



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

Citation: *R. v. Stone*, 2021 NLCA 12

Date: February 22, 2021

Docket Number: 2019 01H 0091

BETWEEN:

HER MAJESTY THE QUEEN

APPLICANT/APPELLANT

AND:

BRIAN FREDERICK STONE

FIRST RESPONDENT

AND:

KEVIN BARNES

SECOND RESPONDENT

Coram: Welsh J.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
201701G1879
(2019 NLSC 164)

Application Heard: February 5, 2021

Judgment Rendered: February 22, 2021

Counsel for the Applicant/Appellant: Lloyd M. Strickland

Counsel for the First Respondent: Rosellen Sullivan

Counsel for the Second Respondent: Brian D. Wentzell

Authorities Cited:

CASES CONSIDERED: *R. v. Pardy*, 2014 NLCA 37, 357 Nfld. & P.E.I.R. 49; *R. v. Lévesque*, 2000 SCC 47, [2000] 2 S.C.R. 487; *Taylor v. Braund (Taylor)*, 2018 NLCA 3, 2 C.A.N.L.R. 428; *Newfoundland and Labrador (Treasury Board) v. Newfoundland and Labrador Association of Public and Private Employees*, 2004 NLCA 58, 241 Nfld. & P.E.I.R. 13.

STATUTES and RULES CONSIDERED: *Criminal Code*, sections 551.1, 551.2, 551.3, 625.1; *Canadian Charter of Rights and Freedoms*, section 11(b); *Court of Appeal Criminal Appeal Rules (2002)*, SI/2002-96, rule 19; *Criminal Proceedings Rules of the Supreme Court of Newfoundland and Labrador*, SI/2018-43, rules 7.01 and 7.05.

Welsh J.A.:

[1] Brian Stone is charged with fraud and breach of trust. The charges were stayed at trial following a determination that Mr. Stone’s right to be tried within a reasonable time, guaranteed by section 11(b) of the *Canadian Charter of Rights and Freedoms*, had been infringed. The Crown appeals that decision (the “section 11(b) appeal”).

[2] The focus of this application is whether transcripts of pre-trial case management conferences, which were not available to the judge who heard the section 11(b) application, should be available for purposes of the appeal. Relevant provisions of the *Criminal Code* and the *Criminal Proceedings Rules of the Supreme Court of Newfoundland and Labrador*, SI/2018-43, provide the necessary context for consideration of this issue.

Case Management Conferences – the *Criminal Code* and the *Rules*

[3] Case management conferences are authorized by section 551.1 of the *Criminal Code*. Their purpose is to “assist in promoting a fair and efficient trial, including by ensuring that the evidence on the merits is presented, to the extent possible, without interruption” (section 551.2). The case management judge has authority under section 551.3(1)(g) to adjudicate issues related to:

- (i) the disclosure of evidence,
- (ii) the admissibility of evidence,

- (iii) the *Canadian Charter of Rights and Freedoms*,
- (iv) expert witnesses,
- (v) the severance of counts, and
- (vi) the separation of trials on one or more counts when there is more than one accused; ...

[4] A decision by a case management judge on an issue under section 551.3(1)(g) binds the parties for the remainder of the trial (section 551.3(4)). The binding decision applies whether the case management judge or a different judge hears the trial (section 551.1(4)).

[5] Rules 7.01 and 7.05 of the *Criminal Proceedings Rules of the Supreme Court of Newfoundland and Labrador* address procedural issues related to case management and other conferences. Those rules provide:

7.01(1) This Rule applies to resolution conferences, pretrial conferences and case management conferences, the purposes of which are set out in rules 8.01, 9.01 and 10.01, respectively.

(2) Conferences under these Rules provide an opportunity for full and free discussion between the parties without prejudice to the rights of the parties in any proceedings which take place thereafter.

...

7.05(2) Unless otherwise ordered, conferences shall be held in the absence of the public.

(3) A conference held under subrule (2) shall be recorded and the recording thereof shall remain sealed unless a judge orders otherwise.

[6] I would note here that these rules apply to the Supreme Court of Newfoundland and Labrador. Separate *Rules*, the *Court of Appeal Criminal Appeal Rules (2002)*, SI/2002-96, set the parameters for an appeal. Where there is a dispute regarding the contents of the record for purposes of an appeal, the decision rests with the panel hearing the appeal, or, in appropriate circumstances, with a judge of this Court.

[7] Prior to consideration of the merits of this application, some comment on the interplay between the *Code* and the *Rules* is apposite. While the rules have not been challenged in this appeal, I would make the following observations:

1. The *Criminal Code* deals separately with case management conferences and pre-hearing conferences. Under the *Code*, a judge conducting a case management conference has specified authority to make binding decisions on the matters listed in section 551.3(1)(g). The same clear authority does not apply to pre-hearing conferences which are less structured and are “held prior to the proceedings to consider the matters that, to promote a fair and expeditious hearing, would be better decided before the start of proceedings, and other similar matters, and to make arrangements for decisions on those matters” (section 625.1(1) of the *Criminal Code*).

By contrast, rules 7.01 and 7.05 do not distinguish among resolution, pre-hearing and case management conferences. (For convenience, I will use the term “pre-hearing” to mean the same as “pretrial”, which is used in the *Rules*.)

2. Case management, pre-hearing, and resolution conferences have different purposes and effects. Despite those differences, pursuant to rule 7.05, all “shall be held in the absence of the public”, and all are recorded, with the recordings to be sealed unless released by a judge. While these constraints may be appropriate in the context of resolution conferences, the rationale for their broad application to pre-hearing, and particularly, case management conferences is not apparent.
3. Applying rule 7.05(3), absent an order from a judge unsealing the recording, the contents of a case management conference would not be available for purposes of the trial. This result is inconsistent with section 551.3(1)(g) of the *Code* which provides that certain decisions made at a case management conference are binding for the remainder of the trial. Because of that binding nature, those decisions must be available for purposes of the trial, and must form part of the record for purposes of an appeal.
4. Given the nature of decisions made in a case management conference pursuant to section 551.3(1)(g) of the *Code*, there is serious concern that the exclusion of the public, and the presumptive sealing of the recording of the conference would be inconsistent with the “open courts” principle which is fundamental to our judicial system. It is not apparent why the public should be excluded and

why access to the recordings should be restricted, absent some special reason.

In my view, the same rationale would apply to other decisions that may have a substantive effect on the trial. This case provides an example where decisions as to postponing the matter, made at a case management conference, may be relevant to a section 11(b) application, but may not fall clearly within the scope of section 551.3(1)(g).

5. Without the restrictions imposed by rule 7.05(3), it may be suggested that counsel will not enjoy full and free discussions without prejudice to the parties' rights, as referenced in rule 7.01(2). In my view, that rule would be limited in its application depending on the context and circumstances. Counsel may well have to monitor their submissions to take account of the potential that the recordings may not be sealed.
6. A decision whether to unseal the recording of a case management conference would fall outside the ambit of binding decisions which would form part of the record and on which the parties may rely for purposes of the trial and an appeal.

The result is that, if the case management judge rather than the trial judge decides whether to unseal the recordings of a case management conference, the trial judge loses control over the information and evidence on which he or she will make a decision. That is not problematic where section 551.3(1)(g) applies because those decisions form part of the record for purposes of the trial and an appeal.

However, where the case management judge refuses to unseal all or portions of a case management conference, that judge may preclude the release of information or evidence that is relevant and material to a decision to be made by the trial judge. This case provides an example where the reasons for postponements addressed at a case management conference may be relevant to the section 11(b) analysis.

The result is, among other things, an inefficient use of judicial resources. A decision of a case management judge refusing to

unseal the recordings could not be appealed until the matter has been concluded because the *Criminal Code* does not provide for interlocutory appeals (*R. v. Pardy*, 2014 NLCA 37, 357 Nfld. & P.E.I.R. 49, at paragraph 11). The trial judge would be making a decision in the absence of full information and evidence, which would have the effect of denying the appellate court the value of a fulsome decision, with reasons, by the trial judge. It would be necessary to appeal the decisions of both the case management and trial judge.

7. Counsel for Mr. Stone submits that the recordings would not be characterized as fresh evidence for purposes of an appeal. The criteria for allowing fresh evidence on appeal are discussed in *R. v. Lévesque*, 2000 SCC 47, [2000] 2 S.C.R. 487, at paragraph 14. In general, evidence will not be admitted on appeal if, by due diligence, it could have been adduced at trial. However, assuming that the recordings of case management conferences would not be characterized as fresh evidence, it remains open to this Court, on appeal, to exercise its discretion to expand the record in appropriate circumstances. (See, for example, rule 19 of the *Court of Appeal Criminal Appeal Rules (2002)*. For a discussion of relevant principles of natural justice and procedural fairness, see *Taylor v. Braund (Taylor)*, 2018 NLCA 3, 2 C.A.N.L.R. 428, at paragraphs 107 and 108.)

[8] In summary, rules 7.05(2) and (3) must be read in a manner consistent with section 551.3(1)(g) of the *Criminal Code*. Decisions made pursuant to that section will form part of the record for purposes of the trial and an appeal. For other issues, to avoid the above discussed concerns and considerations, and pending a possible review of the rules, a decision whether to unseal all or portions of a case management conference should be made by the trial judge, who is “a judge” who may make an order pursuant to rule 7.05(3). (For a discussion of the rationale regarding evidentiary decisions to be made by the trial judge in the civil context, see *Newfoundland and Labrador (Treasury Board) v. Newfoundland and Labrador Association of Public and Private Employees*, 2004 NLCA 58, 241 Nfld. & P.E.I.R. 13.)

Application for the Case Management Recordings

[9] Prior to the hearing of his section 11(b) application, Mr. Stone applied for a transcript of the recordings of the case management conferences. The Crown

opposed Mr. Stone's application. The case management judge, who heard Mr. Stone's application, refused to unseal the recordings. A different judge (the trial judge) heard the section 11(b) application. Given the earlier decision of the case management judge, the trial judge had no access to the recordings of the case management conferences for purposes of considering the section 11(b) application.

[10] It follows that decisions that were made at the case management conferences are not part of the record for purposes of appealing the section 11(b) determination. In an attempt to correct that deficiency, Crown counsel applied to the case management judge seeking to have the recordings unsealed for purposes of the section 11(b) appeal. Mr. Stone opposed the Crown's application. The case management judge ordered transcripts of the recordings to be available to counsel, but that the recordings would remain sealed and, therefore, unavailable to this Court for purposes of the appeal.

[11] Counsel has not pointed to any authority for the proposition that the case management judge would have the authority to revisit the question of unsealing the recordings for purposes of an appeal, having concluded that the trial judge should not have access to them. Further, as discussed above, defining the record of an appeal falls within the scope of authority of the appellate court.

[12] In assessing this application, I begin with the principle that rule 7.05 must be read so as to avoid any inconsistency with the governing legislation, the *Criminal Code*. Insofar as rule 7.05(3) requires an order to unseal the recordings of case management hearings, it cannot apply to binding decisions made pursuant to section 551.3(1)(g) of the *Code*. Those decisions, binding for the remainder of the trial, must be available for purposes of the trial and any appeal.

[13] Further, for the reasons discussed above, I am satisfied that, where a party seeks to rely on decisions made at a case management conference that may have a substantive effect on the fair and principled adjudication of the issues at trial, those decisions must also be available, without the need for an order for the recording to be unsealed. The stated rationale in rule 7.01(2), to provide an opportunity for "full and free discussion between the parties without prejudice to the rights of the parties in any proceedings which take place thereafter", cannot override the basic principle that decisions at trial will be made on the basis of admissible evidence that is relevant and probative.

[14] For purposes of this application, counsel has not provided the judge's reasons for denying the request to unseal the recordings. Nonetheless, if the recordings contain reasons for why a postponement in the proceedings was sought and granted or refused, that information may be relevant to the determination of the section 11(b) application. To refuse the trial judge access to the recordings of the relevant portions of the case management conferences would be inconsistent with basic principles underlying the fair and principled adjudication of matters before the court.

[15] Applying the above principles to this application, I am satisfied that the panel that hears the appeal should determine whether to consider all or portions of the transcripts of the recordings of the case management conferences. In particular,

1. The appellant shall ensure that transcripts of the recordings of the case management conferences are delivered to this Court.
2. The members of the panel assigned to hear the appeal shall decide if and when they will open and review the transcripts.
3. Counsel have access to the transcripts. They may make both written and oral submissions taking the position that the recordings should not be considered, or, if considered, what the effect may be on the substance of the appeal.
4. While this approach may result in some difficulty in preparing facts for the appeal, the difficulty is not insurmountable. The judges hearing the appeal are experienced in setting aside evidence or information that they decide is not properly before them.

[16] Accordingly, I would allow the application to the extent that counsel may make written and oral submissions regarding whether the recordings should or should not be considered, and, if considered, what the effect may be on the substance of the appeal. I would leave the final decision regarding access to and use of the recordings of the case management conferences to the panel hearing the appeal.

B. G. Welsh J.A.