COURT OF APPEAL OF YUKON

Citation: *R. v. Charlie*,
2019 YKCA 18

Date: 20191115
Docket: 18-YU839

Between:

Regina

Appellant

And

Franklin Junior Charlie

Respondent

Before: The Honourable Madam Justice D. Smith
(In Chambers)

On appeal from: Orders of the Territorial Court of Yukon, dated July 24, 2018 (*R. v. Charlie*, 2018 YKTC 30, Whitehorse Dockets 17-00191; 17-00488A); and December 12, 2018 (*R. v. Charlie*, 2018 YKTC 44, Whitehorse Dockets 17-00191; 17-00191B; 17-00488A).

Oral Reasons for Judgment

Counsel for the Appellant:	N. Sinclair
Counsel for the Respondent:	V. Larochelle
Place and Date of Hearing:	Whitehorse, Yukon November 14, 2019
Place and Date of Judgment:	Whitehorse, Yukon November 15, 2019

Summary:

The Crown applies for an extension of time to appeal an order dismissing its application to have the respondent remanded for an assessment under s. 752.1(1) of the Criminal Code*. Held: Application dismissed. While the late filing is attributable to the Crown's good faith belief that the order was interlocutory and, as a result, could not be appealed until the sentencing proceedings concluded, it failed to act diligently to confirm that belief when it was called into question by the case management judge. Furthermore, the Crown did not conclusively form the intention to appeal the order until after the time to file an appeal expired. In the circumstances, granting an extension would cause prejudice to the respondent. As a result, it is in the interests of justice to dismiss the application.*

[1] **SMITH J.A.**: The Crown applies for an extension of time to appeal an order dismissing its application to have Mr. Charlie remanded for an assessment pursuant to s. 752.1(1) of the *Criminal Code*. Section 752.1(1) provides:

> 752.1(1) On application by the prosecutor, if the court is of the opinion that there are reasonable grounds to believe that an offender who is convicted of a serious personal injury offence or an offence referred to in paragraph 753.1(2)(a) might be found to be a dangerous offender under section 753 or a long-term offender under section 753.1, the court shall, by order in writing, before sentence is imposed, remand the offender, for a period not exceeding 60 days, to the custody of a person designated by the court who can perform an assessment or have an assessment performed by experts for use as evidence in an application under section 753 or 753.1.

[2] An assessment under s. 752.1(1) is required before the Crown can apply to have an offender designated as a dangerous offender or a long-term offender under Part XXIV of the *Criminal Code*, R.S.C. 1985, c. C-46. The issue that arose following the s. 752.1(1) ruling was whether it was an interlocutory or final order. If it was a final order, it was captured by s. 759(2) of the *Code* and a notice of appeal had to be filed within 30 days of the ruling. The Crown was of the view that it was an interlocutory order and therefore the 30-day period in which to file a notice of appeal from the ruling did not start until Mr. Charlie had been sentenced.

Background

[3] On May 28, 2018, Mr. Charlie was convicted of aggravated assault (see *R. v. Charlie*, 2018 YKTC 26). Mr. Charlie's appeal from conviction was dismissed on June 20, 2019 (see *R. v. Charlie*, 2019 YKCA 13).

[4] Aggravated assault is "a serious personal injury" offence for the purposes of s. 752.1. It was a statutory pre-requisite for the Crown's application for a s. 752.1(1) assessment of Mr. Charlie for the purpose of pursing an application that he be designated a dangerous or long-term offender under Part XXIV of the *Code*.

[5] On July 24, 2018, the Crown applied before the trial judge to have Mr. Charlie remanded for a s. 752.1(1) assessment. The judge dismissed the application with written reasons to follow.

[6] On August 16, 2018, the judge dismissed the Crown's application on the basis that it had not established the "reasonable grounds" threshold for the order (see *R. v. Charlie*, 2018 YKTC 30).

[7] The Crown submits it immediately formed an intention to appeal the order dismissing the s. 752.1(1) application. However, the joint Admissions of Fact filed in this matter indicate that, after the ruling, the Crown had formed only a "conditional intention" to appeal the s. 752.1(1) ruling, depending upon the final outcome of the sentencing proceedings.

[8] On December 12, 2018, Mr. Charlie was sentenced for the aggravated assault to 14 months' imprisonment, less three months pre-sentence custody, followed by 30 months probation and various ancillary orders (see *R. v. Charlie*, 2018 YKTC 44). At that time, the Crown confirmed its intention to appeal the s. 752.1(1) ruling and the sentence imposed.

[9] On January 11, 2019, the Crown filed a notice of npplication for leave to appeal and an appeal from sentence with respect to: (i) the order dismissing its application for a s. 752.1(1) assessment; and (ii) the order sentencing Mr. Charlie for the aggravated assault. The appeal was set for hearing on October 22, 2019.

[10] The appeal was subject to case management. On March 2, 2019, the case management judge raised with counsel the possibility that the s. 752.1(1) ruling came within s. 759(2) of the *Code*, which provides that the Crown has a limited right of appeal from "decisions" made under Part XXIV of the *Code*. If that was the case,

then the Crown was obliged to commence its appeal within 30 days of the ruling pursuant to ss. 678(1) and (2) of the *Code* and Rule 4(1) of the *Yukon Territory Court of Appeal Criminal Appeal* Rules*, 1993*, SI/93-51 ["*Criminal Appeal Rules*"]. In that result, the appeal would be out of time.

[11] The Crown's position, however, was that the ruling was interlocutory and therefore was not captured by s. 759(2).

[12] Between the March 2, 2019 case management conference and the October 22, 2019 date for the hearing of the appeal, the Crown made no application for an extension of time to appeal the s. 752.1(1) order, electing to forego the determination of that issue until the sentence appeal.

[13] On October 22, 2019, counsel for Mr. Charlie made a preliminary submission that the Yukon Court of Appeal was without jurisdiction to entertain the Crown's appeal of the s. 752.1(1) ruling from July 24, 2018, as the notice of application for leave to appeal the ruling had not been filed until January 11, 2019, some four and a half months beyond the 30-day period he maintained was required under the *Criminal Appeal Rules*. The remainder of the appeal was adjourned pending the determination of this issue.

[14] In oral reasons for judgment dated November 5, 2019, and indexed at 2019 YKCA 17, the Court held that the s. 752.1(1) ruling was a final order. As a result, the Crown was required to file its notice of appeal within 30 days of the ruling. Having failed to do so, and in the absence of an order granting the Crown an extension of time to file its appeal, the Court was without jurisdiction to hear the appeal. The result of that decision was this application by the Crown for an order extending the time to file its appeal of the s. 752.1(1) order to January 11, 2019.

[15] In her reasons for judgment, Justice DeWitt-Van Oosten, speaking for the Court, made the following comments:

> [6] The appeal was set for hearing on October 22, 2019. A few days prior, counsel for Mr. Charlie advised the Court that he considered the appeal from the dismissal under s. 752.1(1) to be out of time. If he is right about that,

> the Court has no jurisdiction to hear this aspect of the Crown's appeal without an extension of time as authorized by s. 678(1) and (2) of the Code, and made manifest in Rules 16 and 17 of the *Yukon Territory Court of Appeal Criminal Appeal Rules*, *1993*, SI/93-51 ["*Criminal Appeal Rules*"]. Counsel for Mr. Charlie took no issue with the Court's jurisdiction to hear the second aspect of the Crown's appeal, namely, the challenge to the fitness of the sentence.
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> [17] At a case management conference held in this Court on March 6, 2019, the presiding justice raised the possibility that the Crown's appeal from dismissal may have been filed out of time. Counsel for the Crown expressed the view that the right of appeal did not crystallize until sentence was imposed. He acknowledged that if he was wrong about that, the Crown would be required to bring an application for an extension of time. It was suggested that the issue be addressed at a subsequent case management conference (along with other matters); however, that does not appear to have occurred.
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> [18] As at October 22, 2019 (the day of hearing), the Crown had not filed an application for an extension of time or any materials in support.

[16] DeWitt-Van Oosten J.A. then engaged in an extensive review of the jurisprudence that she found instructive on this issue, including: *R. v. Boutilier*, 2016 BCCA 24; *R. v. Roy*, 2008 SKCA 42; *R. v. S.(C.L.)* (1999), 133 C.C.C. (3d) 467 (Ont. C.A.); *R. v. Fulton*, 2006 SKCA 115; *R. v. Goforth*, 2005 SKCA 12; *R. v. Steele*, 2014 SCC 61; *R. v. Steele*, 2013 MBCA 21; *R. v. Steele*, 2013 MBQB 219; and *R. v. Steele*, 2016 MBQB 147. She noted that in *Fulton*, the Court had held that the Crown had a right of appeal from the s. 752.1(1) ruling pursuant to s. 759(1) of the *Code*. She rejected the Crown's position that a s. 752.1(1) ruling was an interlocutory order that could not be appealed mid-way through a proceeding, and therefore no right of appeal arises from that order under s. 759(2) of the *Code*. In the result, she agreed with Mr. Charlie's position that an order dismissing an application under s. 752.1(1) was a final order and therefore fell within the right of appeal provisions of s. 759(2) and the time limits for appealing such orders.

Application

[17] In its application for an extension of time to file its appeal from the s. 752.1(1) dismissal order, the Crown relies on the "special circumstances" test set out in *R. v. Smarch*, 2019 YKCA 5, where the Court set out the criteria to be met as: (i) the applicant had formed a *bona fide* intention to appeal the order before the appeal

period expired; (ii) the applicant informed the respondent either impliedly or expressly of their intention to appeal; (iii) the respondent would not be prejudiced by the extension of time; (iv) there is merit in the appeal in the sense that there is a reasonably arguable ground; and (v) it is in the interests of justice that an extension be granted. The weight given to any of these factors in determining whether there are special circumstances warranting an extension will depend on the circumstances of each case. The Court added:

> [23] The "overarching factor" or "ultimate question" on applications of this kind is whether, in all the circumstances, the interests of justice require that an extension of time be granted. The interests of justice criterion embraces the first four questions but is sufficiently broad to take account of the vast range of considerations, individual and societal, that shape what justice requires in a given case: *R. v. M.A.G.*, 2002 BCCA 413 at para. 35 [*M.A.G.*]; *Roberge* at para. 6; *R. v. Tallio*, 2017 BCCA 259 (Chambers) per Bennett J.A. at para. 35.

[18] The Court further noted at para. 33 that “[t]he interests of justice take account not only of the applicant's interests but the public interest in the timely resolution of criminal cases." However, the principle of finality plays a less important role in a sentence appeal than in a conviction appeal (at para. 38). Finally, at para. 39, the Court held:

> [39] Further... the interests of justice must also take account of the exceptional nature of dangerous offender proceedings and what is at stake in applications of this kind. In the absence of prejudice to the Crown, the importance assigned to the correct determination of a dangerous offender application may tip the balance away from finality and towards reviewability.

[19] The Crown contends that it has met each of these criteria: (i) it had an intention to appeal the dismissal order; (ii) it communicated that intention to defence counsel; (iii) Mr. Charlie would not experience prejudice by the extension of time because the sentence appeal is a meritorious one and if successful will likely see him returning to jail; (iv) there is merit to the appeal of the s. 752.1(1) dismissal order; and thus, (v) it is in the interests of justice to grant the application. In particular, counsel submits that, while in hindsight, he may have held a mistaken albeit honest belief that the appeal period for the s. 752.1(1) ruling did not begin to

run until the sentence was imposed, until the decision in *R. v. Charlie*, 2019 YKCA 17, the jurisprudence on that question did not appear to be settled.

[20] Counsel for Mr. Charlie submits that the Crown had only a conditional intention to pursue the appeal, pending the result of the sentencing proceedings. It was only after the sentence was imposed and the Crown decided to appeal that order that its intention to appeal the s. 752.1(1) ruling was crystallized by the filing of a notice of appeal of both orders on January 11, 2019.

[21] Counsel further submits that Mr. Charlie is a member of the Indigenous community that is already greatly overrepresented in Canadian prisons, as discussed in para. 45 of *Smarch*, and who suffers from FASD with many of the features of that condition as identified in para. 44 of *Smarch*. There were, he says, a number of *Gladue* factors that weighed heavily in the sentence that Mr. Charlie received.

[22] Counsel further contends that upon being advised of the potential jurisdictional issue with respect to the appeal of the s. 752.1(1) ruling as early as March 2019, the Crown chose not to take any steps to have that issue determined in a timely manner. Mr. Charlie, he says, faces significant prejudice if the s. 752.1(1) application is permitted to proceed at this time as he has served his custodial sentence and is now living back in the community.

[23] In *R. v. Jordan*, 2014 BCCA 516 (Chambers), Justice Willcock outlined the principles that apply to applications for an extension of time to file a notice of application for leave to appeal a sentence pursuant to Rules 16 and 17 of the *British Columbia Court of Appeal Criminal Appeal Rules, 1986*, B.C. Reg. 145/86, which are similar to Rules 16 and 17 of the Yukon *Criminal Appeal Rules*:

> [8] In *R. v. Roberds*, 2005 BCCA 644 Saunders J.A. in chambers held:
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> > [8] The power to extend time is discretionary, and the criteria described in *R. v. Roberge*, 2005 SCC 48, are apt. This Court, in considering whether the interests of justice favour the extension, will look to the timeliness of the applicant's intention to appeal, the diligence with which the appeal was pursued,

> the explanation proffered for the delay, the extent of the delay, the existence or not of prejudice that may be caused by an extension, and the degree of merit of the appeal.

…

[11] The Crown notes that the approach taken in *Finley* has recently been commented upon in Alberta in *R. v Chan*, 2012 ABCA 250 where Mr. Justice Frans Slatter held:

> [26] There are some statements in the case law suggesting that the Crown has a very high hurdle to overcome in obtaining an extension of time to appeal. For example, in *R. v Finley* (1995), 174 AR 118 at para. 1 (CA), Harradance J.A. suggested it would be a "rare day" when the Crown would receive an extension of time. That position is not driven by any wording in the *Criminal Code*, and indeed his remarks did not form the ratio of the decision. While the Rules give 30 days to appeal, the *Criminal Code* expressly enables an extension of the time, and allows for substitutional service, and does not limit either to extraordinary circumstances.
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> [27] If the case law is read as a whole, the issue often comes down to whether the record demonstrates reasonable diligence by the Crown in appealing and attempting to serve the respondent. This is essentially a question of fact, which falls to be determined on the efforts made by the Crown, considering the entire context. There are no rules of law that particular facts always disentitle the Crown to an extension. The issue of diligence is also tied up with the question of prejudice to the respondent; delay on the part of the Crown that had no effect on the respondent is of less importance.

[12] In my view that description of the court's role is apt. It is consistent with the standard as described in *Roberge*.

[13] In Ontario, while the Court of Appeal commented favourably upon *Finley* in *Rosenthal* in 1999, McPherson J.A., of the same court later, in *R. v. Antonangeli*, 48 OR (3d) 606; 146 CCC (3d) 90; [2000] OJ No 1870 (QL); 132 OAC 365, similarly distanced the court from the approach taken by Mr. Justice Harridance in *Finley*, noting:

> [13] It seems that the Ontario and Alberta decision-making processes are similar. With respect, I do not share Harradence J.A.'s negative view of the Crown's decision-making process. In my view, a Crown appeal in a criminal case should be undertaken only after the most careful consideration. By definition, the context for the decision is that a person has been acquitted of a criminal offence. For the Crown to seek to overturn such a disposition is a serious matter indeed.
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> [15] Of course, this type of structured decision-making process takes time. In Finley, the final decision was not made

> for 23 days. In the present case, it took 20 days. I do not think the 20-day period is at all unreasonable. The Crown should be encouraged not to jump quickly and launch appeals without truly careful reflection. A good, careful decision- making process, like Ontario's, will require a few days to produce a considered final decision. Twenty days, as the actual progress of the file in this case demonstrates, is a reasonable, not an unreasonable, period of time.
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> [15] In my view, the outcome on this application should hinge upon the diligence with which the appeal was pursued and the explanation proffered for the delay in the specific circumstances of this case.
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> [16] I agree with the views expressed by McPherson J.A. in *Antonangeli* to the effect that a Crown appeal in a criminal case should be undertaken only after the most careful consideration. The *Public Prosecution Deskbook* reflects that attitude and explains some of the delay in acting in this case. I also agree with the submissions of Mr. Jackson that the deskbook cannot be used as an excuse for acting slowly in relation to what must be considered to be a simple appeal.

[24] Justice Willcock also referred to *R. v. Roberge*, 2005 SCC 48 at para. 6, where the Court held that the following factors should guide the Court's discretion in extending time under s. 59 of the *Supreme Court Act*:

1. Whether the applicant formed a *bona fide* intention to seek leave to appeal and communicated that intention to the opposing party within the prescribed time;
2. Whether counsel moved diligently;
3. Whether a proper explanation for the delay has been offered;
4. The extent of the delay;
5. Whether granting or denying the extension of time will unduly prejudice one or the other of the parties; and
6. The merits of the application for leave to appeal.

[25] Based on the joint Admissions of Fact, I find that the Crown did not conclusively form the intention to proceed with an appeal of the s. 752.1 ruling until the sentence was imposed on December 12, 2018. Significantly, after having been given notice by the case management judge in March 2019 of the potential jurisdictional issue created when the notice of appeal was filed in respect to the

s. 752.1(1) ruling, the Crown made a deliberate decision to leave the determination of that issue to the same date as the sentence appeal on October 22, 2019, some seven months later. In this respect, I find that the due diligence requirement has not been met.

[26] Mr. Charlie has experienced prejudice by this delay. He has had to live with the uncertain finality of the dismissal of the Crown's s. 752.1(1) application in July 24, 2018 until this date. He has served a custodial portion of his sentence and is now living back in the community. If the Crown's application were to be granted, he would again be faced with that uncertainty for some period of time. In all of the circumstances, I find that it is in the interests of justice to dismiss the application.

“The Honourable Madam Justice D. Smith”