NOVA SCOTIA COURT OF APPEAL

Citation: *R. v. Marr*, 2020 NSCA 30

Date: 20200323
Docket: CAC 495037
Registry: Halifax

Between:

Jolene Holly Marr and Frances Eileen Bignell

Appellants

v.

Her Majesty the Queen

Respondent

Judge: Bryson, J.A.

Motion Heard: March 12, 2020, in Halifax, Nova Scotia in Chambers

Held: Motion dismissed

Counsel: Sarah Shiels, for the appellant Jolene Marr
Richard Norman, for the appellant Frances Bignell
Leonard MacKay, for the respondent and the Attorney General of Canada

Decision:

Introduction:

[1] Jolene Holly Marr and Frances Eileen Bignell are members of the Sipekne'katik First Nation. They are designated to partake in the Food, Social and Ceremonial fishing for lobster in Lobster Fishing Area No. 34. This allows them to fish 60 lobsters per day per fisher.

[2] Ms. Marr and Ms. Bignell were charged in October of 2015 with catching and retaining more than 60 lobsters per day in contravention of s. 7 of the *Aboriginal Communal Fishing Licences Regulations*. The catch occurred near Comeauville, Digby County and Saulnierville, Digby County.

[3] The trial was adjourned to allow for a *Rowbotham* application. The provincial court judge granted the application and stayed the charges pending funding of counsel for the appellants.

[4] The Crown appealed the provincial judge's ruling before the Honourable Justice Ann E. Smith, sitting as a Summary Conviction Appeal Court. Justice Smith allowed the appeal (*R. v. Marr*, 2019 NSSC 327).

[5] Justice Smith concluded:

> [84] I therefore conclude that the trial judge erred in finding that this matter was sufficiently serious and complex that state-funded counsel was required. I am not persuaded that there was a basis to find that the proposed defence was factually and legally relevant to the charges. In any event, as the Court held in *Caron*, I cannot conclude that it is sufficient simply to assert a complex constitutional defence where the charge itself is not serious. As such I am unable to conclude that the Respondents' fair trial rights will be contravened by going to trial without counsel.

[6] The appellants had state-funded counsel for the summary conviction appeal before Justice Smith. They had counsel before me. They now apply in accordance with s. 684 of the *Criminal Code* for counsel with respect to their leave to appeal and, if granted, appeal of Justice Smith's decision.

The Appeal:

[7] If leave is granted, the grounds of appeal are:

1. The learned summary conviction appeal judge erred by determining that a regulatory offence could not be "serious" enough to require the court to order state-funded counsel pursuant to a *Rowbotham* order;
2. The learned summary conviction appeal judge erred by determining that the Appellants had not presented evidence that their potential defence was legally or factually relevant to the charges;
3. The learned summary conviction appeal judge erred by determining that requiring a *Rowbotham* order applicant to provide detailed evidence of their potential defence in advance of trial did not engage the Appellants' constitutionally protected right to silence;
4. The learned summary conviction appeal judge erred by determining that the test for *Rowbotham* order requires a joint consideration of rights protected by s. 7 and 11(d) of the *Charter of Rights and Freedoms*, and that a potential breach of both must be made out by an applicant.
5. The learned summary conviction appeal judge erred by failing to consider the United Nations Declaration of the Rights of Indigenous People ("UNDRIP").

[8] With respect to the grounds of appeal, the Crown says:

The appellants list their grounds of appeal and articulate the respective "arguable issues" at p. 5 of their submissions. The Crown responds in similar fashion, as follows:

a) **Seriousness** – The SCAC agreed with the Crown that state-funded counsel is largely reserved for matters where a person's liberty is at stake – where imprisonment is a real possibility. The appellants are hard-pressed to find current authority otherwise. The trial judge erred in conflating this with the seriousness of the proposed defence.

b) **Legal and factual relevance** – The SCAC agreed that where state-funded counsel is required because of the complexity of a proposed defence, the applicants are required to show the legal and factual relevance of such a defence. The SCAC did not adopt the crown's argument that an air of reality is required, but had no difficulty in concluding that a mere assertion of a right is far from legal and factual relevance.

c) **Right to silence** – This argument is at odds with the statement from this Court in *McDonald*. As noted by the SCAC, this leads to a "circular argument" where the applicant provides no basis for the court to assess the seriousness and complexity of the proposed defence.

d) **Sections 7 <u>and</u> 11(d)** – As noted by the SCAC, the seminal case *Rowbotham* itself makes it clear the right to state-funded counsel is a right

> arising jointly from these *Charter* sections. Again, the appellants are not in a position to offer any authority otherwise.
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> e) **UNDRIP** – Finally, as noted once again by the SCAC, the appellants have provided no foundation for how this UN Declaration would be directly relevant to their motion for state-funded counsel.
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> [footnotes omitted]

Application for Counsel to Conduct the Appeal:

[9] Section 684(1) of the *Criminal Code* authorizes the assignment of counsel in certain cases:

> 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.

[10] Ms. Bignell and Ms. Marr filed affidavits which inform the Court that they both reside in Band houses in Indian Brook. They are both of modest means. Ms. Bignell has a bachelor's degree in sociology and anthropology and a Bachelor of Social Work. Prior to 1997, she worked as a social worker in Nova Scotia, Alberta and Ontario. From 1997 to 2008 she worked as a croupier at a casino in Ontario, returning to Nova Scotia in 2008. Since that time she has had intermittent part-time work only.

[11] Ms. Marr is a high school graduate and began but did not complete a business administration program at the Nova Scotia Community College in Truro.

[12] Ms. Marr and Ms. Bignell depose that they do not feel capable of representing themselves in this proceeding. In her affidavit, Ms. Marr says that she has a right to go fishing "based in part on my ancestral treaty rights, but I do not have enough education and knowledge about the law to defend myself properly". Ms. Bignell says, "I am advised by my lawyer, who I verily believe, that this appeal raises issues relating to a number of constitutional rights, but I do not understand exactly what these rights are or how they are to be argued on this appeal".

[13] The Crown concedes that the appellants are not eligible for legal aid and do not realistically have the means to obtain private counsel. There are arguable

issues on appeal. The parties really join issue on whether it is "in the interests of justice that the accused should have legal assistance".

[14] Justice Beveridge put it this way in *R. v. Forrest*, 2019 NSCA 47:

> [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).
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> [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).
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> ...
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> [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*:
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> > [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.
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> [Emphasis added]

Complexity:

[15] The appellants argue that the application/appeal is “complex”; that “there are a number of constitutionally protected rights including those recognized by section 35 of the *Constitution Act*”, 1982, c. 11(d) of the *Charter*, the appellant’s right to make full answer and defence ... and the appellant’s right to silence”.

[16] The Crown says there is no complexity arising from the charges themselves, nor is there any serious jeopardy to the appellants because the penalty for these regulatory offences is a fine. Any potential complexity arises solely from the defence asserted by the appellants.

[17] The Crown objects that there is no description of what constitutionally protected rights the appellants claim. Indeed, that was a concern of Justice Smith when she allowed the appeal. Counsel for the appellants argued that being required to provide the details of the rights they claim compromises the appellants’ entitlement to full answer and defence and the right to remain silent. These are unpromising submissions. Courts routinely deal with constitutional matters by way of *voir dire*, often prior to a trial on the merits. Fair trial rights are thereby not impaired.

[18] Then counsel says that the appellants are being forced to “formulate” a defence in a vacuum before hearing the evidence”. The Crown replies that in this case it had concluded its evidence when the s. 684 application for counsel was made in the Provincial Court.

[19] The Crown acknowledges that potential complexity may arise from constitutional defence asserting treaty and “ancestral” rights. But this is clearly not such a case because the appellants have not said what their rights are. The Crown says there is some onus on the appellants to describe the rights claimed. Otherwise, anyone could raise unarticulated constitutional issues and demand state-funded counsel. The Crown cites Chief Justice Glube in *R. v. MacDonald*, 2001 NSCA 137, on which Justice Smith also relied to reject the appellants’ submission here:

> [10] To evaluate these issues, trial judges are encouraged to make adequate inquiry into the nature of the defence and whether it is factually and legally relevant to the charge before the court.

[20] Counsel for Ms. Marr and Ms. Bignell insist they need counsel on appeal owing to the "complexity" of the rights asserted, but never say what they are. So one has no idea of whether these rights exist, let alone whether they are complex. Even more, appellants' counsel maintain they have no obligation to explain the rights the appellants claim. This was a bridge too far for Justice Smith. So on appeal the question will not be the complexity asserted, but whether Justice Smith erred by rejecting this argument.

Can the appellants argue their own appeal?

[21] Next, appellants' counsel argues that Ms. Marr and Ms. Bignell are not capable of dealing with the complex issues involved in the appeal.

[22] I do not doubt the reluctance of Ms. Marr and Ms. Bignell to advance their own appeal because they lack familiarity with the law. But they are clearly educated and intelligent people. Ms. Bignell holds university degrees. Both affidavits describe their point of view. They may not be able to advance complicated legal arguments, but they can address principles and they have—like the court—a very full record of those principles argued by counsel and pertinent law. With the assistance of the court, I am confident that their arguments will be sufficiently articulated for the court to decide the case. That brings me to the last consideration.

Can the Court decide without appellate counsel?

[23] The Crown has an obligation to ensure fair process for an accused. In *R. v. Morton*, 2010 NSCA 103 at ¶18, Chief Justice MacDonald quoted from *Boucher v. the Queen*, [1955] S.C.R. 16:

> [18] Finally, let me turn to the Crown's to duty to ensure that the appellant is treated fairly. Here, the famous quote from the Supreme Court of Canada in *Boucher v. the Queen*, [1955] S.C.R. 16 beginning at page 23 bears repeating:
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>> 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.*
>
> [original emphasis]

[24] In addition, the Court has an obligation to ensure that self-represented appellants are given the benefit of meritorious points which they may not themselves recognize:

> [26] 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.
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> (*R. v. Grenkow*, 1994 NSCA 46)
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> [Emphasis added]

[25] Ms. Marr and Ms. Bignell have had the benefit of counsel in the Provincial Court, in the Supreme Court and before me. The arguments have been exhaustively made and are in the record.

[26] In this case, the Court of Appeal will have a full record, including the transcript of what transpired in Provincial Court. The Court also has the benefit of a substantial decision from the Summary Conviction Appeal Court which summarizes the submissions of the parties, including the issues raised by the appellants in their Notice of Appeal. The arguments made to Justice Smith will also be made to the Court of Appeal. Presumably a transcript will be available of the hearing before Justice Smith as well as copies of written submissions made to her.

[27] Deciding whether to grant a *Rowbotham* order for state-funded counsel is a routine issue facing judges of this Court. The grounds on which the Summary Conviction Appeal Court is alleged to have erred are clearly set out in the Application for Leave and Notice of Appeal. The grounds are matters of law or

principle with which the Court is well-equipped to deal. There is nothing in those grounds that suggests the appellants will not receive a fair appeal owing to the inability of the Court to properly consider them.

[28] This Court will be able to decide the appeal without appellate counsel.

[29] It is important that Ms. Marr and Ms. Bignell understand that I am not deciding whether Justice Smith was wrong or whether they should have state-appointed counsel in the Provincial Court. That will be a matter for the Court of Appeal. I am only deciding whether they should have such counsel for the appeal of Justice Smith's refusal to order state-funded counsel. Considering the issues raised, the Court's familiarity with them, the available record, the decision under appeal, the law with respect to *Rowbotham* applications, and the submissions of counsel, I am not persuaded that it is "desirable in the interests of justice that the [appellants] should have legal assistance" for the appeal.

[30] The motion is dismissed, without costs.

Bryson, J.A.