NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. MacLean*, 2018 NSCA 1

Date: 20180102
Docket: CAC 463346
Registry: Halifax

Between:

Randall MacLean

Applicant

v.

Her Majesty the Queen

Respondent

Judge:	Derrick, J.A.
Motion Heard:	December 21, 2017 in Halifax, Nova Scotia in Chambers
Held:	Motion dismissed
Counsel:	Applicant in person Kenneth Fiske, Q.C., for the Respondent Lawrence Rubin, Q.C., for the Lawyers' Association of Nova Scotia (Watching Brief only)

Decision:

Introduction

[1] Mr. MacLean has missed the deadline for filing an appeal against his conviction for aggravated assault. His motion for an extension of time is opposed by the respondent. This is my decision on the motion.

Background – Mr. MacLean's Trial

[2] Mr. MacLean was convicted by Atwood. J. in Provincial Court on October 18, 2016. (*R. v. MacLean, 2016 NSPC 59*). He was sentenced on February 21, 2017 to six months' imprisonment followed by twelve months' probation.

[3] Mr. MacLean's aggravated assault conviction arose out of an altercation at a wake in a private residence. The altercation occurred while Mr. MacLean was being pushed out of the house by its occupants who had decided it was time for him to go. During the altercation Mr. MacLean bit the nose of Paul Gaudet, as Judge Atwood found, "quite badly, as a matter of fact." (*R. v. MacLean*, *para. 2*) The medical evidence at trial described the injury to Mr. Gaudet's nose as "a partial amputation to the tip of the nose…" (*para. 33*).

[4] Judge Atwood described the nose-biting as follows: "As Paul Gaudet held the door, Mr. MacLean reached with one hand, grabbed Paul Gaudet by the back of the head, pulled his head forward and bit his nose." (*para. 9*) Mr. MacLean, testifying in his own defence, told Judge Atwood that he "latched on" to Mr. Gaudet's nose in self-defence "as a last resort" because he was weakening under an onslaught of blows. (*para. 105*)

[5] Judge Atwood noted that "Mr. MacLean does not assert that he bit Mr. Gaudet accidentally; rather, Mr. MacLean declares that he accidentally caused harm to Mr. Gaudet through the intentional application of defensive or self-protective force." (*para. 120*)

[6] Judge Atwood recognized that the Crown's witnesses gave differing versions of the events. He observed that,

> As defence counsel has pointed out, the witnesses called by the prosecution who were inside the home during this kerfuffle have offered varying accounts of this traumatic tableau. That is almost to be expected, given the fact that almost

> everyone present was inebriated, moderately and skyrocketing upward…(*para. 124*)

[7] However he was satisfied that "Enough commonality emerges from the alcohol-thickened fog of this war that would allow me to find a number of facts." (*para. 126*) He found that Mr. MacLean had been "manhandled" during his ejection but not hit by anyone as he claimed.

[8] Judge Atwood concluded that Mr. MacLean's self-defence claim - that he was "trying to keep himself balanced and upright to prevent falling and getting pummeled" - had no air of reality. Judge Atwood found that Mr. MacLean intended to bite Mr. Gaudet's nose and,

> …did not do it to defend himself or to protect himself. He did it because he was angered at being kicked out without being given a reason. He lashed out at the one directly in front of him, and that happened to be Mr. Gaudet…I do not believe Mr. MacLean's explanation why he bit Mr. Gaudet; it is farfetched and fantastic, and I am not left in a state of reasonable doubt…(*paras. 133 and 134*)

Mr. MacLean's Proposed Notice of Appeal

[9] Mr. MacLean's deadline to file an appeal against his conviction was March 29, 2017. On March 7, 2017, Mr. MacLean, who was incarcerated at Northeast Nova Scotia Correctional Facility, had a Notice of Appeal form faxed to the Registrar for the Court of Appeal. He had filled it out by hand.

[10] The Registrar noted that there was information missing from the proposed Notice of Appeal. She emailed Mr. MacLean's case management officer on March 8 identifying the deficiencies. She requested that Mr. MacLean make the necessary corrections and resend the Notice. He was still well within the time limits for filing.

[11] Prior to the end of March 2017, Mr. MacLean's case management officer advised the Registrar that she had brought the email to Mr. MacLean's attention and been informed by him that he no longer wished to proceed with his appeal.

[12] Mr. MacLean changed his mind. In an Affidavit received by the Registrar on May 5, 2017, Mr. MacLean explained why he had not filed his Notice of Appeal within the deadline under *Civil Procedure Rule* 91.09. He said it was because he was in jail and had trouble focusing due to "injuries" sustained during the incident

that led to him being charged. He was "disoriented from procedure and found guilty" and his mind was "scrambled".

[13] On May 19, 2017, the Registrar received a letter from Mr. MacLean dated May 17, 2017, enclosing his original proposed Notice of Appeal. He noted that he had faxed the Notice of Appeal on March 7, 2017 and attached a copy of the transmission report. He did not mention being previously advised that the Notice was incomplete.

[14] Problems associated with being incarcerated came to an end for Mr. MacLean when, on or about June 21, 2017, he was released from jail and returned home.

[15] In a tele-chambers conference call on July 26, 2017, Mr. MacLean advised that he wished to withdraw his motion for an extension of time to file a Notice of Appeal. A Notice of Abandonment was sent to Mr. MacLean by mail on August 3 for his signature. Mr. MacLean never signed it. In a telephone call with the Deputy Registrar of the Court of Appeal on September 20, 2017, Mr. MacLean indicated he had changed his mind and wanted to proceed with his motion. He confirmed this in a tele-chambers call on October 4.

[16] Mr. MacLean has also pursued a motion pursuant to section 684 of the *Criminal Code* seeking to have a lawyer assigned to represent him in the proceedings before this Court. That motion was denied and he has been representing himself. (*R. v. MacLean, 2017 NSCA 86*)

The Respondent's Position on the Motion for an Extension of Time

[17] The respondent opposes Mr. MacLean's motion on the basis that his appeal was not diligently pursued and, in any event, advances grounds that are without merit. A *bona fide* intention to appeal and the merits of the proposed appeal are significant factors in the assessment of whether an extension of time should be granted.

The Test for Obtaining an Extension of Time to File an Appeal

[18] Pursuant to section 678(2) of the *Criminal Code* and *Civil Procedure Rule* 91.04, a judge of the Court of Appeal has the discretion to extend the time for filing a Notice of Appeal. The discretion must be exercised in accordance with the interests of justice and is structured by such factors as a genuine intention to

appeal, a reasonable excuse for the delay, whether any prejudice will arise, and the merits of the proposed appeal. (*R. v. R.E.M., 2011 NSCA 8, para. 39*)

Application of the Test to Mr. MacLean's Motion

[19] The respondent concedes that Mr. MacLean showed an intention to appeal within the deadline for filing but argues that he changed his mind and was not sufficiently diligent in advancing the appeal. Mr. MacLean says he has been consistent and notes that he had filled out the paperwork for his appeal while he was in jail where it was "very difficult to get anything." He points to being challenged by a poor memory and various physical conditions. He indicates he had been fearful that his appeal would lead to him getting more time. This concern appears to have been triggered by the respondent seeking to appeal Mr. MacLean's sentence. The respondent abandoned that appeal in September.

[20] Mr. MacLean's uneven pursuit of his appeal is not the critical pillar in the respondent's arguments against his motion. The respondent says the more significant issue is Mr. MacLean's proposed grounds of appeal. These have been stated by Mr. MacLean as: malicious prosecution; wrongfully convicted; misrepresented; and miscarriage of justice. He elaborated on these grounds in written material sent to the Registrar and by way of his oral submissions on the motion.

[21] In Mr. MacLean's written submissions, for example, his Affidavit filed on May 5, 2017, Mr. MacLean said:

> The evidence in court that my lawyer disclosed on trial was misleading and disclosure from the Respondent [Crown] was not released to the judge, and Legal Aid Lawyer and Paid Lawyers concurred on guilt on my behalf which clearly is conflict of my innocence.

[22] In an Affidavit filed on October 20, 2017 in support of his section 684 motion, Mr. MacLean described his issues with the trial and conviction:

> I feel the judge did not listen to facts clearly – lawyers would not believe it was accident on my behalf. This was not entertained at all. Judge should of thrown out case from court because my lawyer never brought up crown's disclosure from police and disclosure from their statements. No reliable witnesses, all drinking…

[23] Mr. MacLean went on to state that his police statement had been "rigged" and complained that he had been "unfairly represented".

[24] In his oral submissions Mr. MacLean expressed his frustration with how the criminal justice process operated in his case from his arrest through his interrogation by police to the trial itself. He reiterated his complaint that there were no credible witnesses and characterized what the trial judge had found was an aggravated assault as "an accident." He reiterated in his arguments before me what he had said at trial: that he latched on to the victim's nose in self-defence. He expressed dissatisfaction with the police investigation and his representation at trial.

[25] Mr. MacLean is plainly unhappy with the outcome of his trial. He says he was wrongly convicted, ineffectively assisted by his trial lawyer, and the victim of a miscarriage of justice. He also claims to have been the target of a malicious prosecution, an allegation he did not raise at trial or at his sentencing hearing.

[26] Mr. MacLean's dissatisfaction with his conviction is not, by itself, the basis for an appeal. His characterization of his conviction as "wrongful" cannot, without more, constitute a ground of appeal. I agree with the respondent that Mr. MacLean's allegation of wrongful conviction is in effect a claim that the guilty verdict is unreasonable or not supported by the evidence. I have asked myself whether there is any basis for this claim and whether, in the absence of the transcript of the trial to review, I should be reluctant to find it has no merit.

[27] I find the lack of merit in these claims of unreasonable verdict/verdict not supported by the evidence is obvious from a review of Judge Atwood's decision. I agree with the respondent's submission that Judge Atwood's published decision:

> …provides a detailed account of the testimony of the witnesses at the trial, including [Mr. MacLean] who testified in his own behalf. In the trial judge's reasons, the path to conviction can be clearly followed…Judge Atwood's conclusion rejecting the evidence of [Mr. MacLean] is one based on reason and common sense and a clear understanding and appreciation of the evidence…
>
> (Respondent's Brief filed December 8, 2017, *para. 19*)

[28] Although in my decision to dismiss Mr. MacLean's motion to have a lawyer assigned to assist him in this Court, I expressed a reluctance to make "a categorical finding" that Mr. MacLean did not have an arguable issue on appeal, I am satisfied

that Judge Atwood's reasons have enabled me to assess the merits of Mr. MacLean's "wrongfully convicted" and "miscarriage of justice" appeal grounds.

[29] Judge Atwood's careful review in his decision of the trial evidence removes any basis for a complaint by Mr. MacLean that he didn't listen to the facts and failed to take into account that witnesses had been drinking. There is no merit to Mr. MacLean's proposed grounds of wrongful conviction or miscarriage of justice.

[30] Mr. MacLean also raises ineffective assistance of trial counsel, which he terms "misrepresented", as a proposed ground of appeal. He says inconsistencies between witness statements and trial testimony were not brought out at trial, there was no mention of him being assaulted, and he was assumed by counsel to be guilty notwithstanding his version of the events and his claim of "accident", which, as Judge Atwood noted, was actually a claim of self-defence.

[31] As Judge Atwood's published decision makes abundantly clear, he listened closely to all the evidence and noted that, as pointed out by defence counsel, there were varying accounts by the Crown's witnesses. He commented on the fact that witnesses were drinking and intoxicated, and rejected Mr. MacLean's version of events. If Mr. MacLean's lawyer thought the chances of an acquittal were slim, there is nothing to indicate he failed to represent his client competently at trial.

[32] As the respondent notes in its brief, a heavy burden rests on Mr. MacLean to show that his trial lawyer's "acts or omissions did not meet a standard of reasonable, professional judgment…Appeals are not intended to serve as a kind of forensic autopsy of defence counsel's performance at trial." (*R. v. West, 2010 NSCA 16, para. 268*) There is nothing before me to indicate that Mr. MacLean was not effectively served by his trial counsel. The fact that he was convicted does not establish that his lawyer provided him with substandard representation. This proposed ground of appeal is also without merit.

[33] Mr. MacLean has continued to insist that his version of how Paul Gaudet came to have his nose bitten should be accepted. He wanted a different outcome at trial. It was apparent from his oral submissions that he chafes under his conviction and feels it defines him. Of course it does not. I have no doubt there is more to Mr. MacLean as a person than the aggravated assault he committed on Mr. Gaudet. But his dismay over being convicted is not a basis for an appeal.

Conclusion

[34] Mr. MacLean has to succeed in this motion to be able to appeal his conviction. Because he is out of time for filing his Notice of Appeal, the factors I have been discussing, notably whether he has genuinely intended to appeal, his reasons for missing the deadline, and the merits of his proposed grounds, all must be examined to determine if it is in the interests of justice to permit the extension of time for filing. The merit factor is the most significant hurdle to Mr. MacLean obtaining an extension of time. The interests of justice are not served by permitting an appeal that lacks all merit to proceed when it is out of time. Mr. MacLean's proposed grounds of appeal lack all merit. It is not in the interests of justice to allow Mr. MacLean an extension of time for filing his Notice of Appeal. His motion is dismissed. He needs to now move on with his life and put all of this behind him.

Derrick, J.A.