**NOVA SCOTIA COURT OF APPEAL**
**Citation:** *R. v. Keats*, 2017 NSCA 7

**Date:** 20170116
**Docket:** CAC 447080
**Registry:** Halifax

**Between:**

James Duncan Keats

Appellant

v.

Her Majesty the Queen

Respondent

**Restriction on Publication: s. 486 CC**

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| **Judge:** | Beveridge, J.A. |
| **Motion Heard:** | November 10, 2016, in Halifax, Nova Scotia |
| **Held:** | Motion dismissed |
| **Counsel:** | James Duncan Keats, appellant in person<br>James Gumpert, Q.C. for Her Majesty the Queen<br>Edward A. Gores, Q.C., for the Attorney General of Nova Scotia<br>Stacey Gerrard for LIANS |

**Order restricting publication - sexual offences**

486.4 (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

(i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 172, 172.1, 172.2, 173, 210, 211, 212, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 346 or 347,

(ii) an offence under section 144 (rape), 145 (attempt to commit rape), 149 (indecent assault on female), 156 (indecent assault on male) or 245 (common assault) or subsection 246(1) (assault with intent) of the Criminal Code, chapter C 34 of the Revised Statutes of Canada, 1970, as it read immediately before January 4, 1983, or

(iii) an offence under subsection 146(1) (sexual intercourse with a female under 14) or (2) (sexual intercourse with a female between 14 and 16) or section 151 (seduction of a female between 16 and 18), 153 (sexual intercourse with stepdaughter), 155 (buggery or bestiality), 157 (gross indecency), 166 (parent or guardian procuring defilement) or 167 (householder permitting defilement) of the Criminal Code, chapter C 34 of the Revised Statutes of Canada, 1970, as it read immediately before January 1, 1988; or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in any of subparagraphs (a)(i) to (iii).

**Reasons for judgment:**

## INTRODUCTION

[1] Mr. Keats applies to have state funded counsel appointed to prosecute his appeal from conviction on two counts of sexual assault. The Crown takes no position. The Attorney General of Nova Scotia opposes.

[2] I heard the application on November 10, 2016. Mr. Keats was cross-examined on his affidavit by counsel for the Attorney General, Mr. Edward Gores, Q.C. At the end of submissions, Mr. Keats expressed disappointment at not being able to better articulate his case for state funded counsel. He did not have ready access to his appeal materials. I offered to adjourn the application to another date. He did not want to return in person, but did express his wish to make further written submissions.

[3] Mr. Keats agreed that three weeks would be ample time to get his submissions to the Court. December 1, 2016 was set for his submissions. Mr. Gores was given the right to reply by December 8, 2016. I would provide reasons in due course.

[4] Mr. Keats filed no further submissions. I wrote to him on December 15, 2016, stating that I would proceed to decide his application based on the materials and submissions already made.

[5] Before turning to the facts and my analysis, I will briefly set out the principles that guide.

## THE PRINCIPLES

[6] The appellant's motion is pursuant to s. 684(1) of the *Criminal Code*. For an order to be made under this section, a judge or the court must be satisfied of two things: it appears desirable in the interests of justice that the accused should have legal assistance; and it appears that the accused does not have sufficient means to obtain that assistance. Section 684(1) 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.

[7] The bare words of the statutory test, whether "it appears desirable in the interests of justice", do not really offer concrete guidance. As observed by Doherty J.A. in *R. v. Bernardo*, [1997] O.J. No. 5091, 121 C.C.C. (3d) 123 (writing for the Court):

> [16] The phrase "the interests of justice" is used throughout the *Criminal Code*. It takes its meaning from the context in which it is used and signals the existence of a judicial discretion to be exercised on a case-by-case basis. The interests of justice encompass broad based societal concerns and the more specific interests of a particular accused.

[8] The factors that are usually considered in Nova Scotia were succinctly summarized by Cromwell J.A., as he then was, in *R. v. Assoun*, 2002 NSCA 50:

> [42] The first inquiry, therefore, is whether it appears to be in the interests of the administration of justice that Mr. Assoun have legal assistance for the purpose of preparing and presenting his appeal. This involves consideration of numerous factors including the merit of the appeal, its complexity, the ability of the appellant to effectively present his or her appeal without the assistance of a lawyer and the capacity of the court to properly decide the appeal without the assistance of counsel.

[9] The overall burden is on the applicant to demonstrate it is in the interests of justice that counsel be appointed and he does not have the means to obtain counsel.

[10] One factor to consider are the merits. An appeal that is devoid of merit is not going to improve by an appointment of counsel. But what must an applicant show in terms of merits of the appeal? Some cases may require a cautious approach since the applicant is self-represented, and the entire record might be unavailable.

[11] Nevertheless, as a general rule, the applicant must show at least an arguable issue. This means complaints of error that are not frivolous and will have at least an opportunity to succeed. Cory J., in *R. v. Rochon*, [1994] S.C.C.A. No. 251, interpreting identical *Criminal Code* language for appointment of counsel for the Supreme Court, put it this way:

> [6] Secondly the merits of the application must be reviewed. The applicant has the onus of establishing that there is an arguable case to be presented to the

> court that has an opportunity of succeeding. If there is such a case presented counsel should be appointed. The applicant should have legal representation in those circumstances and this court should have the benefit of counsel's submissions.

[12] To do otherwise may cause an injustice—a result that harms the applicant and the administration of justice.

[13] The remaining factors that impact whether state counsel is needed in the interests of justice are driven by the interplay between the apparent complexities of the appeal and the applicant's ability to put forward his case without the assistance of counsel.

[14] The approach of Doherty J.A. in *R. v. Bernardo* has been adopted as appropriate in any number of Nova Scotia cases (see for example: *R. v. Innocente*, [1999] N.S.J. No. 302; *R. v. J.W.*, 2011 NSCA 76; *R. v. J.C.M.*, 2015 NSCA 19). It bears repeating:

> [24] Having decided that the appeal raises arguable issues, the question becomes - can the appellant effectively advance his grounds of appeal without the assistance of counsel? This inquiry looks to the complexities of the arguments to be advanced and the appellant's ability to make an oral argument in support of the grounds of appeal. The complexity of the argument is a product of the grounds of appeal, the length and content of the record on appeal, the legal principles engaged, and the application of those principles to the facts of the case. An appellant's ability to make arguments in support of his or her grounds of appeal turns on a number of factors, including the appellant's ability to understand the written word, comprehend the applicable legal principles, relate those principles to the facts of the case, and articulate the end product of that process before the court.

[15] With these principles in mind, I turn to the specifics of Mr. Keats' application.

ANALYSIS

[16] Mr. Keats says he has no money and no access to assets to generate it to engage counsel. The Attorney General took issue with this proposition. However, in light of the totality of the circumstances, I am satisfied that Mr. Keats does not have sufficient means to retain counsel to prosecute his appeal.

[17] Mr. Keats had been employed as a paramedic for some 18 years. He was fired in 2013 as a result of sexual assault allegations. Legal aid provided counsel to him throughout the trial in Provincial Court. He was convicted in May 2015 of one count of sexual assault, found to have occurred in May 2013. A sentence of four years' incarceration was imposed on October 26, 2015. He has been incarcerated since.

[18] Nova Scotia Legal Aid provided counsel for Mr. Keats on his appeal from that conviction.

[19] Nova Scotia Legal Aid provided Mr. Keats counsel when he was charged in 2014 with five counts of sexual assault. Four of these charges were tried in the Nova Scotia Supreme Court by judge and jury. The trial judge was the Honourable Justice Felix A. Cacchione.

[20] The jury found Mr. Keats guilty of two of the charges on December 3, 2015. Sentencing eventually proceeded on October 20, 2016. Justice Cacchione imposed a total sentence of 30 months' incarceration, to be served concurrently to the four year sentence Mr. Keats was already serving.

[21] Mr. Keats again applied for legal aid. It was refused, not for financial reasons, but because, in their assessment, his grounds of appeal lacked merit. They are next.

[22] Mr. Keats' Notice of Appeal advances just two grounds:

> 1. Requested lawyer present certain facts/information, not done.
> 2. Judge's instructions issues.

[23] The first appears to be an allegation of ineffective assistance of counsel. The second, that the trial judge did not properly instruct the jury. I will address these in reverse order.

[24] It is obvious that Mr. Keats was aware that he needed to establish he had an arguable case on appeal. His affidavit filed on October 4, 2016 explains what he says are the merits of his appeal. With respect to the trial judge's instructions, he asserted:

> 5. That the judge, in closing statement to the jury, incorrectly presented some facts which gave a negative bias to my case.

[25] No further detail is provided. On the hearing of this application on November 10, 2016, he was asked for details. He had none to give. Because he was transported from Dorchester Penitentiary, Mr. Keats did not have his appeal books on November 10. As noted earlier, I offered him an additional opportunity to make further submissions. None have been made.

[26] This complaint of error is bereft of merit. I have read counsels' summations and the judge's charge. I could not discern any error concerning the judge's jury instructions on the law, their duties or his resumé of the evidence heard. Trial counsel voiced no complaint.

[27] Mr. Keats' stated complaint is that the judge "incorrectly presented some facts". Facts are for the jury to find. That is what the judge told the jury. He also told them that he was entitled to express his views of the evidence, but if he did so, it was their view that mattered, not his. In fact, the trial judge expressed no opinions to the jury about the evidence.

[28] As to the other suggestion that counsel did not follow his instructions, Mr. Keats says in his affidavit:

> [4] That my appeal has merit in that evidence presented by the crown by their expert witness was not only bias towards myself, as stated in the witnesses CV document which was provided to the jury during deliberation; that this witness also presented incorrect information as to the necessity of certain medical procedures which I performed as per Nova Scotia protocols; that the expert witness testified about medical procedures which were never performed, had no relation to this case, and only served to confuse the jury and affect their judgement of the validity of my procedures in a negatively biased manner.
>
> [ . . . ]
>
> [6] That I requested my legal aid counsel to present certain facts, documents and rebuttals to the crowns arguments and witnesses which would have assisted my case and this was not done.

[29] Broadly interpreted, Mr. Keats says that his trial counsel failed him. It is a suggestion of ineffective assistance of counsel. Such allegations are serious. Counsel is presumed to have acted in the best interests of his or her client. To succeed requires an appellant to demonstrate that his or her counsel was incompetent and the lack of care caused a miscarriage of justice (*R. v. G.D.B.*, 2000 SCC 22). Again, Mr. Keats was asked for details about what trial counsel did

or did not do that was arguably improper and could arguably have caused a miscarriage of justice.

[30] The things Mr. Keats mentioned in his affidavit, and advanced orally, ring hollow. The Crown called Mr. Johnson as an expert in paramedic care, in particular with respect to patient assessment and emergency medical procedure. His CV was an exhibit. It contains no hint of bias against Mr. Keats. Defence counsel did not object to Mr. Johnson's qualifications to give expert opinion evidence.

[31] It is accurate that, when Mr. Keats testified, he disagreed with some aspects of Mr. Johnson's opinions, but that was hardly the crux of the Crown's case. Four complainants testified that Mr. Keats inappropriately touched and groped their breasts and genital areas. Mr. Keats denied that he ever touched any of the complainants in the genital area, but he had listened to their chest and abdomen with a stethoscope.

[32] In a nutshell, the complainants said he touched them inappropriately. He said he did not. The jury found him guilty of two of the allegations.

[33] At the November 10, 2016 hearing, every opportunity was given to Mr. Keats to identify what it was his counsel did or omitted to do that was improper. Nothing he mentioned, viewed objectively, could arguably be said to have been incompetent, let alone arguably amount to a miscarriage of justice. No further elaboration has since been provided by Mr. Keats.

[34] Furthermore, this appeal does not appear to be particularly complex. Mr. Keats has a high school diploma He obtained his Emergency Medical Attendant Certification in 1998, followed by a Paramedic Level 1 program in 1999. Part of his training occurred at the Dalhousie University School of Medicine. He later received his Intermediate Care Certification or Paramedic 2.

[35] On November 10, 2016, Mr. Keats asserted that he suffers from "ADD". However, his PSR records that he told the probation officer when asked about his educational experience that he "just got by". He had no "resource assistance", but was "diagnosed with borderline Attention Deficit Disorder approximately 15 years ago". I am not satisfied that this diagnosis diminishes his ability to have a fair hearing without the assistance of counsel.

[36] A fundamental role of an appellate court is to remedy wrongful convictions—that is, convictions that are unreasonable, or marred by serious legal error, or amount to a miscarriage of justice. Neither the Court nor Crown counsel acting on an appeal will shirk their respective duties to avoid a wrongful conviction due to the possible imperfect presentation of argument by an appellant.

[37] Given all of these circumstances, I am not satisfied that the interests of justice require the appointment of state funded counsel for Mr. Keats. The application is dismissed.

Beveridge, J.A.