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R. v. Nowack, 2024 ONCA 180

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COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Nowack, 2024 ONCA 180
DATE: 20240311
DOCKET: M52673, M54535 & M54894 (C67831)

Nordheimer, Coroza and George JJ.

DOCKET: M52673 & M54535

BETWEEN

His Majesty the King

Respondent (Responding Party)

and

Steven Nowack

Applicant (Appellant/Moving Party)

DOCKET: M54894

AND BETWEEN

His Majesty the King

Respondent (Moving Party)

and

Steven Nowack

Applicant (Appellant/Responding Party)

Paul Slansky, for the appellant

David Friesen and Matthew Asma, for the respondent

Heard: March 4, 2024

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REASONS FOR DECISION

[1] Mr. Nowack was convicted in 2019, after a trial before a judge and jury, of 12 counts of fraud involving currency trading. He has appealed his convictions. He now brings two motions relating to his appeal. One is a motion to obtain production of various documents and other information relating to certain emails, either through the Crown or directly from the Toronto Police Service ("TPS"). The parties agree that this motion can be dismissed on the basis that it is redundant in light of recent events and in light of the other motion. The other motion is a motion to appoint a special commissioner to conduct an inquiry, under s. 683(1)(e) of the *Criminal Code*, and to preside over the examination of various witnesses in furtherance of that inquiry. This motion is undertaken with the ultimate purpose of obtaining fresh evidence to be put before the panel hearing the appeal in support of a request for a stay of these proceedings. At the conclusion of the hearing, we dismissed the motions with reasons to follow. We now provide our reasons.

[2] It is unnecessary to go into the facts underlying the convictions. Rather, it is sufficient, for the purposes of these motions, to recount that the appellant had contended, at trial, that certain TPS officers, who were involved in the investigation, had deleted emails that should have been disclosed to the defence. The appellant further alleged that the trial judge was misled by the TPS regarding the timing and reason for the deletion of the emails. The appellant also suggested that the

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prosecuting Crown was involved in this misleading. The trial judge dismissed an abuse of process motion brought by the appellant arising out of these allegations.

[3] On appeal, the appellant's abuse of process allegation both changes tack and expands. The change in tack arises from the fact that the emails of the two TPS officers, that were thought to have been deleted, turned out not to have been deleted after all. Those emails were eventually found and provided to the appellant in 2021, but this was, of course, after the trial proceedings had been completed.

[4] The expansion arises from the fact that the appellant contends that the transcripts of at least some parts of the trial proceedings (two days in particular) have been altered. Specifically, portions of the trial proceedings where the trial judge is said to have told the appellant that his conduct of the trial might result in the trial judge revoking his bail, are said to have been altered to remove the "threat". On this point, it should be mentioned that the appellant was unrepresented for most of the trial although he did have assistance from counsel on occasion.

[5] All of this culminates in the contention by the appellant that each of these issues amount to an obstruction of justice such that a continuation of the case would undermine the integrity of the administration of justice. Consequently, the appellant says that a stay of the criminal proceedings by this court is the only appropriate remedy.

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[6] Affidavits were provided from one of the TPS officers (the other officer is no longer with the TPS) and from civilian Information Technology employees of the TPS that seek to explain why it was originally thought that the emails had been deleted. The appellant says that these affidavits demonstrate that the TPS knowingly misled the trial court with respect to the email issue. The appellant extends this misleading to the trial Crown counsel who, he contends, knew or ought to have known that the TPS was not providing truthful information about the status of the emails and did nothing to correct the situation.

[7] With respect to the altered transcripts, copies of the digital recordings were provided to the appellant. He has had these recordings reviewed by someone who he contends is an expert. Neither the respondent nor the TPS accept that this person is an expert. Nevertheless, the appellant points to his expert's opinion that the recordings were altered on two specific occasions and that, on at least one of these two occasions, the alteration was deliberate. The appellant says that the alterations made to the recordings also constitute an obstruction of justice and, by themselves, constitute an affront to the integrity of the administration of justice.

[8] Beginning with the emails, there is no doubt that an error was made by the TPS regarding the existence of these emails. They should have been found and, if relevant (and subject to a possible third-party records issue), disclosed as part of the normal disclosure process. The TPS has explained what happened. While the whole issue does not reflect well on the TPS, the principal difficulty for the

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appellant is that, now that the emails have been found and produced to him, he cannot point to anything in the emails that would have been relevant at the trial or could have possibly affected the result. Put simply, the appellant has not shown that he was hampered, in any way, in his ability to make full answer and defence because of the late disclosure of the emails.

[9] Nevertheless, we recognize that while an abuse of process can arise if a prosecution is conducted in a manner that is fundamentally unfair to the accused person, it can also arise if the prosecution is conducted in a manner that contravenes fundamental notions of justice and thus undermines the integrity of the judicial process: *United States of America v. Khadr*, 2011 ONCA 358, 106 O.R. (3d) 449, at para. 31. It is this latter category of cases that the appellant now seeks to invoke.

[10] When an appellate court is considering an application for an original remedy, such as a stay of proceedings, the test for admitting fresh evidence is set out by Arbour J. in *United States of America v. Shulman,* 2001 SCC 21, [2001] 1 S.C.R. 616, where she said, at para. 45:

> In such cases, the evidence is not offered as a foundation for reviewing the decision under appeal, but as a basis for requesting an original remedy in the Court of Appeal. Consequently, in these circumstances, the evidence must be relevant to the remedy sought before the Court of Appeal. It must be credible and sufficient, if uncontradicted, to justify the court making the order.

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[11] In considering the appellant's request to embark on a process that is intended to lead to a fresh evidence application, we must evaluate whether that process could reasonably lead to the discovery of evidence that might meet this test for admissibility as fresh evidence. There is no basis, on this record, to suggest that the TPS, or the prosecuting Crown, was ever anything but honest and open about what they knew at the various times that they advised the trial judge that the emails had been deleted. It is simply the case that subsequent information demonstrated that the initial understanding of the TPS, and the prosecuting Crown, was both confused and erroneous. However, the appellant has failed to demonstrate any air of reality to his submission that this conduct could amount to an obstruction of justice or that it was undertaken in a manner that undermines the integrity of the administration of justice.

[12] Nothing that the appellant seeks in his s. 683(1)(e) motion satisfies the *Shulman* test. It does not give rise to the level or type of fresh evidence that would be necessary to establish either of the accepted grounds to support an allegation of obstruction of justice or abuse of process, and thus justify the very rare remedy of a stay of proceedings. It also does not satisfy the requirements under s. 683(1)(e) for the appointment of a special commissioner to conduct an inquiry, including having the investigating officers, the prosecuting Crown, the TPS civilian employees, and possibly others, examined. On that latter point, it should be noted that the respondent has never objected to anyone, who has sworn an affidavit in

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these proceedings, being cross-examined on those affidavits. The appellant does not require an order of this court to cross-examine those affiants: see e.g., *Criminal Proceedings Rules* for the Superior Court of Justice (Ontario), SI/2012-7, s. 6.07(4).

[13] In terms of the motion regarding the allegedly altered digital recordings of the proceedings, there is simply no credible evidence to support that allegation nor any basis to suggest that the examination of anyone could reasonably be expected to give rise to that evidence. The digital recordings, and the transcripts, reveal that the trial judge was unhappy with the appellant's manner of cross-examining witnesses on prior transcripts. He made his displeasure known to the appellant. However, his comments do not reveal any "threat" to pull the appellant's bail nor is there any legitimate foundation for the suggestion that the recordings have been deliberately altered to remove the threat. The analysis that the appellant's asserted expert uses for that suggestion is unconvincing. We also note that at least one of the bases for the expert's opinion, that is the absence from the transcripts of another promised discussion between the appellant and the trial judge, is not borne out by the record. The discussion did in fact take place and is reflected on a full reading of the transcripts.

[14] The same effort that is made to show another alteration regarding the exchange between the trial judge and the appellant before the sentencing process took place is similarly not demonstrated.

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[15] The appellant has failed to establish any air of reality to the alterations allegation that would justify pursuing further inquiries on that point. It follows from that fact that there is no basis to order the examination of the transcriptionist or Court Services Division staff.

[16] Two final points need to be made. First, in response to the altered transcript allegation, the respondent brought a motion for leave to introduce audio recordings of the trial proceedings on the two dates that are principally involved. Given our conclusion on the appellant's motions, the respondent's motion does not need to be addressed and therefore it, too, is dismissed.

[17] Second, it has been more than a decade since the charges were laid and almost five years since the convictions were rendered. It is important, not only for the persons involved, but also for the proper administration of justice, that appeals be heard in a timely manner. The parties are therefore directed to obtain a date for the hearing of the appeal.

[18] It is for these reasons that the motions were dismissed.

"I.V.B. Nordheimer J.A."
"S. Coroza J.A."
"J. George J.A."

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