SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Chaisson*, 2022 NSSC 369

Date: 20221230
Docket: SAT No. 503668
Registry: Pictou

Between:

His Majesty the King

v.

Gabriel George Chaisson

DECISION ON APPLICATION TO RECONSIDER

Judge:	The Honourable Justice Scott C. Norton
Heard:	December 5, 2022, in Antigonish, Nova Scotia
Decision:	December 30, 2022
Counsel:	Wayne J. MacMillan, for the Crown Jonathan Hughes, for the Accused

The original text of this decision has been corrected according to the erratum dated January 18, 2023.

By the Court:

Introduction

[1] Gabriel Chaisson was found guilty following trial that he, on or about October 9, 2020, at Goshen, Nova Scotia, did possess cocaine for the purpose of trafficking, and (two counts) that he also breached conditions of a recognizance of bail. He has not yet been sentenced.

[2] Mr. Chaisson ("Applicant") now applies to this Court asking it to vacate the conviction and re-open the case, so the Applicant can re-argue two pre-trial *Charter* motions which this Court previously dismissed. The Crown opposes this request.

[3] At the hearing of the application, Mr. Chaisson acknowledged receiving additional requested disclosure from the Crown related to the pre-trial applications, albeit heavily redacted. Mr. Chaisson advised the Court that the disclosure material received was sufficient for him to proceed with the application to re-consider the pre-trial applications.

[4] Subsequent to the hearing I received additional written submissions from the Crown and Mr. Chaisson (personally, not through counsel).

Summary of Relevant Facts

[5] On October 8, 2020, the RCMP obtained a *Criminal Code* search warrant for evidence related to firearms offences, to be executed at the Applicant's residence in Goshen, Nova Scotia. During execution of the search warrant on October 9, 2020, the police decided to obtain a *Controlled Drugs and Substances Act* search warrant in relation to controlled drugs. That second warrant was issued and executed the same day. Evidence was found and the Applicant was charged.

[6] The Applicant elected trial by judge alone. The Applicant (represented at the time by counsel T.J. McKeough) brought a *Garofoli* challenge to the search warrants. His argument focused on the initial October 8, 2020, *Criminal Code* warrant, particularly in relation to whether the confidential source information presented by the affiant was now discredited, and that on review the issuing judge could not have granted the *Criminal Code* warrant. This Court heard the *Garofoli* application on April 12, 2021, and on April 14, 2021, dismissed it with reasons: *R. v. Chaisson*, 2021 NSSC 123.

[7] Following the decision on the *Garofoli* application, the Applicant (represented by counsel T.J. McKeough) made an application to stay the proceedings against him under s. 24(1) of the *Charter*, arguing that the conduct of the police in applying for

the October 8, 2020, *Criminal Code* warrant amounted to an abuse of process. This Court heard this application on June 3, 2021, and on June 9, 2021, dismissed it with reasons: *R. v. Chaisson*, 2021 NSSC 197.

[8] On March 21 and 28, 2022, this Court heard the trial on its merits. The Applicant was then represented by Jonathan Hughes, his present counsel. On May 13, 2022, this Court found the Applicant guilty of the charge of possession of cocaine for the purpose of trafficking, and two of the four counts of fail to comply with recognizance. Sentencing was adjourned.

[9] On September 6, 2022, the Applicant filed a Notice of Appeal (originally dated June 10 2022) to the Nova Scotia Court of Appeal against his convictions, as a prisoner appeal (CAC No. 517616). The grounds of appeal are stated as:

1. Ineffective assistance of counsel Mr. McKeough for failing to put the February ITO to the officer in the *Charter* application.
2. I erred in his assessment of credibility for the officers by considering improper makeweights for positive credibility.
3. I erred in the abuse of process application by finding that informants who gave incorrect information were still reliable.

4. I erred by finding that the police wilfully or negligently failed to provide information to each other about the February search and the incorrect information from the informants.

5. I failed to provide sufficient reasons for his finding of guilty.

[10] In his Notice of Appeal, the Applicant asks the Court of Appeal for an Order "Quashing the convictions and ordering an acquittal or in the alternative ordering a new trial."

[11] On October 27, 2022, the Applicant filed a written submission seeking an order from this Court directing the Crown to provide additional disclosure, and for the Court to reconsider the *Garofoli* and *Charter* s. 7 abuse of process pre-trial motions based on new evidence.

Issues

1. Should this Court order the Crown to provide disclosure as requested?

2. Should this Court re-open the conviction in order to permit the Applicant to re-argue the *Garafoli* and abuse of process pre-trial motions?

Analysis

Disclosure

At the hearing it appeared that the Crown has made some production of the documentation requested by Mr. Chaisson. Mr. Chaisson advised the Court that he felt that he had sufficient information to proceed with the application to reconsider the pre-trial applications.

Re-opening

[12] Both parties agree that this Court is not *functus officio* because sentencing is still pending.

[13] The parties agree on the legal principles on this application.

The Law

[14] A decision to re-open is discretionary but should only be taken in exceptional circumstances where the interests of justice require it. The approach to be taken was canvassed by the Nova Scotia Court of Appeal in *R. v. MacGregor,* 1997 NSCA 88. Justice Roscoe, for the Court, stated at p. 4:

> On the second issue, the appellant submits that the trial judge did not act judicially in refusing to reopen the trial so that the appellant and two others could

testify in order to establish an alibi. Although he did have the jurisdiction to do so, it is to be exercised only in exceptional cases. (See **R. v. Lessard** (1976), 30 C.C.C.(2d) 70 (Ont. C.A.) and **R. v. Sarson** (1992), 115 N.S.R. (2d) 445). We agree with the submissions of the respondent that the test adopted by the Ontario Court of Appeal in **R. v. Kowall** (1996), 108 C.C.C. (3d) 481 (leave to appeal to S.C.C. dismissed (without reasons) January 30, 1997, S.C.C. Bulletin, 1997 p. 152) is applicable to this case. At pp 493-494, the Court stated:

> The test for reopening the defence case when the application is made prior to conviction has been laid down by this court in *R. v. Hayward* (1993), 86 C.C.C. (3d) 193 (Ont. C.A.). However, once the trial judge has convicted the accused a more rigorous test is required to protect the integrity of the process, including the enhanced interest in finality. It seems to have been common ground in this case that the most appropriate test for determining whether or not to permit the fresh evidence to be admitted is the test for the admissibility of fresh evidence on appeal laid down in *Palmer and Palmer v. The Queen* (1979), 50 C.C.C. (2d) 193 (S.C.C.) at page 205 (see *R. v. Mysko* (1980), 2 Sask. R. 342 (C.A.)). That test is as follows:
>
> (1) the evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases...;
>
> (2) the evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial;
>
> (3) the evidence must be credible in the sense that it is reasonably capable of belief, and
>
> (4) it must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.
>
> These criteria provide helpful guidance to a trial judge faced with an application to reopen after conviction. In addition to the *Palmer* criteria, a trial judge must consider whether the application to reopen is in reality an attempt to reverse a tactical decision made at trial. Counsel must make tactical decisions in every case. Assuming those decisions are within the boundaries of competence, an accused must ordinarily live with the consequences of those decisions. Should the trial judge find that the test for reopening has been met, then the judge must consider whether to carry on with the trial or declare a mistrial.
>
> (emphasis added)

> The trial judge reviewed the long history of the matter and noted that since the evidence sought to be admitted upon a reopening had been available throughout and was within the knowledge of the defendant, there were no exceptional circumstances. In our view the trial judge did not err in arriving at that conclusion. An application of the **Kowall** test to the facts of this case would also result in the dismissal of the application to reopen.

[15] In *MacQueen v. Canada (Attorney General)*, 2014 NSCA 73, the Nova Scotia Court of Appeal said, at para. 28:

> [28] Having reviewed the jurisprudence of this Court on inherent jurisdiction, it is my view that, whatever inherent jurisdiction this Court may possess to re-open a decision after its order issued, it will exercise it only in "extraordinary, compelling and exceptional circumstances" "where justice manifestly so requires".
>
> [emphasis added]

[16] The Crown also referred me to the decisions in *R. v. G.S.*, 2022 NSSC 173 (motion to reopen, mistrial ordered); *R. v. Al-Rawi*, 2020 NSSC 385 (motion to re-open dismissed); and *R. v. Callender*, 2012 NSSC 176 (motion to re-open allowed, mistrial ordered).

[17] As the Crown acknowledged, these decisions arise from circumstances where the defence sought to re-open the trial verdict on the merits of guilt or innocence by pointing to fresh evidence. In the present case, Mr. Chaisson asks this Court to reconsider the pre-trial rulings on the *Garofoli* and abuse of process motions. In my view there is no difference in principle as to why the same considerations would not apply.

[18] Mr. Chaisson says that if, after considering the new evidence, the original application decisions remain the same, then the conviction would not be disturbed. If the *Garofoli* application is allowed on reconsideration, the evidence seized would not be admitted. The conviction would have to be vacated and the verdict reconsidered on the balance of the evidence before the Court. If the Section 7 application is allowed on reconsideration, a stay would be entered, and the verdict would be vacated.

[19] The Crown has referred me to a paper presented by David Schermbrucker at the Federation of Law Societies' 2022 National Criminal Law Program in Victoria, BC, titled "*Bringing and Responding to a Charter Application: Complex Issues*". On the subject of reconsideration of a decision on a *Charter* application, the author stated:

> When a judge has ruled on the merits of a *Charter* motion it is generally considered to be a final ruling, subject only to a possible appeal against the eventual verdict. However the judge retains authority to reconsider their decision on a *Charter* motion until the verdict (in trial by jury) or sentence (in trial by judge alone). *Functus officio* aside, the policy concerns for clarity and finality weigh against reopening; concerns about the interests of justice weigh in favour.
>
> • There is a strong presumption against reconsidering or reopening a *Charter* motion, and it should only be done where truly necessary in the interests of justice.[67]
>
> • The most common circumstance to justify reconsideration is where the original facts or circumstances have materially changed in the interim, so that the previous ruling is now clearly unsound.[68] If the parties agree—or the judge concludes—that the ruling was wrong in law, the judge may reconsider it.[69]

> • Another circumstance is where counsel had made an honest and reasonable mistake as to the evidence, or was misled in their conduct of the original *voir dire*.[70]
>
> • Reconsideration must not work a substantive unfairness. If one of the parties has relied on the original ruling to inform their litigation strategy, this militates against reconsideration.[71]
>
> • These principles apply equally to the defence and Crown parties.

[67] *R v Orr*, 2021 BCCA 42, at para 47, citing *R v R.V.*, 2018 ONCA 547, at paras 98-103.

[68] *R v R.V.*, 2018 ONCA 547, at para 102 (revd. on other grounds, 2019 SCC 41); *R v Adams*, [1995] 4 SCR 707, at paras 29-30; *R v Le* (T.D.), 2011 MBCA 83, at para 123; *R v Tse*, 2008 BCSC 867, at para 25.

[69] *R v Cumor*, 2019 ONCA 747, at para 70; *R v R.V.*, 2018 ONCA 547, at para 103 (revd. on other grounds, 2019 SCC 41).

[70] *R v I.C.*, 20l0 ONSC 32, at paras 151 to 163.

[71] *R v R.V.*, 2018 ONCA 547, at para 101 (revd. on other grounds, 2019 SCC 41).

The Evidence

[20] Mr. Chaisson filed two exhibits in support of his application. The first was a copy of the transcript of the evidence given by Cst. John Donaldson of the RCMP at the *Garofoli* application. The second is a copy of a document titled "Gabriel Chaisson Chart of Material Read and Relied On by Affiants for 4 ITOs", and provided to Mr. Chaisson as part of the after-trial disclosure requested. Both exhibits were admitted with the consent of the Crown.

Mr. Chaisson's Argument

[21] Mr. Chaisson refers to the transcript of John Donaldson's testimony at the pre-trial application, and in particular to the following exchange:

> Mr. McKeough: How many sources of information did you have about Mr. Chaisson when you applied for the firearm's warrant?
>
> A: The firearms warrant was three sources of information
>
> Q: Okay. Now you had previously applied for a warrant with two of these sources, correct?
>
> A: Not myself, no.
>
> Q: But someone had applied for a warrant for them?
>
> A: Not that I know of, I didn't read their ITO, their information to obtain, I read a Prose (ph) file.
>
> Q: So you didn't know anything about source A and B being used for a previous ITO?
>
> A: No.

[22] Mr. Chaisson refers to the second exhibit, and in particular to the information on page 4 of the exhibit speaks to the information read by Cst. Donaldson related to the ITO #3 - October 8, 2020. The document contains the following information in chart form that I have reproduced verbatim. "CI" refers to Confidential Informant. "CIDR" refers to Confidential Informant Debriefing Report):

CI	**Date**	**Para in ITO**	**CIDR/notes/emails, etc. exist for this info? Who authored?**	**Did Donaldson read and rely on these notes/ CIDRs/etc during the drafting of the ITO?**	**Crown Position on Disclosure**
A	November 28, 2019	**11**	**CIDR** – No CIDR exists	**CIDR** – n/a **Notes** – Yes, relied on	Crown will disclose vetted Notes

			Notes – Yes, authorized by Cst. Donaldson **Other** – nothing written	**Other** – had conversation with CI, relied on	
B	January 21, 2020	**12**	**CIDR** – Yes **Notes** – Yes, authorized by Cpl. Jessome **Other** – n/a	**CIDR** – Yes, read and relied upon **Notes** – Not read or relied upon **Other** – n/a	Vetted CIDR and vetted Notes disclosed above for ITO#1
B	February 27, 2020	**13**	**CIDR** – Yes **Notes** – Yes, authorized by Cpl. Jessome **Other** – n/a	**CIDR** – Yes, read and relied upon **Notes** – Not read or relied upon **Other** – n/a	Vetted CIDR and vetted Notes disclosed above for ITO#1
C	October 6, 2020	**15**	**CIDR** – Yes **Notes** – Yes, authorized by Cst. Arsenault **Other** – n/a	**CIDR** – Yes, Donaldson's CI **Notes** – Yes, relied on **Other** – had conversation with CI, relied on	Crown will disclose vetted CIDR and vetted Notes

[23] It is on the information in the fifth column, titled "Did Donaldson read and rely on these notes/ CIDRs/etc. during the drafting of the ITO?", that Mr. Chaisson focuses his argument. He says that the information in this column suggests that Cst. Donaldson was either negligent, wilfully blind, or deliberately misleading when he gave his testimony quoted above. He argues that this information provides an evidentiary basis from which a strong inference should be drawn that Cst. Donaldson did know about the use of sources A and B for a prior ITO.

[24] With due respect, I cannot agree. There is nothing on the face of Exhibit 2 that speaks to knowledge of the previous ITO. There is no basis to infer from the information that Cst. Donaldson did read the previous ITO. To conclude from this evidence that Cst. Donaldson was negligent, wilfully blind, or deliberately misleading would be both unreasonable and unfair.

[25] The law is clear that the burden is on Mr. Chaisson to establish that the original facts or circumstances have materially changed such that the original decision is clearly unsound. I cannot find here circumstances that are extraordinary, compelling, and exceptional and where justice manifestly so requires that I reconsider the pre-trial applications.

[26] The Crown asserts that in addition, Mr. Chaisson has exercised his legal right pursuant to s. 675(1)(a) to appeal from his convictions by this Court to the Nova Scotia Court of Appeal. Therefore, the Court of Appeal now has carriage of the legality of the convictions and the correctness of this Court's rulings on the *Garofoli* and abuse of process motions. It is clear from the Notice of Appeal that Mr. Chaisson is asking the Court of Appeal to review various aspects of those rulings. In addition, Mr. Chaisson is arguing that he had ineffective assistance of counsel at the time of those pre-trial applications.

[27] In my view, all that has occurred at this stage is that Mr. Chaisson has filed a Notice of Appeal. The Court of Appeal has not substantively engaged in the matter yet. This is not a basis to refuse to reconsider the pre-trial applications.

[28] The Application is dismissed.

Norton, J.

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ERRATUM

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Counsel:	Wayne J. MacMillan, for the Crown Jonathan Hughes, for the Accused
Erratum Date:	January 18, 2023

Para. 16 - reference to *R. v. G.S.*, 2022 NSSC 173 (motion to reopen dismissed) should be *R. v. G.S.*, 2022 NSSC 173 (motion to reopen, mistrial ordered)