

Date: 20110120
Docket: 10/0111
R. v. Martin, Citation: 2011 NLCA 10

**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL**

BETWEEN:

RONALD MARTIN

APPELLANT

AND:

HER MAJESTY THE QUEEN

RESPONDENT

Coram: Rowe, White and Harrington, JJ A
Court Appealed From: Supreme Court of Newfoundland and Labrador
Trial Division (General) 201001G3741

Appeal Heard: December 14, 2010
Judgment Rendered: January 20, 2011

Reasons for Judgment by Harrington, J.A.
Concurred in by Rowe and White, JJ.A.

Counsel for the Appellant: Kenneth J. Mahoney
Counsel for the Respondent: Brenda P. Boyd

Harrington, J.A.:

[1] The appellant has appealed a decision of a Trial Division judge (“applications judge”) dismissing his request for the release of funds seized from him during the execution of a search warrant. The police seized the sum of \$56,000.00 from his vehicle. These events were part of an investigation that resulted in his indictment on two charges under the *Controlled Drugs and Substances Act* (CDSA). Pursuant to s. 462.34(4)(c)(ii) of the *Criminal Code* dealing with proceeds of crime, the appellant sought a release of funds to pay reasonable legal expenses in the defence of the two CDSA charges.

[2] The Crown brought an application to strike on the basis that there is no right of appeal by an accused to this Court arising from the rejection of this type of application.

BACKGROUND

[3] The appellant is facing a trial on the CDSA charges. The appellant argues that the applications judge erred in failing to release all or part of the seized funds to cover his reasonable legal expenses given that he has been rejected for legal aid and that his legal counsel is representing him at trial on a “pro bono” basis. The applications judge was not prepared to draw an inference that the appellant had established “... a legitimate possession of the funds so as to reduce the concern that these funds may well be the proceeds of crime...”. The appellant contends that the legitimacy of his possession of the funds was not contested by the Crown before the applications judge and that the only issue for consideration was the state of the appellant’s financial affairs as it affected his need to pay counsel fees from the seized funds.

[4] In *R. v. Druken*, [1998] 1 S.C.R. 978, the Supreme Court of Canada affirmed the dissent of Cameron J.A. of this Court: (1997), 157 Nfld. & P.E.I.R. 93, which held that an appeal court has no inherent jurisdiction to hear appeals in criminal matters and thus there is no jurisdiction to hear interlocutory appeals save where such an appeal is expressly provided for in the *Criminal Code*.

[5] As the ruling of the trial judge regarding the status of Mr. Druken’s defence counsel did not determine the real issue between the Crown and the

accused but was a collateral matter, it was held to be interlocutory with no right of appeal to this Court.

LAW AND ANALYSIS

[6] Section 674 of the *Criminal Code* provides that:

674. No proceedings other than those authorized by this Part [XXI – Appeals - Indictable Offences] and Part XXVI [Extraordinary Remedies] shall be taken by way of appeal in proceedings in respect of indictable offences.

[7] Section 675 deals generally with the right of appeal of a person convicted and section 676 deals generally with the right of appeal of the Attorney General. These provisions set out various rights of appeal with respect to final dispositions, notably a conviction, acquittal or the quashing of an indictment and sentences. Neither s. 675 or s. 676 provides for appeal of an interlocutory decision. Thus, jurisdiction for such an appeal, if it exists, must be found elsewhere in the *Criminal Code*.

[8] Counsel for the appellant submitted in support of a right of appeal to this Court the decision in *R. v. Beaulieu Estate*, 2001 NBCA 107. There the Crown appealed from a dismissal by an applications judge of a Crown forfeiture application and the granting of an administrator's application for restoration, holding that the estate of an accused who died prior to trial had an interest in some of the seized funds. The judge allowed the release of \$15,000.00 to pay legal costs. The order of the applications judge was made pursuant to s. 462.34(4)(c)(ii) of the *Criminal Code* which is the focus of this proceeding. It arose from the dismissal rather than the grant of an application by the Crown of a forfeiture order as well as the granting of a restoration order in favour of the estate of the accused. The provision reads in relevant part:

(4) On an application made to a judge under paragraph (1)(a) in respect of any property and after hearing the applicant and the Attorney General and any other person to whom notice was given pursuant to paragraph (2)(b), the judge may order that the property or a part thereof be returned to the applicant....

....

(c) for the purpose of

(ii) meeting the reasonable business and legal expenses of a person referred to in subparagraph (i) [... who was in

possession of the property at the time the warrant was executed],

...

if the judge is satisfied that the applicant has no other assets or means available for the purposes set out in this paragraph and that no other person appears to be the lawful owner of or lawfully entitled to possession of the property.

[9] The jurisdiction of the New Brunswick Court of Appeal to hear the appeal was not contested by the parties but was commented upon by way of *obiter* at paragraph 16:

... The Attorney General's right to appeal may arise from some other provision, one not mentioned in the Notice of Appeal. See, for example, s. 462.45(b), which was not raised by either party. That provision refers to an appeal taken from an order of forfeiture or restoration in respect of the subject property.

Thus, while the New Brunswick Court of Appeal proceeded as if it had jurisdiction to hear an appeal in a matter such as this, it expressed uncertainty as to the basis for the jurisdiction. That decision, therefore, cannot be taken as appellate authority that there is a statutory jurisdiction to deal with an appeal of a decision made pursuant to section 462.34(4) of the Criminal Code.

[10] Courts of Appeal have rejected attempts to ground a right of appeal based on a "civil" characterization of the interlocutory matter. In **R. v. Aggek (D.I.)** (1999), 209 N.B.R. (2d) 16 (C.A.) the court dealt with an appeal by the accused from an order of a single appellate judge in favour of the Crown extending the time for service of the notice of appeal. The court ruled at para. 9:

The judge hearing the motion [for an extension of time] was exercising jurisdiction set out in the *Criminal Code* and this procedural step cannot be characterized as a civil matter just because it also exists in civil practice.

[11] The only potential sources of appellate jurisdiction in the case on appeal are sections 462.44 and 462.45 of the *Criminal Code* which are noted in *Beaulieu*. Those sections provide:

462.44 Any person who considers that they are aggrieved by an order made under subsection 462.38(2) or 462.41(3) or section 462.43 may appeal from the order as if the order were an appeal against conviction or against a judgment or

verdict of acquittal, as the case may be, under Part XXI, and that Part applies, with such modifications as the circumstances require, to such an appeal.

462.45 Despite anything in this Part, the operation of an order of forfeiture or restoration of property under subsection 462.34(4), 462.37(1) or (2.01), 462.38(2) or 462.41(3) or section 462.43 is suspended pending

...

(b) any appeal taken from an order of forfeiture or restoration in respect of the property ...

(Underlining added)

[12] Those sections, however, do not expressly provide a right to appeal in a case such as the case on appeal. In *Proceeds of Crime and Money Laundering*, German, (Toronto: Carswell, 2010 – Looseleaf – Release 3) at pp. 15-1 to 15-3 the author comments:

Although other sections of the Criminal Code make reference to appeals, the only section in Part XII.2 devoted to the issue is 462.44. It reads: [section omitted]

...

Part XII.2 permits appeals from some, but not all, orders. Where the Code is silent respecting a right of appeal, no right is presumed. When considering the ability to appeal an order under s.462.35 [footnote omitted], the Court of Appeal for Saskatchewan commented as follows, in *R. v. Derksen* [(1999), 180 Sask. R. 271]:

This is in direct contrast to other sections of the Criminal Code that relate to property seized as proceeds of crime, for which a right of appeal is granted (see Criminal Code sections 490.1(3), 490.6, 462.44, 491 and 673). Since Parliament specifically granted the rights of appeal in some situations but not in others, it must be taken to have intended that there would be no right of appeal from orders made under s.462.35.

...

No right of appeal is provided from an order made under s.462.34. Section 462.45 suspends the operation of an order under s.462.34(4), in certain circumstances.

[13] The reasoning in *Derksen* is at play in this case as Parliament specifically granted rights of appeal in some situations but not in others. It

may be taken to have been intended that there would also be no right of appeal from orders made under s.462.34(4). However, the section considered in *Derkson*, s. 462.35, is not listed in s. 462.45. Thus, it is clear that while Parliament did not contemplate an appeal from a s. 462.35 disposition, the reference to the suspension of the operation of a forfeiture or restoration order pending any appeal taken from such orders tends to leave the door ajar.

[14] The problematic wording in s. 462.45 may be avoided, however, when one considers that the accused has a right to seek leave to appeal to the Supreme Court of Canada pursuant to section 40 of the *Supreme Court Act*. This reality gives meaning to the reference to “any appeal taken from an order of forfeiture or restoration ...” provided for in s. 462.45(b) of the *Criminal Code*.

[15] This interpretation was confirmed by the Supreme Court of Canada in *Québec (Attorney General) v. Laroche*, [2002] 3 S.C.R. 708.¹ The appeal arose from restraint orders and special warrants of seizure made under ss. 462.32 and 462.33 of the *Criminal Code* respecting alleged proceeds of crime. The Court was considering the nature and scope of restraint orders and whether the actions taken under the orders under attack represented a “seizure” within s. 8 of the *Charter of Rights and Freedoms*. The case came before the Supreme Court of Canada from the Québec Superior Court as a direct appeal under s. 40 of the *Supreme Court Act*. The accused sought a review under s. 462.34(4)(b) of the *Criminal Code* to have a restraint order and special warrants of seizure quashed and the seized property returned.

[16] The reviewing judge quashed the restraint order and the special warrants of seizure. With respect to the real property affected, the reviewing judge concluded that the investigating officer's assertions had been discredited, removing the basis for the restraint order. With respect to the seizure of vehicles, the reviewing judge concluded that the provincial vehicle licensing agency had erred in providing the police with the information that had initiated the investigation without a warrant. The reviewing judge concluded that all of the subsequent warrants and seizures were invalid as a result of the initial illegal search.

[17] In the course of its reasons, the Supreme Court noted the following:

¹ Crown counsel brought this decision to the Court's attention following the hearing.

21 On March 6, 2001, De Blois J. of the Superior Court granted a stay of execution under s. 65.1 of the *Supreme Court Act*, R.S.C. 1985, c. S-26, until judgment was rendered on the application for leave to appeal to this Court. Leave to appeal was then granted. This is a direct appeal under s. 40 of the Act, because the legislation in question does not provide for any appeal to another court.

...

46 Again, it will have been noted that the *Criminal Code* as it now stands does not make satisfactory provision for the appeal of decisions made under Part XII.2 [Proceeds of Crime]. The legislation contains no procedure for an appeal to the intermediate appellate courts in the case before this Court. Those courts are therefore unable to perform their error correction function in the application of the law. The legislation as it stands also deprives these courts of the opportunity to take part in the development of this particular part of the law. Criminal trials have undergone changes. The number of situations in which pre-trial, interlocutory or incidental decisions are made has risen substantially. The evolution of the law, and particularly the need to protect the constitutional rights of third parties such as victims, persons bound by professional privilege or the media, have given rise to new kinds of issues, which remain incidental to the main issue between the Crown and the accused. Unfortunately, criminal procedure has scarcely kept up with these changes, as Major J. recently pointed out in the case of a direct appeal to this Court concerning a problem involving professional privilege (*R. v. Brown*, 2002 SCC 32 [parallel citations omitted] at paras. 105-10). We must therefore examine this case in a situation in which the parties have been denied an opportunity for a comprehensive review of the issues by the Quebec Court of Appeal.

(Underlining added)

[18] At para. 46, the Supreme Court clearly expressed concern over the lack of recourse to courts of appeal regarding various interlocutory matters arising from the evolution of the criminal law including the granting of restraint orders and orders for seizure under proceeds of crime provisions of the *Code*. However, the clear message from the Court is that although access to intermediate courts of appeal should be provided for under the *Code* "... to perform their error protection function in the development of this part of the law...", that is not now the case.

[19] Therefore, I concur with the Crown's submission based on *Laroche* that the appellant has no right of appeal to this Court arising from the dismissal by the applications judge of his request for the release of some or all of the seized funds to cover his legal expenses.

DISPOSITION

[20] For the reasons set forth, this Court grants the application by the Crown striking the appellant's notice of appeal.

M.F. Harrington, J.A.

I concur:

M.A. Rowe, J.A.

I concur:

C.W. White, J.A.