



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

Citation: *R. v. Barry*, 2019 NLCA 8

Date: February 15, 2019

Docket Number: 201801H0057

BETWEEN:

KEITH BARRY

APPELLANT

AND:

HER MAJESTY THE QUEEN

RESPONDENT

Coram: Welsh, Hoegg and O'Brien JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
General Division 201706G0007
(2018 NLSC 86)

Appeal Heard: October 26, 2018

Judgment Rendered: February 15, 2019

Reasons for Judgment by: Welsh J.A.

Concurred in by: Hoegg and O'Brien JJ.A.

Counsel for the Appellant: Donald A. MacBeath Q.C.

Counsel for the Respondent: Arnold Hussey Q.C.

Welsh J.A.:

[1] On September 1, 2016, Keith Barry was convicted, on summary conviction, of touching and invitation to touch for a sexual purpose, sexual assault, and breach of probation, contrary to provisions of the *Criminal Code*, and of supplying liquor and cigarettes to a minor, contrary to provincial legislation. On November 16, 2016, he was sentenced to fourteen months imprisonment for the *Criminal Code* offences and fines for the provincial offences. He was released from prison on June 9, 2017, having served his sentence.

[2] His appeal against the convictions was dismissed by the summary conviction appeal judge. Mr. Barry seeks leave to appeal that decision and, if granted, appeals against his convictions. The issue turns on whether the refusal of the trial judge to grant an adjournment at the request of Mr. Barry's counsel when Mr. Barry was not present in court resulted in a miscarriage of justice. Mr. Barry is pursuing his appeal, despite having served his sentence. An order of the trial judge pursuant to section 161 of the *Criminal Code* significantly restricts his freedom and ability to obtain certain types of employment for ten years.

BACKGROUND

[3] The circumstances that led to this appeal are stated comprehensively in the decisions of the trial judge (2016 NLPC 0816A00086) and the summary conviction appeal judge (2018 NLSC 86).

[4] On May 4, 2016, when Mr. Barry appeared in provincial court, the matter was adjourned to May 26, 2016 to allow time for the Crown to determine how it would proceed with the *Criminal Code* charges. On that date, the Crown elected to proceed summarily and Mr. Barry pleaded not guilty to all charges. The trial was set for July 18, 2016 in Grand Bank. On that date, Mr. Barry advised the court that he had dismissed his counsel due to a breakdown of the solicitor-client relationship. The matter was adjourned to August 30, 2016.

[5] In his decision on the summary conviction appeal, the judge wrote, regarding the August 30th hearing:

[25] In the same application, Mr. Barry claimed that on August 25 or 26, 2016, Barbara Barker, a staff solicitor with the Newfoundland and Labrador Legal Aid Commission contacted him by telephone. Mr. Barry said that Ms. Barker advised in their conversation that his file had just been assigned to her and she needed more time

to prepare. Mr. Barry said Ms. Barker told him she would file a written application with the Provincial Court to adjourn his trial then scheduled for August 30, 2016. He says Ms. Barker also told him to attend at Provincial Court on August 30, 2016 to hear if the trial judge granted the adjournment.

[26] Mr. Barry explained in paragraph one of his Interlocutory Application what happened when he attended Court: “August 30, 2016, I attended the Courthouse at Grand Bank. I suffered a severe anxiety attack and left the Courthouse. I had previously been treated by a physician for anxiety and suffered a panic attack when I saw the witnesses for the Crown were in attendance, realized that my counsel’s Application for an adjournment might not be granted and that the trial may proceed before I had a chance to properly instruct my counsel”.

[27] The trial judge rejected Ms. Barker’s application to adjourn the trial as Mr. Barry anticipated and proceeded *ex parte* on August 30, 2016, but not before allowing Ms. Barker to withdraw as Mr. Barry’s counsel. However, the trial judge appointed Ms. Barker to cross-examine the complainant. On September 1, 2016, as I noted earlier, after the trial judge heard oral submissions from Crown counsel, he convicted Mr. Barry of all offences and issued a warrant for Mr. Barry’s arrest.

ANALYSIS

Leave to Appeal

[6] Leave to appeal is necessary because this is an appeal following a decision of a summary conviction appeal judge (section 839 of the *Criminal Code*). The test to be applied is set out in *R. v. Newfoundland Recycling Ltd.*, 2009 NLCA 28, 284 Nfld. & P.E.I.R. 153:

[9] Thus, to obtain leave to appeal pursuant to s. 839(1):

(a) the appeal must “be taken on a ground that involves a question of law alone”, and

(b) the ground(s) of appeal must be such that:

(i) either the ground of appeal has a “reasonable possibility of success”, or

(ii) “the proposed question of law [has significance] to the administration of justice”.

[7] In this case, the issue of a miscarriage of justice, resulting from the trial judge’s refusal to grant defence counsel’s request for an adjournment, raises a question of law that satisfies the first criterion. This ground also satisfies both

components of the second criterion, that is, that the appeal has a reasonable possibility of success and has significance to the administration of justice, though only one of those is required to satisfy the test.

[8] Accordingly, I would grant leave to appeal.

Miscarriage of Justice

[9] In refusing defence counsel's request for an adjournment, the trial judge referred to "docket time management" and "the absconding accused". Regarding the first, he stated:

[6] In this matter there was no such agreement [between counsel as to the requested adjournment]. On the contrary, Crown counsel objected to the late request for the further delay, and pointed out that the first trial date (July 18, 2016) had been lost when the accused had discharged his counsel on the day set for trial. The accused had claimed that he was going to retain a member of the private Bar, but then [on Monday, August 29, 2016] had filed an application for another adjournment on the day before the trial date [Tuesday, August 30, 2016]. Counsel for the accused, Crown counsel, and all of the witnesses were at the courthouse for the trial.

[7] On balance, the late request for further delay should have been denied. However, it became moot, because the accused absconded.

[10] The trial judge had granted an adjournment on the first trial date when Mr. Barry advised the court that he had dismissed his counsel due to a breakdown in the solicitor-client relationship. There is no indication that Mr. Barry was using dismissal of his counsel on July 18, 2016 in order to delay the matter. The subsequent application for an adjournment, filed on August 29, 2016, was made by his counsel and stated:

1. Counsel has had insufficient time to prepare for trial. The file was assigned on Thursday, August 25th and the physical file was received Friday, August 26th. Counsel has not had the opportunity to review the disclosure with the accused. ...

[11] Inconvenience to the court, the Crown and the witnesses, as referenced by the trial judge, may be a relevant factor when a judge considers whether to grant or refuse a request for an adjournment. It is for this reason that it is important, where possible, to avoid a last minute request. However, in this case, the late request for an adjournment on the second trial date came from defence counsel, a staff solicitor with the Legal Aid Commission. As indicated in her application, with attached affidavit, she had been assigned the case on August 25th and had not had an opportunity to meet with her client. Counsel advised the court that

she was unprepared and had not had an opportunity to obtain instructions from her client. There is no indication that Mr. Barry delayed in applying to the Legal Aid Commission for counsel or that the Commission did not act as promptly as possible in assessing Mr. Barry's application and assigning counsel, given its processes and the fact of summer holidays during July and August.

[12] In addition, the trial judge expressed concern about the court docket. The summary conviction appeal judge referred to the transcript of the August 30th proceeding:

[28] ...

- After some further discussion between the trial judge and Ms. Barker, the trial judge stated: "With – this is the second day that we've had for the trial scheduled. We've already lost one day on the court docket. I'm not inclined to lose another. At the end of the day, the man is charged with a number of summary conviction offences. Strictly speaking the accused doesn't have to be in court. We can have his trial *ex parte* and that's, I guess, what we'll end up doing. Ms. Barker doesn't have instructions from him and so, it will be unfair to her to ask her to represent him"

[13] The trial in this matter was set for one day in Grand Bank. The Crown had not determined that it would proceed summarily with the charges until May 26, 2016. There was no indication that the docket in Grand Bank could not accommodate a one-day trial without undue delay had the August 30th request for an adjournment been granted. The trial judge did not explain his concern with the docket other than to comment that the matter had not proceeded as expected on July 18th when it was first scheduled.

[14] Rather than considering defence counsel's request on the basis that she had not yet obtained instructions from or conferred with her client, the trial judge focused on the fact that Mr. Barry was not present in court. On the appeal in this Court, Crown counsel conceded that Mr. Barry's presence was not a relevant consideration since he was represented by counsel who made the request for an adjournment to allow her time to assess the case and speak with Mr. Barry. The request was made by application in writing at the earliest possible opportunity.

[15] Further, while the Crown elected to proceed summarily, the *Criminal Code* charges were serious with potentially significant ramifications for Mr. Barry. Indeed, he was ultimately sentenced to fourteen months imprisonment together with ancillary orders, including a section 161 order restricting his freedom and ability to obtain certain types of employment for ten years.

[16] In the circumstances, it cannot be said that the trial judge exercised his discretion judicially when he refused defence counsel's request for an adjournment. He emphasized irrelevant facts, including Mr. Barry's absence, and failed to consider relevant facts as set out above. The effect of his decision was to convict Mr. Barry on an *ex parte* trial, ignoring the concerns of Mr. Barry's counsel who found it necessary to apply to withdraw as counsel.

[17] In dismissing Mr. Barry's appeal, the summary conviction appeal judge summarized:

[49] From what the trial judge said on the record and supplemented with his written reasons three (3) days later, it is clear that the trial judge balanced the various interests affected by Mr. Barry's request for a postponement. These included Mr. Barry's right to be present for his trial (or his wish not to be present as it appeared to the trial judge); the Crown's interest in going ahead with the trial, in that its witnesses were present for a second time; the public interest in delivering justice in a timely and effective manner; and the trial judge's responsibility to effectively manage his docket.

[18] The summary conviction appeal judge erred by failing to address the trial judge's focus on considerations that ignored defence counsel's valid request for time to confer with, advise and seek instructions from her client. As discussed above, in the particular circumstances of this case, the trial judge's refusal to grant the requested adjournment and his decision to proceed *ex parte* on serious charges without the benefit of defence counsel cannot be supported as a judicial exercise of discretion. A miscarriage of justice was the result.

SUMMARY AND DISPOSITION

[19] In summary, the test for granting leave to appeal is satisfied on the basis that the issue of a miscarriage of justice raises a question of law that has a reasonable possibility of success and, in addition, has significance to the administration of justice. In the circumstances, the trial judge and the summary conviction appeal judge each erred by emphasizing irrelevant factors, in particular, Mr. Barry's absence from the court room, and by failing to consider relevant factors, particularly defence counsel's request, with reasons, for an adjournment.

[20] In the result, I would grant leave to appeal, allow the appeal, set aside the decision of the trial judge, and order a new trial.

B. G. Welsh J.A.

I Concur: _____

L. R. Hoegg J.A.

I Concur: _____

F. P. O'Brien J.A.