Date: 2011 05 04
Docket: S-1-CR-2011000024

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

CATHERINE JANET FAIRBAIRN

MEMORANDUM OF JUDGMENT

A) INTRODUCTION AND BACKGROUND

[1] This is an application by the Crown to extend the time to file and serve a Notice of Appeal. The circumstances leading up to the application are not in issue.

[2] On January 12, 2011, the Respondent was sentenced, in the Territorial Court of the Northwest Territories, on a charge of impaired driving and a charge of being in the care and control of a motor vehicle while impaired. At the sentencing hearing, she applied for a curative discharge. The Crown opposed the application and sought a jail term of 8 to 10 months.

[3] The Sentencing Judge granted the Respondent's application for a curative discharge, and placed her on Probation, with a number of conditions, for 18 months. The Crown wants to appeal that decision.

[4] The *Criminal Procedure Rules of the Supreme Court of the Northwest Territories* set filing deadlines for summary conviction appeals. Rule 110 requires that the Respondent be served with a Notice of Appeal within 30 days of the

decision being appealed. Rule 112 requires that proof of service be filed within 10 days of the expiration of the appeal period.

[5] The Respondent was sentenced on January 12. The Crown had until February 11 to serve her with the Notice of Appeal, and until February 21 to file proof of service. The Crown served the Respondent on February 16, 2011 and filed the proof of service on March 4.

[6] The Crown asks to have both the time for service and the time for filing proof of service extended.

B) ANALYSIS

[7] The decision to grant an extension to file an appeal is a discretionary one. While there are no absolute rules as to how that discretion is to be exercised, three factors are generally considered:

1. whether the party seeking the extension has shown a bona fide intention to appeal within the appeal period;

2. whether that party has accounted for, or explained, the delay;

3. whether there is merit to the proposed appeal.

R. v. *Menear* [2002] O.J. No. 244 (Ont. C.A.), at para.20.

[8] The Crown filed its Notice of Appeal on February 10, one day before the expiration of the appeal period. The Respondent properly concedes that the first criterion is met. It is the other two that are at issue.

The explanation for the delay

[9] The Crown concedes that there is no evidence giving an explanation for the late service of the Respondent with the Notice of Appeal. Crown counsel candidly acknowledged that the late service was the result of a mistake. As for the delay in filing proof of service, the evidence is that the officer who served the Respondent failed to properly complete the affidavit of service. The documents had to be returned to him twice. Initially, the documents were returned to the Crown's office

without the exhibit stamps being filled out, so they were sent back. They were later returned to the Crown's office with the exhibits stamps only partially completed. This, obviously, resulted in delays in the filing the affidavit of service with the Court. The Crown acknowledges that this is not a particularly compelling explanation. That is a realistic concession under the circumstances.

[10] The Respondent argues that the explanation for the delay in filing proof of service amounts to no explanation at all, as it boils down to a failure, on the part of the officer who was swearing the affidavit, to carry out a simple and routine task. The Respondent also points out that there is no evidence suggesting that the urgency of the situation was conveyed to the R.C.M.P. by the Crown's office at any point throughout this process.

[11] I agree with the Respondent. By filing its Notice of Appeal 1 day before the expiration of the deadline for serving the Respondent, the Crown placed itself in a difficult position as far as effecting service within the deadline. The problems with completing the affidavit of service, which should not have been a complicated task, made matters worse. The lack of satisfactory explanation accounting for the delay weighs against granting the Crown's application.

The merits of the appeal

[12] In submissions, the Crown emphasized the third factor. It argues that this appeal not only has merit, but raises very important issues that should be addressed by this Court. The Crown argues that the Sentencing Judge made a significant error in her interpretation of the evidentiary basis that is required for a court to entertain a curative discharge application. This, the Crown argues, is an important issue that this Court should examine, even if the Crown missed its filing deadlines, especially considering that the Respondent was served within days of the expiration of the appeal period.

[13] The Respondent argues that the appeal is without merit. She notes that the Sentencing Judge gave lengthy reasons for arriving at the conclusion she did, and points out that sentencing is a highly discretionary matter.

[14] It would not be appropriate for me to engage in a detailed analysis of the grounds of appeal for the purposes of this application. However, to decide whether

the appeal has arguable merit, I must to an extent consider the grounds of appeal and the standard of review they engage.

[15] In the Notice of Appeal, the Crown alleges that the Sentencing Judge erred in principle by granting a curative discharge in the absence of expert evidence, and by overemphasizing the Respondent's rehabilitation while placing insufficient weight on denunciation and deterrence. The Notice also alleges that the sentence imposed was demonstrably unfit.

[16] Where it is alleged that the sentence imposed at trial was unfit, the standard of review is a high one, and calls for considerable deference. But that highly deferential standard does not apply if it is shown that the sentencing judge erred in principle.

[17] Curative discharges are measures of exception in the context of sentencing for drinking and driving offenses, and are subject to specific prerequisites set out in the *Criminal Code*. One of those prerequisites is that the sentencing judge consider, on the basis of medical or other evidence, that the offender is in need of curative treatment in relation to his or her consumption of alcohol or drugs. *Criminal Code*, s. 255(5).

[18] No medical evidence, or other expert evidence, was called at this sentencing hearing. As a result, one of the issues was whether the Respondent's own testimony about her alcoholism, the treatment programs she had taken in the past to address her addiction, and her present commitment to stay sober, constituted "other evidence" within the meaning of Subsection 255(5). The Crown argued that it did not, relying, among other cases, on *R.* v. *Soosay* 2001 ABCA 287, where the Alberta Court of Appeal concluded that Parliament intended the words "other evidence" in section 255(5) to mean evidence that is "similar in kind and quality to 'medical evidence'".

[19] The Sentencing Judge noted that the *Soosay* case had been distinguished in other cases. She engaged in a contextual analysis of Subsection 255(5) and concluded that the evidence adduced by the Respondent was "other evidence" within the meaning of that provision. She then went on to consider whether a curative discharge should be granted.

[20] It is clear that this matter required the Sentencing Judge to deal, as a preliminary matter, with an issue of statutory interpretation. On that issue, some authorities supported the Crown's position, others did not. The party seeking an extension of time to appeal must establish there is an arguable case on appeal, not that the appeal would necessarily succeed. In this case, I do not think it can be said that the appeal is completely devoid of merit.

Balancing the three factors

[21] The Crown argues that the overriding factor should be the importance of having the merits of the appeal decided by this Court. The Crown says it is not so much concerned about the outcome of this specific case or about this offender, but rather, by the potential consequences of the Sentencing Judge's decision on other curative discharge applications that may come before the Territorial Court. The Crown argues that this case sets a precedent that is of concern, and that it is in the interests of justice to have the issue resolved by this Court. The Crown argues that those interests outweigh the concerns that arise from the Crown's failure to provide a satisfactory explanation for having missed its filing deadlines, particularly since there was no inordinate delay in effecting service.

[22] I disagree with the suggestion that considerations about the proper administration of justice weigh in the Crown's favor in the circumstances of this case. The Sentencing Judge's decision is not actually binding on other Territorial Court Judges, although I appreciate they may well find it has a persuasive value. In any event, if another curative discharge application is granted on the basis of evidence that, in the Crown's view, does not meet the requirements of Subsection 255(5), it would be open to the Crown to appeal that decision and have the issue examined by this Court. I do not think that failing to have the issue addressed now, in the context of the Respondent's case, will have broad detrimental consequences for the administration of justice in the Northwest Territories.

[23] By contrast, from the Respondent's perspective, the potential consequences of this matter being allowed to continue are significant. Since January 12, a period of over 3 months, she has been bound by the many conditions of the Probation Order. By the time this appeal could be heard and decided, she would have been bound by those conditions, and presumably complying with them, for an even longer period of time. A successful Crown appeal would result in her incarceration

several months into her period of Probation, and a significant period of time after the matters giving rise to the charges arose. It is true that she was made aware, within 6 days of the expiration of the appeal period, that the Crown did intend to challenge the Sentencing Judge's decision. But these deadlines are set for a reason. Particularly in the context of summary conviction proceedings, matters are expected to be dealt with in a timely fashion and reach a level of finality, for all involved, within a relatively short time.

[24] This is even more so where the Crown, on appeal, seeks a jail term for an offender who has, at the original sentencing, been given a non custodial sentence. Quite apart from the requirement of the *Rules of Court* about filing deadlines, the Crown bears a particularly high burden to have those types of matters proceed expeditiously.

[25] For those reasons, on balance, I conclude that this is not an appropriate case in which to exercise my discretion to grant the Crown's application for extension of time to comply with the filing requirements set out in the *Rules of Court*. The Crown may have other another opportunity to seek a ruling from this Court about the issues that arose in this case. But in my view, granting this application would place an unfair burden on this particular Respondent.

[26] The application is dismissed.

L.A. Charbonneau
J.S.C.

Dated at Yellowknife, NT, this
4th day of May, 2011

Counsel for the Crown: Blair MacPherson
Counsel for Catherine Fairbairn: Caroline Wawzonek

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