

NOVA SCOTIA COURT OF APPEAL

Citation: *R. v. Snow*, 2023 NSCA 71

Date: 20231018

Docket: CAC 517357

Registry: Halifax

Between:

James Snow

Appellant

v.

His Majesty the King

Respondent

Restriction on Publication:
s. 486.4 of the *Criminal Code of Canada*

Judge: Bourgeois J.A.

Motion Heard: October 12, 2023, in Halifax, Nova Scotia in Chambers

Held: Motion dismissed

Counsel: James Snow, self-represented appellant
Glenn Anderson, K.C., for the Attorney General of Nova
Scotia
Timothy O’Leary, for the respondent (on watching brief)

Order restricting publication — sexual offences

486.4 (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

- (a) any of the following offences:
 - (i) an offence under section 151, 152, 153, 153.1, 155, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or
 - (ii) any offence under this Act, as it read from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day; or
- (b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).

Mandatory order on application

(2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall

- (a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the victim of the right to make an application for the order; and
- (b) on application made by the victim, the prosecutor or any such witness, make the order.

Victim under 18 — other offences

(2.1) Subject to subsection (2.2), in proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.

Mandatory order on application

(2.2) In proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice shall

- (a) as soon as feasible, inform the victim of their right to make an application for the order; and
- (b) on application of the victim or the prosecutor, make the order.

Decision:

[1] James Snow has brought a motion seeking the appointment of state-funded counsel pursuant to s. 684(1) of the *Criminal Code*. The Attorney General of Nova Scotia (the “AG”) opposes the motion. The motion was heard on October 12, 2023. After hearing from the parties, I reserved my decision.

[2] For the reasons to follow, I would dismiss the motion.

Background

[3] Mr. Snow was charged by way of Indictment as follows:

1. **THAT HE DID** for a sexual purpose expose his genital organs to P.J., a person under the age of sixteen years, contrary to Section 173(2) of the *Criminal Code*;
2. **AND FURTHERMORE**, at the same time and place aforesaid, while being at large on a Release Order, did fail, without lawful excuse, to comply with a condition of that Release Order, to wit: do not have any contact or communication, directly or indirectly with or be in the presence of any person you know to be or who reasonably appears to be under the age of sixteen years of age, contrary to Section 145(5)(a) of the *Criminal Code*;
3. **AND FURTHERMORE**, at the same time and place aforesaid, while being at large on a Release Order, did fail, without lawful excuse, to comply with a condition of that Release Order, to wit: do not attend at any public park, school ground, daycare centre, swimming pool, playground, skating rink, community centre or recreation centre or anywhere person under the age of sixteen years of age, are present or might reasonably be expected to be present, contrary to Section 145(5)(a) of the *Criminal Code*;...

[4] After a four day trial, Justice Christa Brothers entered convictions in relation to the above charges. Her written reasons are reported at 2022 NSSC 175. In short, it was alleged Mr. Snow had exposed his genitals to a young girl in the toy aisle of a local department store. He was under conditions at the time which required him to refrain from being near young persons. The trial judge noted that

the central issue at trial was the identification of the person alleged to have exposed himself to the complainant, P.J.

[5] Mr. Snow has filed an appeal. In his Notice of Appeal, he sets out the following grounds of appeal:

1. The Judge misapprehended the established requirements regarding eyewitness Identification.
2. The Judge erred in her assessment of credibility for P.J. by considering improper makeweights for positive credibility.
3. The Judge erred when she failed to provide sufficient reasons for her findings of guilt.

[6] Mr. Snow has been unsuccessful in obtaining legal counsel through Nova Scotia Legal Aid.

Legal Principles

[7] Section 684(1) of the *Criminal Code* provides:

Legal assistance for appellant

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.

[8] The approach to be taken when considering a motion under s. 684(1) is well established. There are two inquiries:

1. whether an appellant has sufficient means to obtain legal assistance;
and
2. whether it is desirable in the interest of justice that the appellant have legal assistance with the appeal.

[9] The interest of justice inquiry engages a number of considerations, including:

- i) the merits of the appeal;

- ii) the complexity of the appeal;
- iii) the appellant's capability;
- iv) the Court's role to assist; and
- v) the responsibility of the Crown to ensure that the applicant is treated fairly.

[10] I will now apply the above principles to the matter before me.

Analysis

[11] The AG concedes Mr. Snow lacks the financial means to obtain private counsel, but argues it is not in the interest of justice to grant the motion. As such, I will address only that issue.

Merit of the appeal

[12] Mr. Snow is required to show that his complaints raise an arguable issue. As explained by Justice Beveridge in *R. v. McPherson*, 2019 NSCA 70:

[13] An arguable issue is one that appears to be of enough substance to be capable of convincing a panel of the Court to allow the appeal. A cautious approach to that assessment may be appropriate because it may be hampered by a lack of the complete record, and the fact that the applicant may be self-represented in the s. 684 proceedings and hence at a disadvantage to knowledgeably examine the trial proceedings to identify potential error.

[13] I have reviewed the written decision of the trial judge. It would appear that she carefully reviewed the evidence, set out the law, and made her determinations accordingly. There is nothing from the decision itself that gives rise to an obvious concern. However, an "arguable" ground of appeal, is a low-threshold to meet.

[14] I do not have the entirety of the record. However, the grounds raised by the appellant, in particular, his allegation regarding the misapplication of eyewitness evidence and judge's use of improper makeshifts to enhance the complainant's credibility, are, in my view, arguable.

Complexity of the appeal

[15] The trial was heard over four days, with the central issue being identification. The grounds of appeal do not engage overly complex legal issues. There is no fresh evidence motion. The appeal record will not be voluminous.

The appellant's capabilities

[16] Mr. Snow was cross-examined on the motion. He drafted the grounds of appeal based on his own review and research of the relevant legal principles. Mr. Snow has post-secondary education and has obtained multiple work-related certifications. He has engaged in public-speaking in the past.

[17] Mr. Snow impressed me as being articulate and clearly intelligent. Although he is not legally trained, I have no concerns that he will be able to present his appeal adequately.

The Court's role/Crown's duty

[18] Although the Court cannot undertake the role of counsel, it will undertake its own review of the record to ascertain whether there are concerns in relation to the conviction. Further, the Crown has an obligation to respond to the appeal in a fair manner, including identifying errors which may not have been flagged by Mr. Snow.

[19] Based on the above considerations, I am satisfied Mr. Snow will be able to present, and the Court will be able to fully assess the merits of the appeal, notwithstanding him being self-represented. Mr. Snow has not demonstrated it is in the interest of justice for state-funded counsel to be appointed.

Conclusion

[20] The motion is dismissed. I would ask the Crown to arrange to have the matter set down in Chambers for the scheduling of the appeal.

Bourgeois J.A.