

NOVA SCOTIA COURT OF APPEAL

Cite as: R. v. Forrayi, 1997 NSCA 83

BETWEEN:

BRADLEY RODERICK FORRAYI

Applicant/Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

Mark A. Scott
for the Appellant

Kenneth W.F. Fiske, Q.C.
for the Respondent

Application Heard:
April 24, 1997

Judgment Delivered:
April 24, 1997

BEFORE THE HONOURABLE JUSTICE ELIZABETH A. ROSCOE IN CHAMBERS

ROSCOE, J.A.:

This is an application by Bradley Roderick Forrayi seeking permission to withdraw a notice of abandonment of his appeal from a conviction for first degree murder. The application is made pursuant to **Civil Procedure Rule 65.17 (4)**, which specifically

provides that such an order may be made if, in the opinion of the Chambers judge, "... it is in the interest of the proper administration of justice to do so."

On March 8, 1995 the applicant was found guilty of first degree murder of Michael Cassidy. Although he was represented by counsel at the trial and is represented on this application, he has not otherwise had the assistance of counsel. The applicant filed his notice of appeal on April 11, 1995. It took several months for the transcript to be prepared and the matter was initially scheduled to be heard on April 9, 1996. Although Mr. Forrayi had a Certificate for Legal Aid representation, it provided very limited funding and he was unable to find a lawyer willing to represent him for the appeal. The hearing date for the appeal was adjourned three times with the consent of the Crown attorney. The fourth application to adjourn was opposed by the Crown and was dismissed by the Chambers judge. The appeal was then scheduled to be heard on February 19, 1997. The Crown factum was filed on January 23, 1997. The applicant brought an application for the appointment of counsel pursuant to s. 684 of the **Criminal Code** which was heard and dismissed on February 13, 1997. Mr. Forrayi filed a notice of abandonment later that day. I note, in passing, that the notice is not entirely in accordance with Rule 65.17(1) since the signature of Mr. Forrayi is not either verified or witnessed.

The applicant has filed an affidavit in which he swears that on February 13, after the denial of the application to have counsel appointed for him he "... was faced with having to argue [his] appeal for first degree murder within a week and without the aid of counsel.", and he, "... honestly felt that [he] was unable to undertake argument in relation [to his] own appeal; and [he] felt very emotionally dejected upon the failure of the section 684 application." He also says in paragraphs 4 and 5 of the affidavit:

4. THAT prior to having entered the court room on February 13, 1997, I had a conversation with Mr. William Digby, Q.C., Executive Director of Nova Scotia Legal Aid. I had questioned him as to the effect of abandoning my appeal

and whether I would be able to revive it later. It was indicated to me that it would be problematic; however, I interpreted this to mean that I could indeed abandon my appeal and revive it later. I had sent to the Honourable Court a letter dated March 3, 1997, wherein I outlined that I had received a "legal opinion" from William Digby, Q.C.. Though I inserted quotation marks in the above noted letter as to what William Digby had informed me, I wish to indicate to the court that this was not verbatim of the information that was given to me. It was my interpretation of Mr. Digby's limited response. As a result, I had chosen on my own instance to abandon the appeal upon having my section 684 application dismissed by this Honourable Court. A copy of this letter is attached hereto as Exhibit "B".

5. THAT at the time that I abandoned my Notice of Appeal, I did not do so with full advice from a lawyer and was very emotionally distraught upon having been unable to acquire counsel to argue my conviction and sentence appeal for first degree murder. I felt that I had little or no opportunity to effectively argue my case on the following week and was quite confused as to what to do. As a result, I believe that I did not voluntarily and effectively abandon my appeal as I felt that there was no other choice given:

- (a) my inability to obtain counsel; and
- (b) the time factors that were pressing down on me.

Mr. Digby filed an affidavit in which he swears:

3. **THAT** prior to entering the court room I went to speak to Mr. Forrayi in the holding cell to advise him of my view of my function in appearing before the court, the information I could provide and Legal Aid's position respecting his Legal Aid Certificate. During our conversation, he asked me what would happen if he was to abandon his appeal and try to revive it later. My response to him was something to the effect of "I think you would have a problem". There was no further conversation in relation to that point.

It is submitted by counsel for the applicant that the applicant did not have sufficient legal advice on February 13, 1997, that he had until that time been diligent and persistent in pursuing his right to have an appeal of his conviction, and that he has proceeded quickly to make this application.

The Crown is opposed to the application and submits that the applicant has

planned and schemed in order to circumvent the denial of his last request for an adjournment of the appeal, and that he should not be permitted to withdraw the notice of abandonment in these circumstances.

Since the Crown has not sought to cross-examine Mr. Forrayi on his affidavit, I am prepared to accept as fact that he was emotionally dejected, confused and distraught and under the impression that he could revive his appeal at a later date at the time he signed the notice of abandonment on February 13, 1997.

I have considered the cases to which counsel referred. The most pertinent were: **R. v. Jacobs** (1971), 2 C.C.C. (2d) 26 (S.C.C.); **R. v. Watson** (1975), 23 C.C.C. (2d) 366 (Ont. C.A.); and, **R. v. Horrick, et al.** (1993), 83 Man. R. (2d) 311 (Man. C.A.).

After considering the submissions and the case law, I have come to the conclusion that it is in the interests of the administration of justice that the application be granted so that the appeal can be heard on its merits. Mr. Forrayi has been sentenced to life imprisonment, and he was entitled to have the conviction reviewed by this Court on its merits. The rules provide an avenue for the withdrawal of a notice of abandonment in certain circumstances, and I am satisfied that given the emotional state of the applicant at the time he signed the notice, the serious nature of the offence for which he was convicted, his lack of understanding of the legal effect of signing the notice, and the relatively prompt action taken to withdraw the notice, that it is appropriate in this case to grant the application.

I will set the matter down for hearing in September and fix a date by which Mr. Forrayi should file a factum.

Roscoe, J.A.