NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Domoslai*, 2018 NSCA 45

Date: 20180531
Docket: CAC 461723
Registry: Halifax

Between:

Roderick Joseph Domoslai

Appellant

v.

Her Majesty the Queen

Respondent

Judges:	Beveridge, Oland and Bryson, JJ.A.
Appeal Heard:	April 5, 2018, in Halifax, Nova Scotia
Held:	Appeal dismissed, per reasons for judgment of Oland, J.A.; Beveridge and Bryson, JJ.A. concurring
Counsel:	Adam Rodgers, for the appellant Mark Scott, Q.C., for the respondent William Mahody, Q.C., for LIANS

Reasons for judgment:

[1] Roderick Domoslai was tried on five serious charges: two of counselling to commit murder; and one each of counselling to commit arson, counselling to commit perjury, and obstructing justice. Warner, J. of the Nova Scotia Supreme Court found Mr. Domoslai not guilty of counselling murder; convicted him for counselling arson and perjury; and stayed the charge of obstructing justice. The judge sentenced him to two years' incarceration.

[2] Mr. Domoslai's sole ground of appeal is that he received ineffective legal representation from both his trial counsel. He complains that their lack of preparation, poor cross-examination of witnesses, and low overall competence and professionalism caused a miscarriage of justice. He asks this Court to grant him a new trial.

[3] Section 686(1)(a)(iii) of the *Criminal Code* gives this Court the ability to intervene when there has been a miscarriage of justice. It provides that, on the hearing of an appeal against conviction, the Court of Appeal may allow the appeal "on any ground where there was a miscarriage of justice." Ineffective assistance of counsel can give rise to such an injustice.

[4] On appeal, Mr. Domoslai brought a motion to introduce fresh evidence, namely, his affidavit dated January 12, 2018. In response, the Crown filed affidavits by Laura McCarthy and Raymond Kuszelewski who had been the appellant's trial counsel, and Shauna MacDonald who had been co-counsel for the Crown at trial. Section 683(1) of the *Code* allows this Court to receive fresh evidence "where it considers it in the interests of justice." I would provisionally admit that evidence to assess the appellant's claim of ineffective assistance of counsel.

[5] The counselling to commit perjury charge relates to an earlier Provincial Court decision in which Mr. Domoslai was found not guilty. For context, I will begin there, and then proceed to the decision under appeal. Afterwards, I will set out the issue and arguments raised by the appellant, and the standard of review. Finally, I will provide my analysis and the disposition of this appeal.

[6] The appellant and Dawn MacNeil were married for eight years, and have two children. Their marriage ended around 2006 and their divorce, which included issues of custody and access, was acrimonious. In early 2008, Ms. MacNeil said

she was driving her car when the appellant drove his truck aggressively at her. He was charged with breach of a probation order which, among other things, contained a no contact provision.

[7] At trial, Ms. MacNeil identified Mr. Domoslai as the driver who, in the mid-afternoon on February 3, 2008, tried to force her car into the lane of oncoming traffic on Keltic Drive in Sydney, Nova Scotia. Her parents testified that they had seen him in his truck in the vicinity moments before. Mr. Domoslai argued that he did not do so and, what is more, it could not have been him. He had an alibi. He and his girlfriend, Kelly Frye, testified that he had been at a gathering at her home all that day; and Ms. Frye's mother, Yvonne Toomey, testified that late that morning she had taken his truck to go shopping and did not return until suppertime.

[8] Amy Langeland, an acquaintance, also testified that Mr. Domoslai was at Ms. Frye's home throughout her visit there from late morning until late that afternoon. She had waved to Ms. Toomey when she took the truck, and Ms. Toomey had not come back before her departure.

[9] The Provincial Court judge had a reasonable doubt and so found Mr. Domoslai not guilty of breaching the terms of his probation.

[10] In the decision under appeal before this Court, the appellant was found guilty of counselling Amy Langeland to commit perjury. He was found guilty of counselling her former partner, Erin Maxwell, to commit arson of Ms. MacNeil's SUV, and not guilty of counselling Mr. Maxwell to murder Ms. MacNeil and Lorne Weatherbee with whom Ms. MacNeil was in a relationship for several years.

[11] The charges were laid in late summer 2013. Different lawyers represented the appellant thereafter: Jeffrey Hunt (now the Honourable Justice Hunt of the Nova Scotia Supreme Court); Joel Pink, Q.C.; and, at the preliminary inquiry in 2014, Mike Taylor, Q.C. The appellant then approached MK Law and its lawyers Lyle Howe, Laura McCarthy, and Ray Kuszelewski. On July 4, 2016, Ms. McCarthy brought an unsuccessful application for a stay of proceedings.

[12] The trial in Sydney, Nova Scotia started the next day, with Ms. MacNeil as the first witness. After her testimony concluded during the morning of July 6th, the Crown began its direct examination of Mr. Maxwell.

[13] When court opened on July 7th, Ms. McCarthy sought an adjournment. There had been a breakdown in the solicitor/client relationship and Mr. Domoslai

would require new counsel. Following discussions with her and the Crown, the judge refused to grant her motion to be removed as counsel, and required her to remain for the completion of Mr. Maxwell's evidence. He described Mr. Domoslai, who would be self-represented, as very intelligent and very knowledgeable about the case, and would appoint Ms. McCarthy as amicus, with obligations to the Court to object to perceived legal errors and to advise Mr. Domoslai on any issues of law.

[14] The Crown then proceeded with its direct examination of Mr. Maxwell, which concluded at 12:30 pm. When court resumed that afternoon, Mr. Domoslai told the judge that he didn't want to be self-represented or have amicus, and was worried about cross-examining the Crown's "star witness." He had been able to talk to another counsel over the break and could speak to him that evening. The judge agreed to adjourn.

[15] The next day, July 8th, Lyle Howe appeared in court via video link and advised his availability for Mr. Maxwell's cross-examination. The judge and Mr. Howe discussed a possible ethical issue with his representation of the appellant, which the lawyer would investigate. On July 11th, Mr. Howe and Ray Kuszelewski appeared via video link. Mr. Howe advised that he was unable to proceed, and Mr. Kuszelewski confirmed that he was prepared to conduct Mr. Maxwell's cross-examination and already had some familiarity with the matter. He assured the judge that he could commence the cross-examination on July 13th. Mr. Domoslai agreed to be represented by Mr. Kuszelewski for that purpose.

[16] However, when he appeared on July 13th, Mr. Kuszelewski requested an adjournment in order to complete his preparation for cross-examination. The judge adjourned to July 21st. On that day, Mr. Kuszelewski was not present when court opened, and the judge received a letter that he was not able to attend because of medical issues. The trial was then adjourned to September 6, 2016.

[17] Mr. Kuszelewski represented the appellant during the remaining seven days of trial. The Crown's witnesses included Ms. MacNeil, Mr. Maxwell, Ms. Langeland, and Joseph Robinson, a Toronto parole officer who had been Mr. Maxwell's parole supervisor. The defence called, among others, Mr. Domoslai, Kelly Pero (also known as Kelly Frye), and her mother, Yvonne Toomey.

[18] After the defence closed its case, Mr. Kuszelewski indicated that he was "prepared to do written submissions in short order." The judge asked him to file by September 28th, and the Crown to reply by October 5th. On September 28th, a

legal assistant at MK Law sent a letter to the judge advising that Mr. Kuszelewski could not make that day's deadline and asking for an extension to Monday, October 3rd "to allow for the necessary revisions." The judge agreed. On October 6th, the Crown advised that it could not file its written closing argument as it had yet to receive the defence submissions. Nothing was forthcoming from defence counsel until October 25th, when a letter from Ms. McCarthy advised that, as Mr. Kuszelewski was suffering from health issues and had been admitted to hospital, final submissions were delayed but a final draft had been prepared and was awaiting his approval. Defence submissions were filed on October 28th, and Crown submissions on November 9th.

[19] In the written final submissions, Mr. Kuszelewski set out the defence position: Mr. Domoslai was not guilty of any of the offences with which he was charged. Rather, he was "the victim of an unscrupulous individual who concocted an entirely false story and fed it to the police in exchange for protection against his criminal associates. Erin Maxwell is a lifelong criminal and admitted liar whose evidence cannot be believed by this Court …".

[20] I now turn to the decision under appeal, which is reported as 2016 NSSC 344. Justice Warner reviewed governing principles including the standard of proof and assessment of reliability and credibility, the essential elements of the offences with which the appellant had been charged, and the relevant evidence given by each of the witnesses.

[21] The Crown's principal witness, Mr. Maxwell, gave extensive testimony relevant to all five charges against the appellant. Among other things, he claimed that the appellant gave him $20,000 to hire a hitman, and to arrange for Ms. McNeil's SUV to be damaged by an act of arson. The judge described him as "the epitome of an unsavory witness" and wrote:

> [18] Despite the fact that his evidence was detailed and internally consistent as between his direct and cross-examination, and because of his life of crime, I viewed his evidence with skepticism and special scrutiny, and sought corroboration from other evidence for anything he testified to.

[22] With respect to the charges of counselling perjury and obstructing justice, the judge wrote in part:

> [62] At this trial, Pero, Toomey and the accused gave evidence, containing some significant inconsistencies with their 2009 testimony, but similar to the alibi

> evidence given in 2009, including that Langeland had been present at Pero's house on February 3, 2008.
>
> [63] Langeland testified in this trial, on September 7, 2016, that she lied at the 2009 trial on the basis of pressure from her boyfriend Maxwell and the request and coaching as to the false alibi evidence by the accused.
>
> …
>
> [66] She stated that she had lived in Mississauga, Ontario for seven years before moving to Cape Breton on or about August 1, 2008. She had never been to Cape Breton before a three-week visit with Maxwell in June 2008.

[23] Ms. MacNeil's testimony set out the history of her relationship with the appellant, and the numerous court proceedings and incidents involving the parenting of their children. She described the Keltic Drive incident which had led to the 2009 trial, and an incident involving her vehicle soon afterwards. The judge wrote:

> [99] A week after that, someone unlocked and entered her Buick Rendezvous at her home. In this trial, Maxwell testified that that (*sic*) the accused gave him a key to the SUV after they became friends to carry out one of his many 'dirty deeds', and Maxwell gave it to Amy Langeland to keep safe. She later found it and Maxwell turned it over to the police. Police officers testified to trying the key out on Ms. MacNeil's SUV (MacNeil had sold the SUV to two Cape Breton police officers). The key fit the SUV. The key and video of it being used to open the SUV were exhibits at this trial. I am satisfied that the key that the accused gave Maxwell was for MacNeil's SUV.

As will be seen, the number of keys that Ms. MacNeil had to this SUV figures prominently in the appellant's allegation of ineffective assistance of counsel.

[24] The judge also considered the evidence of Joseph Robinson, the Toronto parole officer who had been Mr. Maxwell's parole supervisor from his release in mid-December 2007 to the expiry of his parole in late May, 2008. One parole condition required Mr. Maxwell to live and remain in the city of Mississauga. Mr. Robinson had had at least 49 face-to-face contacts with Mr. Maxwell, many of which were visits to his residence during different times of the day and sometimes at night to enforce curfew conditions. Mr. Maxwell had been there for every one, and Ms. Langeland had been present at many, including visits on January 29 and February 4, 2008.

[25] With respect to the charges of counselling perjury and obstructing justice, the judge wrote:

> [146] Despite the evidence of Pero, Toomey, Domoslai and Langeland at the 2009 trial that Langeland was at the noontime party at Pero's house on Sunday, February 3, 2008 when Toomey supposedly borrowed the accused's truck and the accused spent the afternoon at Pero's home, I find as a fact, beyond a reasonable doubt, based on the evidence at this trial, that Langeland was not at Pero's house or anywhere in the Greater Cape Breton Region on February 3, 2008. I find she was living in Mississauga, Ontario with Maxwell. She did not visit as a holiday visit or for any other reason North Sydney in or about February 3, 2008, either alone or with Maxwell.
>
> [147] The evidence given by all the witnesses at the 2009 trial was false in that respect. The evidence given by Pero, Toomey and the accused at this trial about February 3, 2008, was not credible. I reject it entirely.

The judge described Ms. Langeland's evidence as detailed, credible and reliable, and Mr. Robinson's evidence as powerful corroboration of her testimony. He said that the evidence by Ms. Pero and Ms. Toomey was not given in a direct or straight-forward manner, and "Pero was clearly unprepared for the questions asked." He did not accept the evidence of Mr. Domoslai. The judge was satisfied that the essential elements of both counts had been proven beyond a reasonable doubt, and found the appellant guilty of counselling perjury and obstructing justice.

[26] The judge then addressed the charges of counselling two murders and arson. The arson charges involved the Buick Rendezvous. Ms. MacNeil testified that the SUV appeared in her yard with, on its seat, a bill of sale, "a key for the Buick, and a card from Rod that said, 'Enjoy'." She had it towed to the dealership, but eventually ended up with it pursuant to a separation agreement.

[27] The judge accepted Ms. MacNeil's evidence that "she had received only one key" to the SUV. After reviewing Ms. Langeland's evidence that Mr. Maxwell had given her a key, police evidence that that key would unlock the SUV doors, and Mr. Maxwell's evidence that the appellant had given him that key for the purposes of various described "dirty deeds", he wrote:

> [200] All of this evidence, by these crown witnesses, with respect to the key confirmed the portions of the evidence of Maxwell as to how he came into possession of the key from the accused. It corroborated and added credibility to Maxwell's evidence that the accused wanted him to burn the SUV and his description of their discussions about various methods by which to do it without attracting attention to the accused.

[28] The judge reiterated that the principal Crown witness was an unsavory witness and a person who had admitted to lying to Mr. Domoslai on several

instances, and felt obliged to treat Mr. Maxwell's testimony "with extreme caution". He concluded:

> [232] With respect to the counts of counselling murder, I am undecided as to whether I accept Maxwell's uncorroborated evidence. I therefore acquit the accused of those two counts.
>
> [233] With regards to the count of counselling arson, there is corroboration. There would be no purpose for the accused to give Maxwell the key to the SUV other than for the purpose of doing some mischief. The accused was paying GMAC for the vehicle, even though it was registered to the company owned by MacNeil. He had a motive to have the vehicle damaged. He claimed that MacNeil was ruining him financially.
>
> [234] There is much corroboration for the fact MacNeil was only given one key. Maxwell was given the other key, and the other key fit the vehicle. There is evidence from MacNeil, which I accept, that the vehicle was entered into in March 2008 (right after the Keltic Drive incident). The accused told Maxwell the same thing.
>
> [235] I am satisfied that Maxwell's evidence, which I do accept with respect to the issue of destroying the SUV, is corroborated to such extent that I am satisfied beyond a reasonable doubt that the accused counselled Maxwell to cause damage to it by fire or explosion.
>
> [236] In summary, I conclude that the crown has not proven beyond a reasonable doubt that the accused counselled murder of MacNeil or Weatherbee, but I am satisfied the crown has proven beyond a reasonable doubt that the accused counselled Maxwell to commit arson of MacNeil's vehicle, and counselled Langeland to commit perjury, and obstructed justice, and so convict Domoslai.

The Issue and Appellant's Argument

[29] The appellant raises a single issue on appeal, namely, whether he received ineffective assistance from his trial counsel resulting in a miscarriage of justice.

[30] In his lengthy affidavit, the appellant described how he had expected Lyle Howe of MK Law, who had been presented as the most experienced criminal trial lawyer at that firm, to be representing him, but Mr. Howe did not appear. He stated that the stay application was to be heard well before the trial, but was filed only days before and heard on the first day of trial. His lawyers failed to subpoena individuals he had suggested, and Ms. McCarthy was "simply not prepared", for that application.

[31] With respect to Mr. Kuszelewski, the appellant deposed that:

(a) he failed to subpoena witnesses and so was "completely caught off guard" and had no witnesses to present when the Crown rested its case;

(b) he then failed to prepare the witnesses that the appellant had managed to find to testify the next day;

(c) Mr. Kuszelewski himself was not prepared and unfamiliar with his file history and overall defense strategy as previously planned with MK Law;

(d) he failed to subpoena certain individuals whom the appellant considered critical to his defense, namely, his friend, Walter MacLeod; a professional locksmith; and Jeffrey Hunt, his former lawyer. The appellant set out what their testimony would have been;

(e) Mr. Kuszelewski failed to introduce key defence exhibits, including certain audio records and transcripts of their contents; a police statement by Ms. MacNeil; and photographs of two of his residences;

(f) according to several of the appellant's family members, Mr. Kuszelewski had "a very real issue with alcohol addiction which affected his ability to perform his duties";

(g) he was "consistently not prepared for trial on a daily basis" and the appellant and others often prepared lists of questions for his use as a guide;

(h) when the appellant called him on July 20, 2016, the day before the trial was to recommence, Mr. Kuszelewski told him he was in Toronto, wouldn't be in court, and the appellant should attend and ask for new court dates. The appellant told him he himself had to notify the court in writing; and

(i) he missed the deadline to file written submissions.

[32] Counsel for the appellant conceded that the content of the appellant's affidavit as to alleged comments by family members about Mr. Kuszelewski, and as to what certain persons not called at trial would have testified, was inadmissible hearsay.

[33] I add that Shauna MacDonald, the Crown's co-counsel at trial, testified that at no point during that proceeding did she ever have any suspicions or concerns that Mr. Kuszelewski, who sat in close proximity to her in the courtroom, was under the influence of alcohol or unable to conduct the trial on behalf of the defence as a result of alcohol consumption.

[34] I will address the evidence contained in the affidavits of the appellant, his counsel and Crown co-counsel at trial, and elicited by cross-examination of those deponents, later in my decision. At this point, I set out what the appellant must demonstrate to establish ineffective assistance of counsel.

The Standard of Review

[35] As this Court recently reiterated in *R. v. Symonds*, 2018 NSCA 34 at ¶ 22, the principles relating to claims of ineffective assistance of counsel are well-established. Saunders, J.A. in *R. v. West*, 2010 NSCA 16 wrote:

> [268] The principles to be applied when considering a complaint of ineffective assistance of counsel, are well known. Absent a miscarriage of justice, the question of counsel's competence is a matter of professional ethics and is not normally something to be considered by the courts. Incompetence is measured by applying a reasonableness standard. There is a strong presumption that counsel's conduct falls within a wide range of reasonable, professional assistance. There is a heavy burden upon the appellant to show that counsel's acts or omissions did not meet a standard of reasonable, professional judgment. Claims of ineffective representation are approached with caution by appellate courts. Appeals are not intended to serve as a kind of forensic autopsy of defence counsel's performance at trial. See for example, **B.(G.D.)**, **supra**; **R. v. Joanisse** (1995), 102 C.C.C. (3d) 35 (Ont. C.A.), leave to appeal ref'd [1996] S.C.C.A. No. 347; and **R. v. M.B.**, 2009 ONCA 524.
>
> [269] One takes a two-step approach when assessing trial counsel's competence: first, the appellant must demonstrate that the conduct or omissions amount to incompetence, and second, that the incompetence resulted in a miscarriage of justice. As Major J., observed in **B.(G.D.), supra**, at ¶ 26-29, in most cases it is best to begin with an inquiry into the prejudice component. If the appellant cannot demonstrate prejudice resulting from the alleged ineffective assistance of counsel, it will be unnecessary to address the issue of the competence.

[36] To be successful in an appeal based on ineffective assistance of counsel, then, an appellant must establish that his counsel was incompetent (the performance component) and that a miscarriage of justice resulted (the prejudice

component). Only when both are established will this Court interfere. If the prejudice component is not demonstrated, it is not necessary to go further and examine the performance component.

The Appeal

[37] The appellant emphasizes that the judge was not prepared to convict on the charges of counselling murder without corroboration of Mr. Maxwell's testimony, and attacks his acceptance of that witness' evidence on the charge of counselling arson. The corroborative evidence there was the key to Ms. MacNeil's SUV. According to the appellant, Ms. MacNeil had had two or both sets of keys to that vehicle. As a result, he could never have had a key to give to Mr. Maxwell.

[38] While he raised several concerns regarding Ms. McCarthy's representation, on appeal the appellant limits the scope of his complaint to one: her failure, after Ms. MacNeil denied during cross-examination that she had had two keys, to impeach her evidence by putting to her a statement that she had given to the police. He says that had his lawyer done so, this would have weakened the credibility of Ms. MacNeil and, by association, Mr. Maxwell, and he would not have been convicted.

[39] Attached to the appellant's affidavit was a copy of handwritten notes of the statement Ms. McNeil gave the police. It read in part: "Also there was a brand new Buick Rendevo (*sic*) in her yard on October 26th. It was unlocked and there were the keys and purchase slip in the truck along with a card saying he's sorry." Also attached was a copy of the Crown Brief Synopsis which summarized a statement Ms. McNeil gave the police from which, among other things:

> Ms. MacNeil can say: … That on October 26th a Buick Rendezvous was left in her yard with an envelope on the seat containing 2 sets of keys, a purchase slip from Ron May Pontiac various other papers for the vehicle and the apology card … .

[40] Ms. MacNeil was consistent in her testimony that she had only ever had one key, and had never lost a key, to that vehicle. During her cross-examination, Ms. McCarthy had put to Ms. MacNeil that she had told the police that she had two keys, or that there were two keys when the vehicle arrived. The witness maintained that she only ever possessed one set of keys to the SUV, and that "I wouldn't have said that." Ms. McCarthy deposed: "Prior to concluding Ms. McNeil's cross examination, I had formed the view that, based on the information I

had available, I had made as much progress as possible relative to the key issue with Ms. MacNeil."

[41] Ms. MacNeil had the SUV twice: once when it appeared in her yard and she promptly returned it to the dealership, and then later pursuant to a separation agreement. The references to "keys" and "2 sets of keys" in the vehicle in the police statement, and as that statement was summarized in the Crown Brief Synopsis, both relate to the first instance.

[42] At the hearing of this appeal, the appellant suggested to Ms. McCarthy that if she had confronted Ms. McNeil with the police statement, it was possible the witness could have given a different answer about how many keys she had to the SUV. Ms. McCarthy responded that she had nothing with which to challenge Ms. MacNeil regarding the number of keys when she took possession after the separation agreement.

[43] There was no apparent strategic reason for defence counsel not to have presented the police statement to Ms. MacNeil after she testified that she wouldn't have told the police that she had had two keys to the vehicle. It might have shaken that witness. However, the important time frame for the counselling arson charge was not that brief interval when the vehicle appeared in her yard, which is what the police statement described, but later, after the separation agreement when Ms. MacNeil took possession and used the SUV. As a result, Ms. McCarthy's failure to use the police statement to impeach Ms. McNeil's evidence did not cause a miscarriage of justice.

[44] I will now address the allegations regarding Mr. Kuszelewski's representation of the appellant at trial. In doing so, I reiterate that where ineffective assistance of counsel is argued, the first question is whether the appellant can demonstrate that the claimed failings caused a miscarriage of justice. If not, it is unnecessary to address the issue of competence.

[45] I cannot accept that either the delays in the trial process between Ms. McCarthy's request to withdraw as counsel and the commencement of Mr. Maxwell's cross-examination by Mr. Kuszelewski, or the late filing of the defence's closing submissions, caused any prejudice. Mr. Kuszelewski testified that the appellant was always aware that he was suffering from rheumatoid arthritis. He denied being in Toronto, as the appellant alleged, when the trial was to resume on July 21st; rather, he was in a Halifax hospital and a flare-up of his condition prevented him from travelling to Sydney for the continuation of the trial.

[46] I need not decide why counsel was not in court that day. The appellant has not shown how the delays were prejudicial to him. The judge was concerned that the trial get underway and progress, but there is nothing in the transcript or his decision which in the slightest indicates that delays caused by the change in counsel frustrated him to any extent, or that they affected his decision on any of the charges against the appellant.

[47] The several missed deadlines for filing written closing submissions, including, for a period, no communication with the Court, were disrespectful of the Court and Crown counsel. Again, however, I am not persuaded that there was any resulting prejudice.

[48] When the Crown closed its case-in-chief mid-afternoon on September 7th, Mr. Kuszelewski admitted to the judge that he was "caught short here." He said that he had anticipated the Crown taking longer to present its case, didn't have anyone prepared to come forward that day, and "we're doing our best to get those people together." The appellant faults Mr. Kuszelewski for not having defence witnesses ready to go when the Crown closed its case, and for not preparing the defence witnesses, including himself. As an illustration of how this affected his case, he points to the judge's description of Ms. Pero as "clearly unprepared".

[49] The appellant and Mr. Kuszelewski gave conflicting evidence as to why there were no witnesses available then, and as to witness preparation. The appellant deposed that his lawyer was to subpoena witnesses and failed to do so. On the other hand, Mr. Kuszelewski deposed:

> 19. During the evening of September 7, 2016, I met with Mr. Domoslai to review, in detail, the witnesses that Mr. Domoslai has personally prepared. Mr. Domoslai was clear that the witnesses would be attending voluntarily.
>
> 20. My direct examination of the defence witnesses were conducted on the specific direction and instruction of Mr. Domoslai. I did meet with each witness in advance of their testimony.
>
> 21. In relation to Mr. Domoslai's own testimony, significant effort was undertaken to prepare Mr. Domoslai for the evidence he would give during direct examination. Mr. Domoslai had a long list of items that he wished to address during this direct examination. Mr. Domoslai directly instructed me to conduct the direct examination in a manner that would allow him to provide testimony on his long list of items.

[50] Whether those defence witnesses were to be subpoenaed or to appear voluntarily, it is clear that Mr. Kuszelewski did not prepare them for trial except, perhaps, very minimally. He testified that his client was to arrange for the witnesses to be present, and to have prepared them. Mr. Kuszelewski admitted that he spent very little time, one half-hour "at best", in preparing the defence witnesses who included Ms. Pero, Ms. Toomey, John Harrietha, and Eric MacKinnon. He did not provide Ms. Pero or Ms. Toomey with copies of their previous statements or testimony for review.

[51] The appellant testified that Mr. Kuszelewski never prepared him as a witness. While his counsel obtained an adjournment over a weekend to do so, he says that they met for two hours during which the appellant gave his lawyer information to assist with the trial. Mr. Kuszelewski testified, without elaboration, that he did prepare the appellant during that weekend. How long that preparation lasted was not specified. It appears from his affidavit that time was spent reviewing with the appellant, the list of items that the appellant wanted him to elicit during direct examination at trial.

[52] Evidence that a defence lawyer did not fully prepare his witnesses or the accused carefully and thoroughly for direct and cross-examination raises concerns. See, for example, *R. v. Simpson*, 2018 NSCA 25. However, in the particular circumstances of this case, I am of the view that its significance is much diminished because of the appellant's heavy involvement and detailed knowledge of the matter.

[53] In this regard, Mr. Kuszelewski deposed:

> 13. In the days leading up to the resumption of trial on September 6, 2016, I fully reviewed the available file materials and prepared for the continuation of trial. The materials I reviewed included a significant amount of material provided to me from Mr. Domoslai. Throughout my retainer Mr. Domoslai was meticulous in collecting materials and preparing for trial.
>
> 14. Throughout my retainer, Mr. Domoslai portrayed himself as a very well prepared client with a committed view of how the trial should proceed and the direction that I, as counsel, should take from him.
>
> 15. Prior to my involvement in the trial, Mr. Domoslai had requested and the Court had permitted that Mr. Domoslai sit at the counsel table. Although this was not my preference, Mr. Domoslai was persistent that this arrangement continue following my retainer. At all times when we were in Court together, Mr. Domoslai regularly verbally consulted with me and passed me many notes of information that he wanted to have conveyed to the Court. Mr. Domoslai was

> clear that his expectation was that I would follow his lead for any verbal suggestions or notes provided.

[54] In her testimony, Ms. McCarthy described the appellant as "a hands-on client" who seemed "very knowledgeable", and had a grasp of the allegations and defence. She too recounted how he sat at the counsel table and provided her with information and questions to assist her in his defence. As indicated earlier in my decision, when Ms. McCarthy sought to be removed as counsel, the judge considered the appellant to be very intelligent and very knowledgeable about the case.

[55] These descriptions of the appellant as highly knowledgeable of the case, and insistent and thorough as to what he wanted presented on his behalf, accord with his evidence and his presentation in this Court. The appellant described how he had prepared lists of questions for examination and cross-examination for his lawyers to use as a guide. He impressed as a determined and focussed individual, one not easily deterred. Under cross-examination, he was articulate and forceful and, at times, impatient and combative.

[56] The appellant did not provide affidavit evidence by any of the defence witnesses or otherwise demonstrate that if that witness had reviewed an earlier statement or transcript or had been better prepared by defence counsel, he or she would have given different, or more complete testimony, or answers that enhanced his or her credibility.

[57] I am not persuaded that Mr. Kuszelewski's omission to fully prepare the defence witnesses resulted in any miscarriage of justice. The appellant knew the case and what he wanted to address in his testimony. The template of questions he produced to assist his counsel demonstrates the extent of his knowledge and diminishes most, if not all, of his defence counsel's shortcomings with respect to witness preparation. While the judge did comment that Ms. Pero was "clearly unprepared for the questions asked," his decision to convict for counselling arson relied on the testimony of Ms. Langeland as corroborated by the parole officer. The evidence with respect to the counselling murder charge was essentially that of Mr. Maxwell and the appellant, and the appellant was found not guilty. In the particular circumstances of this case, I am not persuaded that the trial was unduly affected by inadequacies in the preparation of the defence witnesses.

[58] I turn then to the allegation that Mr. Kuszelewski failed to subpoena certain individuals whom the appellant described in his affidavit as "critical to my

defence," namely, Walter McLeod; his former lawyer, Jeffrey Hunt; and any professional locksmith. The appellant conceded that, as he had not presented affidavits by these persons, what he deposed these persons would have testified was inadmissible hearsay. Under cross-examination, he admitted that, while he now described Mr. McLeod as critical to his defence, at trial he had testified that he did not want Mr. McLeod to testify. It is telling that he also identified persons, not named in his affidavit, as additional critical witnesses who had not been called. His testimony in concert with various exhibits showed that his former lawyer would not have been able to substantiate the chronology of events that the appellant claimed, in regard to Amy Langeland's involvement at the 2009 trial. Quite simply, there is no merit to the appellant's argument that the failure to call the persons named in his affidavit resulted in prejudice.

[59] The appellant criticizes Mr. Kuszelewski for failing to introduce certain "critical exhibits" at trial, namely, his audio recordings of his meetings and phone calls with undercover RCMP officers about Erin Maxwell; audio recordings of a conversation he had with Mr. Maxwell at a Don Cherry's; and photographs of two of his residences.

[60] The recordings were not produced for this appeal. Under cross-examination, the appellant stated that they captured his discussions with those officers about Mr. Maxwell. He had testified about that meeting and those discussions at trial. I fail to see how these recordings would have assisted his case.

[61] During the trial, the appellant told the Crown that he had a recording of his conversation with Mr. Maxwell at Don Cherry's, but it was "at home". He had never disclosed it or given a copy to the police. However, he testified on appeal that he had given the tape to his lawyers, and that he "offered" it to the Crown during his cross-examination. It is significant that the appellant did not produce the recording or a transcript to demonstrate its relevance, either at trial or on appeal.

[62] The photographs attached to the appellant's affidavit showed that his home had been broken into. Mr. Kuszelewski had decided that their introduction would not assist the defence, but the appellant felt that, as Mr. Maxwell had smashed the windows of another residence he had been building, they were important to erode his credibility. Under cross-examination, the appellant acknowledged that there was no evidence that Mr. Maxwell had broken into the property depicted in the

photographs. That being the case, their omission at trial would not have caused him any prejudice.

[63] The appellant detailed nineteen incidents or exchanges during the trial which he submits demonstrated the overall poor performance of Mr. Kuszelewski during the trial. He argues that:

> Viewed independently, perhaps these errors or indicia of underperformance would not rise to the level required to meet the test for having a conviction overturned on the basis of ineffective counsel. Viewed collectively, however, they paint a picture of a defence counsel who was unprepared, and who was unable to effectively compensate for this lack of preparation through his ability to perform during the trial itself.

He added that this lawyer seemed "unusually inept at adhering to the basic rules of cross examination and evidence introduction."

[64] With respect, some of the allegations regarding Mr. Kuszelewski's conduct of the trial are exaggerated or not quite borne out by the record. For example, while the appellant argues that the Court criticized Mr. Kuszelewski on his attempts to attack Constable Weatherbee's credibility, the judge actually responded to the Crown's objection by stating that, while defence counsel had not yet laid the foundation for his line of questioning, he was not precluding that he might, and he allowed Mr. Kuszelewski to proceed. Similarly, although the appellant says that the judge accepted the Crown's objection that Mr. Kuszelewski was leading the witness and eliciting hearsay, his comments went only to hearsay in Ms. Pero's answers to Mr. Kuszelewski's questions and did not fault defence counsel for leading questions.

[65] One of the exchanges upon which the appellant strongly relies turned out to not even be between the judge and Mr. Kuszelewski but, rather, between the judge and Crown counsel. The judge corrected the Crown's objection or suggestion; Mr. Kuszelewski was merely a bystander to their discussion of the law.

[66] Other incidents such as defence counsel once calling Mr. Maxwell, Mr. Domoslai; once calling Amy Langeland, "Erin Lunderdale"; referring to the wrong page in the preliminary inquiry transcript; and not correctly recalling if Mr. Maxwell had earlier given the name of the dog belonging to the appellant's children, are simply momentary and inconsequential slips that any lawyer under the stress of trial might make.

[67] There were a number of instances, some after the Crown had objected to Mr. Kuszelewski's questioning, which were more substantial. More than once, the judge reminded defence counsel that his questions to the witness had to be in context as they would otherwise be unfair. At one point, his comments to Mr. Kuszelewski amounted to an instruction on how to question on a prior inconsistent statement and, at another, the judge reminded Mr. Kuszelewski of the rule in *Browne v. Dunn.* He also had occasion to agree with the Crown that Mr. Kuszelewski could not oblige Mr. Maxwell to reply to his questions with only "yes or no answers."

[68] My careful review of the record shows that Mr. Kuszelewski's overall performance over seven days of trial does not support a finding that a miscarriage of justice resulted. It may not have been brilliant, but it was workmanlike and steady enough. It is clear that he knew the case to be met, and he asked questions in an orderly manner to elicit the information he wanted. Whether this was because he followed what the appellant developed for lines of questioning does not matter. Objections by the Crown, who were diligent in that regard, did not deter his lines of questioning. Guidance from the judge was accepted, and did not throw him off course.

Summary and Conclusion

[69] The appellant's complaints, either individually or cumulatively, regarding his counsels' representation at trial did not establish that there was any miscarriage of justice. I am of the opinion that the fresh evidence proffered could not reasonably have affected the result at trial. I would dismiss the motion to admit the fresh evidence, and I would dismiss the appeal.

Oland, J.A.

Concurred in:

Beveridge, J.A.

Bryson, J.A.