Docket: CAC 163635
Date: 20001128

NOVA SCOTIA COURT OF APPEAL
[Cite as: R. v. Francis, 2000 NSCA 137]

BETWEEN:

MICHAEL FRANCIS

Appellant/Applicant

- and -

HER MAJESTY THE QUEEN

Respondent

DECISION

Counsel: Appellant/Applicant in person
Peter Rosinski for the respondent

Application Heard: November 23, 2000

Decision Delivered: November 28, 2000

BEFORE THE HONOURABLE JUSTICE FLINN, IN CHAMBERS

FLINN, J.A. (In Chambers):

[1] Following a trial in Provincial Court, before Judge Buchan, the appellant was convicted of robbery and sentenced to imprisonment for five and one-half years.

[2] The appellant was represented by Legal Aid counsel at the trial of this matter. He testified before me that he was told by a supervisor at Nova Scotia Legal Aid that Legal Aid would not represent him on any appeal of his conviction and sentence.

[3] The appellant then prepared, and filed, a notice of appeal. The appellant's grounds of appeal, prepared by himself without the assistance counsel, are as follows:

> The reason why my conviction should be quashed is because I was convicted for a crime I did not commit. I feel that I did not have a fair trial. My counsel did not represent me properly. And all the evidence against me was hearsay. Also my charge was robbery and I was convicted of armed robbery and there was no weapon to be found. The judge also told the victim that she could pick my sentence. I feel that I was judged from my past and not for who I am as a person. I would like somebody to look into this seriously. That is why I am appealing my sentence and conviction.

[4] The appellant has made application, pursuant to s. 684 of the **Criminal Code**, requesting that a judge of this court assign counsel to act on his behalf in this appeal.

[5] Section 684 of the **Criminal Code** provides as follows:

> (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.
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> (2) Where counsel is assigned pursuant to subsection (1) and legal aid is not granted to the accused pursuant to a provincial legal aid program, the fees and disbursements of counsel shall be paid by the Attorney General who is the appellant or respondent, as the case may be, in the appeal.
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> (3) Where subsection (2) applies and counsel and the Attorney General cannot agree on fees or disbursements of counsel, the Attorney General or the counsel may apply to the registrar of the court of appeal and the registrar may

> tax the disputed fees and disbursements. R.S., c. C-34, s. 611; R.S.C. 1985, c. 34 (3rd Supp.), s. 9.

[6] I am unable to conclude, on the basis of the appellant's application, that it appears desirable in the interests of justice that I should assign counsel to act on behalf of the appellant on this appeal. The appellant's grounds of appeal have dubious merit. Further, whatever the merit of the grounds of appeal, this is not a complex matter, and I am satisfied that the appellant is quite capable of articulating his grounds of appeal to the panel who will hear his appeal.

[7] I will set out in more detail why I have come to this conclusion.

[8] I have reviewed a transcript of the trial evidence in this proceeding, including the decision of the trial judge. The trial took one day, April 27, 2000. The matter of sentence was put over to, and dealt with on, May 15, 2000.

[9] The Crown called six witnesses, including the complainant, other friends of the complainant, two police officers and a telephone company security person. The complainant, a single mother on social assistance, testified that, shortly after noon on March 7, 2000, she was home making lunch for her children. The appellant, whom she knew as "Mickey" rang her doorbell and asked to use her telephone. Within seconds of entering, the appellant took out a gun, placed it to her temple, and told her to give him the money in her cupboard as well as a gold chain which she was wearing. She gave the appellant $85.00 from the cupboard, and the gold chain.

She testified that the chain was a gift from her boyfriend and was worth $250.00-$300.00. She described the clothing the appellant was wearing which was corroborated by the police officers who described his clothing at the time of the appellant's arrest.

[10] The appellant gave evidence in defence. Essentially his position was that he did not commit the robbery, he was not at the scene of the crime on the day in question, he was in his apartment all day. The mother of his child confirmed his alibi. It was a case of mistaken identity, his counsel submitted to the trial judge.

[11] The trial judge did not believe the appellant's evidence, nor that of his alibi witness. She found them both to be evasive, argumentative and not believable. The trial judge had "absolutely no doubt that [the complainant] positively identified [the appellant] as have the other witnesses." The trial judge decided that "the Crown has proven beyond a reasonable doubt the guilt of [the appellant]."

[12] The appellant testified before me as to the basis of his grounds of appeal.

[13] With respect to the ground that he did not have a fair trial, because his counsel did not represent him properly, he testified that he expected his counsel would give 100% to his case, and, instead, counsel only gave 50%. When pressed as to what counsel did, or failed to do, he testified that she did not get receipts from the appellant's mother. These receipts would have demonstrated that the appellant's

mother was sending money. That fact would prove, he testified, that he had money, and, therefore, had no reason to rob anyone.

[14] I asked the appellant what he meant by the ground of appeal alleging that all of the evidence against him was hearsay. He responded that the witnesses who identified him "Never seen me before. They can't put me at the scene of the crime." The difficulty which the appellant will have with his position on this ground of appeal (quite apart from the fact that the evidence is not hearsay) is that the complainant testified otherwise, as did other witnesses, all of whom the trial judge found to be credible. The trial judge did not find the appellant or his alibi witness to be credible. The appellant also responded to me that he could not understand why the trial judge would believe the Crown witnesses, and, yet, not believe him or his alibi witness.

[15] As to the allegation that he was convicted of armed robbery, the record shows that the appellant was convicted of robbery under s. 344 of the **Criminal Code**. Because no "firearm" was recovered with respect to this matter, the Crown did not proceed under s. 344(a) of the **Criminal Code** which provides for a minimum term of imprisonment where a firearm is used. Clearly, however, the trial judge took into account the evidence of the complainant as to the effect it had upon her of

having a weapon pointed to her head, in considering the seriousness of the offence for the purpose of sentencing.

[16] It is clear from a review of the transcript that the trial judge did not, as the appellant alleges, tell the victim that she could "pick the sentence" for the appellant. The trial judge did nothing more than see that a victim impact statement was considered prior to sentence, which victim impact statement said nothing about sentencing.

[17] With respect to sentencing, the trial judge sentenced the appellant to six years imprisonment, which she reduced by six months to take into account time which the appellant spent in custody on remand. Because of the appellant's prior record, the trial judge ordered that one-half of the sentence be served before the appellant is eligible for parole. The appellant had 21 prior convictions including robbery, several for weapon offences, some crimes with violence, trafficking, use of a firearm while committing an offence, assault with a weapon and assault causing bodily harm.

[18] At the time of the offence the appellant was visiting in Halifax. He is from Toronto where he was last employed in a factory in "packing and shipping." He has a grade 10 education. He testified that he can both read and write.

[19] This appeal does not involve complex issues of law or fact. Quite apart from its merit, or lack thereof, the appellant is quite capable of articulating his grounds to the panel who will hear his appeal.

[20] Under all of these circumstances I would exercise my discretion under s. 684 of the **Criminal Code** by denying the application of the appellant that I assign counsel to act on his behalf in this appeal.

[21] The application is therefore dismissed.

Flinn, J.A.