**NOVA SCOTIA COURT OF APPEAL**
**Citation:** ***R. v. Frank***, 2012 NSCA 114

**Date:** November 16, 2012
**Docket:** CAC 382020
**Registry:** Halifax

**Between:**

Robert Douglas Frank

Appellant

v.

Her Majesty the Queen

Respondent

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| **Judge:** | The Honourable Justice David P.S. Farrar |
| **Motion Heard:** | November 1, 2012, in Halifax, Nova Scotia, in Chambers |
| **Held:** | Motion to appoint counsel is dismissed. |
| **Counsel:** | Appellant, in person<br>Mark Scott and Timothy O'Leary, for the respondent, Her Majesty the Queen<br>Edward Gores, Q.C., for the respondent, Attorney General of Nova Scotia |

**Decision:**

**Introduction**

[1] The appellant applies for appointment of counsel under s. 684 of the **Criminal Code of Canada**, R.S.C. 1985, c. C-46, to assist him in prosecuting his appeal. For the reasons that follow I deny the request.

**Background**

[2] On August 12, 2011, the appellant was convicted of 17 offences involving harassment of Susan Chawner and/or Joyce Chawner. The convictions included:

1. Numerous breaches of undertakings by having contact with Susan Chawner and Joyce Chawner when he was prohibited from doing so;

2. Damage to Susan Chawner's car;

3. Criminally harassing Joyce Chawner;

The individual convictions are described in detail in the decision of Provincial Court Judge Anne Derrick dated August 12, 2011 (reported at 2011 NSPC 107, ¶142).

[3] Mr. Frank's trial took place over five days during which he was represented by counsel. At the conclusion of the trial, Judge Derrick rendered a lengthy decision where she set out, in detail, the evidence and her findings based on that evidence.

[4] In his affidavit in support of this motion the appellant alleges errors based on evidence which, he says, shows he was innocent, including:

1. He had an intimate relationship with Susan Chawner;

2. He had alibis for some of the dates when the offences were alleged to have been committed;

3. The police did not conduct investigations he thought they should;

4. The Crown took advantage of him because he is dyslexic.

[5] Mr. Frank sought and was denied Legal Aid for the prosecution of this appeal.

**Issue**

[6] The issue is whether the appellant has met the prerequisites of s. 684 of the **Criminal Code**.

**Analysis**

[7] Section 684 of the **Criminal Code** provides:

> **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.
>
> (2) Where counsel is assigned pursuant to subsection (1) and legal aid is not granted to the accused pursuant to a provincial legal aid program, the fees and disbursements of counsel shall be paid by the Attorney General who is the appellant or respondent, as the case may be, in the appeal.

[8] In **R. v. J.W.**, 2011 NSCA 76, Fichaud, J.A. (in Chambers) summarized the test as follows:

> [11] Under s. 684(1), literally I have two inquiries - (1) whether it is desirable in the interests of justice that J.W. have legal assistance, and (2) whether J.W. has sufficient means to obtain that assistance. *R. v. Assoun*, 2002 NSCA 50, paras. 41-44. In *R. v. Innocente*, [1999] N.S.J. No. 302, paras. 10-12, Justice Freeman agreed with the statement of Justice Doherty in *R. v. Bernardo* (1997), 121 C.C.C. (3d) 123 (Ont. C.A.), para 22, that, in addition, the chambers judge should be satisfied that the appellant has an arguable appeal.

[9] It is apparent on the information Mr. Frank has provided to the Court that he lacks the means to otherwise retain counsel. Therefore, I am only left to complete the "interests of justice analysis". Cromwell, J.A. (as he then was) noted in **R. v. Assoun**, 2002 NSCA 50, this inquiry involves a number of considerations including: (i) the merits of the appeal; (ii) its complexity; (iii) the appellant's capability; and (iv) the court's role to assist. Chief Justice MacDonald in **R. v. Morton**, 2010 NSCA 103 added an additional consideration, that is, the responsibility of Crown counsel to ensure that the applicant is treated fairly (¶5).

[10] Is it in the interests of the administration of justice that the appellant have legal assistance for the purpose of preparing and presenting his appeal?

**Merits of the Appeal**

[11] All of the appellant's grounds of appeal (with the exception that the Crown taking advantage of him) relate to factual issues and/or credibility findings he says the judge ought to have made at trial.

[12] The appellant testified at trial and gave his versions of what occurred. His evidence was extensive, occupying approximately 335 pages in the trial transcript. Unfortunately for Mr. Frank, the trial judge found him to be an unimpressive witness, not credible, evasive and unconvincing (**R. v. Frank, supra**, ¶25).

[13] In his oral submissions before me, the appellant reiterated his concerns about the trial judge's factual findings which he says are wrong.

[14] I cannot identify an arguable issue in the grounds of appeal, the affidavit filed in support of this motion nor Mr. Frank's oral submissions. The appellant on this appeal is simply asking this Court to re-weigh the evidence or consider evidence not placed before the trial judge and impose our own verdict. That is not our role.

[15] It is very rare, at this stage of the process, to deny the motion solely because there appears to be very little or no merit to the appeal. However, I find this to be a case where I must do so. This case is unlike the situation in **R. v. Morton, supra**,

where the record was not complete, which made it difficult for the Chambers judge to do a meaningful assessment of the merits (¶ 9).

[16] The record here is complete. I have the complete appeal book including the transcript of the proceeding and all the exhibits. As well, I have the very detailed and well-reasoned decision of the trial judge, all of which allows me to assess the merits of this appeal. In a 142-paragraph decision the trial judge reviews the testimony and evidence of the witnesses and makes very strong findings of fact. She found Mr. Frank's evidence was full of fabrications and deceit and that he targeted the Chawners as part of a campaign to make Susan Chawner's life miserable (**R. v. Frank, supra**, ¶139).

[17] There were no legal issues in play before the trial judge and her factual findings are amply supported by the evidence. I can find no merit in the arguments on the judge's factual findings that Mr. Frank wishes to make on this appeal.

[18] Mr. Frank also argues that the Crown took advantage of him because he was dyslexic. There is absolutely no merit to this ground of appeal. A review of the record shows that Mr. Frank was ably represented by his counsel at trial. He was given every opportunity to explain his actions and to contradict the evidence of the other witnesses. There is nothing on the record that suggests that he did not get a fair trial.

[19] Quite simply, the trial judge found Mr. Frank's evidence was so incredulous it could not be believed.

[20] I am not satisfied, after reviewing the materials filed by Mr. Frank in support of his motion, hearing his submissions before me, reading the record and the trial judge's decision that Mr. Frank has raised an arguable issue on this appeal. On this basis alone I would dismiss his motion.

[21] However, I will go on to address the other considerations in the "interest of justice analysis".

**Complexity of the Appeal and the Appellant's Capability**

[22] This is not a complex appeal. The issues before the trial judge were factual. The trial judge only heard evidence from seven people: the two complainants, two police officers who investigated the complaints, a co-worker of Mr. Frank's, the Reverend from Mr. Frank's church, and Mr. Frank himself. Of those witnesses, Susan Chawner and Mr. Frank were, by far, the lengthiest witnesses. There were no complex legal issues at trial and none are raised on the appeal. Certainly, none are evident from the record.

[23] Mr. Frank, although he is somewhat nervous in appearing before the Court, had no difficulty in expressing himself before me. I am satisfied that he has the ability to present, what he considers, to be the errors by the trial judge in this relatively straightforward case.

**The Court's Role:**

[24] In **R. v. Grenkow** (1994), 127 N.S.R. (2d) 355, Justice Hallett describes this Court's role in appeals involving self-represented individuals:

> 26 ... 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. ...

[25] I am confident that this Court's review of the record will reveal any difficulty with the decision below, including whether Mr. Frank was afforded a fair trial.

**The Crown's Role:**

[26] It is the Crown's duty to ensure that the appellant is treated fairly. In **R. v. Morton, supra**, Chief Justice MacDonald quoted from **Boucher v. The Queen**, [1955] S.C.R. 16 as follows:

> It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.

[27] As in all cases, we would expect the Crown in this case to assist the Court in ensuring the appellant receives a fair appeal.

**Conclusion:**

[28] In my view, the appeal is without merit. Not only does it not have a reasonable chance of succeeding (**R. v. Grenkow, supra**, ¶ 17), in my view it does not raise an arguable issue. Further, the appeal is not complex. Mr. Frank is capable, as is evident from his materials filed and his appearance before me, to articulate his concern at the proceedings below. With our careful review of the records, the Crown's additional oversight, I am satisfied that the appellant can effectively present his appeal without the assistance of counsel.

[29] For these reasons, I do not find it to be in the interest of justice to assign counsel. The motion is dismissed.

Farrar, J.A.