NOVA SCOTIA COURT OF APPEAL
Citation: R. v. R. E.M., 2011 NSCA 8

Date: 20110119
Docket: CAC 334444
Registry: Halifax

Between:

R. E. M.

Applicant

v.

Her Majesty the Queen

Respondent

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

Judge:	The Honourable Justice Duncan R. Beveridge
Motion Heard:	December 9, 2010, in Chambers
Held:	Motion to extend time to file an Application for Leave to Appeal and Notice of Appeal is dismissed.
Counsel:	Applicant in person Mark A. Scott, for the respondent

Decision:

INTRODUCTION

[1] R. E. M. was charged in 2005 with offences that alleged he inappropriately touched a young girl. The Crown proceeded summarily. He was eventually convicted in August 2007. His sentence was time served in light of the length of time he had spent in pre-trial custody.

[2] Mr. M. appealed his conviction to the Summary Conviction Appeal Court (SCAC). He was not present at the hearing of his appeal. Justice Allan Boudreau heard the appeal on May 12, 2010, and later that day delivered oral reasons dismissing the appeal. M. says he did not learn of the dismissal for some days. When he did, he immediately voiced his intention to appeal to this Court. The problem was he had no realistic ability to formulate and file appeal documents within the time period set by the rules of court. He has since filed a number of affidavits and documents with this Court. Collectively, they amount to a Motion by Mr. M. for an extension of time to file his Application for Leave to Appeal and his Notice of Appeal.

[3] I heard his Motion on December 9, 2010 and reserved my decision. As I later explain, ordinarily, where a prospective appellant had a *bona fide* intention to appeal within the time period, and a reasonable excuse for being outside the period, it is a relatively rare case where the Court's discretion would not be exercised in favour of extending the time. Nevertheless, for the reasons that follow, the Motion to extend time is dismissed.

BACKGROUND

[4] Mr. M. is a former teacher. He is an educated, intelligent and articulate individual. He originally represented himself on the charges in Provincial Court. The police laid a two count Information charging Mr. M. with touching, for a sexual purpose, a person under the age of 14 with his hand, contrary to s.151 of the *Criminal Code*, and committing a sexual assault on the same complainant contrary to s. 271(1)(a) of the *Criminal Code*.

[5] Both the offence of touching a young person for a sexual purpose and sexual assault are hybrid or dual procedure offences. That is, the Crown has a right to elect to proceed against an accused by indictment or by summary conviction. The difference is usually designated by the charging document specifying which by virtue of the section number – s. 271(1)(a) being by indictment, and s. 271(1)(b) by summary conviction.

[6] Here the Crown proceeded summarily despite the selection by the police officer who swore out the Information that the sexual assault charge was pursuant to s. 271(1)(a).

[7] Eventually, Mr. M. retained defence counsel, Mr. Peter Nolen of Nova Scotia Legal Aid, to represent him at trial. The trial proceeded over multiple days in 2007 before Buchan PCJ. The Crown called seven witnesses. The main witness was the young complainant. She was nine years old when she testified at Mr. M.'s trial. She described events that happened one afternoon in June 2005 when she was seven years of age. Mr. M. testified and denied any improper intentional touching of the complainant. The Crown called two of its previous witnesses in rebuttal.

[8] The trial judge gave an oral decision on August 20, 2007. She found the complainant to be an extremely credible witness. On the other hand, she found the testimony of Mr. M. to be evasive, argumentative and self-serving. The trial judge also accepted the evidence of the complainant's parents which contradicted that of Mr. M. with respect to his conduct following the incident with the complainant, and his rationalization or justification for the complainant's presence in his apartment, and his apology for having embarrassed or upset the complainant.

[9] The trial judge specifically accepted the testimony of the complainant that Mr. M. touched her vaginal area with his hand. She had no reasonable doubt based on all the evidence that Mr. M. intentionally touched the complainant for a sexual purpose, knowing she was well under the age of 14 years when doing so. She was also satisfied beyond a reasonable vote that he committed a sexual assault upon the complainant by touching her, both on the vagina, and by kissing her bare stomach on two occasions, these acts being committed in circumstances of a sexual nature.

[10] She found Mr. M. guilty of the sexual assault charge and entered a conditional stay on the charge under s. 151 of the *Criminal Code*. Sentencing was adjourned to September 18, 2007. Apparently, it did not proceed on that date because of Crown Attorney Cheryl Byard's stated desire to seek to have Mr. M. declared a dangerous offender. Sentence was then adjourned to October 2, 2007.

[11] I interject in this chronology of some earlier events in the proceedings. On February 6, 2007, during one of the adjournments of the trial, the Crown gave notice of its intention to seek revocation of Mr. M.'s bail. Brian Smith, Q.C. appeared for Mr. M. on the proceedings related to this issue. On February 20, 2007, Mr. M. consented to a revocation of the terms of his judicial interim release. Thereafter, he consented to remand until eventually being sentenced on October 2, 2007.

[12] The Crown abandoned the notion of a dangerous offender application. Mr. M. says this was because he had not been convicted of an indictable offence. The trial judge sentenced Mr. M. to time served in light of the time he had already spent on remand.

[13] Mr. M. filed his own appeal from conviction by way of an inmate's appeal. His original Notice of Appeal was dated September 19, 2007. It was stated to be to the Nova Scotia Court of Appeal, even though he had completed the form indicating he had been convicted of sexual assault by way of summary conviction. His grounds of appeal were three in number. He complained the conviction should be quashed as it could not be supported by the evidence, it was wrong on questions of law, and there had been a miscarriage of justice by denial of his right to make full answer and defence.

[14] Once it was confirmed that the Crown had indeed elected to proceed by way of summary conviction, Mr. M.'s appeal proceeded before the SCAC, the Nova Scotia Supreme Court. Brian Smith, Q.C. assumed carriage of the appeal proceedings for Mr. M.. It is apparent Mr. M. was in custody on other matters.

[15] The proceedings in the SCAC were somewhat haphazard and proceeded at a leisurely pace. The initial hearing date was set for May 21, 2008. No facta were filed. The appellant sought an adjournment of the hearing. It is of no consequence to recite all of the various dates that were thereafter set and adjourned until the

appeal was finally heard on May 12, 2010. The grounds of appeal advanced before the SCAC and issues that caused delay in the hearing of the summary conviction appeal are relevant to Mr. M.'s proposed appeal to this Court, and so will be briefly sketched.

[16] The appellant's factum was filed May 6, 2009. The appellant advanced four arguments, described as "grounds of appeal". They had little or only tenuous connection to the original grounds. No application was made to amend the original grounds. The Crown made no objection to the arguments advanced. They need only be described generally.

[17] Ground # 1 was a complaint that trial counsel and the trial judge did not understand and apply the hearsay rule. The gist of the complaint was that the Crown, in questioning her own witnesses, stopped them when she thought they would be offering what others, in particular the complaint, said to them. No objection had yet been made by the defence. Later, the defence did object when a Crown witness was going to stray into what the complainant had said. The trial judge was not asked to nor did rule on any aspect of this issue. The argument appears to be that the trial judge did not get the "best evidence" of what the complainant said happened because the Crown and the defence did not examine or cross-examine on what the complainant had said to other witnesses about the events in question.

[18] Ground # 2 is stated to be an assertion that the guilt of any person charged with a criminal offence must be proved beyond a reasonable doubt. The appellant argued that the Crown engaged in leading questions, including on crucial aspects of the complainant's evidence. The appellant also argued that the trial judge made no reference to *R. v. W.(D.)*, [1991] 1 S.C.R. 742, and therefore erred by only addressing the question whether she believed the complainant or the appellant.

[19] Ground # 3 is an assertion that there were numerous examples of a lack of civility by Crown counsel towards defence counsel, and too many interruptions by the Crown during defence cross-examination such that his flow of questions was defeated. There was little or no involvement by the trial judge to control this conduct.

[20] Ground #4 alleges that the defence appeared to be disorganized and unfocused during the trial, resulting in inadequate representation, which violated the appellant's rights to a fair trial under ss. 7 and 11(d) of the *Charter of Rights and Freedoms*. By way of particulars, the appellant cited the lack of argument by the defence for the complainant to be called first in the trial to avoid any hearsay issues and provide context for later witnesses. Also asserted was the existence of many opportunities for objection which were missed. Lastly, it is suggested that the cross-examination was confusing and unfocused.

[21] The Crown filed its factum on May 21, 2009. The general tenor of its position was that the appeal was simply an attempt to retry the case with different tactics. Neither party at trial sought to admit any utterances made by the complainant following the incident. The Crown argued that the defence could have elicited the out-of-court statements made by the complainant in an attempt to show an inconsistency between what the complainant said on other occasions with what she said on the witness stand. There was no indication that the complainant had said anything inconsistent as between her trial testimony and what she may have said to others. The Crown pointed out, somewhat prophetically, "there is no evidence that defence counsel failed to follow his client's instructions respect to this trial tactic".

[22] The same point was made by the Crown with respect to Ground # 2 concerning the defence decision not to cross-examine the complainant on her videotaped statement. During the trial, defence counsel took a recess to consider the issue of cross-examination on the videotaped statement. No cross-examination occurred on any aspect of what the complainant had told the police and social worker just six days after the incident. They said, absent evidence that the defence failed to follow his client's instructions, this decision was a tactical one.

[23] Further, there was no error with respect to the application of *R. v. W.(D.)*, and no lack of civility by the Crown – only appropriate objections to the use of words by defence counsel that would not be understood by the young complainant. In each instance of intervention, the defence agreed and simply re-phrased the question with age-appropriate language.

[24] With respect to the fourth ground, alleging ineffective assistance of counsel, the Crown correctly set out the two-step approach to analyzing such a claim. The

first being a requirement to demonstrate counsel's acts or omissions constituted incompetence – it was not the result of reasonable professional judgment; and second, to show that the incompetence caused procedural unfairness or that the reliability of the trial outcome may have been compromised. The Crown stressed the lack of any evidence relied upon by the appellant, either from the trial record or otherwise, to substantiate how it was that trial counsel's representation constituted incompetence or identify any prejudice from the claimed inadequacies.

[25] On June 16, 2009 Mr. Smith, counsel for the appellant, notified the SCAC that he intended to apply for an adjournment of the appeal then scheduled for June 17, 2009. He did so. The reason given for the request was that Mr. Smith had had a conversation with trial counsel, Peter Nolen, in which he says a comment was made by trial counsel important to the issue of the claim of ineffective assistance. Smith advised the Court he had instructions from Mr. M. to raise the matter, and this would require an affidavit from himself and from his client. Smith felt obliged to remove himself as counsel since he may have to give evidence.

[26] Brian Church, Q.C. assumed carriage of the appeal on behalf of Mr. M.. Dates were set for the filing of affidavits to be advanced by way of a fresh evidence application. Mr. Church advised the Court he had been in touch with Mr. M. and anticipated filing an affidavit from Mr. Smith and Mr. M..

[27] An affidavit from Mr. Smith was filed with the Court on November 30, 2009, but none from Mr. M.. Smith's affidavit was one page. He deposed that during the winter of 2009 he had met Mr. Peter Nolen outside the central correctional facility in Burnside. They sat in Smith's car. Smith said he had reviewed the trial transcript and observed very few objections by Nolen during the Crown's examination of witnesses. He asked Nolen why that was the case. He said Nolen's response was that any objections he did raise, he lost, so he "just gave up". Smith added that he believed "the outcome of the trial may well have been different had proper objections been made at the time."

[28] The ultimate date for the SCAC hearing was May 12, 2010. The Crown filed a detailed brief on May 6, 2010 dealing with the proposed fresh evidence. In addition, a reply affidavit from Mr. Peter Nolen sworn May 5, 2010 was tendered. This affidavit was also short. He said he did recall sitting in Mr. Smith's car and having a brief conversation about objections at Mr. M.'s trial. Nolen could not

recall his exact response, but the nature of it was that the leading questions from the Crown would not end. He swore that at no time did he "give up" in his representation of Mr. M., and affirmed his belief that he had provided competent representation throughout the trial, and had followed his client's instructions to the best of his ability.

[29] On May 10, 2010 Mr. Church wrote to Bryson J., as he then was, who he understood to be scheduled to hear the appeal. He referenced the affidavit materials filed and the Crown's brief. He then advised that, in light of these materials, he did not believe he could establish incompetence, and would only be arguing the merits of the appeal based on the appellant's factum previously filed.

[30] The appeal proceeded before Justice Boudreau on May 12, 2010. At the outset of the hearing, Mr. Church confirmed that both the application to adduce fresh evidence and Ground # 4, the allegation of ineffective assistance of counsel, had been abandoned. At the conclusion of argument, Boudreau J. announced he would not reserve, but would be prepared to render a decision shortly. He recessed for approximately one hour. On his return he delivered oral reasons for dismissing the appeal.

[31] In his decision, the SCAC judge correctly observed that Grounds #1 and #3 were related as they were complaints about the failure by the trial judge to make rulings on the admissibility of evidence and address the propriety of interventions by Crown during defence cross-examination. He concluded that the decisions by the Crown and defence not to attempt to lead evidence about what the complaint may have said to others after the incident was a matter of trial strategy. It was not up to the trial judge to descend into the arena and decide what evidence the parties should or not try to introduce during the trial.

[32] With respect to the interventions by the Crown during cross-examination, he agreed these exceeded the bounds of proper protocol. He felt the defence could have asked the judge to curtail such interruptions, but concluded that the interventions or objections by the Crown did not render the proceedings unfair or cause a miscarriage of justice. In the end, he concluded there was no merit in these grounds.

[33] Ground # 2 was the complaint that the trial judge failed to articulate the roadmap set out in *R. v. W.(D.)*, and therefore failed to properly apply the burden of proof beyond a reasonable doubt. Boudreau J. reasoned that there was no doubt the trial judge was well aware of the appropriate burden of proof. She made a careful analysis of all of the evidence, made findings of credibility, giving extensive and cogent reasons for doing so. In his view, her reasons showed she was well aware of the burden of proof beyond a reasonable doubt and it was not a contest of whose version of events was more likely or probable. He was satisfied there was no error and the appeal was dismissed.

[34] It is with this background that I turn to the identification of the principles on motions to extend the time to initiate an appeal and how they apply here.

ISSUE

[35] The sole issue is whether I should exercise my discretion to extend the time for Mr. M. to file his Application for Leave to Appeal and Notice of Appeal.

PRINCIPLES

[36] The authority to extend the time to file documents initiating an appeal is found in s. 678(2) of the *Criminal Code*. This section provides:

> **678.** (1) An appellant who proposes to appeal to the court of appeal or to obtain the leave of that court to appeal shall give notice of appeal or notice of his application for leave to appeal in such manner and within such period as may be directed by rules of court.
>
> (2) The court of appeal or a judge thereof may at any time extend the time within which notice of appeal or notice of an application for leave to appeal may be given.

[37] By virtue of s. 839(2) of the *Code*, this provision applies to appeals from the SCAC. Pursuant to this Court's rule-making powers (s. 482 of the *Code*) the *Civil Procedure Rules* provide that the time period to start an appeal is no more than twenty-five days (91.02) as calculated by Rule 94.02 but can be extended under s. 678 or Rule 91.04. Rule 91.04 simply provides:

> **91.04 (1)** Any time prescribed by this Rule may be extended or abridged by a judge of the Court of Appeal or the Court of Appeal before or after the time has expired.
>
> **(2)** A person who seeks an extension or abridgment of a time period in the Code or this Rule may make a motion to a judge of the Court of Appeal or the Court of Appeal under a provision in the Code, such as subsection 678(2), under Rule 2 - General, or under subsection (1) of this Rule.

[38] Under our previous *Rules*, (*Nova Scotia Civil Procedure Rules 1972*), Rule 65.05(3) specified that the judge considering the question of extension of time must examine the court file, including the explanation for the delay and the apparent merits of the proposed appeal as indicated in the grounds of appeal, and the report of the trial judge. Despite the change in language, I see no reason not to follow this general approach to the exercise of this discretion.

[39] Both in Nova Scotia, and elsewhere, the criteria to be considered in the exercise of this discretion has been generally the same. The Court should consider such issues as whether the applicant has demonstrated he had a *bona fide* intention to appeal within the appeal period, a reasonable excuse for the delay, prejudice arising from the delay, and the merits of the proposed appeal. Ultimately, the discretion must be exercised according to what the interests of justice require. (See *R. v Paramasivan* (1996), 155 N.S.R. (2d) 373; *R. v. Pettigrew* (1996), 149 N.S.R. (2d) 303; *R. v. Butler*, 2002 NSCA 55; *R. v. Roberge*, 2005 SCC 48.)

[40] The Crown concedes that Mr. M. had a *bona fide* intention to appeal within the appeal period, and has a reasonable excuse for not being able to do so. There is no also issue about his diligence in pursuing his appeal, nor any prejudice if the extension were to be granted. The sole basis for the Crown's opposition to this motion is that it is not in the interests of justice to extend the time because his proposed grounds of appeal are devoid of merit.

[41] What then is the appropriate test the applicant must meet with respect to establishing merit? On this discrete question there is some divergence. In *R. v. Pettigrew, supra*, Flinn J.A., on an application to extend time to bring an appeal from conviction and sentence, refused to extend the time as he was not satisfied with the explanation for the delay, and because the proposed appeal had "no merit". In *R. v Paramasivan, supra*, Hallett J.A. declined the requested extension

as there was no *bona fide* intention to appeal, adequate explanation for the lengthy delay, nor was he satisfied that the appeal had a "reasonable chance of success".

[42] In *R. v. Butler*, *supra*, Cromwell J.A., as he then was, wrote that the question should be whether the proposed appeal raised reasonably arguable grounds. There was no *bona fide* intention to appeal. However, the applicant had suffered a number of personal crises that mitigated his lack of diligence, and the proposed appeal raised arguable issues (the Crown conceded at least one of the grounds did so). The extension was accordingly granted.

[43] In *R. v. Stapledon* (2000), 225 N.B.R. (2d) 260, Drapeau J.A., as he then was, dismissed an application to extend, requiring the applicant to demonstrate the appeal had a "serious chance of success". Later, in *R. v. Gautreau*, Richard J.A. required the applicant to demonstrate merit in the sense of a reasonably arguable ground. This he failed to do and the application was dismissed. The requirement of a reasonably arguable ground is also the approach in Saskatchewan (see *R. v. Morin* (2005), 195 C.C.C. (3d) 190; *R. v. Brittain*, 2008 SKCA 104).

[44] Ordinarily, where an offender demonstrates that he had a *bona fide* intention to appeal within the applicable time period and has a reasonable excuse for his delay, the Crown consents to the extension. Does the satisfaction of the first two criteria eliminate or reduce the need for the Court to consider whether the applicant can demonstrate an arguable ground of appeal? In my opinion, it does not.

[45] As stressed earlier, the ultimate question is whether or not the interests of justice require the extension of time to be granted. It cannot be in the interests of justice to extend time in order for a prospective appellant to pursue an appeal that has no merit. To do so wastes prosecutorial and judicial resources and reflects negatively on the administration of justice.

[46] There have been a number of Ontario cases where the presiding judge has addressed the merit requirement even though the applicant met the first two criteria (see *R. v. Hayes*, 2007 ONCA 816; *R. v. Garland*, 2008 ONCA 134; *R. v. Junkert* [2009] O.J. No. 2979). In both *Garland* and *Junkert* the Chambers judge appeared to apply an arguable issue test, albeit framed in the negative as they could not say the appeals were "hopeless". I take this to mean there was sufficient merit to make the grounds in issue arguable.

[47] Another case where the first two factors or criteria appeared to be undisputed was *R. v. Price*, 2010 ONCA 541. The applicant had been found guilty at trial. He was successful in establishing his rights under s. 9 of the *Charter* had been infringed. The trial judge refused to stay the proceedings as a remedy, instead imposing a sentence of time served. He appealed unsuccessfully to the SCAC. His subsequent appeal documents to seek leave to appeal to the Ontario Court of Appeal were out of time. Watt J.A. heard the application to extend time. Informing his analysis was the fact that leave to appeal from the SCAC to the Ontario Court of Appeal under s. 839(1) of the *Code* is granted sparingly. It is the panel hearing the appeal that decides the issue of leave. In deciding if leave will be granted, the panel will examine if the questions of law raised transcend the borders of the specific case and are significant to the general administration of justice; or leave may also be granted where a "clear" error is apparent (see *R. v. R.R.*, 2008 ONCA 497). Our Court in *R. v. MacNeil*, 2009 NSCA 46 quoted with approval this approach:

> [9] The Ontario Court of Appeal in **R. v. R. R.** (2008), 234 C.C.C. (3d) 463, (2008), 238 O.A.C. 242, 2008 ONCA 497 explains when leave may be granted:
>
> > [37] In summary, leave to appeal pursuant to s. 839 should be granted sparingly. There is no single litmus test that can identify all cases in which leave should be granted. There are, however, two key variables – the significance of the legal issues raised to the general administration of criminal justice, and the merits of the proposed grounds of appeal. On the one hand, if the issues have significance to the administration of justice beyond the particular case, then leave to appeal may be granted even if the merits are not particularly strong, though the grounds must at least be arguable. On the other hand, where the merits appear very strong, leave to appeal may be granted even if the issues have no general importance, especially if the convictions in issue are serious and the applicant is facing a significant deprivation of his or her liberty.

[48] In *R. v. Price*, *supra*. Watt J.A. concluded that the merits factor had to take into account not just the intrinsic merits of the proposed ground of appeal, but also consideration of the additional conditions imposed in cases governed by s. 839 of the *Criminal Code*. He concluded the findings at trial, confirmed on summary conviction appeal and unassailable in the Court of Appeal did not demonstrate an arguable ground of appeal. Watt J.A. went on to point out where the proposed

grounds seem unlikely to warrant leave being granted, as it must under s. 839, an applicant is equally unlikely to persuade a judge that the proposed appeal has sufficient merit to warrant an extension of time.

[49] What constitutes an arguable ground of appeal has been addressed a number of times in the civil context where an appellant seeks a stay of execution or enforcement of a lower court's order pending appeal. One of the prerequisites for a stay that an appellant must demonstrate is that he or she has an arguable appeal. An oft quoted exposition of what constitutes an arguable issue was written by Freeman J.A. in *Coughlan et al. v. Westminer Canada Ltd. et al.* (1994), 125 N.S.R. (2d) 171 at para. 11:

> "An arguable issue" would be raised by any ground of appeal which, if successfully demonstrated by the appellant, could result in the appeal being allowed. That is, it must be relevant to the outcome of the appeal; and not be based on an erroneous principle of law. It must be a ground available to the applicant; if a right to appeal is limited to a question of law alone, there could be no arguable issue based merely on alleged errors of fact. An arguable issue must be reasonably specific as to the errors it alleges on the part of the trial judge; a general allegation of error may not suffice. But if a notice of appeal contains realistic grounds which, if established, appear of sufficient substance to be capable of convincing a panel of the court to allow the appeal, the Chambers judge hearing the application should not speculate as to the outcome nor look further into the merits. Neither evidence nor arguments relevant to the outcome of the appeal should be considered. Once the grounds of appeal are shown to contain an arguable issue, the working assumption of the Chambers judge is that the outcome of the appeal is in doubt: either side could be successful.

[50] This approach has been consistently applied by this Court. For example, in *MacCulloch v. McInnes, Cooper & Robertson* (2000), 186 N.S.R. (2d) 398, Cromwell J.A., as he then was, wrote:

> [4] The appellants must show that there is an arguable issue raised on appeal. This is not a difficult threshold to meet. What is required is a notice of appeal which contains realistic grounds which, if established, appear of sufficient substance to be capable of convincing a panel of the court to allow the appeal: see Freeman J.A., in **Coughlan et al v. Westminer Canada Ltd. et al.** (1993), 125 N.S.R. (2d) 171; 349 A.P.R. 171 (C.A.). It is not my role as a Chambers judge hearing a stay application to enter into a searching examination of the merits of the appeal or to speculate about its probable outcome but simply to determine whether the arguable issue threshold has been reached.

[51] I see no reason why the same approach is not appropriate to the requirement that a prospective appellant in a criminal case show he or she has an arguable issue.

APPLICATION OF THE PRINCIPLES

[52] Mr. M. is self-represented. Nonetheless, as noted earlier, he is an intelligent and articulate individual. He filed a package of materials on August 27, 2010 that included his proposed Notice of Appeal. It contains just over eight pages of single spaced typed grounds of appeal, including explanations and supporting argument. He was clearly put on notice by the Crown through its letter of September 1, 2010 that its sole objection to an extension of time was that the proposed grounds sought to be raised were issues that were not before the SCAC, or are attempts to re-argue the case heard by the trial judge or raise irrelevant matters.

[53] Mr. M. filed further arguments and materials. These included a submission, based on *R. v. Gautreau*, [2004] N.B.J. No. 326, that the merits of a proposed appeal had no bearing on the application to extend time. This case does not stand for that proposition at all. Richard J.A. there wrote:

> **5** The following factors are usually considered in determining whether or not to grant an extension of time:
>
> i) whether to applicant has shown a bona fide intention to appeal within the appeal period;
>
> ii) whether the applicant has accounted for or explained the delay;
>
> iii) whether the respondent would be unduly prejudiced by the extension of time; and,
>
> iv) whether there is merit to the proposed appeal in the sense that there is a reasonably arguable ground;
>
> **6** A judge hearing a motion for an extension of time will exercise his or her discretion considering these factors and any other factors deemed to be appropriate in the circumstances of the particular case. Ultimately, the judge determines whether it would be in the interest of justice to grant the extension of time.

[54] Mr. M. also filed an affidavit sworn November 19, 2010. It attaches materials, and makes argument, all in support of his position that not only was Mr. Nolen incompetent at trial, and hence he had ineffective assistance of counsel, but that an extension of time should be granted so he can pursue his appeal on the basis that both Messrs. Smith and Church were incompetent in how they dealt with the allegation against Mr. Nolen.

[55] I have reviewed in some detail the proposed grounds of appeal. I also heard lengthy submissions from Mr. M. on those grounds and on other putative errors not raised in his proposed Notice of Appeal. Despite Mr. M.'s valiant efforts, he has failed to identify any arguable issue. I will not go through each of his many grounds. A sampling will suffice.

[56] He complains that the trial judge failed to conduct an age appropriate determination of the promise to tell the truth under s. 16 of the *Canada Evidence Act*. This issue was not raised before the SCAC, and so cannot count as an error in law by the SCAC that is reviewable by this Court.

[57] Mr. M. makes other complaints about the conduct of the trial proceedings that are similar in nature. He questions, if the trial judge properly understood how to assess the credibility of a child witness, why the trial judge did not inquire why other witnesses were not called; that the Crown attorney at trial acted criminally in withholding evidence; the trial judge should have been aware that two or more Crown witnesses were involved in the fabrication of their evidence; the trial judge was in error in entering a conditional stay on the s. 151 offence.

[58] Two of the applicant's proposed grounds of appeal deal with the aborted attempt to have Mr. M. declared a dangerous offender. Not only was this not an issue before the SCAC, it deals with events that happened after he was convicted and has nothing to do with his trial. In sum, these complaints all allege errors by the trial judge, or identify an alleged defect in some aspect of the trial proceedings. They are either irrelevant to the conviction under appeal or were not before the SCAC and are not appealable to this Court.

[59] One of the only real questions of law before Boudreau J., was the issue that the trial judge did not go through the three-step analysis suggested by *R. v. W.(D.)*,

and hence may have not properly applied the burden of proof. It is noteworthy that on this issue, Mr. M. took the view the principles set forth in *R. v. W.(D.)* had no bearing on a judge alone trial. Hence he said the written and oral arguments before Boudreau J. were extraneous. He does not argue any error in law by the SCAC on this issue.

[60] His main complaint appears to be that both of his counsel for the SCAC proceedings failed in their ethical and professional obligations and this caused him to have an unfair hearing before Boudreau J. The position M. advances is this. Brian Church abandoned the ground of appeal alleging ineffective trial counsel without his client's instructions to do so. Mr. Church was otherwise unprepared and unpersuasive in his advocacy before the SCAC. Mr. Smith was supposed to turn over all of his file to Mr. Church. Mr. M. claims Smith did not, and this failure hampered Mr. Church in his ability to prepare written and oral argument on the pending fresh evidence application before the SCAC.

[61] Assuming that incompetence of counsel during an appeal can constitute grounds to obtain relief from a higher court, the complaints by Mr. M. do not present even an arguable issue. I say this for a number of reasons. First, Mr. M. misunderstands the role of counsel. Counsel are not mere mouthpieces to say things or advance whatever arguments that the client wants. Judgment must be exercised by counsel about what matters he or she should press in argument or abandon. In these circumstances, to constitute an arguable issue, there must be at least some basis to conclude the decision to abandon the argument by Mr. Church amounted to incompetence.

[62] The reason Mr. Church abandoned the fresh evidence application and related claim of ineffective counsel at trial is revealed in the materials filed by Mr. M.. As noted earlier, Church wrote to the SCAC judge on May 10, 2010. He explained that he had first considered that an application to adduce fresh evidence might be necessary in relation to the argument of ineffective assistance of counsel at trial. He considered the affidavits of Mr. Smith and Mr. Nolen, and the Crown's brief on what must be established – that the conduct of trial counsel amounted to incompetence, and such incompetence resulted in a miscarriage of justice. After having done so, he formed the opinion the threshold could not be met, and abandoned the application to adduce fresh evidence and the associated ground of

appeal. At the hearing before Boudreau J., Mr. Church confirmed the abandonment in order to focus on the Court's attention on the other arguments.

[63] In my opinion, this kind of assessment is exactly what competent counsel do. They make assessments about where to best focus their energies on behalf of their client. Not every conceivable allegation of error is put forward on appeal. Choices frequently have to be made by an appellant about what points will be relied on. Mr. Church did this.

[64] Nonetheless, during the hearing of this application I invited Mr. M. to demonstrate how it was arguable that the decision by Mr. Church was in any way incompetent and how he was prejudiced by that abandonment. Assuming that abandonment of a plainly meritorious ground of appeal might suffice (and I make no pronouncement on this), I encouraged Mr. M. to demonstrate how, in any way, the claim of ineffective counsel at trial had merit.

[65] Beyond the bare assertion of incompetence of trial counsel, neither he nor his two counsel in the SCAC proceedings, demonstrated incompetence of trial counsel, and just as importantly, how any deficiency in advocacy created an arguable issue of having caused a miscarriage of justice. No examples of missed objections, failure to cross-examine, or lead evidence about what the complainant told others, were ever put forward at any time. Mr. M. acknowledged he had full disclosure at trial. There is no indication that the complainant said different things about the incident in her video statement or in her comments to others about what happened.

[66] In addition to my earlier observations about the role of counsel in deciding what arguments are advanced on appeal, I am far from satisfied that Mr. Church did in fact abandon the fresh evidence application and incompetence of trial counsel argument without his knowledge and consent. Included in Mr. M.'s materials is a letter from Mr. Church dated May 28, 2010 to Mr. M.. A number of documents are identified as being enclosed with that letter. One of these is the letter to the SCAC judge of May 10, 2010 advising the Court of the abandonment and Church's reasons for doing so. In the letter of May 28, 2010, Mr. Church wrote to Mr. M. " I read this letter [the one of May 10, 2010] to you prior to the appeal". There is no evidence before me that this is not so.

[67] The applicant submitted some materials he says Mr. Smith should have provided to Mr. Church that would have demonstrated incompetence by trial counsel, by virtue of trial counsel's failure to follow instructions at trial. I have read those materials. There is nothing in them that would have even the slightest bearing on the issue of effectiveness of trial counsel. The suggestion that Mr. Smith was incompetent is groundless and has no merit.

[68] I gave full rein to Mr. M. throughout the almost full day hearing of his motion to extend time. He went through some of his proposed grounds of appeal, and voiced additional complaints. The complaints he added also have no merit. They ranged from such things as complaining about being convicted of an offence under s. 271(1)(a) of the *Criminal Code* when the Crown had proceeded summarily, to assertions Mr. Church did not argue forcefully enough, and the SCAC judge did not have sufficient time to read the trial record and properly assess the appeal.

[69] The section number of the *Criminal Code* is mere surplusage, and no complaint was made to the SCAC about this, and hence is not an issue appealable to this Court. The complaints against Mr. Church and the SCAC judge are completely without substance.

SUMMARY AND CONCLUSION

[70] Ordinarily the interest of justice would militate in favor of granting an extension, even from a SCAC, if the applicant had a *bona fide* intention to appeal within the time period, and has a reasonable excuse for not having done so. To do otherwise would be to deprive the applicant of his or her opportunity to have a panel of this Court determine if leave should be granted, and if so, address the substance of the appeal.

[71] An examination of the merits of a proposed appeal should be a limited one due to the frequent lack of a complete record and detailed submissions. It is decidedly not the role of the Chambers judge to engage in measuring the chances of success, allowing the extension if convinced the applicant has a reasonable or strong or some other adjective to measure the merits, but dismiss the application if not so satisfied.

[72] However, the applicant must be able to identify and set out a ground that is at least arguable. I had the advantage of having the whole of the trial record, written and oral argument before the SCAC and the decision of the SCAC judge. Mr. M. has had every opportunity to file evidence and submissions and make oral argument to address the requirement that his proposed appeal have at least one arguable issue. I would not hesitate to grant an extension of time for Mr. M. if he articulated, or I could discern, any arguable issue upon which leave to appeal might be granted by this Court. I could find none, and accordingly his Motion to extend time to file an Application for Leave to Appeal and Notice of Appeal is dismissed.

Beveridge, J.A.