Date: 19981013 Docket: CAC 148235 & 148615

NOVA SCOTIA COURT OF APPEAL
Cite as: R. v. Mian, 1998 NSCA 189

Roscoe, Bateman and Cromwell, JJ.A.

BETWEEN:	)	
	)	
SAJJAD RASUL MIAN	)	Appellant appeared
	)	in person
Appellant	)	
	)	
- and -	)	
	)	
HER MAJESTY THE QUEEN	)	Robert C. Hagell
	)	and Jane Greig
Respondent	)	for the Respondent
	)	
	)	
	)	Appeal Heard:
	)	October 13, 1998
	)	
	)	
	)	Judgment Delivered:
	)	October 13, 1998

THE COURT: The appeal is allowed and a new trial is ordered as per oral reasons for judgment of Roscoe, J.A.; Bateman and Cromwell, JJ.A., concurring.

The reasons for judgment of the Court were delivered orally by:

ROSCOE, J.A.:

The appellant, Sajjad Rasul Mian, who is not represented by counsel, has appealed his conviction on a charge that he:

> Between the 18th day of February, 1998 and the 24th day of February, 1998 at or near Dartmouth, in the County of Halifax, Province of Nova Scotia did without lawful excuse disobey a lawful order made by a court of justice, to wit., that he shall not attend at the place of education or residence of his children Sarah Mian and Riana Mian or within 1000 feet thereof, contrary to Section 127(1) of the **Criminal Code**.

The appellant has also applied for leave to appeal his sentence of ten months incarceration followed by three years probation imposed by the trial judge, Justice Jamie Saunders of the Supreme Court.

On the conviction appeal the appellant submits that the trial judge erred by not allowing him to represent himself at trial.

At the commencement of the trial, by judge alone, the accused asked the trial judge for permission to represent himself because of differences between himself and his counsel. The appellant expressed a total lack of trust and confidence in the independence and abilities of his counsel. The Crown's position was that the appellant's counsel should not be permitted to withdraw. Mr. Mian's request was declined.

Although Justice Saunders was, as suggested by the respondent understandably convinced that it was in the best interests of the appellant, and would expedite a fair trial to have the appellant represented by counsel, the ruling was a breach of the little-known right **not** to have counsel. The relevant authorities were not cited to the trial judge.

In **Vescio v. The King**, [1949] S.C.R. 139, Taschereau, J. for the majority of the Supreme Court of Canada said at page 142:

> It is a fundamental principle of our criminal law that the choice of counsel is the choice of the accused himself, that no person charged with a criminal offence can have counsel forced upon him against his will, and that it is the paramount right of the accused to make his own case to the jury if he so wishes, instead of having it made for him by counsel (*Rex v. Woodward* [[1944] All E.R. 159.]) . . .

More recently, Justice Hill, of the Ontario Court of Justice, General Division, in **R. v. Romanowicz**, [1998] O.J. No. 12, (Q.L.), 14 C.R. (5th) 100, reviewed the authorities on this issue in the following passage beginning at paragraph 30:

> The accused has a right to self-representation: **The Queen v. Vescio** (1949), 92 C.C.C. 161 (S.C.C.) at 164 per Taschereau J.; **The Queen v. McGibbon** (1988), 45 C.C.C. (3d) 334 (Ont. C.A.) at 346-7 per Griffiths J.A.; **Regina v. Fabrikant** (1995), 97 C.C.C. (3d) 544 (Que. C.A.) at 555 per Proulx J.A. (leave to appeal to S.C.C. refused [1995] 3 S.C.R. vi). The court cannot, from a paternalistic perspective, force counsel upon an unwilling accused. In **Swain v. The Queen** (1991), 63 C.C.C. (3d) 481 (S.C.C.) at 505-6, Lamer C.J.C. stated "an accused person has control over the decision of whether to have counsel". Likewise, in **R. v. Taylor** (1993), 77 C.C.C. (3d) 551 (Ont. C.A.) at 567 Lacourcière J.A. stated:
>
> > An accused who has not been found unfit to stand trial must be permitted to conduct his own defence, even if this means that the accused may act to his own detriment in doing so. The autonomy of the accused in the adversarial system requires that the accused should be able to make such fundamental decisions and assume the risks involved.
>
> It seems then that the respect for individual autonomy within the adversarial system forecloses the court from forcing counsel upon an accused even where it may clearly be in the interests of the accused: **Regina v. Taylor**, supra at 567; **Regina v. Littlejohn and Tirabasso** (1978), 41 C.C.C. (2d) 161 (Ont. C.A.) at 173 per Martin J.A. In other words, although an accused may be disadvantaged in defending without assistance, no person, otherwise fit to stand trial, can be forced to have counsel. The accused assumes the risks and disadvantages of appearing without counsel.

We agree with Justice Hill's analysis and conclusions. We also refer to **R. v. Bowles and Danylak** (1985), 21 C.C.C. (3d) 540 (Alta. C.A.) where in a similar situation the court said at page 545:

> Sometimes a dismissal of counsel accompanied by a request for an adjournment is perceived by the trial judge as a delay tactic. The better opinion is, we think, that the proper course in such a case is to allow the discharge of counsel if the accused persists. The request for an adjournment must be considered separately, and might be denied . . .

In this case the appellant had not been found unfit to stand trial and was clear in his denunciation and waiver of his right to be represented by counsel. Whether it was in his best interests to proceed without counsel should not have been a determinative factor. He wished to represent himself, and was denied the right to do so. The Crown has not relied on s.686(1)(b)(iii), in our view properly, in light of the decision in **R. v. Bowles and Danylak**.

The appeal is accordingly allowed and a new trial ordered. It is not necessary to deal with the motions made by the appellant, the other grounds of appeal or the sentence appeal.

Roscoe, J.A.

Concurred in:

Bateman, J.A.

Cromwell, J.A.