

CANADA / JUDGMENT

R. v. T.S.K.

2025 BCCA 59

COURT

British Columbia Court of Appeal

DECIDED

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2025 BCCA 59 R. v. T.S.K.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. T.S.K.,

2025 BCCA 59

Date: 20250212

Docket: CA49802

Between:

Rex

Respondent

And

T. S. K.

Appellant

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Before:

The Honourable Madam Justice Bennett

(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated July 19, 2022 (R. v. K, 2022 BCSC 2034, Penticton Docket 40186).

Oral Reasons for Judgment

Counsel for the Appellant:

T.B. Martin

V. Tai, Articled Student

Counsel for the Respondent:

E. Purtzki

Place and Date of Hearing:

Vancouver, British Columbia

February 7, 2025

Place and Date of Judgment:

Vancouver, British Columbia

February 12, 2025

Summary:

The applicant applies for leave to appeal a decision dismissing his application for an extension of time to appeal his summary conviction for sexual assault. He was self-represented in that application. Now, with the assistance of counsel, he argues that there is a clear error with the trial judge's lack of assessment of his credibility, which although he did not argue on the extension of time application, should have been apparent to the application judge. In failing to identify and give weight to this error as a reason to allow the extension of time, the applicant argues that the application judge below erred in law.

Held: The application for an extension of time is allowed. The error alleged is analogous to a previous decision of this Court, which found that it is an error of law for a summary conviction appeal judge to fail to consider all relevant factors in dismissing an application for an extension of time. The appeal is important to the applicant because if it is dismissed, he will be without recourse for what he views as a wrongful conviction. The error that he has alleged has at least some merit, and he should be given the opportunity to argue it before a division.

BENNETT J.A.:

Overview

[1] The applicant applies for leave to appeal the order denying his application for an extension of time to appeal his summary conviction.

[2] For the following reasons, I grant leave to appeal.

Background

- [3] In December 2012, the applicant was convicted of sexual assault against two complainants, M.M. and N.B. M.M. was related to the applicant, and N.B. was her friend. At the time of the assaults, both M.M. and N.B. lived with the applicant. They were both 18 years old.
- [4] The Crown proceeded summarily.
- [5] The complainants had gone to a party. At around 1:30 a.m., the applicant received a telephone call from the party's host advising him that the young women were extremely drunk, and he should pick them up. He did so. They stopped at a fast-food drive through on the way home. Once home, both women were sick. At some point in the night, according to the two women, the applicant lifted their shirts and touched his lips to their breasts. M.M. testified that she told him to stop, but he persisted. He seemed to think it was amusing.
- [6] The applicant testified that he did pick the women up from the party, but did not touch them as they alleged.
- [7] The trial judge summarized the testimony of both complainants and the accused and dealt with inconsistencies between the complainants' evidence. The trial judge instructed herself on the principles set out in *R. v. W. D.* (1991), 63 C.C.C. (3d) 397: see Trial Reasons at para. 37. The trial judge did not specifically set out why she did not accept the evidence of the accused. Indeed, after concluding that the two complainants were truthful, she convicted the applicant without any analysis of his credibility or his evidence.
- [8] In March 2013, the applicant was sentenced to a 12-month conditional sentence and 2 years' probation.
- [9] Under s. 678 of the Criminal Code, R.S.C. 1985, c. C-46, the rules of the applicable court set the time limit for initiating a criminal appeal. Pursuant to R. 6 of the Criminal Rules of the Supreme Court of British Columbia, a defendant has 30 days from their sentencing hearing to appeal their summary conviction.
- [10] The applicant engaged his trial counsel to appeal his conviction. His trial counsel applied for, but was refused funding for the appeal by the Legal Services Society. His counsel did not file a notice of appeal. The applicant was advised in April 2014 that funding had been denied.
- [11] In March 2022, the applicant started the process of appealing his conviction in the BC Supreme Court ("BCSC"). As he was out of time to do so, he applied for an extension of time.
- [12] This application was heard in the BCSC in July 2022. The applicant, who was self-represented, primarily argued that his trial counsel had provided ineffective assistance. The application judge noted that the applicant sought the services of his trial counsel for his appeal, which undermined this argument. Nonetheless, because the applicant's trial counsel

was prepared to act for him, the application judge accepted that "there was a reasonable, arguable ground for an appeal". The applicant did not raise the issue in relation to the lack of reasons regarding his credibility. However, that issue stands out when the reasons are reviewed. The application judge did not refer to it.

- [13] The applicant also relied on his mental health issues as a basis for not filing his appeal. He provided some medical records to support his mental health diagnosis.
- [14] The application judge nonetheless found that it was not in the interests of justice that an extension be granted. He found that Mr. K.'s mental health challenges did not provide an explanation for much of the lengthy delay. He also determined that the Crown would be unduly prejudiced if the extension were granted, as "[m]emories fade and witnesses once available may no longer be available": para. 16.
- [15] For unknown reasons, the applicant was allowed to appear in front of a different justice on January 15, 2024, who heard his application for an extension of time anew, on the basis of fresh evidence. She dismissed his application on February 8, 2024. I do not know what jurisdiction existed for a reconsideration of this in the Supreme Court, however, it is not relevant to this issue on appeal, other than to show that Mr. K. persisted in pursuing his appeal.
- [16] On April 23, 2024, the applicant filed his notice of appeal of the first application judge's decision. On October 1, 2024, his application to appoint counsel for this leave application was granted, as well as his application for an extension of time to file in this Court.

Legal framework

- [17] Section 839(1)(a) of the Criminal Code provides that leave to appeal may be sought for decisions "in respect of an appeal":

839 (1) Subject to subsection (1.1), an appeal to the court of appeal as defined in section 673 may, with leave of that court or a judge thereof, be taken on any ground that involves a question of law alone, against

- (a) a decision of a court in respect of an appeal under section 822; or
- (b) a decision of an appeal court under section 834, except where that court is the court of appeal.

- [18] A decision refusing to extend the time for a notice of appeal is a decision "in respect of an appeal" under s. 839(1)(a): *R. v. Burgar*, 2003 BCCA 340 (Chambers).

- [19] In these circumstances, the test for leave to appeal has three criteria:

- (a) the ground of appeal involves a question of law alone;
- (b) the issue is one of importance; and

(c) there is sufficient merit in the proposed appeal that it has a reasonable possibility of success.

[20] The overarching consideration in the exercise of discretion to refuse or grant leave is whether doing so is in the interests of justice: *R. v. Balogh*, 2018 BCCA 367 at para. 4 (Chambers). Leave is to be granted sparingly: *R. v. Han*, 2018 BCCA 239 (Chambers).

Positions of the parties

[21] The applicant submits that if given leave, he would argue that the application judge erred in his application of the test for an extension of time by failing to recognize and give weight to an obvious legal error in the trial reasons, and by allowing the extent of the delay to overwhelm the analysis on whether to grant an extension. This obvious legal error, according to the defence, was the failure to properly apply the principles in *W.(D.)*. The applicant submits that whether the application judge erred by failing to identify and give weight to this legal error in the trial judge's reasons is a question of law alone, it is of importance, and his position on it has a reasonable possibility of success.

[22] The Crown argues that the application for leave should be dismissed as the application judge applied the correct legal test, considered all relevant factors, and reasonably concluded that it was not in the interests of justice to grant the extension of time. The Crown argues that this was a highly discretionary decision based on well-established legal criteria and is owed considerable deference.

[23] The Crown submits that the application judge did not place too much weight on the extent of the delay. Instead, he considered that the extent of the delay in concert with the other factors, including the lack of explanation for the delay and the fact that the Crown would be unduly prejudiced by granting an extension (given that it was a credibility case involving two complainants). It was all of those factors together that led to his conclusion that the extension was not in the interests of justice. The Crown argues that the reasons must be read as a whole to understand how he weighed the relevant factors.

[24] Second, the Crown contends that the judge did not err in law by overlooking a "clear legal error" in the trial judge's reasons. First, the Crown points out that the judge accepted that there was a "reasonable, arguable ground of appeal" for the purposes of the extension analysis. Second, the Crown argues that the trial judge did not commit a "clear legal error" in her reasons. While the trial judge did not provide specific reasons for rejecting the applicant's evidence, she was not required to do so. The Crown argues that even if the issue of the sufficiency of the judge's reasons is an arguable one, this does not outweigh the other factors and reveals no error in the application judge's analysis.

Analysis

Question of law alone

- [25] The application of a legal standard to the facts of a case is a question of law: *R. v. Shepherd*, 2009 SCC 35 at para. 20; *R. v. Klos*, 2022 BCCA 361 at para. 13.
- [26] In *R. v. M.A.G.*, 2002 BCCA 413 at para. 27, quoting from *R. v. Smith*, [1990] B.C.J. No. 2933 (C.A.), this Court summarized the relevant considerations for determining whether an extension of time should be granted in criminal appeals as follows:
- [27] I return to the language of Macfarlane J.A. in *Smith* (quoted *supra*, para. 11) which for convenience I repeat here:
- [4] The appellant in order to obtain an extension of time must satisfy certain rules. The governing principle on which this Court acts on applications to extend time for doing an act is that the applicant must establish special circumstances.
- [5] In considering whether there are special circumstances this Court has always taken into account such factors as whether: (1) the applicant had a bona fide intention to appeal before the expiration date of the appeal date; (2) informed the respondent either expressly or impliedly of his intention; (3) the respondent would not be unduly prejudiced by an extension of time; (4) there is merit in the appeal in the sense that there is a reasonably arguable ground; (5) it is in the interest of justice, that is the interest of the parties, that an extension be granted. How much weight will be given to any of these factors in determining whether there are special circumstances will depend on the circumstances of each case.
- [27] In *R. v. Sidhu*, 2016 BCCA 23 this Court allowed an appeal from a dismissal of an application to extend time because the summary conviction appeal judge only considered two of the five relevant factors. Justice Saunders noted that this was an error in law at para. 14:
- In my opinion, it can be said that the summary conviction appeal judge erred in law in failing to have due regard to all of the applicable factors and, most importantly, whether the granting of an extension of time was in the interests of justice.
- [28] The applicant here raises the same legal issue: that the summary conviction judge, in dismissing his application to extend time, erred in law by failing to have due regard to all applicable factors, in particular, the merit of the appeal on the grounds of the trial judge's alleged failure to properly apply *W.(D.)*.
- [29] The application judge only briefly mentioned the merit of the applicant's appeal:
- [10] On the basis that Mr. K.'s trial counsel was willing to pursue an appeal (with Legal Services funding), the Court will accept that there was a reasonable, arguable ground for an appeal (trial counsel warned Mr. K. that "any appeal of your conviction is not likely to succeed.")

[30] The summary conviction judge did not state what ground of appeal was arguable. Most notably, the judge did not include the factor of merit in his list of "key factors that require consideration":

[12] The key factors that require consideration are:

- a) whether the Crown would be unduly prejudiced by granting the extension sought;
- b) the extent of the delay;
- c) the explanation for the delay; and
- d) an overarching consideration of the interests of justice.

[31] He then weighed the four factors, concluding that the delay was extraordinarily long (which it is) and that the Crown would be unduly prejudiced by a new trial (which it would), and that the explanation for the delay was insufficient.

[32] He then said:

[17] Weighing the various factors, I am satisfied that as an overarching consideration that it is in the interest of justice that the extension not be granted. Justice is best served where there is finality within a reasonable period.

[33] Thus, when weighing the various factors, he failed to consider the merits of the appeal, and in particular, the obvious arguable error in the reasons for judgment in relation to a complete failure to analyze or even mention the evidence of the applicant when considering the credibility of the various witnesses. The judge essentially said; I believe the complainants and I therefore convict the applicant.

[34] In my view, the applicant has raised a question of law alone and passes the first threshold for leave to appeal. In particular, he raises the following question: did the summary conviction judge err in failing to have due regard to all factors, in particular the merit of his appeal? I am not here to decide whether he will be successful on the appeal, only whether he should have the opportunity to argue it before a division of the Court.

Importance

[35] The determination of this appeal is important to the applicant, as without an extension of time, he is prevented from arguing his summary conviction on its merits and has no recourse for what he considers to be a wrongful conviction.

[36] I also agree with the applicant that the issue is important to the administration of justice, as justice system participants should know "whether it is an error to deny an extension of time to bring a summary conviction appeal without considering a clear legal error in the decision being appealed from, even if that error was not raised before the summary conviction appeal judge."

- [37] The issue here is parallel to, and therefore as important as, the error raised in *Sidhu*, where leave was granted, and the appeal was ultimately allowed.

Merit

- [38] The main barriers to leave being granted based on the merits are (1) whether the summary conviction appeal judge can be said to have erred, given that the ground of appeal now relied upon by the applicant was not raised before him, and (2) whether the ground of appeal now relied upon holds weight given developments in the law post-*W.(D.)*. In my view, the applicant has presented at the very least an arguable case which overcomes both these barriers.
- [39] Where the BCSC dismisses an offender's summary conviction appeal, and they appeal the decision to this Court, this Court may hear new arguments that are of fundamental importance to the accused's conviction. As Justice Finch (as he then was) reasoned in *R. v. Anderson*, 1996 CanLII 3099 (B.C.C.A.), 111 C.C.C. (3d) 540, leave to appeal S.C.C. refused [1997] S.C.C.A. No. 10:
- [26] The Crown always bears the onus of proving the requisite criminal intent beyond a reasonable doubt. To permit a conviction to stand in the absence of proof of criminal intent would be an obvious miscarriage of justice. Where reasonable doubt as to that intent is apparent on the facts found by the trial judge, it would be an error of law to permit the conviction to stand. I therefore think it open to the appellant to raise in this Court, for the first time, a ground which goes to so fundamental an element of the Crown's case.
- [40] The applicant in this case was prevented from arguing his summary conviction appeal because his application for an extension of time was dismissed. Had his application been allowed and his appeal dismissed on the merits, he would have been able to raise new grounds of appeal in this Court, provided they meet the above threshold. In my view, it is therefore in the interests of justice that the applicant also be allowed to raise new grounds of appeal in this Court on his appeal of the decision to deny him an extension of time. This is especially so where, as here, the applicant was self-represented before the BCSC.
- [41] The second potential pitfall is that since *W.(D.)*, the law concerning the sufficiency of reasons in a trial judge's credibility assessment has evolved. In *R. v. Dick*, 2018 BCCA 343, this Court explained that in some cases, an explanation for the rejection of an accused's testimony is not necessary to show that the principles of the presumption of innocence and reasonable doubt have been respected:
- [27] The three-step process outlined in *W.(D.)* provides a framework for analysing credibility where an accused testifies. Its purpose is to help ensure that the decision-maker does not unintentionally fall into the trap of choosing between believing the evidence of the Crown or that of the defence: *R. v. L.(C.J.)*, 2004 MBCA 126 at para. 34. As the judge correctly noted in this case, there is nothing sacrosanct about the *W.(D.)* formula and it need not be followed slavishly: *Dinardo* at para. 23. What matters is that the principle of reasonable doubt is

clearly respected and there is no risk that the burden of proof was shifted unintentionally. In some circumstances, this may be apparent even in the absence of an explanation for the rejection of an accused's testimony, particularly where that testimony involves a bare denial and credible contradictory evidence is accepted: see, for example, R.E.M. and Vuradin. However, in other circumstances, an articulated explanation of why the testimony of an accused is disbelieved and why it does not raise a reasonable doubt may be necessary for the pathway to the verdict to be discerned: see, for example, S.J.D. and L.(C.J.).

[Emphasis added.]

[42] Despite the potential pitfalls with respect to that argument, in my view, the appeal has sufficient merit to grant leave to appeal, and I shall say no more.

[43] I grant leave to appeal. Counsel appeared as a result of a s. 684 appointment, which expires after the leave to appeal application is made. I therefore renew the s. 684 application to cover the appeal.

"The Honourable Madam Justice Bennett"

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