

NOVA SCOTIA COURT OF APPEAL

Citation: *R. v. Kobylanski*, 2018 NSCA 76

Date: 20180910

Docket: CAC 464095

Registry: Halifax

Between:

Michael Kobylanski

Appellant

v.

Her Majesty the Queen

Respondent

Judge: Farrar, J.A.

Motion Heard: September 6, 2018, in Halifax, Nova Scotia in Chambers

Held: Motion dismissed.

Counsel: Appellant in person
Jennifer MacLellan, Q.C., for the respondent
Glenn Anderson, Q.C., for the Attorney General of Nova
Scotia
Lawrence Rubin, for the Lawyers' Insurance Association of
Nova Scotia (not appearing)

Decision:

[1] The appellant, Michael Kobylanski, was charged with:

1. uttering a threat to cause harm or death;
2. sexual assault;
3. unlawful confinement;
4. attempting to choke, suffocate or strangle with intent to commit sexual assault;
5. threatening to use a weapon in committing a sexual assault; and
6. assault.

[2] In March 2017, he was tried before Justice Felix Cacchione sitting with a jury. The trial lasted two weeks. At the conclusion of the jury deliberations, Mr. Kobylanski was convicted of the assault charge and acquitted of the offence of attempting to choke, suffocate or strangle with intent to commit sexual assault. The jury was unable to reach a verdict on the other four counts.

[3] Justice Cacchoine sentenced him to 20 months incarceration and three years probation with the usual ancillary orders. The jail time, after giving credit for remand, was already served. Presently, Mr. Kobylanski remains on remand awaiting a retrial on the four charges on which the jury was unable to reach a verdict.

[4] Mr. Kobylanski appeals both his conviction and sentence and moves, pursuant to s. 684(1) of the *Criminal Code of Canada*, R.S.C. 1985, c. C-46, for the appointment of counsel to act for him on this appeal. It provides:

Legal assistance for appellant

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.

[5] For an order to be made under this section, a judge must be satisfied that it appears desirable in the interests of justice that the appellant should have legal

assistance and it appears the accused does not have sufficient means to obtain that assistance.

[6] The Attorney General concedes and I am satisfied that Mr. Kobylanski lacks the means to obtain counsel and that he has been denied legal aid.

[7] The inquiry then becomes whether it appears desirable in the interests of justice that counsel be appointed.

[8] The considerations to be taken into account in “the interest of justice analysis” include:

1. the merits of the appeal;
2. the complexity of the appeal;
3. the appellant’s capabilities;
4. the Court’s role to assist and its capacity to decide the appeal without the assistance of counsel;
5. the responsibility of Crown counsel to ensure the appellant is treated fairly.

(*R. v. Assoun*, 2002 NSCA 50, ¶42 ; *R. v. Kelsie*, 2016 NSCA 72, ¶13)

[9] I am satisfied that the appeal has merit in that it at least raises an arguable issue. This means it raises grounds of appeal that are not frivolous and the appeal has an opportunity to succeed (*R. v. Keats*, 2017 NSCA 7, ¶11).

[10] Mr. Kobylanski’s grounds of appeal in his Notice of Appeal can be summarized as follows:

1. the judge erred in his *Corbett* decision allowing the jury to hear of Mr. Kobylanski’s conviction for aggravated assault in 1997;
2. the judge erred in his determination of the relevant facts for sentencing purposes, resulting in a more severe sentence; and
3. ineffective counsel, in particular, counsel’s failure to properly cross-examine the complainant on discrepancies in testimony at trial, and her statements to police and her evidence at the preliminary inquiry.

[11] In his oral argument on the motion, Mr. Kobylanski fleshed out his arguments in some detail on the ineffective counsel aspect of his appeal saying his

counsel also failed to properly obtain disclosure from the Crown. He wishes to amend his Notice of Appeal to add another ground of appeal which he says relates to the Crown disclosure.

[12] He says that the disclosure provided him with information which was available at the first trial but was not provided to him. He argues that this information would materially change the manner in which the trial was conducted and that the Crown's failure to disclose it at the first trial amounts to an abuse of process.

[13] He will particularize his concerns if he is permitted to amend his Notice of Appeal.

[14] Unfortunately, prior to the hearing of the motion, Mr. Kobylanski did not file an affidavit or present written argument on this proposed ground of appeal. As a result, it is difficult to assess the merits and complexity of this issue. However, I am prepared to consider his submissions in determining whether he should receive state-appointed counsel.

[15] This appeal is not particularly complex. It involves Mr. Kobylanski being convicted of one count of assault and being sentenced to 20 months in prison. Mr. Kobylanski had a fundamental misunderstanding of this Court's ability to impact his retrial. He was of the view that if this appeal was successful on the assault charge that would impact the Crown's ability to retry him on the other charges. With respect, the other charges are not before this Court and Mr. Kobylanski has not yet been convicted of anything with respect to those charges. This Court has no ability to stay or otherwise address them.

[16] Mr. Kobylanski also believed this Court could grant him bail pending his retrial. Again, he was mistaken in that regard. He has already been served his sentence for the charge for which he was convicted. As a result, there is no ability for this Court to grant him bail on the charges that are presently before the Supreme Court.

[17] His misunderstandings led him to believe there was much more at stake on this appeal than the conviction and sentencing on the assault charge.

[18] Mr. Kobylanski ably articulated his arguments on his enumerated grounds of appeal, including citing case law in support of his position.

[19] In my view, even if Mr. Kobylanski raises additional grounds of appeal before me, his written materials satisfy me that he is quite capable of presenting argument on any additional ground of appeal.

[20] I am satisfied that Mr. Kobylanski has the ability to present his appeal without the assistance of counsel. His submissions to Legal Aid, his affidavit in support of this motion and his submissions to this Court shows an ability to understand the issues and to effectively communicate them to the Court.

[21] Given all the circumstances I am satisfied that the interests of justice do not require the appointment of counsel.

[22] The motion is dismissed.

Farrar, J.A.