



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

Citation: *R. v. Kennedy*, 2020 NLCA 11

Date: March 18, 2020

Docket Number: 201901H0065

BETWEEN:

NICHOLAS KENNEDY

APPELLANT

AND:

HER MAJESTY THE QUEEN

RESPONDENT

Coram: Welsh, White and Goodridge JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
General Division 201703G0013
(2019 NLSC 135)

Appeal Heard: March 18, 2020

Decision Rendered: March 18, 2020 (Orally)

Written Reasons Filed: March 19, 2020

Reasons for Judgment by: Welsh J.A.

Concurred in by: White and Goodridge JJ.A.

Counsel for the Appellant: Philip Whalen

Counsel for the Respondent: Sheldon Steeves

Welsh J.A.:

[1] Nicholas Kennedy was convicted of one count of unlawful confinement and two counts of common assault, contrary to provisions of the *Criminal Code*. A summary conviction appeal judge dismissed Mr. Kennedy's appeal against the unlawful confinement conviction, but allowed the appeal against the convictions for assault. The appeal to this Court centres on the fact that one summary conviction appeal judge heard the arguments and submissions of counsel while a different judge rendered the decision. Leave to appeal is required under the *Criminal Code* for an appeal to this Court from a summary conviction appeal.

[2] At the hearing, leave to appeal was granted, the appeal was allowed and Mr. Kennedy's appeal against his convictions for assault and unlawful confinement were remitted to the summary conviction appeal court for determination. Following are the reasons.

BACKGROUND

[3] Sitting as a summary conviction appeal judge, Peddle J. heard argument and submissions from counsel on June 29 and September 25, 2018. He reserved, but did not render his decision before he retired on January 31, 2019. On July 16, 2019, Boone J., without explanation and without providing counsel with an opportunity to make submissions, handed down a decision.

ISSUE

[4] At issue is whether Boone J. had jurisdiction to render the decision on the summary conviction appeal.

ANALYSIS

Leave to Appeal

[5] Leave to appeal is required where a decision of a summary conviction appeal court is at issue (section 839 of the *Criminal Code*). The applicable test is set out in *Newfoundland Recycling Ltd. v. Newfoundland and Labrador (Attorney General)*, 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”.

[6] Leave to appeal was granted at the hearing on the basis that these requirements were satisfied; that is, the jurisdiction of a judge to decide a matter is a question of law, and there was a reasonable possibility of success on that ground.

Jurisdiction of Boone J.

The Law

[7] Section 31(1) of the *Judicature Act*, RSNL 1990, c. J-4, provides for a judge to enter judgment on a reserved matter within six months after retirement:

When a judge has reserved a decision in a proceeding and retires, ... that judge may, within 6 months after retirement, ... give his or her decision as if that judge were still a judge.

[8] Section 32(1) of the *Judicature Act* addresses rehearing of a matter where a judge has retired:

Where a judge who has reserved a decision in a proceeding

...

(b) retires, ... without having given the decision within the time set out in section 31; or

...

a judge may upon application order that the proceeding be retried or reheard by another judge.

[9] Section 29(1) of the *Judicature Act* provides for substitution of a judge in the case of urgency:

Where ... the office [of a judge] has become vacant, or where there is some other cause, and it is urgent to do so, another judge may sit for that judge to hear or dispose of a proceeding heard in part by that judge.

Application of the Law

[10] Peddle J., sitting as a summary conviction appeal judge, having heard argument and submissions of counsel in June and September 2018, retired on January 31, 2019. Pursuant to section 31 of the *Judicature Act*, he had jurisdiction to file a decision within six months, that is, not later than July 31, 2019. However, Boone J. filed a decision on July 16, 2019, before the time available to Peddle J. had expired. Section 32 of the *Act* provides for another judge to rehear a summary conviction appeal if a retired judge has not rendered a decision “within the time limit set out in section 31”, in this case, July 31, 2019. The necessary condition precedent not having been established, Boone J. could not rely on section 31 for jurisdiction to proceed in Peddle J.’s place.

[11] Further, with respect to section 29 of the *Act*, Boone J. gave no reason that would satisfy the requirement that it be “urgent” to dispose of the matter. Peddle J.’s window for filing a decision had not expired. It may be inferred that a delay of six months, without more, would not satisfy the need for urgency.

[12] In the result, there was no basis in sections 29, 31 or 32 of the *Act* on which Boone J. could rely to assume jurisdiction to decide the summary conviction appeal. Further, if a judge intends to rely on one of those provisions, notice should be given to the parties together with the reason the court is proceeding with a different judge. Consistent with procedural fairness, the parties should have the opportunity to address the Court and make submissions if they so choose.

SUMMARY AND DISPOSITION

[13] In the circumstances, Boone J. was without jurisdiction to render a decision in the summary conviction appeal that had been heard by Peddle J.

[14] In the result, at the hearing, the Court granted leave to appeal, allowed the appeal, set aside the decision of Boone J., and remitted Mr. Kennedy’s appeal against his convictions for assault and unlawful confinement to the summary conviction appeal court for determination.

B. G. Welsh J.A.

I concur: _____

C. W. White J.A.

I concur: _____

W. H. Goodridge J.A.