NOVA SCOTIA COURT OF APPEAL
Citation: *R, v. MacLean*, 2017 NSCA 86

Date: 20171128
Docket: CAC 463346
Registry: Halifax

Between:

Randall MacLean

Applicant

v.

Her Majesty the Queen

Respondent

Judge:	Derrick, J.A.
Motion Heard:	November 23, 2017 in Halifax, Nova Scotia in Chambers
Held:	Motion dismissed
Counsel:	Applicant by video-link James A. Gumpert, Q.C., for the respondent (Watching Brief) Glenn R. Anderson, Q.C., for the Attorney General of Nova Scotia Lawrence Rubin, for the Lawyers' Insurance Association of Nova Scotia (not participating)

Decision:

Introduction

[1] This decision deals with Mr. MacLean's motion pursuant to section 684 of the *Criminal Code of Canada*, R.S.C. 1985, c. C-46, seeking assignment of counsel to act for him in proceedings before this Court.

[2] Mr. MacLean wants a lawyer appointed to represent him on a motion to extend the time for filing his appeal, and if that motion is successful, to represent him on his appeal.

[3] The Attorney General opposes Mr. MacLean's application to have counsel appointed. The Crown takes no position.

[4] Mr. MacLean appeared before me by video-link with the consent of the Attorney General and the Crown, and was cross-examined by Mr. Anderson.

Background

[5] Mr. MacLean was convicted in Provincial Court on October 18, 2016 of aggravated assault contrary to section 268(2) of the *Criminal Code* (*R. v. MacLean, 2016 NSPC 59*). He was sentenced on February 21, 2017 to six months' imprisonment followed by twelve months' probation.

[6] Mr. MacLean's deadline to file an appeal against his conviction was March 29, 2017. On March 7, 2017 Mr. MacLean, who was incarcerated at Northeast Nova Scotia Correctional Facility, had a Notice of Appeal faxed to the Registrar for the Court of Appeal.

[7] The Registrar noted that there was information missing from the Notice of Appeal. She emailed Mr. MacLean's case management officer on March 8 identifying where the Notice of Appeal was not properly completed or incomplete and requested that Mr. MacLean make the necessary corrections and resend the Notice.

[8] Prior to the end of March 2017, the Registrar was advised by Mr. MacLean's case management officer that she had brought the email to Mr. MacLean's attention and been informed by him that he no longer wished to proceed with his appeal.

[9] On May 19, 2017, the Registrar received by mail a letter from Mr. MacLean dated May 17, 2017, enclosing his original Notice of Appeal. Mr. MacLean was still incarcerated at this time. Mr. MacLean's letter indicated that he had approached Nova Scotia Legal Aid looking for representation for his appeal.

[10] In a telechambers conference call on July 26, 2017, Mr. MacLean advised that he wished to withdraw his Notice of Appeal. A Notice of Abandonment was sent to Mr. MacLean by mail on August 3 for his signature. Mr. MacLean never signed the Notice. In a telephone call on September 20, 2017 with the Deputy Registrar of the Court of Appeal, he indicated he had changed his mind and now wanted to proceed with his appeal.

[11] Mr. MacLean's motion to extend the time to file his Notice of Appeal is scheduled for December 21 in Chambers. The Crown is opposed to the extension of time being granted.

The Principles

[12] The burden of establishing that state-funded counsel should be appointed rests on Mr. MacLean. To be successful Mr. MacLean must demonstrate that it is in the interests of justice that he have legal assistance in this Court and that he does not have sufficient means to obtain that assistance. Section 684(1) of the *Criminal Code* provides:

> 684(1) A court of appeal or a judge of that court may, at any time, assign counsel to act on behalf of an accused who is a party to an appeal or to proceedings preliminary or incidental to an appeal where, in the opinion of the court or judge, it appears desirable in the interests of justice that the accused should have legal assistance and where it appears that the accused has not sufficient means to obtain that assistance.

[13] As noted by Beveridge, J.A. in *R. v. Keats*, 2017 NSCA 7, citing Doherty, J.A. in *R. v. Bernardo*, [1997] O.J. No. 5091, the "interests of justice" is a phrase that has been held to take "its meaning from the context in which it is used" and is to be assessed by the exercise of judicial discretion on a case-by-case basis. Doherty, J.A. found: "The interests of justice encompass broad based societal concerns and the more specific interests of a particular accused." (*para. 16*)

[14] Beveridge, J.A. observed in *Keats* that the "interests of justice" factors "usually considered in Nova Scotia" were discussed by Cromwell, J.A., in *R. v. Assoun*, 2002 NSCA 50 as "the merit of the appeal, its complexity, the ability of the

appellant to effectively present his or her appeal without the assistance of a lawyer and the capacity of the court to properly decide the appeal without the assistance of counsel." (*para. 42*)

[15] The "merit of the appeal" factor is typically established by an applicant demonstrating that there is, at least, an arguable issue on appeal. (*R. v. Fudge*, 2013 NSCA 149, per Beveridge, J.A., citing *R. v. Innocente*, [1999] N.S.J. No. 302; *R. v. J.W.*, 2011 NSCA 76 at para. 11; *R. v. Frank*, 2012 NSCA 114, at para. 14; and *R. v. George*, 2013 NSCA 41 at para. 21).

[16] In *Keats*, Beveridge, J.A. held that an "arguable issue" is an issue constituted by "complaints of error that are not frivolous and will have at least an opportunity to succeed." (*para. 11*). He noted in *Fudge*, Doherty, J.A.'s persuasive reasoning from *Bernardo*:

> [22] …First, the assessment is often made on less than the entire record. Second, any assessment beyond the arguable case standard would be unfair to the appellant. An appellant who has only an arguable case is presumably more in need of counsel than an appellant who has a clearly strong appeal.

[17] However, as both Beveridge, J.A. and Doherty, J.A. have observed, appeals that lack merit "will not be helped by the appointment of counsel" (*Fudge*, para. 15; *Bernardo, para. 22*).

[18] The "interests of justice" factor must also be assessed with consideration of "the interplay between the apparent complexities of the appeal and the applicant's ability to put forward his case without the assistance of counsel." (*Keats, para. 13*) Beveridge, J.A. in *Keats* referenced the discussion of these factors from *Bernardo*:

> [24] …The complexity of the argument is a product of the grounds of appeal, the length and content of the record on appeal, the legal principles engaged, and the application of those principles to the facts of the case. An appellant's ability to make arguments in support of his or her grounds of appeal turns on a number of factors, including the appellant's ability to understand the written word, comprehend the applicable legal principles, relate those principles to the facts of the case, and articulate the end product of that process before the court.

[19] I will turn now to consider Mr. MacLean's motion in the context of the legal framework I have been reviewing.

The Interests of Justice Requirement

[20] The Appeal Book, filed by the Crown for its appeal against sentence, since abandoned, contains the trial decision, although not the transcript from the trial itself. I have also looked at the documents Mr. MacLean prepared and filed for this motion. Referring to these, Mr. Anderson suggested to Mr. MacLean on cross-examination that his grounds of appeal can be reasonably described as ineffective assistance of counsel at trial and judicial bias. Mr. MacLean agreed.

[21] Mr. MacLean's Notice of Motion indicates the nature of his complaints about his trial. He says:

> I feel the judge did not listen to facts clearly – lawyers would not believe it was accident on my behalf. This was not entertained at all…Judge should of thrown out case from court because my lawyer never brought up crowns disclosure from police and disclosure from their statements. No reliable witnesses, all drinking."

This is followed by other complaints about the adequacy of his representation.

[22] From what I have before me I have struggled to extract an "arguable issue" for Mr. MacLean's proposed appeal. He testified in his own defence at trial. He did not advance the defence of accident. The trial judge reviewed the testimony of the witnesses, the exhibits, and the theories of the Crown and the Defence. He rejected Mr. MacLean's claim of self-defence and his explanation for the injuries inflicted on the victim. He found no reasonable doubt, concluding that Mr. MacLean acted out of anger and knew or ought reasonably to have known that he would seriously injure the victim.

[23] I note that Nova Scotia Legal Aid viewed Mr. MacLean's appeal to be without merit. A letter to Mr. MacLean dated April 25, 2017 from Stephen Robertson, a Legal Aid staff lawyer, contained the negative evaluation:

> Judge Atwood thoroughly reviewed the law as it relates to self-defense and reasonable doubt. Judge Atwood made no errors in coming to his conclusion. Also his conclusion is reasonable. Therefore there is no merit in appealing the verdict…" (*Exhibit 1, Tab 3)*

[24] Without the full trial record before me, I am reluctant to make a categorical finding that Mr. MacLean has no arguable issue on appeal. I will simply say that on what I have reviewed I do not see one.

[25] What I can say based on the record before me is that neither Mr. MacLean's motion to extend the time to file his Notice of Appeal or his appeal, in the event his motion succeeds, will be complex. Mr. MacLean's aggravated assault trial was a straight-forward proceeding in terms of the facts and the law. There was no expert evidence and no *voir dires*. Mr. MacLean's motion to extend the time to file his Notice of Appeal concerns readily understandable factual circumstances.

[26] Mr. MacLean has emphasized health and literacy issues that he says will compromise his ability to effectively present his motion and his appeal. He is on Workers' Compensation from an accident he sustained at work. He takes pain medication, has diabetes which he says affects his vision and his judgment, and mentioned being "bipolar." He testified that "navigating" this case without a lawyer will be too much of a challenge for him.

[27] Although Mr. MacLean did not produce any evidence of his health problems, I am prepared to accept that he has various physical disabilities. Notwithstanding them, he has been able to advance this section 684 application, including putting together and filing documents for it and participating in the hearing. He may feel, as he said, that he "can't read or write that good" but his materials are readable and appear quite comprehensive of the issues that concern him. I also note that despite any limitations he may have, he left high school with his Grade 11, attended a two-year Nova Scotia Community College program in "comprehensive basic skills", and obtained a welding certificate. He worked for 14 years as a welder at Trenton Works.

[28] In the course of this motion Mr. MacLean displayed moments of frustration but he was able to express himself, identify and read documents, respond appropriately to questions, and press his points. I am satisfied he has the ability to effectively present his case on the motion to extend time to file his Notice of Appeal and argue the appeal itself, if his motion is successful.

[29] There is a final point to be made on the interests of justice issue: as Mr. Anderson acknowledged in his submissions, the Crown and the Court each have a duty to ensure that Mr. MacLean is treated fairly. This obligation applies to both Mr. MacLean's motion to extend time for the filing of his Notice of Appeal and his appeal, if it proceeds.

The Sufficient Means to Obtain the Services of a Lawyer

[30] Mr. MacLean has a modest annual income from Workers' Compensation of $32,000. This income is non-taxable. He owns his home. It is mortgage-free. The

current assessment is $97,700 (*Exhibit 1, Tab 9*). Mr. MacLean disputes the accuracy of this assessment but has not appealed it.

[31] Mr. MacLean's legal aid application indicates credit card debt of $20,000 with payments of $600 per month (*Exhibit 1, Tab 5*). He testified that this debt is for legal fees. He was asked by Mr. Anderson whether he had inquired into mortgaging his home to pay off this high-interest debt and raise funds for a lawyer. He has not. He says he cannot afford a mortgage and does not want to acquire more indebtedness: "I just paid off a mortgage, why would I get back into it?"

[32] Cross-examination brought out that Mr. MacLean sought legal representation for his appeal through Nova Scotia Legal Aid but has taken no other steps to find a lawyer. He has not approached any private lawyers about representing him in this Court and has made no inquiries about the cost of a retainer.

[33] Mr. MacLean is not wealthy. But he has not established that retaining a lawyer for the proceedings in this Court is beyond his means.

Conclusion

[34] To succeed in obtaining an Order for the appointment of a lawyer under section 684 of the *Criminal Code*, Mr. MacLean has the burden of establishing that the interests of justice require it and that he does not have sufficient means to secure these services. I find he has failed to satisfy either criteria. Despite his concerns, I am satisfied he has the ability to "navigate" the proceedings before this Court and will have the benefit of the attention to fairness that is the duty of the Crown and the Court. His motion to have a lawyer appointed to represent him in this Court is dismissed.

Derrick, J.A.