

NOVA SCOTIA COURT OF APPEAL

Citation: *R. v. Martin*, 2015 NSCA 82

Date: 20150827

Docket: CAC 437121

Registry: Halifax

Between:

Darren Martin

Appellant

v.

Her Majesty the Queen

Respondent

Judge: Farrar, J.A.

Motion Heard: August 20, 2015, in Halifax, Nova Scotia in Chambers

Held: Motion dismissed

Counsel: Appellant in person
Shawn O’Leary and Mark Covan for the respondent not
appearing
Ronda van der Hoek for the Attorney General of Canada

Decision:

Introduction

[1] The appellant applies for appointment of counsel under s. 684 of the **Criminal Code of Canada**, R.S.C. 1985, c. C-46, to assist him in the prosecution of his appeal. For the reasons that follow I deny the request.

Background

[2] The appellant was charged with multiple counts under the **Income Tax Act**, R.S.C. 1985, c. 5 (5th Supp.) and the **Excise Tax Act**, R.S.C. 1985, c. E-15, for failing to remit tax or report income as required. The offences involved a total of 26 charges that cover alleged evaded income tax and HST remittances for the years 2004, 2005 and 2006.

[3] The appellant filed two preliminary motions pursuant to ss. 7 and 8 of the **Charter** before Provincial Court Judge Del Atwood. The two applications were heard over five days, June 17-21, 2013. The first application sought to have evidence seized under a warrant excluded on the basis of violation of Mr. Martin's **Charter** rights. The application was allowed (reported 2013 NSPC 49).

[4] The second application related to a s. 8 **Charter** application to determine the constitutionality of a s. 487 warrant to search. Again, that application was successful and the court ordered that all evidence seized as a result of the warrant be excluded from evidence (reported 2013 NSPC 50).

[5] In light of the two rulings, the charges against Mr. Martin were dismissed.

[6] The Crown subsequently brought a summary conviction appeal pursuant to s. 813 of the **Criminal Code**.

[7] Justice Van den Eynden, sitting as a summary conviction appeal court, allowed the appeal, set aside the decisions of Judge Atwood and ordered a new trial (reported 2015 NSSC 8).

[8] Mr. Martin, self-represented, filed a Notice of Appeal from Justice Van den Eynden's decision. His grounds of appeal are as follows:

- (1) The learned Justice erred in mixed fact and law when she determined the learned trial judge's factual findings were not supported by the evidence.
- (2) The learned Justice erred in law by substituting her view of the facts for those of the learned trial judge.
- (3) The learned justice, having received agreement from Crown counsel to consider new material, and having reviewed same, failed to adequately address same which denied the appellant further defense at law.

[9] In essence, Mr. Martin is arguing that the summary conviction appeal court judge applied the wrong standard of review in considering the trial judge's decisions and substituted her own view of the facts for those of the trial judge.

[10] Mr. Martin sought and was denied legal aid for prosecution of his appeal.

[11] On July 19, 2015, Mr. Martin filed his application for appointment of counsel. In support of his application he swore an affidavit setting forth his reasons for seeking appointment of counsel which are, in summary, an inability to instruct, organize and administer a proper legal argument in support of his position.

[12] His affidavit is silent on his financial circumstances. However, at the hearing of this motion on August 20, 2015, Mr. Martin provided considerable detail with respect to his financial position.

[13] After Mr. Martin's description of his financial circumstances, the Crown acknowledged it was satisfied that he did not otherwise have the means to retain counsel.

Issue

[14] The issue is whether the appellant has met the prerequisites of s. 684 of the **Criminal Code**.

Analysis

[15] Section 684 of the **Criminal Code** provides:

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.

[16] There are two inquiries under s. 684(1): (i) whether Mr. Martin has sufficient means to obtain legal assistance; and (ii) whether it is desirable in the interests of justice that Mr. Martin have legal assistance. (**R. v. J.W.**, 2011 NSCA 76, ¶11)

[17] I am satisfied from the information Mr. Martin has provided to the Court that he lacks the means to otherwise retain counsel. Therefore, I am left to complete the “interests of justice” analysis.

[18] This inquiry involves a number of considerations including:

- (i) the merits of the appeal;
- (ii) its complexity;
- (iii) the appellant’s capability;
- (iv) the court’s role to assist; and
- (v) the responsibility of Crown counsel to ensure that the applicant is treated fairly. (See **R. v. Assoun**, 2002 NSCA 50; **R. v. Morton**, 2010 NSCA 103; **R. v. Sykes**, 2014 NSCA 4).

[19] Is it in the interests of the administration of justice that the appellant have legal assistance for the purpose of preparing and prosecuting his appeal?

Merits of the Appeal

[20] The appropriate threshold for evaluating the merits of the appeal is whether there is an arguable issue. (**R. v. Sykes, surpa**, ¶19)

[21] I have reviewed the trial judges’ two decisions, the decision of Justice Van den Eynden and the grounds of appeal. I am satisfied that this threshold has been met and I will not comment further on it.

Complexity of the Appeal & the Appellant’s Capability

[22] This is not a complex appeal. The issues are straightforward, did the summary conviction appeal court judge properly apply the proper test in

overturning the trial judge's decision? And did she, as Mr. Martin suggests, substitute her own view of the facts for those of the trial judge?

[23] Mr. Martin, in both his written and oral submissions, exhibited a very good knowledge of the issues. He is articulate and writes very well. He represented himself before the trial judge and before Justice Van den Eynden. I was impressed by his ability to express himself both orally and in writing.

[24] I am satisfied that he has the ability to present his argument on the appeal effectively.

The Court's Role

[25] As noted above, the issues on this appeal are straightforward and involve consideration of questions of law. The appeal panel will have the benefit of the two decisions of Judge Atwood, the decision of Justice Van den Eynden as well as the transcript of the proceedings below. If the issues raised on the appeal have merit, the panel will recognize it and the appeal will be allowed notwithstanding the lack of experience or imperfection of argument by Mr. Martin (see **R. v. Grenkow**, [1994] N.S.J. No. 26 (C.A.), ¶26).

[26] I am confident that this Court's review of the record and the decisions below will reveal any error, including, whether the summary conviction appeal court judge failed to properly apply the appropriate test when reviewing the trial judge's decision.

The Crown's Role

[27] It is the Crown's duty to ensure the appellant is treated fairly. It is well-established, that the purpose of a criminal prosecution is not to obtain a conviction but rather to lay before the court what the Crown considers to be the credible evidence relevant to what is alleged. The role of the Crown prosecutor precludes any notion of winning or losing. Their function is public duty. (See **Boucher v. The Queen**, [1955] S.C.R. 16; **Morton, supra**).

[28] As in all cases, I expect the Crown to assist the Court in ensuring that the appellant receives a fair trial.

Conclusion

[29] In my view, the appellant has raised an arguable issue for appeal. However, I am satisfied that he is capable, as is evidenced from his appearance before me, to articulate his concerns with the summary conviction appeal court judge's decision. With this Court's careful review of the record and the Crown's additional oversight, I am satisfied the appellant can effectively present his appeal without the assistance of counsel.

[30] For these reasons, I do not find it to be in the interests of justice to assign legal counsel. Mr. Martin's motion is dismissed.

Farrar, J.A.