NOVA SCOTIA COURT OF APPEAL
Citation *R. v. George*, 2013 NSCA 41

Date: 20130403
Docket: CAC 374959
Registry: Halifax

Between:

Lesa Anne George

Appellant

v.

Her Majesty the Queen

Respondent

Judge:	The Honourable Mr. Justice Jamie W.S. Saunders
Motion Heard:	March 28, 2013, in Halifax, Nova Scotia, in Chambers
Held:	**Motion dismissed.**
Counsel:	Appellant in person
	Timothy O'Leary, for the respondent Her Majesty the Queen
	Edward A. Gores, Q.C., for the respondent, Attorney General of Nova Scotia

Decision:

[1] The appellant is in custody, still serving the sentence she hopes to have reduced on appeal. She appeared in Chambers this morning on her motion filed March 6, 2013 asking that state-funded counsel be appointed to represent her pursuant to s. 684 of the **Criminal Code of Canada**, R.S.C. 1985, c. C-46. Her motion was opposed by Mr. Edward A. Gores, Q.C., senior solicitor for the respondent, the Attorney General of Nova Scotia.

[2] At the start of the hearing I explained in considerable detail the procedures to be followed and the legal and factual issues which would need to be addressed. The appellant had filed an unsworn affidavit along with her motion which declared that she had no funds with which to retain counsel; no means to access case law; that she had been refused Legal Aid representation; and that because her eyeglasses had been damaged in an altercation at the prison, she was unable to read documents. In order to have her affidavit properly authenticated and admitted as evidence Ms. George chose to affirm the accuracy and truthfulness of its contents. Mr. Gores did not seek leave to cross-examine the appellant on her affidavit.

[3] Mr. Gores had filed a comprehensive and most helpful brief dated March 27. Without her glasses Ms. George said she was unable to read it. I then spent a good deal of time summarizing the contents of the brief and through a subsequent series of questions and answers I satisfied myself that the appellant had a clear and complete understanding of the Crown's position and was perfectly capable of articulating her own.

[4] I then proceeded to hear the appellant's arguments and the Crown's reply. At the end of the hearing, and after fully considering the submissions and the record I informed Ms. George that her motion was denied, with reasons to follow.

[5] These are my reasons.

[6] I will begin with a brief summary of the facts gleaned from Mr. Gores' brief as well as the Agreed Statement of Facts presented to the judge at the time of Ms. George's sentencing hearing.

[7] The appellant was arrested on June 1, 2011, and remained in custody until she was sentenced on December 22, 2011, having entered guilty pleas the day before.

[8] At sentencing Ms. George appeared and was represented by senior defence counsel. The Agreed Statement of Facts signed by the appellant personally as well as her lawyer and the Crown attorney was introduced in evidence and marked Exhibit #1. It is an extensive document comprising 20 pages, single spaced. It chronicles the long trail of misery and defalcation to individuals, past employers, insurers, hotels, credit card companies and other businesses Ms. George left in her wake. Among the variety of false pretences she used to dupe her victims were claims to be a cancer patient undergoing radiation treatments and desperately in need of money; a wealthy and succcessful businesswoman from Germany who owned a large company with many employees on the payroll; and that she was a lawyer running a successful practice with a large law firm in the city. The Crown Attorney formally read into the record the contents of the Agreed Statement of Facts. The transcript confirms that the appellant pleaded guilty to twelve counts of fraud; eight counts of breach of an undertaking; six counts of false pretences; four counts of forgery; three counts of uttering forged documents; three counts of theft; and one count of unlawful possession of a credit card.

[9] A joint recommendation by counsel for the Crown and the defence was presented to Provincial Court Judge Michael B. Sherar. That recommendation called for a global sentence of incarceration for 25 months in a federal penitentiary on a go-forward basis, taking into account the six months and 25 days the appellant had spent in pre-trial custody. The appellant and the Crown attorney agreed with Judge Sherar's rounding that period up to seven months for the purposes of calculating the "credit" for pre-trial custody.

[10] Judge Sherar accepted the joint recommendation and ordered Ms. George to be incarcerated for a period of 25 months. In accordance with the joint recommendation, the judge also made 11 separate restitution orders.

[11] During the sentencing hearing Ms. George was asked repeatedly whether she understood and agreed with the facts as presented and the joint sentencing recommendation made on her behalf. She said she did. Her lawyer informed the judge that all of the appellant's pleas were "knowing, volitional, unequivocal, in compliance with s. 606(1).1 of the **Criminal Code**".

[12] In response to questions from the court regarding her guilty pleas, the appellant stated explicitly that she had reviewed her legal rights with counsel,

instructed her counsel, made her pleas freely and voluntarily, and that she had nothing else to say to the court.

[13] By a handwritten Notice of Appeal dated January 18, 2012, the appellant applied for leave to appeal and if leave were granted, appealed the sentence ordered by Judge Sherar. While the words written by the appellant under the heading "Grounds of Appeal" are incomplete, it would appear that her principal claim for relief was to seek a greater "credit" for the time spent in pre-trial custody which would, presumably, reduce her overall term of imprisonment. Ms. George's Notice of Appeal also indicated that she wished to present her appeal in writing, and not personally. At today's hearing Ms. George elaborated. She said she intended to challenge the sentence for two reasons. First, she said she entered pleas of guilty to 33, and not 37, charges. Second, she said her understanding was that the seven months "credit" for remand would be deducted from the 25 months so that she would only be obliged to serve the "net" of 18 months in jail.

[14] From the time of filing her Notice of Appeal on January 18, 2012, the Court log confirms that Ms. George participated in several of this Court's Chambers telephone conferences. Such conferences are arranged to ensure that appeals – especially prisioner appeals – are suitably monitored and advanced so that when cases are ready, they can be set down for hearing. In the appellant's case, these conferences were held May 9, 2012; July 4, 2012; January 9, 2013; February 20, 2013; and March 20, 2013.

[15] At today's hearing I quoted relevant portions from the Court log notes and asked the appellant to confirm that they were accurate and complete. She did. For example, on July 4, 2012, at a Chambers telephone conference over which Justice Oland presided, it was established that Ms. George's attempts to have Nova Scotia Legal Aid provide counsel were denied, as was her appeal to the Nova Scotia Legal Aid Commission Appeal Committee. At that conference almost a year ago, Justice Oland reminded Ms. George of the provisions of s. 684, to which the appellant replied that she had decided to represent herself. Justice Oland fixed November 30, 2012, as the date for the appeal hearing, and set other dates for the filing of facta.

[16] On November 30, 2012, Ms. George appeared and requested an adjournment to obtain counsel. The panel granted her request and adjourned the matter to Chambers in January in order to set new dates. Ms. George was directed to notify the Court and the Crown in writing of the name of the lawyer she had retained.

[17] At a telephone conference on January 9, 2013, over which Justice Bryson presided, Ms. George advised that she had come into funds from a term deposit which she intended to use either for certain orthodontic work or to retain a lawyer. She asked for a 4-6 week adjournment. That request was granted.

[18] At a telephone conference on February 20, 2013, over which Chief Justice MacDonald presided, the appellant said she had decided to apply for state-funded counsel pursuant to s. 684. The Registrar sent her the necessary kit of materials.

[19] The law in this area is well-settled. To succeed on an application under s. 684 of the **Criminal Code** an applicant must show that:

1. It is in the interests of justice that she have legal assistance for the purpose of preparing and presenting her appeal; and
2. She does not have sufficient means to obtain that assistance.

[20] Before addressing these two inquiries judges first tend to begin with a quick evaluation of the strengths of the grounds of appeal.

[21] While not delving too deeply into the merits of the appeal I should at least be satisfied that the appeal is arguable, in other words, tenable and not frivolous. As I will explain in a moment, from what I've seen of this record it is questionable whether the appellant has cracked that initial threshold.

[22] Although Ms. George has not provided correspondence from Nova Scotia Legal Aid confirming their rejection of her efforts to acquire public legal assistance, I am prepared to accept, based on the entries in the Court log, that the Commission did in fact reject her application for legal aid and denied her appeal from that initial decision. I am also prepared to accept that she does not have sufficient means to hire her own lawyer.

[23] Accordingly, my inquiry will focus on the factors to be addressed when considering "the interests of justice", and how those words have come to be interpreted and applied by this Court in a host of cases. See, for example, **R. v. Grenkow** (1994), 127 N.S.R. (2d) 355 (C.A.); **R. v. Assoun**, 2002 NSCA 50; **R. v. Morton**, 2010 NSCA 103; **R. v. Frank**, 2012 NSCA 114; and **R. v. Buckley**, 2012 NSCA 108.

[24] My power to assign counsel pursuant to s. 684 is discretionary. In exercising that discretion in this case I have considered a range of factors including the seriousness of the charges; the complexity of the case; the fact that Ms. George

has initiated the appeal; and whether the grounds advanced by the appellant appear to have any merit.

[25] In terms of the merit of this appeal, the appellant has failed to provide any satisfactory explanation or particulars as to why she believes the sentence imposed by Judge Sherar should be set aside or reduced by this Court. At today's hearing Ms. George implied that she was rushed, or given little choice but to accept the "deal" put to her. There is nothing in the record which would suggest any such pressure or constraint. On the contrary, Ms. George and her lawyer explicitly affirmed the appellant's clear understanding and acceptance of the proposed terms. The transcript of the sentencing submissions does not disclose any irrelevant considerations taken into account by the sentencing judge, nor is the sentence outside the range of possible sentences available in the circumstances. The transcript confirms that the appellant was present during her sentencing and was given full opportunity to address the court concerning the facts, the calculation of remand time, and that the joint sentencing recommendation of a 25 month term of incarceration was intended to be on a go-forward basis. Ms. George never said or implied that she disagreed with any of the positions advanced on her behalf by her counsel. There is nothing in the record to suggest that the appellant thought her lawyer's representations were inadequate or inaccurate or that she was dissatisfied with the professional services he provided.

[26] Put simply, the appellant's principal complaint seems to relate to the very things she expressly approved when she appeared before Judge Sherar. In fact, the Agreed Statement of Facts (Exhibit #1) she signed concludes:

> **Summation**
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> 98. The Crown and Defence agree that the defendant has been in custody on these charges since her arrest June 1, 2011 and is entitled to a pre-trial custody credit on a one-for-one basis for that time. As of December 6, 2011, that pre-trial custody time amounts to 189 days or 6 months, 9 days. ... This pre-trial custody should be credited towards her sentence.
>
> 99. The Crown and Defence jointly recommend a further actual sentence on 2 years, 1 months jail (the original typed version is corrected by a handwritten annotation initialed by all parties) on the above charges at the time of sentencing, making an effective sentence of (a) pre-trial custody from June 1, 2011 to the time of the imposition of sentence (b) plus 2 years jail. No probation would attach as the actual sentence going forward is not less than 2 years. ... (Underlining mine)

[27] In the absence of any credible reason as to why the sentence warrants our intervention, I am left in considerable doubt as to the merits of Ms. George's appeal.

[28] Even if I were to give the benefit of the doubt to Ms. George and assume that her appeal has merit, there is nothing to indicate that the issues on appeal are complex. The underlying facts are not in dispute. There is no suggestion that wrong sentencing principles were applied by Judge Sherar.

[29] With respect to her ability to represent herself on appeal without the assistance of a lawyer, the record confirms that Ms. George is a capable, intelligent person who has held positions of responsibility. She had entered into a series of complex transactions and worked as a business or office manager for several of her victims. The appellant owned and operated her own company. Although she states in her affidavit that she is "vision-impaired" it appears to me that such impairment is the result of not having her eyeglasses available to her at the time she prepared her affidavit. There is no evidence of any long term impairment. She can either read or have materials read to her if she doesn't have her glasses.

[30] It is also obvious that Ms. George has no trouble communicating with others. She is familiar with court process and procedures. I am satisfied that the appellant is able to effectively articulate her position and address the issues relating to her sentencing appeal. She is able to answer questions, and give appropriate answers.

[31] At today's hearing Ms. George said that her 25-month prison sentence ends January 20, 2014 and that following her statutory release date on May 9, 2013 she expects to move to Ottawa, Ontario where she will have the assistance of others in supporting her release, and preparing her appeal. She said that she would be flying back and forth between Ontario and Nova Scotia during the intervening months and that she would expect to have others attend with her at her appeal, should further support be required.

[32] We will be able to properly hear and decide the appeal without the assistance of state-funded counsel for Ms. George.

[33] I have no doubt that the Crown will fulfil its customary role of assisting the Court in ensuring that Ms. George receives a fair appeal.

[34] For all of these reasons I do not find that it would be in the interests of justice to assign counsel. The appellant's motion is dismissed.

[35] I direct that within one week of taking up residence in Ottawa, Ontario the appellant is obliged to contact the Registrar to provide complete details of her address, telephone number, etc. so that necessary communications may be effectively sent and received.

[36] I also direct:

- The appellant's factum is due June 28, 2013.
- The respondent's factum is due July 21, 2013.
- The appeal will be heard Wednesday, September 18, 2013 at 2:00 p.m.

Saunders, J.A.