

NOVA SCOTIA COURT OF APPEAL

Citation: *R. v. Charter*, 2022 NSCA 18

Date: 20220210

Docket: CAC 500525

Registry: Halifax

Between:

Christopher James Charter

Appellant

v.

Her Majesty the Queen

Respondent

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- Judge:** The Honourable Justice Anne S. Derrick
- Appeal Heard:** January 31 and February 10, 2022, in Halifax, Nova Scotia
- Subject:** Criminal Law. Ineffective Assistance of Counsel. Right to Testify.
- Summary:** The appellant was convicted of possession of cocaine for the purpose of trafficking. His co-accused incriminated him, claiming no knowledge of the drugs. The appellant's lawyer told him the co-accused's testimony could not be used against him. The appellant did not testify in his own defence or call any evidence. Just prior to sentencing, trial counsel informed the appellant his advice about the co-accused's evidence had been wrong in law. The appellant appealed his conviction alleging ineffective assistance of counsel. He made a motion for the admission of fresh evidence concerning the advice he had received and his reliance on it.
- Issues:** Did trial counsel's incorrect advice render the appellant's trial unfair resulting in a miscarriage of justice?
- Result:** Following cross-examination of the appellant and his trial counsel at the appeal, Crown counsel conceded that the appeal should be allowed. The appellant testified he waived his right

to testify at trial because of the incorrect advice from his lawyer. Trial counsel acknowledged he had been wrong in law. An accused person has a fundamental right to testify in their defence. Trial counsel's incorrect advice deprived the appellant of the ability to make an informed decision about whether to do so. The appellant's trial was rendered unfair and amounted to a miscarriage of justice. The Crown's concession on appeal was appropriate. The appellant's conviction was overturned and a new trial ordered.

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 4 pages.

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Judges: Beveridge, Scanlan, Derrick, JJ.A.

Appeal Heard: January 31 and February 10, 2022 in Halifax, Nova Scotia

Written Release: February 18, 2022

Held: Appeal allowed, per reasons for judgment of Derrick, J.A.;
Beveridge and Scanlan, JJ.A., concurring

Counsel: Zebedee Brown, for the Appellant
Mark J. Covan and Scott Millar, for the Respondent

Reasons for judgment:

Introduction

[1] Alleging ineffective assistance of his counsel at trial, Christopher Charter appealed his conviction for possession of cocaine for the purpose of trafficking. He supported his claim with a motion to adduce fresh evidence. We admitted the fresh evidence – affidavits from Mr. Charter and trial counsel. Crown counsel subjected each of them to an exacting cross-examination. Following a recess, he conceded the appeal. Agreeing the concession was appropriate, we allowed the appeal, overturned the conviction and ordered a new trial. We indicated our reasons would follow. These are those reasons.

Factual Background

[2] As a new trial has been ordered, I will provide a very abbreviated description of the facts.

[3] Mr. Charter and his co-accused, Wendie Frost were convicted on January 20, 2020 in the Nova Scotia Provincial Court by Chief Judge Pamela S. Williams.

[4] Mr. Charter had been found in Ms. Frost's apartment when police executed a search warrant under the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19. The search turned up a quantity of cocaine and items of personal property belonging to Mr. Charter. Ms. Frost implicated Mr. Charter at trial, testifying that she had not known about the drugs and drug-trafficking paraphernalia. Mr. Charter did not testify and called no evidence in his defence. The trial judge accepted the Crown's theory that Mr. Charter and Ms. Frost had been engaged in a joint drug trafficking enterprise conducted from Ms. Frost's apartment.

[5] Mr. Charter testified at this appeal that he could have explained his presence at the apartment and why there were items belonging to him found there. He said the reason he did not offer this evidence at his trial was because his lawyer told him that Ms. Frost's incriminating evidence was not admissible against him. He was told there was a very good chance he would be acquitted as the Crown had very little against him other than Ms. Frost's testimony. On the basis of the advice, Mr. Charter waived his right to testify.

[6] The advice Mr. Charter received was incorrect. Just prior to Mr. Charter's sentencing hearing, his lawyer realized this. He properly told Mr. Charter he had

made a mistake and withdrew as counsel. Mr. Charter retained a new lawyer for his sentencing. He was given a four year prison sentence.

The Appeal

[7] In cross-examination before us, Mr. Charter said he relied on the advice he was given by his trial lawyer and based his decision not to testify on it. He indicated he believed that without Ms. Frost's evidence there was a very reduced risk he would be convicted.

[8] Mr. Charter's trial lawyer candidly acknowledged the error of his advice. In his fresh evidence affidavit he said he had told Mr. Charter that "...Ms. Frost's testimony would not likely be sufficient to sustain a conviction against him based on my understanding of the law regarding limitations on the use of co-accused testimony as a basis for a conviction". Once he learned he had been wrong about the law he promptly informed Mr. Charter.

[9] The trial lawyer testified he had concerns about putting Mr. Charter into the witness box because he thought his prior record for drug trafficking could prejudice him.¹ He understood it was his client's decision about whether to testify. Once Ms. Frost testified, he had the critical discussion with Mr. Charter about whether he should exercise his right to do so. Mr. Charter testified he would have made a different decision if he had not been given incorrect advice.

The Right to a Fair Trial

[10] As this Court has observed:

Every accused is constitutionally entitled to a fair trial. As noted by Doherty, J.A. in *R. v. Joannis*, [1995] O.J. No. 2883, para.63: "That entitlement finds expression in s. 7 and s. 11(d) of the Charter." It is a right afforded to all accused persons and "is seen as a principle of fundamental justice." (*R. v. G.D.B.*, 2000 SCC 22, para. 24) Impairment of the right can constitute a miscarriage of justice requiring appellate intervention under section 686(1)(a)(iii) of the *Criminal Code*.

¹ This was also a misunderstanding of the law. If he had testified, Mr. Charter's prior record could have been put to him with implications for his credibility if he had denied it. But it could not have been used for propensity purposes as trial counsel seemed to think, that his denials of drug trafficking on this occasion should be disbelieved because he had been convicted of drug trafficking previously. As noted by this Court in *R. v. A.W.H.*, 2019 NSCA 40 at para. 38: "It is a basic rule that general disposition evidence cannot be used to infer that the accused committed the offence alleged" (*cites omitted*).

"A conviction entered after an unfair trial is in general a miscarriage of justice."
(*R. v. Wolkins*, 2005 NSCA 2, para. 89)²

[11] A trial is rendered unfair or tainted by the appearance of unfairness where trial counsel's advice is "so deficient" that the accused is denied the ability to make "an informed choice about a matter of fundamental importance to the conduct of the defence such as whether to testify or elect the mode of trial".³ Whether to testify is perhaps the most critical decision an accused person will make in the course of a trial. They are entitled to be guided by advice that is correct in law.

[12] Ineffective assistance of counsel is not automatically made out where erroneous legal advice has been given but it is a particularly relevant consideration "where the mistake of law was intimately connected" to the accused's failure to testify.⁴ The decision to testify or not is one defence counsel "are ethically bound to discuss with the client and regarding which they must obtain instructions".⁵ In Mr. Charter's case those instructions were compromised by flawed advice about the law.

[13] It is unnecessary for us to determine whether on appeal Mr. Charter needed to establish that had he received sound legal advice he (a) would have testified; and (b) there is a reasonable probability he would not have been convicted. Appellate courts have not reached a consensus that this is required to find a miscarriage of justice where ineffective assistance of counsel has led to a determination the trial was unfair.⁶

[14] Mr. Charter did not receive a fair trial. Due to his lawyer's ineffective assistance, he provided a waiver of his right to testify that was uninformed. He was deprived of the opportunity to offer an explanation for the evidence the Crown had advanced in support of a conviction. This amounted to a miscarriage of justice and justifies the ordering of a new trial.⁷

² *R. v. Simpson*, 2018 NSCA 25, at para. 39.

³ *R. v. Mehl*, 2021 BCCA 264, at para 145.

⁴ *R. v. A.W.H.*, 2019 NSCA 40, at para. 61.

⁵ *R. v. G.D.B.*, 2000 SCC 22, at para. 34.

⁶ *R. v. Mehl*, supra at paras. 147-148, citing *R. v. Lundrigan*, 2020 ABCA 281 and *R. v. K.K.M.*, 2020 ONCA 736.

⁷ *R. v. A.W.H.*, supra at para. 65.

Disposition

[15] The fresh evidence is admitted and Mr. Charter's appeal is allowed. His conviction is overturned and a new trial ordered.

Derrick, J.A.

Concurred in:

Beveridge, J.A.

Scanlan, J.A.