

**NOVA SCOTIA COURT OF APPEAL**

**Citation:** *R. v. Marriott*, 2012 NSCA 76

**Date:** 20120716

**Docket:** CAC 352265

**Registry:** Halifax

**Between:**

Aaron Gregory Marriott

Appellant (Applicant)

-and-

Her Majesty the Queen

Respondent

**Judge:**

The Honourable Justice Joel Fichaud

**Motion Heard:**

July 12, 2012, in Halifax, Nova Scotia, in Chambers

**Held:**

Amendment to notice of appeal allowed

**Counsel:**

Elizabeth Cooper, for the appellant (applicant)

Kenneth W. F. Fiske, Q.C. for the respondent

**Reasons for judgment:**

[1] After a guilty plea, Mr. Marriott was convicted of attempted murder contrary to s. 239(1) of the *Criminal Code*. The facts of the offence were that Mr. Marriott approached Mr. Jason Hallett, who was in a vehicle in the parking lot of the IWK Hospital for Sick Children in Halifax, and fired several shots from a handgun at Mr. Hallett. Mr. Hallett survived. On May 16, 2011, Justice Coady of the Supreme Court of Nova Scotia accepted the joint recommendation of counsel for the Crown and defence, and sentenced Mr. Marriott to fifteen years in a federal penitentiary.

[2] On June 20, 2011, Mr. Marriott filed a prisoner's appeal from the sentence. In the autumn of 2011, Mr. Marriott retained his current appeal counsel. Further to a consent order issued by Justice Beveridge of this Court on May 24, 2012, Mr. Marriott amended his Notice of Appeal.

[3] On June 28, 2012, Mr. Marriott filed a motion to again amend his Notice of Appeal. I heard the motion on July 12, 2012. This further amendment would include grounds that Mr. Marriott's *Charter* rights have been infringed, and that his sentence should be mitigated under the principles stated by the Supreme Court in *R. v. Nasogaluak*, [2010] 1 S.C.R. 206.

[4] Civil Procedure Rule 91 (Criminal Appeal) does not specifically address amendments to Notices of Appeal. But Rule 91.02(2) incorporates Rule 90 (Civil Appeal) with necessary modifications where not inconsistent with Rule 91. This imports Rule 90.39(2), which says that a "judge of the Court of Appeal may permit a party to amend a document filed at any time".

[5] The judge's exercise of discretion under Rule 90.39(2) should be governed by whether: (1) the amendment is arguable on its face, (2) the amendment is reasonably necessary for the administration of justice by enabling the presentation and determination of a material issue between the parties, and (3) the interval between the original, and properly timed notice of appeal and the amendment would cause irreparable prejudice to the respondent. On the first point, if the amendment is arguable on its face, the merits of the amendment are for the panel on the appeal, not the motions judge. Another way to express the second point is to say that the amendment must be sought in good faith, and not for an ulterior

purpose. On the third point, the mere fact that the respondent will now have to reply to the issue in the amendment does not constitute prejudice. *Carsen Group Inc. v. Lane*, 2003 NSCA 42 (Saunders, J.A. in Chambers), para 7. *2301072 Nova Scotia Ltd. v. Lienaux*, 2007 NSCA 4 (Cromwell J.A. in Chambers), paras 5-9. *Nyiti v. Cape Breton University*, 2009 NSCA 54 (MacDonald, C.J.N.S. in Chambers), paras 5-6. *Marshall v. Annapolis County District School Board*, 2010 NSCA 13 (Saunders, J.A. in Chambers), para 10. *Molloy v. Molloy*, 2012 NSCA 28 (Fichaud, J.A. in Chambers), para 9. *Stacey v. Electrolux Canada* (1986), 76 N.S.R. (2d) 182 (C.A.), at para 5. *Scott Maritimes Pulp Limited v. B.F. Goodrich Canada Limited and Day & Ross Limited* (1977), 19 N.S.R. (2d) 181 (C.A.), paras 39-40. *Jeffrey v. Naugler*, 2006 NSCA 117, paras 12-16. *Innocente v. Canada (Attorney General)*, 2012 NSCA 36, paras 53-54.

[6] The Crown opposes Mr. Marriott's further amendment. The Crown's brief says:

#### **Submissions on Proposed Grounds**

As to the proposed third ground of appeal, the respondent submits there is nothing in the record which supports this ground. Neither Defence nor Crown counsel addressed this issue before the sentencing Judge.

As to the proposed fourth ground of appeal, the respondent submits this simply restates the current seventh [revised by Mr. Fiske to read "third"] ground of appeal.

As to the proposed fifth ground of appeal, the issue of the sentences imposed on the appellant's co-accused was raised by the appellant in his prisoner's notice of appeal filed June 20, 2011.

As to the proposed sixth ground of appeal, the respondent submits this is simply another way of arguing the fitness of the sentence ordered by Justice Coady.

Basically, the Crown submits that the proposed grounds either reiterate current grounds, or are unsupported by the record and were not raised in argument to the sentencing judge.

[7] I will address the Crown's objections.

[8] The grounds in the amendment are raised in good faith and are arguable on their face. Whether the record, or the law, supports the merits of the amended grounds is for the panel on the appeal hearing, not for a chambers judge on this amendment motion.

[9] To the extent that the amendment reiterates, with better particulars, a ground of appeal that existed already, then the amendment may assist to focus the issues and would cause no prejudice to the Crown.

[10] The Crown's principal objection is that the amendment would involve submissions, including *Charter* issues, that were not made to the sentencing judge. I agree with the Crown that this is a significant issue.

[11] In *Nova Scotia (Health) v. V.S.*, 2006 NSCA 122, at paras 28-35, an appeal panel of this Court reviewed the principles in the substantial body of case law from the Supreme Court of Canada and appellate courts, including this one, that governs whether a party may raise a new constitutional issue on appeal. In *V.S.* the appeal panel declined to consider the new *Charter* issue. Similarly, in *R. v. Watt*, 2008 NSCA 25, at para 9, and in *R. v. Phillips*, 2006 NSCA 135, at paras 32-34, appeal panels of this Court applied the principles cited in *V.S.*, and then declined to consider the new constitutional issues. In my view, as occurred in those three decisions, the application of the principles and determination of whether or not the Court of Appeal should consider any new *Charter* issues raised by Mr. Marriott, are matters for the panel of this Court to consider on the appeal proper. They are not for a single chambers judge on an amendment motion.

[12] Accordingly, I grant Mr. Marriott's motion to further amend his Notice of Appeal. The amendment should be filed and served on or before July, 19, 2012.

Fichaud, J.A.