NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. MacLellan*, 2019 NSCA 2

Date: 20190118
Docket: CAC 472065
Registry: Halifax

Between:

William Roger MacLellan

Appellant

v.

Her Majesty the Queen

Respondent

Restriction on Publication: s. 486.4 of the Criminal Code of Canada

Judges:	The Honourable Justice Beveridge The Honourable Chief Justice MacDonald (dissenting)
Appeal Heard:	November 19, 2018, in Halifax, Nova Scotia
Subject:	Criminal law: abatement of an appeal by the death of the appellant.
Summary:	A summary conviction appeal court judge refused to appoint a personal representative to prosecute an appeal made moot by the offender's death.
Issues:	(1) Should leave to appeal be granted? (2) Did the SCAC judge commit a reversible error in the exercise of his discretion to decline to hear the appeal?
Result:	Leave to appeal should be granted because the process followed by the SCAC was flawed, and this Court had not yet addressed the issue of appeals made moot by an appellant's death. Criminal appeals made moot by the appellant's death are stayed. Absent a successful application to appoint a personal representative, the Crown should apply to have the appeal

dismissed as abated. If a personal representative is appointed, he or she must then apply to have the appeal court hear the appeal.

An appeal court has a discretion to hear such an appeal in rare and exceptional circumstances where it is "in the interests of justice". The Supreme Court of Canada in *R. v. Smith* established the relevant factors to be weighed by the appeal court to inform that decision. The SCAC judge articulated and balanced the *Smith* factors and concluded that they strongly militated against hearing the appeal. He committed no legal error, and hence there is no basis to interfere with the SCAC judge's discretionary decision.

In dissenting reasons, the Chief Justice found that the SCAC judge erred in law when interpreting the principles for abating appeals when one of the parties dies.

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Judges:	MacDonald, C.J.N.S.; Beveridge and Van den Eynden, JJ.A.
Appeal Heard:	November 19, 2018, in Halifax, Nova Scotia
Held:	Leave to appeal granted and appeal dismissed, per reasons for judgment of Beveridge, J.A.; Van den Eynden, J.A. concurring; MacDonald, C.J.N.S. dissenting.
Counsel:	Mark T. Knox, Q.C. and Michael Potter, for the appellant Jennifer MacLellan, Q.C., for the respondent

Order restricting publication — sexual offences

486.4 (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim 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, 171.1, 172, 172.1, 172.2, 173, 210, 211, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or

(ii) any offence under this Act, as it read from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day; or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).

Reasons for judgment:

[1] Canada long followed English precedent that death of a party to a criminal appeal ends the proceedings. The rule is no longer absolute. England changed the law by legislation. In Canada, the Courts now recognize that in rare and exceptional circumstances an appeal court has the discretion to hear an appeal notwithstanding the death of the appellant. But a personal representative must be appointed to stand in the shoes of the appellant.

[2] In this case, the Honourable Justice D. Timothy Gabriel denied the appointment of a personal representative for William Roger MacLellan to prosecute an appeal from a summary conviction for sexual assault (2017 NSSC 307). The late Mr. MacLellan (who I will refer to as the appellant) now seeks leave to appeal, and if leave is granted, appeals to this Court from that denial.

[3] For reasons that follow, I would grant leave to appeal but dismiss the appeal. I will set out sufficient background information to understand the issues, then turn to what happens when death intervenes before the criminal process has been completed. I will summarize Justice Gabriel's reasons and then explain why I would grant leave but dismiss the appeal.

BACKGROUND

[4] A young student at St. F.X. University went with friends to a local pub, Piper's. She consumed alcohol before and while at the pub. By her own assessment, she was intoxicated. She became upset when she saw her ex-boyfriend. When the complainant hurriedly left the pub, she fell. A bystander helped her up. Others put her into the front seat of a taxi van.

[5] During the drive to her residence, the taxi driver touched her genitals without her consent. The complainant called 911 while still in the taxi. On arrival at her residence, she stayed in the taxi, crying. The driver jumped out and asked for help. A group of three young women stepped forward. The driver, unprompted, said "can you please get her out of the cab for me, she won't get out. I don't want to touch her, I don't touch women like that".

[6] At some point, the complainant said to the 911 operator that the driver had just molested her. The witnesses described the driver as frantic, and he repeatedly

said “she’s crazy” and “don’t listen to anything she says, she hit her head at the Pub”. Some of the driver’s comments were captured on the recorded 911 call.

[7] The driver left without being paid or identifying himself.

[8] The police initially did not have much to go on with respect to the driver’s identity. The witnesses gave different descriptions of the taxi. All agreed it was a dark-coloured, older-model van. The complainant and none of the three good Samaritans knew the driver. The women were friends but prior to that night, had never met the complainant.

[9] The complainant and the three independent witnesses gave various descriptions of the driver’s clothes and general appearance. Based on these descriptions, several police officers thought the driver was the appellant, William Roger MacLellan. He was known to own and operate a taxi and limousine service in Antigonish.

[10] Two weeks later, Cst. Bezaire became the lead investigator. The appellant was a possible suspect. She went to the only 24-hour gas station in Antigonish to look at video surveillance to determine if anyone that matched the description of the taxi van or driver purchased gas.

[11] When Cst. Bezaire viewed the video surveillance, she identified the appellant as the driver of a dark-blue 2005 minivan. Cst. Bezaire had known the appellant for more than ten years. This footage was recorded just 20-30 minutes before the offence. In addition, the clothing he had on in the video generally matched the description given by the witnesses.

[12] Cst. Bezaire listened to the 911 call. Based on numerous and lengthy historical conversations she had had with the appellant, she positively identified the taxi driver’s voice as that of William Roger MacLellan. Arrest and charges followed.

[13] The Honourable Laurel Halfpenny MacQuarrie was the trial judge. Identity was the sole issue at trial. The complainant and the three independent witnesses identified the appellant as the cab driver. The appellant testified and called other evidence. The trial judge reserved.

[14] On November 4, 2016, the trial judge delivered a 56-page decision (unreported). She explained why she rejected the appellant’s evidence. Based on

all of the evidence, she found that the Crown had proven beyond a reasonable doubt the guilt of the appellant.

[15] The trial judge ordered a Pre-Sentence Report for a sentence hearing of January 11, 2017. Sentence was postponed to February 17, and then to April 6, 2017. It did not proceed. Counsel advised us that the appellant unfortunately took his own life on April 5, 2017.

[16] In the meantime, the appellant had filed a Notice of Appeal to the Summary Conviction Appeal Court on December 5, 2016. It complained that the trial judge had erred: in applying the law of identification evidence; in applying the law of voice identification evidence; and, the verdict was unreasonable or could not be supported by the evidence. The Notice of Appeal was amended and re-amended. It is not necessary to trace the iterations of the Notice of Appeal. I will set out below the final version.

[17] It is sufficient for context to note that the summary conviction appeal was scheduled to be heard on June 6, 2017. The appellant's death intervened. Appeal Books had been filed, but not *facta*.

[18] Counsel for the appellant brought an application on May 2, 2017. The identified remedies sought were: an acknowledgement that the appeal was stayed, pursuant to *Civil Procedure Rule* 35.11(1); and, the appointment of Dorothy Lane-MacLellan as the personal representative of the appellant to continue the appeal, pursuant to *Civil Procedure Rule* 36.01(1)(f).

[19] Appellant counsel's correspondence to the chambers judge referenced *R. v. Smith*, 2004 SCC 14, the leading authority in Canada on continuation of a criminal appeal notwithstanding an appellant's death. Counsel mentioned that he would be seeking to further amend the Notice of Appeal.

[20] The parties appeared before Justice Gabriel on May 2, 2017. They offered cursory comments about the principles set out in *R. v. Smith*.

[21] The Crown confirmed its consent to the appointment of a personal representative and to the proposed amended Notice of Appeal. Despite the stated limited nature of the appearance, the chambers judge requested brief submissions on the *Smith* test. This led to an invitation for counsel to provide written submissions why the appeal should be heard.

[22] The parties filed further materials which included the final amended Notice of Appeal. It is similar to the earlier version, but alters the remedy sought and adds details to what it says were the trial judge's legal errors. The proposed grounds were:

1. That the learned trial judge erred in law in applying the law of identification evidence;
2. That the learned trial judge erred in law by failing to consider cross-racial identification principles, also known as the "other-race" effect when applying the law of voice identification evidence, the law of circumstantial evidence, and in her assessment and findings of credibility;
3. That the verdict is unreasonable or cannot be supported by the evidence;

[23] In terms of remedy, the appellant maintained his request that the conviction be vacated and an acquittal entered, but asked in the alternative for a judicial stay as opposed to a new trial.

DEATH AND THE CRIMINAL PROCESS

[24] The criminal process exists to protect society. Offenders are deterred from committing offences because of fear of apprehension, prosecution, conviction and punishment. Absent a live accused, there are no charges. There would be no accused to instruct counsel, enter election and plea, be present at trial to make full answer and defence, or be punished or rehabilitated. In sum, the dead cannot be prosecuted.

[25] There are scarce reported cases that document the consequences of death after charges but before verdict or sentence. What cases exist are clear: the criminal process abates (see: *R. v. Ssenyonga*, [1993] O.J. No. 3273 (Ont. Ct. (Gen. Div.)); *R. v. Neufeldt*, 2005 ABPC 163; *R. v. Douglas*, 2004 BCPC 279).
[26] The situation is not as cut and dried on appeal. At one time, the rule in Canada appeared to be the same, death abated the process (see: *R. v. Netter*, [1975] B.C.J. No. 1191 (C.A.); *Collins v. The Queen*, [1973] 3 O.R. 672 (C.A.); *Cadeddu v. The Queen* (1983), 41 O.R. (2d) 481 (C.A.); *R. v. Hay*, [1994] O.J. No. 2598 (C.A.); *R. v. Lewis* (1997), 153 D.L.R. (4th) 184 (B.C.C.A.)).

[27] The tide changed with the decision of the Quebec Court of Appeal in *R. v. Jetté* (1999), 141 C.C.C. (3d) 52; [1999] J.Q. no 4641. The facts are appalling. Mr. Jetté was convicted of manslaughter. The only evidence that supported the conviction was his police statement. The statement was obtained on his arrest,

which the police justified by reliance on the existence of a recorded, allegedly incriminating, conversation. The police claimed the recording had since been erased.

[28] The appellant testified at trial that his police statement was false—it had been extorted from him by police threats and physical violence and in deprivation of his right to counsel. Furthermore, he had not made any incriminating comments that could have justified his arrest. He appealed and filed fresh evidence in support, but died before the appeal could be heard.

[29] The fresh evidence consisted of the supposedly erased recording and the sworn testimony of a police officer. The recording demonstrated that Mr. Jetté had not made any incriminating statements, and the police had obviously lied about those statements. Furthermore, the police officer deposed that he had lied under oath at trial—he had indeed threatened the appellant and other officers had beaten the appellant.

[30] Fish J.A., as he then was, wrote the unanimous reasons for judgment. After canvassing the English, United States and Canadian authorities, he proposed that the Court had a discretion to declare the appeal abated or consider it on its merits. He suggested that the appeal should be heard on its merits where the Court is satisfied that there are serious grounds of appeal and the verdict carried significant consequences for the party seeking to continue the appeal proceeding or where it is in the interests of justice to do so. Fish J.A, expressed his view of the applicable principles as follows:

> 59. First, I would hold that we retain jurisdiction over a pending appeal upon the death of the convicted appellant and, in our discretion, may either declare the appeal abated or consider it on its merits.
>
> 60. Second, I believe that an appeal should be heard on its merits where the Court is satisfied that there are serious grounds of appeal and that the verdict carried with it significant consequences for the party seeking to continue the proceedings. I would also hear the appeal on its merits where the Court is satisfied, for any other reason, that it is in the interest of justice to do so.
>
> 61. Where these threshold criteria are satisfied, I would authorize continuation of the appeal by a close relative or friend of the appellant; by counsel of record, either at trial or upon inscription of the appeal; or by any other person considered to have a sufficient interest.

[31] Justice Fish concluded that the interests of justice required them to hear the appeal, admit the fresh evidence and quash the conviction (para. 75). Indeed, to allow the conviction to stand would cause the justice system to suffer disrepute (para. 20).

[32] The decision in *R. v. Jetté* set into motion events that led to the Supreme Court of Canada's decision in *R. v. Smith*, *supra*. Mr. Smith was convicted of second-degree murder in 1985 and sentenced to life imprisonment without parole eligibility for ten years. He immediately appealed conviction. Through no fault of the appellant, the appeal did not progress. In 1994, he died of lung cancer.

[33] The appeal sat dormant for seven years. The release of *R. v. Jetté* caused counsel to take up afresh the Smith family's desire to have the appeal heard. The Crown moved in 2001 to strike the appeal as abated.

[34] Wells C.J.N. wrote the unanimous reasons for the Court (2002 NFCA 8). He observed that prior to *Jetté*, there was no doubt that Canadian decisions invariably supported the proposition a criminal appeal abates where the appellant dies before the appeal concludes (para. 29). Wells C.J.N. accepted that an appellate court retained the discretion to hear the appeal, but only where the interests of justice required the appeal be heard. The test was not met. Hence, death abated the appeal and the notice of appeal was struck.

[35] The Supreme Court of Canada granted leave to appeal ([2002] S.C.C.A. No.

170). Binnie J. wrote the unanimous reasons for judgment of the Court (2004 SCC 14). He concluded that the Newfoundland Court of Appeal was correct to determine it had the jurisdiction to hear the appeal and there was no basis to interfere in its discretionary decision not to do so.

[36] Justice Binnie set out the process to be followed. First, there must be a motion to appoint a live person to act in the stead of the deceased. Second, the appellate court must make a discretionary decision whether to hear the moot appeal. He wrote:

> 10. Accordingly, when an interested party seeks to continue an appeal notwithstanding the death of the appellant (or, in the case of a Crown appeal, the respondent), the following steps should be taken:

> 1. A motion, pursuant to the relevant rules of procedure, should be made for substitution of the personal representative or another interested party for the deceased accused, and
>
> 2. The appellate court must consider, in light of the interests of justice, whether it is proper to exercise its jurisdiction to hear the appeal despite it being rendered moot by the death of the accused, or to abate the appeal. Those cases in which it will be proper to exercise jurisdiction to hear a moot criminal appeal will be rare and exceptional.

[37] I will return later to the issue of process and the parties' failure to follow the correct process in the case at bar.

[38] With respect to the test to be used whether to exercise the discretion to hear a moot criminal appeal, Binnie J. pointed out that Fish J.A. in *Jetté* did not refer to the general principles that govern moot appeals; nonetheless, the factors mentioned by Justice Fish were compatible with those principles. After quoting the *Jetté* factors of serious grounds of appeal, significant consequences and the interests of justice, Justice Binnie explained:

> 41. …The fundamental criterion is "the interests of justice". The two preliminary *Jetté* factors can be subsumed in the "interests of justice", which is a broad and flexible concept, and deliberately chosen on that account. *Borowski* supplies the principled framework within which "the interests of justice" can be evaluated.
>
> 42. It is apparent that if there are no "serious grounds of appeal", the appeal should be abated. Equally, under the second *Jetté* factor, where a verdict carries no significant consequences for the party seeking to continue it, a court should not exercise its discretion in favour of continuing the appeal. However, this factor will, in most cases, be self-fulfilling. If there were no significant consequences for the survivors, they would be unlikely to resist the Crown's motion to quash the appeal.

[39] Justice Binnie underscored that Wells C.J.N. was right to emphasize the "interests of justice" in his analysis. After all, this was the primary consideration of the Court in *Jetté*. An "interests of justice" test captures the necessary flexibility urged by Sopinka J. in *Borowski* ([1989] 1 S.C.R. 342). Justice Binnie explained:

> 46. It is "the interests of justice" on which Wells C.J.N.L. laid his emphasis, and I think he was correct to do so. This was clearly the primary consideration of Fish J.A. in *Jetté*. The "interests of justice" test captures the flexibility urged by Sopinka J. in *Borowski* (at p. 358). It signals the need not to be too dogmatic about the various criteria for its application. **The exercise of the court's discretion should turn on a consideration of all the relevant circumstances,**

> **keeping in mind the general rule that in the overwhelming number of cases the death of the appellant abates his or her appeal leaving the conviction intact**.
>
> 47. In *Jetté*, the "interests of justice" test was clearly satisfied. The grounds of appeal were not only serious, but overwhelming. The Quebec Court of Appeal was confronted with fresh evidence that suggested the factual innocence of the convicted offender. The opportunity to clear the name of the deceased appellant was of major significance to his family, and their determination to establish his factual innocence supplied the adversarial context. In the presence of such an apparent miscarriage of justice, "scarce judicial resources" could seldom be a disqualifying consideration. The issues surrounding the perjured testimony were quintessentially for the courts, not the legislature, to resolve. For the court to have declined to look into a serious abuse of its own process would clearly not have been "in the interests of justice".
>
> 48. *Jetté* raised issues of broad public importance concerning police conduct and a potential systemic failure in the justice system, as well as the spectre of a serious injustice to the deceased and his family. In other words, continuance of the appeal had important collateral consequences above and beyond the potential impact on the verdict itself.
>
> [Emphasis added]

[40] Justice Binnie then articulated a general test for appellate courts to use: are there special circumstances which make hearing the appeal "in the interests of justice". To inform the inquiry, Justice Binnie set out a non-exhaustive list of factors to be weighed:

> 50. In summary, when an appellate court is considering whether to proceed with an appeal rendered moot by the death of the appellant (or, in a Crown appeal, the respondent), the general test is whether there exist special circumstances that make it "in the interests of justice" to proceed. That question may be approached by reference to the following factors, which are intended to be helpful rather than exhaustive. Not all factors will necessarily be present in a particular case, and their strength will vary according to the circumstances:
>
> 1. whether the appeal will proceed in a proper adversarial context;
> 2. the strength of the grounds of the appeal;
> 3. whether there are special circumstances that transcend the death of the individual appellant/respondent, including:
>
> (a) a legal issue of general public importance, particularly if it is otherwise evasive of appellate review;
>
> (b) a systemic issue related to the administration of justice;

> (c) collateral consequences to the family of the deceased or to other interested persons or to the public;
>
> 4. whether the nature of the order which could be made by the appellate court justifies the expenditure of limited judicial (or court) resources to resolve a moot appeal;
>
> 5. whether continuing the appeal would go beyond the judicial function of resolving concrete disputes and involve the court in free-standing, legislative-type pronouncements more properly left to the legislature itself.
>
> 51. What is necessary is that, at the end of the day, the court weigh up the different factors relevant to a particular appeal, some of which may favour continuation and others not, to determine whether in the particular case, notwithstanding the general rule favouring abatement, it is in the interests of justice to proceed.

THE SCAC DECISION

[41] The SCAC judge reasoned that he had the authority to appoint a representative pursuant to *Civil Procedure Rule* 36.01 because the *Summary Conviction Appeal Rule* (63) adopted such other *Rules* that are suitable and not inconsistent with the *Criminal Code* or *Rule* 63.

[42] He acknowledged the common ground of the parties that he was bound to follow the principles set out in *R. v. Smith*. Accordingly, the SCAC judge quoted the relevant excerpts from *R. v. Smith*, including the test set out above to determine if there are special circumstances that make it in the interests of justice to hear a moot appeal.

[43] The SCAC judge referred in detail to the trial evidence, the issues the trial judge had to resolve, and quoted from the trial judge's decision that captured her reasoning on the live issues at trial. With that backdrop, the SCAC judge turned to the grounds of appeal advanced by counsel: that the trial judge had inadequately considered or appreciated the traditional law regarding identification evidence; and, the issue of cross-racial voice identification.

[44] Justice Gabriel did not find either ground to be strong, nor did they transcend the interests of the appellant. He identified numerous decisions that plainly articulated the dangers and inherent frailties of identification evidence, including cross-racial voice identification. The trial judge was alive to these issues. She quoted from those very authorities.

[45] As the SCAC judge pointed out, the case against the appellant was largely a circumstantial case. The trial judge had rightly discounted the in-dock identification of the appellant. Conviction was based on the totality of the evidence, which included: the witnesses' descriptions of the cab driver and the taxi van; the appellant's admission (and the CCTV footage of his appearance), to being the driver of a similar taxi van in the area within a half hour of the offence; the positive well-grounded voice identification; and, the police investigation that eliminated other possible cab drivers. The SCAC judge commented:

> [44] This was a circumstantial case. What was described by almost all of the witnesses was a collection of characteristics that the driver/perpetrator and his taxi or van possessed. The voice recognition by the female officer, who positively identified the background voice on the 911 tape as that of the accused, was another circumstance which the trial judge considered in this context. It was pointed out that the voice appeared to have an accent common to residents of a particular black community in Guysborough County, and the accused himself agreed that this characteristic was present in the voice in the recording.
>
> [45] As we have seen, these were circumstances that were added to the others and it was the totality of these circumstantial facts from which the learned trial judge drew what she considered to be the only reasonable inference available to her: the identity of the accused as the perpetrator of the sexual assault.

[46] Turning to the *Smith* factors, the SCAC judge found there would be a proper adversarial context, but that the grounds of appeal were not strong. He was not able to conclude that an acquittal was a real possibility. In terms of special circumstances, the SCAC judge agreed that cross-racial identification or recognition was a serious issue that concerns the public, but it was not an issue evasive of appellate review. Indeed, the appellant's materials pointed to four recent decisions that dealt with the very issue. Finally, even if successful, the outcome of the appeal would be inconclusive, which militated against its continuation. He concluded as follows:

> [62] Consideration of the *Smith*, *supra*, factors (as noted above) strongly militates against the order which the applicant seeks. The application to have the appeal continue posthumously through Ms. Lane-MacLellan, Mr. MacLellan's personal representative, is accordingly dismissed.

ISSUES

[47] The appellant advances one ground of appeal:

> The learned Summary Conviction Appeal Court judge erred in assessing Civil Procedure Rule 36.01, the facts of the case under appeal, and the law allowing a "posthumous" conviction appeal to be heard.

[48] The appellant did not advance any suggestion in his factum and oral argument that the SCAC judge committed any error, let alone a reversible one, in relation to *CPR* 36.01 or "the facts of the case". His submissions focus solely on what he says are an erroneous assessment of the *Smith* factors. I would therefore re-state the issues on appeal to be:

1. Should leave to appeal be granted?
2. Did the SCAC commit a reversible error in the exercise of its discretion to decline to hear the appeal?

LEAVE TO APPEAL

[49] An appeal to this Court from a decision of the SCAC requires leave and is limited to questions of law alone. In other words, appeals from questions of mixed law and fact, absent an extricable error of law, are beyond our jurisdiction to entertain.

[50] Even if an arguable error of law alone were identified, leave is by no means automatic. The governing principles were recently reiterated by this Court in *R. v. MacIntosh*, 2018 NSCA 39:

> [9] Leave to appeal from the SCAC will be granted where the questions of law raised transcend the borders of the specific case and are significant to the general administration of justice or where a "clear" error is apparent, especially if the convictions are serious and the appellant faces a significant deprivation of liberty (see *R. v. R.R.*, 2008 ONCA 497; *R. v. MacNeil*, 2009 NSCA 46; *R. v. Pottie*, 2013 NSCA 68).
>
> [10] An appeal involving well-settled areas of the law will not usually raise issues that have significance to the administration of justice beyond a particular case (*R. v. Zaky*, 2010 ABCA 95 at para.10).

[51] Despite the absence of any submissions by the appellant on the question, I would grant leave. I would do so because the issue of the appropriate process and

principles have not yet been addressed by this Court, and the process followed in this case went awry.

THE PROCESS

[52] There is no common law right to appeal. Appeals are strictly creatures of statute. The *Criminal Code* is the statute that gives an offender and the Attorney General the right to appeal in summary conviction matters to the SCAC, which in this province is the Nova Scotia Supreme Court. I will return later to the Appeal Court's powers.

[53] The Nova Scotia Supreme Court enacted *Civil Procedure Rule* 63 pursuant to s. 482 of the *Criminal Code*. *Rule* 63.03 provides, in part:

> 63.03 (1) All Rules outside this Rule apply to the extent that they provide procedures that are suitable to a summary conviction appeal, and are not inconsistent with the provisions of the Criminal Code or this Rule.

[54] As noted earlier, there are *Civil Procedure Rules* that are relevant to what happens to proceedings if a party dies. *Rule* 35.11 provides that "A proceeding is stayed" from when a party dies until an executor or other personal representative of the estate becomes a party, or a judge appoints a representative under *Rule* 36. *Rule* 94.10 defines "proceeding" to include an appeal.

[55] The appellant applied under *Rule* 36 to appoint Dorothy Lane-MacLellan as the appellant's personal representative to try to continue the appeal. This was appropriate. Binnie J., in *R. v. Smith*, endorsed reliance on civil rules of court in similar circumstances. The Newfoundland Supreme Court Criminal Rules made the rules relating to civil proceedings, if not inconsistent with the Criminal Rules or other statutes, applicable with any necessary modifications (para. 27).

[56] Binnie J., in *R. v. Smith*, pointed out that the right to appeal is a personal one. For indictable offences, the *Criminal Code* provides a "person who is convicted may appeal to the court of appeal against his conviction" (s. 675). According to Binnie J.:

> …This language presupposes that at the time of the filing of the notice of appeal, the person convicted is alive and thus competent to initiate the appeal….
>
> para. 21

[57] For summary conviction proceedings, s. 813 contains similar language:

> 813. Except where otherwise provided by law,
>
> (a) the defendant in proceedings under this Part may appeal to the appeal court
>
> (i) from a conviction or order made against him, …

[58] In *R. v. Smith*, there was no application by an executor or personal representative of the deceased appellant to pursue the appeal. Binnie J. emphasized that the substitution of a live appellant is important to the retention of jurisdiction to hear an appeal. To overcome this irregularity, he would have invited counsel to apply to appoint a personal representative *nunc pro tunc*, but as the appeal was to be dismissed, it would be an unnecessary burden:

> 29. The substitution of a live appellant is important to the retention of jurisdiction. In *R. v. Lofthouse* (1990), 60 O.A.C. 320, a case under the *Supreme Court Act*, R.S.C. 1985, c. S-26, Sopinka J. noted that where a statute or regulation provides for the continuation of an appeal upon death of a party, that procedure *must* be followed, failing which the Court will quash the appeal (at para. 1):
>
> > Entirely apart from the doctrine of mootness, an appeal to this Court cannot be prosecuted or continued by a party who has since died. An application must be made to continue the appeal pursuant to s. 73(1) of the *Supreme Court Act*, R.S.C. 1985, c. S-26. This application must be made by a personal representative who is either the executor or the administrator of the estate. The application under s. 73(1) is therefore dismissed. The application to quash is granted and the appeal is therefore quashed.
>
> 30. No application is before us to quash the appeal for failure to substitute a live appellant. If it were necessary to do so, I would invite counsel to apply to appoint Smith's executor or personal representative *nunc pro tunc* to continue the appeal on behalf of the Smith family. However, as the appeal is to be dismissed in any event, it seems unnecessary to burden the litigants with additional procedures at this late stage.
>
> [Emphasis in original]

[59] Although there was no formal application by the Crown to dismiss this appeal, the Crown questions whether this application for leave to appeal is properly before this Court in the absence of a live appellant. There is merit in the Crown's complaint, but in the circumstances, I would, were it necessary, have invited counsel to apply *nunc pro tunc* for the appointment of Ms. Lane-MacLellan as the

appellant's personal representative to bring the application for leave to appeal. But in light of my disposition of the appeal, it would impose an additional cost to no end.

[60] I feel it important to make some additional observations about the process before the SCAC. The SCAC judge, perhaps out of a desire for efficiency, merged the application for the appointment of a personal representative into a determination whether the appeal should be dismissed as abated pursuant to the discretion described in *R. v. Smith*.

[61] It would be better practice to keep these issues separate. I say this for two reasons. First, the separation confirms that there is a live appellant to act as the representative of the deceased appellant and the Court then has the jurisdiction to potentially hear the appeal. Absent the appointment, the appeal is stayed pursuant to *Rule* 35.11.

[62] The separation of the issues ensures that the personal representative enjoys the opportunity to marshal the necessary materials to present argument on the factors relevant to the Court's discretion to hear the moot appeal.

[63] In this case, no one voiced an objection to the process initiated by the SCAC, and counsel for the appellant frankly acknowledged to us in argument that he had a full opportunity to address the *Smith* factors. That may not always be the case. Care must be taken to ensure that the personal representative has that full opportunity.

[64] Secondly, the merger can lead to unnecessary confusion about what exactly has been decided. In this case, no order was taken out. We have no explanation why. In any event, the parties agree the effect of the decision by the SCAC was that the appeal was dismissed as abated, and hence there would be no purpose served to appoint Ms. Lane-MacLellan as the personal representative to prosecute an appeal that would not be heard.

[65] If there is no motion for the deceased appellant to have a personal representative and consequent application for the court to hear the appeal, the Crown should bring an application to have the appeal dismissed as abated.

STANDARD OF REVIEW

[66] It cannot be gainsaid that an appellate court's decision to hear or decline to hear a moot appeal is purely a discretionary decision. Where mootness is caused by death of the appellant in a criminal case, *R. v. Smith* tells us that the discretion to hear such an appeal should only be exercised in "exceptional circumstances" (para. 4) and the jurisdiction to hear an appeal should be "sparingly exercised" (para. 20). The general rule is that "in the overwhelming number of cases the death of the appellant abates his or her appeal leaving the conviction intact" (para. 46).

[67] The appellant submits that the SCAC's decision is owed no deference because it was a question of law and/or jurisdiction. No authority is cited for such a proposition. It is contrary to *R. v. Smith*. It is also contradicted by his later argument:

> 37. When exercising such discretion, **Smith** states that "the interests of justice" is the fundamental criterion to be considered (**Smith** at para. 41, Tab 18). Though the question is ultimately one of judicial discretion, it is critical to note the discretion has been exercised in the past (see **Jetté**, Tab 11). It is respectfully submitted that judicial discretion should be exercised here.

[68] The deference owed to a trial judge's discretionary decision is well known. With respect to the entry of stay of proceedings as a *Charter* remedy, the majority of the Supreme Court of Canada in *R. v. Regan*, 2002 SCC 12 set out the following approach:

> 117. The decision to grant a stay is a discretionary one, which should not be lightly interfered with: "an appellate court will be justified in intervening in a trial judge's exercise of his discretion only if the trial judge misdirects himself or if his decision is so clearly wrong as to amount to an injustice" (*Tobiass, supra*, at para. 87; *Elsom v. Elsom*, [1989] 1 S.C.R. 1367, at p. 1375). Furthermore, where a trial judge exercises her or his discretion, that decision cannot be replaced simply because the appellate court has a different assessment of the facts (*Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802; see also *R. v. Oickle*, [2000] 2 S.C.R. 3, 2000 SCC 38; *R. v. Van der Peet*, [1996] 2 S.C.R. 507).

[69] Similar language about challenges to discretionary decisions is found in Pigeon J.'s majority reasons in *R. v. Barrette*, [1977] 2 S.C.R. 121:

> It is true that a decision on an application for adjournment is in the judge's discretion. It is, however, a judicial discretion so that his decision may be

> reviewed on appeal if it is based on reasons which are not well founded in law. This right of review is especially wide when the consequence of the exercise of discretion is that someone is deprived of his rights, whether in criminal or in civil proceedings. …
>
> p. 125

[70] From these authorities, an appeal court should not interfere with a discretionary decision unless the appellant can identify an error in principle or the result of the decision amounts to a denial of rights that causes an injustice.

APPLICATION OF THE PRINCIPLES

[71] The appellant identifies just two alleged errors in principle in his factum: the SCAC judge erred when he examined the strength of the grounds of appeal beyond a determination whether they were "frivolous"; and, his reference that there would be ample opportunity to address cross-racial identification in the future.

[72] At the appeal hearing, the appellant appropriately conceded he had overstated the threshold that the grounds of appeal be just not "frivolous". The SCAC judge was right to examine the strength of the grounds of appeal. The appellant points to no error, let alone a reversible one in the SCAC judge's conclusion that the grounds of appeal were not strong.

[73] The appellant suggests that the SCAC judge erred in principle by reasoning that there would be ample opportunity to address cross-racial identification in the future.

[74] With respect, the SCAC judge did not just say there is no need to hear the appeal because there will be ample opportunity in the future to consider the issue. He pointed out that the frailties of cross-racial identification were already well-known. The SCAC judge referred to cases that had extensively canvassed the issue. For example, he commented:

> [39] In *R. v. Richards*, 2004 CanLii 39407 (Ontario Court of Appeal), *R. v. A.C.* (2009) CanLii 46651 (Ontario Supreme Court) and *R. v. MacIntosh*, 1997 CanLii 3862 (Ontario Court of Appeal), the difficulties associated with cross-racial identification were repeatedly stressed. So, too, the fact that there is an increased risk of error (and consequently a need for increased vigilance on the part of the trier of fact) when such evidence is presented. Other cases which deal with this concept will be discussed later in these reasons.

[75] Later, the SCAC judge summed up his analysis as follows:

> [47] **The dangers inherent in cross-racial identification and the need for extreme caution therewith is well known in Canadian courts. It is a phenomenon that has been addressed in courts across the country as we have seen**. Most unfortunately, it will likely continue to generate cases which will require further reference to it, and a continuing re-emphasis and reinforcement of the need for a great deal of caution when assessing such evidence. The essential caution which emerges from cases which do advert directly to the issue emphasizes the need for increased vigilance when assessing such evidence, and to look for other corroborating evidence when determining whether to accept it and how much weight to give it. The learned trial judge did that.
>
> [48] Appellant's counsel is indeed correct that this is a weighty and often troubling issue. The court must be extremely vigilant when dealing with this type of evidence because of the danger that it may lead to a wrongful conviction for reasons which are amply discussed in the existing jurisprudence. Context, and whether other evidence exists which supports such evidence, should be examined thoroughly when the credibility and/or reliability of a witness proffering cross-racial identification is assessed. The trial judge, to repeat, did just that. Moreover, to repeat, it is clear that the trial judge did consider the issue, which is referenced in the quote that she extracted (at para. 181 of the decision) from *Pinch, supra*, as to "the dangers and potential prejudice of cross-racial voice identification evidence".
>
> [49] **As we have seen, many cases across the country make this very point. Sadly, it appears that opportunities will exist in all courts, at all levels across the country, to re-emphasize it in the future.**
>
> [Emphasis added]

[76] As Binnie J. pointed out in *R. v. Smith*, a legal issue of general public importance "particularly if it is otherwise evasive of appellate review" (para. 50) can militate in favour of hearing an otherwise moot appeal. The SCAC judge did exactly what *R. v. Smith* directs: enquired if cross-racial identification is an issue of general public importance that is otherwise evasive of appellate review.

[77] The SCAC judge found it was not. He later summarized his analysis of the *Smith* factors:

> [56] As discussed above, the appellant says that this case addresses an issue of transcendent or public legal importance. I agree that cross-racial identification or recognition is indeed a serious issue that concerns the public. In particular, the dangers of misidentification of African Canadians touches upon a number of core Canadian values.
>
> [57] That said, such issues, although of public legal importance, and while certainly not ubiquitous, are encountered often enough in the existing

> jurisprudence such that the phenomenon has been identified and is well known across the country. **I cannot conclude that the case at bar deals with a public issue that is "evasive of appellate review" (as the term is used in *Smith*, para. 49).**
>
> [58] The paper cited by the appellant as earlier referenced, itself cites four recent cases that have all dealt with the issue of cross-racial identification. Of those cases, two were decided by the Ontario Court of Appeal within the last five years: *R. v. Jack*, 2013 ONCA 80 and *R. v. Yigzaw*, 2013 ONCA 547. **This, in conjunction with the case law canvassed earlier, tends to further support the conclusion that the topic is not one which is "evasive of appellate review"**.
>
> [Emphasis added]

[78] The appellant points to no error in this analysis. More significantly, we invited the appellant to identify any legal error by the trial judge in her decision with respect to the issue of cross-racial identification. He could not. Nor did he argue to the SCAC that the trial judge had committed any such error.

[79] What then would be the point of hearing a moot appeal on the issue of cross-racial identification when the appellant cannot identify an error even capable of disturbing the conviction? It is time to return to the powers of an appellate court on a conviction appeal.

[80] With some exceptions, s. 822 adopts for appeals pursuant to s. 813 the powers of an appeal court from Part XX for indictable appeals. The powers of an appeal court are found in s. 686. It provides as follows:

> 686 (1) On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal
>
> (a) may allow the appeal where it is of the opinion that
>
> (i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,
>
> (ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or
>
> (iii) on any ground there was a miscarriage of justice;

[81] The appellant does not suggest that there was a miscarriage of justice within the meaning of s. 686, nor did he advance to the SCAC any suggestion that the verdict was unreasonable or unsupported by the evidence, apart from his bare assertion in the Notice of Appeal. It is patent that there was ample evidence to

support the conviction. The appellant has not been able to even identify a potential error in law by the trial judge with respect to the issue of cross-racial identification.

[82] Instead, the appellant argues that he, Crown counsel, and presumably the trial judge, were unaware of the need to be sensitive to examining and cross-examining witnesses about their ethnic characteristics.

[83] The basis for the appellant's argument is that he had, by happenstance, a post-conviction discussion with a professor from the Schulich School of Law, which led him to a paper by a law student about the need to be sensitive to examining a witness or accused on ethnic characteristics. He says he wants the appeal court to "roll back the clock and have everyone in the courtroom alert to the issue".

[84] There are problems with the appellant's premise. There would be no rolling back of the clock to have everyone in the courtroom alive to the issue because there cannot be a re-trial.

[85] However, perhaps more fundamentally, it was counsel for the appellant that raised the issues of cross-racial identification and ethnic characteristics. No witness identified or referred to the cab driver as being Black or African-Nova Scotian. Appellant's counsel cross-examined the complainant as follows:

> Q. No? Okay. And the person that was driving the cab, was that person African-Nova Scotia, African-Canadian? Black, as some people call it.
>
> A. Not Black.
>
> Q. Not Black. What -- what race was the person who was driving the cab you were in?
>
> …
>
> Q. Okay, all right. Do you remember the race of the person driving your cab?
>
> A. I can't judge a race.
>
> Q. Uh, huh.
>
> A. But I do know that he had darker skin.
>
> Q. Uh, huh.
>
> A. But he wasn't Black. For all I know he could be Black, but see I don't know his ethnic background so I couldn't give you that guarantee that he was Black, but he did have dark skin.
>
> Q. I'm sorry?

A. I can't tell you that he is Black, as per se, African.

Q. Right.

A. But I can tell -- tell you that he had dark skin.

Q. Uh, huh.

A. Darker skin.

Q. Uh, huh. Okay. Which, in your world, what does that mean?

A. A different ethnicity.

Q. Yeah. Could be African-Canadian. It could be what else?

A. Umm, Mexican?

Q. Uh, huh.

A. Some type of Latino.

[86] Defence counsel elicited from the appellant that he was from a small predominantly African-Nova Scotian community; he identified himself culturally and racially as African-Nova Scotian, and no one had ever identified him as being Latino or Filipino. Defence counsel suggested that being African-Nova Scotian was distinctive, and the appellant added that he also had very bright white teeth from cosmetic dental surgery:

Q. Okay. I asked, at least, some of the persons at the scene what was distinctive about the person, this…apparently this cab driver, and nothing really struck me as noteworthy. **In terms of yourself, is there anything distinctive about you that you're familiar with? You're…you're African Nova Scotian, that's one thing, is there anything else**?

A. I would say often [sic] get questioned about my smile, that it's bright, I have nice teeth. They seem to stand out, I get a lot of questions about them…

[Emphasis added]

[87] During cross-examination, the appellant referred to the existence of Filipino and other "tan coloured drivers". Mr. MacLellan volunteered that his father is African-Nova Scotian and his mother is Caucasian. The cross-examination included this exchange:

Q. And you earlier identified yourself as black African Nova Scotian?

A. That's correct.

> Q. Would you agree with me though that perhaps your own pigment is quite tan, light coloured as well?
>
> A. Without standing offence to what you're saying, Mr. Kayter, no, I consider myself African Nova Scotian and I consider my complexion to be slightly tan, but not…not identifiable as white.

[88] There was no objection to any of the Crown's cross-examination of the appellant. Indeed, the trial judge commented on the courtesy shown by the Crown to the appellant:

> [185] During the entirety of Mr. MacLellan's cross-examination he was at times curt with the Crown, at times evasive and asking questions back to Mr. Kayter. At one point he was almost dismissive and defensive of the Crown's submission. Mr. Kayter was exceptionally polite in all of his questioning of Mr. MacLellan. His seeking clarification and questioning previous evidence appeared to illicit these responses.

[89] At the end of the case, the appellant forcefully argued to the trial judge:

> MR. KNOX: …And from the defence point of view, it's important to recall that not one said that …the driver was an African-Canadian, that he was African-Nova Scotian. They didn't say he was a black man and they didn't use the old vernacular unacceptable term, a coloured man. None said anything of that nature. None. Very noteworthy.

[90] In essence, counsel requests us to find the SCAC judge erred to hear a moot appeal about an issue that he himself raised at trial to try to create a reasonable doubt, absent any hint of a miscarriage of justice or legal error by the trial judge in how she dealt with the issue.

[91] We are being asked to re-weigh the *Smith* factors and come to a different conclusion than the SCAC judge. The appellant points to just one case, *R. v. Jetté*, where an appeal court decided to hear a conviction appeal despite the appellant's death. The circumstances in *Jetté* were vastly different than here.

[92] As observed by Binnie J. in *Smith*, the interests of justice test were clearly satisfied in *Jetté*. The grounds of appeal were not only serious but "overwhelming". The fresh evidence suggested factual innocence and serious abuse of the Court process by the police (*Smith* at para. 47).

[93] In this case, there are: no "serious grounds of appeal"; no special circumstances that transcend the death of the appellant; no collateral consequences to the MacLellan family or the public that could be impacted by the appeal.

[94] The SCAC judge weighed the relevant *Smith* factors and found that they strongly militated against the appeal being heard. I see no reversible error in the SCAC judge's analysis. It is in line with the general rule, applied consistently since *Smith*, that death abates a criminal appeal (see, for example: *R. v. Lewis*, 2008 BCCA 266; *R. v. J.E.T.*, 2013 ONCA 492; *R. v. Hicks*, 2016 ONCA 291; *R. v. Lessard*, 2016 ONCA 596; *R. v. Lillie*, 2018 ONCA 133; *R. v. Beaton*, 2018 ONCA 924).

[95] I have had the opportunity to read Chief Justice MacDonald's reasons. With respect, he misinterprets the appropriate approach to whether an appeal court should find special circumstances. He also relies on matters that were not argued by the appellant before the SCAC or our Court and have no support in the record.

[96] According to the approach articulated by the Chief Justice, every appeal would pass the "low threshold" he proposes. More is needed than just grounds of appeal that are arguable. The whole thrust of the *Smith* test is that there must be real substance to the complaints of error such that the circumstances warrant the appeal court hearing the moot appeal.

[97] For example, in *Smith*, there were the issues of: *Charter* infringement which could cause exclusion of the accused's admissions; use of jailhouse informant testimony without scrutiny; and, flawed jury directions (para. 54). Justice Binnie observed that, at best, these were good arguable points. That was not good enough in *Smith* and is even less so here, where the appellant cannot articulate any legal error by the trial judge.

[98] My colleague references how the grounds of appeal should not "impede the appeal's continuation" or "pre-empt the processing of the appeal" (paras. 136 and 142). With respect, the grounds of appeal should not just be such as to not impede the appeal from being heard but should animate the Court to hear the appeal.

[99] My colleague reasons that the SCAC judge committed an error in principle because he did not refer to the collateral consequences to the MacLellan family. The issue of collateral consequences was never argued before the SCAC judge. How can he be found to be in error for not considering a relevant factor to inform his analysis when the appellant never suggested there was any basis to do so?

[100] At the hearing of the application for leave to appeal, counsel for the appellant specifically conceded that there was no evidence of any collateral consequences to the MacLellan family. The concession is appropriate. The only evidence is the affidavit of the proposed personal representative. It makes no reference to any collateral consequences—just her desire to continue the appeal as his personal representative.

[101] Yet my colleague insists that the SCAC judge erred in principle because he made no mention of collateral consequences. With respect, my colleague misinterprets what is meant by the issue of collateral consequences.

[102] Criminal proceedings could have significant impact on a surviving family or others in terms of fines, orders for compensation, confiscation or forfeiture, availability of insurance proceeds or the ability to inherit (see for example the discussion in *R. v. Jetté*, *supra* at para. 56; and *R. v. Beausoleil*, 2016 QCCA 1046).

[103] The only collateral consequence my colleague refers to is his apparent inference that Mr. MacLellan's family feels aggrieved because death triggered the loss of Mr. MacLellan's absolute right to appeal. Those feelings will exist in every case. They are not a "collateral consequence".

[104] Finally, my colleague criticizes the SCAC judge because the judge only referred to the lack of real benefit that would flow from the appeal being heard and not the quantity of judicial resources that would be expended. In support, my colleague suggests that little judicial resources would be in play because the Appeal Books were filed and a date had been set for the appeal hearing.

[105] The appellant never argued in his factum or at the hearing that the judge committed such an error. In any event, again, I would say with respect, my colleague misunderstands what is meant by the expenditure of judicial resources, and who is in the best position to make that determination.

[106] The fact that Appeal Books had been filed is irrelevant to the expenditure of judicial resources. The appellant made those expenditures. The date for the hearing of the appeal was released at the request of appellant's counsel. If it were allowed to proceed, another date would have to have been set to hear the appeal, and a judge of the Nova Scotia Supreme Court would need to prepare for the appeal, hear it and eventually give reasons.

[107] The approach set out in *Smith* directs that the appeal court consider "whether the nature of the order which could be made by the appellate court justifies the expenditure of limited judicial (or court) resources to resolve a moot appeal" (no. 4, para. 50). That is precisely what the SCAC judge did, where he reasoned in a section of his decision entitled "Investment of Court Resources":

> [59] The appellant has pointed out that *R. v. T.W*, 2016 NLCA 3, stands for the proposition that a Court of Appeal under s. 686(8) of the *Criminal Code* may grant a stay of proceedings instead of a new trial or any other order that justice requires. The respondent's position is that "the only potential remedy that could realistically result with an accrued benefit to the deceased appellant would be a judicial stay of proceedings" (Crown post-hearing submissions, para. 13 emphasis added). I agree. Further, I consider the Supreme Court of Canada's observation in *Smith, supra*. This was to the effect that a stay is not the same as an acquittal and "the fact that, even if successful, the outcome of the appeal would be inconclusive is a factor that militates against its continuation" (*Smith*, para. 59)
>
> [Emphasis in original]

[108] The appellant never suggested that the SCAC judge made any error with respect to this aspect of his reasons. The issue of expenditure of judicial resources rests with the appeal court, in this case, the SCAC.

[109] Absent an error in principle, deference is owed to the balancing of the *Smith* factors whether special circumstances exist to make it "in the interests of justice" to hear an appeal rendered moot by the appellant's death. There is no basis to interfere with the discretion exercised by the SCAC judge. I would grant leave to appeal but dismiss the appeal.

Beveridge, J.A.

Concurred in:

Van den Eynden, J.A.

Dissenting Reasons:

[110] Despite his thoughtful analysis, Justice Gabriel, in my respectful view, misinterprets and misapplies the Supreme Court of Canada's direction in *Smith*. The result is an outcome that runs contrary to the interests of justice.

[111] My analysis will (a) take a closer look at *Smith*; (b) highlight the legal errors committed by the SCAC judge in interpreting and applying *Smith*; and (c) explain why it is in the interests of justice to process this appeal.

ANALYSIS

The *Smith* Case

[112] My colleague, Justice Beveridge, has already summarized the facts in *Smith* (¶ 32–33, above). Being so distant from our situation, these facts offer us little guidance. For example, the *Smith* appeal languished for most of the 16 years it took to finally arrive before the Newfoundland Court of Appeal. As my colleague noted, this included some seven years following Mr. Smith's death. During this time, the family was not involved in pursuing the matter. Instead, the file was activated by the court registrar who urged the Crown to bring the matter forward (¶ 1, 24). It did so by asking the Court to declare the appeal abated. In other words, *Smith* is the product of the Court's own initiative to deal with a dormant file. Granted, the family supported the appeal, but only after the Crown motion and the Court's initiative to appoint counsel for them (¶ 8). By comparison, since Mr. MacLellan's death, his sister has been actively pursuing this appeal with the blessing of Mr. MacLellan's widow.

[113] Nonetheless, *Smith* remains fundamental to this appeal. As my colleague correctly observes, its "interests of justice" test, including the non-exhaustive list of five considerations, applies to all appeals rendered moot (and presumptively abated) by the death of one of the parties (*Smith* at ¶ 50–51).

[114] However, that is the extent of *Smith's* reach. The SCAC judge's task here was to consider all the relevant circumstances of Mr. MacLellan's appeal against the applicable *Smith* factors (and any others) in order to determine if it was in the "interests of justice" for the appeal to proceed. As I will now explain, the SCAC judge made three errors when completing this task.

Errors in Principle

[115] For ease of reference, here are the five *Smith* factors as explained by Binnie J.:

> 50. In summary, when an appellate court is considering whether to proceed with an appeal rendered moot by the death of the appellant (or, in a Crown appeal, the respondent), the general test is whether there exists special circumstances that make it "in the interests of justice" to proceed. That question may be approached by reference to the following factors, which are intended to be helpful rather than exhaustive. Not all factors will necessarily be present in a particular case, and their strength will vary according to the circumstances:
>
> 1. whether the appeal will proceed in a proper adversarial context;
> 2. the strength of the grounds of the appeal;
> 3. whether there are special circumstances that transcend the death of the individual appellant/respondent, including:
>   (a) a legal issue of general public importance, particularly if it is otherwise evasive of appellate review;
>   (b) a systemic issue related to the administration of justice;
>   (c) collateral consequences to the family of the deceased or to other interested persons or to the public;
> 4. whether the nature of the order which could be made by the appellate court justifies the expenditure of limited judicial (or court) resources to resolve a moot appeal;
> 5. whether continuing the appeal would go beyond the judicial function of resolving concrete disputes and involve the court in free-standing, legislative-type pronouncements more properly left to the legislature itself.
>
> 51. What is necessary is that, at the end of the day, the court weigh up the different factors relevant to a particular appeal, some of which may favour continuation and others not, to determine whether in the particular case, notwithstanding the general rule favouring abatement, it is in the interests of justice to proceed.

[116] Neither factor #1 nor #5 is at play in this appeal. Specifically, it is acknowledged that the appeal would have proceeded in a proper adversarial context and continuing the appeal would not go beyond the judicial function. That

left factors #2 through #4 for the SCAC judge to consider. In my view, the SCAC judge's errors involve the third and fourth factors.

#3 Special Circumstances

[117] I have two concerns with the SCAC judge's approach to this factor: a misinterpretation of factor #3(a) (a legal issue of general public importance); and a failure to even consider factor #3(c) (collateral consequences).

#3(a) – A Legal Issue of General Public Importance

[118] The SCAC judge acknowledged that this appeal raised a "serious issue that concerns the public":

> [56] As discussed above, the appellant says that this case addresses an issue of transcendent or public legal importance. I agree that cross-racial identification or recognition is indeed a serious issue that concerns the public. In particular, the dangers of misidentification of African Canadians touches upon a number of core Canadian values.

[119] Yet he dismissed its influence because this same issue has been considered in the past and would be in the future. In other words, he concluded that this issue (in the language of *Smith*) was not "evasive of appellate review":

> [57] That said, such issues, although of public legal importance, and while certainly not ubiquitous, are encountered often enough in the existing jurisprudence such that the phenomenon has been identified and is well known across the country. I cannot conclude that the case at bar deals with a public issue that is "evasive of appellate review" (as the term is used in *Smith*, para. 49).
>
> [58] The paper cited by the appellant as earlier referenced, itself cites four recent cases that have all dealt with the issue of cross-racial identification. Of those cases, two were decided by the Ontario Court of Appeal within the last five years: *R. v. Jack*, 2013 ONCA 80 and *R. v. Yigzaw*, 2013 ONCA 547. This, in conjunction with the case law canvassed earlier, tends to further support the conclusion that the topic is not one which is "evasive of appellate review".

[120] In my respectful view, the SCAC judge has misread this factor. The Supreme Court in *Smith* did not say that *only* cases "evasive of appellate review" justify the exercise of discretion to hear the moot appeal. It simply said that such cases would be *particularly* significant. In other words, according to *Smith*, an appeal that raises a "a legal issue of general public importance" should be

considered a special circumstance (supporting the continuation of the appeal) regardless of whether it is "evasive of appellate review".

[121] In my view, this constitutes an error in principle that in part motivated the SCAC judge to abate the appeal.

#3(c) – Collateral Consequences

[122] *Smith* directs us to consider any collateral consequences of terminating an appeal upon the death of one of the parties. Factor 3(c) specifically requires consideration of any collateral consequences on the deceased's family. Yet the SCAC judge makes no mention of this. In fact, his analysis targets only factor #3(a):

> ***iii. Special Circumstances.***
>
> [53] This adverts to an issue of public importance. The rarer or more pressing the issues on appeal, the more this factor has weighed (in the jurisprudence) in favor of continuing with the appeal. The less rare the issue on appeal, the less importance this factor has assumed. A comparatively trivial example occurred in *R. v. Hicks*, 2016 ONCA 291, where the court declined to review the appeal of a traffic ticket, given the vast numbers of them decided annually.
>
> (See also paragraphs 54 to 58 of the SCAC judge's decision.)

[123] In my view, this narrow focus resulted in a significant omission because of the importance of this appeal to Mr. MacLellan's family. This will be discussed in more detail below.

#4 The Expenditure of Judicial Resources

[124] This factor invites a cost-benefit analysis—that is, would continuing the appeal justify the expenditure of judicial resources, considering that Mr. MacLellan can never be fully exonerated?

[125] However, it appears that the SCAC judge considered only half of the equation, namely, the limited benefit aspect:

> ***iv. Investment of Court Resources***
>
> [59] The appellant has pointed out that *R. v. T.W.*, 2016 NLCA 3, stands for the proposition that a Court of Appeal under s. 686(8) of the *Criminal Code* may

> grant a stay of proceedings instead of a new trial or any other order that justice requires. The respondent's position is that "the only potential remedy that could realistically result with an accrued benefit to the deceased appellant would be a judicial stay of proceedings" (Crown post-hearing submissions, para. 13 emphasis added). I agree. Further, I consider the Supreme Court of Canada's observation in *Smith, supra*. This was to the effect that a stay is not the same as an acquittal and "the fact that, even if successful, the outcome of the appeal would be inconclusive is a factor that militates against its continuation" (*Smith*, para. 59)
>
> [Emphasis in original]

[126] Missing is the fact that by the time of Mr. MacLellan's death, his appeal was already well-advanced, with a date set and the appeal book filed. Furthermore, as a record appeal, Mr. MacLellan's attendance would not have been necessary. It would have been simply a matter of filing written submissions and arguing the appeal on the assigned date. Failing to consider the limited cost to judicial resources of hearing the appeal represents an error in principle that affected the SCAC judge's decision.

[127] In my view, these three concerns constitute errors in principle that coalesce to undermine the SCAC judge's ultimate decision. As such, it must be set aside. Furthermore, with the full record before us and considering the time and effort that has already been expended, this Court should now make the appropriate determination (as opposed to remitting it to the SCAC). See e.g. *R. v. Spin*, 2014 NSCA 1 at ¶ 50. My "interests of justice" analysis therefore follows.

The Interests of Justice

[128] In this part, I will elaborate on *Smith*'s "interests of justice" test and apply it to the facts of this case.

The Smith Test

[129] At the outset, I acknowledge the long history of appeals abating when a party dies (well articulated by my colleague at ¶ 24-27, 94). I am also aware of the "special circumstances" and "rare and exceptional" language employed by the Supreme Court in *Smith*. That is not surprising. As the Court in *Smith* explained, this is to be expected:

> [37] The general reluctance of Canadian courts to proceed with a moot criminal appeal is justified by the fact that, in the overwhelming majority of cases, the *Borowski* criteria are not satisfied. In some cases, there is missing an appropriate

> adversarial context in which to determine the outstanding issues: *Southam, supra,* at p. 431. In other cases, the court expressed a concern not to dedicate scarce judicial resources to an appeal whose usefulness of result was not commensurate with its cost: *Romania (State) v. Cheng* (1997), 119 C.C.C. (3d) 561 (N.S.C.A.), at p. 563; *R. v. Anderson,* [1982] 1 C.C.C. (3d) 267 (Ont. C.A.), at p. 268; *Lewis, supra*, at p. 186; and *Cadeddu, supra*, at p. 116. In other cases, the court was sensitive to the constitutional limitations on the role of the courts whose function, apart from references authorized by statute, is to decide concrete disputes and not to pronounce generally on questions of law in the absence of a "live controversy" presented for resolution: *Cadeddu, supra*, at p. 116, and *Borowski, supra*, at p. 362.

[130] However, these admonitions must not distract us from the fundamental direction in *Smith*: to determine, on a case by case basis, whether the interests of justice warrant the appeal's continuation. They do not represent a "principle" "underpinning" all other considerations as the SCAC judge suggests (¶ 15).

[131] Furthermore, to accommodate each different fact pattern, the test in *Smith* is broad and flexible by design:

> [41] … The fundamental criterion is "the interests of justice"… which is a broad and flexible concept, and deliberately chosen on that account. …

[132] In fact, flexibility is a hallmark of many iterations of the "interests of justice" test, which is often employed by our courts when an outcome depends almost exclusively on the facts. For example, when an appeal court considers the admission of fresh evidence, the application of the test from *R. v. Palmer* (1979), [1980] 1 S.C.R. 759 should be "relaxed and flexible" (*R. v. Lévesque*, 2000 SCC 47 at ¶ 18) because it involves "widely varying sets of circumstances" (*R. v. Sipos*, 2014 SCC 47 at ¶ 31). In sentence appeals, we must conduct a "holistic assessment" when deciding whether to reincarcerate an offender (*R. v. J.J.W.*, 2012 NSCA 96 at ¶ 76). When considering the effect of prior rulings in a retrial, we are reminded that the "interests of justice" analysis includes not just the parties' interests but also "broad-based societal concerns" and "the cumulative force of all relevant circumstances" (*R. v. Victoria*, 2018 ONCA 69 at ¶ 53-54; see also *R. v. Keats*, 2017 NSCA 7 at ¶ 6-8 where the same considerations were identified in the context of an application for court-appointed counsel).

[133] With that backdrop, let me consider the circumstances of this case against the three *Smith* factors at play in this appeal, that is, factors #2 through #4.

#2 The Strength of the Grounds of the Appeal

[134] The Supreme Court noted that without "serious grounds of appeal", the appeal should not continue (*Smith* at ¶ 42). This raises the question of what constitutes a "serious" ground of appeal. The Court explained it this way:

> [54] The grounds of appeal are "serious" in the sense that a court *could* have determined in Smith's lifetime that a new trial would be the correct result. …
>
> [Emphasis added]

[135] In other words, for our purposes, grounds would be sufficiently serious if they *could* result in a successful appeal. That is a low threshold which, in my view, makes sense and is in keeping with Binnie J.'s cursory assessment of the strength of the grounds in *Smith* (¶ 54). After all, we must remember that the SCAC was not being asked to determine the merits of the appeal. That would be for another day. In fact, although the appeal book was available to the SCAC judge in this particular case, typically we would expect to have only the grounds as stated in the notice of appeal along with the decision under appeal. Put otherwise, at this stage, our analysis must be limited to a screening exercise, as opposed to a merits assessment. This is not unlike the "arguable issue" threshold we employ when considering whether to stay a judgment pending appeal. For example, in *MacCulloch v. McInnes Cooper & Robertson*, 2000 NSCA 92, Cromwell, J.A. (as he then was) cautioned:

> [4] […] It is not my role as a Chambers judge hearing a stay application to enter into a searching examination of the merits of the appeal or to speculate about its probable outcome but simply to determine whether the arguable issue threshold has been reached.
>
> [5] Here the notice of appeal sets out grounds relating to both the duty and standard of care as well as causation which, if accepted by the panel hearing the appeal, could result in the appeal being allowed. […]

[136] Applying this low bar, the grounds in this case should not impede the appeal's continuation.

[137] Here are the grounds as contained in the most recent notice of appeal (the third iteration so far):

> 1. That the learned trial judge erred in law in applying the law of identification evidence;

2. That the learned trial judge erred in law by failing to consider cross-racial identification principles also known as the "other-race" effect when applying the law of voice identification evidence, the law of circumstantial evidence, and in her assessment and findings of credibility;

3. That the verdict is unreasonable or cannot be supported by the evidence.

[138] Without assessing the merits, I will briefly comment on each ground.

Ground #1 – Identification Evidence

[139] The perils of eye-witness identification are renowned, but particularly challenging in this case. For example, a photo line-up was never used and, as the trial judge acknowledged, the "in dock" identification evidence was unreliable.

Ground #2 – Voice Identification

[140] Voice identification played a pivotal role in this matter. The Crown's key voice identification witness was the investigating officer. This factor alone raises serious red flags (see e.g. *R. v. Pinch*, 2011 ONSC 5484 at ¶ 75).

Ground #3 – Unreasonable Verdict

[141] This ground involves more than a sufficiency of evidence analysis. Instead, the appeal court must carefully examine the record to ensure the verdict is one that could reasonably have been reached by a trier of fact with proper instruction. That this trial was by judge alone is also significant. In such a case, the appeal court must also ensure the verdict did not rest on key factual findings that are incompatible with uncontradicted evidence that is not otherwise rejected by the trial judge (*R. v. Biniaris*, 2000 SCC 15 at ¶ 36–37; *R. v. R.P.*, 2012 SCC 22 at ¶ 9; *R. v. W.H.*, 2013 SCC 22 at ¶ 25–28; see also *R. v. Murphy*, 2014 NSCA 91 at ¶ 4-13; *R. v. J.P.*, 2014 NSCA 29 at ¶ 51–53). Given the complexities highlighted in the first two grounds of appeal and again the low threshold discussed above in paragraph 26, I am not prepared to say this ground has no merit.

[142] In summary, while these grounds of appeal may not, on their own, justify hearing the moot appeal (see *Smith* at ¶ 55), they should not pre-empt the processing of this appeal.

#3 Special Circumstances Transcending the Death

#3(a) and (b) – Legal Issues of General Public Importance and Systemic Issues related to the Administration of Justice

[143] In this aspect of his analysis, the SCAC judge acknowledged that this appeal raised a "weighty and often troubling" issue:

> [48] Appellant's counsel is indeed correct that this is a weighty and often troubling issue. The court must be extremely vigilant when dealing with this type of evidence because of the danger that it may lead to a wrongful conviction for reasons which are amply discussed in the existing jurisprudence. …

[144] In fact, Crown counsel acknowledged to the SCAC that Mr. MacLellan's appeal raised a "novel" issue, prompting it to take no position on the "interests of justice" analysis and acknowledging a judicial stay to be a potential remedy in the event of a successful appeal. It stated in its written submission:

> 6. As also indicated during our May 2, 2017 appearance in Chambers in Antigonish, the Crown agreed to take-no-position on the 'interests of justice' component of the *Smith* test.
>
> 7. 'Taking-no-position' is not a Crown endorsement of the issue raised in the amended grounds of appeal, but a reflection that the issue is so novel, that the Crown is unable to research and take a position on the issue at law.
>
> …
>
> 17. Therefore, if this Honourable Court grants leave for the summary appeal to be heard (on considering the 'interests of justice' element of the *Smith* test), and the appellant (deceased) eventually succeeds on the appeal, the Crown acknowledges that a Judicial Stay of Proceedings will be an available remedy.

[145] This supports the appeal going forward, despite the fact that, as noted, these issues may not have been "evasive of appellate review".

#3(c) – Collateral Consequences

Mr. MacLellan's Family

[146] As alluded to above, there will be serious collateral consequences to Mr. MacLellan's family should this appeal be cancelled without a merits assessment. For example, consider the following.

[147] Mr. MacLellan was identified by the police as the person committing this crime and charged accordingly. At trial, he took the stand in his own defence and, under oath, stated that it was not him driving the cab that evening. He was convicted, but even before being sentenced, he instructed his lawyer to file a notice of appeal. This was done promptly and a date for the conviction appeal hearing was set.

[148] Then misfortune struck. Mr. MacLellan died unexpectedly. That placed the appeal in limbo.

[149] While alive, Mr. MacLellan's right to appeal his conviction was absolute. That was his and every offender's basic right. Now, by dying, Mr. MacLellan's family has been denied what would have been a basic right. This is despite the fact that, as noted, an appeal hearing date had been set and his attendance would have been unnecessary. The fact that these factors would apply to all such appeals does not render them less relevant.

[150] Mr. MacLellan's sister, Dorothy Lane, supported her brother both before and after the conviction. With the approval of Mr. MacLellan's widow, she asked the Court to let the appeal proceed as scheduled. She volunteered to be her brother's representative for that purpose. She attested to Justice Gabriel:

> 5. My brother and I always had a very close relationship. He notified me of his criminal charges the same day he was charged in November 2014. He continued to keep me apprised of his case throughout the trial and after his conviction.
>
> 6. I attended the office of my brother's lawyer, Mark T. Knox, Q.C., on multiple occasions with my brother to support him. For example, I met with my brother and Mr. Knox on or about May 20, 2016 and again more recently to discuss sentencing and the appeal that is before this Honourable Court.
>
> 7. Outside of meeting with my brother's lawyer, I also had many private conversations with my brother about the case. These conversations took place in person, on the phone and via text message. My most recent conversation with my brother about the case was via text message on April 5, 2017, shortly before he passed away.
>
> 8. Since my brother's death on April 5, 2017 I have been in contact with Mr. Knox and his associate Michael Potter, and I attended their office on April 21, 2017.

> 9. I am interested in my brother's appeal of the trial court's decision continuing, despite my brother's passing. I would like to act as my brother's representative so that this appeal can continue and I believe I am an appropriate party to assume this role.

[151] Note that Ms. Lane did not ask Justice Gabriel to overturn the conviction. She simply asked the Court to honour what would have been her brother's fundamental right. The appeal may or may not have been successful. Yet, should the appeal be abated, the message for Ms. Lane and her family will be that it is over. Mr. MacLellan's right to appeal has died with him. This result communicates to Mr. MacLellan's family and to the public that court time has now become too precious to accommodate what would have been his fundamental right and/or that his issues on appeal lack sufficient public importance or merit to even consider them. This is despite time already having been reserved in the SCAC docket for that very purpose.

The Victim

[152] On the other hand, should the appeal go forward, there would be serious collateral consequences to the victim, Ms. C. She courageously took the stand and gave her evidence to secure a conviction. With a successful appeal, the conviction would be lifted. That is a serious consideration.

[153] However, it is important to note that this is an identification case. In other words, a successful appeal will not jeopardize the finding that Ms. C was sexually assaulted. Furthermore, we must recall that, at this stage, the request is only that the appeal proceed. Whether or not the conviction would ever be overturned would be for another day and then only if it were found to have been unlawful. Preventing a wrongful conviction remains in everyone's interest.

#4 – The Expenditure of Judicial Resources

[154] As noted, Mr. MacLellan's appeal was well-launched by the time he died. The date had been set, the court time reserved and the appeal book filed. Much of the effort had been expended. In my view, this should support the continuation of the appeal. Furthermore, although a complete exoneration would be impossible, a stay is acknowledged as a potential remedy. That would be important for Mr. MacLellan's family.

[155] For all these reasons, I conclude that the interests of justice command that the appeal go forward.

DISPOSITION

[156] I would grant leave to appeal the SCAC decision, allow the appeal, set aside the decision, and direct the conviction appeal from the Provincial Court to proceed. Should this require an application appointing Ms. Lane as Mr. MacLellan's personal representative in this Court, like my colleague, I would invite the same.

MacDonald, C.J.N.S.