NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. M.J.R.*, 2007 NSCA 35

Date: 20070330
Docket: CAC 276894
Registry: Halifax

Between:

Her Majesty the Queen

Appellant/Applicant

v.

M.J.R.

Respondent

Restriction on publication: Pursuant to s. 486(3) of the *Criminal Code of Canada*, R.S.C. 1985, c. C-46, as amended.

Judge: The Honourable Justice Linda Oland

Application Heard: Commenced on January 22, 2007 at appeal hearing in CAC 272734, in Halifax, Nova Scotia

Held: Application to extend the time to file notice of appeal granted

Counsel: Peter Rosinski, for the appellant/applicant
Donald C. Murray, Q.C., for the respondent

Decision:

[1] The circumstances surrounding this application by the Crown for an extension of time to file a notice of appeal pursuant to *Civil Procedure Rule* 62.31(7)(e) are unusual. They involve the respondent's appeal of a decision of Provincial Court Judge Flora Buchan regarding his reporting obligations under the *Sex Offender Information Registration Act*, S.C. 2004, c. 10, s. 20 (*SOIRA*).

[2] Before considering the application to extend, I will briefly set out the circumstances which led to the appeal and then to the application.

[3] Having pled guilty on January 29, 2004 to four counts of sexual assault against his daughter, the respondent was sentenced to a total of 27 months in prison. While he was still incarcerated, the *SOIRA* came into force on December 15, 2004. On July 11, 2005 he was served with a Form 53, Notice of Obligation to Comply with the *SOIRA*, requiring him to report under the *SOIRA* during his lifetime.

[4] That October, the respondent filed an application in regard to *SOIRA*, which was heard and decided on February 16, 2006. The judge refused to exempt the respondent from his reporting obligations under the *SOIRA*, but also determined that his reporting obligation should be 20 years rather than life. She issued a Form 52 Order to Comply with *SOIRA* to effect that change.

[5] At the Crown's request, the matter returned before the judge on February 21, 2006, and again on May 9, 2006, when she heard submissions on whether the Form 52 Order that had issued was appropriate. The Crown argued that pursuant to s. 490.012 of the *Criminal Code*, Form 52 is an order which applies only to persons convicted of a sexual offence after the *SOIRA* came into force, and the respondent had been convicted prior to that date. It also submitted that a lifetime reporting obligation was mandatory pursuant to s. 490.022(3)(d), because the respondent had been convicted of more than one sexual offence prior to the *SOIRA* coming into force.

[6] During the May 9, 2006 hearing, the judge commented that the Form 52 order she signed on February 16, 2006, was incorrect. She concluded that she had been *functus officio* once she denied the respondent's application for an exemption. As a result of her decision, the respondent's reporting obligation continued for his

lifetime. This was the decision that the respondent appealed. He asked that the May 9, 2006 decision be rescinded and the February 16, 2006 decision be restored or, alternatively, if the provincial court did not have jurisdiction to determine the reporting obligation, then this court did and should declare it to be 20 years.

[7] On January 22, 2007, the panel hearing the respondent's appeal observed that the Crown had not appealed that part of the judge's February 16, 2006, decision reducing the respondent's *SOIRA* reporting period and the Form 52 order. It raised a concern that the disposition of the appeal might leave outstanding an order which could or should not have been made. The appeal hearing was adjourned to allow the Crown to determine if it wished to apply for an extension of time to file a notice of appeal in these regards. The Crown applied for such an extension. In its proposed notice of appeal the Crown alleges:

> Provincial Court Judge Buchan erred in law on February 16, 2006, when she purported to order the Respondent herein to be subject to a s.490.012 **Criminal Code** order for twenty (20) years pursuant to s.490.013(2)(b).

The respondent objected to the granting of an extension.

[8] Justice Saunders of this court recently dealt with an application for an extension of time in *Boehner Trucking v. United Gulf et al.*, 2007 NSCA 26. He stated:

> [15] The granting of an extension to file an appeal pursuant to **Civil Procedure Rule** 62.31(7)(e) is discretionary. The objective must always be to do justice between the parties. The test is simple: does justice require that the application succeed? In making that determination my assessment should be flexible and take into account all relevant circumstances. **Jollymore v. Jollymore Estate**, 2001 NSCA 116 (in Chambers); **Scotia Chevrolet Oldsmobile Ltd. v. Whynot**, (1970) 1 N.S.R. (2d) (1041) (N.S.S.C.A.D.) and **Tibbetts v. Tibbetts** (1992), 112 N.S.R. (2d) 173 (N.S.C.A.).
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> [16] As I made clear in **Jollymore**, supra, the so-called three-part test may serve as a useful guide but it was never intended to be a fixed grid onto which all cases would be slotted to see if they made the grade.

[9] With regard the three-part test referred to in that decision, the Crown admits that it did not intend to appeal the February 16, 2006 decision within the time allowed for an appeal. It thought that the respondent's appeal would adequately

address all the Crown's concerns with the judge's decision. The Crown argued that the respondent, whose appeal is ongoing, has not been seriously prejudiced by its delay.

[10] The respondent argued that the Crown's application should be dismissed because it had no *bona fide* intention to appeal during the time permitted. He also submitted that the Crown's argument on its extension application that the judge erred is contrary to its position before the judge and before this court at the respondent's appeal hearing, and that prejudice, namely, increased legal costs, has been caused by the delay.

[11] Having reviewed the record and considered the submissions of counsel, I am persuaded that, in the unusual circumstances of this particular case, the Crown's application to extend the time to file a notice of appeal should be granted. Unless the result of the February 16, 2006, decision is appealed, the disposition of the respondent's appeal could leave in place an order which may be contrary to the provisions of the *SOIRA*.

[12] Appellate courts have granted applications for extension of time to file a notice of appeal where an illegal sentence had been imposed. See, for example, *R. v. Bourque*, [1976] N.B.J. No. 215 (N.B.S.C.,A.D.), where the court stated:

> 10 No positive rule has been laid down or should be laid down for the exercise of the court's discretion to extend the time for appeal to cover all conceivable circumstances. Special circumstances occasionally arise where the ordinary rules should not be applied. In my opinion the fact the sentence imposed on the respondent was an illegal sentence and that the Attorney General of Canada took prompt action upon learning of it to instruct counsel to seek an extension of time for the service and filing of the notice of application for leave to appeal are facts which justify granting leave, this being a case where the inherent justice of the case requires it. Thus in *Regina v. Grover* (1967), 1 C.R.N.S. 129, on an application made by the Crown long after the period for appeal had expired to extend the time for appealing a suspended sentence which in the circumstances was not authorized by law and therefore imposed without jurisdiction, it was held that the application should be granted. Laskin, J.A., as he then was, who heard the application stated at pp. 130,1:
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> > Apart from the question whether a second "suspended sentence" may be imposed at a time when a previous "suspended sentence" is still in force, it is clear under the *Criminal Code*, 1953-54 (Can.),

> c.51, s. 638 that the magistrate had no jurisdiction to suspend the passing of sentence in the present case both because the accused had within the past five years been convicted of an offence and because that conviction was for an offence of a like character: See *Regina v. Beatson* (1958), 120 C.C.C. 234. It follows that the respondent has not in law been sentenced for the offence to which he pleaded guilty: See *Regina v. Beam*, [1954] O.W.N. 761, 109 C.C.C. 381 and cf. *Regina v. Peterson*; *Regina v. Normandin*, 40 C.R. 288.
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> Two questions thus arise. First, is the proper way to have the illegal sentence expunged an appeal to a court that can so declare and remit the case for lawful disposition? Second, if so, do or should the ordinary rules limiting the time to appeal apply? As to the first question, it may be thought that if the sentence is a nullity it can be ignored and that proceedings can be taken to compel the reattendance of the respondent for the purpose of imposing a sentence according to law. I need not pursue this point because, even if it be so, it does not preclude invocation of appellate jurisdiction to have the illegality declared and the proceedings put right: see *Regina v. Beam*, *supra*. The *Beam* case, which is a judgment of this Court, also indicates, in my view, the proper approach to the second question. Pickup C.J.O., speaking for the Court said, *inter alia*, at p.384 (C.C.C.):
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> > The appellant has not yet been lawfully sentenced for the original offence. If necessary, the Crown desires to appeal from the ineffective sentence imposed by the Magistrate . . . and this Court would, if necessary, extend the time for an appeal from the original sentence . . . whether it be an appeal by the Crown or by the present appellant. Justice must be done.
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> There will, accordingly, be an order pursuant to R.25 of the Criminal Appeal Rules, extending the time for an appeal by the Crown against sentence and giving leave to appeal accordingly.

[13] In *R. v. Sutton*, [1988] B.C.J. No. 103 (B.C.C.A.) (Quicklaw), an accused person applied for an extension of time to appeal an illegal sentence him. In granting the extension, the court stated:

> . . . In view of the fact that the sentence is contrary to the provisions of the Code I consider that the time for filing the notice of appeal ought to be extended and the application for leave to appeal ought to be granted. Even if the result is a result which seems to be a fitting one, in my opinion unlawful sentences should not be left when they are brought before the court. (Emphasis added)

[14] Accordingly, I would grant the Crown's application to extend the time to file its appeal, deem that the notice of appeal it filed was filed in time and direct the Crown, in co-operation with the respondent, to obtain a telephone chambers date on or before April 20, 2007, so that any outstanding issues concerning what additional filings and time for argument, if any, may be required so that both appeals, that of the Crown and that of the respondent, may be determined.

Oland, J.A.