



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

Citation: *R. v. Bennett*, 2017 NLCA 59

Date: October 10, 2017

Docket: 201601H0001

BETWEEN:

JOSHUA AARON BENNETT

RESPONDENT/APPELLANT

AND:

HER MAJESTY THE QUEEN
IN RIGHT OF THE PROVINCE OF
NEWFOUNDLAND AND
LABRADOR

APPLICANT/RESPONDENT

AND:

HER MAJESTY THE QUEEN IN RIGHT
OF CANADA

RESPONDENT

Coram: Welsh, White and Hoegg JJ.A.

Court Appealed From: Provincial Court of Newfoundland and Labrador
Stephenville

Application Heard: September 18, 2017

Decision Rendered: October 10, 2017

Reasons for Decision by Welsh J.A.
Concurred in by White J.A.
Separate Concurring Reasons by Hoegg J.A.

Counsel for the Respondent/Appellant: Aaron Felt
Counsel for the Applicant/Respondent: Iain R. W. Hollett
Counsel for the Respondent in Right of Canada: Elaine M. Reid

Welsh J.A.:

[1] This is an application by the Provincial Crown for a re-hearing of the appeal following release of the Court's decision in *R. v. Bennett*, 2017 NLCA 41, on the basis that the Provincial Crown did not have the opportunity to be heard on the appeal.

[2] I begin with a clear and unequivocal statement that the parties to an appeal have the right to be heard and to have their submissions given due consideration. However, that principle will not always result in a re-hearing of an appeal.

[3] The circumstances that resulted in the Provincial Crown not being heard in this case are unusual. As set out in the decision, it became apparent at the hearing that the notice of appeal, drafted by Mr. Bennett without the aid of counsel, was deficient. While the Provincial Crown received a copy of the notice of appeal, the grounds of appeal related only to offences under the *Controlled Drugs and Substances Act*, falling within the Federal Crown's bailiwick. There was no mention of the sentences for breaches of recognizance and probation, matters dealt with by the Provincial Crown.

[4] At the hearing, when the deficiency in the notice of appeal became apparent, counsel for the Federal Crown consented to amending the notice of appeal to include all the offences for which she had responsibility. The Court considered that it was unnecessary to delay the hearing to provide notice of the change in circumstances to the Provincial Crown. It is clearly stated in the decision of the majority that the sentences for breaches of recognizance and probation were not under appeal.

[5] However, in applying the analytical approach to sentencing for multiple convictions as set out in *R. v. Hutchings*, 2012 NLCA 2, 316 Nfld.

& P.E.I.R. 211, the principle of totality was engaged. At that stage, the sentences imposed by the trial judge for the breaches of recognizance and probation were factored into the assessment. While the length of the sentences for those offences was not altered, the effect of the totality analysis was to change the manner of serving those sentences from incarceration to a conditional sentence. This flowed from the decision of the majority to adjust the sentences for the offences dealt with by the Federal Crown, which were the primary offences, and to impose a conditional sentence rather than a period of incarceration. Since the length of sentences for the offences dealt with by the Provincial Crown was not altered, it was considered that to change the manner of serving those sentences did not engage a need to hear submissions from the Provincial Crown.

[6] That said, in the circumstances, the more appropriate approach may have been to separate the sentences for breaches of recognizance and probation, a total of three months and fifteen days, from the sentences for the remaining offences. Mr. Bennett had already served more than three months and fifteen days in prison. Therefore, the Court could have ordered that he had already served his sentences for the breaches of recognizance and probation. The result would have been to deal only with the federal offences for purposes of totality.

[7] In terms of the effect on Mr. Bennett, either approach would have led to the same result since the time he had served in prison was subtracted from the total sentence.

[8] The Provincial Crown also objected to the manner in which the fifteen day portion of the sentence for a breach of probation was dealt with in the decision. It may have been desirable to apply that reduction for purposes of totality to one of the federal offences. Again, there is no practical effect. At the final stage of the totality analysis, where there is a reduction in the total sentence, the adjustment of sentences may be done in any manner that achieves the determined total sentence.

[9] In the result, I would deny the application by the Provincial Crown for a re-hearing of the appeal.

I Concur: _____

C. W. White J.A.

Separate Concurring Reasons by Hoegg J.A.

Hoegg J.A.

[10] I agree that the Crown's application for a re-hearing of Mr. Bennett's appeal be dismissed. However, I arrive at that conclusion in a somewhat different manner than my colleague.

[11] In this case the provincial Crown had no notice that the sentences for the matters of which it had carriage would be altered or affected by the Court's decision. Mr. Bennett's notice of appeal, which was served on the provincial Crown, involved only his two-year sentence for the federal offence of possession for the purpose of trafficking in cocaine. Consequently, the provincial Crown elected not to appear. After amending his notice of appeal at the hearing, Mr. Bennett's appeal still involved only the sentences respecting several federal drug offences. And, he did not argue on appeal that the sentences he received for the provincial offences should be altered or affected. Consequently, the Court did not consider it necessary to notify the provincial Crown and the provincial Crown did not appear.

[12] A majority of the Court (the Court) allowed Mr. Bennett's sentencing appeal. In the course of conducting a totality analysis respecting its sentence, the Court affected the provincial Crown's rights and interests in two ways:

- (1) it reduced the sentence for the June 15, 2011 breach of probation conviction by 15 days; and
- (2) it varied the service of the sentences for the provincial offences from incarceration to conditional (to be served in the community).

I consider this result to be an unintended breach of the provincial Crown's rights to notice and to be heard respecting Mr. Bennett's appeal. In other words, the provincial Crown was denied procedural fairness.

[13] Upon receipt of the Court's decision, and before a final order was filed, the provincial Crown filed its application for a rehearing. The provincial Crown argues that a miscarriage of justice occurred by virtue of the Court allowing "the proceedings to occur without a party present and without notice that an interest it protects [was] being impugned", and that a rehearing of the appeal should obtain.

[14] Although the provincial Crown was a party to the trial proceedings involving Mr. Bennett and was given notice of his appeal, it was not, strictly speaking, a party to the appeal. Neither is it noted to have been a party in the style of cause of the Court's decision. Nevertheless, I will refer to the provincial Crown as a party because of its original status and because its interests were affected by the decision.

[15] The jurisprudence suggests that miscarriage of justice or the potential for a miscarriage of justice are the primary reasons for rehearing an appeal (*R. v. Hummel*, 2003 YKCA 4 at para. 25, leave to appeal to SCC refused, 29406 (December 18, 2003), *R. v. Chudley*, 2015 BCCA 391 at para. 7, and *R. v. McPherson*, 2010 NWTCA 3 at para. 8, 487 A.R. 157). Finality is also an important consideration in deciding whether to rehear an appeal, as Charron J.A. in *R. v. E.F.H.*, (1997) 33 O.R. (3d) 202 (C.A.), leave to appeal to SCC refused, 25321 (September 18, 1997) explained at paragraph 34:

There are sound policy reasons for so limiting the power to reopen appeals. An unlimited discretion to reopen appeals that have been heard on their merits is not only unjustifiable as an ancillary power of the court, but would do significant harm to the criminal justice system. Finality is an important goal of the criminal process. Statutory rights of appeal provide a carefully crafted exception to the general rule that trial decisions are final. By providing broad rights of appellate review in criminal matters, Parliament recognizes that fairness and justice interests require that the accused have a full opportunity to challenge a conviction even though that opportunity will prolong the process. Once those broad appellate rights have been exercised and the merits of the appeal decided, then absent an appeal to a higher court, finality concerns must become paramount. Those affected by the process should be entitled to rely on the appellate decision and conduct themselves accordingly. The appellate process cannot become or even appear to become a never-closing revolving door through which appellants come and go whenever they propose to argue a new ground of appeal.

[16] A party's right to be heard when its interests are at stake is a principle of natural justice. If the party's security of the person is engaged, it can also be a principle of fundamental justice under section 7 of the *Charter*. However, the *Charter* would not apply in this case as the provincial Crown cannot be said to have security of the person. In any event, the right to be heard is fundamental to the proper functioning of our justice system.

[17] Abrogation of the right to be heard was held to be a miscarriage of justice by this Court in *R. v. Prior*, 2010 NLCA 61, 301 Nfld. & P.E.I.R. 138. At trial, Mr. Prior had been denied the right to make final submissions on a charge of criminal libel. He was ultimately found not guilty by reason of insanity. His appeal to this Court was allowed and a new trial was ordered on the basis that a miscarriage of justice had occurred. In so ruling, this Court, per White J.A., stated at paragraph 24:

No curative provision can be available relative to a trial where there are no submissions invited before a decision. An opportunity to make submissions is so fundamental that a miscarriage of justice will result if a decision is rendered before submissions are made.

[18] The Supreme Court of Canada considered the effect on a party whose interest was decided without notice to him in *R. v. Jacobs*, [1971] S.C.R. 92. Mr. Jacobs had failed to appear at his appeal hearing so the Court dismissed his appeal. It was later learned that he had had no notice of the hearing date, so he applied to the appeal court for a rehearing. The appeal court rescinded its previous decision and granted his application. The Crown appealed to the Supreme Court, which upheld the appellate court's decision to rescind, saying that Mr. Jacobs was due the remedy he sought *ex debito justitiae*.

[19] In *Supermarchés Jean Labrecque Inc. v. Flamand*, [1987] 2 S.C.R. 219, the Supreme Court of Canada applied the *audi alteram partem* rule in allowing an appeal and reinstating a lower court's decision. The lower court had issued a writ of evocation because the court had changed the location of a hearing without notice to the parties. At page 233 of the decision, L'Heureux-Dubé, J. described the importance of the right to be heard:

The rule is so fundamental in our legal system that I do not think there is any necessity to discuss it at length.

The right of a party to be heard [...] long antedates the Canadian Charter of Rights and Freedoms, which was not relied upon here, if only because it was not in effect at the time this case began.

Respect for the rule of law goes back to the origins of our democratic institutions and is part of our most cherished legal heritage.

[20] This Court considered circumstances warranting reconsideration of an appeal in *Metal World Inc. v. Pennecon Energy Ltd.*, 2014 NLCA 10, 346 Nfld. & P.E.I.R. 302, a civil case. At paragraph 17, the Court identified several examples of situations where reconsideration would be appropriate in cases where the final order had not yet been filed. The following example is relevant to this case:

3. The applicant establishes that the fundamental basis for the decision is lacking. For example, without consideration of the merits, the appeal is struck out for non-appearance, but the party had not been served (*Marlay Construction Ltd. v. Mount Pearl (City)* (1997), 147 Nfld. & P.E.I.R. 191 (NFCA), at paragraph 4). See also: *Beanland*, at paragraph 40. ...

[21] I also note this Court's statement in *Aylward v. The Law Society of Newfoundland and Labrador*, 2013 NLCA 68, 344 Nfld. & P.E.I.R. 62 at para. 19:

[19] Where a party alleges a breach of the duty of procedural fairness, the Court does not need to engage in an assessment of the appropriate standard of review: *Moreau-Bérubé v. New Brunswick (Judicial Council)*, 2002 SCC 11, [2002] 1 S.C.R. 249 at para. 74. If the tribunal being reviewed failed to accord appropriate procedural safeguards to an interested party, the decision must be set aside. *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at para. 43. See also *McAdam v. Law Society of Newfoundland and Labrador*, 2010 NLTD 39, 302 Nfld. & P.E.I.R. 284, at para. 11, citing *Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, 2001 SCC 4, [2001] 1 S.C.R. 221 at para. 65.

[22] The jurisprudence is replete with references to the fundamental nature of the right to notice and the right to be heard and rulings upholding a party's right to those rights before a decision affecting the party is made. These rights are so fundamental that there will be very few and very limited circumstances in which an appellate court would not rehear an appeal when its decision was made in breach of them.

[23] Despite violation of the principle in this case, I agree with my colleague that this is not a case for rehearing. I believe that my reasons – more practical than principled – have logic in the circumstances.

[24] The Court's alteration of the sentencing judge's sentence was principally based on its determinations of sentences for Mr. Bennett's convictions respecting the federal drug offences. The federal Crown was present at the appeal hearing and had the opportunity to address the Court in relation to matters respecting those sentences. In regard to those matters, its interests were similar if not the same as those of the provincial Crown. This is not to minimize the role of the provincial Crown, which is a different entity than the federal Crown, or say that the submissions of the federal and provincial Crowns would have been the same, or say that the provincial Crown's participation and submissions would not have been persuasive. It is only to say that there was representation respecting the interests of provincial Crown and the Court's decision did not affect the interests of the provincial Crown differently than it affected the interests of the federal Crown.

[25] As well, the Court's alteration of the sentence for the June 15, 2015 provincial offence and the conversion of incarcerating sentences to conditional sentences for the provincial offences were minor adjustments made to give effect to the Court's sentencing reasoning. In other words, the effect on the interests of the provincial Crown could be said to be incidental; the foundation for the Court's decision was in relation to the federal offences, and its decision would not likely have been altered by the provincial Crown's participation or submissions. In fact, the Court could come to exactly the same conclusion after hearing the provincial Crown. Or if persuaded to leave the sentences for the provincial offences untouched, and given that Mr. Bennett had already served incarcerating time in excess of the total sentence for the provincial offences, the same result for Mr. Bennett could obtain on the Court's reconfigured math. Accordingly, little would be gained by rehearing the matter.

[26] In this regard I refer to some of the reasoning in *McPherson*, where the court held that the alleged error in that case, even if it were substantiated, would not likely have affected the lower court's decision:

[8] The applicant has not shown that the potential for a miscarriage of justice in his case overrides the need for finality in criminal litigation. The trial judge did not overlook an argument or misapprehend evidence, as both parties agreed that the pre-amendment legislation should apply. As in *Hummel*, the application to re-open seeks to make up for a potential error of counsel. Even if the trial judge had applied the amended legislation, with the interpretation mandated by *Johnson*, it is not clear that he would have reached a different conclusion. The trial judge

sought to apply what he thought was the more lenient legislation and still imposed an indeterminate sentence of detention.

[27] I also refer to the decision of the Saskatchewan Court of Appeal in *Sayer v. Minister of Social Services* (1983), 28 Sask. R. 111 in which the Court did rehear a case where an affected party had not been heard. At the rehearing, the Court noted that “the issues that could prejudicially affect [the party who was unrepresented] were fully argued by [another party]” and that “no conflict was apparent” between those parties’ interests (paragraph 2). I mention this case only for the purpose of showing that compatibility of interests between those originally argued on appeal and those missing from the appeal and sought to be argued on rehearing can be a relevant factor for a court when considering whether to reconsider a case.

[28] In the circumstances of this case, I am not convinced that the majority decision would have been different had the provincial Crown been heard or that the Court’s decision would be materially different after a rehearing. While a miscarriage of justice did occur, which in principle justifies a rehearing, in the very limited circumstances of this particular case, I would not order a rehearing of Mr. Bennett’s appeal.

[29] In the result, I would deny the provincial Crown’s application.

L. R. Hoegg J.A.