

CANADA / JUDGMENT

R. v. Mossman

2024 BCCA 346

COURT

British Columbia Court of Appeal

DECIDED

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2024 BCCA 346 R. v. Mossman

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Mossman,

2024 BCCA 346

Date: 20241011

Docket: CA49807

Between:

Rex

Respondent

And

Benjamin Mossman

Appellant

Before:

The Honourable Chief Justice Marchand

The Honourable Madam Justice Newbury

The Honourable Justice Riley

On an application to vary: An order of the Court of Appeal for British Columbia,
dated June 21, 2024 (R. v. Mossman, Vancouver Docket CA49807).

Counsel for the Respondent:

G.G.R. McDonald

E. Lehrer

Counsel for the Appellant:

C.C. Cheng

J. Mason

Place and Date of Hearing:

Vancouver, British Columbia

September 26, 2024

Place and Date of Judgment:

Vancouver, British Columbia

October 11, 2024

Written Reasons by:

The Honourable Justice Riley

Concurred in by:

The Honourable Chief Justice Marchand

The Honourable Madam Justice Newbury

Summary:

The applicant Mr. Mossman applies for (i) an extension of time to seek a variation of an order of a justice, and (ii) variation of the justice's order, granting leave to appeal on certain grounds but refusing leave on other grounds. Mr. Mossman and a co-accused were charged with various regulatory offences, prosecuted summarily. After a lengthy trial in Provincial Court, Mr. Mossman was acquitted on most of the counts, and convicted of others. Both parties appealed to the Supreme Court. The Supreme Court judge overturned the acquittals and ordered a new trial on those counts, while affirming the convictions. Mr. Mossman then applied for leave to appeal to this Court, advancing six proposed grounds of appeal. A justice of the Court granted leave on two grounds, but refused leave on the other four proposed grounds of appeal. Mr. Mossman then applied to vary. The variation application was brought more than 60 days after the seven-day time limit provided for in the Rules, without a written notice of application to extend the time. The Court nevertheless entertained the application to extend the time, concluding it was not in the interests of justice to grant an extension.

Reasons for Judgment of the Honourable Justice Riley:

Introduction

- [1] The applicant Mr. Mossman applies for (i) an extension of time to vary an order of a justice of the Court, and (ii) variation of the justice's order, granting leave to appeal in a summary conviction matter on two grounds, but refusing leave on four other proposed grounds of appeal. The application was filed more than 60 days after the seven-day time limit provided for in R. 62(2) of the Court of Appeal Rules, B.C. Reg. 120/2022.

Background

- [2] Mr. Mossman and another man, Mr. Meckert, were charged with regulatory offences under the Environmental Management Act, S.B.C. 2003, c. 53 [EMA], the Water Act, R.S.B.C. 1996, c. 483, and the Fisheries Act, R.S.C. 1985, c. F-14. The charges were prosecuted summarily in the Provincial Court of British Columbia.
- [3] The charges related to a number of alleged pollution incidents at the Yellow Giant Mine site on Banks Island, B.C. from 9 September 2014 to 31 July 2016.
- [4] The mine was owned and operated by Banks Island Gold Ltd. ("BIG").
- [5] Mr. Mossman was at the relevant time a director, and also the president and chief operating officer of BIG. The co-accused, Mr. Meckert, was a supervisor at the mine, working under Mr. Mossman.
- [6] Following a previous trial and successful appeal, the matter went to trial, for the second time, commencing in April 2022. The trial continued on and off over the next year, concluding in April 2023.
- [7] On 7 July 2023, the trial judge gave reasons for judgment finding Mr. Mossman guilty on certain offences and acquitting him on others.
- [8] The trial judge's decision dealt with four categories of alleged offences, which I would classify as: (i) failure to report certain discharges of mine waste ("failure to report counts"), (ii) permitting certain discharges of mine waste to occur ("discharge counts"), (iii) permitting certain discharges of mine waste containing listed substances in excess of allowable concentrations ("exceedance counts"), and (iv) creating or permitting certain unauthorized works or unauthorized changes to waterways ("unauthorized works counts").
- [9] The outcome at trial was as follows:
- a) The trial judge found both accused not guilty on the failure to report counts.
 - b) The trial judge found both accused not guilty on the discharge counts.
 - c) The trial judge found Mr. Mossman guilty and Mr. Meckert not guilty on the exceedance counts.
 - d) The trial judge found both accused not guilty on the unauthorized works counts.

- [10] The Crown appealed Mr. Mossman's acquittal on the failure to report and discharge counts, and Mr. Mossman appealed his conviction on the exceedance counts. There was no appeal in relation to the unauthorized works counts.
- [11] Both appeals, Mr. Mossman's appeal from conviction and the Crown's appeal from the acquittals, were heard by Justice C. Ross of the Supreme Court, sitting as a summary conviction appeal court judge, on 16 and 17 January 2024.
- [12] On 15 March 2024, the Supreme Court judge gave written reasons for judgment. The Supreme Court judge dismissed Mr. Mossman's appeal from conviction on the exceedance counts, holding the trial judge committed no error in finding Mr. Mossman guilty of these offences on the basis of secondary liability. The Supreme Court judge allowed the Crown's appeal from acquittal on the failure to report and the discharge counts, reasoning the trial judge erred in law (i) in his approach to the issue of secondary liability in relation to one of these counts, and (ii) in his approach to both primary and secondary liability in relation to the balance of these counts. However, since the facts found by the trial judge did not provide a basis to substitute a conviction on appeal, the Supreme Court judge ordered a new trial on all of the counts on which Mr. Mossman had been acquitted.
- [13] Mr. Mossman applied to this Court for leave to bring a further appeal. The leave application identified six proposed grounds of appeal asserting errors on the part of the Supreme Court judge.
- [14] The application for leave to appeal came on for hearing before Justice Willcock, in chambers on 20 June 2024. On 21 June 2024, Willcock J.A. gave oral reasons for judgment, granting Mr. Mossman leave to appeal on two grounds, but refusing leave on the other four.
- [15] The two grounds of appeal on which leave to appeal was granted (grounds 1 and 2 in the leave application) both related to the Supreme Court judge's legal analysis of the scope of secondary liability as contemplated in s. 121 of the EMA and s. 78.2 of the Fisheries Act. The proposed grounds in respect of which Willcock J.A. did not grant leave were more case-specific complaints about the Supreme Court judge's analysis.
- [16] On 6 September 2024, Mr. Mossman filed an application to vary the order of Willcock J.A. This was more than 60 days after the seven-day time limit provided for under R. 62(2).
- [17] Mr. Mossman did not file a written application for an extension of time. The day before the matter was to be heard, counsel for Mr. Mossman filed a paralegal's affidavit, but, as discussed below, the affidavit does not address some of the important factors normally considered on an application to extend time.

Analysis

- [18] The first issue is whether the Court should grant an extension of time for Mr. Mossman to bring his application to vary Willcock J.A.'s order. If Mr. Mossman is successful on that issue, the next issue would be whether Mr. Mossman has shown there was some reviewable error

in Willcock J.A.'s order granting leave to appeal on two grounds but refusing leave on four others. Mr. Mossman's memorandum of argument also raises a third issue, namely, whether he should be granted leave to file a factum in excess of the 30-page limit provided for in the Rules.

(i) Extension of Time

- [19] The criteria to be considered in deciding whether to grant an extension of time can be stated as follows: (1) whether the applicant formed a bona fide intention to take the step for which the extension is sought, (2) whether the respondent was informed of that intention, (3) whether the respondent would be unduly prejudiced by an extension of time, (4) whether there is merit in the proposed application, and (5) whether it is in the interests of justice to grant the extension: *Barnes v. Letkemen*, 2016 BCCA 455 at paras. 9-10 (Chambers) *Savage J.A.*, applying the criteria for granting an extension of time to file an appeal as set out in *Davies v. C.I.B.C.* (1987), 15 B.C.L.R. (2d) 256 at 259-260 (C.A.), with appropriate modifications to suit the context. I should add that the final factor--the interests of justice--is the overarching consideration, encompassing all of the others: *Davies* at 260, 261.
- [20] Applications for extension of time are governed by R. 41. The general expectation is that such applications will be made by written notice of application together with a supporting affidavit. In this particular case, no written notice of application was filed. A paralegal's affidavit was tendered the day before the hearing. The affidavit does not say anything about when Mr. Mossman formed an intention to seek a variation of Willcock J.A.'s order, nor does it give any explanation for the delay in doing so. Although Mr. Mossman's application for an extension of time could be dismissed on this basis alone, I prefer to deal with the matter on a full consideration of the *Davies* factors.
- [21] The Crown respondent has not pointed to any particular prejudice arising from the delay in bringing the application to vary. However, in the course of the hearing, it became clear the application to vary has had a knock-on effect in causing delay in the filing of factums and scheduling the appeal itself.
- [22] With regard to the merits of the proposed application to vary, I have the following three observations.
- [23] First, it is settled law that this Court has no jurisdiction to entertain an application to vary an order refusing leave to appeal a summary conviction matter under the Criminal Code, R.S.C. 1985, c. C-46, or any other federal statute: *R. v. Verma*, 2016 BCCA 498 at para. 21. This matter is somewhat anomalous, in that some of the counts in issue pertain to offences under provincial statutes, such that the Court is able to invoke its jurisdiction to reconsider the decision of the justice refusing leave in relation to those counts under what is now s. 29 of the Court of Appeal Act, S.B.C. 2021, c. 6: *R. v. Alpha Manufacturing Inc.*, 2009 BCCA 443 at para. 11. However, the fact the case involves charges under both federal and provincial statutes does not give the Court jurisdiction to vary aspects of an order pertaining solely to federal matters. It follows that there is no jurisdiction to revisit Willcock J.A.'s refusal to

grant leave on the sixth proposed ground of appeal, which relates exclusively to the federal Fisheries Act offences.

- [24] Second, with regard to the balance of the proposed grounds of appeal, Mr. Mossman's application appears to be an effort to reargue or perhaps even recast some of the points raised before Willcock J.A., without identifying any reviewable error. An application to vary is not to be treated as a fresh application argued before a division of the Court. The applicant must establish that the chambers judge's decision was wrong in law, wrong in principle, or based on a misconception of the facts: *R. v. Alpha Manufacturing Inc.* at para. 14, citing *Redpath v. Redpath*, 2009 BCCA 168 at paras. 3-4. Mr. Mossman's memorandum of argument does not address that test or explain how it is met in his case.
- [25] No basis has been shown for interfering with Willcock J.A.'s conclusion there was no merit in ground 3, which contended the Supreme Court judge erred in "[i]nferring that Mr. Mossman acquiesced to the company's offences because he was an operating mind of the company". The Supreme Court judge did not make any findings of fact or draw any inferences. Rather, she found extricable errors of law in the trial judge's analysis.
- [26] With regard to ground 4, the focal point of Mr. Mossman's submissions before us was a contention that Crown appeals from acquittal are limited to questions of law alone, and that the Supreme Court judge failed to respect this limitation when she intervened to set aside the trial judge's finding that the Crown had failed to prove Mr. Mossman's guilt. However, as the respondent has aptly pointed out, the rule that Crown appeals from acquittal are limited to questions of law alone applies to indictable matters governed by s. 686 of the Criminal Code. The scope of Crown appeals from acquittal in summary conviction proceedings is dealt with in s. 813(b) of the Criminal Code, which is not so constrained. Furthermore, and in any event, the Supreme Court judge found that the trial judge made extricable legal errors in relation to the elements of the offences, and in assessing the scope of secondary liability, which errors infected the trial judge's conclusion that the Crown had failed to prove the counts in issue.
- [27] Lastly, no basis been shown for revisiting Willcock J.A.'s finding that there was no merit in ground 5, which asserted the Supreme Court judge erred in misconstruing s. 79(5) of the EMA to conclude Mr. Mossman was the person who had "possession, charge, or control" of the waste that was the subject matter of the single charge of failure to report under the EMA. The Supreme Court judge accepted the trial judge's conclusion that the Crown had failed to prove this particular element of the charge such that Mr. Mossman could not be found guilty on the basis of primary liability. The Supreme Court judge went on to find that the trial judge had committed extricable errors of law in his approach to secondary liability on this count. Mr. Mossman was granted leave to appeal on grounds 1 and 2, which deal with the scope of secondary liability.

- [28] I will add that, at the hearing of the application, many of Mr. Mossman's arguments were not tethered to any of the proposed grounds of appeal as framed in the leave application. When presented with this concern, counsel responded that, if given the opportunity, he could revise or amend the proposed grounds of appeal to marry up with the points he was making in oral submissions. With respect, that is not the proper way to approach an application for leave to appeal, much less an application to a division of the Court seeking to vary an order of a single justice refusing leave. This underscores that Mr. Mossman is essentially seeking to reargue the leave application, thus inviting this Court to go beyond its limited role in deciding whether there is a basis to vary the chambers judge's order under s. 29 of the Court of Appeal Act.
- [29] The third and final observation about the merits of the application to vary is that Mr. Mossman has not identified any reviewable error in Willcock J.A.'s conclusion that the proposed grounds of appeal on which leave was refused all relate to case-specific matters with no broader importance to the administration of justice or the legal community. That, of course, is a relevant consideration in deciding whether leave to pursue a second-level appeal to this Court ought to be granted, as discussed in *R. v. Winfield*, 2009 YKCA 9 at paras. 13-14. This aspect of Willcock J.A.'s analysis involved an exercise of discretion with which we ought not to interfere in the absence of some error of law or principle: *Redpath* at para. 3.
- [30] For all of these reasons, I see little merit in Mr. Mossman's application to vary the order granting leave on two grounds of appeal but refusing leave on four others.
- [31] This brings me to the final and overarching factor, the interests of justice. The delay of more than 60 days is well outside the seven-day time limit in the Rules, as mentioned. This delay has had a knock-on effect on the progress of the appeal itself. The relief sought--variation of a justice's order refusing leave to appeal in a summary conviction matter involving provincial offences--is extraordinary. This is particularly so given that second-level appeals to this Court in summary conviction matters are themselves considered extraordinary: *Winfield* at para. 14. Willcock J.A. granted leave on two grounds determined to have sufficient merit and importance, while denying leave on the other proposed grounds. Mr. Mossman's application to vary is not only late, but also appears to be an attempt to reargue grounds that Willcock J.A. found to be both (i) unmeritorious, and (ii) lacking broader significance. In all of these circumstances, the interests of justice weigh against Mr. Mossman's request for an extension of time.
- (ii) The Merits of the Application to Vary
- [32] Having concluded that it would not be in the interests of justice to grant an extension of time, it is unnecessary to comment further on the merits of the application to vary. Suffice it to say that, for the reasons given above, no basis has been shown for revisiting Willcock J.A.'s order granting leave to appeal on two grounds, but refusing leave on four others.

(iii) Extension of the Factum Page Limit

- [33] Mr. Mossman's written notice of application, filed on 9 September 2024, merely seeks variation of Willcock J.A.'s order under R. 62(2). The notice makes no mention of a request to file a factum in excess of the 30-page limit as contemplated in R. 25(4) and the "completion instructions" referenced therein. Mr. Mossman's memorandum of argument includes a request, in the relief sought, for an order extending the factum page limit. No reasons are given and no submissions were made as to why a 50-page factum is necessary in this case.
- [34] Requests to extend the factum page limit are normally dealt with by way of an application to a justice in chambers, or dealt with by a case management judge as contemplated in R. 48(1) (f). To seek such an order from a justice in chambers, the applicant would normally be expected to file a notice of application to dispense with the requirements of a rule as provided for in R. 41(a), together with a supporting affidavit. None of that has been done in this case. There may be instances—for example, in the course of case management—where a less formal procedure is permitted, but I see no good reason for proceeding informally in this case.
- [35] As Justice Groberman stated in *Chief Mountain v. Canada (A.G.)*, 2012 BCCA 69 (Chambers) at para. 11, "[a] party seeking to file a factum in excess of 30 pages bears the onus of providing a convincing explanation as to why extra space is necessary." See also *Ma v. Vansanten*, 2017 BCCA 441 at para. 12. In this case, no basis has been shown for an order allowing Mr. Mossman to file a factum in excess of the 30-page limit.

Conclusion

- [36] I would dismiss the application for an extension of time. I would deny the request to file a factum in excess of the 30-page limit, without prejudice to Mr. Mossman's right to renew that request on application to a justice in chambers.

"The Honourable Justice Riley"

I AGREE:

"The Honourable Chief Justice Marchand"

I AGREE:

"The Honourable Madam Justice Newbury"

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