

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Slingerland, 2020 ONCA 417

DATE: 20200625

DOCKET: M51576 (C58040)

Watt, Harvison Young and Coroza JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

John Owen Slingerland

Moving Party

Brian H. Greenspan, for the moving party

Katherine Beaudoin, for the respondent

Heard: In-writing

REASONS FOR DECISION

[1] After a trial before a judge of the Superior Court of Justice sitting without a jury, the appellant, who was then 90 years old and in poor health, was convicted of four counts of indecent assault. The trial judge sentenced the appellant to imprisonment for a term of two years and imposed the usual array of ancillary orders.

[2] The offences of which the appellant was convicted arose out of conduct alleged to have occurred over a half-century earlier when the appellant was a practising family physician. It was alleged that the appellant indecently assaulted all four complainants during medical examinations and, on one occasion, two of the complainants at their home.

[3] The appellant appealed both conviction and sentence. Counsel perfected the appeal on April 8, 2015.

[4] Unfortunately, on May 14, 2015, about six weeks after his appeal had been perfected, the appellant passed away.

[5] Sometime after the appellant's death, family members contacted appellate counsel. They wanted to pursue the appeal. The reasons were twofold. They wanted to clear the appellant's reputation. And they wanted to have the conviction quashed so that they could properly defend civil actions commenced by two of the complainants.

[6] After several discussions with members of the appellant's family, appellate counsel received instructions to ask this court to dismiss the appeal as an abated appeal due to the death of the appellant.

The Positions of the Parties

[7] The parties jointly consent to the dismissal of the appeal as an abated appeal.

The Governing Principles

[8] The traditional view in Canada is that a criminal appeal ought never to survive the death of an accused. The death of the accused causes the appeal to abate whether the accused is the appellant or respondent, and abatement occurs even if the appeal has been argued and the decision reserved: *R. v. Cadeddu* (1983), 3 C.C.C. (3d) 112 (Ont. C.A.), at p. 114; *R. v. Smith*, 2004 SCC 14, [2004] 1 S.C.R. 385, at para. 11. Under this traditional rule, the courts nonetheless recognized some discretion to proceed to judgment despite the death of the accused: *Cadeddu*, at pp. 118-119.

[9] In *Smith*, where the accused was the appellant, the Supreme Court of Canada held that the appellant's death rendered the appeal moot. But the court acknowledged a discretion to proceed with a moot appeal, provided the discretion was exercised in accordance with judicial principles. The court emphasized, however, that this discretion should be exercised only in exceptional

circumstances where the appellant's death is survived by a continuing controversy which requires resolution in the interests of justice: *Smith*, at paras. 4, 20.

[10] Three principal rationalia underlie the policy or practice governing the continuance of moot appeals and inform the exercise of the circumscribed discretion to determine the appeal despite the party litigant's death:

- i. the existence of a truly adversarial context;
- ii. the presence of particular circumstances which justify the expenditure of limited judicial resources to resolve the issue; and
- iii. the respect shown by courts to limit themselves to their proper adjudicative role, as opposed to making freestanding legislative-type pronouncements.

See *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, at p. 358; *Smith*, at para. 39.

[11] The *Borowski* court outlined a two-step approach to the hearing of moot appeals. The first step involves an inquiry and determination whether the required tangible and concrete dispute has disappeared and the issues have become academic. If the case ascends the first step, the court should then determine whether it should exercise its discretion to hear the case: *Borowski*, at p. 353; *Smith*, at para. 33.

[12] In the end, the general test an appellate court should apply when considering whether to proceed with an appeal rendered moot by the death of an

accused, is whether there exist special circumstances that make it “in the interests of justice” to proceed: *Smith*, at para. 50.

The Principles Applied

[13] We are satisfied that this is an appropriate case in which to give effect to the joint position advanced by the parties. In addition, we are unable to find any exceptional circumstances that would justify departure from the general rule that the death of an accused appellant renders the appeals against conviction and sentence moot.

[14] First, the controversy in the appeal does not survive the appellant's unfortunate death. He would not benefit if the conviction appeal were allowed, nor from any reduction or alteration in the manner in which the sentence imposed is to be served.

[15] Second, the issues raised on both appeals do not transcend the circumstances of this case in their significance to the administration of justice. None of the grounds advanced in argument of the appeals raise any issue of importance to the administration of criminal justice. Nothing has a constitutional dimension. Nothing requires the interpretation of a statutory provision or common law rule of frequent application and unresolved controversy in the daily business of our trial courts. And no issue raised is evasive of appellate review.

[16] Third, while we recognize that convictions for sexual offences carry with them a stigma, most serious crimes carry with them a stigma. But if stigma, coupled with media coverage, were sufficient to constitute exceptional circumstances, the rule that generally forecloses continuation of an appeal by a deceased party would be supplanted by its exception. Put otherwise, the rule would become the exception and the exception, the rule.

Disposition

[17] In the result, we see no reason to reject the agreement of the parties or to depart from the general rule that the death of the appellant renders his appeals from conviction and sentence moot. The appeals against conviction and sentence are dismissed as abated appeals without any adjudication of their merits.

“David Watt J.A.”
“A. Harvison Young J.A.”
“S. Coroza J.A.”