

NOVA SCOTIA COURT OF APPEAL

Citation: *R. v. A.L.*, 2022 NSCA 82

Date: 20221215

Docket: CAC 508678

Registry: Halifax

Between:

A.L.

Appellant

v.

His Majesty the King

Respondent

Restriction on Publication: Section 486.4 of the *Criminal Code*

Judge: Wood, C.J.N.S.

Motion Heard: December 8, 2022, in Halifax, Nova Scotia in Chambers

Held: Motion granted

Counsel: A.L., appellant in person via videoconference
Glenn Hubbard for the respondent
Myles Thompson for the Attorney General of Nova Scotia

Order restricting publication — sexual offences

486.4 (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

(i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 210, 211, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or

(ii) any offence under this Act, as it read from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day; or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).

Mandatory order on application

(2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall

(a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the victim of the right to make an application for the order; and

(b) on application made by the victim, the prosecutor or any such witness, make the order.

Decision:

[1] A.L. appeals his convictions for sexual interference and sexual exploitation contrary to s. 151 and s. 153(1)(a) of the *Criminal Code*. He was sentenced to a six year custodial term in July 2021 and is currently incarcerated.

[2] A.L. applied for and was denied counsel by Nova Scotia Legal Aid. He is now seeking state funded counsel to prosecute his appeal. The Attorney General of Nova Scotia opposes his application.

[3] Section 684(1) of the *Criminal Code* governs A.L.'s application. It says:

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.

[4] A.L. has provided evidence that he has no assets nor source of income beyond what he is able to earn through work at the penitentiary. He has satisfied me that he does not have sufficient financial resources to obtain counsel and, therefore, the question will be whether “it appears desirable in the interests of justice” that he have state funded counsel.

[5] Although there are a number of factors which typically arise in applications of this nature, each case must be assessed on its particular circumstances. Cromwell, JA, as he then was, summarized it this way in *R. v. Assoun*, 2002 NSCA 50:

[42] The first inquiry, therefore, is whether it appears to be in the interests of the administration of justice that Mr. Assoun have legal assistance for the purpose of preparing and presenting his appeal. This involves consideration of numerous factors including the merit of the appeal, its complexity, the ability of the appellant to effectively present his or her appeal without the assistance of a lawyer and the capacity of the court to properly decide the appeal without the assistance of counsel.

[6] In order to assess the merits of A.L.'s request, it is important to have an understanding of the proceeding which led to his conviction.

[7] On November 10, 2016, a four-count Information was laid against A.L. alleging offences under sections 151, 153 and 271 of the *Criminal Code*. The complainant had been diagnosed with a rare medical condition which was linked to a wide range of symptoms. At trial there was expert evidence concerning the impact of this condition on her “intellectual challenges”, “learning and other developmental delays”, and “psychiatric issues”.

[8] The complainant alleged extensive sexual contact with A.L. over a number of years. A.L. testified at trial that none of this took place.

[9] In the spring of 2020 the trial judge heard an application on behalf of A.L. in which he alleged a breach of his rights under s. 7 of the *Canadian Charter of Rights and Freedoms* and requested a stay of proceedings. The application related to an audio recording of a police interview with the complainant which had been lost. The interview related to the circumstances of the complainant’s surreptitious recording of a discussion with A.L. concerning the alleged offences. The *Charter* motion was dismissed. This recording became an exhibit at trial and was given great weight by the trial judge in his assessment of A.L.’s credibility.

[10] The trial took place over 12 days between November 2019 and September 2020. On January 8, 2021, the trial judge convicted A.L. and on July 27, 2021 sentenced him.

[11] A.L.’s Notice of Appeal alleges a single ground of appeal, ineffective assistance of trial counsel. In his application for state funded legal counsel, A.L. expanded on his concerns about the trial and his conviction. He provided additional information at the hearing of his application when I asked him for details concerning some of the comments in his materials.

[12] A.L. said that when he drafted the Notice of Appeal, he thought his trial lawyer had not properly represented him. However, at that time, he did not have the Appeal Book which contained the trial record. When he reviewed that record in preparation for his application, he said he identified a number of issues on which he wanted legal advice in order to determine if there were other potential grounds of appeal. The additional issues identified by A.L. included the following:

- There were inconsistencies between the complainant’s testimony and her earlier statements as well as evidence of other witnesses. He feels these were not properly taken into account by the trial judge.

- He would like to obtain advice on whether there were errors in the decision on his *Charter* application concerning the lost recording of the complainant's interview.
- There were witnesses and documents known to his trial lawyer which could have contradicted the testimony of the complainant and her mother which his lawyer did not present. (At the hearing A.L. provided a list of names and a description of the evidence that he believed each witness could have provided)
- The trial judge admitted in evidence text messages and Facebook messages which were not properly authenticated and relied on these to impeach his credibility.

[13] As the jurisprudence pursuant to s. 684 of the *Code* indicates, the most common factors to be considered are as follows:

1. The merits of the appeal.
2. The complexity of the appeal and the appellant's ability to effectively present their arguments.
3. The capacity of the court to consider the appeal in the absence of legal counsel for the appellant.

[14] I will consider each of these factors in relation to A.L.'s application.

Merits of the Appeal

[15] Generally, an appellant must show an arguable issue before state funded counsel is ordered. A cautious approach should be taken in situations where an unrepresented appellant may have difficulty identifying and explaining the legal issues at play. Where the charge is serious, there may be less emphasis on the merits (*R. v. McDormand*, 2020 SKCA 83).

[16] In this case, I am satisfied that A.L. has established an arguable issue on appeal. With respect to the one pleaded ground of appeal, ineffective assistance of counsel, A.L. has identified, by name, potential witnesses which he testified he discussed with his trial counsel as potentially providing evidence to contradict portions of the Crown's case. If those facts can be established, the appeal has a chance of success.

[17] In some cases the effectiveness of trial counsel can be ascertained from the trial record. In this case that is not possible since the discussions with counsel were private and the potential witnesses never testified.

Complexity of the Appeal and Capacity of the Appellant

[18] In considering the complexity of the appeal, I will not limit my analysis to the single ground set out in A.L.'s Notice of Appeal. In my view, he has identified a range of concerns which merit consideration by legal counsel for potential inclusion in the appeal. These include the *Charter* application concerning the lost police interview of the complainant, the admissibility of the Facebook and text messages relied upon by the trial judge, and the trial judge's approach to the assessment of credibility and reliability between the testimony of A.L. and the complainant.

[19] In addition, this proceeding included several days of pre-trial appearances and a 12 day trial spread over many months. Reviewing the transcripts and evaluating the evidence and submissions would be challenging for anyone.

[20] In a case such as this, where an accused's evidence is diametrically opposed to that of the complainant, any examination of the judge's application of the principles in *R. v. W(D)*, [1991] 1 S.C.R. 742 requires careful and thorough review. That is particularly so here, where there was expert evidence bearing on the reliability of the complainant's testimony and acknowledged inconsistencies between her testimony and other evidence.

[21] A.L. has a grade 11 education and struggles with reading and understanding legal documents. Although he did an admirable job explaining his concerns at the application, he struggled, at times, to stay on point. In my view, it would be a significant challenge for him to prepare a factum and present oral argument on this appeal. In addition, he would have great difficulty appreciating and responding to the Crown's legal submissions.

[22] The fact A.L. is in custody presents further hurdles. He has limited access to legal research and would face significant challenges in attempting to contact potential witnesses and prepare affidavits as part of a motion for fresh evidence. In my view, such a motion would be essential in relation to the allegations of ineffective trial counsel if A.L. is to have any chance of success on this ground.

Capacity of the Court

[23] The Court endeavours to provide assistance to unrepresented individuals particularly in criminal cases. However, it is important to recognize the limitations which are in place. The panel hearing the appeal cannot provide legal advice to A.L. nor review the record for purposes of identifying potential additional grounds of appeal. It cannot conduct direct or cross-examination of witnesses who may be called as part of a fresh evidence motion.

[24] If A.L.'s application for state funded counsel is any indication, an appeal hearing where he represents himself would be relatively unfocused and time consuming. He would struggle to keep his submissions within the scope of the issues which could be considered on appeal.

[25] I am satisfied that if A.L. had legal counsel the appeal could be argued efficiently and include all issues which might call his conviction into question.

Conclusion

[26] Based upon materials provided by A.L. and his submissions, I am satisfied that he has established it is desirable in the interests of justice that he have state funded legal counsel for purposes of prosecuting his appeal. I will, therefore, issue an order to this effect directed to the Attorney General of Nova Scotia.

Wood, C.J.N.S.