NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Miller*, 2015 NSCA 19

Date: 20150303
Docket: CAC 416979
Registry: Halifax

Between:

Christopher Justin Miller

Appellant

v.

Her Majesty the Queen

Respondent

Restriction on Publication: Pursuant to s. 486 of the *Criminal Code of Canada*

Judge:	The Honourable Justice Joel E. Fichaud
Motion Heard:	February 26, 2015, in Halifax, Nova Scotia, in Chambers
Held:	Motion for appointment of counsel dismissed
Counsel:	The Appellant Christopher Justin Miller on his own behalf Edward A. Gores, Q.C., for the Attorney General of Nova Scotia Mark Scott for the Respondent Her Majesty the Queen

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or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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, 159, 160, 162, 163.1, 170, 171, 172, 172.1, 172.2, 173, 210, 211, 212, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 346 or 347,

(ii) an offence under section 144 (rape), 145 (attempt to commit rape), 149 (indecent assault on female), 156 (indecent assault on male) or 245 (common assault) or subsection 246(1) (assault with intent) of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 4, 1983, or

(iii) an offence under subsection 146(1) (sexual intercourse with a female under 14) or (2) (sexual intercourse with a female between 14 and 16) or section 151 (seduction of a female between 16 and 18), 153 (sexual intercourse with stepdaughter), 155 (buggery or bestiality), 157 (gross indecency), 166 (parent or guardian procuring defilement) or 167 (householder permitting defilement) of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 1, 1988; or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in any of subparagraphs (a)(i) to (iii).

Reasons:

[1] Mr. Miller applies for the appointment of state funded counsel under s. 684 of the *Criminal Code*.

Background

[2] On July 10, 2012, Mr. Miller pled guilty to aggravated assault contrary to s. 273(2)(b) of the *Code*.

[3] At the sentencing, Mr. Miller's counsel agreed with the facts stated in the Crown's brief. Those facts are summarized in the sentencing Decision of Bourgeois, J., as she then was (2013 NSSC 126). In summary, on August 28, 2010, in Port Hawkesbury, Mr. Miller and the victim were at a friend's home until late at night. Then the victim left. Mr. Miller followed her. He tackled her. Next was what the sentencing judge described as "a very long sexual assault". Mr. Miller "was choking [the victim] with two hands and stating that he would kill her if she moved or tried to get away". The victim was "punched in the face several times with Mr. Miller's fist" and with another object. Mr. Miller pulled off her clothes, had vaginal intercourse for five minutes and forced his penis into her mouth. There followed several minutes of anal intercourse, according to the victim, though Mr. Miller denied that aspect. The sentencing judge (para. 7) said that, "[w]hether there was or was not anal intercourse, does not in my view alter the significance of the assault perpetrated against [the victim] overall".

[4] The victim suffered a fractured jaw, requiring surgery, a laceration over the eye, and various scrapes and bruises.

[5] Mr. Miller told the police that two unknown males had attacked them, and that one of them had committed the sexual assault on the victim. But DNA from the victim's vaginal swab matched Mr. Miller's DNA. So he pled guilty.

[6] Mr. Miller is 31 years of age. At the sentencing, expert evidence described him as suffering from biastophilia, meaning he becomes sexually aroused by non-consensual sexual contact, and an anti-social personality disorder. He has alcohol dependence, and a pattern of drug abuse. He has a history of ADHD, violent outbursts and, according to his mother, schizophrenia. According to the expert in forensic sexual behaviour, he is at high risk for future sexual violence, a risk that

Mr. Miller appears unable to manage. The expert opined that, even if Mr. Miller applies himself to treatment and programs, any amelioration will require a lengthy time commitment.

[7] Mr. Miller's record included prior offences and incarceration, though he had no history of aggravated sexual assault.

[8] The Crown sought a term of 12 to 14 years incarceration. Mr. Miller's counsel submitted that a fit sentence would be 6 to 8 years.

[9] The judge considered the mitigating and aggravating factors, and accepted the expert's testimony that, without intensive intervention, Mr. Miller is at high risk of re-offending.

[10] On January 24, 2013, the judge sentenced Mr. Miller to 12 years, less one-to-one credit for time served, for a go forward term of 9 years, 7 months and 4 days.

[11] Mr. Miller has appealed his sentence. Essentially his ground is that his sentence exceeds the upper limit of the appropriate range.

[12] Mr. Miller sought legal aid. Nova Scotia Legal Aid declined, after a merits assessment. Mr. Miller appealed to Nova Scotia Legal Aid's Appeal Committee, which dismissed his appeal.

[13] Mr. Miller then moved for an order under s. 684 that the Attorney General appoint counsel. On February 26, 2015, I heard his motion.

Analysis

[14] Section 684(1) of the *Code* says:

> 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.

[15] As stated in *R. v. J.W.*, 2011 NSCA 76 (Chambers):

[11] Under s. 684(1), literally I have two inquiries – (1) whether it is desirable in the interests of justice that J.W. have legal assistance, and (2) whether J.W. has sufficient means to obtain that assistance. *R. v. Assoun*, 2002 NSCA 50, paras 41-44. In *R. v. Innocente*, [1999] N.S.J. No. 302, paras 10-12, Justice Freeman agreed with the statement of Justice Doherty in *R. v. Bernardo* (1997), 121 C.C.C. (3d) 123 (Ont. C.A.), para 22, that, in addition, the chambers judge should be satisfied that the appellant has an arguable appeal.

[12] On the first prerequisite, the interests of justice, in *Assoun* Justice Cromwell said:

> 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.

[13] Still on the interests of justice prerequisite, in *R. v. Grenkow*, [1994] N.S.J. No. 26 (C.A.), at para 31, Justice Hallett said that, before assigning counsel under s. 684, the chambers judge would have to be satisfied that "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". In *Innocente*, Justice Freeman (para 9) referred to Justice Hallett's passage from *Grenkow*, then (para 13) adopted the following from the decision of Justice Doherty in *Bernardo, para. 24:*

> Having decided that the appeal raises arguable issues, the question becomes – can the appellant effectively advance his grounds of appeal without the assistance of counsel? This inquiry looks to the complexities of the arguments to be advanced and the appellant's ability to make an oral argument in support of the grounds of appeal. The complexity of the argument is a product of the grounds of appeal, the length and content of the record on appeal, the legal principles engaged, and the application of those principles to the facts of the case. An appellant's ability to make arguments in support of his or her grounds of appeal turns on a number of factors, including the appellant's ability to understand the written word, comprehend the applicable legal principles, relate those principles to the facts of the case, and articulate the end product of that process before the court.

[16] **Insufficient Means:** The Attorney General concedes that Mr. Miller does not have the resources to hire counsel. The pre-sentence report supports that view. I accept that Mr. Miller does not have the financial means to retain counsel.

[17] **Arguable Appeal:** In *R. v. Fudge*, 2013 NSCA 149 (Chambers), paras. 10-15, Justice Beveridge reviewed the authorities as to whether the applicant must show a "reasonable chance of success" or merely "that the appeal was not frivolous in the sense of there being an arguable issue". In the circumstances of the *Fudge* appeal, Justice Beveridge (para. 15) found it unnecessary to resolve "the apparent differences in the height of the hurdle for an assessment of merit" because "[h]owever it is expressed, an appeal that lacks merit will not be helped by the appointment of counsel".

[18] I will apply the "arguable issue" standard. But I don't interpret "arguable" to mean merely a notch above frivolous. It is also important to consider the nature of the ground of appeal. When the facts are basically agreed, as in Mr. Miller's sentencing, a ground that turns on a balancing of legal principles usually is arguable.

[19] The appropriate period of incarceration derives from a balance of various sentencing principles. Before the sentencing judge, the submitted range spanned the goalposts of an 8 year high suggested by the defence to a 12 year low requested by the Crown. The Court of Appeal's perspective would focus on whether the actual sentence occupies "the range". But the range's ambit will turn on the application of the circumstances of this offence and offender to a balance of the sentencing principles that are stated in the *Code*.

[20] There are cases where nothing anyone might say would alter the inexorable conclusion that the sentence occupies the range. I am not convinced this is one of them. The Attorney General's submissions, that Mr. Miller's appeal lacks merit, are better suited to the appeal proper than to a s. 684 motion. In my view, the appeal is arguable.

[21] **Interests of Justice:** The merits of the appeal, that I have discussed under "arguability", affect the interests of justice. It remains to consider the other factors that affect the "interests of justice" under s. 684(1).

[22] On the appeal, the issue will be whether the sentence is unfit, or exceeds the range given the circumstances of the offence and the offender. It is not a complex point of law. It will not pivot on knife-edged courtroom technique. Mr. Miller committed a very serious offence, for which he submits that a very serious sentence should stop short of twelve years. He expressed his point to me, and will be able to do so to the Court's panel at the appeal hearing.

[23] Determination of the issue will involve a weighing of sentencing criteria and an appreciation of sentencing practice in similar cases from the authorities. The Court will have the record. The Court is familiar with the sentencing principles and the authorities. The Court will have the benefit of the transcribed sentencing submissions by Mr. Miller's counsel to the sentencing judge. As Justice Hallett said in *Grenkow*:

> [26] … 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. …

[24] The Court also will have the benefit of the Crown's input. The Attorney General's brief for this s. 684 motion said "[i]t is the Crown's duty to ensure that the appellant is treated fairly", and quoted from Justice Rand's well-known statement to that effect from *Boucher v. The Queen*, [1955] S.C.R. 16, at pp. 23-24. There is a continuum between what the Attorney General cites to deflect a s. 684 motion and what is expected from the Crown on the appeal. The counsel for the Crown who appear in this Court, in my experience, regularly show conscientious regard for their role to see that the accused, or offender if there has been a conviction, is treated fairly. I expect that regard will continue in Mr. Miller's case. If Mr. Miller's submissions omit an important point of argument, I am confident that the Crown will bring that to the Court's attention.

Conclusion

[25] I am not satisfied that it is desirable in the interests of justice that Mr. Miller have state funded counsel for his appeal. I dismiss his motion under s. 684.

Fichaud, J.A.