C.A.C. No. 126642

NOVA SCOTIA COURT OF APPEAL
Cite as: R. v. Dorman, 1996 NSCA 256

Chipman, Jones and Roscoe, JJ.A.

BETWEEN:	
DONALD ARTHUR DORMAN Appellant	Appellant appeared in person
- and -	
HER MAJESTY THE QUEEN Respondent	Kenneth W.F. Fiske, Q.C. for the Respondent
	Appeal Heard: November 26, 1996
	Judgment Delivered: December 11, 1996

THE COURT: The conviction appeal is dismissed, leave to appeal the sentence is granted but the appeal from sentence is dismissed as per reasons for judgment of Chipman, J.A.; Jones and Roscoe, JJ.A., concurring.

CHIPMAN, J.A.:

The appellant was convicted in Provincial Court on March 22, 1996 of break, enter and theft. He was sentenced to 30 months incarceration. He appeals from his conviction and seeks leave to appeal his sentence. He represented himself personally in

the preparation of his factum and presentation of his oral argument before the Court.

The Canada Post Corporation outlet at Head of Jeddore, Halifax County, was, in January of 1994, located in a building on Highway No. 7, supported on posts above ground. The building had a front door and a side door. The postmistress closed the post office on Saturday, January 22, 1994 at 12:30 p.m. She secured the two doors to the building. Upon her return to work at 7:00 a.m. on Monday, January 24, she discovered that the side door of the building had been forced and the post office had been ransacked. There was a hole in the floor. A safe containing money orders, a money order machine, postage stamps and cash was missing. The R.C.M.P. were notified.

As a result of information received, the R.C.M.P. located the door to the post office safe in the waters of the Musquodoboit River. One Wilfred MacDonald was charged by the police with a number of burglaries, including the break into the post office at issue. He subsequently pleaded guilty to this charge and was sentenced to a term of imprisonment.

The appellant was charged by information sworn on November 14, 1994 that he did break and enter the office of Canada Post Corporation at Head of Jeddore and did commit therein the indictable offence of theft contrary to s. 348(1)(b) of the **Criminal Code**.

The appellant elected trial in Provincial Court and pled not guilty. His trial began on October 25, 1995. Counsel for Nova Scotia Legal Aid appeared at the opening of the trial and informed the Court that the appellant had fired him. He requested leave to withdraw. When questioned by the trial judge, the appellant confirmed that he did not wish to be represented any longer by the solicitor. He was unwilling to represent himself and wished an adjournment to obtain counsel. He also complained of lack of full disclosure by the Crown. The trial judge granted the solicitor's application to withdraw as solicitor on the record. The judge pointed out that the decision to discharge counsel was made at the last minute. He denied the motion for adjournment, advising the appellant that he would have

to represent himself. The case would proceed to trial with two witnesses who were to identify the stolen property. Following that, an adjournment would be granted to permit the appellant to examine a video tape, photo lineups and other material just provided by the Crown. The appellant cross-examined the two witnesses called to give identification evidence. They did not implicate the appellant. The trial was then adjourned until January 25, 1996. Evidence was subsequently heard by the trial judge on January 25, February 16 and March 22. The appellant conducted his own defence.

The evidence implicating the appellant was provided by Wilfred MacDonald and his wife Shelley. Shelley MacDonald testified that she drove her husband and the appellant in a truck to the post office early in the morning of January 24. Her husband and the appellant loaded a safe into the truck. They returned to the MacDonald home where both opened the safe with torches and removed the contents. The next day the safe was dropped into the Musquodoboit River by the appellant and MacDonald. MacDonald gave a detailed account of the break and of the appellant's participation therein.

The appellant was advised by the trial judge of his right to present evidence and to testify. He was also advised of the distinction between submissions he might make to the court on the one hand and his sworn testimony on the other. He did call witnesses on his own behalf but did not choose to take the stand.

Following the taking of evidence on March 22, 1996 and the hearing of submissions from counsel for the Crown and the appellant, the trial judge found the appellant guilty as charged and imposed the sentence of 30 months in a federal penitentiary, having taken into consideration the fact that the appellant had spent eight months on remand prior to trial.

The appellant applied on October 10, 1996 to Hallett, J.A. in Chambers asking him to assign counsel to act on his behalf on this appeal. Hallett, J.A., by written decision delivered October 10, reviewed the circumstances and referred to his decision in

R. v. Grenkow (1994), 127 N.S.R. (2d) 355. Hallett, J.A. concluded that the appellant had not met the test imposed upon him by the decision in **Grenkow, supra**, in the following respects: (i) there was no evidence that the appellant was refused Legal Aid on the appeal; (ii) that a review of the grounds of appeal did not indicate a reasonable chance of success on either the conviction or the sentence appeal; (iii) the issues were not complex. Hallett, J.A. declined the appellant's application. He noted that it was still open to the appellant to ask the panel hearing the appeal to appoint counsel to assist him if it was desirable in the interests of justice.

The points raised by the appellant are whether:

(1) This Court should appoint counsel for the appellant pursuant to s. 684 of the **Criminal Code**.

(2) The appellant was improperly arrested by the R.C.M.P.

(3) The appellant was improperly denied the right to counsel at trial.

(4) The appellant's right to make full answer and defence was impaired by reason of the failure of the Crown to make timely disclosure.

(5) The taking of the appellant's election and plea and the assignment of the trial judge was improper.

(6) The verdict was unreasonable.

(7) The sentence imposed was a fit one.

(1) <u>Appointment of counsel</u>:

This Court did not accede to the appellant's request for the appointment of counsel, but required the appellant to argue his appeal in person.

The appellant did not establish what, if any, efforts he made to obtain legal aid for this appeal.

In **Grenkow, supra**, Hallett, J.A. said at p. 360:

> In my opinion the test under s. 684 must be as set out in the words of the section, that is, does it appear desirable in the

> interest of justice that the accused should have legal assistance and that the accused has not sufficient means to obtain the same. If legal aid has been refused by Nova Scotia Legal Aid counsel should only be assigned if the court is satisfied that there is a reasonable chance of the appeal succeeding; the appellant must do more than raise an arguable issue.
>
> And at p. 362:
>
> Third, the reality is that on an appeal from conviction or sentence where the appellant appears in person, the appeal panel hearing the appeal will carefully address the issues raised by the appellant. The panel will have the trial record and the panel members will have reviewed the record of the proceedings. If the points raised on the appeal have merit the appeal will be allowed notwithstanding the possible imperfect presentation of argument by the appellant. There is a problem, of course, in that the appellant may not recognize that he or she has a meritorious point and there is no requirement that a court of appeal dig around in a transcript to discover errors. However, in most appeals where an appellant appears in person, and for the most part those are sentence appeals, any errors will come to the attention of the appeal court. A review of the results of appeals from conviction show that in the past 18 months two appellants representing themselves have been successful.
>
> And at p. 364:
>
> Before assigning counsel to an appellant on an application under s. 684 of the **Code** the chambers judge would have to be satisfied that (i) the appellant was refused legal aid for the appeal by Nova Scotia Legal Aid although qualified on financial grounds; (ii) the appeal has a reasonable chance of success; and, (iii) the appellant, due to the complexity of the appeal issues or the inability of the appellant to articulate the grounds, requires the assistance of counsel, in other words the appellant could not have a fair hearing of the appeal without the assistance of counsel. These would be minimum requirements; each application would turn on its facts.

The same considerations that apply on a Chambers application also apply on an application under s. 684 of the **Code** to the panel hearing the appeal.

In declining to appoint counsel for the appellant, we were prepared to assume that he had met the first two conditions of the test proposed by Hallett, J.A. However, we were satisfied from a review of the record and the appellant's position that the third

condition had not been met.

Our primary concern must be whether the appellant's case could be properly placed by him before this Court. Prior to the argument, the Court carefully reviewed the record and concluded that the primary issue arising out of the conviction was not complex. It was simply a question of identification of the appellant as MacDonald's accomplice in the break, enter and theft. The other issues, as will appear from these reasons, were not complex either. The appellant argued his case forcefully before this Court, the Crown presented a fair and balanced argument, and this Court was able to identify with respect to each issue all that could be usefully said on the appellant's behalf with respect to each.

I am satisfied that the appellant suffered no prejudice by being required to present his own case.

(2) Arrest:

The appellant did not raise this issue at trial. He now asserts that he was arrested in December, 1994 at Lower Sackville by the R.C.M.P. and taken to the Musquodoboit Detachment without being read his rights until after he arrived there. He states that at that time he waived his right to counsel in view of the late hour and would talk to a lawyer the following day.

No application was made to the trial judge pursuant to s. 24 of the **Charter** for a remedy as a result of the circumstances surrounding the appellant's arrest. There is no evidence of any statement or anything else obtained by the police upon or following the arrest that implicated the appellant in the break-in. The evidence of the appellant's participation therein came solely from the two witnesses who identified him. There is, therefore, in my view no basis upon which **Charter** relief could be sought or granted arising out of any delay by the police in giving the appellant his right to counsel.

(3) Right to counsel at trial:

The appellant discharged his counsel at the outset of the trial. He sought the

appointment of new counsel by the trial judge and an adjournment. He added that he did not consider Legal Aid capable of representing him in this serious matter because of its limited resources. The trial judge denied this request but an adjournment was granted for disclosure purposes. This adjournment was for three months. On reviewing the record, it appears that the appellant did not, at the resumption of the trial on January 25 persist in his request for counsel. Rather, he proceeded to represent himself throughout the balance of the proceedings. He was assisted by the court throughout. In particular, he was advised respecting a number of points of law. The trial judge was helpful to him and provided much more than the minimum assistance to which an unrepresented accused is entitled: See **R. v. Kennie** (1993), 121 N.S.R. (2d) 91 at p. 98. The appellant presented a vigorous defence with searching and effective cross-examinations of the witnesses. He made a full closing argument to the trial judge. I am satisfied that the appellant had ample opportunity to seek counsel through the Legal Aid system and has not demonstrated he made such effort or if he did, that it was refused for no sufficient reason. Moreover, I am satisfied from a review of the transcript that he conducted an effective defence on his own behalf. He was convicted because the trial judge accepted the evidence of two eye witnesses implicating him in the crime.

(4) **Non-disclosure by the Crown:**

Only shortly before the trial opened on October 25 did the Crown supply the appellant's counsel with a video tape of a statement given by Shelley MacDonald, a photo lineup and certain information respecting Wilfred MacDonald. Upon this becoming apparent, the trial judge granted an adjournment of three months to the appellant to enable him to assess and deal with the material which had been disclosed late. On January 18, 1996, the appellant applied to the trial judge for a stay by a reason of late disclosure by the Crown. This motion was dismissed. The appellant made a similar application during the

trial. The Court reserved judgment on this and permitted the trial to proceed. The trial judge kept the issue open until the end of the trial when it was again argued by the appellant. The trial judge, in his decision, reviewed the entire question of disclosure and came to the conclusion that the untimely disclosure by the Crown was rectified by the adjournments provided to the appellant. These gave him ample time to assess the material and prepare his defence. I have reviewed the material and the entire record and I am of the opinion that the trial judge was correct in this conclusion. The appellant has not shown that the remedy of an adjournment fashioned by the trial judge was inadequate to overcome any problems arising out of delayed disclosure: See **Stinchcombe v. R.** (1991), 68 C.C.C. (3d) 1 (S.C.C.); **O'Connor v. R.** (1995), 103 C.C.C. (3d) 1 (S.C.C.) per L'Heureux-Dubé, J. at pp. 39-43; **R. v. Antenello** (1995), 39 C.R. (4th) 99 (Alta. C.A.).

As well, I am not satisfied that there was any incomplete disclosure by the Crown of material information.

(5) <u>The taking of the election of plea and the assignment of the trial judge</u>:

The appellant's suggestion that there was a requirement that the same judge taking the election and plea should have been the trial judge is without merit: See s. 554(1), **Criminal Code**; **R. v. Wiseberg** (1973), 15 C.C.C. (2d) 26 (Ont. C.A.); **R. v. Gillis** (1967), 1 C.C.C. 266 (Sask. C.A.).

(6) <u>Unreasonable verdict</u>:

The conviction of the appellant is based upon the acceptance by the trial judge of the evidence of Wilfred and Shelley MacDonald. That evidence, if believed, was sufficient to support a conviction. In analyzing the evidence, the trial judge considered the challenges made by the appellant to the credibility of the witnesses. I am satisfied that the verdict cannot be said to be unreasonable or unsupported by the evidence.

(7) <u>Sentence</u>:

The appellant contends that the trial judge failed to take into account

sufficiently or at all the time spent by the appellant on remand prior to and during the trial proceedings. The appellant's position is that he spent eight months on remand and that proper credit therefore should have resulted in a sentence less than the 30 months imposed.

The issue is whether a sentence of 30 months imprisonment is, in all the circumstances, clearly unreasonable or manifestly excessive: See **R. v. Shropshire** (1995), 102 C.C.C. (3d) 193.

The trial judge took into account the appellant's remand time in fixing the sentence at 30 months. I am satisfied that the trial judge treated the appellant leniently. The appellant has a deplorable criminal record. It extends over a period of 21 years and numbers 36 convictions. Of these, 13 were for break and enter. It has not been shown that the trial judge erred either in the application of the proper principles of sentencing or by imposing a sentence that was unreasonable or manifestly excessive.

I would dismiss the conviction appeal, grant leave to appeal the sentence, but dismiss the appeal from sentence.

Chipman, J.A.

Concurred in:

Jones, J.A.

Roscoe, J.A.