NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. R.A.*, 2020 NSCA 3

Date: 20200120
Docket: CAC 494747
Registry: Halifax

Between:

Her Majesty the Queen

Appellant

v.

R.A.

Respondent

Restriction on Publication: s. 486.4 of the Criminal Code

Judge:	Beveridge, J.A.
Motion Heard:	December 19, 2019, in Halifax, Nova Scotia in Chambers
Held:	Motion dismissed
Counsel:	Mark Scott, Q.C., for the appellant Brian Bailey, 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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 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).

Decision:

[1] The Crown asks that I exercise my discretion to extend the time to appeal from the respondent's acquittal. The time to file and serve a Notice of Appeal expired on October 23, 2019. While I have some sympathy for the predicament that the Crown found itself in, I am not satisfied that it would be in the interests of justice to extend the time.

[2] In September 2017, a young girl disclosed to her mother that her father had done something during the previous night that was not only inappropriate but, if true, a crime. Police were contacted. An extensive recorded interview of the daughter proved mostly unproductive as she steadfastly refused to give the police any information. Eventually, she repeated in terse fashion what she had told her mother.

[3] The police laid charges. The trial proceeded in the Nova Scotia Supreme Court from September 9 to 17, 2019. The complainant adamantly refused to answer any questions about the alleged criminal conduct. The Crown applied to have her unsworn out-of-court utterances to her mother and to the police admitted pursuant to the principled exception to the inadmissibility of hearsay evidence.

[4] At the end of the *voir dire* on admissibility, the trial judge reserved his decision until September 17, 2019. On that date, he gave a bottom-line decision—the hearsay evidence would not be admitted. The judge promised written reasons would follow within a week or so.

[5] Without the hearsay evidence, the Crown had no evidence to present and invited an acquittal. The trial judge agreed.

[6] On October 24, 2019, the trial judge released his reasons (2019 NSSC 319). It was then that the machinery of the Public Prosecution Service swung into action with a recommendation to appeal, eventually endorsed, with this consequent motion dated December 12, 2019 to extend the time.

[7] I will set out the principles that guide my discretion and then turn to the Crown's motion materials.

Principles

[8] The *Criminal Code* gives to the Crown the right to appeal an acquittal in indictable proceedings on questions of law alone (s. 676). The *Code* does not deal with the procedural mechanics such as the time and service requirements. Those are left to the rules of court, with the proviso that the time to bring an appeal can be extended. Section 678 of the *Code* provides:

> 678.(1) An appellant who proposes to appeal to the court of appeal or to obtain the leave of that court to appeal shall give notice of appeal or notice of his application for leave to appeal in such manner and within such period as may be directed by rules of court.
>
> (2) The court of appeal or a judge thereof may at any time extend the time within which notice of appeal or notice of an application for leave to appeal may be given.

[9] *Rule* 91 of the *Nova Scotia Civil Procedure Rules* is the primary rule for criminal appeals. *Rule* 91.09 provides that an appeal may be started by serving on the respondent and then filing a notice of appeal no more than 25 days after conviction, acquittal, or sentence. Days are to be calculated as provided by *Rule* 94.02 but can be extended before or after the time has expired (*Rule* 91.09(2) and 91.04).

[10] Time under *Rule* 94.02 excludes the days a period begins and ends, and days the Court office is closed. This method is oft called "clear days".

[11] *R. v. R.E.M.*, 2011 NSCA 8 set out the general parameters of the test. Ultimately, the discretion must be exercised by what the interests of justice require. The Court will look at whether the applicant had a *bona fide* intention to appeal within the appeal period and if there is a reasonable excuse for the delay. The Court will also consider such factors as the length of the delay as well as prejudice arising from the delay and the strength or merits of the proposed appeal:

> [39] Both in Nova Scotia, and elsewhere, the criteria to be considered in the exercise of this discretion has been generally the same. The Court should consider such issues as whether the applicant has demonstrated he had a *bona fide* intention to appeal within the appeal period, a reasonable excuse for the delay, prejudice arising from the delay, and the merits of the proposed appeal. Ultimately, the discretion must be exercised according to what the interests of justice require. (See *R. v. Paramasivan* (1996), 155 N.S.R. (2d) 373; *R. v. Pettigrew* (1996), 149 N.S.R. (2d) 303; *R. v. Butler*, 2002 NSCA 55; *R. v. Roberge*, 2005 SCC 48.)

See also: *R. v. Derbyshire*, 2015 NSCA 23; *R. v. MacLean*, 2018 NSCA 1; *R. v. Spencer*, 2018 NSCA 3; *R. v. McNeil*, 2019 NSCA 8; *R. v. Stuart*, 2019 NSCA 34; *R. v. Charlie*, 2019 YKCA 18.

[12] The burden is, of course, on the applicant.

[13] Ordinarily, where it is the Crown that seeks an extension of time, it is because the prospective respondent is, for whatever reason, unavailable to be served with the Notice of Appeal (see for example: *Canada (Attorney General) v. Harris* (1996), 154 N.S.R. (2d) 399 (C.A.); *R. v. Derbyshire*, *supra*; *Regina v. Antonangeli* (2000), 132 O.A.C. 365). That is not the situation here.

Analysis of the Crown's materials

[14] The Crown tendered trial counsel's affidavit. She discloses the basic facts referred to above. Nowhere in the affidavit does she actually say that the *Crown* intended to appeal from the acquittal within the appeal period based on the trial judge's *voir dire* decision not to admit the proffered hearsay.

[15] In summary form, she avers that: without reasons, they had to wait for the written decision in order to assess their appeal prospects; they believed that the appeal period did not start until the judge released a decision with reasons; once they had the decision, they prepared a memorandum setting out their reasons and recommendation why they would like the Crown to appeal the decision; they provided their recommendation to the Chief Crown attorney on November 18, 2019, who endorsed it the same day; at some unspecified date, they also sent their recommendation to the Appeals Branch with their opinion that the service and filing deadline was November 24, 2019.

[16] Of particular note are the following paragraphs:

> 16. I had misunderstood the date from which the clock for filing and serving a Notice of Appeal began, thinking that the clock began once a decision with reasons was given.
>
> …
>
> 18. Had I known the deadline was 25 clear days from the date of the September 17, 2019 acquittal, I would have provided the memorandum and recommendation at an earlier date.
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> 19. I do not believe, however, that I could have realistically completed the recommendation before reviewing the written, October 24, 2019 decision.

> 20. Co-counsel and I have always intended to appeal from the *voir dire* decision provided there appeared to be viable grounds for such an appeal.

[17] October 23, 2019 was the last day to serve and file a Notice of Appeal. The earliest date that it can be said that the *Crown* intended to pursue an appeal was sometime on or after November 18, 2019 when the Appeals Branch decided to initiate an appeal. The most that can be said is that trial Crown counsel had a conditional, subjective desire to pursue an appeal.

[18] I have sympathy with Mr. Scott's position that service and filing of a Notice of Appeal without firm knowledge of the merits and potential substantive grounds may well be counterproductive. However, not only is there no clear path to a conclusion that the Crown had a *bona fide* intention to appeal within the appeal period, I have concerns about the lack of due diligence.

[19] There must be a reasonable excuse for the delay. I have no explanation how trial Crown counsel could have reasonably believed that the appeal period did not commence until she received a decision with reasons. It is settled law that there are no interlocutory appeals. The *voir dire* decision was interlocutory. It led to the Crown's offer of no further evidence and an acquittal. The Crown's right of appeal is from the date of the acquittal.

[20] I have no information about trial Crown counsel's communication, if any, with anyone with decision-making authority about initiating an appeal prior to November 18, 2019, nor with the trial judge about when they would receive his reasons, if indeed those reasons were in fact required to initiate a Crown appeal. I say this for two reasons.

[21] First, trial counsel also swore that if she had known the appeal period started on September 17, she would have provided her memorandum and recommendation at an earlier date. Second, the draft Notice of Appeal sets out two substantive grounds of appeal, only the second can be attributed to a review of the trial judge's reasons. The proposed grounds are:

> 1. That the learned Trial Judge erred in law in his application of the principled approach to hearsay when he excluded the statements of Z.A.;
>
> 2. That the learned Trial Judge erred in law in his consideration and application of the residual discretion to exclude the hearsay statements of Z.A.
>
> 3. Such other grounds of appeal as may appear from a review of the record under appeal.

[22] The first ground is generic and conclusionary in nature. It could have been advanced at any time. However, I do not offer any criticism of the laudable approach that the Crown should not lightly undertake an appeal from an acquittal. That ideology is sound.

[23] While trial Crown counsel say they had a subjective desire to appeal if there were viable grounds, the respondent and his counsel were in the dark. The Crown argues that it is unaware of any prejudice. With respect, I am more than entitled to infer prejudice to the respondent. He had been acquitted. The appeal period had come and gone. His two-year ordeal of facing an allegation of sexual assault against his own daughter was finally over.

[24] The first the respondent or respondent's counsel heard of the Crown's intent to appeal came in early December 2019, a full month-and-a-half after the appeal period expired. As recognized in *R. v. Roberge*, 2005 SCC 48, communication of the intention to appeal to the opposite party within the appeal period can influence the exercise of the discretion to extend.

[25] The factors that guide the discretion are not mutually exclusive. The strength of one or more factors can overcome the weakness or even vacuity of some of the others. At the end of the day, it is whether the interests of justice require an extension.

[26] However, it cannot be in the interests of justice to extend time for a proposed appeal that is devoid of merit (*R. v. R.E.M.*, *supra* at para. 45). The applicant must at least demonstrate realistic grounds of appeal of sufficient substance to be capable of convincing a panel of the Court to allow the appeal. That is the minimum.

[27] But the stronger the case for legal error and appellate intervention, the more likely it is in the interests of justice to grant an extension of time. For that reason, I turn to the apparent strength or merits of the proposed appeal.

[28] The trial judge's decision is 27 pages. He set out the principles established by the Supreme Court of Canada in *R. v. Khelawon*, 2006 SCC 57 and *R. v. Bradshaw*, 2017 SCC 35 that govern admissibility of hearsay. The Crown must establish the twin criteria of necessity and threshold reliability. The respondent conceded necessity. The only issue was threshold reliability.

[29] The applicant does not contest that the trial judge accurately set out the Crown's onus to show procedural or substantive reliability of the hearsay. The trial judge concluded that the Crown had not made out either.

[30] With respect to procedural reliability, he reasoned:

> [81] The Crown has not met its burden to establish procedural reliability. There have been no adequate substitutes for testing the hearsay statements, so as to provide a satisfactory basis upon which "to rationally evaluate the truth and accuracy of the hearsay statements".

[31] On substantive reliability, the trial judge set out the test:

> [83] As set out in paragraph 31 of the *Bradshaw* decision, the Crown is not required to show that reliability has been established with "absolute certainty", but rather that "the statements are so reliable that contemporaneous cross-examination of the declarant would add little if anything to the process." (citing *Khelawon*, at para. 49)

[32] Later, he concluded:

> [114] Her allegations were untested and remain impossible to test. The complainant has made certain of that. There are issues that need to be explored with her but a trier of fact has no objective means by which to assess the truth or accuracy of the statements, which in my opinion renders it inadmissible.
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> [115] I cannot say that contemporaneous cross examination would have failed to show that these allegations were inaccurate or untruthful.
>
> [116] After fully considering the able submissions of counsel and the evidence adduced in the application, I had and continue to have significant concerns with trial fairness arising from the circumstances. If this very prejudicial evidence is admitted, the accused has no means by which to test it for accuracy or truthfulness. This is particularly prejudicial in that his statement tendered by the Crown for the truth asserts his innocence.
>
> [117] *Khelawon* held that the court has a "... residual discretion" to exclude the evidence, "even if necessity and reliability can be shown. In my assessment, this is one of those cases where necessity has been shown, and that there is evidence supporting the substantive reliability of the hearsay, however it is insufficient to satisfy me that threshold reliability has been shown or that it is sufficiently probative so as to overcome the significant prejudice that would occur by admission.
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> [118] Application denied.

[33] The Crown points to the trial judge's reference to the statements and Z.A's evidence not having been under oath and without cross-examination. This tainted his analysis because young witnesses need only promise to tell the truth. In addition, the Crown says the judge failed to consider the overlap between substantive reliability and procedural reliability; and had he done so, it is at least arguable that procedural reliability was met. Further, the judge did not consider that the respondent had every opportunity to test the recipients of the hearsay.

[34] The respondent argues that the trial judge's analysis was completely proper.

[35] There is no doubt that the application of the principled exception to the hearsay rule is complex. In the context of an incomplete record on this type of application, I cannot say that the Crown would not have at least an arguable ground of appeal, but I am not convinced that the Crown has demonstrated a strong case for legal error and appellate intervention.

[36] I am not satisfied that it is in the interests of justice to extend the time to appeal in light of: the absence of a *bona fide* intent of the Crown to appeal within the appeal period; the lack of communication with respondent of even the possibility of such an appeal; the absence of a reasonable excuse for failing to respect the appeal period for appeal from acquittal; the prejudice to the respondent; and, the lack of a strong case for appellate intervention.

[37] The motion is dismissed.

Beveridge, J.A.