NOVA SCOTIA COURT OF APPEAL

Citation: *R. v. Robb*, 2024 NSCA 69

Date: 20240712
Docket: CAC 529305
Registry: Halifax

Between:

Kohl Roger Kenneth Robb

Appellant

v.

His Majesty the King

Respondent

Judge:	The Honourable Justice Robin C. Gogan
Appeal Heard:	June 17, 2024, in Halifax, Nova Scotia
Subject:	Criminal Law. *Charter* – s. 11(b). *R. v. K.G.K.* – verdict deliberation delay.
Summary:	The appellant was convicted of two offences in the Provincial Court of Nova Scotia. He brought an application for a stay under s. 11(b) of the *Charter* alleging that the proceeding had taken too long. The application was denied. He appealed. The Summary Conviction Appeal Court dismissed the appeal finding that: (1) the proceeding did not exceed the presumptive ceiling, and (2) the verdict deliberation time was not markedly longer than it reasonably should have been in all the circumstances. The appellant sought leave to appeal.
Issue:	Should leave be granted?
Result:	Leave to appeal is denied. The appellant has not established any error of law, any issue that requiring resolution for the

benefit of the administration of justice, nor any significant deprivation of liberty.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 32 paragraphs.

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Judges:	Wood C.J.N.S., Derrick and Gogan, JJ.A.
Appeal Heard:	June 17, 2024, in Halifax, Nova Scotia
Held:	Appeal dismissed, per reasons for judgment of Gogan J.A.; Wood C.J.N.S. and Derrick J.A., concurring
Counsel:	Kohl Roger Kenneth Robb, appellant, self-represented Timothy O'Leary, for the respondent

Reasons for judgment:

Introduction

[1] This is an appeal from a decision of the Summary Conviction Appeal Court ("SCAC").

[2] On July 3, 2019, the appellant was charged with a number of offences based upon events that occurred the day prior. The one-day trial took place on November 9, 2020, before Judge Frank Hoskins (as he then was), in the Provincial Court of Nova Scotia. Final submissions were made on March 10, 2021. The trial judge reserved his decision. The original decision date of June 2, 2021, was adjourned to August 3, 2021.

[3] On July 2, 2021, the trial judge was appointed to the Supreme Court of Nova Scotia. He retained jurisdiction over this matter, but also began to preside in Supreme Court. The matter was adjourned on August 3, August 27, and October 1, 2021. On October 6, 2021, the trial judge advised that he was prepared to deliver an oral decision, which he thought could take "a few hours". Alternatively, he could provide a "bottom-line" decision with reasons to follow. The appellant chose the latter. The trial judge gave the parties the bottom-line decision, convicting Mr. Robb of two charges. Detailed reasons followed on January 14, 2022.

[4] On January 13, 2022, the appellant brought an application to the trial judge alleging a breach of his rights under s. 11(b) of the *Charter* [1]. He sought a stay of proceedings. His application was denied, and he appealed to the SCAC. Justice Christa Brothers (the "SCAJ") dismissed his appeal.

[5] The appellant now brings a further appeal. He represents himself and alleges errors of law made by the courts below in the analysis of his s. 11(b) *Charter* rights.

[6] For the reasons that follow, I would not grant leave to appeal.

Standard of Review

[7] This is an appeal brought under s. 839 of the *Criminal Code of Canada*. An appeal from a decision of the SCAC is restricted to questions of law and requires

[1] *Canadian Charter of Rights and Freedoms*, s 7, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (UK), 1982, c 11.

leave be granted. Only if leave is granted will the merits be considered. The focus of this decision is on the question of leave.

[8] The jurisdiction of this Court is limited. Leave is granted sparingly. There must be a clear error, or an issue that has significance beyond the specific case (*R. v. R.E.M.*, 2011 NSCA 8, citing *R. v. R.R.*, 2008 ONCA 497 and *R. v. MacNeil,* 2009 NSCA 46). The rationale for limiting these appeals is the recognition that there has already been an appeal in the proceeding. A further appeal is only allowed if the issues raised have clear merit or transcendence (*R. v. Ankur; R. v. Chandran*, 2023 NSCA 55 at para. 7).

[9] The principles that guide the analysis of leave were discussed in *R. v. Pottie*, 2013 NSCA 68. Justice Farrar, writing for the Court, distilled the approach into a series of inquiries at para. 22:

> [22] To decide whether the appellant should be granted leave to appeal, I agree with the Crown's submission that the following questions must be answered:
>
> a. Does this case raise an issue that is significant to the administration of justice?
>
> b. Are the merits of the appellant's case strong; is there a "clear" error of law?
>
> c. Does the appellant face a significant deprivation of his liberty if he is not granted leave to appeal?

[10] It is well settled that these questions continue to guide the leave analysis. Each of these questions is addressed in this decision.

Analysis

The Summary Conviction Appeal

[11] Before turning to the question of leave, I will briefly review the decision under appeal.

[12] The issue before the SCAC was whether the trial judge was correct to conclude the appellant's s. 11(b) *Charter* right had not been violated. By the time the appeal was heard, the issue had sharpened to consideration of error in the trial judge's characterization of the period between the parties' final submissions (March 10, 2021) and the bottom-line decision (October 6, 2021). The review was

guided by the analysis of Justice Derrick in *R. v. Ellis*, 2020 NSCA 78 at paras. 78 – 95.

[13] The parties' arguments before the SCAC focused on the 18-month presumptive ceiling prescribed by the Supreme Court of Canada in *R. v. Jordan*, 2016 SCC 27. It was the SCAJ who directed the parties to the decision in *R. v. K.G.K.*, 2020 SCC 7, and sought supplemental submissions.

[14] The Supreme Court of Canada in *K.G.K.* clarified that the presumptive ceiling as explained in *Jordan* did not include verdict deliberation time. The issue then became whether, in assessing possible infringement of a s. 11(b) right, "the deliberation time took markedly longer than it reasonably should have in all of the circumstances" (*K.G.K.* at para. 54). Using the *K.G.K.* analysis, it was the appellant's view that the deliberation time of 311 days (or ten months and five days) was too long, especially when compared with the nine months of deliberation time in *K.G.K*. The Crown disagreed, noting that the *Jordan* ceiling had not been exceeded, and the impact of the pandemic meant the deliberation time was reasonable in the circumstances.

[15] The SCAJ extensively reviewed the procedural history and authorities, concluding: (1) the case had not exceeded the presumptive ceiling, and (2) the deliberation time had not markedly exceeded what was reasonable in the circumstances. In coming to this conclusion, she considered: (1) the total amount of deliberation time (both to the bottom-line decision and full reasons), (2) the proximity of the case to the *Jordan* ceiling, (3) the complexity of the case, and (4) the record on the judge's workload and institutional demands. All things considered, the appellant had not discharged the high burden of rebutting the presumption of judicial integrity operating here as a presumption the judge took no longer than reasonably necessary to reach a verdict by balancing timeliness, trial fairness, and practical constraints[2].

Positions on Appeal

[16] Before this Court, the appellant does not take issue with the guiding principles or allege any error of law. He did not specifically address the question of leave. He is focused on the merits and argues: (1) he did what he could to expedite the proceedings and have his case heard as quickly as possible, (2) neither the pandemic nor the trial judge's appointment to the Supreme Court of

[2] *K.G.K*, *supra*, at paras. 55-56.

Nova Scotia excuses the delay, (3) the case was not complex, and (4) the assessment of deliberation time should not be based on precise calculations but on a "bird's eye view of the case". He maintains the total of the net *Jordan* delay, plus the deliberation delay, together violate his right to trial within a reasonable time.

[17] The Crown argues against leave on the basis that: (1) there is no error, (2) there is no point of law to be settled, (3) the issues raised are not significant to the administration of justice, and (4) the circumstances of the case are without precedential value.

The Question of Leave

[18] I turn now to the question of whether leave should be granted. The reasons are organized with reference to the questions proposed in *Pottie*:

(a) Does this case raise an issue that is significant to the administration of justice?

[19] This appeal arises in the context of the issue of delay. It invokes consideration of the appellant's right to be tried within a reasonable time, a right guaranteed by s. 11(b) of the *Charter*. Questions about the scope of *Charter* values are always important. But the question here is whether there is an issue that has a significant level of importance to the administration of justice. In my view, it does not.

[20] First, the law in this area is increasingly well settled. In both *Jordan* and *R. v. Cody*, 2017 SCC 31, the Supreme Court of Canada called for a culture shift in the approach to ensuring trials within a reasonable time. The principles have now been subject to years of consideration. Although the question of deliberation delay remained uncertain for a period, it too has now received clarification. The Supreme Court of Canada tells us that verdict deliberation time is not included in the presumptive ceilings. Deliberation periods are assessed separately, according to the marked departure standard set out in *K.G.K.* Those principles were applied by the SCAJ. More recently, they were applied by our Court in *R. v. McNeil*, 2024 NSCA 57. There are no new principles in this case with significance to the general administration of justice.

[21] Second, I note the observation at para. 69 of *McNeil* that "each deliberative delay case will be fact-specific". This is consistent with the Crown's submission in this case. The deliberation delay at issue here was impacted, amongst other things,

by both the COVID-19 pandemic and the appointment of the trial judge to the Nova Scotia Supreme Court. This highly unusual combination of events created an exceptional workload for the trial judge and an environment of constant case triage and priority assessment. The outcome of an appeal in this context is unlikely to have any broad precedential value.

[22] I conclude there is no issue in this case that will have significance for the administration of justice.

(b) Are the merits of the appellant's case strong; is there a "clear" error of law?

[23] The appellant's Notice of Application for Leave states his *Charter* rights were infringed and an error of law occurred in "attributing certain delay to defence in [*sic*] ultimate decision on 11(b)". When considered in the context of his written and oral submission, it is not clear whether the alleged errors are those of the trial judge or the SCAJ.

[24] The appellant does not dispute the principles that apply. He relies on the principles in *K.G.K*. at paras. 3, 4, 23, 33, and 67-73. He also cites *Jordan* for the proposition that delay may still be unreasonable even when the presumptive ceiling is not exceeded. None of the principles cited are the subject of any dispute.

[25] What the appellant appears to contend is that the principles were not correctly applied. He adds the required assessment is "not based on precise calculations or a focus on minutiae."

[26] In *Pottie*, the requirements on this point were identified at para. 21:

> …
>
> 4. If the appeal does not raise an issue significant to the administration of justice, an appeal that is merely "arguable" on its merits should not be granted leave to appeal. Leave to appeal should only be granted where there appears to be a clear error by the SCAC. [see *M. (R.W.)* at para. 37; *R.R.* at para.32]
>
> 5. A second level of appeal is an appeal of the SCAC justice. It is to see if he or she made an error of law. The second level of appeal is not meant to be a second appeal of the provincial court decision. [see *R.R.* at para. 24; *Chatur* at para. 17]

[27] In my view, the complaints raised by the appellant were fully canvassed by the SCAC. As already noted, it was the SCAJ who raised the decision in *K.G.K.*

and refocused the arguments to the issue of verdict deliberation time. This was an important correction in the analysis. The SCAJ identified and applied the correct principles. I am satisfied the record does not demonstrate any error of law or any other basis to say a strong argument exists on the merits.

(c) Does the appellant face a significant deprivation of his liberty if he is not granted leave to appeal?

[28] The answer to this final inquiry is no.

[29] On October 3, 2022, the appellant was sentenced to thirty days in custody to be served intermittently, along with a two-year driving prohibition. The custodial portion of the sentence is concluded. There is no deprivation of liberty issue here.

Conclusion

[30] Leave of this Court is required for the appellant to pursue his appeal. Granting leave is the exception and not the rule.

[31] The test for leave is well settled as is the law on the points raised by this appeal. There are no issues in this appeal that call out for resolution for the benefit of the administration of justice. Nor has the appellant demonstrated any error of law or significant deprivation of liberty that favours granting leave.

[32] In the circumstances, I would deny leave.

Gogan, J.A.

Concurred in:

Wood, C.J.N.S.

Derrick, J.A.