IN THE COURT OF APPEAL OF THE NORTHWEST TERRITORIES

*Madsen v. HMTQ*, 2007 NWTCA 04

Date: 2007 05 10
Docket: A-1-AP 2006000003

BETWEEN:

LEIF MADSEN

Appellant/Applicant

-and-

HER MAJESTY THE QUEEN

Respondent

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RULING ON APPLICATION FOR LEAVE TO APPEAL
THE HONOURABLE JUSTICE V.A. SCHULER

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Application for leave to appeal the dismissal of a summary conviction appeal from a conviction for assault with a weapon.

Ruling on Application for Leave to Appeal
The Honourable Justice V.A. Schuler

[1] This is an application for leave to appeal the dismissal of a summary conviction appeal from a conviction for assault with a weapon. The summary conviction appeal judge dismissed the appeal for want of prosecution.

[2] The trial in June 2004 involved an allegation that the applicant hit the complainant with a beer mug during an altercation in a bar. The trial judge rejectedthe applicant's version of events and found that his guilt was established on the evidence of the Crown witnesses. He sentenced the applicant to four months in jail, which has long since been served. The applicant appealed the conviction on the ground of failings by his trial counsel, in particular, failure to call certain witnesses in his defence.

[3] The notice of appeal was filed in the Supreme Court in June 2004. The trial transcript was filed in August 2004. In January 2005, the Court set the appeal down for hearing. The applicant appeared without counsel and was given direction by the presiding judge about the material he needed to file on the issues of inadequate representation and presentation of new evidence. The applicant was given until February 28, 2005 (subsequently extended to March 31, 2005) to file his material and his appeal was adjourned *sine die*.

[4] In February and March 2005, affidavits of the applicant's trial counsel and one of the witnesses not called at trial were filed. In May 2005, the Respondent ("the Crown") indicated to the applicant that it wished to cross-examine the witness on her affidavit.

[5] The Court record indicates that no one appeared on behalf of the applicantwhen his appeal was called as part of the general list on May 13 and September 13, 2005.

[6] In December 2005, the Court set the appeal down to be spoken to on January 19, 2006. The notice sent to the applicant indicated that the Court would consider dismissing the appeal for want of prosecution pursuant to Rule 117 of the *Supreme Court Rules* and section 825(b) of the *Criminal Code*. It also stated, "You or someone acting on your behalf must appear on the above noted date if you want to speak to your appeal".

[7] The applicant's appeal counsel, a Calgary lawyer who was not then entitled to practice in the Northwest Territories, was aware of the January 19, 2006 date by December 20, 2005. He made inquiries of the Court registry about he or the applicant, who is also resident in Calgary, appearing by telephone, but ultimately did not make those arrangements.

[8] On January 19, no one appeared on behalf of the applicant. The presidingjudge had before him a fax received from the applicant that day, indicating that there had been delays due to the Crown's inability to locate the witness who swore the affidavit, that he did not intend to abandon the appeal and asking that a new date be set for March 10. Crown counsel indicated that he was not in a position to argue that the applicant was not pursuing the appeal and that, "it does appear he is taking the appropriate steps". When questioned by the judge as to what progress had been made, Crown counsel referred to the unsuccessful efforts to locate the witness for cross-examination and the applicant's counsel's stated intention to obtain a restricted appearance certificatefrom the NorthwestTerritories Law Societyand move the matter forward. Although it appears that by that time the Crown may have decidedto take the position that the appeal should be set for hearing on the basis of what had been filed by that point, notwithstanding the inabilityto cross-examinethe witness,that positionwas not conveyed to the summary conviction appeal judge. Nor, of course, was anyone there on behalf of the applicant to suggest that course of action.

[9] The summary conviction appeal judge referred to the previous appearance in January 2005, when the applicant had been given direction by the presiding judge about what he had to do to get the matter ready for hearing. He noted that it was up to the applicant to get the appeal on for hearing and found that he had not provided evidence to show that he had done so. He dismissed the appealfor want of prosecution pursuant to Rule 117 and section 825(b) of the *Criminal Code*.

[10] The grounds of appeal as set out in the applicant's application for leave are:

> 1. The learned Justice misdirected himself with respect to the efforts made by, and the intention of the [applicant] to prosecute the Appeal;
>
> 2. The learned Justice erred in not correctly considering the submissions of the Crown prosecutor prior to dismissing the Appeal.

[11] The applicant submits that due to these errors, the summary conviction appeal judge erred in not granting the adjournment requested and dismissing the appeal for want of prosecution.

[12] Section 839 of the *Criminal Code* says that leave to appeal may be granted only on a question of law. The appeal must have merit in the sense of being arguable: *R. v. Werner*, [2005] N.W.T.J. No. 97, 2005 NWTCA 5; *R. v. H.(C.R.)*, [2002] M.J. No. 180, 2002 MBCA 58.

[13] Courts have further confined leave to matters of public importance: *Werner*, *supra; R. v. Toor*, [2001] A.J. No. 401, 2001 ABCA 88. In *Toor*, Paperny J.A. said: "Leave will be granted to remedy clear errors of law where to do otherwise would result in injustice. Leave will be denied where there is mere error if there is no potential to significantly impact the law".

[14] On this application, the Crown concedes that a question of law could be raised and the threshold test for merit could be satisfied on the record, having regard to the decision of the Ontario Court of Appeal in *R. v. Kiers*, [1968] O.J. no. 585 (C.A.). In *Kiers*, the Court found that the summaryconviction appealjudge wronglyexercised his discretion in dismissing the appeal as abandoned where the appeal had in fact been perfected. As I read the case, it was found that the judge acted pursuant to the wrong branch of the rule allowing for dismissal.

[15] In this case, the applicant alleges that the summary conviction appeal judge misdirected himself as to the applicant's efforts and intentions and did not correctly consider the submissions of the Crown. This is really an allegation that he erred as to the facts; at most it is an issue of mixed law and fact, that is, whether the facts satisfied the legal test for dismissal. It is not an allegation that the summary conviction appeal judge acted pursuant to the wrong rule or part thereof, making an error of law, as was the case in *Kiers*.

[16] The applicant and his counsel were aware that his appeal was to be spoken to on the date in question. They were also aware of the need to appear and that the Court would consider dismissing the appeal for want of prosecution. Yet despite the notice to that effect, no one appeared and the applicant's fax provided no information as to when he would perfect his fresh evidence application, file his factum and other material and be ready to argue the appeal. Nor was there any information as to when his counsel expected to obtain his certificate to appear in the Northwest Territories. In these circumstances, the summary conviction appeal judge was entitled to find that the appeal had not been proceeded with. He was not bound by the submission made by Crown counsel.

[17] Even if the summary conviction appeal judge's dismissal of the appeal can be said to give rise to a question of law involving the exercise of discretion under Rule 117 and section 825(b), this is not a matter of public importance warranting consideration by the Court of Appeal. There is no question of law that needs to be settled or that will have a significant impact on the administration of justice.

[18] In the circumstances of this case, there is no injustice. The applicant has not proceeded diligently with his appeals. His appeal in the summary conviction appeal court had been pending for approximately 19 months before it was dismissed; his application for leave to appeal in this court was pending for 14 months before it was heard. There is also no evidence that the applicant is any better prepared to proceed with his summary conviction appeal now than he was when it was dismissed. The witness who swore the affidavit in February 2005 has still not been located. Nor has the applicant obtained an affidavit from any other witness with evidence not called at trial. In considering whether there has been an injustice, the Court should considernot only the applicant's position, but also the interest in finality of proceedings for the proper administration of justice.

[19] The applicant relied on *R. v. Jacobs* (1971), 2 C.C.C. (2d) 26 (S.C.C.), *R. v. Blaker* (1983), 46 B.C.L.R. 344 (B.C.C.A.) and *R. v. Wigmore* (1997), 94 BCAC 19. Those cases deal with the jurisdiction of an appellate court to vary or set aside an order made in that court, disposing of an appeal in a criminal case. They indicate that jurisdiction to do so exists where the appeal was disposed of other than on the merits and if the court considers it to be in the interests of justice. They do not, however, apply to applications for leave to appeal to another court, which is the procedure undertaken by the applicant in this case.

[20] For the foregoing reasons, the application for leave to appeal is dismissed.

Dated this 10th day of May, 2007

V.A. Schuler,
J.A.

Counsel for the Appellant: Cyril Bright
Counsel for the Respondent: Shannon Smallwood

Heard at Yellowknife, NT
30th day of April, 2007