NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. Cummings***, 2013 NSCA 96

Date: 20130822
Docket: CAC 416755
Registry: Halifax

Between:

Wanda Cummings

Appellant

v.

Her Majesty the Queen in right of Nova Scotia,
The Provincial Court of Nova Scotia,
The Attorney General of Nova Scotia representing
Her Majesty the Queen in Right of the Province of
Nova Scotia; and the Nova Scotia Department of Justice

Respondent

Judge:	The Honourable Justice Duncan R. Beveridge
Motion Heard:	August 22, 2013, in Halifax, Nova Scotia
Written Release	August 27, 2013
Held:	Motions by the appellant are dismissed.
Counsel:	Appellant, in person Kenneth W. F. Fiske, Q.C., for the respondent, Her Majesty the Queen in right of Nova Scotia Sheldon Choo, for the respondent, Attorney General of Nova Scotia

Reasons for judgment:

INTRODUCTION

[1] On August 22, 2013 I heard a motion brought by the appellant, Wanda Cummings. Her formal Notice of Motion dated August 15, 2013 sought five types of relief. During the hearing she only spoke to two of them: a stay of the decision under appeal, and of all matters in Provincial Court pending appeal; and an order permitting her to amend her Notice of Appeal.

[2] At the conclusion of the hearing I advised Ms. Cummings that I would not grant the relief she requested, and I would provide written reasons. These are they.

BACKGROUND

[3] Ms. Cummings has a number of matters pending in Provincial Court for sentence and trial. Many appear to be arising out of allegations of failing to attend court or to comply with conditions required by terms of judicial interim release. It appears that she has been successful in Provincial Court contesting some of the outstanding charges. Others remain.

[4] On June 11, 2013 Ms. Cummings presented to the Prothonotary of the Nova Scotia Supreme Court a Notice of Judicial Review. By letter dated June 13,

2013 the Prothonotary told Ms. Cummings the Notice had been reviewed by Justice M. Heather Robertson, and that the Court declined to accept her Notice "for want of jurisdiction". Ms. Cummings' documents were returned to her. No copy was kept by the court.

[5] Ms. Cummings did file, on June 12, 2013 a "Notice of Application to Appear Crownside", returnable June 13, 2013. This Notice announced that Ms. Cummings was impecunious, and that the Provincial Court either had no jurisdiction or lost jurisdiction over her since 2008, and she therefore could not attend a trial in Port Hawkesbury on June 14, 2013.

[6] The relief Ms. Cummings sought was an order for an interim stay, and a declaration that the Provincial Court's jurisdiction was suspended pending the outcome of her Notice for Judicial Review.

[7] On June 13, 2013 Ms. Cummings appeared in Crownside before Justice Robertson. According to the unofficial transcript of that appearance, the Crown confirmed that there was a trial set in Port Hawkesbury Provincial Court on June 14, 2013. Further, that the trial date was set in March 2013 and Ms. Cummings had appeared at a pre-trial motion in Port Hawkesbury the week of June 3-7 and had said nothing about being unable to appear for trial on June 14, 2013.

[8] Despite Ms. Cummings' urgings that the "*certiorari* issue is supposed to be dealt with before trial, not after", Justice Robertson told Ms. Cummings that the Nova Scotia Provincial Court had jurisdiction; the Supreme Court did not.

[9] On Monday, June 17, 2013 Ms. Cummings filed a Notice of Appeal (C.A.C. 416755). This document sets out three pages of what is described as "Particulars of jurisdictional error". In that description Ms. Cummings wrote that because of Justice Robertson's refusal to order an interim stay, Judge John D. MacDougall "continued to commit the Appellant to trial"; and that Judge MacDougall made a number of other specified errors in the conduct of the trial and made conclusions that resulted in a denial of natural justice and a miscarriage of justice.

[10] Ms. Cummings, in her Notice of Appeal, set out eleven detailed paragraphs as "Grounds of Appeal". With respect, they are not proper grounds of appeal. The eleven paragraphs recite a partial history of events surrounding Ms. Cummings' legal odyssey in Provincial Court.

[11] Despite this shortcoming in form and style, Ms. Cummings does recite at the outset of her Notice of Appeal at least two allegations of error that could be called her grounds of appeal. They are:

> On 13 June 2013, Justice Heather Robertson erred in law by denying natural justice in her decision that the Supreme Court of Nova Scotia did not have jurisdiction over the Appellant's request for an interim stay pending her Notice for Judicial Review, which sought an order of prohibition with *certiorari* in aid. She also erred in law by not providing the Appellant the declaration that the Provincial Court did not have jurisdiction over her or the offences pending the outcome of the judicial review, and in dismissing the Notice for Judicial Review summarily, which was not before Justice Robertson.

[12] The orders that Ms. Cummings requests in her appeal are far-ranging: she seeks a declaration that the Provincial Court lost jurisdiction over all charges and that all arrests and warrants since 2008 were null and void; an order quashing all informations, undertakings and recognizances; an order directing all persons to cease taking any further action against her in Provincial Court; an order staying the conviction entered against her by Judge MacDougall on June 14, 2014; and costs.

[13] Two years ago, Ms. Cummings sought similar relief in a notice for judicial review. The motion was heard by Justice C. Richard Coughlan (2011 NSSC 324, ¶1). He struck her notice as not being the proper subject for judicial review. Ms. Cummings appealed that decision. Justice M. Jill Hamilton, of this Court, dismissed her appeal for failure to perfect (2012 NSCA 52; leave refused [2012] S.C.C.A. No. 366).

[14] One of the outstanding proceedings in Provincial Court was an appearance in Port Hawkesbury scheduled for Friday August 23, 2013. Kenneth W. F. Fiske, Q.C., on behalf of the Public Prosecution Service, understood that it was for an application by Ms. Cummings to be permitted to withdraw guilty pleas. Ms.

Cummings advised that she had entered pleas in 2007 and was not seeking to have them struck, due to incompetence of counsel.

[15] I will discuss later Ms. Cummings' request to amend her Notice of Appeal.

REQUESTS FOR STAYS

[16] Although there is some debate in the authorities about my jurisdiction to grant the kind of relief requested by the appellant (see *R. v. Bugden*, [1992] N.J. No. 168 (C.A.); *R. v. Howells*, 2009 BCCA 297), this kind of relief has been recognized as available in criminal cases in Nova Scotia (see *R. v. Dempsey*, [1995] N.S.J. No. 4*; R. v. MacIntosh*, 2008 NSCA 73). I will therefore assume that I have the power to stay a decision of the lower court and the proceedings in Provincial Court; but what is the test that guides the exercise of this discretion?

[17] The seminal decision of Hallett J.A. in *Purdy v. Fulton Insurance Agencies Ltd*. (1990), 100 N.S.R. (2d) 341 sets out the test to be applied in Nova Scotia. Drawing on recent case law from the Supreme Court of Canada, Hallett J.A. proposed that a stay should only be granted if an appellant satisfies the court: there is an arguable issue raised by the appeal; the appellant will have suffered irreparable harm if the stay is not granted and the appeal is successful; and the appellant will suffer greater harm if the stay is not granted than the respondent would suffer if the stay is granted; even if none of these criteria can be met, a judge

can still grant a stay if satisfied that there are exceptional circumstances that make it fit and just that a stay be granted.

[18] I am satisfied that Ms. Cummings was fully aware of the test. It was extensively discussed in some of the authorities she relied upon (see: *Morrison Estate v. Nova Scotia (Attorney General)*, 2009 NSCA 116). Turning to the requested stays, I will deal with them sequentially.

[19] There is no order issued by Justice Robertson. Her decision does not require the appellant to do or to refrain from doing anything. In short, there is nothing to stay, nor could the appellant point to any adverse effects flowing from the fact of Justice Robertson's decision(s). This is sufficient to decline the requested stay related to any decision made by Justice Robertson.

[20] With respect to the stay of all proceedings in Provincial Court, neither the appellant nor respondents made explicit submissions about the *Purdy* test. Ms. Cummings focussed on one aspect of it: that she would suffer irreparable harm should the stay not be granted.

[21] On this issue, the appellant relies heavily on the decision of Clarke C.J.N.S. in *R. v. Dempsey*. In that case, the appellant was unsuccessful in his application in the Supreme Court for an order in the nature of *certiorari* to quash the decision of

a provincial court judge to commit Mr. Dempsey to stand trial in Supreme Court. On this part of the test, Clarke C.J.N.S. simply said:

> [24] There can be little doubt that if Mr. Dempsey is to be put to his trial, if arising from an improper committal, he will suffer irreparable harm.

[22] The reported decision does not set out the evidence that supported this conclusion. The report does reveal that Mr. Dempsey's appeal was scheduled to be heard on March 29, 1995 and his trial was to commence on February 1, 1995.

[23] Ms. Cummings, in her documents, refers to the improper committal (or a continuation of committal) by different judges of her to stand her trial. This is not accurate. Provincial Court judges do not commit accused to stand trial in Provincial Court. Charges or other proceedings may be pending in that court. It is the function of judges of that court to schedule such matters to be heard.

[24] Ms. Cummings had the burden to establish all of the prerequisites for a stay of proceedings. I was not satisfied that she would suffer irreparable harm should the requested stay of all Provincial Court proceedings be granted. None of the affidavits submitted by or on behalf of Ms. Cummings claimed irreparable harm. Her oral and written submissions did assert that she will suffer irreparable harm, but I fail to see what harm she would have suffered had I declined to grant her request for a stay, let alone how it would be irreparable harm.

[25] The record before me demonstrated that proceedings have been going on in Provincial Court since 2007. Ms. Cummings attempted in 2011 to have all of the Provincial Court proceedings stayed by way of judicial review. She was unsuccessful. She appealed. She failed to properly pursue that appeal. Proceedings in Provincial Court have been ongoing since then.

[26] Two years later, Ms. Cummings tried to file a similar motion for judicial review and a stay of Provincial Court proceedings (the subject matter of this appeal), referencing in particular, the proceeding scheduled for June 14, 2013. No information was provided by Ms. Cummings about the harm, irreparable or otherwise, suffered by her as a result of those proceedings not being stayed.

[27] No information was provided about the harm she claimed she would suffer if I did not stay the remaining Provincial Court proceedings. The proceeding she mentioned in her documents and submissions was her application scheduled for Friday August 23, 2013 for withdrawal of guilty pleas she had entered some years ago to various charges.

[28] Forcing an appellant to unnecessarily stand trial on proceedings that are tainted by jurisdictional error may, in certain circumstances, rise to the level of irreparable harm. I was not satisfied that was the case as of August 22, 2013. Nor

were exceptional circumstances shown. I therefore declined to exercise my discretion to grant a stay.

AMENDMENT OF NOTICE OF APPEAL

[29] I venture to say that the articulated grounds of appeal set out in notices of appeal are formally and informally amended on a routine basis. The keys to a successful motion to amend are: is the other side going to suffer prejudice by being faced with a different and expanded appeal; and, how will the proposed amendment impact on the orderly and proper management of the appeal process for the litigants, and ultimately the Court?

[30] Ordinarily, a party seeking to amend a notice of appeal provides written details about the proposed amendment. Here, Ms. Cummings did not do so. Her written materials refer to the dismissal of her *habeas corpus* application heard by Justice John D. Murphy on July 18, 2013. In addition, during oral argument, she also sought to include the issue of her pending request to withdraw her guilty pleas. No notice whatsoever was given of this latter request; nor information provided how such an issue could or should be part of an appeal from Justice Robertson's decision(s).

[31] When questioned as to the terms of her proposed amendment, she agreed that it would be to add allegations that Justice Murphy erred in law in his

interpretation of the *Liberty of the Subject Act* R.S.N.S. 1989, c. 253; and in denying the requested relief she sought (an order in the nature of *habeas corpus*). The respondents objected to the proposed amendments on the basis that the decision and consequent order by Justice Murphy constitute a completely different and discrete matter. I agree.

[32] It would be inconsistent with the orderly and proper management of the appeal process to try to meld together issues from the decision(s) of Justice Robertson with the proposed appeal Ms. Cummings wishes to pursue from the decision and order of Justice Murphy.

[33] Accordingly, the motions by the appellant are dismissed. The respondents did not request costs. I will therefore not order any.

Beveridge, J.A.