

NOVA SCOTIA COURT OF APPEAL

Citation: *R. v. T.M.*, 2022 NSCA 22

Date: 20220316

Docket: CAC 510661

Registry: Halifax

Between:

T.M.

Applicant

v.

Her Majesty the Queen

Respondent

Restriction on Publication: Sections 486.4 and 486.5 of the *Criminal Code*

Judge: Derrick, J.A.

Motion Heard: March 10, 2022, in Halifax, Nova Scotia in Chambers

Held: Motion dismissed

Counsel: T.M., in person
Mark Scott, Q.C., for the respondent
Shane McCracken, watching brief for Brian Church, Q.C.

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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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).

Order restricting publication — victims and witnesses

486.5 (1) Unless an order is made under section 486.4, on application of the prosecutor in respect of a victim or a witness, or on application of a victim or a witness, a judge or justice may make an order directing that any information that could identify the victim or witness shall not be published in any document or broadcast or transmitted in any way if the judge or justice is of the opinion that the order is in the interest of the proper administration of justice.

Decision:

Introduction

[1] On December 20th, 2019 following a trial, the applicant, T.M., was convicted of the sexual assault of his two stepdaughters. On February 28th, 2020 he was sentenced to three years in prison. He says he wants to file a Notice of Appeal from

conviction and has filed a motion seeking an extension of time. The Crown is opposed, submitting that T.M. has failed to satisfy the requirements for filing a late Notice of Appeal. For the reasons that follow, I agree.

The Hearing of the Motion

[2] At the start of the hearing for his motion, T.M. requested an adjournment. He indicated he had not reviewed the materials filed by the Crown in as much detail as he would like and was feeling stressed and anxious. Indicating that an adjournment would not make the situation any less stressful, I recessed to give T.M. a further opportunity to review the Crown's brief (which he acknowledged he had previously read) and the other documents filed.

[3] Several affidavits, which I discuss below, were filed on this motion. Neither T.M. nor Mr. Scott for the Crown wished to cross-examine on the affidavits.

Factual Background

[4] T.M. filed an affidavit, dated October 3rd, 2021, in support of his motion. He claimed the lawyer who represented him for his sentencing, Brian Church, Q.C. agreed to "do" his appeal and undertook to "take care of everything". After that T.M. said he did not hear from Mr. Church, had trouble reaching him and was then given "the run around". According to T.M., Mr. Church was waiting for the trial transcript. He said Mr. Church forwarded him "appeal papers" which he signed and returned. In T.M.'s words, "This took up all last year and some of this year", referring to 2020 and 2021 respectively. T.M. said he heard nothing further from Mr. Church.

[5] T.M. indicated he then talked to "Karen" from the Dartmouth Legal Aid office who sent him a "second set of forms to file an appeal and ask for an extension". T.M. said he completed and signed these forms but heard nothing after sending them back. He said his mother became involved and contacted the Court on his behalf.

[6] T.M. concluded his affidavit with a complaint about the challenges of being incarcerated: "...being locked up in Dorchester [Penitentiary] its [sic] next to impossible to get anything done and have it done properly".

[7] T.M. added some further details in his oral submissions. He says he spoke to Mr. Church prior to the sentencing about an appeal and that Mr. Church told him

he would obtain a legal aid certificate to represent him for the appeal. He says “Karen” from Legal Aid first sent him an application to complete for legal aid representation and then sent him the forms for a prisoner’s appeal. It was his submission that he tried to do what he could do to advance an appeal.

[8] T.M.’s allegations that he was poorly served by Brian Church, Q.C. are emphatically disputed in Mr. Church’s affidavit. He confirmed his retainer by Nova Scotia Legal Aid to represent T.M. “for the limited purpose of sentencing”. He explained he was contacted by T.M. from prison:

[T.M.] called me from Dorchester Penitentiary expressing an interest in appealing the conviction and sentence.

At the time of this phone call from [T.M.], I was no longer engaged by Nova Scotia Legal Aid to represent him, as my retainer was limited to the concluded sentencing.

I explained to [T.M.] that I do not generally represent people in relation to criminal appeals. At no point did I advise [T.M.] that I would represent him for the appeal, nor was I at any point retained to do so. Rather, I explained to [T.M.] that my representation of him had concluded, and that my suggestion to him was to file a Prisoner’s Appeal if he wished to advance this appeal. In explaining the process to [T.M.], I offered to take a look at the trial transcript once he received it, as I wished to provide what assistance I could.

After receiving word from [T.M.]’s mother that he had not yet initiated his appeal, I sent [T.M.] the documents he would need to prepare and file with the Court to advance a Prisoner’s Appeal as a self-represented person, as shown in the letter attached hereto as Exhibit “A”.

I offered to answer questions if [T.M.] had any in preparing the documents, but reiterated that this process would allow him to proceed with the appeal on a self-represented basis. I also noted in this correspondence that due to delay in filing the appeal he would need to request an extension from the Court. At no point did I advise [T.M.] that I would be taking any of these steps for him or representing him in relation to the appeal.

[9] Mr. Church sent his letter to T.M., dated August 17th, 2020 to Dorchester Penitentiary where T.M. was serving his sentence. It enclosed three copies of the Notice of Appeal form and “Self-Represented Appellant Information”. Mr. Church explained in the letter that T.M. had to complete the forms himself and that Mr. Church could not do it for him. He indicated T.M. had to file a prisoner’s appeal so the transcript would be paid for as he was self-represented. He reminded T.M. to

read the Self-Represented Appellant Information he had enclosed. He concluded by telling T.M. to ensure he sent the completed forms to the court “and ask for an extension of time to file the Appeal because you don’t have a lawyer, and because of the Covid 19”.

[10] T.M. did eventually file a prisoner’s appeal. As he confirmed in his submissions, he did so with assistance from the Registrar for the Court of Appeal.

[11] The respondent Crown’s motion materials included copies of email correspondence from the Court’s file. The emails indicate the Registrar received a message from T.M. on August 6th, 2021 asking for a form to file an appeal. She sent the forms T.M. needed to complete and an instruction sheet to Sentence Management at Dorchester Penitentiary. On August 30th, the Registrar advised Sentence Management that T.M.’s mother had called to indicate he had not received the documents. On September 16th, the Registrar emailed Sentence Management to say she had received the forms from T.M. “but they are blank and he says he needs assistance completing them and would like to speak to me on the phone”. The Registrar was willing to talk to T.M. and confirmed her phone number as well as offering to schedule a time for a call if that was more convenient. It appears from the email correspondence between Dorchester and the Registrar that a call was organized for October 1st, 2021.

[12] T.M.’s motion for an extension of time to file his appeal was filed with the Court on November 16th, 2021.

[13] An affidavit from T.M.’s institutional parole officer sheds further light on steps T.M. took in relation to filing documents for an appeal. The parole officer worked at Dorchester from April to November 2021 during which time T.M. was on his case load. His affidavit states:

The first time I received requests to provide [T.M.] with assistance in filling out prisoner/self-represented documents related to seeking an appeal in Nova Scotia was in August 2021.

I confirmed with [T.M.] on September 13, 2021 that he had received the materials from the Nova Scotia Court of Appeal that I had recently sent to him.

[14] T.M. acknowledged in oral submissions he had met with the parole officer, once. He indicated it sounded right to him that August 2021 was when this occurred.

The Applicable Law

[15] As Chambers judge I can “at any time” extend the time within which a notice of appeal may be filed (s. 678(2), *Criminal Code*). *Civil Procedure Rule* 91.04 echoes this authority.

[16] The factors to be considered in the exercise of discretion to grant an extension of time are well-established: the applicant must have demonstrated a *bona fide* intention to appeal within the appeal period; they must have a reasonable excuse for the delay; the question of prejudice to the opposing party must be addressed; and the merits of the proposed appeal assessed. “Ultimately, the discretion must be exercised according to what the interests of justice require” (*R. v. R.E.M.*, 2011 NSCA 8, para. 39).

[17] The interests of justice are not served by a proposed appeal that lacks merit being afforded an extension of time. As Justice Beveridge held in *R.E.M.*:

[45] ...the ultimate question is whether or not the interests of justice require the extension of time to be granted. It cannot be in the interests of justice to extend time in order for a prospective appellant to pursue an appeal that has no merit. To do so wastes prosecutorial and judicial resources and reflects negatively on the administration of justice.

[18] Satisfying the meritorious appeal criterion requires T.M. to advance “realistic grounds, which, if established, appear of sufficient substance to be capable of convincing a panel of the court to allow the appeal” (*R.E.M.*, at para. 50, per Justice Beveridge citing *MacCulloch v. McInnes, Cooper & Robertson*, 2000 NSCA 92, at para. 4). In other words, T.M.’s proposed appeal must contain an arguable issue.

[19] The arguable issue is not assessed against a standard of probable success. To again quote Justice Beveridge in *R.E.M.*:

[71] An examination of the merits of a proposed appeal should be a limited one due to the frequent lack of a complete record and detailed submissions. It is decidedly not the role of the Chambers judge to engage in measuring the chances of success, allowing the extension if convinced the applicant has a reasonable or strong or some other adjective to measure the merits, but dismiss the application if not so satisfied.

Analysis

[20] *Civil Procedure Rule 91.09(1)(a)* establishes that a notice of appeal in a criminal case is to be filed no more than twenty-five days after the imposition of sentence. The twenty-five days is calculated with weekends and holidays excluded. T.M. was sentenced on February 28th, 2020. This was just before widespread lockdowns were imposed in response to the global COVID-19 pandemic. The Nova Scotia Court of Appeal suspended all filing deadlines between March 26th and June 26th, 2020. Taking that period of suspension into account, T.M.'s deadline for filing his notice of appeal was July 9th, 2020.

[21] The respondent Crown submits T.M. has failed to show the necessary diligence in pursuing an appeal within the appeal period or meritorious grounds of appeal.

[22] The evidence satisfies me T.M.'s approach to filing a notice of appeal lacked the required attentiveness. I find he belatedly contacted Mr. Church about appealing his conviction, doing so after, not before, his sentencing. Mr. Church's letter of August 17th, 2020 contradicts T.M.'s narrative about their interaction. It represents a careful explanation from an experienced lawyer of the steps T.M. needed to take. I accept Mr. Church's evidence that he endeavoured to be helpful while emphasizing to T.M. what was required to advance a prisoner's appeal and request an extension of time. Where there is divergence between the evidence of T.M. and Mr. Church, I prefer Mr. Church's and find it more credible and reliable.

[23] I am not persuaded T.M. then took any meaningful action, if he took any action at all, until a year later when he spoke with his Dorchester parole officer. T.M. has not satisfied me that after his contact with Mr. Church and before he finally filed his Notice of Appeal, he prepared a prisoner's appeal using documents sent to him by Nova Scotia Legal Aid. I note he added to his original narrative in oral submissions, saying that NSLA first sent him an application for legal aid before then sending forms for a prisoner's appeal. This additional detail, which T.M. says led him to tell NSLA they had initially sent him the wrong documents, emerged after Mr. Scott noted that an application for legal aid is always the first step undertaken by NSLA. I can take notice of the fact that NSLA does not provide to prisoners they are not representing Notice of Appeal forms to be completed and returned for filing. As Chambers judge I have enough experience dealing with unrepresented prisoners and NSLA to know NSLA does not become involved with a prisoner's Notice of Appeal prior to accepting them as a client.

[24] T.M.'s contact with NSLA aside, he has indicated he first reached out about an appeal to Mr. Church. That was in August 2020 when the deadline for filing his Notice of Appeal had already passed. T.M. did not then pick up the pace of his efforts, only contacting the Court about an appeal in August 2021, over a year since his filing deadline. He has provided no convincing explanation for not doing more, sooner. I accept the challenges faced by unrepresented prisoners trying to deal with legal matters are real; but, T.M. has not described any institutional impediments that frustrated his ability to launch an appeal. I find he has not shown he had a good faith intention to appeal within the time period.

[25] T.M.'s application also falls at the merits hurdle. He lists three grounds of appeal: ineffective assistance of trial counsel; inconsistent testimony by the Crown witnesses; and judicial bias. I find none of the grounds on which he wants to rest his appeal clear even the relatively low bar for what constitutes an arguable issue.

[26] T.M.'s grounds alleging ineffective assistance of trial counsel and complaining about Crown witnesses giving conflicting evidence cannot be reconciled. He says Crown witnesses were inconsistent in statements they made at various stages of the prosecution – in interviews, (I presume he is referring to police interviews), at the preliminary inquiry and at trial. He says “They all contradicted each other” when they testified. This suggests trial counsel must have achieved some success in drawing out credibility and reliability issues in the evidence that could have raised a reasonable doubt. It is not a measure of incompetence that reasonable doubt was not found.

[27] I further note a statement in T.M.'s complaint of judicial bias that cuts against his allegation of trial counsel incompetence: “All the lies that were proven by my lawyer that the Crown witnesses told the judge ignored”. (emphasis added)

[28] T.M. also criticizes trial counsel for not calling any witnesses; although, he does not indicate who such witnesses would have been nor does he say he drew potential witnesses to his lawyer's attention. He testified in his own defence. He has not shown what more should have been done to enable him to make a full answer and defence to the charges.

[29] On appeal T.M. would bear the burden of demonstrating that trial counsel's acts or omissions amounted to incompetence. It is a heavy onus. In *R. v. Gogan*, 2011 NSCA 105, this Court held that:

[29] ...Incompetence is measured against a reasonableness standard. The appellant must demonstrate that counsel's ineffective representation caused a miscarriage of justice. A miscarriage of justice occurs if we are satisfied that counsel's ineffective representation undermined trial fairness, or the reliability of the verdict. *R. v. Fraser*, 2011 NSCA 70...

[30] The grounds relating to ineffective assistance of counsel that T.M. proposes to advance on appeal do not raise an arguable issue. I agree with the respondent Crown's characterization of T.M.'s claims: "He has done no more than make bare assertions, none of which necessarily constitute incompetence, let alone establish a miscarriage of justice".

[31] T.M.'s allegations of bias on the part of the trial judge are similarly nothing more than bald assertions. He claims the judge "was completely on my side" until she returned from a recess in the trial with "her attitude totally changed". T.M. says he was found guilty because the judge "felt bad" for the complainants. This constitutes an unsubstantiated opinion. It does not qualify as an arguable issue.

[32] There is nothing in any of the grounds T.M. proposes for his appeal that would justify extending the time for him to file a Notice of Appeal.

Disposition

[33] T.M. carries the burden of demonstrating that he genuinely intended to appeal his conviction by July 9th, 2020, had a reasonable excuse for not doing so, and is advancing arguable grounds of appeal. I have not been persuaded that any of these requirements have been satisfied. The motion to extend the time for T.M. to file his Notice of Appeal is dismissed.

Derrick, J.A.