

[Indexed as: R. v. Jonas]

Re Jonas and The Queen

139 C.C.C. (3d) 136

**Ontario Court of Appeal
Court File No. C26554
Brooke, Rosenberg and Feldman JJ.A.**

Heard: September 29, 1999
Judgment rendered: October 7, 1999

Appeal — Procedure — Jurisdiction — Reopening appeal — Inmate filing notice of appeal indicating that he wished appeal to be dealt with in writing — [page137] Court requesting Crown to make written submissions — Crown's written submissions sent to inmate with request for further written submissions — Inmate having sought assistance from university correctional law project in preparation of written submissions — Director of project having been assured that appeal would not be processed until submissions received — However, due to oversight, panel considering appeal not aware of this and appeal dismissed without inmate's written submissions — In circumstances, appropriate to reopen appeal — Not appropriate to consider whether accused's submissions would have changed result.

The accused was convicted of perjury, and filed an inmate notice of appeal from conviction indicating that he wished his appeal to be dealt with in writing. Written submissions made by the Crown were sent to the accused with a request for further written submissions. The accused contacted the Queen's University Correctional Law Project for assistance in preparing his written submissions. The Director of the Project had been assured that the accused's appeal would not be processed until the court received the accused's submissions. However, due to an oversight this was not brought to the attention of the panel considering the inmate's in-writing appeal, and the appeal was dismissed.

On application by the accused to reopen his appeal, **held**, the application was granted.

This was a proper case for the court to exercise its discretion to reopen the appeal. It was no answer that the accused's submissions might not have changed the result. The accused was entitled to procedural fairness in the processing of his appeal.

Cases referred to

R. v. H. (E.F.) (1997), 115 C.C.C. (3d) 89 sub nom. R. v. Rhingo, 33 O.R. (3d) 202, 98 O.A.C. 363, 34 W.C.B. (2d) 298 [leave to appeal to S.C.C. refused 117 C.C.C. (3d) vi,

APPLICATION by the accused to reopen the appeal from his conviction on a charge of perjury.

Robert Goddard, for accused, applicant.

Gary Trotter, for the Crown, respondent.

¶ 1 **BY THE COURT:**— This is an application to reopen an inmate in-writing appeal. On January 22, 1997, the applicant was convicted of perjury. He filed an inmate notice of appeal against that conviction and indicated that he wished his appeal to be dealt with "in writing". At the request of the court, the Crown was asked to make written submissions with respect to the appeal. Those submissions were filed with the court and sent to the applicant, inviting him to make further written submissions. When no further submissions were received, the appeal was dealt with in writing and dismissed by a panel of the court.
[page138]

¶ 2 Due to an oversight, it was not brought to the attention of the panel considering the in-writing appeal that Mr. Goddard had been in touch with staff in the Court of Appeal office. Mr. Goddard is the Director of the Queen's Correctional Law Project. The Project had agreed to assist the applicant with his written submissions and had been assured that the applicant's appeal would not be processed until those submissions had been received by the Court. When Mr. Goddard learned that the applicant's appeal had been dismissed, he promptly completed the submissions, forwarded them to the Court, and drew the Court's attention to the oversight. He now applies on behalf of the applicant to reopen the appeal. Mr. Trotter, on behalf of the respondent, submits that this court has no power to reopen the appeal and that in any event the matter is academic since even if the applicant's written submissions had been considered by the court they would not have changed the result.

¶ 3 This appeal must be reopened in the interests of justice. In our view, the holding in *R. v. H. (E.F.)*; *R. v. Rhingo* (1997), 115 C.C.C. (3d) 89 (Ont. C.A.), has no application. In that case, Charron J.A. held that the well-recognized inherent or ancillary jurisdiction of a court, including an appellate court, to control its own process does not extend to reopening an appeal that has been heard on its merits. As she said at p. 101:

	heard on the merits. Once the appeal has been heard on its merits and finally disposed of by the issuance of an order, the statutory right of appeal has been exhausted. Any subsequent reopening of the same proceeding would involve the creation of further substantive or procedural rights, which only Parliament can enact.	
	There are sound policy reasons for so limiting the power to reopen appeals. An unlimited discretion to reopen appeals that have been heard on their merits is not only unjustifiable as an ancillary power of the court, but would do significant harm to the criminal justice system. Finality is an important goal of the criminal process. Statutory rights of appeal provide a carefully crafted exception to the general rule that trial decisions are final. By providing broad rights of appellate review in criminal matters, Parliament recognizes that fairness and justice interests require that the accused have a full opportunity to challenge a conviction even though that opportunity will prolong the process. Once those broad appellate rights	

¶ 4 Due to the oversight, this appeal was not heard on the merits as the court did not receive the applicant's submissions. This is not a case where an appellant seeks to raise new substantive arguments. Rather, this applicant seeks to present his substantive arguments for the first time. He did not, in the words of Charron J.A., have a full opportunity to challenge his conviction.

¶ 5 In our view, it is no answer that those submissions might not have changed the result. The applicant was entitled to procedural fairness in the processing of his in-writing appeal. Due to the oversight, that did not occur. We recognize that merely because there has been this kind of an oversight, the appellant will not always be entitled to have the appeal reopened. However, in this case, Mr. Goddard moved promptly on behalf of the applicant when he learned of the error and, in the circumstances, this is a proper case to exercise our discretion in favour of reopening.

¶ 6 Accordingly, the application is allowed and the appeal restored to the list of pending appeals. This application was heard in Kingston and Mr. Jonas was present for the hearing. He stated that he wished to be present when the appeal is heard on the merits. Accordingly, this appeal is converted to an in-person appeal and adjourned to November 24, 1999 for hearing. The written submissions of the appellant and the respondent are to be placed before the panel hearing the appeal.

Application granted.
