NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. McKenna*, 2015 NSCA 36

Date: 20150415
Docket: CAC 433276
Registry: Halifax

Between:

Randall Bruce McKenna

Appellant

v.

Her Majesty the Queen

Respondent

Judge:	Bryson, J.A.
Motion Heard:	April 9, 2015, in Halifax, Nova Scotia, in Chambers
Held:	Motion dismissed
Counsel:	Randall Bruce McKenna, appellant in person Edward A. Gores, Q.C., for the Attorney General of Nova Scotia Marian Fortune-Stone, Q.C. for the respondent, watching brief only

Decision:

[1] Mr. McKenna seeks counsel for his appeal. Legal aid has turned him down. He has brought a motion under s. 684 under the *Criminal Code of Canada* to have the Court appoint counsel for him.

[2] Mr. McKenna pleaded guilty to possession of stolen property and breach of probation. Provincial Court Judge Del Atwood sentenced Mr. McKenna to six months imprisonment in relation to the possession charge and twelve months imprisonment for breach of probation, to be served consecutively. Both matters proceeded indictably.

[3] In sentencing Mr. McKenna, the Provincial Court judge observed:

> [2] Mr. McKenna holds a championship-level criminal record that consists of 29 prior findings of guilt for section145-related offences; 25 prior findings of guilt for breach of probation-related offences; 20 prior findings of guilt for property-related offences; 13 offences against the person, including one conviction for intimidating a justice system participant; and five convictions for assaulting peace officers.

[4] Mr. McKenna has now appealed arguing that his sentence is excessive and should be reduced to six months in total.

[5] Section 684 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.

[6] The classic description of the factors considered in the context of the phrase "interests of justice" is that of Justice Cromwell's in *R. v. Assoun*, 2002 NSCA 50:

> [42] The first inquiry, therefore, is whether it appears to be in the interests of the administration of justice that Mr. Assoun have legal assistance for the purpose of preparing and presenting his appeal. This involves consideration of numerous factors including 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.

[7] This Court has frequently applied *Assoun* (*R. v. Fudge*, 2013 NSCA 149; *R. v. Sykes*, 2014 NSCA 4; more recently *R. v. Miller*, 2015 NSCA 19.

[8] The Attorney General concedes that the appeal is arguable and focuses her submissions in opposing the request for court appointed counsel on the "interests of justice". She also concedes that Mr. McKenna lacks the means to retain counsel.

[9] Mr. McKenna submits that he needs legal counsel to help him present his case. He says that he is blind in one eye and has difficulty reading. He claims he has some form of dyslexia. He also said he suffered from cerebral palsy and mental retardation. Mr. McKenna did provide the Court with a very brief letter written in December 2013 by Mr. McKenna's family physician in Arichat explaining that Mr. McKenna had been prescribed medication for "anxiety neurosis" and that he was "disabled due to borderline mental retardation and mild cerebral palsy".

[10] No details about these diagnoses or their potentially debilitating effects are elaborated upon in the brief letter from Mr. McKenna's physician.

[11] In response to questions from the Court, Mr. McKenna claimed that on his appeal "papers and cases" would have to be presented to the Court by legal counsel. He referred to a case in his possession that had been provided to him by a lawyer with whom he had spoken last fall. At the Court's request he provided a copy of the case to the Crown. It is *R. v. Chinn*, [1977] A.J. No. 779, a decision of the Alberta District Court regarding the fitness of sentence in a theft and breach of probation case. The Crown had appealed a nominal sentence imposed for breach of the terms of the probation order. One cannot tell from the case report whether the facts bear any relation to Mr. McKenna's case.

[12] Whatever Mr. McKenna's personal circumstances may be, they do not interfere with his ability to express what he means. He explained to the Court that the Notice of Appeal had been completed with the assistance of someone at the Correctional Facility who had written out the grounds for him upon his instruction at which point he signed the Notice of Appeal. He clearly describes that he is appealing what he considers an excessive sentence. He even offers an appropriate sentence – six months imprisonment.

[13] During his sentencing before Judge Atwood, Mr. McKenna addressed the Court appropriately by augmenting his counsel's submissions on sentence.

Likewise before this Court, Mr. McKenna's demeanour and submissions were logical and appropriate. Mr. McKenna had numerous papers with him in court. Although reading may be a challenge for him, Mr. McKenna was able to identify and provide both the foregoing case and his doctor's letter to the Attorney General's counsel and the Court without difficulty.

[14] In the words of the sentencing judge, Mr. McKenna holds a "championship-level criminal record". His experience with the criminal justice system has made him familiar with its process. Indeed, the Attorney General points out that Mr. McKenna argued his own appeal and was successful in overturning a conviction for breach of undertaking and a conviction of four months (*R. v. McKenna*, 2007 NSCA 40). The Attorney General cannot take too much comfort from Mr. McKenna's success in this earlier foray into the Court of Appeal because the Crown conceded that the breach of undertaking conviction should be set aside. Nevertheless the case records that Mr. McKenna argued his own appeal regarding sentence for theft, albeit unsuccessfully.

[15] The issues on this appeal are not complex. The convictions are not in doubt. The question is whether the sentence was excessive. The legal principles involved are well known to the Crown and the Court and that is important for Mr. McKenna because both the Crown and the Court have an obligation to ensure that Mr. McKenna receives a fair hearing.

[16] This Court has often quoted Justice Hallett's remarks in *R. v. Grenkow*, (1994) 127 N.S.R. (2d) 355 and para. 26:

> [26] Third, the reality is that on an appeal from conviction or sentence ***where the appellant appears in person, the appeal panel hearing the appeal will carefully address the issues raised by the appellant***. The panel will have the trial record and the panel members will have reviewed the record of the proceedings. ***If the points raised on the appeal have merit the appeal will be allowed notwithstanding the possible imperfect presentation of argument by the appellant.*** There is a problem, of course, in that the appellant may not recognize that he or she has a meritorious point and there is no requirement that a court of appeal dig around in a transcript to discover errors. However, ***in most appeals where an appellant appears in person, and for the most part those are sentence appeals, any errors will come to the attention of the appeal court.*** A review of the results of appeals from conviction show that in the past 18 months two appellants representing themselves have been successful.
>
> [Emphasis added]

[17] In addition, the Crown itself has an obligation to ensure that Mr. McKenna is treated fairly. In *R. v. Morton*, 2010 NSCA 103, Chief Justice MacDonald quoted from *Boucher v. the Queen*, [1955] S.C.R. 16:

> It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.

[18] The Attorney General in its written submissions has affirmed that duty. In her brief she submits:

> 24. The Crown will continue to assist the Court and will show conscientious regard for their role to see that the accused, or offender if there has been a conviction, is treated fairly. Should Mr. McKenna omit an important point of argument, the Crown will bring that to the Court's attention: *J.W.M.*, *supra*, para. 24.

[19] Keeping in mind the foregoing considerations, the nature of the appeal and legal principles involved, as well as Mr. McKenna's personal circumstances, I am satisfied that he will receive a fair hearing without counsel. The interests of justice do not require that Mr. McKenna have legal assistance in this case.

[20] While Mr. McKenna will no doubt be disappointed that the Court has decided that he should not receive state funded counsel, he should take comfort from the fact that both this Court and the Crown will ensure that his appeal is conducted fairly and that appropriate principles of sentencing will be applied in reviewing the sentence imposed upon him by the Provincial Court judge.

[21] The motion for appointment of counsel under s. 684 of the *Criminal Code* is dismissed.

Bryson, J.A.