C.A.C. 02611

NOVA SCOTIA COURT OF APPEAL
Cite as: R. v. Smith; R. v. Thompson, 1993 NSCA 59

B E T W E E N:

MARVIN SMITH and JOHN THOMPSON	**) Davies B.N. Bagambiire) for applicants**
applicants	)
- and -	)
HER MAJESTY THE QUEEN	**) Robert C. Hagell) for respondent**
respondent	)
	) Application Heard:) March 4, l993
	) Judgment Delivered:) March 23, l993

BEFORE: THE HONOURABLE MR. JUSTICE G.B. FREEMAN IN CHAMBERS

FREEMAN, J.A.:

Counsel for the applicants, Davies B.N. Bagambiire, Esq., has applied for an order

granting him the right to conduct his clients' appeals despite the fact that he testified as a witness at their trial.

Both applicants were convicted of causing a disturbance by fighting contrary to s. 175(1)(a) of the **Criminal Code** following a school ground incident with racial implications. Mr. Thompson was given a conditional discharge and Mr. Smith a suspended sentence. Their appeals are from conviction and sentence.

Mr. Bagambiire was lead counsel at the trials and conducted the summary conviction appeals. In preparing for trial he examined Crown files and copied documents. He explains in his affidavit:

> "Later on during the trial, it became evident that the documents I had copied from the Crown files may be helpful to the Defence, and I took the stand as a witness to produce and identify those documents, I was the only party that could have done that."

He acknowledges the difficulty:

> "I am aware that both the CBA and the Nova Scotia Codes of professional conduct caution lawyers against giving evidence. During argument of the first appeal in what was then the County Court, I made full disclosure of the situation to Justice Cacchione and to counsel for the Crown, who did not object to my presentation of the appeal; . . . I have discussed the matter with the solicitor for the Attorney General and it was agreed that the issue be brought to the attention of this court ahead of the hearing."

Madeline Downey, president of the Parent Student Association of Preston, formed after the outbreak of fighting at Cole Harbour High School, states in her affidavit that the organization was created to provide counsel for the persons involved and that Mr. Bagambiire was the choice of lawyer. "We have been unable to settle his account . . . he has continued to do the work required for no immediate payment." She requests that "the rule of ethics restricting the appearance of lawyers as advocates in matters in which they have given evidence be waived."

Mr. Bagambiire states:

> "That my application for leave of the court to waive this rule in this appeal is based on the following facts: (a) the appeal involves a large volume of evidence (over 11,000 pages of transcript); (b) I have been the lead counsel working with the appellants, their parents, and the parent student organization which was formed in the aftermath of the fights in the school yard, to offer

> support to the students, and I am the one most familiar with the sequence of events that are critical to the appeal; (c) that even though the parents and their organization agreed to pay me for my services, I have to date received very little money from them, as I am advised and verily believe that they have no money with which to pay for those services; (d) that I have continued to represent the appellants and to prosecute the appeal even though I have not been paid for the services; and that (e) I am advised by Mrs. Madeline Downey, the president of the parent school organization which retained me in 1989, and verily believe that the parents and their organization have no resources with which to retain other counsel.

The type of evidence he gave was not the testimony of a witness to events in issue, which could give rise to questions of credibility. However, as the Crown has pointed out in opposing the present application, he appears to have been more than merely a witness testifying to a matter of form.

There are many obvious reasons, both in principle and practice, for the well-established rule that a lawyer who becomes a witness should not conduct the case or the appeal. The rule appears to have exceptions.

Rules 14.4 and 14.9 of Nova Scotia's **Code of Legal Ethics and Professional Conduct**, provide as follows:

> 14.4 A lawyer who appears as an advocate in a proceeding, and every partner or associate of that lawyer in the practice of law has a duty not to submit an affidavit or testify in the proceeding, except as permitted by local rule or practice or as to purely formal or uncontroverted matters.
>
> 14.9 A lawyer who has been a witness in a proceeding has a duty not to appear as an advocate in any appeal from a decision in the proceeding.

There is authority for the proposition that these rules are directory rather than mandatory.

The issue has been considered in Nova Scotia in at least two cases. In **Oakfield Builders v. Leblanc** (1977), 25 N.S.R. (2d) 556 (T.D.), Cowan C.J. considered whether it was appropriate for an associate of counsel who had acted as a witness in a proceeding to act for that client. At p. 571, he stated:

"In the present case, both counsel stated that they waived any objection to the

> giving of evidence by the solicitor for the opposite party. Both parties were anxious to keep the cost of litigation to a minimum. Counsel, therefore, continued to act and to examine and cross-examine solicitors who gave evidence and who were associated with them in practice.
>
> I comment on this, only to note that the practice followed in this case is not the usual practice, and it should not be taken as a precedent to be followed, except in very exceptional cases, of which this seemed to be one."

In **R. v. Coates** (1984), 64 N.S.R. (2d) 289 (Co. Ct.), O Hearn C.C.J. considered the related issue of comments made by counsel respecting the credibility of his client. He noted that

> "it is not really proper for counsel to engage their personal credit on behalf of clients, however firmly they believe in the client....The general rule is that if he becomes a witness for the client he must then cease to be his advocate."

These cases suggest a recognition that the general rule may be departed from in "exceptional cases." See also **A. and E. Land Industries v. Sask. Crop Insurance Corp.,** [1988] 3 W.W.R. 590 (Sask. Q.B.); **Saskatoon Credit Union v. Creighton Holdings Ltd.,** [1988] 2 W.W.R. 541 (Sask Q.B.); **National Trust Co. v. Palace Theatre**, [1928] 1 W.W.R. 805 (Alta. C.A.).

There is also authority for the proposition that the Court, at least at the trial stage, cannot prevent counsel from acting in such circumstances. This position was stated by Cartwright J. in **Stanley v. Douglas**, [1952] 1 S.C.R. 260. The appellant in that case was seeking a new trial in part due to the participation of counsel for the respondent as a witness in the proceeding. It was argued that the evidence thus tendered should have been ruled inadmissible. Cartwright J. described the circumstances at p. 272:

> "This was not one of those cases which occasionally, although very rarely, arise in which some quite unexpected turn of events in the course of a trial makes it necessary to hear a counsel in the case as a witness. It must have been obvious at all times that the counsel in question was an essential witness and it was "irregular and contrary to practice"-- to use the words of Humphrey J., concurred in by Singleton and Tucker JJ. in **Rex v. Secretary of State of India** *(1)*-- that he should act as counsel and a witness in the same case. The fact that one of the counsel for the appellants followed the same course does not render what was done less objectionable."

In spite of his apparent disapprobation of this practice Cartwright J. concluded that there was no rule of law which actually prohibited that practice in Canada. At pp. 273-4, he reviewed some of the authorities and concluded by quoting the words of Ritchie J. in **Bank of British North America**

v. McElroy (1875), 15 N.B.R. 462 who stated:

> "It is the privilege of the party to offer counsel as a witness: but that it is an indecent proceeding, and should be discouraged, no one can deny...."

The issue has also been addressed by Mahoney J. of the Federal Court in **New West Construction Co. Ltd v. Minister of Public Works**, [1981] 1 F.C. 583 who stated at p. 584 that "it is beyond the power of a Trial Judge to put a party to his election and to require that the lawyer serve either as counsel or witness but not both." In reaching this conclusion, Mahoney J. also relies on the decision of the British Columbia Court of Appeal in **Phoenix v. Metcalfe**, [1974] 5 W.W.R. 661.

Some authorities suggest that the situation is different on appeal. In **Imperial Oil Ltd. v. Grabarchuk** (1974), 3 O.R. (2d) 783 (C.A.), the Court stated unequivocally that a lawyer, having acted as a witness below, will not be heard on appeal. The brief judgment was delivered by Schroeder J.A. who stated:

> "Both counsel for the appellant and the respondent who appeared before his Court had made affidavits which had been submitted to the Court of first instance in support of and in opposition to the appellant's application. It was not until the question was raised by the Court that either counsel appreciated the impropriety of counsel; who had been a witness in the proceedings appearing as counsel on the appeal. This is a well-settled rule which the Court has strictly enforced over the years. In the circumstances we felt it necessary to adjourn the hearing of this appeal to the May sittings in order to facilitate the appointment of other counsel for both parties."

This position was accepted in **Re Hillcrest Housing Ltd.** (1985), 7 C.P.C. (2d) 60 (P.E.I.S.C.) at 72, **New West Construction**, *supra*, at 585-6.

The stricter approach on appeals appears predicated on foreseeability. While a situation requiring a lawyer to testify may arise unexpectedly at trial, the appeal is approached with the full knowledge of all concerned as to the lawyer's earlier role. An appeal court has the right to refuse to permit a lawyer who has given evidence to conduct an appeal, as the **Imperial Oil** case makes clear, but I do not consider myself bound to follow Schroeder, J.A. in the present circumstances.

I find the following circumstances significant in determining that Mr. Bagambiire's application should be treated as an exception to the general rule: (1) he is acting almost unpaid and the applicants

are unlikely to find alternate representation on the same basis; to deprive them of Mr. Bagambiire's services may be to deprive them of their right to appeal; (2) Mr. Bagambiire has a special knowledge of the cases available only to a lawyer who has been involved from the outset; (3) the evidence he gave related to records in the Crown's possession and was unlikely to have given rise to an issue of credibility which would have been reflected in the decision of the trial judge; (3) no objection was made to his continuing to act as counsel at trial and on the summary conviction appeal; (4) he has made full disclosure.

I will therefore grant the application and issue an order that Mr. Bagambiire shall be at liberty to represent the appellants upon their appeal.

Freeman, J.A.

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