SUPREME COURT OF NOVA SCOTIA
Citation: *Lee v. R.*, 2023 NSSC 38

Date: 20230202
Docket: Syd. No. 519579
Registry: Sydney

Between:

Lionel Alexander Lee

Applicant/Appellant

v.

His Majesty the King

Respondent

Judge:	The Honourable Justice Patrick Murray
Heard:	January 5, 2023, in Sydney, Nova Scotia
Oral Decision:	February 2, 2023
Counsel:	Kathy Pentz, KC, for the Crown Nicholas Burke for Mr. Lee

By the Court:

Introduction

[1] This is an Application in Chambers by the Appellant, Lionel Lee, for an order seeking an extension to file a Notice of Appeal, of a decision in Provincial Court made on August 24, 2022 by the Honourable Judge Daniel A. MacRury.

[2] Mr. Lee wishes to appeal his sentence imposed by the Court following his plea of guilty to the offences of refusing to comply with a breathalyzer demand contrary to s. 320.15(1) and the offence of uttering a threat to a peace officer, contrary to s. 264.1(1)(a) of the *Criminal Code of Canada*.

[3] The Appellant was sentenced to twelve months in custody for the uttering a threat conviction and two months consecutive for the refusal.

[4] This was followed by a 24-month probation order and a two year driving prohibition.

[5] The grounds set out in the proposed Notice of Appeal are threefold.

1. The Learned Judge erred by failing to provide notice that he was planning to exceed the Crown range and to provide an opportunity for further submissions by the Crown and Defence counsel;
2. The Learned Judge erred in failing to provide adequate reasons for why he exceeded the Crown range; and
3. The sentence was demonstrably unfit.

[6] The Appellant is asking the Appeal Court to substitute a sentence of a six month conditional sentence order or alternatively, 30 days incarceration.

[7] The Application before me is limited to whether leave should be granted to Mr. Lee to file these grounds of appeal, and not the appeal itself. An appeal hearing will follow only if the Court grants the Order extending the time to file the appeal.

Background

[8] The record of the proceedings before the sentencing judge is not before me. For example, I do not have the benefit of his decision, or the reasons contained therein. Nor do I have a transcript of the proceedings.

[9] Thus, this Court is in no position to make comment on the merit of the appeal with respect to grounds 2 or 3 of the Notice. In any event the law is clear that it is not the role of the chambers judge considering whether to grant an extension to "engage in measuring the chances of success".

[10] However, as state by Beveridge, J.A., in ***R v. R (ME)***, 2011 NSCA 8, the Applicant must be able to identify and set out a ground that is "at least arguable". (Paragraph 72 ***R(ME)***)

[11] The Appellant argues in ground 1 that the learned trial judge failed to advise counsel that he intended to exceed the Crown's recommendation and failed to provide an opportunity to make further submissions at the time of sentence.

[12] Mr. Lee's counsel cites as authority the recent Supreme Court of Canada's decision in ***R v. Nahanee***, 2022 SCC 37.

[13] The Crown, as Respondent in this matter, argues that it is not sufficient for the Appellant to simply argue such an opportunity was denied. Instead, the Appellant must show that such a failure had an impact on the sentence or that the sentencing judge failed to provide clear or sufficient reasons for imposing a harsher sentence, or provided erroneous reasons. These are what is required by ***Nahanee***, in paragraph 59 of its decision.

[14] That said, it is not disputed that Mr. Lee nor the Crown were given that opportunity. Once again, I make no finding without a record but rather state what appears obvious from the submissions of Counsel.

[15] In addition, it is not disputed that the decision was given on August 24, 2022 or that the Application seeking an extension was filed on December 7, 2022. In his affidavit sworn on December 6, 2022, the Appellant states he learned from a fellow inmate that he could appeal on November 19, 2022. After that, he immediately applied to Nova Scotia Legal Aid for representation and retained counsel on November 28, 2022.

[16] It is not disputed that the appeal period in this matter is as set out in Rule 63 for Summary Conviction Appeals. Rule 63.05(1)(a) states that a person may start

an appeal no more than 25 days after the day the appellant is sentenced if the appeal is from a conviction, finding of guilt, sentence or both.

[17] It is not in dispute that the appeal period here expired before an Appeal was sought. Using clear days and not calendar days, it expired on or about September 29, 2022. The total period in months from the date of the decision to the filing of the Application is 3 ½ months.

[18] In his affidavit Mr. Lee gave reasons for not being able to meet the deadline in the Rules:

> 4. I was immediately incarcerated following the oral decision of Judge Daniel MacRury. Matthew MacNeil of Nova Scotia Legal Aid had assisted me during the sentencing as duty counsel.
>
> 5. I was not aware I could appeal the oral decision of Judge Daniel MacRury, as I had plead guilty and ws of the belief that prohibited me from appealing. On November 19, 2022, a fellow inmate indicated I could appeal. I immediately contacted Nova Scotia Legal Aid after being notified of same. I applied for Nova Scotia Legal Aid representation and was subsequently appoint a certificate lawyer, being my current counsel, Nicholas E. Burke on November 28, 2022.

[19] In his brief, the Applicant has correctly stated the Court's authority to grant the extension is discretionary. There is "no absolute rule" to be applied in the exercise of the discretion whether or not to grant an extension of time.

Law – The Three Criteria

[20] The law in ***R v. Ellison***, 2021 NSCA 54, sets out the factors that are usually applied. The Court of Appeal described the criteria as follows:

> [13] The criteria to consider when deciding whether to grant an extension to file a notice of appeal was discussed in *R. v. M. (R.E.)*, 2011 NSCA 8:
>
> > [39] Both in Nova Scotia, and elsewhere, the criteria to be considered in the exercise of this discretion has been generally the same. The Court should consider such issues as whether the applicant has demonstrated he had a *bona fide* intention to appeal within the appeal period, a reasonable excuse for the delay, prejudice arising from the delay, and the

> merits of the proposed appeal. Ultimately, the discretion must be exercised according to what the interests of justice require. (See *R. v. Paramasivan* (1996), 155 N.S.R. (2d) 373; *R. v. Pettigrew* (1996), 149 N.S.R. (2d) 303; *R. v. Butler*, 2002 NSCA 55; *R. v. Roberge*, 2005 SCC 48.)

[21] The Crown has conceded that prejudice is not an issue for the purpose of this application. This leaves for consideration whether Mr. Lee had a bona fide intention to appeal within the appeal period, whether there was a reasonable excuse for the delay, and whether the proposed appeal has merit.

[22] Again, I pause here to state that the ultimate test is whether justice requires that an extension be granted. This was explained by Bryson, J.A., in ***Brooks v. Soto***, 2013 NSCA 7, stating the test is an appropriate guide, but not an exhaustive description of the discretion available to the Court. (See ***Jollymore Estate Re*** (2001), 196 N.S.R. (2d) 177 at paragraph 5)

Analysis

[23] I am going to turn first to whether there is merit to the proposed appeal.

[24] The Appellant submits the learned judge should have notified counsel of his intention to impose a higher sentence than that being sought by the Crown. Mr. Lee says the Crown was seeking 8 months custody, followed by 24 months of probation. He says ***Nahanee*** makes this requirement, abundantly clear.

[25] The Respondent Crown submits that while ***Nahanee*** establishes it was an error of law for the trial judge to provide notice to counsel of his intent to impose a higher sentence than recommended by the Crown, that alone does not provide a valid ground of appeal. The Crown argues there are only certain instances where such failure would provide a basis for appeal and ***Nahanee*** points out that there are three errors in principle that would warrant intervention by the Appellant Court.

[26] The Crown submits the Appellant has provided no information to suggest that error in these principles has been made.

[27] Having considered this submission, I am not prepared to accept that the Applicant has that onus to meet on this application to extend the time.

[28] I find expecting the Appellant to satisfy the Court of these three errors at this stage is premature and more properly an argument for the appeal itself, should the extension be granted.

[29] The Appellant is not seeking appellate intervention on this application, but the right to be given a chance to seek appellate intervention and thus asks the Court for leave.

[30] Once again, Justice Beveridge said in his decision in ***R(ME)*** the appellant must be able to identify and set out a ground that is "at least arguable". Beyond that, the record is not available to make the kind of assessment, the Crown submits should be made, even if it were appropriate to do so, which I say at this stage it is not.

[31] I am satisfied that Mr. Lee has shown there is sufficient merit to meet that component on the basis that the judge did not do what ***Nahanee*** says was required.

[32] Once again, it is not the role of this Court to delve deeply into the merits. ***Nahanee*** states the obligation arises if the sentencing judge is of a mind to impose a harsher sentence, "in any respect".

[33] Accordingly, it is the first and second factors in the criteria that are in issue in this application. Did Mr. Lee have a bona fide intention to appeal at the relevant time, and did he have a reasonable excuse for the delay.

[34] In his submission the Appellant brings both of these together by stating the delay in appealing is because he was unaware that he could appeal. This overlaps with his argument that he had a bona fide intention to appeal, but did not realize he could until he was informed of same on November 19, 2022.

[35] Mr. Lee therefore states he had a genuine wish and intention to appeal and continued to be of this "mindset" but did not advance this appeal because "as a self-represented litigant he was aware". Thus, his appeal was filed late.

[36] In his affidavit the Appellant stated he had "duty counsel" whom was on a limited retainer. Further, that he was unaware of his right to appeal in light of his voluntary guilty plea, which prohibited him from appealing.

[37] Further, Mr. Lee states he was incarcerated immediately following the oral decision.

[38] The Court accepts that a lack of counsel and being incarcerated could amount to a reasonable excuse for the delay in filing the appeal. That is, if Mr. Lee had a bona fide intention to file the appeal during the appeal period.

[39] The Crown submits there was no bona fide intention of Mr. Lee to appeal within the appeal period. It submits the Appellant finding out through another inmate is not credible. The Crown further suggests that the Appellant himself very likely would have been familiar with such procedures, given his own previous record of convictions. The timing is suspect, says the Crown.

[40] Mr. Lee's counsel argued there is an air of reality to the notion that Mr. Lee had a bona fide intention. Respectfully I disagree.

[41] If the Appellant had a bona fide intention to appeal, but he has not shown or demonstrated it to this Court, that it was during the appeal period.

[42] What record the Court has shows that between the decision date of August 24, 2022 and November 28, 2022, when Mr. Ley retained counsel, he did nothing to indicate he had such an intention. At a minimum, one would expect that an inquiry into this right to appeal would be made, especially given the sentence was unexpected, and taking into account Mr. Lee's background.

[43] Mr. Lee's affidavit is silent and bereft of any efforts he made during this 3 month period. Although Mr. Lee states he had such an intention, his actions speak louder than his words.

[44] As previously noted, determining whether or not the criteria are met does not end the matter. There is no absolute rule, as stated by Ferrar, J.A. in ***Ellison***.

> [14] There is no absolute rule to be applied when deciding whether or not grant an extension. Depending on the circumstances, a court may take into consideration additional criteria or factors. These factors can include the extent of the delay, whether a guilty plea resulted in a benefit for an applicant, and whether there is a real doubt an applicant committed the offence for which he pled guilty (*R. v. Menear*, [2002] 155 O.A.C. 13, at ¶ 20, 21, 24 and 25; *R. v. Roberge*, 2005 SCC 48, at ¶ 6; and *R. v. Al-Rabie*, 2009 NSCA 55, at ¶ 7-12).

[45] In this case, at issue is Mr. Lee's jeopardy, his personal liberty. As well the Court is entitled to take into account other factors in deciding whether to grant an extension. The extent of the delay is not lengthy, the Crown has acknowledged it

is not arguing that an extension is prejudicial. It is a fact that Mr. Lee had no counsel. Further is there a "discernable" issue that would make granting the extension a proper exercise of discretion.

[46] In the end, the test is whether justice requires that the application be granted. I have been considering this matter since the initial appearance by Mr. Ley on January 8, 2023.

[47] In my view a bona fide intention to appeal within the appeal period is a fundamental aspect and a primary consideration in determining what is just in these circumstances. The absence a clear intention causes me to deny Mr. Lee's application. A bald assertion of his intention is not enough.

[48] An extension of the time to appeal will not be granted.

Murray, J.