NOVA SCOTIA COURT OF APPEAL
Citation: R. v. Ross, 2012 NSCA 8

Date: 20120123
Docket: CAC 356611
Registry: Halifax

Between:

Bradley Roderick Ross

Appellant

v.

Her Majesty the Queen

Respondent

Restriction on publication: Pursuant to s. 486 of the *Criminal Code*

Judge: The Honourable Justice Joel E. Fichaud

Motion Heard: January 19, 2012, in Halifax, Nova Scotia, in Chambers

Held: Motion for intervention granted on conditions.

Counsel: William L. Mahody, for the proposed intervenor Gary Jewitt
Stanley W. MacDonald, Q.C., for the Appellant (respondent to motion) Bradley Roderick Ross
Mark A. Scott for the Respondent Her Majesty the Queen

486.4 (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

(i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 172, 172.1, 173, 210, 211, 212, 213, 271, 272, 273, 279.01, 279.02, 279.03, 346 or 347,

(ii) an offence under section 144 (rape), 145 (attempt to commit rape), 149 (indecent assault on female), 156 (indecent assault on male) or 245 (common assault) or subsection 246(1) (assault with intent) of the Criminal Code, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 4, 1983, or

(iii) an offence under subsection 146(1) (sexual intercourse with a female under 14) or (2) (sexual intercourse with a female between 14 and 16) or section 151 (seduction of a female between 16 and 18), 153 (sexual intercourse with step-daughter), 155 (buggery or bestiality), 157 (gross indecency), 166 (parent or guardian procuring defilement) or 167 (householder permitting defilement) of the Criminal Code, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 1, 1988; or

Reasons for judgment:

[1] This is a motion to intervene in a criminal appeal. The proposed intervenor is the appellant's trial counsel. He seeks the opportunity for input in the Court of Appeal on his former client's ground of appeal that trial counsel's representation was ineffective or incompetent.

Background

[2] Mr. Ross was convicted in the Provincial Court of sexual touching of a person under the age of sixteen contrary to s. 151 of the *Criminal Code*. Judge Alanna Murphy heard evidence over four days in the autumn of 2010, and issued her decision on March 8, 2011. At the trial Mr. Ross was represented by Mr. Gary Jewitt.

[3] Mr. Ross, represented by new counsel, appealed his conviction to the Court of Appeal. His grounds of appeal include that he "did not receive effective assistance from his trial counsel such that the reliability of the Judge's verdict was compromised and a miscarriage of justice resulted".

[4] On October 20, 2011, Justice Saunders in the Court of Appeal's chambers scheduled the appeal hearing for March 22, 2012. Mr. Ross' counsel advised that there would be a motion to adduce fresh evidence.

[5] On November 30, 2011, Mr. Ross filed a Notice of Motion to Adduce Fresh Evidence. The fresh evidence includes three affidavits, with exhibits. The material deals with the allegation that Mr. Ross received ineffective assistance from Mr. Jewitt at the trial.

[6] On January 6, 2012, Mr. Ross moved in this Court's chambers for an Order permitting him to file a factum longer than the standard 40 pages. His appeal counsel's supporting affidavit says:

> 4. This appeal involves an allegation that the Appellant's trial counsel was ineffective. A Motion to Adduce Fresh Evidence has been filed. The fresh evidence is relatively extensive. Additionally, there are allegations that the trial Judge made legal errors during the course of the trial.

> Consequently, based on my review and knowledge of the matter to date, a Factum nor to exceed eighty-five (85) pages will be required.

On January 12, 2012, Justice Farrar ordered that Mr. Ross' factum may extend to eighty five pages, to be filed by January 18, and the Crown's factum is to be filed by February 20. Mr. Ross has since filed an eighty-three page factum.

Issue

[7] On January 12, 2012 Mr. Jewitt moved for leave to intervene in Mr. Ross' appeal. His Notice says that he proposes to "take the position that the representation provided was reasonable and appropriate in the circumstances". He requests leave to file a factum not exceeding twenty five pages and to make oral submissions at the hearing. His Notice does not request the opportunity to cross-examine. The Crown supports Mr. Jewitt's motion. Mr. Ross opposes it, and submits that any affidavit from Mr. Jewitt be tendered by the Crown without Mr. Jewitt's participation as an intervenor.

[8] I heard Mr. Jewitt's motion to intervene on January 19, 2012 and reserved my decision. These are my reasons.

Analysis

[9] Nova Scotia's criminal Rule 91, enacted under s. 482 of the *Criminal Code*, does not expressly discuss intervention. But Rule 91.02(2) incorporates Civil Procedure Rule 90, with necessary modifications, when it is not inconsistent with Rule 91. Rule 90.19 permits a judge to grant leave to intervene in an appeal. Rule 90.02(1) says that other Civil Procedure Rules, not inconsistent with Rule 90, apply with necessary modifications to a matter in the Court of Appeal. Rule 35.10 permits a judge to allow an intervention in the Supreme Court.

[10] Those provisions govern motions by trial counsel to intervene in a criminal appeal where a ground of appeal challenges the effectiveness or competence of counsel's effort at trial: *R. v. Fraser*, 2010 NSCA 106, paras. 8-9; *R. v. West*, 2009 NSCA 63, paras. 13-16. These Rules give the motions judge a discretion whether to allow an intervention. In *Logan v. WCAT*, 2006 NSCA 11, I discussed that discretion under the former Rule 62.35(1), the predecessor to the current Rule 90.19:

> [8] The authorities have described a flexible menu of criteria to govern that discretion. I refer to Justice Cromwell's decision in *R. v. Regan* (1999), 174 N.S.R. (2d) 1 (C.A.) At paras 29-53, and Justice Bateman's decision in *Nova Scotia (Attorney General) v. Arrow Construction Products Ltd.* (1996), 148 N.S.R. (2d) 392 (C.A.) at para 5. Generally, an intervention should (1) target the parties' existing *lis* and (2) accommodate the process of the existing appeal while (3) augmenting and not just duplicating the parties' submissions or perspectives to assist the court's consideration of the parties' issues.

[11] In *Fraser*, paras. 10-19 and *West*, paras. 28-38, Justices Beveridge and Saunders respectively reviewed the criteria pertinent to a motion by trial counsel to intervene in a criminal appeal, where there is a ground of appeal that counsel's trial representation was ineffective or incompetent.

[12] In *Fraser*, paras. 12-13, Justice Beveridge found the following passages to be useful, as do I. John Sopinka & Mark E. Gelowitz, *The Conduct of an Appeal*, 2nd ed, (Canada: Butterworths, 2000), pages 258-59, says:

> In considering an application to intervene, appellate courts will consider: (1) whether the intervention will unduly delay the proceedings; (2) possible prejudice to the parties if intervention is granted; (3) whether the intervention will widen the *lis* between the parties; (4) the extent to which the position of the intervenor is already represented and protected by one of the parties; and (5) whether the intervention will transform the court into a political arena. As it is a matter of discretion, the court is not bound by any of these factors in determining an application for intervention but must balance these factors against the convenience, efficiency and social purpose of moving the case forward with only the persons directly involved in the *lis*.

In *R. v. McCullough* (1995), 24 O.R. (3d) 239 (C.A. in chambers), Chief Justice Dubin said:

> [15] Notwithstanding the breadth of the Rule, absent a constitutional issue, leave to intervene is seldom granted in criminal appeals. What is normally required is material which discloses that the proposed intervenor would be able to make a useful contribution beyond that which would be offered by the parties and without causing an injustice to the immediate parties.

[13] In *West*, Justice Saunders summarized his application of the key principles:

> [31] It seems obvious to me that Mr. Jeffcock has a direct interest in these proceedings with respect to the ground of appeal alleging incompetence. A finding of incompetence would have an impact on him personally, and might give rise to civil regulatory proceedings. Mr. Jeffcock's conduct and professional competence as a lawyer are under attack by Mr. West. In my view he would be denied an effective way of answering those charges (which may ultimately have a significant bearing on the outcome of the appeal) without being added as an intervenor.
>
> [32] At the hearing before me both Mr. Wood and Mr. Scott expressed their serious concerns that obliging Mr. Jeffcock to respond to Mr. West's allegation through Crown counsel acting as his proxy, could require him to turn over the contents of his entire file. Those materials could then possibly be used by the Crown for purposes unrelated to the preparation of an affidavit responding to the appellant's application for leave to introduce fresh evidence. There may be elements of strategy from the first case which ought not to ever be seen by the Crown.
>
> [33] As the jurisprudence makes clear, the waiver of solicitor-client privilege may not trigger or oblige a complete disclosure of all communications. This feature is especially important where, as here, a re-trial could be ordered if Mr. West were successful in his appeal on the merits. To have enabled the Crown to pour over Mr. Jeffcock's file in its entirety, would seriously prejudice the appellant in his (future) defence of those charges. My concern here is speculative, but its consequences are sufficiently serious as to support permitting Mr. Jeffcock to intervene.

[14] I will apply these principles to Mr. Jewitt's motion.

[15] Clearly Mr Jewitt has a direct interest, for reasons similar to those expressed in para. 31 of *West*.

[16] The intervention will not delay the appeal and will accommodate the existing process of this appeal. The hearing initially was scheduled for March 22, 2012. I rescheduled it to April 17-18, 2012. That was not because of Mr. Jewitt's prospective intervention. Rather, the complexity of the issues embodied in Mr. Ross' eighty-three page factum and Mr. Ross' motion to add fresh evidence, which will involve cross-examination and possible rebuttal evidence from the Crown, made it clear that the time originally allocated was insufficient. The date would

have been rescheduled and hearing time expanded whether or not Mr Jewitt intervenes.

[17] I see no prejudice to the other parties from the intervention. I disagree with the suggestion by Mr. Ross' counsel that Mr. Ross would face "two prosecutors". Neither will the intervention widen the *lis* or introduce extraneous issues. The conditions of intervention would circumscribe the role of Mr. Jewitt, and his counsel, to the allegation of ineffective counsel. That is an allegation that Mr. Ross has introduced. Mr Jewitt's participation will assist the Court to deal with it. The conditions of the intervention will not permit Mr. Jewitt to address whether a miscarriage of justice resulted from any ineffective representation, or any other ground of appeal, or to add new issues to the appeal.

[18] I am satisfied that Mr. Jewitt's intervention would offer a useful contribution, of potential assistance to the Court, beyond those of Mr. Ross and the Crown. In this respect I echo Justice Saunders' concern expressed in paras. 32-33 of *West*, quoted above, and add the following.

[19] If Mr. Jewitt does not intervene then, to respond to the ground of appeal that trial counsel was ineffective, counsel for the Crown will have to explore the confidences between Mr. Ross and his trial counsel. The Crown's counsel would review otherwise privileged documents and likely interview Mr. Jewitt about matters of trial strategy, advice and instructions.

[20] To this prospect, Mr. Ross' current counsel responds simply that privilege is waived, the Crown is welcome to explore, and Mr. Jewitt's intervention is unnecessary.

[21] In my respectful view, counsel's response is too blunt an instrument for the delicate workings of solicitor client privilege in mid-litigation. Mr. Ross' Notice of Appeal (as amended) seeks a new trial. If the Crown fully probes the confidences between Mr. Jewitt and Mr. Ross related to the first trial, then (if Mr. Ross' appeal succeeds) at that new trial the Crown would be armed with full knowledge of Mr. Ross' trial strategy, Mr. Ross' admissions and instructions to his trial counsel and counsel's advice to Mr. Ross, at the initial trial. All that information had been expressed with a candour that was never meant for the Crown's ears. From his own perspective, this prospect is a matter for Mr. Ross to

weigh and, on advice of his current counsel, waive. But there are other perspectives in play. The uncertainty about what use the Crown might properly make of that knowledge could constrain the Crown's approach at a new trial. Concern about inexpedient access to confidential information might inhibit either the Crown's inquiries of Mr. Jewitt, or Mr. Jewitt's disclosures to the Crown, during the preparation for the current appeal. The result would be that the Court of Appeal is without access to the best information to assess Mr. Ross' allegation of ineffective counsel.

[22] At the chambers hearing before me, counsel for the Crown said that, if Mr. Jewitt intervenes with his own counsel, it will be unnecessary for the Crown to examine any of Mr. Jewitt's confidential information, except of course what is offered as fresh evidence by Mr. Ross or Mr. Jewitt. In my view, it is preferable that Mr. Ross and, in reply, his former trial counsel make the initial choices as to what otherwise privileged information should be disclosed, to the Court and Crown, on the allegations of ineffective counsel. Of course, given Mr. Ross' waiver of privilege, the Crown's cross-examination of Mr. Ross or Mr. Jewitt at the fresh evidence hearing might explore other aspects of the matter. But the scope of the Crown's cross-examination would be in the presence of the Court and would be subject to the safety valve of an admissibility ruling if the Court considered such a ruling to be appropriate.

Conclusion

[23] After considering the criteria that govern my discretion whether to allow an intervention, I will order that Mr. Jewitt may intervene, subject to the conditions that: (1) the intervention be limited to the issue of whether Mr. Jewitt's representation of Mr. Ross was ineffective or incompetent; (2) Mr. Jewitt not be permitted to address whether or not a miscarriage of justice occurred from any ineffective or incompetent representation; (3) Mr. Jewitt be permitted to tender an affidavit, to be filed and served on counsel for Mr. Ross and the Crown by January 26, 2012; (4) Mr. Jewitt be permitted to submit a factum, of no more than 25 pages, to be filed and served on counsel for Mr. Ross and Her Majesty the Queen by February 13, 2012; (5) The Crown's factum, scheduled for February 20, may include comments that address Mr. Jewitt's affidavit and factum and, for this purpose, the Crown's factum length may be extended by ten pages; (6) Mr. Ross may file a further factum, limited to ten pages, that responds to Mr. Jewitt's

affidavit and factum, this further factum to be filed and served on counsel for Mr. Jewitt and the Crown by February 23, 2012; (7) at the hearing, Mr. Jewitt be permitted, through counsel, to make oral submissions to the Court that address the allegation of ineffective or incompetent counsel, with the length of time and schedule of those submissions to be for the hearing panel. Mr. Jewitt did not request an opportunity to cross-examine Mr. Ross, and I make no comment on that matter. Cross-examination is for the hearing panel.

Fichaud, J.A.