NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Clyke*, 2024 NSCA 66

Date: 20240710
Docket: CAC 488562
Registry: Halifax

Between:

Christian Enang Clyke

Applicant

v.

His Majesty the King

Respondent

And

Jonathan Hughes

Intervenor

Judges:	Bourgeois, Fichaud, Beaton, JJ.A.
Motion Heard:	June 12, 2024, in Halifax, Nova Scotia
Held:	Motion granted; reasons for judgment of Bourgeois, J.A.; Fichaud and Beaton, JJ.A. concurring
Counsel:	Malcolm S. Jeffcock, K.C., for the applicant Mark Scott, K.C., for the respondent Shane McCracken, on watching brief for the intervenor

Reasons for judgment:

[1] On June 12, 2024, this Court heard a motion brought by Christian Enang Clyke, in which he seeks to re-open an appeal in relation to his conviction for second degree murder. That appeal was dismissed by order of this Court on June 29, 2022.

[2] Although it is exceptionally rare to do so, for the reasons to follow, I would grant the motion, set aside the Court's earlier order and direct Mr. Clyke's appeal be re-opened.

Background

[3] On May 1, 2019, Mr. Clyke was convicted of second degree murder and received a life sentence with no eligibility for parole for 12 years. Mr. Clyke is schizophrenic and has had periods of profound dysregulation which have waxed and waned depending on the treatment received from time to time.

[4] Mr. Clyke filed a Notice of Appeal challenging his conviction, and was eventually provided legal counsel for his appeal. His appeal counsel, Mr. David Mahoney, K.C., filed a Second Amended Notice of Appeal, in which two grounds of appeal were alleged: that the conviction constituted a miscarriage of justice due to the ineffective assistance of trial counsel, and that his right to make a full answer and defence as guaranteed by s. 7 of the *Charter of Rights and Freedoms*, had been breached by the Crown's failure to disclose an audio recording of a statement he had given to police.

[5] Shortly before his scheduled hearing, Mr. Clyke fired his appeal lawyer. In his evidence on the motion, Mr. Mahoney indicated Mr. Clyke had insisted he obtain a transcript of a civil proceeding which, according to Mr. Clyke, would invalidate the murder conviction. The relationship broke down when Mr. Mahoney didn't obtain the transcript.

[6] Mr. Clyke then had staff at the federal institution where he was incarcerated fax a letter to the Court indicating he no longer wished to pursue his appeal. The Crown submitted that given the appellant's discontinuance of the appeal, the Court had no further jurisdiction to hear it. The Court directed Mr. Clyke attend the scheduled appeal hearing, and further appointed his former counsel as *amicus curiae*.

[7] The hearing commenced on June 22, 2022 with Mr. Clyke being present and expressing he would continue with the appeal. As is the usual procedure, Mr. Clyke's motion to introduce fresh evidence in relation to the allegation of ineffectiveness of counsel was heard first. Two expert witnesses who had provided affidavits in support of the Mr. Clyke's motion were cross-examined by the Crown.

[8] The next witness was Mr. Clyke himself. During cross-examination by the Crown, Mr. Clyke became upset, and indicated he no longer wished to continue with the appeal. He repeated his desire to discontinue the appeal, notwithstanding the presiding justices offering him the opportunity to obtain legal advice, and explaining the consequences of the Court accepting his abandonment. Mr. Clyke persisted, and the Court dismissed the appeal and issued an order accordingly on June 29, 2022.

[9] On August 9, 2022, Mr. Clyke placed a call to his former counsel, asking that his appeal be re-activated. A motion was subsequently made, and after a number of scheduling delays due to Mr. Clyke's deteriorated mental health, the motion was heard on June 12, 2024.

Issues

[10] Based on the materials before me, including the submissions of counsel, I would identify the issues to be resolved on the motion as follows:

1. Does this Court have jurisdiction to set aside the previous order dismissing the appeal?

2. If the Court has jurisdiction, should we exercise our discretion to set aside the previous order and re-open the appeal?

Analysis

Does this Court have jurisdiction to set aside the previous order dismissing the appeal?

[11] The Crown submits there is no jurisdiction to set aside the earlier order of this Court and relies on the doctrine of *functus officio*. In the Crown's written brief it asserts as follows:

> **An appeal that has been disposed of on the merits cannot be revived**
> Appellate courts are creatures of statute. Their jurisdiction is found both in statute and in their limited inherent jurisdiction to control their own process. *Civil Procedure Rules* cannot extend jurisdiction where the *Criminal Code* does not otherwise grant it. Nor can consent of the parties confer jurisdiction where it does not otherwise exist.
>
> These principles inform two preconditions that enable a court to exercise its extraordinary jurisdiction to revive an abandoned appeal:
>
> (i) There can be no final order dismissing the appeal, and
>
> (ii) The appeal cannot have been disposed of on the merits.
>
> When an appeal is disposed of on the merits and there is a final order, a court of appeal is *functus officio* and has no jurisdiction to re-hear any substantive aspects.

[12] The Crown says in the present case there is both an order dismissing the appeal, and it was disposed of "on the merits". Counsel for Mr. Clyke submits the existence of an order is not fatal to the re-opening of an appeal, where, as here, the appeal was not resolved on the merits, but rather, based on an appellant requesting a discontinuance.

[13] I am satisfied this Court has jurisdiction to set aside a prior order dismissing an appeal where the appeal was not heard on its merits. In that regard, I rely upon *R. v. Forrayi*, [1997] N.S.J. No. 179, *R. v. H. (E.)* (1997), 33 O.R. (3d) 202 (C.A.), *R. v. M.S.*, 2021 BCCA 378, and *R. v. Scott*, 2023 ONCA 820. The crucial questions here is: was Mr. Clyke's appeal heard on its merits?

[14] In *Scott*, *supra*, the Ontario Court of Appeal, in discussing the restricted ability to re-open an appeal said:

> [33] Under any formulation, jurisdiction to reopen after a formal order has been issued is precluded where there has been a hearing at which merit based arguments were made and a decision that is based on the panel's appreciation and assessment of the merits of the appeal, as opposed to a basis independent of the merits. For example, an appeal that was heard on the merits but was then dismissed because the appellant abandoned it would not fall into the *Rhingo*[1] formulation or any of the later formulations of when jurisdiction is precluded.
>
> [Emphasis added]

[15] I am satisfied the order of dismissal previously issued in this matter was not based on the merits of the appeal. The evidence presented on the motion demonstrates the hearing of the appeal was cut short by Mr. Clyke's insistence on discontinuing it. The motion for fresh evidence had not concluded, nor had the hearing of argument on the merits commenced. The order clearly noted it was made due to "the appellant advising the Court that he wished to abandon his appeal".

[16] There were no merit based arguments made, nor was the panel's determination to dismiss the appeal based on any consideration of the grounds of appeal. I am satisfied this Court is not *functus officio* and has jurisdiction to consider the motion.

> *If the Court has jurisdiction, should we exercise our discretion to set aside the previous order and re-open the appeal?*

[17] Mr. Clyke submits that in considering whether to re-open the appeal, this Court should be guided by whether it is in "the interests of justice" to do so. He relies on *Civil Procedure Rule* 91.23(6) which provides:

> (6) A notice of abandonment has the same effect as an order dismissing an appeal, unless a judge who is satisfied that it is in the interest of justice to do so permits the appellant to withdraw the abandonment.

[18] Mr. Clyke submits there are a number of considerations which weigh in favour of permitting the appeal to be heard on the merits. These include the seriousness of the charge and resulting sentence, that there is arguable merit to the appeal, and that his discontinuance of the appeal was, on a balance of probabilities, influenced by his status as a self-represented litigant and his mental health issues.

---

[1] *R. v. H.(E.)* (1997), 33 O.R. (3d) 202 (C.A.).

[19] The Crown argues the re-opening of an appeal should be permitted only in the most clear and compelling of cases. It is an exceptional discretionary remedy which should be used sparingly. The Crown suggests this Court apply the approach set out by the Ontario Court of Appeal in *R. v. Smithen-Davis*, 2020 ONCA 759. There, Justice Watt wrote:

> [36] Among the relevant factors a court might consider in deciding whether to permit re-opening of an appeal previously argued and decided on the merits are:
>
> i. the principle of finality;
>
> ii. the interests of justice including finality and the risk of a miscarriage of justice;
>
> iii. whether the applicant has established a clear and compelling case to justify a re-opening;
>
> iv. whether, in hearing and deciding the appeal on the merits, the court overlooked or misapprehended the evidence or an argument advanced by counsel; and
>
> v. whether the error alleged concerns a significant aspect of the case.

[20] The Crown asks this Court to require Mr. Clyke to establish a "clear and compelling" case in order to justify re-opening the appeal. The Crown says he has failed to do so. Further, the Crown submits Mr. Clyke fully understood the ramifications of abandoning the appeal mid-hearing and this Court should respect his right to self-determination. This is especially so given the absence of expert evidence demonstrating Mr. Clyke was delusional or otherwise unable to make decisions regarding the conduct of his appeal.

[21] I am satisfied it is in the interests of justice to re-open the appeal to allow it to be heard on the merits. In doing so, I note:

- Unlike in *Smithen-Davis*, the appeal here was not heard on its merits. As such, I decline to accept the Crown's invitation to apply the standard of a "clear and compelling case", rather, the consideration here is whether Mr. Clyke has demonstrated his appeal raises arguable grounds;

- Mr. Clyke's appeal raises arguable grounds of appeal. In particular, based on the material before the Court on the motion, there is arguable merit to the assertion Mr. Clyke did not receive effective representation from his trial counsel;

- The charge before the Court is extremely serious. Mr. Clyke is serving a life sentence with parole ineligibility set at 12 years;
- Although there was no expert evidence adduced on the motion, this Court had the opportunity to listen to Mr. Clyke provide evidence regarding why he abandoned his appeal. It is more likely than not his decision to do so was influenced by a delusional belief the conviction was going to be set aside as a result of civil litigation being undertaken;

- Mr. Clyke made the decision to abandon the appeal when he was emotionally upset and without the benefit of legal counsel; and

- Following the dismissal of the appeal, Mr. Clyke, less than two months later contacted his former appeal counsel to have the appeal revived.

[22] As the Crown correctly asserts, there are other factors which are engaged in a consideration of the "interests of justice", including finality and a consideration of the victims of crime. In some contexts, those factors may out weigh others, and result in a Court declining to re-open an appeal. However, this is not such a case.

Disposition

[23] The motion to re-open the appeal is granted. The appeal shall proceed based upon the allegations contained in the Second Amended Notice of Appeal, filed March 31, 2022.

[24] The Crown is asked to arrange for the matter to return to telephone chambers for scheduling purposes.

Bourgeois, J.A.

Concurred in:

Fichaud, J.A.

Beaton, J.A.