NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Assoun*, 2005 NSCA 140

Date: 20051104
Docket: CAC 159286
Registry: Halifax

Between:

Glen Eugene Assoun

Applicant/Appellant

v.

Her Majesty The Queen

Respondent

Judge: Justice Linda Lee Oland

Application Heard: November 3, 2005, in Halifax, Nova Scotia, in Chambers

Held: Application to be present at the hearing of appeal granted; application to be present at the hearing of the application to adduce fresh evidence dismissed.

Counsel: Jerome P. Kennedy, Q.C. for the applicant/appellant
Daniel A. MacRury for the respondent

Decision:

[1] This is an application by Glen Assoun to be present at the hearing of his appeal and all related proceedings pursuant to s. 687(2) of the *Criminal Code*. In particular Mr. Assoun seeks to attend the hearing of his application for fresh evidence later this month as well as the hearing of the appeal of his conviction early in 2006.

[2] In September 1999 Mr. Assoun was convicted of second degree murder and sentenced to a term of life imprisonment with no possibility of parole for 18 l/2 years. Early in his trial, he dismissed his lawyer. He then represented himself for the remainder of the trial. Two of Mr. Assoun's grounds of appeal of his conviction deal with the Crown's conduct at trial and the trial judge's failure to properly assist him as an unrepresented accused.

[3] Mr. Assoun applied twice under s. 684 of the *Criminal Code* for appointment of counsel. His first application was unsuccessful. His lawyer on the appeal, Jerome Kennedy, has acted for him only since Mr. Assoun's second s. 684 application which was heard in the fall of 2002.

[4] Subsections (1) and (2) of s. 688 of the *Code* provide as follows:

> 688. (1) Subject to subsection (2), an appellant who is in custody is entitled, if he desires, to be present at the hearing of the appeal.
>
> (2) An appellant who is in custody and who is represented by counsel is not entitled to be present
>
> (a) at the hearing of the appeal, where the appeal is on a ground involving a question of law alone,
>
> (b) on an application for leave to appeal, or

> (c) on any proceedings that are preliminary or incidental to an appeal,
>
> unless rules of court provide that he is entitled to be present or the court of appeal or a judge thereof gives him leave to be present.

[5] Mr. Assoun is in custody and is represented by counsel on his appeal. His amended notice of appeal appeals his conviction on grounds involving a question of law. It also applies for leave to appeal on grounds involving a question of fact alone or a question of mixed law and fact. There are no rules of court in this province which provide that an appellant in custody and represented is entitled to be present at any of the proceedings set out in s. 688(2).

[6] The granting of leave under s. 688(2) is discretionary. Cause must be shown why an order granting leave to be present should be made: *R. v. Morin* (1993), 78 C.C.C. (3d) 559 (Ont. C.A. in Chambers) at p. 56l.

[7] In his affidavit in support of his appeal, Mr. Assoun deposed that despite his counsel's assurances, because of his past experiences during his s. 684 applications and particularly the first which was dismissed, he lacks confidence in the "system" that he will be treated fairly. His affidavit continues:

> 8. **THAT** since Mr. Kennedy was not present during my trial I feel it is important for me to be present in this Honourable Court at the hearing of my appeal if disputes or confusion arises over what happened at trial or other factual issues arise. Also, there may be issues arise concerning solicitor-client privilege which require discussion with Mr. Kennedy.
>
> 9. **THAT** I feel it is necessary for me to be present at the hearing of the application for fresh evidence as I expect that issues will arise as to what information I possessed and when I came into possession of the same. Also, my presence may be necessary if other factual issues arise.

[8] I am satisfied that if Mr. Assoun is not present at the hearing of his appeal, his absence might work some prejudice against him. His trial was lengthy. The Crown's case against him was a circumstantial one. Several of his grounds of

appeal concern the admissibility of the evidence of various witnesses. Mr. Assoun is likely the only person who has full knowledge of certain events which may be significant on the appeal. His present counsel did not represent him at trial and may require his client's assistance to respond to matters with which counsel cannot be completely familiar. Finally, much is at stake for Mr. Assoun on his appeal.

[9] However, I am not of the same view with respect to his presence at the hearing of the fresh evidence application. Mr. Assoun has applied to adduce evidence which relates to other suspects for the crime for which he was convicted. The evidence sought to be adduced includes certain affidavits, including one by Mr. Assoun.

[10] Mr. Assoun submits that his application to be present on the hearing of the fresh evidence application is not pursuant to s. 688(2)(c) which pertains to any proceedings that are preliminary or incidental to an appeal, but pursuant to s. 688(2)(c) which pertains to the hearing of the appeal itself. In short, his argument is that the fresh evidence application is integral to the appeal and accordingly, Mr. Assoun's presence is warranted. With respect, I cannot agree. The application to adduce fresh evidence is being be heard separately from the hearing of the appeal and is supported by affidavits and argument confined to that issue. The Crown has indicated that it will not be seeking to cross-examine Mr. Assoun on his affidavit. Moreover Mr. Assoun's counsel does not assert that, unlike at the hearing of the appeal itself, his client's presence at the fresh evidence application might be helpful to him. In all these circumstances, I am not persuaded that Mr. Assoun would be prejudiced by reason of his absence at the fresh evidence application.

[11] I would grant the application to be present at the hearing of the appeal itself but dismiss that to be present at the hearing of the application to adduce fresh evidence.

Oland, J.A.