

NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Bou-Daher*, 2014 NSCA 82

Date: 20140909
Docket: CAC 422634
Registry: Halifax

Between:

Jean (John) Bou-Daher

Appellant

v.

Her Majesty the Queen

Respondent

Judge: Farrar, J.A.

Motion Heard: August 28, 2014, in Halifax, Nova Scotia in Chambers

Held: Motion granted.

Counsel: Appellant in person
Mark Scott, for the respondent
Edward A. Gores, Q.C., for the respondent Attorney General
of Nova Scotia

Decision:

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 from an arson conviction. For the reasons that follow I allow the request.

Background

[2] On November 21, 2013, Mr. Bou-Daher was convicted of simple arson, an offence under s. 434 of the **Criminal Code**. He was acquitted of arson for a fraudulent purpose under s. 435(1) of the **Criminal Code**.

[3] The factual foundation for the conviction is found in the decision of Provincial Court Judge Anne S. Derrick dated November 21, 2013 (2013 NSPC 114). In summary, shortly after 1 a.m. on Monday, July 7, 2008, two fires were deliberately set on the second level of Key Largos, a bar at 70 First Lake Drive in Lower Sackville.

[4] It was established at trial that a liquid accelerant was used to ignite the fires. The area smelled strongly of gasoline or some similar petroleum product. Carpet and wood samples were removed and forensic testing indicated gasoline and a light petroleum distillate in the carpet sample. Gasoline was also detected in the other samples.

[5] The evidence also indicated that the fires started in two different locations and were quickly extinguished by the sprinkler system.

[6] Mr. Bou-Daher was the manager of Key Largos. It was owned by his son and his nephew through a numbered company. He worked for the numbered company.

[7] As Sunday, July 6 turned into Monday, July 7, the evidence indicates there were only three people at Key Largos, Mr. Bou-Daher, Asal Vakili and Taleb Badour. Ms. Vakili waitressed at the bar on Sunday, July 6. The bar was typically open until 1 a.m. seven days a week. However, on that night the customers were

all gone by midnight so she closed the bar early, handed in her money and receipts to Mr. Bou-Daher who was in his office on the second level of the bar. As she was leaving, Mr. Badour was waiting at the locked front door to get in. He wanted to see Mr. Bou-Daher who owed him money for doing some work at the bar.

[8] Mr. Badour went upstairs where he found Mr. Bou-Daher in his office counting money. Mr. Bou-Daher paid Mr. Badour what was owed to him. He was about to leave when Mr. Bou-Daher told him he was done and they should leave together.

[9] Mr. Badour went downstairs and waited for Mr. Bou-Daher. The security surveillance indicates they left the bar together.

[10] Mr. Bou-Daher armed the security system at approximately 1:11 a.m.

[11] The fires triggered the alarm system and the Halifax Regional Fire Service was notified of the fire alarm at approximately 1:15 a.m. Two fire trucks arrived at Key Largos at approximately 1:22 a.m. and 1:26 a.m. respectively.

[12] The evidence established that the fires were set in the vicinity of sprinkler heads and because of that, they were extinguished very quickly.

[13] This is a brief summary of the evidence. It is reviewed in much more detail in the decision of the trial judge.

[14] Mr. Bou-Daher sought and was denied legal aid in pursuit of the appeal. His Notice of Appeal is sparse with respect to the basis of appeal. He simply says that the judge made the wrong decision as there was not enough evidence in support of his guilt which I take to mean that the verdict was unreasonable or not supported by the evidence.

[15] The materials filed in support of the s. 684 application give some detail to the grounds of appeal suggesting ineffective assistance of counsel:

1. in failing to make a **Charter** application to have the charges dismissed based on the delay in bringing the matter to trial;
2. instructing him not to testify on his own behalf; and
3. other allegations regarding the overall conduct of the trial.

[16] He also raises other issues which, from his written submissions, I take him to be arguing that the trial judge failed to give significance to or failed to take into account certain evidence in reaching her decision including:

1. There was absolutely no motive and nothing to be gained by Mr. Bou-Daher, his son or nephew by the setting of the fire;
2. To the contrary, the result was a tragic financial loss and damages;
3. That the timelines regarding when he left the premises, the times on the video surveillance and the time of the alarm were confused; and
4. No gas can or other container which could have been used to bring the accelerant into the premises was ever found. Mr. Bou-Daher says it is clear on the evidence that he did not have anything with him when he left the bar. Although not expressing it in these words, I take him to be arguing that this should have raised a reasonable doubt in the trial judge's mind.

[17] In his appearance before me, Mr. Bou-Daher's submissions were very short arguing simply the evidence was not sufficient to convict him of this crime.

[18] I should also point out that it is apparent from his oral submissions that English is not Mr. Bou-Daher's first language and although he can adequately communicate in English he has difficulty expressing the issues he wishes to raise on appeal.

Issue

[19] The issue is whether the appellant has met the pre-requisites of s. 684 of the **Criminal Code**.

Analysis

[20] 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.

[21] 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, the chambers judge should be satisfied that the appellant has an arguable appeal.

[22] I am satisfied from the information Mr. Bou-Daher 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;
- ii. its complexity;
- iii. the appellant’s capability; and
- iv. the Court’s role to assist.

[23] 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).

[24] 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?

The Merits of the Appeal

[25] It is difficult, in cases such as this, where I am of the view that the appellant does not have the ability to properly articulate what would be the appropriate grounds of appeal to assess the merits of the appeal. However, I have had an opportunity to review Mr. Bou-Daher’s submissions, as well as the Appeal Book in this matter and I am satisfied that there is, at least, an arguable issue.

[26] Having found the threshold has been met, I will not comment on it further.

Complexity of the Appeal and the Appellant's Capability

[27] In my view, this is a relatively complex appeal. The case against Mr. Bou-Daher was wholly circumstantial. The trial judge had to be satisfied that the Crown had proven beyond a reasonable doubt that Mr. Bou-Daher had exclusive opportunity to set the fires that damaged Key Largos.

[28] The evidence relied upon by the trial judge, although for the most part undisputed, was extensive, involving timelines from the security system, the alarm monitoring company, the fire department and video surveillance cameras which did not necessarily coordinate with one another.

[29] It also involves a consideration of the law relating to exclusive opportunity.

[30] I am not remotely satisfied that Mr. Bou-Daher has the ability to present his argument effectively or to even identify what arguments he needs to make in order to prosecute his appeal.

The Court's Role

[31] 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. ...

[32] Although I recognize that the Court has a role where an individual is self-represented, in his case, in my view, considering Mr. Bou-Daher's lack of ability to present what I consider to be a relatively complex appeal, the Court's role would become much broader and would involve, not only addressing the issues raised by the appellant but also identifying the issues that ought to have been raised by the appellant on the appeal.

[33] In my view, that goes further than what Justice Hallett envisioned in **Grenkow**.

The Crown's Role

[34] Although it is the Crown's duty to ensure the appellant is treated fairly (**R. v. Morton**, 2010 NSCA 103), it is my view Mr. Bou-Daher requires much more assistance than the Crown could reasonably be expected to give in these circumstances.

Conclusion

[35] There is an arguable issue for appeal in this matter. Mr. Bou-Daher requires counsel in order to properly frame the grounds of appeal and to properly present his case. As a result, I find that it is in the interests of justice that he have legal assistance. I am also satisfied that he has insufficient means to obtain that assistance.

[36] As a result, I order that legal assistance be assigned to Mr. Bou-Daher pursuant to s. 684 of the **Criminal Code**.

Farrar, J.A.