NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Fudge*, 2013 NSCA 149

Date: 20131216
Docket: CAC 408524
Registry: Halifax

Between:

Chad Fudge

Appellant

v.

Her Majesty the Queen

Respondent

Judges:	The Honourable Justice Duncan R. Beveridge
Motion Heard:	December 5, 2013, in Halifax, Nova Scotia, in Chambers
Held:	Motion denied
Counsel:	Chad Fudge, for the appellant in person Marian Fortune-Stone, Q.C., for the respondent Edward Gores, Q. C., for the respondent Attorney General of Nova Scotia

Decision:

INTRODUCTION

[1] The appellant pled guilty to offences arising out of two separate incidents. The first was a break and enter on February 12, 2012, into an apartment where the owner was assaulted and robbed. The second was on April 6, 2012; while on remand, he was captured on video committing an aggravated assault on another inmate.

[2] With the assistance of counsel, the appellant agreed to plead guilty to the robbery charge (and a related charge of breach of a recognizance), and the aggravated assault charge. A joint recommendation would be proposed to the trial judge of ten years' incarceration. The deal was implemented. The joint recommendation was accepted by the trial judge on September 21, 2012.

[3] The appellant filed an application for leave to appeal, and if granted, an appeal from the sentence of ten years' incarceration. The grounds he advances are: "my lawyer did not represent me properly" and "other people got lesser sentences for the same crimes".

[4] When I heard this motion, the appeal had not yet been set down for hearing. The delay results from Mr. Fudge's request to have counsel assigned to him by Nova Scotia Legal Aid. Since he alleges ineffective assistance of counsel, notice was duly given of that claim to trial counsel. To investigate his claim, the appellant waived solicitor-client privilege.

[5] Nova Scotia Legal Aid denied his request for counsel. He appealed to the Appeal Committee of the Legal Aid Commission. On July 18, 2013, the denial was confirmed.

[6] On November 7, 2013, the appellant filed a motion, and his affidavit in support, to have me appoint counsel for him pursuant to s. 684 of the *Criminal Code*. I heard the motion on December 5, 2013. At the conclusion of the hearing, I advised Mr. Fudge that his motion was denied. I explained to him why, but also promised written reasons. These are they.

[7] First the legal framework. The appellant's motion is pursuant to s. 684(1) of the *Criminal Code*. Before an order can be made under that section, a judge or the court must be satisfied of two requirements: it appears desirable in the interests of justice that the accused should have legal assistance; and it appears that the accused does not have sufficient means to obtain that assistance. The formal language of s. 684(1) reads as follows:

> 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 words in the first part of the articulated test, whether "it appears desirable in the interests of justice" do not really offer concrete guidance. As observed by Doherty J.A. in *R. v. Bernardo*, [1997] O.J. No. 5091, 121 C.C.C. (3d) 123, writing for the Court:

> [16] The phrase "the interests of justice" is used throughout the *Criminal Code*. It takes its meaning from the context in which it is used and signals the existence of a judicial discretion to be exercised on a case-by-case basis. The interests of

> justice encompass broad based societal concerns and the more specific interests of a particular accused.

[9] The factors that are usually considered in applying this test were succinctly summarized by Cromwell J.A., as he then was, 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.**
>
> [emphasis added]

[10] It is universally accepted that a merits assessment is obligatory (see: *R. v. Grenkow*, [1994] N.S.J. No. 26; *R. v. Innocente*, [1999] N.S.J. No. 302; *R. v. Smith*, 2001 NFCA 38; *R. v. Bernardo*; *R. v. Clark*, 2006 BCCA 312). However, there may be some uncertainty as to what exactly may be necessary in terms of overcoming a merits hurdle.

[11] For example, in *Grenkow*, Hallett J.A. was of the view that if Legal Aid had rejected an application for counsel on appeal based on a lack of merit, then the applicant had to demonstrate he or she had a "reasonable chance of success" on the appeal – merely establishing that the appeal was not frivolous in the sense of there being an arguable issue was insufficient (¶17).

[12] To similar effect are some older cases from British Columbia which seem to suggest an applicant must demonstrate a "reasonable prospect of success" (see: *R. v. Koehn*, 1999 BCCA 265*; R. v. Chan*, 2001 BCCA 138; *R. v. Rennie*, 2002 BCCA 4, ¶6). More recent cases in that province adopt the threshold as requiring simply an "an arguable case" (see: *R. v. Donald*, 2008 BCCA 316 at ¶15; *R. v.*

Silcoff, 2012 BCCA 463 at ¶24; *United States of America v. Adam*, 2013 BCCA 207 at ¶18).

[13] The "arguable issue" test was adopted by Freeman J.A. in *R. v. Innocente*, who distinguished *Grenkow* on the basis there had been no merits assessment by Legal Aid. However, even in cases where Legal Aid has been denied based on its view of the merits, the "arguable issue" test is often cited, and apparently applied (see *R. v. J.W.*, 2011 NSCA 76 at ¶11; *R. v. Frank*, 2012 NSCA 114 at ¶14 and ¶20; *R. v. George*, 2013 NSCA 41 at ¶21).

[14] The "arguable issue" test appears to be the threshold in Newfoundland (*R. v. Smith*, 2001 NFCA 38), Alberta (*R. v. Ewanchuk*, [2008] A.J. No. 191(C.A.), Saskatchewan (*R. v. Ermine*, 2010 SKCA 73), Manitoba (*R. v. B.L.B.*, 2004 MBCA 100), New Brunswick (*R. v. Murray*, 2009 NBCA 83), and in Ontario (*R. v. Bernardo; R. v. Abbey*, 2013 ONCA 206 at ¶32).

[15] I need not, in this case, try to resolve the apparent differences in the height of the hurdle for an assessment of merit. However it is expressed, an appeal that lacks merit will not be helped by the appointment of counsel, and hence, it is not in the interests of justice to do so. As Doherty J.A., in *R. v. Bernardo*, observed:

> [22] **In deciding whether counsel should be appointed, it is appropriate to begin with an inquiry into the merits of the appeal. Appeals which are void of merit will not be helped by the appointment of counsel**. The merits inquiry should not, however, go any further than a determination of whether the appeal is an arguable one. I would so limit the merits inquiry for two reasons. 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.
>
> [emphasis added]

See also: *R. v. Butler*, 2006 BCCA 476 at ¶10

[16] Keeping in mind the fact that the applicant is self-represented on this application, I will turn to a consideration of the circumstances of this case; in particular, can I discern that there is even an arguable issue?

[17] I have before me the complete record. Mr. Fudge was represented by counsel in Provincial Court. The transcripts of the court appearances reveal that he pled guilty to the charge of aggravated assault on May 28, 2012. Sentence was adjourned to June 28, 2012.

[18] There was a further adjournment of sentence to September 7, 2012, due to an announced plan to consolidate the appellant's legal matters with a change of plea on the robbery and related charges. September 7, 2012 was the scheduled date for trial on those matters.

[19] On September 7, the appellant changed his plea to guilty on the charges of robbery and breach of his recognizance. Apparently, all matters were set over to September 10, 2012. On that date, the sentence hearing for all charges was adjourned to September 20, 2012.

[20] On September 20, 2012 the Crown set out the facts of the offences, and that the Crown and defence were proposing a joint recommendation of ten years' incarceration on a global basis, taking into account the time the appellant had already spent on remand. The appellant was present throughout. He had no dispute with the facts as set out, nor with respect to the joint recommendation.

[21] The appellant's trial counsel made submissions asking the trial judge to accept the joint recommendation. She highlighted the mitigating factors: the

appellant was relatively youthful; his record was mostly for thefts and his longest previous sentence was only one of 60 days' incarceration. She urged the trial judge to conclude that the suggested global sentence was within the range. On the so-called 'home invasion' robbery, the following exchange illustrates:

> We would submit the sentence is within the range. Certainly there are cases, at least in relation to home invasion, they do seem to go from around four years upwards to 15 years, depending on the circumstances.
>
> THE COURT: Up to 20.
>
> MS. JONES: I found as high as 15 for crimes similar.
>
> THE COURT: I can tell you, Miss Jones, from having dealt with those cases, they brought 18 to 20.
>
> MS. JONES: I believe you, Your Honour.
>
> THE COURT: I can give you the names if you want but they're done in a much different context than here, in fairness.

[22] At the end of the hearing, the trial judge indicated that he was inclined to endorse the joint recommendation, but given that there were two very serious acts of violence he wanted some time to consider the joint recommendation. He adjourned his decision to the following day.

[23] On September 21, 2012 the trial judge gave an oral decision. He correctly cited the law about joint recommendations. He recognized that it was the Court's obligation to arrive at the appropriate sentence; a joint recommendation should only be rejected if it would be contrary to the public interest or bring the administration of justice into disrepute. In deciding to accept the joint recommendation, the trial judge said:

> The question for this Court is whether or not ten years for these two offences, committed on separate dates is appropriate and a just disposition in these circumstances, I am satisfied, after hearing from counsel and giving the matter careful consideration, that the joint recommendation of ten years is an appropriate

> disposition for Mr. Fudge for having committed the very serious, violent offences against two helpless and vulnerable individuals.

[24] What were the circumstances of these two serious, violent offences? They were described by the trial judge. First, the robbery:

> With respect to the February 14th robbery, I will not recite all of the facts or circumstances surrounding that offence. They have been ably and succinctly submitted to the Court by Crown counsel but it's fair to say that this robbery is a home invasion and therefore engages Section 348.1, which is the statutory provision that deems a home invasion, in the context of this case, to be an aggravating factor which has been conceded by both counsel. In this situation, Mr. Fudge, with a cohort, another male, viciously attacked and assaulted a defenceless, helpless and vulnerable man in his home. The nature of the offence is in and of itself aggravating as well as the quality of the accused's actions. Mr. Fudge's actions can only be described as extremely violent as there is no collection of words that I can think of that describes his behaviour more succinctly and accurately than an extreme act of violence. The victim endured two male adult attackers beat him or strike him repeatedly in a vicious manner.

[25] The aggravated assault was, if anything, worse. While on remand, he obtained a long metal handled brush. Without any provocation, while the victim sat with his back to the appellant, he used the brush to beat the victim in the back of the head, fracturing his skull. The trial judge summed up the attack as follows:

> Crown counsel fairly and accurately set out all of the aggravating factors including that this was an extreme aggravating fact in the present case, the degree of premeditated and planning involved. There was obviously malice aforethought which is very aggravating. The offence was an extreme violent act, an unprovoked assault against a defenceless person.

[26] At the suggestion of counsel, the ten year global sentence was split as being six years for the robbery and four years consecutive for the aggravated assault. It could easily have been the converse. For breach of the recognizance, 30 days' concurrent was imposed.

[27] In light of these circumstances, and the relevant legal principles, what can be said about the merits of the appeal? I have no information before me as to the test utilized by the staff at Nova Scotia Legal Aid, or the Commission, to assess merit. An application under s. 684 is not an appeal from their determination. With all due respect, I fail to see how it can be said that I should owe deference to their assessment.

[28] The appellant's affidavit addresses his lack of education and financial resources. It also speaks to the merits of his appeal. On this subject, he says he feels that he was not properly represented in Court; he did not want to plead guilty to the charges, but felt forced to do so, and that ten years is too long a sentence for his first federal sentence. One of seven to eight years would be more appropriate.

[29] Mr. Fudge explained at the hearing of his application that he got "bad advice" – his case was "not properly assessed". In essence, he should have gotten a better deal.

[30] I have no hesitation in saying Mr. Fudge has not identified any arguable issue on his appeal. His claim that he "was not properly represented" in Court is not borne out by the record as found in the Appeal Book. With all due respect to Mr. Fudge's subjective views on this issue, his opinion does not satisfy me that the joint recommendation was in any way inappropriate. He has identified nothing, and neither could I, in the record that could, in my opinion, lead a panel of this Court to be persuaded that the trial judge erred in accepting the joint recommendation of ten years' incarceration.

[31] In short, he has not identified an arguable issue. I am, therefore, not satisfied that it is in the interests of justice to appoint counsel on his application for leave to appeal sentence.

[32] It was for this reason I dismissed his application asking that I appoint counsel to act on his behalf. I immediately set dates for the filing of facta and for the hearing of his appeal.

Beveridge, J.A.