NOVA SCOTIA COURT OF APPEAL

Citation: *R. v. McPherson*, 2018 NSCA 87

Date: 20181113
Docket: CAC 441393
Registry: Halifax

Between:

Drew William McPherson

Appellant

v.

Her Majesty the Queen

Respondent

Judge:	Beveridge, J.A.
Motion Heard:	November 1, 2018, in Halifax, Nova Scotia in Chambers
Held:	Motion dismissed
Counsel:	Drew McPherson, appellant in person Mark Scott, Q.C., for the respondent

Decision:

[1] On November 1, 2018 I heard, as case management judge, Mr. McPherson's motion to adjourn the hearing of his appeal, presently scheduled for a full day on Thursday, March 14, 2019.

[2] The essence of the appellant's request is he says that he needs to prepare "683 & 684 applications" and needs the mental capacity to do so. The Crown opposed the request. I reserved, with reasons to follow.

[3] The motion is dismissed. I will set out some background details, the principles that should guide the discretion to adjourn, and how they applied here.

BACKGROUND

[4] The appellant was convicted at the conclusion of a trial by judge and jury, on June 16, 2015, of various driving offences, all arising out of a collision that happened on September 30, 2011. The most serious offences were criminal negligence causing death and bodily harm. Sentence was 10 years' incarceration less remand credit.

[5] Mr. McPherson filed an appeal on July 15, 2015. It contains 50 grounds of appeal. The appellant has appeared in many telephone chambers to deal with his stated intention to obtain counsel, either from Nova Scotia Legal Aid or by the Court appointing counsel for him under s. 684 of the *Criminal Code*. He has not applied for bail pending appeal.

[6] The appellant has filed numerous letters with the Court, claiming bitterly that he has been wrongfully convicted. He has accused NSLA, numerous Crown attorneys, judges and the police of trying to sabotage his appeal from being heard.

[7] NSLA rejected the appellant's request for counsel on appeal from conviction, but offered counsel on the narrow issue of remand credit on his sentence. The appellant rejected the NSLA offer.

[8] The necessary materials for the appellant to bring a s. 684 application were sent to him. Rather than proceed with the application, the appellant requested and was granted an adjournment from March 9, 2016 to March 8, 2017 to permit him to file his s. 684 application.

[9] The appellant voiced his preference for the appeal not be set down for hearing in light of his stated desire to pursue a s. 684 application.

[10] On September 27, 2017, the appellant advised the Chambers judge that he had filed a s. 684 application on another appeal and wanted to include this appeal. The appellant was advised he needed to make a separate application for this file. At the appellant's suggestion that he would need a year to bring the application, this case was again adjourned, this time to October 2018.

[11] In June 2018, the appellant filed a motion that requested the production of a "proper transcript" and for inclusion of an unspecified medical report in the appeal book. His documents also referenced s. 684, but in relation to another criminal appeal. In any event, on July 3, 2018, I set September 6, 2018 to hear the appellant's motions. I encouraged him to bring a s. 684 application if he wanted state funded counsel on this appeal.

[12] On September 6, 2018, I dismissed his motion that complained about the trial transcript and content of the appeal book. Absent a s. 684 application, I set this appeal down for hearing on March 14, 2019, with filing dates for facta.

[13] I chose that date to give Mr. McPherson ample time to prepare his factum, should he choose to file one, or bring whatever motions he may elect to bring in advance of the hearing, including an application for state funded counsel under s. 684 of the *Criminal Code*.

[14] Rather than bring a s. 684 application, he moved for an adjournment of the appeal hearing in order that he bring a s. 684 application and an unspecified s. 683 application. No affidavit accompanied his Notice of Motion. Nonetheless, I heard his motion.

PRINCIPLES

[15] Both a single judge of the Court of Appeal, and the Court itself have broad discretions to manage and provide directions on any outstanding appeal. This includes the scheduling and adjournment of an appeal hearing. How should such discretion be exercised?

[16] A trial judge's exercise of jurisdiction to refuse or grant an adjournment of a criminal trial has been frequently litigated, but not an adjournment of an appeal.

Nonetheless, the approach on appeal should mirror the exercise of discretion at trial.

[17] In *R. v. Beals*, 1993 NSCA 215, Hallett J.A., for the Court, observed that while the power to grant or refuse an adjournment is discretionary, "[i]t is, of course, a discretion which must be exercised judicially, that is, for proper and sound reasons" (para. 14). Justice Hallett quoted with approval prior authorities that explain:

> 17 In *R. v. Casey* (1988), 80 N.S.R. (2d) 247 at paragraph 8 Macdonald J.A. referred to a statement of Lord Halsbury to explain what is meant by the judicial exercise of a discretionary power:
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> > In *Sharp v. Wakefield et al.*, [1891] A.C. 173, Lord Halsbury expressed what is meant by the judicial exercise of discretionary power in the following terms (p. 191):
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> > > An extensive power is confided to the justices in their capacity as justices to be exercised judicially; and "discretion" means when it is said that something is to be done within the discretion of the authorities that that something is to be done according to the rules of reason and justice, not according to private opinion: Rooke's Case (1); according to law, and not humour. It is to be, not arbitrary, vague, and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man competent to the discharge of his office ought to confine himself.
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> 18 Various factors impact on whether an adjournment should be granted. In *R. v. B.(J.E.)* (1990), 52 C.C.C. (3d) 224 this court recognized that the public interest in the orderly and expeditious administration of justice is a factor that may be considered by a trial judge when determining whether an adjournment should be granted (see p. 229).

[18] What rules of reason and justice are in play? First and foremost, on appeal, the appellant and respondent must have a fair hearing to adjudicate his or her claim that the conviction or sentence is flawed and appellate intervention is warranted. Secondly, the hearing should proceed as expeditiously as possible. This is particularly so where the appellant is serving a sentence for the case under appeal. Any unnecessary delay could result in injustice.

[19] Delays should therefore be avoided or at least minimized. This has long been recognized, but can be missed for any number of reasons. When it is overlooked, the administration of justice suffers. *The Lamer Commission of Inquiry into the Proceedings Pertaining to: Ronald Dalton, Gregory Parsons, and*

Randy Druken, by the Right Honourable Antonio Lamer (2006) concluded that each actor in the justice system has a responsibility not only for their own specific tasks but also for the results ultimately reached by the system (pp.67-8). The Commissioner referred to the Canadian Judicial Council's recommendations released to the Canadian Bar Association in Halifax in 1992: "In general terms, each Court should accept more responsibility than it now does for supervising and controlling appeals from their commencement through to final disposition"(p.62). *R. v. Dalton* (1998), 163 Nfld. & P.E.I.R. 254 (C.A.) is a reminder of the injustice that may occur if courts of appeal do not accept increased responsibility for hearing appeals in a timely fashion.

[20] In Nova Scotia, a Bench/Bar committee studied if the processes for handling complex criminal appeals might be improved. Its report of October 2008 noted the Court's informal practice of having a judge assigned to case manage the progress of appeals. The Committee proposed a formal case management rule. The rule was adopted, with some modifications, into the new *Civil Procedure Rules*. For criminal appeals, it is *Rule* 91.21:

> **Management of appeal**
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> 91.21
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> (1) The Chief Justice may appoint a judge of the Court of Appeal, or a panel of judges of the Court of Appeal, to assist in the management of an appeal.
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> (2) A party may request the appointment of an appeal management judge, or panel of judges, by filing a request with the registrar.
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> (3) An appeal management judge, or panel of judges, may give directions that are consistent with this Rule 91 and determine motions.
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> (4) Directions may be given and motions may be heard in conference, by correspondence, in chambers, by teleconference, or otherwise, as the appeal management judge, or panel of judges, decides.
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> (5) The following are examples of subjects that may be dealt with in judicial management of an appeal:
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> > (a) setting tasks and deadlines to complete all steps to the hearing of the appeal;
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> > (b) settling the order of argument;
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> > (c) limiting the time allocated to each party for argument;
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> > (d) settling the issues to be argued and determined;
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> > (e) scheduling motions before the hearing of the appeal.

> (6) Directions may be varied on motion.
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> (7) An appeal management judge may direct that the conference be recorded by the Court of Appeal.
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> (8) An appeal management judge or a panel may make an order after a conference that does any of the following:
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> > (a) records the subjects discussed, and agreements made, at the conference;
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> > (b) records directions given at the conference, or gives further directions;
> >
> > (c) gives effect to a ruling on an issue relating to the appeal book or a factum, or procedure for an upcoming hearing submitted to the judge at the conference with the consent of the parties.
>
> (9) An appeal management judge who determines relief must do so by order if a party seeks relief from compliance with these Rules, and an order is required.

[21] In May 2018, for purposes of continuity, I was appointed the case management judge for all of Mr. McPherson's outstanding appeals by MacDonald, C.J.N.S.

[22] The Court or any judge thereof is not "entering the fray" by virtue of involvement in case management of an appeal. Case management is not adversarial. I have no interest in the outcome of this or any of Mr. McPherson's appeals. My job is to assist the parties to minimize cost and delay in having the appeal heard.

[23] An example of this is found in *R. v. Silbernagel*, 1999 BCCA 521. Judges frequently must hear Registrar motions where a party fails to meet the time limits set by the rules or by judicial direction. In *Silbernagel*, the Registrar of the Court brought a motion to dismiss an appeal for the appellant's non-compliance with the time lines to prepare and file an appeal book. Mr. Silbernagel argued the motion should be dismissed because the Registrar's motion showed that the Court had become his adversary. Justice Newbury rejected the objection:

> [5] I explained to Mr. Silbernagel that the Court has not become his "adversary", nor would any right-thinking and reasonable member of society think it appeared so. Indeed, a right-thinking member of society would in my view understand that the Court must control its process and cannot leave it to appellants to pursue or not pursue their appeals in their own time as they see fit. **The Court of Appeal does not have an interest in seeing the appellant convicted or in seeing the appellant acquitted, but does have the responsibility of seeing that appeals are heard and decided on a timely basis. To quote another famous dictum,**

> **"Justice delayed is justice denied"**. The purpose of R. 13(3) is to permit the Court to control its process to this end, and Mr. Silbernagel's fears about the Court's becoming his "adversary" are without foundation.
>
> [Emphasis added]

[24] The principles that guide are the need to provide a fair hearing for the parties and to do so expeditiously. I turn to their application.

APPLICATION

[25] As of May 2018, Mr. McPherson had five outstanding appeals in this Court. As noted above, I was appointed by the Chief Justice to case manage all appeals.

[26] Three of Mr. McPherson's appeals were from conviction and/or sentence. All were ready to be set down, but were not due to Mr. McPherson's stated desire to obtain NSLA or state funded counsel under s. 684.

[27] In CAC 463009, the appellant had multiple adjournments of the setting down date in order for him to bring a s. 684 application. No application was made. I set that appeal down to be heard on October 4, 2018. At the time I did so, Mr. McPherson angrily claimed that in setting down the appeal I was trying to murder him. He would be killed if the appeal was heard.

[28] The appeal went ahead as scheduled on October 4, 2018. The appellant sought an adjournment and made an application to the panel for state funded counsel under s. 684 of the *Criminal Code*. The applications were dismissed. The Court released its decision dismissing his appeal on October 18, 2018 (2018 NSCA 82).

[29] The present appeal (CAC 441393) has been outstanding since July 2015. The appeal books were filed on January 26, 2016. Hence, the Court has been ready to set an appeal date since then. The appeal was not been set down because the appellant repeatedly requested a delay so he could obtain counsel.

[30] As of March 9, 2016, his only option to obtain counsel was to pursue a s. 684 application. He did not do so. Instead, he has requested lengthy adjournments in order to file a s. 684 application. Still, no application has been made.

[31] In his Notice of Motion for adjournment of the hearing, he suggests he needs to wait until he has served his sentence before the appeal is heard. The appellant claims that although he has a very effective brain and has a very high IQ, he is

experiencing psychological problems—as he put it, going through the materials causes him a lot of psychological duress. He claims that he has an imminent medical appointment that might help.

[32] Mr. McPherson presented essentially the same position to me on September 6, 2018—that he requires different treatment in order to present his appeal. And, if this appeal is heard, he will be murdered. As I explained to Mr. McPherson then, I have no medical information that indicates he is unable to present his arguments, either for state funded counsel or on his appeal proper.

[33] I do not doubt that the appellant has experienced, and may well continue to live with, mental illness. As noted by Bryson J. in *R. v. McPherson*, 2018 NSCA 82, Mr. McPherson has had a number of psychiatric assessments. I will refer to some of those assessments, and to the trial proceedings that demonstrate the appellant's ability to present complicated legal arguments without impairment.

[34] Dr. Grainne Neilson of the East Cost Forensic Hospital opined in her report of August 16, 2013 that the appellant was unfit to stand trial due to psychosis, but his condition at the time of the offences did not bring him within the requirements of s. 16 of the *Criminal Code* so as to make him not criminally responsible due to mental disorder.

[35] On January 15, 2014, His Honour Judge Michael Sherar found the appellant unfit to stand trial, and remanded him to the East Coast Forensic Hospital for the Review Board to determine when he might be fit.

[36] Dr. Scott Theriault prepared a report, dated January 24, 2014, in which he concluded that the appellant was not currently suffering from a psychotic disorder but "is likely experiencing an autism spectrum disorder (Asperger's) with concurrent features of narcissistic, paranoid and schizotypal personality traits. Mr. MacPherson [*sic*] is fit to stand trial."

[37] Judge Sherar subsequently found the appellant fit to stand trial on May 21, 2014. Shortly thereafter, Mr. McPherson affirmed his election to be tried by judge and jury and waived his preliminary inquiry on the criminal negligence and related charges.

[38] The appellant eventually stood his trial before a judge and jury June 8-16, 2015, with the Honourable Justice Allan Boudreau presiding.

[39] Prior to the trial, Mr. McPherson appeared on numerous occasions to present a host of motions, including applications for *habeas corpus*, a bail review, state funded counsel (*Rowbotham* application) and various types of *Charter* relief for alleged violations of ss. 7, 8, 11(d) and 11(b). All were dismissed.

[40] The trial proceeded with jury selection, including challenges for cause. Mr. McPherson cross-examined the Crown witnesses. He declined to testify, but argued strenuously to the jury that the Crown had not proven the case against him beyond a reasonable doubt.

[41] All of this reveals that the appellant, despite his difficulties, is quite capable of bringing applications and presenting legal argument. As recently observed by Bryson J.A. in *R. v. McPherson*, *supra*:

> [20] According to Dr. Theriault, Mr. McPherson has an IQ of 135. He graduated from university with a Bachelor of Mathematics with distinction in computer science and electrical engineering. While clearly experiencing some disabilities, Mr. McPherson presented as a highly intelligent, highly articulate individual with a broad vocabulary and the capacity—when he wants to—of addressing issues put to him by the Court. . . .

[42] This Court has long recognized not only the Crown's role in ensuring a self-represented litigant receives a fair appellate hearing (*R. v. Morton*, 2010 NSCA 103 at para. 19), but its own role to assist (see for example *R. v. Grenkow* (1994), 127 N.S.R. (2d) 355 at para. 27). Although the Court has no obligation to comb through transcripts searching for error, it would be fair to say that members of this Court have not hesitated to raise issues that may cast doubt on the legal soundness or fairness of trial proceedings (see for example, *R. v. Borden*, 2017 NSCA 45).

[43] In these circumstances, I see no unfairness in maintaining the March 14, 2019 hearing date. Furthermore, I am confident that if I were to grant the appellant's request to adjourn that he would simply bring another adjournment request for the next date. He has said that he does not want the appeal to be heard before he finishes serving his sentence. It would be contrary to the Court's duty to hear his appeal from conviction and sentence in a timely fashion to accede to such a request.

[44] Moreover, when I set the appeal hearing date of March 14, 2019 it was fixed that far in advance to give to the appellant sufficient time to bring any pre-hearing

motions that he may elect to bring, including an application for state funded counsel under s. 684.

[45] I am not satisfied that it would be a proper exercise of my discretion to adjourn the appeal. The motion is dismissed.

Beveridge, J.A.