

NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Henneberry*, 2016 NSCA 50

Date: 20160607
Docket: CAC 441343
Registry: Halifax

Between:

Victoria Lea Henneberry

Appellant

v.

Her Majesty the Queen

Respondent

Judge: Van den Eynden, J.A.

Motion Heard: April 28, 2016, in Halifax, Nova Scotia

Held: Motion dismissed

Counsel: Victoria Henneberry, appellant in person
Edward A. Gores, Q.C. for the Attorney General of Nova
Scotia
Mark Scott, Q.C., for the respondent (watching brief)
Stacey Gerrard for Lawyers' Insurance Association of Nova
Scotia (watching brief)

Reasons for judgment:

Introduction

[1] Ms. Henneberry and her co-accused were charged with the first degree murder of Loretta Saunders. Early into her murder trial, Ms. Henneberry entered a guilty plea to second degree murder. On appeal, she now seeks to overturn her second degree murder conviction. Ms. Henneberry seeks state funded counsel to assist her in presenting her appeal to this Court.

[2] For the reasons set out herein, Ms. Henneberry's motion for state funded counsel under s. 684 of the *Criminal Code* is denied.

Section 684 of the *Criminal Code*

[3] Section 684(1) requires that I consider: (1) whether it is desirable in the interests of justice that Ms. Henneberry have legal assistance, and (2) whether she has sufficient means to obtain that assistance. Section 684(1) provides as follows:

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.

[4] Prior to proceeding with her motion for state funded counsel, Ms. Henneberry exhausted her avenues to obtain counsel through Nova Scotia Legal Aid (NSLA). She applied to NSLA for assistance. After conducting its merit assessment of her grounds of appeal, NSLA declined to provide counsel. She appealed the decision to the NSLA Appeal Committee. Her appeal was dismissed.

[5] The Crown concedes that Ms. Henneberry does not have sufficient means to retain private counsel. Therefore, the focus is on whether it is desirable in the interests of justice to appoint state funded counsel. In making that determination, I consider a number of factors, such as:

1. Do the grounds of appeal raised by Ms. Henneberry have merit?
2. Is the appeal complex?
3. Can Ms. Henneberry meaningfully participate in and effectively present her appeal without the assistance of counsel?
4. The ability of the appeal panel to address the issues raised on appeal in the absence of counsel; and
5. The obligation of the Crown to ensure Ms. Henneberry is treated fairly and to bring important arguments to the attention of the Court, notwithstanding this might benefit Ms. Henneberry in her appeal pursuit.

Analysis of relevant factors

Merits/arguable issue

[6] In her Notice of Appeal, Ms. Henneberry contends:

1. She did not appreciate the nature of the charge, and/or did not intend to admit guilt;
2. There was no direct evidence, only circumstantial evidence, of her role in the murder of Loretta Saunders; and
3. Her Agreed Statement of Facts contains untrue admissions or wrong inferences were drawn of her culpability.

[7] On this motion, the threshold for determining merit is whether Ms. Henneberry has raised an arguable issue on appeal (*R. v. Martin*, 2015 NSCA 82). The following background provides context to my assessment of whether her assertion that she did not appreciate the nature of the charge and/or did not intend to admit her guilt has merit:

- Ms. Henneberry was represented by experienced criminal defense counsel from the time of her arrest in February 2014 through to her conviction on April 22, 2015 and her sentencing hearing on April 29, 2015;

- To help her understand the nature of the charge she was facing and the evidence the Crown was relying upon, she had the benefit of a preliminary inquiry and the judge's decision which committed her to stand trial on first degree murder;
- After the jury was selected and prior to the commencement of calling any evidence at her first degree murder trial, Ms. Henneberry decided to tender a plea of guilty to the included offence of second degree murder pursuant to s. 231(7) of the *Criminal Code* and re-elect to be tried by judge alone. The Crown accepted her plea to second degree murder;
- She signed and filed with the Court a detailed written Agreed Statement of Facts which supported her guilty plea. Before accepting her guilty plea, the trial judge, Justice Joshua Arnold, carefully carried out the required inquiry under s. 606 of the *Criminal Code* to ensure her guilty plea was being entered freely and voluntarily. Section 606(1.1) provides as follows:
 - (1.1) A court may accept a plea of guilty only if it is satisfied that the accused
 - (a) is making the plea voluntarily; and
 - (b) understands
 - (i) that the plea is an admission of the essential elements of the offence,
 - (ii) the nature and consequences of the plea, and
 - (iii) that the court is not bound by any agreement made between the accused and the prosecutor.
- In her direct exchange with Justice Arnold, she confirmed, on the record, her understanding and agreement with the following:
 - She was pleading guilty to the second degree murder of Loretta Saunders, thereby committing an indictable offence contrary to s. 235 of the *Code*, and the punishment provided for that offence is life imprisonment without eligibility for parole for a period of between 10 and 25 years;
 - By Justice Arnold accepting her guilty plea she gives up her right to a trial;
 - When being sentenced, although Justice Arnold will listen to what her counsel and the Crown will say about the proper

sentence and her parole eligibility, he is not bound by any opinion or agreement between her and the Crown;

- She was pleading guilty voluntarily of her own free will;
- By pleading guilty she was admitting all the facts and essential elements of the offence which the Crown must prove at trial for her to be found guilty;
- In addition, although the essential elements were covered in her Agreed Statement of Facts, the trial judge reviewed the essential elements of the offence with Ms. Henneberry on the record. That exchange is as follows:

THE COURT: . . . Even though, Ms. Henneberry, you have filed an admission of facts in compliance with section 606 of the *Criminal Code of Canada*, I'm going to outline for you the essential elements of second degree murder and I'll ask you whether you admit to these essential elements.

The essential elements are that you were, in this case, a party to the killing of Loretta Saunders, that the killing you were a party to was unlawful, that at the time Loretta Saunders was killed, you knew Blake Leggette intended to kill her and meant to kill her. Do you understand these essential elements?

MS. HENNEBERRY: Yes

THE COURT: Were you a party to causing Loretta Saunders' death?

MS. HENNEBERRY: Yes.

THE COURT: Were you a party to causing Loretta Saunders' death unlawfully?

MS. HENNEBERRY: Yes.

THE COURT: Did you know that Blake Leggette intended to kill Loretta Saunders and meant to kill Loretta Saunders when he killed Loretta Saunders?

MS. HENNEBERRY: Yes.

THE COURT: Ms. Henneberry, I formally accept your plea of guilty to the second degree murder of Loretta Saunders as included within count 1 of the indictment and, based upon the agreed facts as filed, I find you guilty of the second degree murder of Loretta Saunders.

- A week passed between the entering of her guilty plea and her sentencing date. During her sentence hearing, Ms. Henneberry once again confirmed to the trial judge her acknowledgement of the facts which underpinned her guilty plea and resulting conviction.
- At no time during the proceedings wherein she tendered her guilty plea and was sentenced, did Ms. Henneberry express any dissatisfaction, confusion or misunderstanding of the process. She never expressed any intention to resile from her guilty plea. She never expressed any impairment which might affect her decision-making, such as an underlying mental health issue or absence of any medication she had previously been taking to cope with stress, panic or anxiety. She never asked for an adjournment or more time to consider matters. To the contrary, throughout the process she clearly and unequivocally confirmed that she understood the charge to which she plead guilty and understood the consequences of her guilty plea.

[8] Respecting her second ground of appeal, Ms. Henneberry argues there was an absence of direct evidence sufficient to support a finding of her guilt. Further, she appears to be operating under the mistaken belief that circumstantial evidence is not sufficient to ground a conviction. In her final ground of appeal, she asserts the Agreed Statement of Facts contains untrue statements or that wrong inferences were drawn respecting her culpability. This ground appears to be tied to her second ground. She makes these assertions notwithstanding her clear admission, on the record, to the essential elements of the offence of second degree murder.

[9] The Crown argues Ms. Henneberry has failed to establish that her appeal has merit, and as a result of her failing to meet this burden, her motion for state funded counsel should be dismissed.

[10] Ultimately, it will up to a panel of this Court to determine whether Ms. Henneberry's appeal has any merit. For the purposes of this motion, I will only say this—if there are any arguable issues raised by Ms. Henneberry on appeal, they appear weak at best.

Complexity of the appeal

[11] The complexity of the appeal can be ascertained from factors such as the grounds of appeal, the length and content of the record, the legal principles involved and their application to the facts. (See *R. v. Miller*, 2015 NSCA 19.)

[12] Ms. Henneberry, in part, argues her appeal is complex because the crime to which she pleaded guilty is a serious one. It is true, second degree murder is a serious charge. However, in the context of this appeal, the grounds of appeal are not complex. The record is clear. It is not overly lengthy, complex or unmanageable for Ms. Henneberry.

[13] Ms. Henneberry also indicates she wishes to obtain some medical records respecting her medical/mental health. An application for fresh evidence might be forthcoming. She would like counsel to assist her with these endeavors. Although Ms. Henneberry is currently incarcerated, I am not satisfied that she is unable to adequately address these issues on her own behalf.

Ability to meaningfully participate in and effectively present her own appeal

[14] In assessing whether Ms. Henneberry can effectively present her appeal without the assistance of counsel, I look to her level of comprehension, ability to communicate (both orally and in writing) and whether she is able to apply the relevant legal principles to the facts. (See *Miller*.)

[15] Ms. Henneberry indicates she finds it difficult to speak in front of people, and that she finds the court process quite stressful and anxiety provoking. Many litigants might well say the same. However, despite these challenges, she was quite able to effectively present her arguments, both in written form and orally before me. She filed a detailed affidavit in support of her motion. In court, she was also able to articulate what she wanted and why. She was able to respond to the Crown's arguments in opposition to her motion. In fact, when questioned by me on certain aspects of the record which did not seem to support her motion or grounds of appeal, she was assertive in presenting her responses. She demonstrated an ability to articulate her position and push back on points she did not agree with.

[16] All this speaks to her ability to both understand and apply the applicable legal principles involved in her appeal. I am satisfied her comprehension and communication skills equip her to adequately present and meaningfully participate in her appeal.

Crown's duty and role of Court of Appeal

[17] Ms. Henneberry's ability to present her case is further enhanced by some additional safeguards. First, the Crown has a duty to ensure the appellant is treated fairly. (See *Miller* and *Martin*.) Should Ms. Henneberry omit an important point or

argument, the Crown is expected, and has acknowledged its obligation, to bring this to the Court's attention.

[18] Notwithstanding Ms. Henneberry being without counsel, the Court of Appeal has the capacity to decide the appeal. An appeal panel will have reviewed the record, and is well able to recognize whether the appeal has merit. (See *Miller* and *Martin*.)

Conclusion

[19] For the forgoing reasons, it is not in the interests of justice that Ms. Henneberry be afforded state funded counsel. Her motion is dismissed.

Van den Eynden, J.A.