NOVA SCOTIA COURT OF APPEAL

Citation: *R. v. T.M.*, 2022 NSCA 28

Date: 20220330
Docket: CAC 510661
Registry: Halifax

Between:

T.M.

Applicant

v.

Her Majesty the Queen

Respondent

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

Judge:	Wood, C.J.N.S.
Motion Heard:	Motion by written submission (CPR 90.38)
Held:	Motion for leave dismissed
Counsel:	T.M., the applicant Mark A. 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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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a judge or justice may make an order directing that any information that could identify the victim or witness shall not be published in any document or broadcast or transmitted in any way if the judge or justice is of the opinion that the order is in the interest of the proper administration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:

[1] The applicant T.M. was tried and convicted of sexual assault by Justice Ann E. Smith of the Nova Scotia Supreme Court, and on February 28, 2020 she sentenced him to three years in prison. The appeal period for T.M. to challenge his conviction expired on July 9, 2020; however, it was not until November 16, 2021 that he filed a motion for an extension of that period.

[2] T.M.'s motion for an extension of the time for appealing his conviction was heard in chambers by Justice Anne S. Derrick on March 10, 2022. She dismissed his motion by written decision and order issued on March 16, 2022 (2022 NSCA 22).

[3] A decision of a chambers judge which disposes of an appeal may be reviewed by a panel of the Court with leave of the Chief Justice in accordance with *Civil Procedure Rule* 90.38. Subsection 6 sets out the options available to the Chief Justice on such a motion:

> (6) The Chief Justice may do any of the following on a motion for leave to review:
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> > (a) dismiss the motion for leave to review;
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> > (b) set the motion down for hearing;
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> > (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.

[4] On March 23, 2022, T.M. filed a letter with the Registrar indicating that he wished to "appeal" the decision of Justice Derrick. The *Civil Procedure Rules* do not provide for an appeal of a chambers judge's decision; however, I interpreted T.M.'s letter as being a motion for leave to have a panel review. *Rule* 90.38(6)(c) sets out three circumstances in which the Chief Justice may grant leave:

1. When the judge acted without authority under the *Rules*;
2. Where the decision is inconsistent with an earlier decision of a judge or the Court; and

3. Where a review hearing by a panel of the Court is necessary to prevent an injustice.

[5] The first two criteria are straightforward however, in practice, they are rarely invoked. Most review requests are based upon an assertion that a panel hearing is necessary to prevent an injustice. This is a high threshold and is not an avenue by which a party is able to simply re-argue an unsuccessful motion before a panel. In *Marshall v. Truro (Town)*, 2009 NSCA 89, MacDonald, C.J.N.S. described the burden on a party seeking a panel review as follows:

> [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.

[emphasis added]

[6] The circumstances in which leave is granted for a panel review in order to prevent an injustice almost invariably include the applicant providing information that was not available to the chambers judge. It is this additional information which provides context for the motion and raises the potential that, without review, the chambers decision might create an injustice.

[7] The significance of an applicant providing new information as part of their request for leave to review is illustrated by the decision in *R. v. Liberatore*, 2010 NSCA 26 where an appeal was dismissed as a result of the appellant's failure to file their factum by the specified date. On the motion for leave, the appellant provided evidence indicating that the failure was as a result of an oversight by his legal counsel. MacDonald, C.J.N.S. described the rationale for granting leave to review as follows:

> [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.
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> [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.
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> [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.
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> [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.

[8] This demonstrates the importance of providing contextual information not known to the chambers judge in support of the request for leave to review. In *Marshall*, the motion for leave was dismissed because the chambers judge was fully aware of all of the circumstances including the potential for an injustice.

[9] After receipt of T.M.'s letter seeking to "appeal" the dismissal of his motion to extend the appeal period, I reviewed the materials filed by T.M. and the Crown, listened to the audio recording of the motion hearing and reviewed Justice Derrick's written decision. There is no question that Justice Derrick identified and applied the correct principles governing a motion to extend the appeal period. As part of this, she was required to assess the affidavit evidence provided by T.M. and the Crown and determine what weight the evidence of each deponent ought to be given. In her written reasons, she explains the conclusions which she reached and why. She expresses her findings with respect to the steps taken by T.M. to advance his appeal as follows:

> [22] The evidence satisfies me T.M.'s approach to filing a notice of appeal lacked the required attentiveness. I find he belatedly contacted Mr. Church about appealing his conviction, doing so after, not before, his sentencing. Mr. Church's letter of August 17th, 2020 contradicts T.M.'s narrative about their interaction. It represents a careful explanation from an experienced lawyer of the steps T.M. needed to take. I accept Mr. Church's evidence that he endeavoured to be helpful while emphasizing to T.M. what was required to advance a prisoner's appeal and request an extension of time. Where there is divergence between the evidence of T.M. and Mr. Church, I prefer Mr. Church's and find it more credible and reliable.
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> [23] I am not persuaded T.M. then took any meaningful action, if he took any action at all, until a year later when he spoke with his Dorchester parole officer. T.M. has not satisfied me that after his contact with Mr. Church and before he finally filed his Notice of Appeal, he prepared a prisoner's appeal using documents sent to him by Nova Scotia Legal Aid. I note he added to his original narrative in oral submissions, saying that NSLA first sent him an application for legal aid before then sending forms for a prisoner's appeal. This additional detail, which T.M. says led him to tell NSLA they had initially sent him the wrong documents, emerged after Mr. Scott noted that an application for legal aid is always the first step undertaken by NSLA. I can take notice of the fact that NSLA does not provide to prisoners they are not representing Notice of Appeal forms to be completed and returned for filing. As Chambers judge I have enough experience dealing with unrepresented prisoners and NSLA to know NSLA does not become involved with a prisoner's Notice of Appeal prior to accepting them as a client.
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> [24] T.M.'s contact with NSLA aside, he has indicated he first reached out about an appeal to Mr. Church. That was in August 2020 when the deadline for filing his Notice of Appeal had already passed. T.M. did not then pick up the pace of his efforts, only contacting the Court about an appeal in August 2021, over a year since his filing deadline. He has provided no convincing explanation for not doing more, sooner. I accept the challenges faced by unrepresented prisoners trying to deal with legal matters are real; but, T.M. has not described any institutional impediments that frustrated his ability to launch an appeal. I find he has not shown he had a good faith intention to appeal within the time period.
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> [25] T.M.'s application also falls at the merits hurdle. He lists three grounds of appeal: ineffective assistance of trial counsel; inconsistent testimony by the Crown witnesses; and judicial bias. I find none of the grounds on which he wants to rest his appeal clear even the relatively low bar for what constitutes an arguable issue.

[10] T.M.'s letter of March 23, 2022 does not provide any new evidence or information which was not before Justice Derrick. T.M. was contacted by the

Registrar and asked if he wished to file any additional material in support of his review request, and he indicated that he did not wish to do so.

[11] From the material before me, it is clear that T.M. proposes to make the same arguments on the same evidence as he did before Justice Derrick, hoping for a different outcome. That is not the purpose of the review process set out in *Civil Procedure Rule* 90.38 when the chambers judge has acted within her authority and applied the proper principles. Even if one could conclude there was a potential injustice to T.M. because of the foreclosure of any possible appeal, that information would have been apparent to Justice Derrick when she dismissed the motion. She was aware of the implications of her decision and gave the matter careful consideration as is apparent from her written reasons.

[12] T.M. has not satisfied me that a review by a panel of the Court is necessary in order to prevent an injustice and I would, therefore, dismiss his motion.

Wood, C.J.NS.