

**NOVA SCOTIA COURT OF APPEAL**

**Citation:** *R. v. J.T.*, 2022 NSCA 21

**Date:** 20220316

**Docket:** CAC 501694

**Registry:** Halifax

**Between:**

J.T.

Applicant

v.

Her Majesty the Queen

Respondent

**Restriction on Publication: Sections 486.4 and 486.5 of the *Criminal Code***

**Judge:** Derrick, J.A.

**Motion Heard:** March 9, 2022, in Halifax, Nova Scotia in Chambers

**Held:** Motion dismissed; leave to appeal granted.

**Counsel:** Brian Church, Q.C., Eugene Tan, and Heather Mills for the  
applicant  
Mark Scott, Q.C. for the respondent

### **Order restricting publication — sexual offences**

**486.4 (1)** Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

(i) an offence under section 151, 152, 153, 153.1, 155, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or

(ii) any offence under this Act, as it read from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day; or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).

### **Order restricting publication — victims and witnesses**

**486.5 (1)** Unless an order is made under section 486.4, on application of the prosecutor in respect of a victim or a witness, or on application of a victim or a witness, a judge or justice may make an order directing that any information that could identify the victim or witness shall not be published in any document or broadcast or transmitted in any way if the judge or justice is of the opinion that the order is in the interest of the proper administration of justice.

### **Decision:**

#### *Introduction*

[1] J.T. is seeking to amend his Notice of Appeal. The respondent Crown has no objection to one of the two proposed amendments – Ground 1: alleging, and particularizing, ineffective assistance of counsel at trial. The Crown is opposed to

the applicant's Ground 2: ineffective assistance of counsel at the appeal to the Summary Conviction Appeal Court (SCAC).

[2] For the reasons below, I am granting the amendment to the Notice of Appeal to add Ground 1. I dismiss the applicant's motion to amend his Notice of Appeal by adding Ground 2. The following will contextualize my decision.

*Background*

[3] On September 5, 2019, J.T. was convicted in the Provincial Court of Nova Scotia of sexual assault, contrary to s. 271 of the *Criminal Code*. His counsel at trial was Pavel Boubnov. J.T. appealed his conviction to the SCAC, alleging the verdict was unreasonable and not supported by the evidence and the trial judge failed to correctly apply reasonable doubt. Mr. Boubnov represented him at the appeal. The issue of ineffective assistance of trial counsel was not raised before the SCAC judge.

[4] The SCAC judge dismissed the appeal. He noted J.T. had been charged following a complaint that he had sexually touched a co-worker in a staffroom. The complainant and J.T. both testified. The complainant could not remember the date of the incident and was incorrect about the time of day. The two men were not in the staffroom at the time indicated by the complainant making his "best guess". J.T. acknowledged in his testimony that he was present in the staffroom at the same time as the complainant but denied any touching. The date they were together in the staffroom was confirmed by work records as November 21, 2018.

[5] The SCAC judge reviewed the trial judge's decision, including her findings that: the inconsistencies as to time and date were understandable in the circumstances; the complainant's basic allegation was not undermined; and the allegation was corroborated by the work records indicating when the complainant and J.T. had been in the staffroom together. The trial judge accepted the complainant's evidence after assessing all the evidence including J.T.'s denial. The SCAC judge found the credibility findings made by the trial judge were supported by evidence that was reasonably capable of belief. He was satisfied the judge had properly assessed the evidence and correctly applied the reasonable doubt standard.

*The Motion to Amend*

[6] The proposed ground of appeal in dispute, Ground 2, states:

That the applicant received ineffective assistance from their counsel during the summary conviction appeal by:

- a. failing to raise the ineffective assistance of counsel as listed in ground 1;
- b. by raising the issue of alibi on the appeal without it being properly articulated at trial.

[7] The alibi issue referenced in Ground 2 relates to an argument made by Mr. Boubnov on J.T.'s behalf at the SCAC appeal about the complainant's mistaken memory concerning the time when he and the complainant were in the staffroom together.

[8] Mr. Tan explained in his submissions on the motion the rationale for seeking to have the Notice of Appeal include Ground 2. Leave to appeal from the SCAC is granted sparingly. Mr. Tan is concerned that if Ground 2 is not included in the Notice of Appeal, the scope available to be argued in relation to Ground 1 will be circumscribed because the issue of ineffective assistance of counsel was not raised before the SCAC.

[9] I will note here that in oral submissions, Mr. Scott indicated the Crown consents to leave being granted for J.T.'s appeal on Ground 1.

### *The Law*

[10] It is well established that the authority to permit an amendment to a Notice of Appeal is found in *Civil Procedure Rule* 90.39(2). The governing considerations are whether (a) the amendment is reasonably necessary, and (b) the extent to which it will result in prejudice to the respondent (*Lane v. Carsen Group*, 2003 NSCA 42; *R. v. DeYoung*, 2017 NSCA 13). In *R. v. Rouse*, 2020 NSCA 28, Justice Bryson held a proposed amendment that "is not plainly unsustainable or fails to present an arguable issue" should be granted (para. 18).

[11] The circumstances of J.T.'s motion have not previously been before this Court. Mr. Tan and Mr. Scott identified a case with similar facts, *R. v. Hjorleifson*, 2021 MBCA 69, and are in agreement that it should be followed here. In *Hjorleifson* there were two witnesses at trial, the complainant and the accused. Credibility and reasonable doubt were the pivotal issues. The same lawyer represented Mr. Hjorleifson at trial and on appeal to the summary conviction appeal court. It was on appeal to the Manitoba Court of Appeal that the issue of ineffective assistance of counsel at trial was raised for the first time. The Manitoba

Court of Appeal found that the ineffectiveness of trial counsel had not been addressed in the summary conviction court, “for obvious reasons”. Permitting leave to argue ineffective assistance was held to be warranted to avoid “the risk of an injustice” (para. 18).

*Analysis*

[12] I am satisfied J.T.’s Notice of Appeal should be amended to include Ground 1 but not Ground 2. I will explain.

[13] *Hjorleifson* illuminates the path to Ground 1 being an appropriate amendment to the Notice of Appeal. It is an arguable ground that is reasonably necessary to ensure the issue of a potential miscarriage of justice is able to be examined. As in *Hjorleifson*, there are obvious reasons here why ineffectiveness of trial counsel was not raised at the SCAC appeal.

[14] Ground 2 does not clear the “arguable issue” requirement for amendment. It is not plausible that trial counsel could have raised at the SCAC an allegation of his own ineffectiveness at trial. Presumably he could only have done so on instructions from the client who was satisfied to have him as counsel for the SCAC appeal. The Crown described the process as a patent conflict of interest, requiring trial/SCAC counsel to “give advice about their own shortcomings in order to receive instructions on whether to appeal”. Indeed, trial/SCAC counsel may well be of the view there were no shortcomings in his representation at trial.

[15] There is a further problem. An ineffective assistance of trial counsel ground of appeal at the SCAC would have required Mr. Boubnov to both argue the appeal and give evidence as a witness at the appeal. The Nova Scotia Court of Appeal protocol governing appeal proceedings involving an allegation of ineffective assistance of trial counsel does not allow for this, nor is it permissible under the Nova Scotia Barristers’ Society Code of Professional Conduct. The protocol indicates:

If the Appellant is represented by counsel it is expected that they will undertake an assessment of the merits of the allegations against trial counsel prior to raising these issues in the Notice of Appeal. In most cases such assessment will include giving trial counsel notice of the allegations and providing a reasonable opportunity to respond.

The Code of Professional Conduct prohibits a lawyer from appearing both as an advocate and as a witness in a proceeding, “unless the matter is purely formal or uncontroverted”.

[16] J.T.’s trial counsel could not have advanced a claim of his incompetence as a ground of appeal before the SCAC judge. The first branch of the proposed Ground 2 amendment – failure to raise ineffective assistance of trial counsel at the SCAC – is plainly unsustainable and fails to advance an arguable issue.

[17] The same can be said of the second branch of the proposed amendment, which alleges the issue of alibi was incompetently raised at the SCAC appeal “without it being properly articulated at trial”. If ineffective assistance of counsel at trial caused a miscarriage of justice, this can be rooted out on appeal before this Court. Ground 1 covers the issue, alleging as one of five examples of alleged incompetence, a failure by trial counsel to “consider all of the alternative timelines, during which the offence may have occurred”.

[18] The court in *Hjorleifson* found ineffective assistance of trial counsel to be a first-instance issue, as it had not been on the radar before the summary conviction appeal court. I find that reasoning applies here. The fact the issue was not raised in the SCAC appeal is no impediment to it being fully addressed on appeal to this Court in accordance with what has been alleged in Ground 1. As noted earlier, the Crown will concede leave should be granted on Ground 1.

### **Disposition**

[19] J.T.’s Notice of Appeal is amended to include Ground 1. The motion to amend the Notice of Appeal by adding Ground 2 alleging ineffective assistance of counsel at the SCAC is dismissed.

Derrick, J.A.