



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

Citation: *Rowe v. Newfoundland and Labrador*, 2017 NLCA 17

Date: February 21, 2017

Docket: 201601H0108 and 201601H0109

BETWEEN:

JONATHAN ROWE

APPELLANT/APPLICANT

AND:

HER MAJESTY THE QUEEN IN RIGHT OF
NEWFOUNDLAND AND LABRADOR

RESPONDENT

AND:

NEWFOUNDLAND AND LABRADOR
LEGAL AID COMMISSION

RESPONDENT

Coram: Hoegg J.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
General Division, 201601G4405
(2016 NLTD(G) 155)

Application Heard: January 24, 2017

Judgment Rendered: February 21, 2017

Reasons for Judgment: Hoegg J.A.

Counsel for the Applicant: Robert Buckingham

Counsel for the Respondent: David Rodgers

Counsel for Legal Aid: Derek Hogan

MEMORANDUM OF DISPOSITION

Hoegg J.A.:

INTRODUCTION

[1] Jonathan Rowe is charged with being an accessory after the fact to murder. Approximately three years after he was charged, he made two applications to the Supreme Court of Newfoundland and Labrador Trial Division for counsel of choice funded by the Attorney General. Both applications were denied. Mr. Rowe did not appeal either denial decision within the required time and now applies to this Court for extensions of time within which to do so.

[2] In his first application for counsel of choice, Mr. Rowe argued that he was unable to form a solicitor-client relationship with any of the three lawyers provided to him by the Newfoundland and Labrador Legal Aid Commission. (He declined the offer of a fourth Legal Aid lawyer.) Justice George Murphy heard the application and dismissed it on May 27, 2016 for the reason that there was no objective evidence to support Mr. Rowe's position.

[3] In Mr. Rowe's second application for counsel of choice, he argued that section 31(3.1) of the *Legal Aid Act*, RSNL 1990, c. L-11 ought to be interpreted to permit persons charged with accessory after the fact to murder to select counsel of their choice from a panel of private lawyers established under the Legal Aid Regulations. Justice David Orsborn dismissed this application on September 26, 2016, reasoning that the wording of section 31(3.1) of the *Act* could not be interpreted to extend counsel of choice to persons facing charges for offences other than the listed ones of murder, manslaughter, or infanticide.

[4] Mr. Rowe did not appeal either of the Trial Division decisions within the applicable time periods. He elected to represent himself and has been doing so save in respect of his applications to this Court, filed on November

10, 2016, for extensions of time to file Notices of Appeal. Of note is that an *amicus curiae* was appointed to assist the court with Mr. Rowe's trial shortly after June 29, 2016.

ANALYSIS

[5] Mr. Rowe's applications for extensions of time were heard together by this Court on January 24, 2017. Despite the applications being made in the context of criminal charges, they are civil proceedings (*Pardy v. Newfoundland and Labrador*, 2014 NLCA 37, paras 10-40). As such, they are governed by rule 14 of the new *Court of Appeal Rules*, NLR 38/16 which permits the Court to abridge times prescribed by the *Rules*.

[6] In *Fahey v. Newfoundland (The Law Society of)*, 2003 NLCA 8, 221 Nfld. & P.E.I.R. 79 at para. 10, this Court set out factors to be considered in applications to extend the time for filing a notice of appeal. The factors continue to provide a useful analytical framework for determining whether such an application should be granted. They are:

1. whether the appellant had a *bona fide* intention to appeal within the appeal period;
2. whether there is a reasonable excuse for the failure to comply with the rule;
3. the potential merits of the appeal; and
4. the presence of any exceptional or special circumstances justifying or working against the fairness of an extension.

Bona Fide Intention, Reasonable Excuse and Exceptional or Special Circumstances

[7] In this case, Mr. Rowe candidly admits that he had no *bona fide* intention to appeal either of the two Trial Division decisions within the applicable appeal periods. Neither does he say that he was trying to meet the time requirements but unable to do so. He simply says that he decided not to appeal the decisions because he wanted to get on with his trial rather than have it delayed by appeals. While Mr. Rowe makes no excuse for missing the deadlines, he does explain why he decided to apply for extensions after the appeal deadlines had passed. In this regard he recounts his experience at

a pre-trial conference in October 2016 which caused him to change his mind about appealing.

[8] At the pre-trial conference Mr. Rowe learned that evidence which he believes would be helpful to his defence might no longer exist. The evidence in question is communications between Philip Pynn, who was convicted of manslaughter in respect of the same incident from which Mr. Rowe's charge arises, and his (Mr. Pynn's) lawyer between July 9 and 11, 2011. After learning that these communications might no longer exist, Mr. Rowe consulted with private counsel, and thereafter decided to attempt to appeal the two Trial Division decisions. He maintains that he was advised that he would be entitled to these communications on the basis of the "innocence at stake" exception to solicitor-client privilege, and also that their unavailability might give him grounds for a mistrial. Mr. Rowe has since been informed that the communications still exist.

[9] In order to determine if the circumstances which caused Mr. Rowe to change his mind justify exemptions from the appeal timelines, it is useful to consider how the communications Mr. Rowe seeks relate to his applications for counsel of choice.

[10] The record shows that Mr. Rowe knew that he wanted the communications between Mr. Pynn and his counsel well before the pre-trial conference in October 2016. In fact, Mr. Rowe took steps himself to obtain the communications by filing a court application, although that application has not yet been heard.

[11] Mr. Rowe gave evidence on his applications in this Court. This was because he did not file supporting affidavits with his applications, and counsel for Legal Aid wanted Mr. Rowe's application involving Legal Aid grounded by his affidavit. Mr. Rowe testified under oath that the facts in his applications were true.

[12] The solicitor-client privilege that appears to *prima facie* protect the communications from production belongs to Mr. Pynn, who is able to waive it at any time should he care to do so. Moreover, Mr. Pynn is an available factual witness who can testify to his knowledge of Mr. Rowe's involvement in the matter. Since Mr. Pynn has been convicted and sentenced, he would not likely be in any jeopardy if he were to testify at trial to his knowledge of Mr. Rowe's involvement which Mr. Rowe believes would be of assistance to him. Moreover, Mr. Pynn would enjoy *Charter* protection from self-

incrimination respecting such testimony. Mr. Pynn could also free his counsel to testify to the privileged information in the communications by waiving his privilege, and his counsel could testify in any event as a fact witness to factual matters she witnessed. It was revealed during the hearing that Mr. Pynn's counsel testified at Mr. Rowe's preliminary inquiry.

[13] One has to wonder why Mr. Rowe is sure that these communications are of assistance to him. If he witnessed these communications, then they are not privileged. In any event, to engage the "innocence at stake" exception to privileged solicitor-client communications, Mr. Rowe must prove that he cannot raise a reasonable doubt without the privileged communications (*R. v. McClure*, 2001 SCC 14, [2001] 1 S.C.R. 445). This is a tall order in the above circumstances. Regardless, it is difficult to see how the communications, which would have to be introduced through a witness who could speak to their reliability whatever their content and in whatever form they exist, relate to the Trial Division decisions he seeks to appeal.

[14] There was some additional questioning of Mr. Rowe. It was apparent to me from the additional questioning that production of the sought-after communications had in all likelihood been considered by his previous counsel and also that Mr. Rowe has been made aware of the possible implications and risks associated with production of the communications he seeks.

[15] Accordingly, I do not see, nor did Mr. Rowe demonstrate in his testimony or in his applications, any connection between his seeking the communications between Mr. Pynn and his lawyer and why he ought to be granted counsel of choice. There is no connection between the two, and no connection between Mr. Rowe having learned at the pre-trial conference that the communications may no longer exist (now known to be incorrect) and entitlement to counsel of choice. Mr. Rowe remains entitled to representation by other Legal Aid counsel – he must simply apply and new counsel will be appointed. Legal Aid counsel is just as well positioned to take instructions from Mr. Rowe respecting his desire to obtain the communications as his counsel of choice would be. I am therefore not persuaded that the circumstances and/or timing of Mr. Rowe's change of mind to appeal the Trial Division decisions constitute an exceptional or special circumstance which would justify granting Mr. Rowe his counsel of choice.

The Merits of the Appeals

[16] As a general rule, there is no point to granting extensions of time to appeal in cases where the grounds for appeal do not have merit (see *R. v. Sawiki*, 2013 NLCA 35 at para. 22). Merit in this context has been interpreted to mean “an arguable point” (*L.T. v. Director of Child, Youth and Family Services (No. 2)*, 2011 NLCA 1, 304 Nfld. & P.E.I.R. 134). (See also *Winters v. Nor-Lab Limited*, 2017 NLCA 7 and *Ellis v. Pelley Estate*, 2016 NLCA 77 where the merits of appeals were considered in the context of reinstating abandoned appeals).

[17] The basis for Mr. Rowe’s application for counsel of choice made before Justice Murphy was that he was unable to form a solicitor-client relationship with any of the three staff lawyers assigned to his case because “he did not trust them and did not have confidence in them.”

[18] In the notice of appeal which Mr. Rowe seeks to file respecting Justice Murphy’s decision, he alleges that Judge Murphy “failed to understand or misapprehended or failed to review” the evidence respecting the relationship between Mr. Rowe and the Legal Aid lawyers who had been assigned to his case.

[19] Justice Murphy heard evidence from the three former lawyers and from Mr. Rowe. He rejected Mr. Rowe’s contention that he could not form a solicitor-client relationship with any of them as there was no objective evidence supporting it. In the course of doing so he made factual and credibility findings which Mr. Rowe does not challenge in his proposed notice of appeal. Neither does Mr. Rowe allege any palpable and overriding error on the part of the Judge; he simply alleges a failure on the Judge’s part to “put the evidence into a proper context” and seeks a different result than the one arrived at by Justice Murphy.

[20] Such assertions do not provide an arguable basis upon which it could be said that Justice Murphy erred in his assessment of the evidence, factual findings, or ultimate ruling. I therefore conclude that an appeal of Justice Murphy’s decision has little to no merit.

[21] Justice Orsborn’s decision was based on a question of law requiring interpretation of a statutory provision in the *Legal Aid Act*. Mr. Rowe does not argue that the Judge erred in his articulation of the principles of statutory interpretation or in their application to his application. Rather, he simply

asserts that the result ought to have been different on the basis that the offence of accessory to murder carries the potential sentence of life imprisonment like the offences of murder, manslaughter and infanticide for which counsel of choice can be provided. Many criminal offences carry the potential for life imprisonment; some examples are impaired driving causing death, robbery, stopping mail with intent, and offences related to the *Riot Act* proclamation, among approximately forty others. Accordingly, the fact that a conviction for accessory to murder carries the same potential sentence as sentences for conviction of murder, manslaughter and infanticide cannot constitute a stand-alone basis for extending the right to counsel of choice for those charged with accessory to murder.

[22] I have reviewed Justice Orsborn's decision. It is comprehensive and well-reasoned. While I am loathe to definitively pronounce that any appeal on a question of law involving statutory interpretation is devoid of merit, I do not see any point or reasonable basis, in Mr. Rowe's proposed notice of appeal or submissions, on which it could be argued that Justice Orsborn was in error.

[23] In summary, in all of the circumstances, I am not persuaded that Mr. Rowe's requests for extensions of time to file a notice of appeal respecting either of the Trial Division decisions ought to be granted.

[24] Mr. Rowe's applications are denied.

L. R. Hoegg J.A.