<u>NOVA SCOTIA COURT OF APPEAL</u>
Citation: *R. v. Sykes*, 2014 NSCA 4

Date: 20140114
Docket: CAC 417943
Registry: Halifax

Between:

Kenneth Curry Sykes

Appellant

v.

Her Majesty the Queen

Respondent

Judge: The Honourable Justice David P.S., Farrar

Motion Heard: January 7, 2014, in Halifax, Nova Scotia, in Chambers

Held: **Motion for appointment of counsel denied.**

Counsel: Appellant in person
William Delaney, Q.C., for the respondent
Edward A. Gores, Q.C., for the Attorney General of Nova Scotia
Peter Mancini, for Nova Scotia Legal Aid

Reasons for judgment:

Introduction

[1] The appellant applies for appointment of counsel under s. 684 of the **Criminal Code of Canada**, R.S.C. 1985, c. C-46, to assist him in the prosecution of his appeal for conviction. For the reasons that follow I deny the request.

Background

[2] On June 27, 2013, the appellant was convicted on charges of robbery while wearing a mask and breach of conditions while on a recognizance or undertaking. He was sentenced to seven years imprisonment.

[3] The factual foundation for the convictions are found in the decision of Chief Justice Joseph P. Kennedy dated June 27, 2013 (unreported). In summary, Mr. Sykes was convicted of robbing the Running Room in the Sunnyside Mall in Bedford on January 26, 2012. On that day an individual, with his face partially covered, entered the store and demanded money. The store clerk asked him if he was joking to which he responded by showing her, what she considered to be a gun, grabbing her by the throat and threatening violence if she didn't open the cash register. She did and the robber left with the cash from the register.

[4] The robbery was captured on the store's security camera.

[5] Mr. Sykes testified at trial that he was in the mall that day but did not rob the store.

[6] Mr. Sykes' affidavit in support of his appeal and his Notice of Appeal are sparse with respect to the basis of his appeal. However, in oral argument he fleshed out the grounds of his appeal in some detail. In essence, he is arguing that the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence. He says that the trial judge reached conclusions that are not supported by the evidence and ignored relevant evidence which was exculpatory in nature. In particular, he gave the following examples:

1. The only evidence linking him to the robbery was a fingerprint found on a bench outside of the store in the Mall. The police could not indicate when the fingerprint was placed there or how long it could had been there;
2. The video taken by the store's security camera shows the robber touching the counter as well as a pair of white sunglasses. Both of these items were tested for fingerprints. Neither had Mr. Sykes' fingerprints on them;
3. The video also shows the clerk being grabbed by the throat by the robber. The clerk was screened for DNA evidence and that the evidence was inconclusive;
4. The security camera in the Mall and the video in the store show the robber. Mr. Sykes says the person on the videos do not match his description. He says the trial judge's finding that the robber has the same size and body shape as Mr. Sykes is simply wrong. He says any reasonable person reviewing the videos would conclude it was not him. He further adds that the trial judge did not have an opportunity to observe him in the courtroom for the length of time necessary to make the comparison;
5. The police executed warrants on his house and his car and found none of the clothing, money or other items identified in the robbery; and
6. Most importantly, the clerk in the court identified him as a white male. Mr. Sykes says he is of mixed race and that anyone describing him would not say he is white.

[7] For these reasons Mr. Sykes (although not expressing it in exactly these words) says that the verdict is unreasonable and not supported by the evidence.

[8] Mr. Sykes sought and was denied legal aid for the prosecution of his appeal on the basis that the appeal lacked sufficient merit to be funded.

Issue

[9] The issue is whether the appellant has met the prerequisites of s. 684 of the **Criminal Code**.

Analysis

[10] Section 684 of the **Criminal Code** provides:

> **Legal assistance for appellant**
>
> 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.

[11] In **R. v. J.W.**, 2011 NSCA 76, Fichaud, J.A. (in Chambers) summarized the test for appointment of counsel under s. 684(1) as follows:

> [11] Under s. 684(1), literally I have two inquiries - - (1) whether it is desirable in the interests of justice that J.W. have legal assistance, and (2) whether J.W. has sufficient means to obtain that assistance. *R. v. Assoun*, 2002 NSCA 50, paras. 41-44. In *R. v. Innocente*, [1999] N.S.J. No. 302, paras. 10-12, Justice Freeman agreed with the statement of Justice Doherty in *R. v. Bernardo* (1997), 121 C.C.C. (3d) 123 (Ont. C.A.), para 22, that, in addition, <u>the chambers judge should be satisfied that the appellant has an arguable appeal</u>. (My emphasis)

[12] I am satisfied from the information Mr. Sykes has provided to the court that he lacks the means to otherwise retain counsel. Therefore, I am only left to complete the "interests of justice analysis". Cromwell, J.A. (as he then was) noted in **R. v. Assoun**, 2002 NSCA 50, this inquiry involves a number of considerations including:

> i. the merits of the appeal;
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> ii. its complexity;
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> iii. the appellant's capability; and
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> iv. the Court's role to assist.

[13] Chief Justice MacDonald in **R. v. Morton**, 2010 NSCA 103 added an additional consideration, that is, the responsibility of Crown counsel to ensure that the applicant is treated fairly (¶5).

[14] Is it in the interest of the administration of justice that the appellant have legal assistance for the purpose of preparing and presenting his appeal?

Merits of the Appeal

[15] Recently, in **R. v. Fudge**, 2013 NSCA 149, Justice Beveridge reviewed the case law with respect to the merits assessment and noted that there appears to be some uncertainty as to what may be the threshold to be overcome in a merits assessment (¶10). The uncertainty arises out of Justice Hallett's decision in **R. v.**

Grenkow, [1994] N.S.J. No. 26 (Q.L.)(C.A.) where he expressed the view that where Legal Aid had rejected an application for counsel based on a lack of merit, then the appellant had to demonstrate that there was a reasonable chance of success on appeal – merely establishing that there was an arguable issue was insufficient (¶27).

[16] However, in more recent cases, even where legal aid has been denied, the arguable issue test has been used (See **R. v. J.W., supra** at ¶11; **R. v. Frank**, 2012 NSCA 114 at ¶14 and ¶20; **R. v. George**, 2013 NSCA 41 at ¶21). As Justice Beveridge pointed out the arguable issue test appears to be the threshold in Newfoundland and Labrador, Alberta, Saskatchewan, Manitoba, New Brunswick and Ontario (**Fudge**, ¶14).

[17] In my respectful view, the fact that legal aid has been denied does not change the threshold for the merits assessment but, rather, simply evidences that all avenues available to the applicant to obtain legal counsel have been exhausted and s. 684 is the final recourse available.

[18] I agree with the comments of Doherty, J.A. in **R. v. Bernardo** (1997), 121 C.C.C. (3d) 123 (Ont. C.A.) that to go any further than a determination of whether there is an arguable case would be unfair to the appellant. He observed:

> [22] In deciding whether counsel should be appointed, it is appropriate to begin with an inquiry into the merits of the appeal. Appeals which are void of merit will not be helped by the appointment of counsel. The merits inquiry should not, however, go any further than a determination of whether the appeal is an arguable one. I would so limit the merits inquiry for two reasons. First, the assessment is often made on less than the entire record. Second, any assessment beyond the arguable case standard would be unfair to the appellant. An appellant who has only an arguable case is presumably more in need of counsel than an appellant who has a clearly strong appeal.

[19] Therefore, it is my view that the appropriate threshold in doing a merits assessment is an arguable issue. To the extent **Grenkow** suggests otherwise, that reasoning has been overtaken by more recent cases.

[20] Returning now to Mr. Sykes submissions, I am satisfied based on his submissions and his argument to me that he has met that threshold and I will not comment further on it.

[21] I will now address the other considerations in the "interests of justice" analysis.

Complexity of the Appeal and the Appellant's Capability

[22] This is not a complex appeal. The issue at trial was one of identification. The issue on appeal is whether Mr. Sykes being identified as the robber was unreasonable and not supported by the evidence. Mr. Sykes, during his oral submissions, exhibited a very good knowledge of the record and the issues that the trial judge had to address and which must be addressed by the Court of Appeal. He obviously reviewed the record in some detail, was familiar with the issues and presented his argument in an articulate and forceful manner. I was impressed by his presentation and ability to express himself.

[23] I am satisfied that he has the ability to present his argument effectively.

The Court's Role

[24] In **Grenkow, supra**, Justice Hallett describes this Court's role in an appeal involving a self-represented individual:

> [26] ... 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. ...

[25] I am confident that this Court's review of the record and the trial judge's decision will reveal any difficulty with the decision below, including whether the evidence is capable of supporting the verdict.

The Crown's Role

[26] It is the Crown's duty to ensure that the appellant is treated fairly. In **R. v. Morton**, **supra**, Chief Justice MacDonald quoted from **Boucher v. The Queen**, [1955] S.C.R. 16 as follows:

> 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.

[27] As in all cases, I expect the Crown to assist the Court in ensuring that the appellant receives a fair appeal.

Conclusion

[28] In my view, the appellant has raised an arguable issue for appeal. However, I am satisfied that he is very capable, as is evident from his appearance before me, to articulate his concerns with the record and the trial judge's decision. With this Court's careful review of the record and the Crown's additional oversight, I am satisfied the appellant can effectively present his appeal without the assistance of counsel.

[29] For these reasons, I do not find it to be in the interest of justice to assign legal counsel. Mr. Sykes' motion is dismissed.

Farrar, J.A.