NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Forrest*, 2019 NSCA 47

Date: 20190604
Docket: CAC 479322
Registry: Halifax

Between:

David Angus Forrest

Appellant

v.

Her Majesty the Queen

Respondent

Judge:	Beveridge, J.A.
Motion Heard:	May 30, 2019, in Halifax, Nova Scotia in Chambers
Held:	Motion dismissed
Counsel:	David Forrest, appellant in person James A. Gumpert, Q.C., for the respondent Adam Norton, for the Attorney General of Nova Scotia

Decision:

[1] The Honourable Judge Brian Williston convicted the appellant of break and enter and commit theft, assault, and breach of probation. The appellant challenges the convictions and now applies under s. 684 of the *Criminal Code* to have me appoint state funded counsel to act for him on his conviction appeal.

[2] The principles that guide the discretionary power to appoint counsel are well settled. Before an order can be made under s. 684, a judge or the court must be satisfied of two requirements: 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) reads as follows:

> 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.

[3] To satisfy the "interests of justice" requirement, the Court must be satisfied that: the appellant has at least one arguable ground of appeal; he cannot effectively present his appeal without a lawyer; or, the Court may not be able to properly decide the appeal without appellate counsel (see: *R. v. Bernardo*, 105 OAC 244, 121 C.C.C. (3d) 123 (C.A.); *R. v. Assoun*, 2002 NSCA 50; *R. v. J.W.*, 2011 NSCA 76; *R. v. Keats*, 2017 NSCA 7; *R. v. Fudge*, 2013 NSCA 149).

[4] A merits assessment is necessary (see: *R. v. Grenkow*, 1994 NSCA 46, 127 N.S.R. (2d) 355; *R. v. Innocente* (1999), 178 N.S.R. (2d) 395; *R. v. Smith*, 2001 NFCA 38; *R. v. Bernardo, supra*; *R. v. Clark*, 2006 BCCA 312). But I need only be satisfied that the appellant's complaints raise an arguable issue (*R. v. Smith, supra*; *R. v. Ewanchuk*, 2008 ABCA 78; *R. v. Ermine*, 2010 SKCA 73; *R. v. B.L.B.*, 2004 MBCA 100; *R. v. Murray*, 2009 NBCA 83; *R. v. Bernardo, supra*; *R. v. Abbey*, 2013 ONCA 206 at para. 32).

[5] An arguable issue is one that appears to be of sufficient substance to be capable of convincing a panel of the Court to allow the appeal. I approach the analysis cautiously because a merits assessment may be hampered by: a lack of the complete record; the fact that the applicant may be self-represented in the s. 684

proceedings and hence at a disadvantage to knowledgeably examine the trial proceedings to identify potential error.

[6] If satisfied that the merits assessment demonstrates an arguable issue, then the analysis turns to consider the complexity of the issues, the ability of the appellant to understand the principles and marshal the arguments to the Court. This approach was articulated by Doherty J.A. in *R. v. Bernardo*:

> [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.

[7] These principles were set out in the Attorney General's materials well in advance of the hearing, and Mr. Forrest demonstrated his knowledge of these on May 30, 2019.

Merits assessment

[8] The appeal books have been filed. The parties and the Court therefore have the benefit of the complete trial record. Mr. Forrest's Notice of Appeal challenges the convictions because:

> 1. [The victim] I grew up with as a child, teen [played] Hockey and Baseball together he got on the stand and said it wasn't me.
>
> 2. They searched my home took a shirt with blood on it, found nothing in my home that was taken from the victim's home. Took blood from inside my vehicle and none of the blood samples were a match. The blood was old blood.
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> 3. The scene was full of blood and the blood did not match me. There was no finger prints or shoe prints that matched me.
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> 4. My brother admitted to doing the crime and everything matched him, and he told the judg [sic] he [did] it and the victim said that he [my brother] did it to [sic].

> 5. The police officers that did the evidence of the crime, My lawyer asked if there was an [sic] evidence at the scene putting me there they said no. They were asked if any of the blood from the scene was mine they said no. They were asked if they found anything in my [house] that was taken from the scene. They said no. The blood they took from my vehicle and the shirt they took from in my house, was my blood from building a fence earlier in the day. My lawyer asked them if the [blood] linked me to the scene they said no. So my lawyer asked is their [sic] any evidence at all putting Mr. Forrest at the crime scene they said no.

[9] The appellant identifies no legal error. The Attorney General reasonably interprets his grounds of appeal as a complaint that the verdict is unreasonable or unsupported by the evidence within the meaning of s. 686(1)(a).

[10] An appeal court certainly has the power and duty to ensure verdicts are not flawed by absence of evidence or inexplicable reasoning. An appeal court has the duty to re-examine, and, to some extent, reweigh the effect of the evidence to ensure that the verdict is one that a properly instructed trier of fact, acting reasonably, could have reached. This duty, and consequent power to intervene, extends to verdicts founded on credibility assessments (see: *R. v. W. (R.)*, [1992] 2 S.C.R. 122; *R. v. Burke*, [1996] 1 S.C.R. 474).

[11] In addition, where the verdict emanates from a judge alone trial, an appeal court may be persuaded that the verdict is unreasonable because, despite the existence of evidence to support a finding of guilt, the reasons of the trial judge demonstrate the verdict to be flawed by irrational or illogical findings—ones that are demonstrably incompatible with evidence, neither contradicted by other evidence nor rejected by the trial judge (see: *R. v. Beaudry*, 2007 SCC 5; *R. v. Sinclair*, 2011 SCC 40; *R. v. R.P.*, 2012 SCC 22; *R. v. J.P.*, 2014 NSCA 29, leave to appeal denied, [2014] S.C.C.A. No. 255).

[12] In *R. v. Bou-Daher*, 2015 NSCA 97, Fichaud, J.A., recently referred to the principles this Court is to apply when reviewing a conviction to determine if it is unreasonable or unsupported by the evidence:

> [30] *R. v. R.P.*, [2012] 1 S.C.R. 746, Justice Deschamps for the majority discussed unreasonableness and the appeal court's review of the evidence:
>
> > [9] To decide whether a verdict is unreasonable, an appellate court must, as this Court held in *R. v. Yebes*, [1987] 2 S.C.R. 168, and *R. v. Biniaris*, 2000 SCC 15, at para. 36, determine whether the verdict is one that a properly instructed jury or a judge could reasonably have rendered. The appellate court may also find a verdict unreasonable if the trial judge has

> drawn an inference or made a finding of fact essential to the verdict that (1) is plainly contradicted by the evidence relied on by the trial judge in support of that inference or finding, or (2) is shown to be incompatible with evidence that has not otherwise been contradicted or rejected by the trial judge (*R. v. Sinclair*, 2011 SCC 40, at paras. 4, 16 and 19-21; *R. v. Beaudry*, 2007 SCC 5).
>
> [10] Whereas the question whether a verdict is reasonable is one of law, whether a witness is credible is a question of fact. A court of appeal that reviews a trial court's assessments of credibility in order to determine, for example, whether the verdict is reasonable cannot interfere with those assessments unless it is established that they "cannot be supported on any reasonable view of the evidence" (*R. v. Burke*, [1996] 1 S.C.R. 474, at para. 7).

[13] The appellant's s. 684 affidavit repeats his complaints that: one of the victims (his cousin) testified as a defence witness that the appellant was not present; his accomplice, also a defence witness, testified that the appellant was not present; and, there was no physical evidence that implicated the appellant in the offences. In addition, he complains that there were credibility and reliability concerns associated with the key Crown witnesses arising from alcohol and drug consumption, contradictory statements, and the plea bargain that one of them had received.

[14] These very same arguments were forcibly made at trial. The trial judge was alive to these credibility and reliability concerns. He made positive and clear findings of fact that are supported by the evidence and are not contradicted by other evidence that he did accept.

[15] The judge set out his findings as follows:

> Crystal Hatcher is, of course, one of the principal witnesses the Crown relies on, and I will say, after examining her evidence, **I concluded that she is a forthright and convincing witness**. She knows all four persons: Crumb Forrest, who is, in fact, Michael Forrest; David Forrest; Ashley MacQueen; and Jolene, although she did not know her last name at the time she made the 911 call.
>
> I accept her evidence that the 911 call was made when she and Greg Forrest were barricaded behind a dresser up to the door of Greg Forrest's bedroom. As I said earlier, that 911 call is vivid and chilling, and the urgency of that call can be heard in the fear present in Crystal Hatcher's voice.
>
> She had seen David Forrest a few times before that morning. **She pointed out David Forrest as the person she saw in the apartment break-in, and I believe her when she testified that she saw David Forrest when he was in the hallway**

> **in the apartment. I believe her when she testified that she saw Michael Forrest and the accused, David Forrest, dragging Greg Forrest to the kitchen.**
>
> I believe her when she testified she was dragged back into the bedroom by Ashley MacQueen and Jolene Gillard. I believe her when she testified that Ashley MacQueen got on top of her on the bed while Jolene went rummaging through her purse. I accept her evidence that she sustained bruises, as well as the loss of the clump of hair, as a result of that altercation with Ashley MacQueen in the bedroom.
>
> I accept her evidence that the damage was caused after these four persons entered the upstairs apartment forcefully. She was not certain that the downstairs steel door was locked with the deadbolt, but there is no doubt on the evidence that I do accept that the upstairs door to Greg Forrest's apartment was forcefully opened by ripping it off its hinges.
>
> I accept her evidence that it was Michael Forrest who had an axe in his hand and that she saw Michael Forrest hit Greg Forrest in the knee with the axe, which she described as small with a wood handle. I also accept her evidence that it was Michael Forrest who did most of the damage.
>
> She also described her ID and other items taken from her that morning, which were found in Jolene's purse, in her evidence.
>
> [Emphasis added]

[16] With respect to the evidence of Jolene Gillard, the trial judge cautioned himself about the dangers of relying on her evidence as she had: been an accomplice; pled guilty to lesser charges and received a conditional sentence; and, lied in her original police statement. Nonetheless, he emphatically found her to be a credible witness:

> I have considered and weighed her evidence carefully. **I can say without hesitation that I found her to be a credible witness and much of her evidence was supported by confirmatory evidence: by the police witnesses who found her handbag or purse and the items in it, and Crystal Hatcher as well.**
>
> Jolene was arrested by the police at the scene trying to get back into the house. Her purse was seized by the police and contained items stolen from Crystal Hatcher and Greg Forrest. She had already been sentenced when she testified and was not awaiting trial. She testified at trial that she is trying to overcome her substance abuse and at the present time is on methadone.
>
> Taking into account all the legitimate concerns regarding her past and that she is an accomplice, as well as the way her charges proceeded in being reduced, I nonetheless find she was credible and reliable as a witness. I accept her evidence that the accused, David Forrest, along with his brother, Michael "Crumb" Forrest,

> and Ashley MacQueen, along with herself, committed and participated as parties in the home invasion which involved theft, mischief and assault, at 41 Barrington Street, Sydney Mines, Nova Scotia, on July 23rd, 2017.
>
> [Emphasis added]

[17] The appellant's brother, Michael Forrest, had earlier been sentenced to eight year's incarceration for his involvement in the offence. He testified for the defence that there had been no break and enter on July 23, 2017, just an altercation with Greg Forrest in the driveway. The appellant was not present.

[18] Greg Forrest also testified for the defence. He said he had an argument with Michael Forrest in the driveway. Later that night, four complete strangers entered his apartment and assaulted him. He did not recognize them and could give no description. But he testified that he could guarantee it had not been the appellant, as he knew him well.

[19] The trial judge rejected the evidence of Greg and Michael Forrest. With respect to Michael Forrest he reasoned:

> With respect to the evidence of the accused's brother, Michael Forrest, he testified that there was no home invasion on July 23rd, 2017, and that the altercation was earlier outside in the driveway where he fought briefly with Greg Forrest and then damaged the car with the axe handle as he left. He maintained that no one was with him and that he was alone.
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> He testified he did not see the accused, David Forrest, after he dropped him off earlier at the Dollar Store. He further testified that he had been invited into the residence of Greg Forrest by Greg and that he didn't cause any damage inside the residence, maintaining that the damage was done by someone to make him look bad.
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> **I do not believe the evidence of Michael Forrest. He was not a credible and reliable witness. His evidence was not forthright and did not have the ring of truth.** His evidence makes no sense when I look at the totality of the evidence and the exhibits which I do accept. I have no doubt that he participated in the home invasion along with his brother, David Forrest, Ashley MacQueen and Jolene Gillard. **I reject his evidence and that part that the accused, David Forrest, did not take part in the home invasion.**
>
> [Emphasis added]

[20] For Greg Forrest, the judge was equally clear and emphatic:

> In regard to the evidence of Greg Forrest, I've considered his evidence in the context of the other evidence in the trial that I accept, including the witnesses Crystal Hatcher and Jolene Gillard, as well as the 911 call.
>
> He testified that the four undisguised, two women and two men, who came to his home uninvited on July 23rd, 2017, were complete strangers to him. He could not even describe them. I do not believe Greg Forrest when he testified he did not know those persons and that it was not David Forrest.
>
> I have no doubt that he was with Crystal Hatcher barricaded behind the dresser up to the bedroom door when she made that 911 call identifying the four individuals involved in the home invasion.
>
> **I find his evidence that he did not know any of those four persons who participated in the home invasion as far fetched and unbelievable.** For whatever reason or motivation he had in testifying, I do not accept his evidence that these intruders were unknown to him. I realize he was in jail at the time that he gave his evidence; however, **I reject his testimony as untruthful. He was not a credible and reliable witness.**
>
> [Emphasis added]

[21] The appellant, with the assistance of counsel, did not testify at trial. After reviewing the materials filed by the appellant, his submissions, and the trial record, including the trial judge's reasons, it is untenable that there is no evidence to support the verdict. Nor is there any basis to suggest that the verdict is unreasonable.

[22] The trial judge made findings of reliability and credibility that underpinned his conclusion that the Crown had established the appellant's guilt beyond a reasonable doubt. There is nothing illogical, contradictory or arguably unreasonable about those findings.

[23] I am not satisfied that he has raised an arguable issue. It would therefore not be in the interests of justice to appoint counsel. An appeal that is devoid of merit will not be helped by the appointment of counsel (*R. v. Bernardo, supra* at para. 22).

[24] Even if I were satisfied that the appellant has an arguable issue, I would not appoint counsel. The complaints the appellant raises are factual. He is familiar with the record and demonstrated his ability to reference the relevant portions of it in support of his complaint that the judge erred in his factual determinations.

[25] The motion is dismissed. The appeal will now be scheduled for hearing.

Beveridge, J.A.