Docket No.: CAC 168801
Date: 20010711

NOVA SCOTIA COURT OF APPEAL

[Cite as: R. v. L.E. B., 2001 NSCA 113]

BETWEEN:

L. E. B.

Applicant/Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

DECISION

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

Counsel: L.E.B. applicant/appellant in person
Edward Gores for the Attorney General of Nova Scotia
James A. Gumpert, Q.C. for the Crown
Janet Clark for the Nova Scotia Legal Aid Commission

Application Heard: July 5, 2001

Decision Delivered: July 11, 2001

BEFORE THE HONOURABLE JUSTICE OLAND
IN CHAMBERS

OLAND, J.A. (In Chambers):

[1] The hearing of L. E. B.'s appeal from conviction on charges of sexual assault, sexual interference, uttering death threats, and possession of a weapon to commit a crime is scheduled for this September. His appeal is from conviction only as the appellant has not yet been sentenced. He was represented by counsel through the trial.

[2] Earlier this year, the appellant applied to the Nova Scotia Legal Aid Commission (hereafter, "Legal Aid") pursuant to the **Legal Aid Act** R.S.N.S. 1989, c. 252 for legal representation on the appeal. His application was denied. He then filed an application in Chambers in June 2001 for assignment of counsel under s. 684 of the **Criminal Code of Canada** R.S.C. 1985, c. C. 46, s. 1. His application did not proceed when Legal Aid granted him a certificate which enabled the appellant to assure counsel retained by him of payment for a certain number of hours at a certain rate of compensation.

[3] The appellant now brings an application for an order increasing the hours and compensation granted under the Legal Aid certificate "to such an extent that counsel can be obtained" for his appeal, and alternatively, an order assigning counsel under s. 684 of the **Code**. In an unsworn document signed by him dated June 21, 2001 and entitled "Affidavit in Support of Application", the appellant stated that the certificate allowed 15 hours and that, after telephoning 28 lawyers, he was still without representation for the appeal. In Chambers, he stated that since then he had spoken unsuccessfully to one additional lawyer. In his "Affidavit", the appellant identified the lawyers he had contacted and recounted in brief form the reason given by each for declining to act. He categorized those reasons as "not enough money", "no time", "not available", or "not interested".

[4] The Attorney General for Nova Scotia (hereafter, the "Attorney General") filed submissions and appeared in Chambers to speak to the application. Counsel for the Crown and Legal Aid were also present in Chambers; neither spoke to the application. The Attorney General argued that the court of appeal is not the appropriate venue to challenge the sufficiency of a Legal Aid certificate. Further, it urged that where legal aid has been granted, s. 684 does not support an application for court assigned counsel to be paid by the Attorney General.

Sufficiency of the Legal Aid Certificate

[5] No case law in which a court dealt with the sufficiency of a legal aid certificate where counsel had not yet been retained was identified. However, in **R. v. Munroe** (1990), 57 C.C.C. (3d) 421 (N.S.S.C.), Glube, C.J.S.C. (as she then was) dismissed an application for an extension of the legal aid tariff presented by counsel acting on a certificate in defence of an accused charged with murder. That counsel deposed that the maximum preparation time allotted had already been exceeded. Affidavit evidence from three experienced counsel indicated that the hours provided by the certificate were insufficient for competent counsel to properly discharge the obligations to his client in a murder case.

[6] Chief Justice Glube observed that the appellant, who sought additional funding over and above that allocated by legal aid, had had his request for an increase turned down by the appeal committee of Legal Aid. In dismissing the application before her, she stated at p. 426 that in her opinion a *certiorari* application would have been an appropriate procedure to follow to determine whether the appeal committee might have erred in some fashion. Her decision was upheld by the court of appeal in (1990), 59 C.C.C. (3d) 446 (N.S.C.A).

[7] In the application before me, there is no indication that the appellant has pursued any review by Legal Aid or any internal appeal which might be available to him of the hours or the rate of compensation provided in the certificate. Further, there is no evidence that the appellant has brought any application for judicial review of the decision by Legal Aid.

[8] I would also note that it is not apparent from the materials provided by the appellant that the time made available under the certificate is indeed insufficient for preparation and attendance on the appeal before this court. Fourteen of the 29 lawyers he telephoned gave “no time” or “not available” rather than “not enough money” as the reason for not acting. The appellant has been calling counsel in late June and early July, traditionally the start of summer holidays, to prepare for an appeal scheduled to be heard in September. Clearly the schedules of many counsel are already filled for this period. It could well be that the appellant could obtain legal representation with the Legal Aid certificate provided him in other circumstances.

[9] In summary, the appellant has apparently not yet pursued any review or appeal pursuant to the **Legal Aid Act** on the sufficiency of its certificate nor sought judicial review of any decision unfavourable to him and he has not established that

the certificate is insufficient for his appeal. I agree with the submission made by the Attorney General that the court of appeal is not the appropriate venue to initially challenge the sufficiency of a Legal Aid certificate. In the particular circumstances of this case, it is not necessary for me to decide whether this court has jurisdiction to interfere with the decision of Legal Aid.

Assignment of Counsel

[10] In the alternative, the appellant applies for assignment of counsel pursuant to s. 684 of the **Code**. That provision reads in part:

> **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 . . . 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.
>
> (2) Where counsel is assigned pursuant to subsection (1) and legal aid is not granted to the accused pursuant to provincial legal aid program, the fees and disbursements of counsel shall be paid by the Attorney General who is the appellant or respondent, as the case may be, in the appeal.
>
> (3) Where subsection (2) applies and counsel and the Attorney General cannot agree on fees or disbursements of counsel, the Attorney General or the counsel may apply to the registrar of the court of appeal and the registrar may tax the disputed fees and disbursements.

[11] Generally, an application under this provision cannot be considered without inquiring whether representation was available through legal aid. In **R. v. Grenkow (I.G.)** (1994), 127 N.S.R. (2d) 355 (N.S.C.A.) at § 32, Hallett, J.A. set out the minimum requirements under s. 684 as follows:

> Before assigning counsel to an appellant on an application under s.684 of the **Code** the chambers judge would have to be satisfied that (i) the appellant was refused legal aid for the appeal by Nova Scotia Legal Aid although qualified on financial grounds; (ii) the appeal has a reasonable chance of success; and, (iii) the appellant, due to the complexity of the appeal issues or the inability of the appellant to articulate the grounds, requires the assistance of counsel, in other words the appellant could not have a fair hearing of the appeal without the assistance of counsel. These would be minimum requirements; each

> application would turn on its facts**.** (Emphasis added)

He then continued at § 33:

> It would only be in the most unusual circumstances, given the availability of legal aid in Nova Scotia to those who qualify, that a judge on a chambers application would assign counsel under s.684 of the **Code** to represent an appellant on the appeal from conviction or sentence.

[12] In **R. v. Johal** (1998), 127 C.C.C. (3d) 273 (B.C.C.A.), the Crown appealed the acquittal of four accused charged with first degree murder. The accused sought the appointment of counsel, wanted counsel renumerated at the same rate paid to private counsel retained by the Crown for the appeal, and requested unlimited hours for preparation and appearances. McEachern, C.J.B.C. in Chambers, dismissed the applications under s. 684. In doing so, he made observations at § 24 similar to those expressed in **Grenkow**, *supra*. In his view, that section must be read alongside the provisions for legal aid. While an appeal court judge may assign counsel if satisfied the statutory requirements have been met, the scheme of the enactment contemplates that the section will only operate when an accused is not granted legal aid and he cannot obtain legal assistance.

[13] In the application for assignment of counsel before me, the appellant has not been refused legal aid; rather, he has been granted legal aid. Accordingly, one of the minimum requirements stipulated in **Grenkow**, *supra* before counsel can be assigned under s. 684 has not been satisfied and it would appear that the application fails.

[14] However, the situation here is unusual in that the appellant is claiming that while he has been granted legal aid, he cannot obtain legal services. This is different from that reviewed at § 30 in **Grenkow**, *supra* where Hallett, J.A. stated that a Chambers judge confronted with a s. 684 application is entitled to assume, in the absence of credible evidence to the contrary, that the appellant was represented at trial by competent counsel and if legal aid were refused for the appeal, it is probable the appeal is without merit. The fact that Legal Aid has provided a certificate to this appellant allows an inference that the appeal has merit.

[15] In these circumstances, it is appropriate to continue and consider whether ss. 7 and 11(d) of the **Charter of Rights** might apply. Section 7 provides that a

person is not to be deprived of the right to life, liberty and security except in accordance with the principles of fundamental justice. Section 11(d) provides that a person is presumed innocent until proven guilty. As stated by the Ontario Court of Appeal in **R. v. Rowbotham** (1988), 41 C.C.C. (3d) 1 at p.70, "where the trial judge finds that representation of an accused is essential to a fair trial, the accused . . . has a constitutional right to be provided with counsel at the expense of the state."

[16] In **R. v. Rockwood** (1989), 49 C.C.C. (3rd) 129 (N.S.C.A), the appellant relied on ss. 7, 10(b) and 11(d) of the **Charter** in appealing a decision denying his motion that the Attorney General or Legal Aid be compelled to fund competent counsel of his choice for the defence of charges against him. At page 133, Chipman, J.A. for the court wrote that the position under the **Charter** is succinctly stated by the Ontario Court of Appeal in **Rowbotham**, *supra* and quoted the following passage from that decision at its pp. 65-66:

> The right to retain counsel, constitutionally secured by s. 10(b) of the Charter, and the right to have counsel provided at the expense of the state are not the same thing. The Charter does not *in terms* constitutionalize the right of an indigent accused to be provided with funded counsel. . . . In our opinion, those who framed the Charter did not expressly constitutionalize the right of an indigent accused to be provided with counsel, because they considered that, generally speaking, the provincial legal aid systems were adequate to provide counsel for persons charged with serious crimes who lacked the means to employ counsel. However, *in cases not falling within provincial legal aid plans*, ss. 7 and 11(d) of the Charter, which guarantee an accused a fair trial in accordance with the principles of fundamental justice, require funded counsel to be provided if the accused wishes counsel, but cannot pay a lawyer, and representation of the accused by counsel is essential to a fair trial. (Emphasis in original)

[17] If the appellant is unable to retain a lawyer with the certificate provided him, his situation might be considered equivalent to a case "not falling within the provincial legal aid plans."

[18] In **R. v. Keating** (1997), 159 N.S.R. (2d) 357 (N.S.C.A.), the Crown had appealed the order of the trial judge to stay proceedings until state-funded counsel was provided to the accused who was charged with three sexual offences and who appeared for trial without counsel, asking for court-appointed counsel. The judge had concluded that the respondent's right to a fair trial pursuant to s. 11(d) of the

Charter would be infringed should he be required to proceed to trial without counsel. This court allowed the appeal. Bateman, J.A. writing for the court set out the following test at § 13:

> The issue for this court is whether the judge made an inquiry sufficient to enable him to conclude:
>
> (i) that Mr. Keating could not receive a fair trial without counsel, and, if so,
>
> (ii) that he had exhausted all possible routes to obtain counsel.

[19] Whether an accused can receive a fair trial without counsel requires consideration of the personal attributes and abilities of the particular accused, the complexity of the law and evidence to be relied upon, and the expected complexity of the trial itself: **R. v. Wilson** (1997), 163 N.S.R. (2d) 206 (N.S.C.A.) at § 6. In **R. v. Taylor** (1996), 150 N.S.R. (2d) 97 (N.S.S.C.), Scanlan, J. allowed the appeal of a decision of the Provincial Court staying a charge against the respondent until state financed legal representation was provided. In considering whether the stay should be lifted, he stated at § 6:

> I am satisfied that a proper consideration in determining whether a stay should be entered is whether the accused person is capable of representing himself or herself. An accused may be unable to represent himself or herself because of the complexity of the case or as a result of a personal attribute such as illiteracy.

and at § 20 continued:

> Courts must not routinely require the state to fund legal defences based solely on the fact that an accused is indigent or that there is a possibility of incarceration if convicted. The test must be whether an accused is capable of answering the charge with sufficient skill so that the accused will not be deprived of their liberty without being afforded fundamental justice.

Pugsley, J.A. writing for this court in dismissing the appeal of that decision in (1996), 154 N.S.R. (2d) 378 stated that he was in complete agreement with the reasons given by the trial judge.

[20] In Chambers the appellant stated that he has a grade 6 education. However, he mentioned several upgrading courses which he had taken over the years but for which he had not obtained grade equivalency. He said the last one was taken pretty much for a year, about three or four years after a 1990 accident which he says affected his ability to learn and remember. The appellant also advised that he successfully completed a six month, three days a week, business course entitled "So you want to be an entrepreneur" in December 1998. He did not state that he was unable to read. He indicated that he had had assistance available to him in preparing the written material filed with this application and with the earlier one under s. 684 which did not proceed to hearing. There was no information as to his employment background.

[21] In Chambers the appellant spoke clearly, easily made himself understood, and answered questions appropriately. His ability to communicate orally exceeds what might be expected of a person with his level of formal education. He did not appear hesitant, confused, or uncomprehending. His submissions and responses to the court were direct and organized. He asked to reply to the Attorney General's argument and addressed the points he selected for clarification or rebuttal with some confidence.

[22] It does not appear that the issues on the appeal will be unusually complex or so complex that the appellant would be unable to represent himself. The trial took four days. The Crown having sought to introduce similar fact evidence, the first day was consumed by a *voir dire*. The second day opened with the trial judge's decision to deny the Crown's application and continued with the evidence of the complainant, the Crown's main witness, followed by three brief witnesses. Three further witnesses completed their testimony the morning of the third day, and counsel made their closing submissions that afternoon. On the morning of the last day, the judge rendered his decision. The transcript of evidence runs some 450 pages.

[23] In his notice of appeal, the appellant submits that the trial judge erred in deciding that the Crown had proved the charges beyond a reasonable doubt and that the judge was biased in hearing the *voir dire*. He is familiar with the evidence and should be able to express the reasons underlying the grounds of appeal he articulated in his notice. As already noted, the judge dismissed the similar fact application so the similar fact evidence preferred by the Crown in the *voir dire* formed no part of the case against the appellant. As indicated at the outset, his

appeal is from conviction only and the appellant will not be dealing with issues on appeal that relate to sentence.

[24] The appellant has not established that the appeal issues are complex, that he does not have the personal attributes and abilities to adequately conduct his appeal, and that he could not receive a fair hearing without counsel. Accordingly, even if it were assumed or accepted that this was a case "not falling within the provincial legal aid plans" as stated in **Rowbotham**, *supra* I am not persuaded that, having in mind ss. 7 and 11(d) of the **Charter**, representation of the accused by counsel is essential for a fair hearing of the appeal. I need not consider then the second part of the test in **Keating**, *supra*.

Disposition

[25] I would dismiss both the application for an increase in the number of hours or the compensation allotted in the Legal Aid certificate and that for assignment of counsel pursuant to s. 684 of the **Code**. There will be no award of costs.

Oland, J.A.