NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Liberatore*, 2010 NSCA 26

Date: 20100401
Docket: C.A.C. 316092
Registry: Halifax

Between:

Michael Vincent Liberatore

Appellant

v.

Her Majesty the Queen

Respondent

Judges: The Honourable Chief Justice Michael MacDonald, in Chambers

Motion Heard: March 18, 2010, in Halifax, Nova Scotia

Held: Motion granted.

Counsel: J. Patrick L. Atherton, for the appellant
Shaun O'Leary, for the respondent

Decision:

[1] The appellant, serving two years for possessing and trafficking cocaine, had his appeal dismissed summarily because his lawyer failed to file his factum on time. He now asks me, as Chief Justice, to grant leave to have this dismissal order reviewed by a panel of this court. For the reasons which follow, I am reluctantly prepared to grant this exceptional relief.

BACKGROUND

[2] The appellant received his two-year sentence on August 25, 2009. He appealed his conviction to this court three days later on August 28. Then on September 2, the appellant filed a motion (returnable September 10) to secure a date for the appeal and for his interim release.

[3] On September 10, Justice Roscoe, formerly of this court, set the appeal down for January 19, 2010. At the same time, she directed the appellant to file his factum by October 26. Then, with the Crown's consent, she released the appellant pending appeal upon conditions including his duty to surrender should the appeal be dismissed.

[4] October 26 came and went with no factum from the appellant. Then on December 22, in telephone chambers, Bateman J.A. of this court heard the appellant's request to have the appeal adjourned so as to afford the appellant's counsel, Mr. Patrick Atherton, more time to file his factum. This relief was granted. The appeal was adjourned to March 31, 2010 and the appellant was granted an extension to January 22 to file his factum. During this session, and in subsequent correspondence, Mr. Atherton was warned that if the factum was not filed by then, "the appeal would be dismissed without further notice to you".

[5] The March 31 appeal date was later changed to May 13, 2010, but the appellant's January 22 filing deadline remained intact.

[6] January 22 came and went with no factum from the appellant. As a result, on February 9, Bateman J.A. dismissed the appeal. This triggered the appellant's obligation to surrender into custody.

[7] This, in turn, prompted the appellant's instant request to have the dismissal reviewed by a panel of this court, which, as noted, initially requires leave from me as Chief Justice. In support of his leave motion, Mr. Atherton simply falls on his proverbial sword stating that the failure to file the factum was totally his fault and because of that, his client should not lose his right to what he asserts is a meritable appeal. In explaining his failure, Mr. Atherton offers this in his supporting affidavit:

> 4. While I have no excuse, I simply got overwhelmed by the pressure of my other commitments and my family responsibilities and thus failed to file this factum.

[8] For its part, the Crown takes no position on this motion.

[9] Upon reviewing the material filed on the leave motion, I opted to hear further submissions from counsel. This hearing was completed on March 18, at which time I reserved judgment.

ANALYSIS

[10] *Civil Procedure Rule 90.38* sets out the procedure for having this dismissal order reviewed:

> 90.38 (1) In this Rule 90.38,
>
> (a) a reference to the "Chief Justice" includes a judge designated by the Chief Justice for the purpose of this Rule;
>
> (b) "party" includes an intervenor under Rule 90.19.
>
> (2) An order of a judge of the Court of Appeal in chambers is a final order of the Court of Appeal, subject only to review under this Rule 90.38.
>
> *(3) An order of a judge in chambers that disposes of an appeal may be reviewed by a panel of the Court of Appeal, with leave of the Chief Justice.*
>
> (4) A party who requests leave to review an order of a judge must file a notice of motion for leave to review with the Chief Justice and deliver the notice to the other parties to the appeal, no more than seven days after the date of the order to be reviewed.

> (5) A party who opposes a motion for leave to review must file with the Chief Justice, and deliver to the other parties, a reply no more than seven days after the date of the filing of the motion for leave to review.
>
> *(6) The Chief Justice may do any of the following on a motion for leave to review:*
>
> > (a) dismiss the motion for leave to review;
> >
> > (b) set the motion down for hearing;
> >
> > *(c) grant leave to review the order of the judge in chambers if the Chief Justice is satisfied that the judge acted without authority under the rules, or the order is inconsistent with an earlier decision of a judge in chambers or the Court of Appeal, or that a hearing by a panel is necessary to prevent an injustice.*
>
> (7) The Chief Justice need not give reasons for the determination of a motion under this Rule.
>
> (8) If leave is granted, the Chief Justice must set a time and date for the hearing of the review before a panel of the Court of Appeal and give directions for the filing of factums and other material.
>
> (9) A judge may not sit as a member of the panel of the Court of Appeal hearing an appeal from the judge's order.
>
> (10) An order granting leave to appeal under this Rule 90.38 is a final order of the Court of Appeal and is not subject to further review.
>
> [Emphasis added.]

[11] Considering *s-s. 90.38(6)(c)*, it is clear in this case that the only motivation for granting leave would be to prevent an injustice. I say this because Bateman J.A. certainly acted with authority under the Rules. Specifically a judge of this court may dismiss an appeal if, *for any reason*, our provisions for perfecting an appeal are not complied with:

> 90.40(2) A judge of the Court of Appeal may dismiss an appeal if the appeal is not conducted in compliance with this Rule 90 ...

[12] In fact it was reasonable for Bateman, J.A. to dismiss the appeal in these circumstances. The hearing had to be adjourned on at least two occasions and the appellant missed two filing deadlines. Nor was this order "inconsistent with an earlier decision of a judge in chambers or the Court of Appeal", as also contemplated under *90.38(6)(c)*.

[13] Therefore, in what circumstances would leave be necessary to prevent an injustice? In **Marshall v. Truro (Town)**, 2009 NSCA 89, I said that it would take a highly compelling case:

> ¶ 10 It occurs to me that to warrant a review by a panel of this court, an aggrieved party must present a highly compelling case. In other words ,the potential for injustice must be clear and significant. Furthermore, one must presume that any potential injustice would have been obvious to the judge who granted the order under review. Therefore, I would expect to grant such relief only in very exceptional circumstances. Otherwise, this provision might be simply viewed as an opportunity for a rehearing; a consequence that would be clearly unintended and unnecessary. In fact, it would be ill advised to allow such a provision to serve as an opportunity for a rehearing. Indeed, courts in similar contexts have discouraged such approaches.

[14] That said, the facts in this case are unique and it is one of those exceptional cases prompting me to grant leave. I have reached this conclusion primarily for following two reasons.

[15] Firstly, the order under review was issued directly as a result of Mr. Atherton not filing his client's factum on time (albeit after being made fully aware that his failure to do so would result in a dismissal). In other words, the order was justifiably issued without further submissions from the appellant. In these circumstances, the Chambers judge may not have been fully aware that this breach had absolutely nothing to do with the appellant who had every reason to assume that his lawyer would handle this. Thus, unlike **Marshall**, *supra*, here the Chambers judge may not have fully appreciated the potential for injustice to the appellant.

[16] Secondly, this appeal does not appear to be frivolous. Specifically, the appellant testified in his own defence and denied any illegal activity. In this context, he challenges the trial judge's handling of the Crown's burden to establish proof beyond a reasonable doubt. Specifically, he relies on the Supreme

Court of Canada decision in **R. v. W.(D.) [D.W.]**, [1991] S.C.J. No. 26, which offers guidance to trial judges in such circumstances.

[17] Of course, it is not for me, at this stage, to decide the merits of the appeal. That would be for a panel of this court should the appeal ultimately proceed. I simply state that the appeal does not appear to be frivolous. Furthermore, I am buoyed in this conclusion by the fact that the Crown does not oppose the appellant's motion.

[18] Thus, I am left with a dilemma. On these facts, it was perfectly reasonable for the Chambers judge to dismiss this appeal without further notice to the appellant. However, it is now clear that the appellant would be denied his right of appeal through no fault of his own and in circumstances where the appeal may have merit. This raises sufficient apprehension for me to grant leave to avoid a potential injustice. Of course, as *Rule 90.38* prescribes, it will be ultimately up to a panel of this court to decide if the appeal should proceed. I am, at this stage, simply satisfied that this is one of those exceptional cases where leave should be granted.

[19] Having reached this conclusion, there must still be consequences for Mr. Atherton's inaction which has caused unnecessary delay and significant disruption. Thus I direct him to personally pay $500.00 costs forthwith to the Crown. I make this order pursuant to *Rule 77.12* (which applies to this matter by virtue of *Rules 90.02 and 91.02)*:

> 77.12 (1) A judge may award, assess, and provide for payment of costs for any act or omission of a person in relation to a proceeding or an order.
>
> (2) A judge who determines that expenses are caused by the improper or negligent conduct of counsel may order any of the following:
>
> (a) counsel not recover fees from the client;
>
> (b) counsel reimburse the client for costs the client is ordered to pay to another party as a result of counsel's conduct;
>
> *(c) counsel personally pay costs.*
>
> [Emphasis added.]

[20] I realize that ordering costs against counsel personally is an extraordinary remedy, particularly in the criminal law context. However, the facts of this case are extraordinary and such relief is not unprecedented. For example, see **R. v. Smith** [1999] M.J. No. 15, affirmed by the Man. C.A. in [2000] M. J. No. 75 . See also **R. v. Chapman** (2006), 204 C.C.C. (3d) 457 (O.C.A.).

[21] I therefore grant leave to have this dismissal order reviewed by a panel of this court. Pursuant to *Rule 90.38(8)*, I must set a time and date for this review hearing as well as any other appropriate directions. To this end, the review shall take place on Friday, April 9, 2010, at 10:00 am. Assuming the parties have nothing further to file in relation to this motion, the panel will hear oral submissions at that time. That said, the panel designated to conduct this review may, in its discretion, alter any of these directions.

MacDonald, C.J.N.S.