
CANADA / JUDGMENT

M.P.W. v. Victoria (City)

2022 BCCA 113

COURT

British Columbia Court of Appeal

DECIDED

14 March 2022

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2022 BCCA 113 M.P.W. v. Victoria (City)

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

M.P.W. v. Victoria (City),

2022 BCCA 113

Date: 20220314

Docket: CA46915

Between:

M.P.W.

Appellant

(Plaintiff)

And

City of Victoria, Mark Knoop, and Cory Moore

Respondents

(Defendants)

Before:

The Honourable Madam Justice Fisher

(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated

June 9, 2020 (M.P.W. v. City of Victoria, 2020 BCSC 858, Victoria Docket S124134).

Oral Reasons for Judgment

The Appellant, appearing in person

(via videoconference):

M.P.W.

Counsel for the Respondents

(via videoconference):

D.G. Butcher, Q.C.

C. Fleck

Place and Date of Hearing:

Vancouver, British Columbia

March 14, 2022

Place and Date of Judgment:

Vancouver, British Columbia

March 14, 2022

Summary:

The appellant applied to remove his appeal from the inactive list. In the appeal, the appellant contends that the trial judge failed to accommodate his health problems and disabilities throughout the trial and in assessing his credibility and therefore treated him unfairly. The appellant deposes that those same health problems and disabilities explain his delay in the appeal. Held: Application granted on conditions. Although the delay is considerable and the merits of the appeal are questionable, the issues raised are difficult to assess in an application of this nature. It is in the interests of justice to accommodate the appellant to a limited extent given his circumstances.

FISHER J.A.:

Nature of the application

- [1] The appellant applies under s. 25(2) of the Court of Appeal Act, R.S.B.C. 1996, c. 77 to remove his appeal from the inactive list.

Background

- [2] The appellant sued the City of Victoria and two officers of the Victoria Police Department for alleged wrongful arrest and negligence in connection with their investigation of allegations made in 2010 by a seven-year-old family member, VW, of sexual impropriety on his part. The police arrested the appellant without a warrant on November 30, 2010, and released him four hours later. In early January 2011, the Crown decided it would not charge the appellant.
- [3] The nature of the appellant's claims for damages was described by Newbury J.A. in reasons for judgment in relation to an application for no fee status (*M.P.W. v. Victoria (City)*, 2020 BCCA 351):
- [2] Mr. W.'s claims for damages were tried in the Supreme Court before Madam Justice Forth between late 2019 and early 2020. No constitutional issues were raised; rather, the issues were factual, involving mainly the circumstances of VW's disclosures, whether she had been 'coached' by her mother, her mother's credibility and that of the police officers. At paras. 114-125 of her reasons, however, Madam Justice Forth considered Mr. W.'s credibility, especially his claims that the child's mother was mentally ill and was abusing VW during the time of the investigation. (The couple were evidently in the process of divorcing and were disputing custody and access.) These allegations against the mother were found not to be supported by the evidence at trial
- [3] As a result of the apparent inconsistencies, the judge said that a "concern" in her mind had been raised concerning Mr. W.'s evidence. The main issues that had to be decided at trial, however, concerned the propriety of the arrest without warrant and the procedures followed by the arresting officers in interviewing VW and her mother.
- [4] The trial proceeded over 15 days in September and October of 2019, followed with written submissions by the parties. The respondent, Det. Mark Knoop, was the investigating officer who interviewed the complainant and her mother. The respondent, Cst. Cory Moore, was the officer who arrested the appellant. In lengthy reasons for judgment, released June 9, 2020, the trial judge dismissed all of the appellant's claims. In assessing the credibility of the witnesses, the judge described a number of issues that raised concerns for her about the credibility of the appellant's evidence. She found that the respondent Det. Knoop did not carry out a negligent investigation and that both Det. Knoop and Cst. Moore had reasonable grounds to arrest the appellant.
- [5] The appellant filed his notice of appeal on July 8, 2020. Since then, he has obtained extensions of time to file the appeal record, transcripts, appeal book and his factum. On November 4, 2020, Justice Groberman granted the appellant an extension of time to November 30, 2020 to file the appeal record and to December 31, 2020 to file transcripts, with liberty to apply for a further extension. The appellant filed an appeal record on November 30 (although the respondents say it was incomplete), as well as a Notice of Constitutional Question, and sought further extensions of time for the other documents. On December 23, 2020, Justice Hunter granted him an extension of time to March 25, 2021 to file

transcripts and the appeal book and to May 15, 2021 to file his factum. On March 26, 2021, the respondents consented to a further extension of time to May 7, 2021 and June 25, 2021, respectively.

- [6] The appellant filed transcripts on May 7, 2021, and the respondents consented to a further extension for filing the appeal book.
- [7] On June 1, 2021, the respondents filed a certificate of costs certifying, by consent, that their costs against the appellant at trial had been allowed in the amount of \$65,000.
- [8] On June 22, 2021, the respondents consented to extend time to August 20, 2021 for the appellant to file his factum and the appeal book. On August 19, 2021, they consented to another extension, to September 3, 2021, and subsequently to further extensions, first to September 14, 2021, and finally to September 17, 2021.
- [9] On September 15, 2021, the matter was placed on the inactive appeal list, pursuant to s. 25(1) of the Court of Appeal Act. In doing so, the Registry notified the appellant that if no steps are taken, the appeal will stand dismissed as abandoned pursuant to s. 25(5) on March 15, 2022.
- [10] Meanwhile, the appellant met the September 17, 2021 deadline but was unable to file his factum and appeal book due to its placement on the inactive list. Hence, this application.

Legal framework

- [11] The Registrar has the authority under s. 25(1) of the Act to transfer an appeal to the inactive list if a certificate of readiness has not been filed within one year after the filing of a notice of appeal. Under s. 25(2), a justice may grant leave for an appellant to proceed with their appeal, and if so, the appeal must be removed from the inactive list. The most important consideration in deciding whether to grant leave to proceed is whether it would be in the interests of justice.
- [12] This Court has been reluctant to formulate a rigid test; however, it often considers the factors set out in *Kar Recovery, Ltd. v. KDA*, 2004 BCCA 503 at para. 24 (Chambers) that include: (1) the extent of the delay; (2) the explanation for the delay; (3) the existence of any prejudice arising from the delay; and (4) the likelihood of success on appeal.
- [13] While this Court has been prepared to show self-represented litigants some lenience in the context of applications to remove an appeal from the inactive list (see, e.g., *Berg v. Berg*, 2000 BCCA 574 at paras. 18-19 (Chambers)), they still bear the burden of demonstrating that there is a good reason to reactivate their appeal.

Appellant's position

- [14] The appellant is self-represented. He deposes that he has several disabilities that impede his daily functioning, such as cognitive challenges that prohibit the use of computers, the ability to concentrate and memory issues. He also deposes that the delay is due to the respondents' counsel, including a failure on counsel's part to accommodate his disability.
- [15] The appellant has included in his affidavit a draft form of his factum, which he says is currently being reformatted and changed to adhere to the Court of Appeal Rules with the assistance of the Friends of the Court society. The draft factum indicates that his main ground of appeal is that the trial judge did not appreciate his health difficulties in assessing his credibility and that therefore he had been unfairly treated. He has produced various records relating to his medical condition, which he says is due to a concussion suffered in a motor vehicle accident and a stroke that occurred mid-trial. He says he suffers from cognitive deficits, poor memory, dizziness and poor balance, and experiences hearing difficulties.
- [16] In his oral submissions this morning, the appellant reiterated the same essential issues but added that his condition is getting worse. He explains the six-month delay since September on his ill health and says that he is working on correcting problems with his factum with the assistance of the Friends of the Court. He has also since learned of possible funding through the Court Challenges program and will be getting assistance to make an application.

Respondents' position

- [17] The respondents oppose the granting of the order sought. They submit that the cumulative delays are so excessive that removing the appeal from the inactive list cannot be in the interests of justice. They say there is no evidence that the appellant suffered a stroke during the trial and that he has overstated his medical issues as they did not prevent him from conducting the trial or filing extensive written submissions, affidavits and a factum. The individual respondents, one of whom is retired, assert particular prejudice by having this matter outstanding for such a long time.
- [18] The respondents contend that the appeal has no prospect of success given that the trial judgment rested in part on findings of credibility and a correct analysis of the facts and law regarding negligent investigation and false arrest. They point out the appellant's proposed factum does not meaningfully assert any errors of fact or law but rather asserts that the trial was unfair because the trial judge failed to accommodate his disabilities, and also raises a constitutional issue that was not before the trial court.
- [19] Although the respondents concede that there is some merit to the issue of a trial judge's duty to accommodate an unrepresented litigant with disabilities, they submit that the transcripts of the trial demonstrate that the trial judge in fact accommodated the appellant in almost all instances where he had advised her that he was fatigued or unable to follow the proceedings.

Analysis

- [20] The appellant brings this application on the eve of having his appeal dismissed as abandoned. He has been granted many extensions of time, both by order and by the consent of the respondents. Despite the length of his delays, he had finally sought to comply with the latest consent to file his factum and appeal book on September 17, 2021. Unfortunately, he was two days beyond the date the matter had been placed on the inactive list.
- [21] The appellant explains the delay since then on his ill health and consequent disabilities. He says that he has cognitive deficits that make it difficult for him to concentrate and prevent him from being able to use a computer for extended periods of time. He also contends that the respondents' counsel has contributed to the delay by refusing to accommodate his disability, such as refusing service.
- [22] I accept that the appellant's disabilities certainly appear to have contributed to his need for all the extensions of time. It appears that the respondents have been receptive throughout in accommodating this by consenting to numerous extensions, contrary to his submission. However, the appellant was at least close to ready to proceed on September 17, 2021, yet he did not file this motion until March 4, 2022, shortly before his appeal was to be dismissed as abandoned. He now says he can complete his factum and appeal book in the proper form in one month's time. The respondents question whether this is truly possible and submit that another month will be no different from the past six months.
- [23] There is no question that the delay here is considerable, which in itself is prejudicial to the respondents. The merits of the appeal are also questionable.
- [24] To succeed, the appellant must demonstrate that the trial judge made palpable and overriding errors of fact, errors in law, or exercised discretion improperly. An appeal is not a re-trial and this Court cannot re-weigh the evidence. Trial judges are given considerable deference in their assessments of credibility, as they are in the best position to do so. They are also given considerable deference in the way they manage a trial.
- [25] The appellant is primarily challenging the fairness of the trial, as well as the judge's assessment of his credibility, due to an alleged failure to accommodate his disabilities and health problems. His draft factum (which I note is almost twice as long as the Court of Appeal Rules allow) focuses on this, does not identify errors of fact or law by the trial judge, and raises constitutional issues--the primary one relating to the judge's role in accommodating litigants with disabilities. The respondents concede that there is some merit to this latter issue but say there is no prospect that the appellant will succeed in the circumstances here, as the judge did accommodate him. Counsel referred me to numerous examples in the transcript that the appellant relies on in his draft factum, to demonstrate this.

- [26] I accept that the transcripts show the trial judge was alive to the appellant's disability issues and did accommodate him to the extent she considered herself able to do so in the context of an ongoing trial. Although I agree with the respondents that the appellant has little likelihood of succeeding in his appeal, whether he was adequately accommodated and whether the trial was therefore rendered unfair, is a question that is very difficult to assess in an application of this nature.
- [27] All that said, I am prepared to accommodate the appellant to a limited extent given his circumstances. I consider it to be in the interests of justice to grant him leave to proceed with his appeal on the following conditions:
- 1) He is to file and serve his factum and the appeal book in accordance with the Court of Appeal Rules, on or before April 15, 2022; and
 - 2) In the event the appellant does not comply with this condition, the respondents will have liberty to bring an application to have the appeal dismissed as abandoned under s. 10(2)(e) of the Court of Appeal Act.
- [28] In effect, a failure to comply will place this matter back on the inactive list, after which the appeal may be dismissed as abandoned on application by the respondents.
- [29] The appellant must understand that these conditions are strict. His factum must not exceed the length permitted under the Rules and his appeal book must include all the necessary material.

"The Honourable Madam Justice Fisher"

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