NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Redden*, 2022 NSCA 2

Date: 20220113
Docket: CAC 497955
Registry: Halifax

Between:

Beverly Frances Redden

Appellant

v.

Her Majesty the Queen

Respondent

Judge:	The Honourable Justice J. E. (Ted) Scanlan
Appeal Heard:	December 6, 2021, in Halifax, Nova Scotia
Subject:	Ineffective assistance of counsel
Summary:	The appellant had been charged with a number of offences and was eventually convicted of having counselled a person to commit arson. She appealed, alleging she did not receive reasonable assistance of counsel during her trial.
Issues:	Was there a miscarriage of justice caused through the ineffective assistance of counsel?
Result:	Appeal dismissed.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 8 pages.

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Judges:	Bryson, Hamilton, Scanlan, JJ.A.
Appeal Heard:	December 6, 2021, in Halifax, Nova Scotia
Held:	Appeal dismissed, per reasons for judgment of Scanlan, J.A.; Bryson and Hamilton, JJ.A. concurring
Counsel:	Jonathan T. Hughes, for the appellant Glenn Hubbard, for the respondent

Reasons for judgment:

Introduction

[1] The appellant was convicted under s. 464(a) of the *Criminal Code*, one count of counselling a person to commit an indictable offence (arson), and s. 264.1, one count of uttering a threat. She appeals the convictions. She asserts there is a miscarriage of justice caused by ineffective assistance of counsel at trial. That is the sole ground of appeal.

[2] The appellant applied to have fresh evidence admitted on appeal in the form of her affidavit sworn October 5, 2021. She was not cross-examined on the affidavit. The respondent tendered an affidavit of trial counsel who was cross-examined during the appeal hearing. Counsel for the appellant conceded that if the affidavit and evidence of trial counsel were accepted as credible, then the appeal should be dismissed as trial counsel's advice would not have fallen below a reasonable standard of professional assistance and a miscarriage of justice would not have occurred.

Issue

[3] Was there a miscarriage of justice caused through the ineffective assistance of counsel?

Standard of Review

[4] The standard of review for allegations of ineffective assistance of counsel was set out in *R. v. Snow***,** 2019 NSCA 76, Beveridge, J.A. said:

> [26] Incompetence is to be determined by application of a reasonableness standard. There is a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. The conduct of counsel is not to be assessed simply with the clairvoyance of hindsight.
>
> [27] If no prejudice can be demonstrated, it is appropriate to dispose of the claim on that basis and leave the issue of counsel's conduct or performance to the profession's self-governing body. (see *R. v. G.D.B.*, 200 SCC 2, paras. 26-29)
>
> [28] What is meant by prejudice? An appellant must satisfy the Court that the failings of counsel caused a miscarriage of justice. This requirement can be satisfied by different considerations. In a general way, an unfair trial, or one

> tainted by a serious appearance of unfairness, amounts to a miscarriage of justice. […]

[5] As noted in *R. v. Wolkins*, 2005 NSCA 2:

> [89] The clearest example is the conviction of an innocent person. There can be no greater miscarriage of justice. Beyond that […] there can be no "strict formula … to determine whether a miscarriage of justice has occurred." *R. v. Khan*, [2001] 3 SCR 823 *per* LeBel, J. at para. 74. However, the courts have generally grouped miscarriages of justice under two headings. The first is concerned with whether the trial was fair in fact. […] The second is concerned with the integrity of the administration of justice. […]

[6] The respondent refers to *R. v. Kobylanski*, 2019 NSCA 57, where Justice Bourgeois, on behalf of the Court, discussed the standard of review related to ineffective assistance of counsel, referencing Justice Saunders in *R. v. West*, 2010 NSCA 16:

> [268] […] Absent a miscarriage of justice, the question of counsel's competence is a matter of professional ethics and is not normally something to be considered by the courts. Incompetence is measured by applying a reasonableness standard. There is a strong presumption that counsel's conduct falls within a wide range of reasonable, professional assistance. There is a heavy burden upon the appellant to show that counsel's acts or omissions did not meet a standard of reasonable, professional judgment. Claims of ineffective representation are approached with caution by appellate courts. Appeals are not intended to serve as a kind of forensic autopsy of defence counsel's performance at trial. See for example, *B.(G.D.)*, *supra*; *R. v. Joanisse* (1995), 102 C.C.C. (3d) 35 (Ont. C.A.), leave to appeal ref'd [1996] S.C.C.A. No. 347; and *R. v. M.B.*, 2009 ONCA 524.

[7] Justice Bourgeois referred to a two-step approach in assessing trial counsel's competence—first, whether the conduct amounted to incompetence; and second, that it resulted in a miscarriage of justice. If an appellant cannot demonstrate prejudice resulting from the alleged ineffective assistance of counsel it is unnecessary to address the issue of competence (see also: *R. v. Fraser*, 2011 NSCA 70; *R. v. Gogan*, 2011 NSCA 105; *R. v. G.K.N.*, 2016 NSCA 29; and, *R. v. Symonds*, 2018 NSCA 34).

Analysis

[8] The panel provisionally admitted Ms. Redden's affidavit so as to consider her allegations of trial counsel's incompetence (see *West, supra* at para. 60). I am satisfied the appellant's affidavit submitted to support her fresh evidence

application does little more than provide context for the arguments of counsel. I say that because I am satisfied the affidavit and oral evidence given by her trial counsel in response is both credible and reliable, contradicting the appellant in all material ways. I therefore begin my analysis with that in mind and offer some general comments.

[9] The sole issue on this appeal is whether trial counsel provided reasonable professional assistance. Much of this appeal is based upon the appellant's assertion of facts which I am satisfied did not exist. Her affidavit alleges a lack of information and consultation.

[10] Ms. Redden says she was not consulted on the issue of why counsel would seek an adjournment to allow him to have a witness, Ms. Deagle, attend. I am satisfied this issue was discussed with her, including the risks of having Ms. Deagle testify. I am satisfied she was told by counsel why he wanted to have Ms. Deagle testify—the reason was to undermine the credibility of another Crown witness, Ms. Grant. I will discuss this further below.

[11] Ms. Redden says she was not properly consulted or advised on the issue of whether she should testify. The record confirms trial counsel asked for an adjournment so he could speak with his client before advising as to whether she would testify. He swore in his affidavit, and confirmed in cross-examination, that the issue of whether the appellant should testify was discussed with her just prior to advising the court that she would not be testifying. She was advised that, in the end, it was her decision, but he counselled her not to take the stand. I will expand upon these discussions below.

[12] The tactic adopted by trial counsel, while not successful in terms of the ultimate verdict, was based upon instructions from his client—which instructions were given after he provided reasonable professional assistance.

[13] Finally, even if the appellant had convinced this Court that counsel had not rendered reasonable professional assistance, she has failed to demonstrate prejudice. As expressed by trial counsel, in his mind, the appellant's best trial strategy, or, at a minimum, a reasonable strategy, was to attempt to have the two main Crown witnesses contradict one another to the extent neither was sufficiently credible for the Crown to prove its case beyond a reasonable doubt.

[14] Trial counsel advised his client that he felt the two witnesses had contradicted one another on key points to the extent of undermining one another's credibility. He felt his client could do little more than offer a denial.

[15] Ms. Redden's affidavit on the fresh evidence application does not suggest she had anything more than a denial to offer the court. I will refer below to additional risks to her defence had she testified.

Was the decision to call Ms. Deagle made by the appellant after she received reasonable assistance of counsel?

[16] At the beginning of the trial, the appellant was charged with four separate charges: the two as referenced above; a second count of uttering a threat (s. 264.1); and, one charge of intentionally or recklessly causing damage by fire (s. 434). During the trial, it became apparent that one person named in one of the counts, Ms. Deagle, had not been subpoenaed by the Crown. Crown counsel advised the court there would be no evidence called on that count and advised it would be appropriate to have that count dismissed. That left the two counts that are the subject of this appeal, plus the s. 434 charge.

[17] At the close of the Crown's case, still facing three charges as noted above, trial counsel advised the court that he wished to have an adjournment in order to take instructions from his client. Upon return, counsel advised he was asking for an adjournment in order to secure the attendance of the missing Crown witness, Ms. Deagle, even though the charge related to that witness had been dismissed. In evidence on this appeal, trial counsel testified that he felt Ms. Deagle was important to the appellant's defence because, based on information provided to him through Crown disclosure, he believed Ms. Deagle's evidence would contradict important aspects of evidence from a main Crown witness; Ms. Grant.

[18] The appellant now asserts her trial counsel should not have requested an adjournment to secure the attendance of Ms. Deagle and as a result of that decision she was denied reasonable professional assistance.

[19] I am satisfied trial counsel did in fact discuss the adjournment, the strategy, and the risk associated with the decision to have Ms. Deagle testify. Specifically, counsel discussed the fact that she might corroborate some of Ms. Grant's testimony. When Ms. Deagle testified, her evidence contradicted the evidence of Ms. Grant on some important points as counsel had hoped. Unfortunately, she also testified that she too heard the appellant counsel Ms. Grant to commit the offence

of arson. Trial counsel was nevertheless satisfied the two witnesses sufficiently contradicted one another and opined neither was sufficiently credible to prove the Crown case beyond a reasonable doubt.

[20] It was with this in mind that trial counsel also felt there was no need to further cross-examine Ms. Deagle, even though she, like Ms. Grant, testified the appellant had counselled Ms. Grant to commit arson. By that time, it was clear the two main Crown witnesses had contradicted one another, and it was not unreasonable for trial counsel to be of the opinion that neither one of those two witnesses would be found to be credible or reliable.

[21] Counsel must continually assess the dynamics of a trial before deciding what questions should be asked of a witness. Given trial counsel's assessment as to the reliability of the witnesses at that point, one can readily understand his decision not to continue cross-examining Ms. Deagle. For him to continue cross-examining her risked completely undermining her credibility leaving Ms. Grant's testimony to stand alone, uncontradicted. The decision to call Ms. Deagle had borne some fruit; though apparently not enough.

Was the appellant denied reasonable assistance of counsel when deciding whether she should testify at trial?

[22] The issue of whether the appellant would testify at her trial had been discussed many times with her counsel. By the time the issue of whether she should testify was discussed for the last time, the charge of arson had been dismissed at the invitation of the Crown. Only the two charges for which she was ultimately convicted remained before the court.

[23] The appellant now asserts she was prejudiced due to the fact that not testifying left the inculpatory evidence of Ms. Grant and Ms. Deagle unchallenged. She suggests in her affidavit, tendered in her fresh evidence application, that had she received reasonable professional assistance, she would have testified.

[24] In his affidavit and oral evidence during the appeal hearing, trial counsel testified that he requested time during the trial to meet with his client and discuss whether she should testify. The record confirms the requests to adjourn. Trial counsel explained that the appellant, from the first time he met with her, made it clear she did not want to testify. At no time did she convey to him that she changed her mind. He said:

> […] Ms. Redden was clear that 1) she did not want to testify at her trial, 2) she was frightened by the prospect of testifying, and 3) she wanted me to do whatever I could to ensure that she did not have to testify.

[25] After the Crown closed its case and Ms. Deagle had testified, the issue of the appellant testifying was discussed again. As I noted above, trial counsel testified his advice to the appellant was that, even though the two witnesses gave similar testimony on the issue of counselling he had, through cross-examination, highlighted the contradictory portions of their evidence, sufficiently challenged their credibility.

[26] In spite of the inculpatory portions of the evidence, trial counsel told his client he was of the opinion that the case had not been proven beyond a reasonable doubt. He said they discussed what, if anything, the appellant could add in terms of evidence other than a straight denial.

[27] Trial counsel said he was concerned what the Crown could do if they had an opportunity to cross-examine the accused based on a statement she had earlier provided to the police. He discussed this with her, noting by then the statement would likely be considered voluntary and admissible. He explained the risk—the Crown could use the statement to undermine her credibility and elicit information damaging to the defence.

[28] Ms. Redden's trial counsel did not correctly predict the verdict, but that is not the test for obtaining a new trial. Lawyers do not have crystal balls allowing them to accurately predict outcomes, nor does their advice come with guarantees. Appeals based on ineffective assistance of counsel succeed only where the Court is convinced reasonable professional assistance has not been rendered, resulting in a miscarriage of justice.

[29] Here, the most that can be said is the appellant, after due consideration and with reasonable professional assistance, decided not to testify. There is no suggestion of alibi, missing witnesses, or anything else that could have been offered in her defence. Of more import is the fact the decision not to testify was made by her after receiving reasonable professional assistance.

Conclusion

[30] Although admitted provisionally for the sole purpose of framing the ineffective assistance of counsel argument, Ms. Redden's fresh evidence should

not be admitted. It was not found to be credible and on that basis it could not be said to establish any prejudice. The appellant has not demonstrated that she did not have reasonable professional assistance. The assistance afforded to her by counsel was reasonable, and it could not form the legal basis upon which she could assert there had been a miscarriage of justice.

[31] I would dismiss the appeal.

Scanlan, J.A.

Concurred in:

Hamilton, J.A.

Bryson, J.A.