

COURT OF APPEAL OF YUKON

Citation: *R. v. Penner*,
2024 YKCA 16

Date: 20241121
Docket: 19-YU852

Between:

Rex

Respondent

And

Edward James Penner

Appellant

Before: The Honourable Chief Justice Marchand
The Honourable Mr. Justice Butler
The Honourable Justice MacPherson

On appeal from: An order of the Supreme Court of Yukon, dated
September 19, 2019 (*R. v. Penner*, Whitehorse Docket 18-01502).

Oral Reasons for Judgment

Counsel for the Appellant:

V. Larochelle

Counsel for the Respondent:

A. Ferguson

Place and Date of Hearing:

Whitehorse, Yukon
November 21, 2024

Place and Date of Judgment:

Whitehorse, Yukon
November 21, 2024

Summary:

The appellant was convicted of first-degree murder in September 2019 and filed a notice of appeal. In May 2023, the Court dismissed the appeal for want of prosecution. The appellant applied to reinstate his appeal. Held: Application granted. The interests of justice favour reinstatement. The Crown is not opposed.

MARCHAND C.J.Y.C.A.:

Introduction

[1] On September 19, 2019, a jury convicted Edward James Penner of first-degree murder. The case against Mr. Penner was circumstantial.

[2] Mr. Penner filed a notice of appeal on his own behalf on October 17, 2019. The Yukon Legal Services Society (“YLSS”) subsequently appointed counsel to act for Mr. Penner on his appeal. Counsel filed six volumes of transcripts on November 5, 2020, and three volumes of appeal books on December 11, 2020. Counsel also prepared a draft factum for Mr. Penner but did not file it because counsel was discharged by Mr. Penner before being able to do so.

[3] Beginning in March 2022, a number of case management conferences were held and a number of letters were sent to Mr. Penner. With one early exception, Mr. Penner declined to appear at the case management conferences. He did not respond to the letters.

[4] On May 16, 2022, the Crown applied to have Mr. Penner’s appeal dismissed for want of prosecution. In reasons indexed as 2022 YKCA 4, this Court determined it was not yet appropriate to do so. The Court instead ordered the appointment of an *amicus curiae* to provide submissions on the merits of the appeal.

[5] On March 3, 2023, *amicus* provided his opinion that Mr. Penner has three viable grounds of appeal. A copy of *amicus*’ opinion was delivered to Mr. Penner but he apparently refused to review it. Then, despite written cautions that his appeal may be dismissed, Mr. Penner did not attend a subsequent case management conference on May 10, 2023.

[6] At the May 2023 case management conference, the Crown renewed its application to dismiss Mr. Penner's appeal for want of prosecution. On May 25, 2023, in reasons indexed as 2023 YKCA 3, this Court granted that application.

[7] Mr. Penner has now re-engaged counsel and applies to reinstate his appeal. The Crown is not opposed.

Discussion

[8] In its reasons dismissing Mr. Penner's appeal, this Court noted a dismissal for want of prosecution is not an absolute bar to an appeal being heard and set out the test for reinstatement:

[23] For Mr. Penner's benefit, we wish to mention that an order dismissing an appeal for want of prosecution is not an absolute bar to the appeal being heard. As such a dismissal does not engage the merits of the appeal, it is open to an appellant to apply to reopen/reinstate the appeal. This occurred in *R. v. T.L.C.*, 2012 BCCA 131, 285 C.C.C. (3d) 486, a case in which a conviction appeal that had been dismissed for want of prosecution was reinstated and allowed. As discussed in *T.L.C.*, the overarching factor on an application to reinstate is the interests of justice. Making that determination requires consideration of such matters as:

- (a) the length of delay between the dismissal and the application for reinstatement, and the adequacy of the explanation offered for that delay;
- (b) whether the appellant contributed to the delay;
- (c) whether the appellant had a *bona fide* intention to pursue the appeal throughout the proceedings;
- (d) whether the initial order was made in error, or the court was operating under some misunderstanding of the material facts;
- (e) the effect reinstatement would have on public confidence in the administration of justice;
- (f) the seriousness of the charges; and
- (g) the merit of the appeal.

[9] Here, the evidence tendered by Mr. Penner favours reinstating his appeal.

[10] First, it is apparent Mr. Penner has long-standing mental health issues that were exacerbated by his post-conviction incarceration. This was particularly the case during the pandemic when he was largely isolated from others and fell out of touch

with his family. This resulted in him discharging counsel, failing to participate in the case management process, and ultimately having his appeal dismissed for want of prosecution.

[11] Second, the delay between the dismissal and Mr. Penner's application to reinstate his appeal has not been inordinate and is explainable. Initially, Mr. Penner appears not to have been aware or appreciated his appeal had been dismissed. In fact, he contacted the YLSS on June 28, 2024, to inquire about its status.

[12] Following that phone conversation, the YLSS re-appointed counsel on July 17, 2024. Counsel then worked diligently to re-establish communications with Mr. Penner, conduct research, assemble the necessary evidence and file the notice of application for reinstatement. Despite challenging circumstances, counsel filed the application for reinstatement on September 5, 2024.

[13] Third, there is no question Mr. Penner has always intended to pursue his appeal. This is more than understandable given his conviction for first-degree murder, his mandatory life-sentence with no eligibility for parole for 25 years and the presence of viable grounds of appeal.

[14] Finally, reinstating Mr. Penner's appeal should enhance rather than harm public confidence in the administration of justice. Reasonable and informed members of the public would surely recognize the importance of allowing a person convicted of the most serious offence in the *Criminal Code* to reinstate a viable appeal that was lost due to the person's mental health issues. This is particularly so where the Crown has not identified any prejudice and is not opposed to the reinstatement.

Disposition

[15] In my view, the interests of justice favour reinstating Mr. Penner's appeal and I would make that order.

[16] **BUTLER J.A.:** I agree.

[17] **MACPHERSON J.A.:** I agree.

[18] **MARCHAND C.J.Y.C.A.:** The application is allowed, and Mr. Penner's appeal is reinstated.

"The Honourable Chief Justice Marchand"