

**NOVA SCOTIA COURT OF APPEAL**

**Citation:** R. v. Morton, 2010 NSCA 103

**Date:** 20101209

**Docket:** CAC 328179

**Registry:** Halifax

**Between:**

Tara Lynn Morton

Appellant

v.

Her Majesty the Queen

Respondent

**Judge:** The Honourable Chief Justice J. Michael MacDonald

**Motion Heard:** December 2, 2010, in Chambers

**Held:** Motion to appoint legal counsel dismissed

**Counsel:** Appellant in person  
Duane Eddy for the Attorney General of Nova Scotia  
Mark Scott for the respondent (Watching Brief)  
Anne Malick, Q.C., (Watching Brief)

**Decision:**

OVERVIEW

[1] The appellant, having been convicted of robbery and related charges, asks me to appoint legal counsel to help her prosecute her appeal. For the reasons that follow, I deny this request.

ANALYSIS

[2] I have jurisdiction under the *Criminal Code* to assign counsel:

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.

[3] As this provision suggests, the appellant's motion involves two inquiries; namely (a.) whether it is in the interests of justice to assign counsel and (b.) whether otherwise the appellant lacks the sufficient means to obtain counsel.

[4] Here, the Attorney General concedes that Ms. Morton lacks the means to otherwise retain counsel so I am left to complete only the "interests of justice" analysis. As Cromwell J.A. (as he then was) noted in *R. v. Assoun*, 2002 NSCA 50, this inquiry involves a host of considerations including (a.) the merits of the appeal, (b.) its complexity, (c.), the appellant's capability and (d.) the Court's role to assist:

[43] 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.

[5] To Cromwell J.A.'s list I would add a fifth consideration, namely the responsibility of crown counsel to ensure that the appellant is treated fairly. I will now elaborate on each of these five factors.

*The Merits of the Appeal*

[6] This Court has ruled that to be successful under *s. 684*, an applicant must at least establish an *arguable issue* on appeal (*R. v. Innocente*, [1999] N.S.J. No. 302 at ¶ 10); if not a *reasonable chance of success* (*R. v. Grenkow*, [1994] N.S.J. No. 26, at ¶ 32). In reviewing the appellant's notice of appeal, her written motion and hearing her oral submissions, it is difficult to pinpoint an arguable issue. For example, here are the grounds from her notice of appeal:

1. Witness testified the knives I had on my person were not the same knives used in the crime
2. The grey sweater used to identify offender was worn by a white male, not a black person
3. It cannot be proven that the tan shoes in my possession were the same ones worn by the offender
4. Evidence was tampered with
5. Witness testimonies differed from their statements
6. Police testimonies differed from what was in their notebooks (see disclosure)
7. Witnesses could not identify gender of offender. I was only suspect
8. Witnesses were not credible due to buying stolen merchandise (verified through Interact) from me. This was exposed during the trial
9. Many discrepancies overlooked during my trial

[7] Here is what Ms. Morton wrote in support of her motion:

I would like to appeal my conviction and sentence of the guilty finding of Judge Digby for robbery X 2, weapons X 2 as I feel that during my sentencing he appeared to be doubtful of the evidence

I feel the evidence was tampered with during my trial

Witnesses clearly testified that the knife[sic] that we[sic] found on my person were not the knives used in the crime

It was further identified during my trial that the grey sweater that they found in my possession was actually worn by a white male during the crime. This was evident in the crime video

It can not be proven that the tan shoes in my possession were worn by the offender in the crime video. The Judging[sic] finding said it appeared that the shoes in my possession are similar to the ones in the video of robbery

Witness testimony differs from their statements as Erin (one of the victims) says that during the month of December, I was in and out of the Subway restaunt[sic] and it was found by the Crown Cogswell that during the month of December I was

During trial my jacket color went from being blue to green during testimony

During my trial it was revealed that after the robbery occurred both victims Heather & Erin could not pick me out during a photo line up. It was also shown that during the photo line up Erin stopped at # 6 as 65% sure, then moved to # 7 hairs different 70% possibly, continued to # 9 said she is unsure about this one and then stopped on # 10 and said she was now 90% sure of this one

Heather during the photo line spent approximately 20 seconds on each picture until she reached # 6 for approximattely[sic] 1 minute, then continued but no other photo became of interest and then said # 6 had a similar mouth but no selection could be made

Police testimony during my trial differed from their notes. See disclosed[sic] for discrepancies

Witness was unable to identify the gender of the offender during the video of the robbery

Witnesses were not credible due to criminal activity[.] This was proven during the trial by verify[sic] through Internet by me

Also many discrepancies was over looked and evidence was with held by the police

I applied to Nova Scotia Legal Aid five times March 16th 2010 April 25/2010 April 27, 2010, May 27, 2010, May 26 2010 as well as June 2010 without response. I then spoke with Margaret on June 15, 2010 who was in charge of appeals for NSLA and was told I could not get a Lawyer until I was given a new trial dates. I feel I should be given a lawyer to assist me to fill out and file legal document, understand the legal precedents[sic] and criminal code processes

I would like to take this time and thank you for your time in reviewing this information[.] Should you require anything further, please do not hesitate to contact me!

[8] The appellant's oral submissions were essentially an elaboration on many of these points. On this basis, it is hard to find an arguable issue since it appears as though she will simply ask the Court to re-weigh the evidence and to impose our own verdict. That of course would not be our role.

[9] Yet, at this early stage of the process, it would be difficult to deny the motion solely because there appears to be no arguable issue. I say this for two reasons. Firstly, consider the context of this motion and its touch of irony. The appellant is expected to articulate the merits of her appeal when the entire purpose of her motion is to secure assistance to do that very thing. Secondly, the record is still far from complete, rendering a meaningful assessment of the merits difficult.

[10] Therefore, I prefer to move on to the remaining four criteria which, when considered together, convince me to deny the motion, regardless of the merits of the appeal.

### *The Complexity of the Appeal*

[11] This is not a complex appeal. Ms. Morton was convicted of robbing a Subway restaurant (two counts) and for failing to comply with an undertaking. The Crown's case consisted of the evidence of the restaurant employees and investigating officers together with the appellant's warned statement which,

through her trial counsel, the appellant agreed to have admitted. The only defence evidence was that offered by the appellant. Identification was the main issue. The Attorney General in his brief before me summarized the evidence as follows:

### **3. The Evidence**

The Crown's witnesses were:

- Erin Kerr: a Subway employee, who testified she was robbed at knife point by a man and woman. She saw the woman earlier on the day of the robbery, there was a confrontation about paying for a pop, when the woman said that is why you guys are going to get robbed. [**APPEAL BOOK, TAB 7 at pp. 9-101**]
- Heather MacKinnon, a Subway employee, who testified that she was robbed at knife point by a man and woman. The woman looked like the same woman who had been in the store on the day before the robbery and earlier on the day of the robbery, there was a confrontation about paying for a pop, when the woman said that is why you guys are going to get robbed. [**APPEAL BOOK, TAB 7 AT pp. 102-74**]
- Patrick Porter, a Subway manager, who testified that \$105 was taken in the robbery. [**APPEAL BOOK, TAB 7 at pp. 176-94**]
- Cst. Josh McNeil, a police officer, who testified that he stopped a male and Ms. Morton at Agricola and Bilby Streets minutes after the report of the robbery. He asked the male to take his hands out of his pockets and Ms. Morton to drop the bag(s). [**APPEAL BOOK, TAB 7 at pp. 198-242**]
- Cst. Jonathan Hayes, a police officer, who testified that he arrested Ms. Morton at 2:32 p.m. (4 minutes after the report of the robbery) and saw two knives, a grey hoodie and money in one of the two President's Choice grocery bags. [**APPEAL BOOK, TAB 7 at pp. 248-306**]
- Cst. Adam Cole, a police officer, who testified that he administered a photo line up. [**APPEAL BOOK, TAB 7 at pp. 307-28**]
- Cst. Stephen Hillier, a police officer, who testified that he took a statement from Erin Kerr. [**APPEAL BOOK, TAB 7 at pp. 329-340**]

- Cst. Adam Whynott a police officer, who testified that he transported Ms. Morton and two President's Choice shopping bags to the police station, the bags contained two knives, \$101.72, grey sweat shirt, make-up and scarf. **[APPEAL BOOK, TAB 8 at pp. 344-91]**
- Cst. Jamie Bricker, a police officer, who testified that the robbery call came in at 3:30 p.m., the description was of a black female approximately 30 years of age and a male. He seized the bags. **[APPEAL BOOK, TAB 8 at pp. 392-438]**
- Cst. Robert Tortola, a police officer, who testified that he interviewed Ms. Morton; at which time Ms. Morton confessed and explained why she did the robbery. **[APPEAL BOOK, TAB 8 at pp. 442-481]**

Ms. Morton's statement was admitted by agreement. Among numerous denials of any involvement in the robbery, Ms. Morton said: **[APPEAL BOOK, TAB 11]**

- "Like I told her, 'People like you, that's why you guys get jacked.'" **[pp. 128-29]**
- "Because I was waiting there for Tracy, for Tracy to give me money because she told me she was going to go do it..." **[p. 129]**
- "I didn't do nothing. I just made it happen." **[p. 130]**
- "That's why people like you and things happen." **[p. 132]**
- "Because the bitch made me mad ..." **[p. 132]**
- "I watched Tracy go in. Okay? I was standing across the street ..." **[p. 134]**
- "I watched them go in." **[p. 135]**
- "Because the girl pissed me off. So I just wanted to show her, you want to play the game, there you go ..." **[p. 150]**
- "Yes, the girl seen me with my scar because I was in there. Okay?" **[p. 160]**
- "... I said, 'That's why things happen, because you guys act like you pay for it.' That's all." **[p. 168]**

- “ ... I was there ... Yeah, I was there ... At Subway ... Just stood there ... Young buck took the money and booked ... It was me, Tracy and him ... I put Derek’s coat on. Okay? I put Tracy’s wig on. Tracy stodd outside and she put the purple scarf ...” [pp. 209-10]
- “I just stood there ... And he told the girls to get the money and then he took off with the bag of money and Tracy left. And then I went and got young buck and I bounced.” [p. 211]
- “I didn’t even go by the till. I just stood at the door.” [pp. 212-13]
- “... the woman is lying because my back was to her so she cannot surely pick me out.” [p. 215]

The Defence witness was:

- Tara Morton, who testified she had 65 prior convictions, was a crack addict, stole from the mall every day, the money in the bags was stolen, was released from jail on December 18th, sold make-up at the Subway on December 19th, had a confrontation with a Subway employee about paying for pop on the morning of December 20th, denied telling the Subway employees that’s why people get robbed or telling Cst. Tortola that she said that to the Subway employees. She denied being involved in the robbery. She said that none of her statements to Cst Tortola were true and that she admitted to the robbery at the interview to get out of jail. [APPEAL BOOK, TAB 8, pp. 485-523, 531-585]

[12] In his brief before me, the Attorney General as well summarized the judge’s decision:

#### **4. The Trial Judge’s decision**

The robbery was perpetrated by two persons in about 40 seconds during the afternoon of December 20, 2009. One, apparently a male, reached over and took money out of the till. The second one, apparently a female, stood by the door. [APPEAL BOOK, TAB 4 at pp. 21-22]

Judge Digby summarized the evidence against Ms. Morton, which included: [APPEAL BOOK, TAB 4 at pp. 21-28]



- she was in the store prior to the robbery; between 11 and 12 on the morning of the robbery and on the day before; [Decision, p. 3]
- the employees were acquainted with Ms. Morton prior to the robbery; [Decision, p. 4]
- she had a dispute with employees at the store on the morning of the robbery and said to them words to the effect, “That’s the way you treat people, that’s why people like you get jacked”. [Decision, pp. 8-9]
- she said in a statement to Cst. Tortola, “I didn’t do nothing. I just made it happen ... Because the bitch made me mad”; [Decision, p. 9]
- she said in a statement to Cst. Tortola, “Like I told her, people like you, that’s why you guys get jacked”. [Decision, pp. 9-10]
- her statement to Cst. Tortola was admitted by agreement. [Decision, p. 10]
- she previously wore a winter jacket with fur trim around the hood into the store; which was similar, if not identical, to the jacket worn by a robber; [Decision, p. 4]
- she has a facial scar. The employees said the female robber had a facial scar; [Decision, p. 5]
- she, along with a companion, was stopped by police close to the store shortly after the robbery carrying two Atlantic Superstore reusable grocery bags. The two robbers went into the store carrying Atlantic Superstore reusable grocery bags; [Decision, pp. 6-7]
- in one of the bags was a sweatshirt with a hood; which appeared to be similar in colour and style to the jacket worn by the robber who reached over and took money out of the till; [Decision, p. 7]
- also in the bag were two knives; [Decision, p. 7]
- also in the bag was money; which approximated the amount and quantity of bills that the store lost; [Decision, p. 10]

His Honour summarized Ms. Morton’s case: **[APPEAL BOOK, TAB 4 at pp. 26-28]**

- she testified that she did not rob the store; [Decision, p. 8]
- she admitted being in the store on the two prior occasions; [Decision, p. 8]
- she denied saying to the employees, “That’s the way you treat people, that’s why people like you get jacked”; [Decision, p. 9]
- she denied stating to Cst. Tortola that she said to the employees words to the effect “That’s the way you treat people, that’s why people like you get jacked”; [Decision, pp.9-10]
- she testified that, by saying to Cst. Tortola about making the offence happen, she was hoping that he would let her go; [Decision, p. 10]

His Honour stated that Ms. Morton’s explanation about confessing to robbery in the statement to Cst. Tortola was absurd: [**APPEAL BOOK, TAB 8 at p. 618**]

The explanation that she gave makes no sense for someone with her experience with the criminal justice system. That anyone would think that someone with that lengthy record confessing to robbery would be released by the police is absurd.

His Honour found Ms. Morton guilty on the basis of the evidence; which included a confession: [**APPEAL BOOK, TAB 4 at pp. 28-29**]

Ms. Morton says that she said the things about making the offence happen because she hoped that if she gave Cst. Tortola something in the nature - and these are my words, not hers - something in the nature what Cst. Tortola was looking for, he would let her go. There’s no suggestion by Cst. Tortola that he was going to let her go. In fact, if he had done so, the statement would be inadmissible. The Defence has agreed to the admissibility of the statement.

I am satisfied that it is extremely likely that Ms. Morton was, in fact, the person who robbed the store exactly as the clerk said. I am, however, satisfied based on her location in the area, the two knives, the clothing which was damp, and the quantity of bills, that the store lost that were found in her bag, the fact that she had worn a coat similar to what was used in the robbery and her statements to the officer make her a party to the offence, and I find her guilty of two counts with robbery. She is thus guilty of the offence of failure to keep the peace and be of good behavior.

His Honour sentenced Ms. Morton: **[APPEAL BOOK, TAB 4 at p. 30]**

The principles of sentencing are set forth in s. 718 of the Code. The Appeal Court in this province has given the lower courts, this being a lower court, very specific directions as to how to deal with offences of robbery. Only in exceptional circumstances are non-custodial, non-federal times imposed.

You have previous convictions for robbery. Unfortunately, during the times when you were on the street you were unsuccessful in dealing with your addictions and that's what has brought you back here today.

Since there's only two robberies and the 145 on ... well, on the two robberies it's really, in fact, one event, the sentences on that will be three years except for credit for time served, which is the equivalent of eight months given the fact that these events took place prior to the recent amendments in the Criminal Code dealing with credit for time served.

So for the two robberies sentences will be 28 months concurrent one with the other.

The [section] 145 charge will be 30 days concurrent with that.

[13] Thus there was nothing complex about this trial. As noted, it rested on the issue of identification.

### *The Appellant's Capability*

[14] This inquiry asks whether the appellant can effectively present her appeal without the assistance of counsel. To me, Ms. Morton appeared to be an intelligent and articulate person. She acknowledged writing her own documents. Furthermore, she had obviously read and had a good understanding of the appeal book that had been filed by the Crown. With the assistance of the Court (which will be discussed next) she should be able to effectively present her appeal.

### *The Court's Role*

[15] In *Grenkow, supra*, Hallett J.A. described this court's role in appeals involving self-represented litigants.

**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.

[16] This case will be no exception. I am satisfied that with the appellant's ability to express herself and this Court's care in reviewing the record, any problems with the verdict will be spotted and appropriately addressed.

[17] Furthermore, it is important to note that this relief can be granted not just by a motions judge but by the court itself. In other words, the panel assigned to hear this appeal can always reconsider this issue should a more detail review of the record so warrant.

### *The Crown's Role*

[18] Finally, let me turn to the Crown's duty to ensure that the appellant is treated fairly. Here, the famous quote from the Supreme Court of Canada in *Boucher v. the Queen*, [1955] S.C.R. 16 beginning at page 23 bears repeating:

*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.*

[Emphasis added]

[19] This important tradition exists in Nova Scotia and it includes crown attorneys who handle criminal appeals. We would expect the Crown in this case to assist the Court in ensuring that the appellant receives a fair appeal.

## CONCLUSION

[20] In short, this appeal is not complex. Identification is the main issue. This appellant appears to be intelligent and articulate. With our careful review of the record, and the Crown's additional oversight, I believe that she can effectively present her appeal without the assistance of Counsel. For all these reasons, I do not find it to be in the interests of justice to assign counsel. The motion is dismissed.

MacDonald, C.J.N.S.