COURT OF APPEAL OF YUKON

Citation: *R. v. Smith*,
2023 YKCA 4

Date: 20230531
Docket: 22-YU889

Between:

Rex

Respondent

And

Morey Smith

Appellant

Before: The Honourable Madam Justice DeWitt-Van Oosten
(In Chambers)

On appeal from: An order of the Supreme Court of Yukon, dated August 8, 2022 (*R. v. Smith*, 2022 YKSC 37, Whitehorse Docket 20-AP016).

The Appellant, appearing on his own behalf:	M. Smith
Counsel for the Respondent:	K. Sova
Place and Date of Hearing:	Whitehorse, Yukon May 16, 2023
Place and Date of Judgment:	Vancouver, British Columbia May 31, 2023

Summary:

This is an application for the appointment of counsel under s. 684(1) of the Criminal Code. The appellant seeks counsel to assist him with advancing an application for leave to appeal, and, if leave is granted, an appeal from an order dismissing his summary conviction appeal from a ticketed offence. Held: Application dismissed. Applying the factors for consideration under s. 684(1), it is not in the interests of justice that counsel be appointed.

Reasons for Judgment of the Honourable Madam Justice DeWitt-Van Oosten:

Introduction

[1] This is an application for the appointment of counsel under s. 684(1) of the *Criminal Code*, R.S.C. 1985, c. C-46 [*Criminal Code*].

[2] To succeed on his application, the appellant, Morey Smith, must establish that an appointment of counsel is in the interests of justice.

[3] Relevant factors include: (1) the complexity of his appeal; (2) the points to be argued; (3) Mr. Smith's competency to present the appeal; (4) the need for counsel to find facts, research law, or make argument; (5) the nature and extent of the penalty imposed; and (6) the merits of the appeal. See, for example, *R. v. Costello,* 2021 BCCA 59 (Chambers) at para. 3; *R. v. Myles*, 2020 BCCA 143 (Chambers) at para. 37; *R. v. Silcoff*, 2012 BCCA 463 (Chambers) at paras. 19–27.

Background

[4] Mr. Smith's appeal comes to this Court by way of s. 839(1) of the *Criminal Code*. It arises out of a regulatory prosecution and requires leave before it can be heard on the merits. This Court has not yet decided whether leave is warranted:

> 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.
>
> [Emphasis added.]

[5] Mr. Smith applied for, but has been refused Legal Aid funding. He has been told that the nature of his proposed appeal does not fall within the scope of the services provided by the Yukon Legal Services Society.

[6] The appeal is from an order dismissing a summary conviction appeal to the Supreme Court of Yukon: 2022 YKSC 37.

[7] In November 2020, Mr. Smith was found guilty in the Territorial Court of Yukon of making a false statement to a forest officer, contrary to s. 39(a) of the *Forest Resources Act*, SY 2008, c. 15. The trial judge concluded that Mr. Smith falsely reported harvesting certain amounts of wood from his land (he was required to harvest a minimum amount as a condition of one or more cutting permits).

[8] The conviction was entered following a two-day trial, at which Mr. Smith testified. After being found guilty, he was fined $100 for the offence (less than the prescribed amount). He was also ordered to pay a $15 surcharge. The matter proceeded by way of a ticket prosecution.

Summary Conviction Appeal

[9] Appeals from regulatory prosecutions in the Territorial Court proceed in the Supreme Court pursuant to the *Summary Convictions Act*, RSY 2002, c. 210.

[10] The *Summary Convictions Act* does not set out an appeal process. Rather, it provides in s. 2.01(2) that: "… every provision of the Criminal Code that applies to an appeal of a summary conviction matter or proceeding applies to an appeal of a summary conviction matter or proceeding under this Act".

[11] As a result, s. 813 of the *Criminal Code* was engaged by Mr. Smith's appeal. Section 813 allows a defendant to appeal from a conviction or order made against them. In accordance with s. 822(1), the appeal process is governed by ss. 683–689 of the *Criminal Code*, with "such modifications as the circumstances require". This includes s. 683(1)(d), which allows a summary conviction appeal court to receive fresh or new evidence. When an appellant wants to introduce fresh evidence in an appeal, they must do so by way of a formal application with supporting affidavits. A

specific legal test is applied, as set out by the Supreme Court of Canada in *Palmer v. The Queen,* [1980] 1 S.C.R. 759, 1979 CanLII 8.

[12] Section 686(1)(a) of the *Criminal Code* authorized the summary conviction appeal court to allow Mr. Smith's appeal if it found that: (i) the verdict in the trial court was unreasonable or could not be supported by the evidence; (ii) the trial judge committed a reversible legal error; or (iii) there was a miscarriage of justice.

[13] The Supreme Court was authorized to dismiss the summary conviction appeal if the appeal was not decided in favour of Mr. Smith on any ground mentioned in s. 686(1)(a); there had been an error of law, but no substantial wrong or miscarriage of justice had occurred; or, notwithstanding a procedural irregularity at the trial, Mr. Smith was not prejudiced: s. 686(1)(b)(ii)-(iv).

[14] Mr. Smith appealed his conviction on a number of different bases. See 2022 YKSC 37 at para. 12. He said: (1) he did not receive a statutorily mandated notice of trial before the hearing; (2) the ticket was improperly sworn; (3) the trial judge erred when he denied Mr. Smith an adjournment and deprived him of relevant evidence for his defence; (4) the date of the offence specified in the ticket was amended at the trial, to Mr. Smith's prejudice; (5) the trial judge failed to properly assess whether the forest officers involved in the case followed proper process or the policies that guide them; and (6) the trial judge found a breach of the *Canadian Charter of Rights and Freedoms* [*Charter*], but provided an inadequate remedy.

[15] The appeal was dismissed. The Supreme Court judge noted that "[m]any of the issues raised by Mr. Smith" involved questions of mixed fact and law, which attract a deferential standard of review: 2022 YKSC 37 at para. 18. An appeal court will generally not interfere with a question of mixed fact and law unless the appellant is able to show palpable and overriding error.

[16] Ultimately, the Supreme Court judge concluded that: (1) the manner in which Mr. Smith's ticket prosecution proceeded was consistent with the scheme established under the *Summary Convictions Act* and/or its regulation(s); (2) the

alleged irregularities with the ticket did not render it invalid or inadmissible at the trial; (3) denying an adjournment was reasonable in light of the history of the case (including several adjournments to accommodate Mr. Smith's requests), and the fact that Mr. Smith did not subpoena his unavailable witness; (4) it was open to the trial judge to amend the ticket as requested by the Crown and to find that Mr. Smith was not prejudiced by the amendment; (5) Mr. Smith's challenge to the substantive and procedural decision-making of the forest officers was not squarely raised at the trial, and, in any event, the evidence did not support a stay of proceedings on the basis of non-compliance with policies that applied to them; and (6) there is no basis for interference with the trial judge's determination of a remedy under the *Charter*. The breach found to exist by the trial judge (which was raised and conceded by the prosecutor), did not warrant a stay of proceedings. Instead, it was open to the trial judge to grant a reduction in the prescribed penalty.

[17] Mr. Smith sought to introduce fresh evidence at the summary conviction appeal. The evidence consisted of affidavits of "proposed witnesses for his defence": 2022 YKSC 37 at para. 76. He was not allowed to rely on the affidavits because he did not bring a proper application for that purpose.

Application For Appointment of Counsel

[18] It is the dismissal of the summary conviction appeal, rather than the conviction, that is properly the subject of the appeal in this Court if leave is granted under s. 839(1) of the *Criminal Code.*

[19] Mr. Smith's notice of appeal from the Supreme Court order (filed on September 21, 2022), reads as follows:

> A. Infringement of Charter s. 11(d.) Presumption of [Innocence]. B. S.C. Justice Duncan Does Not Speak to Charge on S.C.A. Ticket No. 330401 or T.C. Judge Two (2) Reasons for Conviction. Rather Dismisses Appeal on Ancillary Elements on The Service of the S.C.A. Ticket. C. Justice Duncan Reasons for Decision Page 3, Line/Paragraph 9, Quotes Trial Judge: "Mr. Smith may have harvested some wood …" invokes The Balance of Probabilities Up to A Reasonable Doubt. Whenever the accused's liable to be convicted despite the existence of A Reasonable Doubt, Infringement of

> Charter s. 11(d) is Visible. “I do not question that Mr. Smith may have harvested”.

[20] Mr. Smith filed an affidavit in this Court on October 11, 2022, which contains further information. The affidavit sets out various concerns about the conviction and the dismissal of his summary conviction appeal. These concerns include (but are not limited to): (1) alleged perjury and collusion by the “Crown and Crown witness”; (2) Mr. Smith says his fresh evidence application was improperly dismissed; and (3) he says the Supreme Court judge failed to address his arguments about the “duty of care” owed by the forest officers (which he alleges they breached).

[21] In the affidavit specific to his s. 684(1) application (dated April 21, 2023), Mr. Smith states that if granted leave to appeal, he intends to argue: “questions of law”; that the enforcement officers perjured themselves at his trial; and he will address the regulations under the *Forest Resources Act.*

[22] In his submissions before me, Mr. Smith fleshed out these arguments. He did not complain of court-related procedural matters surrounding the issuance of the ticket and/or whether the ticket was valid (matters he pursued in the Supreme Court). Rather, as I understand it, if granted leave to appeal, Mr. Smith will focus on the following matters:

- The trial judge stated in his judgment that he “[did] not question” that Mr. Smith may have harvested “some wood” during the period in question. However, he found that Mr. Smith did not harvest the amount of wood required of him. Mr. Smith says that once the trial judge found that “some” wood had been harvested (contrary to the theory of the prosecution), he should have had a reasonable doubt about whether the Crown proved a false report about the <u>amount</u> of wood harvested. Mr. Smith was presumed innocent at his trial, and, from his perspective, this constitutional principle has not been respected.

- The Supreme Court judge referred to the above-noted finding at para. 9 of her reasons for judgment: “[The trial judge] found that while Mr. Smith may

have harvested some wood during the period in question, he did not harvest the requisite amount of wood as required by his permit" (2022 YKSC 37). Mr. Smith says this is not an accurate recitation of the finding and the Supreme Court judge intentionally misstated the trial judge's reasons to deprive Mr. Smith of their full benefit.

- Mr. Smith submits that under the *Forest Resources Act* and related regulation(s), he was entitled to harvest wood that had already been downed on his land (for example, trees that had been previously cut, downed by fire or were subject to beetle kill). His required harvest amounts did not have to consist of fresh cuts. Mr. Smith says the amount of previously downed wood surpassed the volume he is said to have falsely reported, and, over the period in question, he delivered sufficient amounts of this wood to others to meet the requirements. From his perspective, the trial judge failed to appreciate that fact, and, instead, convicted him on the basis that he falsely reported fresh cuts. Mr. Smith says this has resulted in a miscarriage of justice. He has been convicted of a regulatory offence even though the scheme itself allowed him to meet his requirements based on previously cut or fallen trees. The forest officers testified that it was "unlikely" Mr. Smith had removed 5 cubic metres of "non-merchantable" wood from his property, but could not rule out this possibility. Mr. Smith says the officers gave false evidence about this, but, in any event, the fact that they could not rule out the possibility should have given rise to a reasonable doubt.

- Mr. Smith contends that both the trial judge and the summary conviction appeal judge wrongly deprived him of defence evidence that would have shown that he removed the required amount of wood from his land. The trial judge improperly declined an adjournment to accommodate an important witness and the summary conviction appeal judge improperly declined to allow him to introduce fresh evidence. He did not bring a

formal application; but, he is a self-represented litigant and should have been given flexibility in that regard.

- The trial judge convicted Mr. Smith after concluding that he "did not harvest the requisite amount of wood as required by his permit". Mr. Smith says he should not have been convicted on the basis of the trial judge's "opinion" about how much wood may or may not have been harvested. The trial judge was speculating. He was not in a position to know how much wood had actually been removed from the property and, as a result, whether Mr. Smith's reports were false.

- Finally, Mr. Smith cites *Grove v. Yukon (Ministry of the Environment)*, 2022 YKCA 8 [*Grove*] in support of his appeal. In the latter case, an order striking civil claims brought against the Yukon government was overturned, at least in part, on the basis that the judge who made the order erroneously concluded it was "plain and obvious" that the Ministry of Environment did not owe a private law duty of care to the plaintiffs. Mr. Smith says *Grove* supports his argument that the forest officers were duty-bound to exercise care in deciding to issue a ticket against him, and that they failed in that duty, resulting in a prosecution that did not account for his authority to harvest wood that was already on the ground.

Discussion

[23] Leave to appeal from an order made by a summary conviction appeal judge is granted "sparingly" under s. 839(1) of the *Criminal Code*: *R. v. University of British Columbia*, 2021 BCCA 188 at para. 17.

[24] The test for leave is set out in *R. v. Winfield*, 2009 YKCA 9:

> [13] To obtain leave to appeal from the decision of a summary conviction appeal court, the applicant must establish that (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. The overriding consideration in the exercise of the discretion to grant or refuse leave is the interests of justice: *R. v. Cai*, 2008

> BCCA 332, 258 B.C.A.C. 235 at para. 26 (Chambers); *R. v. Gill*, 2008 BCCA 259 at para. 3 (Chambers).
>
> [Emphasis added.]

[25] In assessing Mr. Smith's application for counsel under s. 684(1), it is appropriate for me to keep this threshold in mind. If I conclude there is no reasonable possibility that Mr. Smith would meet the test for leave to appeal, it is not in the interests of justice to appoint publicly funded legal counsel to assist him with advancing an appeal.

[26] On the basis of the material before me, and in light of the factors that properly inform an application for the appointment of counsel, I am satisfied it is not in the interests of justice to make an order under s. 684(1).

[27] The issues sought to be raised by Mr. Smith on appeal do not appear to be complex. Indeed, in his material, Mr. Smith acknowledges this fact. His concerns about the ticket process, the trial process, and the evidence adduced in his case, do not raise any novel or complicated legal or factual questions.

[28] I accept that Mr. Smith cannot afford to retain legal counsel (the Crown agrees that he meets this criteria), and that his lack of legal training would make it difficult for him to appropriately frame and advance an application for leave to appeal, and, if leave is granted, the appeal itself. Consequently, Mr. Smith would no doubt benefit from the assistance of counsel in conducting legal research and in making argument before this Court. However, the fact that Mr. Smith may meet these aspects of the s. 684(1) criteria is not dispositive.

[29] The conviction resulted in a $100 fine. I appreciate the importance of the conviction to Mr. Smith and the fact that he considers it to be unjust. However, the Crown says, and I agree, that the nature and extent of the penalty imposed in this case weighs against a s. 684(1) appointment.

[30] The proposed appeal, as framed, does not raise any issues of general application or importance that extend beyond the individualized circumstances of the

case, requiring consideration by this Court for the purpose of future ticketing and prosecutions under the *Forest Resources Act* and *Summary Convictions Act.* Instead, as I see it, this is a case which was (and would be) resolved through the application of already well-established principles of law to a particular factual matrix.

[31] Finally, and most critically, Mr. Smith has not persuaded me that his application for leave to appeal under s. 839(1) carries a reasonable possibility of success.

[32] It is unclear to me whether the appeal, as currently framed, raises a question of law. The bulk of Mr. Smith's concerns about his conviction and resolution of his summary conviction appeal take issue with the factual findings of the trial judge and his assessment of credibility — Mr. Smith's credibility, and that of the forest officers.

[33] As explained by this Court in *Winfield*:

> [12] … an appeal to a court of appeal in a summary conviction matter is not a second appeal from the trial court. Rather, it is an appeal from the decision of the summary conviction appeal court. Accordingly, the focus of a leave application, and the appeal if leave is granted, is on whether any error of law was committed by the summary conviction appeal judge: *R. v. Emery* (1981), 61 C.C.C. (2d) 84 at 85 (B.C.C.A.), leave refused, [1981] 2 S.C.R. vii; *R. v. M.(C.S.)*, 2004 NSCA 60, 185 C.C.C. (3d) 471 at para. 26; *R. v. R. (R.)*, 2008 ONCA 497, 234 C.C.C. (3d) 463 at para. 24.

[34] It is clear from the trial judge's reasons that in convicting Mr. Smith, he accepted the evidence of the forest officers that they: saw no "signs of recent cutting"; "no signs of any wood harvesting"; and that although "it was possible that Mr. Smith might have removed 5 cubic metres of non-merchantable wood", it "was unlikely", as there would have been "evidence of that movement of wood" and there were "no markings of equipment, no indication of burnt brush, no clearings, and no signs of cutting of merchantable or non-merchantable wood".

[35] It is also clear from the trial judge's reasons that he rejected Mr. Smith's testimony that during the material timeframe, he harvested non-merchantable wood that had been "on the ground for years", giving it away and using it personally. The

trial judge did not believe Ms. Smith's testimony. He provided an explanation for why that was so. He was entitled, as the trier of fact, to reach this conclusion.

[36] A trial judge can accept all, some or none of the testimony provided by witnesses, including the testimony of a defendant. As correctly noted by the summary conviction appeal judge, the decision to do so is entitled to considerable deference. Mr. Smith takes issue with the Crown's evidence and says the trial judge should not have relied on it, but, that was a decision for the trial judge to make. Mr. Smith was not able to persuade the summary conviction appeal judge that it was not open to the trial judge to make the findings that he did. Without meeting that test, it was proper for the summary conviction judge to decline to interfere.

[37] In my view, the summary conviction appeal judge gave thorough and careful consideration to the various issues raised by Mr. Smith in the Supreme Court. She correctly instructed herself on the governing standards of review, the legal principles that applied to the many grounds advanced by Mr. Smith, and she allowed Mr. Smith sufficient opportunity to challenge the trial judgment. On my review of her reasons, I see no misapprehensions of the trial record or misstatements of the trial judge's reasons. Paragraph 9 of her reasons does not misstate the trial judge's primary finding. It accurately captures the essence. Nor, as contended by Mr. Smith, is there an inconsistency between a finding that he may have harvested wood from his land, but not the amount required of him and reported in the statements that formed the subject matter of the charge. These two conclusions can logically and reasonably co-exist.

[38] The Supreme Court judge's decision to not consider fresh evidence on the appeal was a discretionary decision and subject to deference. Mr. Smith was told about the required procedure, did not follow it, and then sought to introduce fresh evidence that was not properly before the Court. In that context, it was open to the Supreme Court judge to refuse to accept the evidence, even though Mr. Smith was a self-represented appellant. I agree with the Crown that without a proper application for the admission of the evidence, the Supreme Court judge did not have an

appropriate foundation from which to make an informed fresh evidence determination.

[39] Lastly, Mr. Smith says the summary conviction appeal judge erred by ignoring or not giving adequate effect to his argument about the forest officers' (and the Crown's) "duty of care" to conduct a thorough investigation; to make sure he was not ticketed for something he did not do; and to pay attention to the whole of the statutory scheme and its regulation(s) in deciding whether to charge him for non-compliance.

[40] In my view, the Supreme Court judge was alive to this argument and gave it proper consideration (see paras. 61–70 of her decision). It was also reasonably open to her to dismiss it. Before me, Mr. Smith emphasized the *Grove* case. However, that decision has no application here. In the context of a regulatory prosecution (as opposed to a civil claim), a discretionary decision to charge someone with an offence is only reviewable for abuse of process and requires proof of conduct that is egregious and seriously compromises trial fairness and/or the integrity of the justice system: *R. v. Anderson*, 2014 SCC 41 at para. 50. There is no indication that existed here.

[41] On the whole, I am satisfied there is no reasonable prospect of Mr. Smith obtaining leave to appeal. In light of this conclusion, as well as other factors relevant to the s. 684(1) analysis (set out above), Mr. Smith has not persuaded me that an appointment of legal counsel is in the interests of justice.

Disposition

[42] Accordingly, I dismiss the application for the appointment of counsel under s. 684(1) of the *Criminal Code.*

"The Honourable Madam Justice DeWitt-Van Oosten"