brief oral decision.

[2] When Mr. Hall's trial date was scheduled, he was on release conditions and residing in the community. Months before the trial date, he was taken into custody on unrelated matters and the Crown brought application to revoke his release on the trial matter. The revocation application was abandoned after four court appearances and Mr. Hall was ultimately sentenced on the unrelated matter with a 2023 release date.

[3] Mr. Hall was not present on the trial date because a section 527 *Criminal Code* prisoner-transport order had not been prepared. The Crown sought an adjournment of trial arguing it was defence counsel's responsibility to prepare the transport order because he knew Mr. Hall was in custody. While defence counsel agrees the Crown wrote to discuss the case and advise that Mr. Hall was in

custody, he opposes the request to adjourn arguing it is always the Crown's responsibility to bring an accused person before the Court for trial.

[4] The complainant was reportedly ill and also not present. Unable to produce proof of a served subpoena compelling her attendance, defence counsel argues the Crown is guilty of laches rendered additionally problematic given the matter has been before the Court for 40 months.

Issue:

[5] Is it settled law that the Crown is responsible to bring an accused person before the Court for trial?

[6] Should failure to establish proof an absent material witness was served, tilt the scales in favour of not granting an adjournment?

Decision:

[7] Application to adjourn is denied. The Crown is obligated to prepare prisoner-transport orders. On these facts, the Crown was aware of Mr. Hall's scheduled trial date when it made application to revoke his release. As such, the Crown was also aware an order was required to secure his attendance at trial, and cannot absolve itself of that responsibility by reliance on local custom.

[8] Failure to produce proof of a served subpoena for the missing material witness was a relevant factor tilting the scale in favour of not granting an adjournment.

Background:

[9] The day before trial, judicial assistant, Ms. Robin O'Hara, advised the Court that Mr. Hall was in custody, and she could not locate a prisoner-transport order. The Court asked her to contact counsel to advise immediately of the noted oversight. While it is not the practice, and highly unusual, for judicial assistants to note such oversights, Ms. O'Hara is a dedicated long-term employee who regularly attends to such matters when time permits. All parties agree an order could have been secured the day before trial.

[10] Email correspondence between Ms. O'Hara, defence counsel and the Crown was entered as an exhibit on the application. At 12:12 pm Ms. O'Hara advised defence counsel that Mr. Hall was in custody without a prisoner transport order and Mr. Brown quickly replied asking the Crown what was happening with the order. The Crown replied that it had not prepared one as Mr. Hall was not in custody on the trial matter, adding in such circumstances they usually leave it to defence counsel "to arrange to have their clients transported to court."

[11] The next day the matter was called, an order for transport had not been prepared and Mr. Hall was not present.

[12] The complainant was also not present having advised her social worker, who in turn advised the Crown that morning, that she was not well. In accordance with Covid-19 protocols currently in place, the Crown took the decision not to have her attend court.

Position of the Defence:

[13] Mr. Brown, who represented Mr. Hall on a legal aid certificate, scheduled the trial date when Mr. Hall was not in custody. Mr. Brown learned of his client's incarceration shortly before trial, and was not his counsel on the matter that brought Mr. Hall into custody, nor was he aware the Crown also brought application to revoke Mr. Hall's release on the trial matter. Mr. Hall was sentenced on the former matter with a 2023 release date, and the revocation application was before the Court four times before the Crown abandoned the application. Mr. Hall was represented by Nova Scotia Legal Aid [NSLA] counsel on those matters and, according to the endorsements on the Information, Mr. Hall's upcoming trial date was acknowledged by the Crown on the Court record.

[14] Mr. Brown points out that none of this is particularly surprising given private lawyers in the province do not have access to the provincial JEIN program used by Crown and NSLA lawyers to research information related to charges, outstanding matters, and whether a person is in custody, *inter alia.* As such, Mr. Brown has "no special information about where Mr. Hall might be housed" at any given time, nor when he might be released. Additionally, NSLA duty counsel represent people who come into custody even if that person has a trial scheduled on the matter represented by certificate counsel.

[15] Mr. Brown submits the Crown, on the other hand, was certainly aware Mr. Hall was in custody with an upcoming trial date. The relevant Information was endorsed with the trial date, counsel of record, etc., all information that was also available to the Crown on JEIN. While the revocation application was scheduled on the court docket four times, each time it was addressed Mr. Brown was completely unaware because NSLA duty counsel represented Mr. Hall.

[16] Mr. Brown practices criminal law across the province and says he has never been asked to prepare a prisoner-transport order for a client in custody and did not consider, based on the exhibited email correspondence from the Crown, that he had been asked to do so. Having consulted the *Crown Counsel Policy Manual*, he notes there is nothing in it to support such a practice. Afterall, the order is not prepared

on behalf of an accused, rather it is prepared on behalf of the Crown and the law recognizes a Crown responsibility to bring an accused person before the Court for trial.

[17] Finally, Mr. Brown argues *Darville* appears to anticipate affidavit evidence when a witness does not appear for trial, and while somewhat flexibly applied, given the complicated history of this matter now at the 40-month mark, there is a heightened need to prove the complainant was served a subpoena. He also argues a third-party report of illness, even in Covid times, cannot be sufficient on its own to support a Crown request to adjourn for nonattendance of a material witness.

Position of the Crown:

[18] The Crown points out that defence counsel knew as a result of correspondence between the two, and since June 17, 2022, that his client was in custody remanded on other charges. The Crown wrote to advise defence counsel of Mr. Hall's situation and the sentence expiry in January 2023.

[19] The Crown was unaware there was a transport issue before receiving Ms. O'Hara's email, and had not secured one as it is typical, customary in this region, to leave such orders to defence counsel when an accused was not incarcerated at the time the trial date was scheduled, but is subsequently incarcerated. If such a

circumstance occurs, the custom does see the Crown prepare the order upon request of counsel. With no clear request from Mr. Brown, the Crown did not do so.

[20] The Crown submits it would be useful, and appreciated, if the Court could provide some clarity as to whether the ‘long standing practice in Kentville applies’ or address what the practice should be in such cases.

[21] While the Crown is centrally focused on seeking an adjournment due to Mr. Hall’s absence, he says there is no need for heightened scrutiny of the complainant’s non-attendance. He has been in contact with her for trial preparation and, but for the reported illness, fully expected her to come to court. The social worker had been tasked to drive from Truro to Halifax to collect the complainant and bring her to Court, and as late as Friday, he and the complainant had been discussing transportation. Receiving the report this morning that she was feeling unwell yesterday and had a respiratory issue today, the Crown maintains it was appropriate that he direct her not to attend court in light of Covid circulating in the community.

[22] The Crown was unable to produce information about the method of service, personal or substituted, but presumes one or the other occurred although not when.

While the social worker advised she had not seen a subpoena, an RCMP officer told her the complainant *had been served* when he provided her the trial date.

The Law:

[23] The decision to grant an adjournment is discretionary, as long as that discretion is exercised judiciously. (*R. v. Smith* (1989), 1989 CanLII 7222 (ON CA), 52 C.C.C. (3d) 90 (Ont. C.A.); *R. v. Hazelwood* (1994), 67 W.A.C. 44 (B.C.C.A.))

[24] Section 571of the *Criminal Code* “contains no exhaustive or illustrative list of factors the judge is required or entitled to consider in determining whether to grant or refuse an adjournment”. (*R. v. Ke*, 2021 ONCA 179)

[25] In *R. v. Reddick*, 2011 NSSC 95, Cacchione J. sitting as a summary conviction appeal court judge, concluded the Crown failed to secure a timely prisoner-transport order despite being aware Mr. Reddick was in federal custody with 14-16 days notice required to effect transport.

[26] In that case, the Crown knew Mr. Reddick had been sentenced to federal incarceration, had sought an earlier adjournment of the trial matter, knew a prisoner-transport order was required to effect transport and was aware 14-16 days

notice was required for same. There was no mention of a custom requiring defence counsel to assist in preparing an order.

[27] Cacchione J. addressed the trial judge's considerations on the application:

> [11] After hearing both Crown and defence counsel, the trial judge brought to their attention two cases: *R. v. MacDonald*, [1989] N.S.J. No. 582 and *R. v. Fuhrer*, [2007] A.J. No. 102 dealing with Crown adjournment requests brought as a result of prisoner transportation issues, more particularly the Crown's responsibility to have an accused present for his/her trial where the Crown is aware of the accused's detention due to a denial of bail or incarceration while serving a sentence. [Emphasis added]

[28] After summarizing the Crown's argument about defence counsel's actions, Cacchione J. noted the Crown's failure to refer in argument to, "its responsibility for procuring the attendance of an incarcerated accused and its failure to procure the accused's attendance for his trial." (at para. 27)

[29] My brother Atwood J. considered in some detail those two decisions in the case on appeal in *R. v. Reddick, 2010 NSPC 56* where he addressed the role of custom.

> [11] In reviewing the decisions of R. v. MacDonald and R. v. Fuhrer, the Court acknowledges that there are factual distinctions between those cases and the situation before the Court today. However, in the view of this Court, they are distinctions without a difference. While the MacDonald decision is clearly not binding on this Court, the principle of judicial comity suggests that, in dealing with a situation that is similar to a situation involving a decided case out of a court of co-ordinate jurisdiction, I should seek to follow that case to the extent possible, if I am satisfied that the authority is well and correctly reasoned as, indeed, I am.

> [12] As was stated by Judge Niedermayer in paragraph 15 of the MacDonald decision:
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> "For the parties to characterize the current method of obtaining orders pursuant to s. 527(1) of the Code as a custom is rather imprecise. If what is meant by that phrase is gratuitous assistance by the Crown, without legal obligations to obtain the orders, I disagree. The custom is of usage based on legal principles that the Crown is in charge of prisoners and prosecutions and must assure the attendance of an accused when practicable to do so, and certainly when an accused is under the direct control of Crown officials, be they federal or provincial. The custom is a requirement of the Crown. It must carry out the responsibility of assuring the attendance of a prisoner in such instances. It has failed in this case."

While not argued here, Cacchione J.'s comments with respect to prejudice, at para. 43, are *apropos*:

> [43] Stating that the accused would not have been prejudiced by the granting of the adjournment because he was already in custody serving a sentence is simply an attempt to deflect attention from *the Crown's responsibility to ensure the accused's attendance in these circumstances and its failure to discharge that responsibility*. Such statement also ignores the realities faced by an incarcerated accused in procuring his own attendance at trial and in preparation of his or her defence. The passage of time and its affect on the memory of witnesses and the reduced ability to consult with counsel in preparation of an accused's defence are some examples of the prejudice suffered by an incarcerated accused whose trial has to be adjourned because the Crown has not discharged its obligations.

Securing the attendance of a material witness:

[30] In *Darville*, at p. 117, the Supreme Court of Canada identified three factors a court should consider in determining whether to grant an adjournment required to procure the attendance of a material witness:

> i. that the absent witness is a *material* witness in the case;

> ii. that the party requesting the adjournment has not been guilty of laches or neglect in failing to endeavour to procure the witness' attendance; and
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> iii. that there is a reasonable expectation that the witness' attendance can be procured at the future time to which the party proposes the trial be adjourned.

[31] The NSCA considered the issue of laches in *R. v. LeBlanc*, 2005 NSCA 37, where the NSCA overturned the summary conviction appeal and reinstated the trial judge's decision not to grant an adjournment. In the decision the Court considered illness and subpoenas.

> [11] The more challenging issue involved the second condition; that is, the Crown's neglect in failing to re-subpoena these witnesses. The Summary Conviction Appeal Court judge found this issue to be essentially irrelevant because he concluded that "their failure to attend was simply the result of their illness." Yet, with respect, there was nothing on the record to support such a conclusion. In other words, had these witnesses been subpoenaed, they very well may have appeared, depending on the extent of their reported illness. This was therefore a legitimate issue for the trial judge. Yet, the Summary Conviction Appeal Court, without a factual basis, dismissed this important consideration. By doing so, he erred in law.
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> [12] Furthermore, there is nothing in the record to support the Summary Conviction Appeal Court judge's conclusion that the trial judge required "some form of medical certificate" before granting the adjournment. The trial judge sought no such documentation. As is evident from the above passage, he simply probed Crown counsel to see if *she* had more details as to the extent of the respective illnesses. In this regard, the trial judge acted judicially and, respectfully, it was an error in law for the Summary Conviction Appeal Court judge to conclude otherwise.
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> [13] The trial judge here did not improperly exercise his discretion to deny the Crown's request for an adjournment.

Analysis:

[32] Clearly there is a need to address this issue even if relevant only in this particular part of the province. The Court has no special knowledge of this local custom having never turned its mind to consider same, and while there is often discussion in the courtroom between counsel as to who will prepare a ‘pick up’ order, the Court did not pay these discussions any particular attention except to note that a person in custody would be conveyed to the court. On the facts of this case, but for Ms. O’Hara noting the absence of the order, there would have been no opportunity for counsel to consider it before trial. Such must not occur again because the consequences are simply too high for accused persons, members of the public and the management of scarce judicial resources.

[33] This matter was before the Court for 40 months, and defence counsel was correct in law that the Crown, being fully aware that Mr. Hall was serving a custodial sentence, was required to secure his attendance at trial. That Crown obligation has been the law in this province since at least 2011 when the summary conviction appeal court concluded so in *Reddick*. There is no *caveat* that the obligation shifts to defence counsel when he finds out his client is incarcerated, concluding so leads to myriad difficulties.

[34] This Court is bound by precedent to apply the law as set out in *Reddick* and is persuaded that Atwood J. properly considered the use to be made of the cases of

concurrent jurisdiction that clarified the Crown obligation. Custom simply cannot trump legal requirements, and certainly not when the costs are so high.

[35] All justice system participants are tasked to ensure matters are brought to trial in an expeditious manner. Attendance to this responsibility also ensures our actions do not risk breaching *Charter* protected rights. Systems must be in place at all levels to ensure the right to a trial in a reasonable time is not breached, thus protecting the public interest in resolving matters before the Court.

[36] With respect to the material witness, the Crown was told third hand that she was ill and there was no proof of service, either because it did not exist or because the officer who could have produced it left the courthouse before the Court heard the application to adjourn. While the Court probed the Crown for information about proof of service, with the officer gone from courtroom and on leave there was no access to the police file in order to locate any documents. It is worth noting that proof of service documents, while prepared by the police, are created for the use of the Crown and the Court. They are not police file documents. While the Crown had been in contact with the material witness for trial preparation, neither the Court nor the Crown were furnished with proof she was under compulsion to attend court. As in *LeBlanc* it was necessary to canvass the situation.

[37] While there was some suggestion a witness who has Covid symptoms should perhaps prove this to the Court, I find this impractical. PCR tests are not always easily obtained or accurate and the same applies to rapid tests.

[38] Lack of proof of service was not the determinative reason the Court is denying the application, rather it is the lack of a transport order for Mr. Hall. If Mr. Hall had attended, the Court could have explored the option of remote testimony. During Covid times there has been significant effort on the part of courts to adapt to situations such as this.

[39] After hearing from both parties, balancing all the interests and factors discussed, considering the law that addresses the Crown's obligation to secure Mr. Hall's attendance at trial, the prejudice to Mr. Hall's right to a trial in a reasonable time, the significant delay expected to arise in scheduling another full day of trial time, and society's interest in the expedient administration of justice, the application is denied.

van der Hoek PCJ.