

**NOVA SCOTIA COURT OF APPEAL**

**Citation:** *R. v. Rouse*, 2020 NSCA 28

**Date:** 20200319

**Docket:** CAC 480811

**Registry:** Halifax

**Between:**

Darrin Phillip Rouse

Appellant

v.

Her Majesty the Queen

Respondent

**Judge:** Bryson, J.A.

**Motion Heard:** March 12, 2020, in Halifax, Nova Scotia in Chambers

**Held:** Motion dismissed

**Counsel:** Craig Arsenault, for the appellant  
Mark Scott, Q.C., for the respondent

**Decision:**

**Introduction:**

[1] Mr. Rouse wants to amend his Notice of Appeal. He wants to allege that his trial counsel was ineffective. He did that before but amended his appeal to withdraw that allegation. Now he wants to reinstate it. The Crown is opposed and proposes a more stringent test than usual for amendments to Notices of Appeal.

[2] For reasons that follow, I reject the Crown's proposed test for amendment, but dismiss the motion to amend, without prejudice to a proper application by Mr. Rouse.

[3] Before doing any analysis, a little history is in order.

**Background:**

[4] On April 18, 2018, Mr. Rouse was convicted of sexual interference contrary to s. 151 of the *Criminal Code*. He appealed. He filed his own Notice of Appeal in which he alleged ineffectiveness of trial counsel as one of his grounds. The particulars included the failure to call a witness as instructed by Mr. Rouse and a failure to effectively cross-examine the complainant regarding matters on which Mr. Rouse claims the complainant could have been contradicted.

[5] Mr. Rouse later retained Patrick Eagan as his counsel for the appeal.

[6] In a telephone conference before Chief Justice Wood on June 19, 2019, Mr. Rouse with Mr. Eagan's associate Mr. Arsenault on the call, withdrew his allegations of ineffectiveness of counsel and ultimately filed an amended Notice of Appeal withdrawing such allegations. The appeal was scheduled to be heard on November 21, 2019.

[7] At the commencement of the appeal, Mr. Eagan announced that his client wished to amend his Notice of Appeal to reinstate allegations of ineffectiveness of counsel. The appeal was adjourned without day. Mr. Eagan was told to file a motion to amend the Notice of Appeal. He agreed he could do this by Thursday, December 12, 2019. No such motion appeared. Finally upon inquiry from the Court, a Notice of Motion was filed returnable on March 12, 2020. Mr. Eagan did not actually appear but his colleague, Mr. Arsenault, came in his stead.

**The motion to amend:**

[8] There were actually three motions before the Court. Mr. Rouse moved to amend his Notice of Appeal to allege ineffective assistance of counsel. He also sought dates for filing fresh evidence and setting an appeal date. Coincidentally, the Crown made a similar motion for date and directions.

[9] At the outset of the hearing, Mr. Arsenault asked for an adjournment in light of Crown submissions that Mr. Eagan may have to give evidence on the motion to amend the Notice of Appeal and may be cross-examined and so other counsel would have to be retained for the purposes of such a hearing.

[10] Mr. Scott for the Crown made submissions relying upon an affidavit of Mr. Rouse's which had not been filed with the Court. That affidavit was sworn February 20, 2020, and was served on the Crown but not filed. I adjourned briefly to read that affidavit.

[11] The Crown's position was that no motion to amend the Notice of Appeal should be permitted. Instead a hearing on Mr. Rouse's change of heart would have to occur. Mr. Eagan would have to file an affidavit in support of the motion. The Crown indicated that it would seek cross-examination of Mr. Eagan and Mr. Rouse. These submissions were all premised on an argument that this was not an ordinary motion to amend and Mr. Rouse should have to meet a more demanding test for amending his Notice of Appeal in light of his abandonment of it earlier.

[12] Without getting into detail, there are discrepancies between the submissions made to the Court by Mr. Eagan in November regarding the request to amend the Notice of Appeal and the explanations in Mr. Rouse's affidavit served on the Crown but not filed with the Court until requested on March 12, 2020.

[13] Normally this Court will grant an amendment to a Notice of Appeal when "reasonably necessary for the presentation of the appeal and [it] will not occasion prejudice" to the respondent (*Lane v. Carsen Group*, 2003 NSCA 42 at ¶12; *2301072 Nova Scotia Ltd. v. Lienaux*, 2007 NSCA 4; *R. v. DeYoung*, 2017 NSCA 13 at ¶18 where the Court refused the motion because it would cause prejudice to the Crown which had been denied the opportunity to call evidence at trial on the new ground of appeal).

[14] In this case, there is no such impediment to granting an amendment to the Notice of Appeal alleging ineffectiveness of counsel. But Mr. Scott argues for a

more robust test than the one just described. He refers me to *R. v. Alam*, 2020 ABCA 10 at ¶6 and 7 where the Court was considering whether to reinstate an appeal which had been struck owing to failure to file an appeal record and transcripts. In that context, Justice Rowbotham said:

[6] The decision to restore an appeal is discretionary and requires that Mr. Alam establish that:

- (a) there is arguable merit to the appeal;
- (b) he has a reasonable explanation for the defect or delay which caused the appeal to be taken off the list;
- (c) he has moved promptly to cure the defect and have the appeal restored to the list;
- (d) he had a timely intention to proceed with the appeal; and
- (e) there is no prejudice to the respondent (including length of delay).

[7] These factors are weighed to determine if it is in the interests of justice to permit the appeal to proceed: *Al-Ghamdi v Alberta*, 2016 ABCA 324 at para 9.

[15] This test appears similar to one that this Court would apply on a motion to extend time to file an appeal that was out of time (for example: *R. v. R. E.M.*, 2011 NSCA 8 at ¶39).

[16] Respectfully, *Alam* is a completely different situation than the one with which this Court is now faced. The appeal exists. Mr. Rouse seeks to amend it. That he seeks to reinstate a ground that he formerly abandoned does not change the fact that there will be an appeal. The Crown candidly concedes that there will be no prejudice to the Crown flowing from amending the appeal and cannot oppose it on that basis. But Mr. Scott urges that the Court should consider the administration of justice more generally and in particular the prejudice to the victim and to Mr. Rouse's trial counsel as a result of the reinstatement of the ineffectiveness of counsel ground.

[17] Mr. Scott is really making a kind of abuse of process argument. One has some sympathy for this submission in light of the unfortunate history of this appeal. If this were a civil case, Mr. Scott's points would have some attraction. At the very least, costs would be awarded against Mr. Rouse. But this is a criminal appeal and Mr. Scott's arguments must yield to Mr. Rouse's right to fully argue his appeal.

[18] In the end, assuming that the proposed amendment is not plainly unsustainable or fails to present an arguable issue, the amendment should be granted, applying the tests outlined in *DeYoung*. However, what Mr. Eagan has filed on behalf of Mr. Rouse is not adequate to grant his motion to amend. A generic allegation of ineffectiveness of counsel will not do. Accordingly, the motion to amend is dismissed as is his motion to set date and directions for filing fresh evidence in the appeal. Similarly, the Crown's motion to set dates is dismissed.

### **Disposition**

[19] Mr. Rouse's request for an adjournment, motions to amend and set dates, are dismissed. The Crown's motion for date and directions is dismissed.

[20] Mr. Rouse may file a fresh motion and affidavit attaching a draft Amended Notice of Appeal setting forth the basis for the allegations of ineffectiveness of counsel. There is no need that Mr. Rouse be the affiant. The Court will then consider that motion on its merits.

[21] At the same time, Mr. Rouse should file a motion for date and directions with respect to fresh evidence and to set down the appeal.

Bryson, J.A.