NOVA SCOTIA COURT OF APPEAL
Citation: R. v. Messervey, 2010 NSCA 55

Date: 20100617
Docket: CAC 295554
Registry: Halifax

Between:

Arnold Clifton Messervey

Appellant

v.

Her Majesty the Queen

Respondent

Judges:	Bateman, Beveridge and Farrar, JJ.A.
Appeal Heard:	April 7, 2010, in Halifax, Nova Scotia
Held:	The motion to adduce fresh evidence and the appeal are dismissed, per reasons for judgment of Beveridge, J.A., Bateman and Farrar, JJ.A. concurring.
Counsel:	Kevin A. Burke, Q.C., for the appellant Mark A. Scott, for the respondent

Reasons for judgment:

INTRODUCTION

[1] Once again an appellant, dissatisfied with the result at trial, alleges ineffective assistance of counsel. Here there was no trial. Nonetheless, he says counsel failed him, causing a miscarriage of justice.

[2] The appellant pled guilty on the morning of his trial to a variety of offences involving a pattern of abuse perpetrated against his common law spouse. He was subsequently sentenced for those, and other offences, to a total period of incarceration of forty months. Initially the appeal was from conviction and sentence. After counsel assumed carriage of the appeal, the appeal from sentence was abandoned.

[3] The appellant now alleges his trial counsel was incompetent in how he handled certain matters, and asks this Court to set aside the guilty pleas on the charges involving spousal abuse and order a new trial. In support, he filed a motion to adduce fresh evidence. For reasons that follow, I would not admit the proffered fresh evidence and would dismiss the appeal.

BACKGROUND FACTS

[4] In the late summer of 2007 a complaint was made by the appellant against an acquaintance. There was a suggestion that his spouse, Ms. Claudine Ryan, had been sexually assaulted by that acquaintance. Cst. Wagner, of the RCMP, interviewed Ms. Ryan. It became evident that there had been no sexual assault, but Ms. Ryan revealed numerous incidents of assaults at the hands of the appellant over the previous three years.

[5] The complainant told the police that the appellant suspected her of wanton infidelities. In order to get the truth out of her, he would use violence, including weapons, until she confessed. In the spring of 2007 the appellant purchased padlocks that he installed on the inside of their bedroom door. In this way he would prevent her from sneaking out for nocturnal sexual rendevous.

[6] Ms. Ryan left the matrimonial home on November 11, 2007. Further statements were provided by the complainant. The police also interviewed her daughter, Patricia Ryan. Cst. Wagner contacted the appellant to come to the detachment for an interview on November 20, 2007. The appellant was only too happy to do so, believing that it was in furtherance of the allegations (including sexual assault) against his acquaintance.

[7] When the appellant arrived at the detachment, he was arrested for assault, assault with a weapon, forcible confinement and uttering threats. He was appropriately cautioned and advised of his right to counsel. The appellant said he understood and did not want to speak with counsel. Instead he proceeded to give a videotaped interview lasting more than three hours. In that statement, the appellant admitted to all of the allegations made by Ms. Ryan about various assaults, including the assaults with weapons and the forcible confinement.

[8] Generally, the appellant downplayed the seriousness of the incidents and provided, as justifications for his conduct, the need to apply pressure to Ms. Ryan for her to tell him the truth about her sexual infidelities. One incident had occurred on Ms. Ryan's 40th birthday. A verbal argument escalated to the point that he struck her in the face, causing a black eye. The appellant admitted he had done so, but had taken Ms. Ryan and Patricia to the Ovens the next day and that she was "all happy".

[9] There were three charges of assault with a weapon. In the first, the appellant, during a dispute with the complainant, produced a long gun and struck her in the rib area with the butt of the gun. The dispute was loud and long enough to bring the complainant's daughter downstairs to intervene. The appellant took a hammer and hit the stairs and ordered Patricia to mind her own business. Patricia ran back upstairs and jumped out her bedroom window, fracturing a bone in her foot.

[10] On the second of the three assault with a weapon charges, the appellant used a baseball bat. On a remote back road, he confronted the complainant with allegations of having sex with one of his brothers. When she denied it, he picked up a baseball bat, shook it at her and demanded the truth. He then proceeded to hit her left leg with the bat. He admitted he had bruised her leg, but he didn't really hit her hard, and she "didn't miss a day's work".

[11] The third incident with a weapon was again precipitated by his belief she had been unfaithful. At the end of a secluded road he ordered her out of the vehicle. He picked up a piece of 2 x 4, which had been part of a fence, and struck her in the shoulder with it. On each occasion after the assault she would admit her infidelities. The appellant admitted the assault with the piece of wood but noted that the wood had a nail in it and he had hit her with the flat side, the one with no nail protruding.

[12] In the spring of 2007 the appellant purchased locks and installed them on the inside of their bedroom door. The purpose was to keep her inside at night with him, to prevent her from sneaking out at night for sex. He believed she was finding the key and sneaking out, so he would lock the door and slip the key under the door for safekeeping with Patricia. In the morning he would call out to Patricia to slide the key back under the door. The appellant told the police that his acts were "AIDS prevention".

[13] The only offence the appellant came close to denying was the alleged threat on November 10, 2007 to blow off the complainant's knee caps. He did acknowledge, on that date, to having said he "ought to shoot you in the shoulder". Information was provided by both Claudine and Patricia Ryan about the presence of unsecured firearms. The appellant admitted he had them stored in his bedroom. A warrant was obtained and executed to search his residence.

[14] The appellant was kept in custody. He was duly charged with 12 *Criminal Code* offences. Six were for allegations based on the complaint by Ms. Ryan, and six firearm offences. The appellant arranged for Tim Peacock to act for him as counsel. Mr. Peacock acted for the appellant from his first appearance in court to the end of the sentencing hearing. There is no need to set out in detail all of the court appearances and developments. I will only refer to those that the appellant says are relevant to his allegations of ineffective assistance of counsel.

[15] It is useful to interject here that in pursuit of his allegation, the appellant filed an affidavit sworn January 14, 2010. In response the Crown filed affidavits, one from Mr. Peacock sworn February 5, 2010, and from trial Crown Attorney Ingrid Brodie and Cst. Nancy Wagner, both sworn January 26, 2010. All affiants were cross-examined at the outset of the appeal hearing.

[16] The Crown proceeded by indictment on all charges. Although initially opposed to his release, on November 27, 2007 the Crown consented to release on a recognizance in the amount of $10,000 with two sureties to justify, with strict conditions. Included were the usual ones of having no contact with the complainant and to remain away from his former matrimonial home. Election and plea was adjourned to December 18, 2007 pending receipt of more disclosure from the Crown. Mr. Peacock wrote to the Crown seeking a consent variation to the terms of release to permit the appellant to live in the matrimonial home in order to access his home office to fulfill his employment obligations.

[17] In the meantime, the complainant and her father enlisted the RCMP to attend the matrimonial home with them. When they went there on December 14, 2007, they found the appellant in the home. He was arrested for violation of the terms of his release and held in custody until December 17, 2007. The Crown was opposed to his release. The appellant consented to remand to December 18 and then to January 4, 2008, February 5, and to February 18th. On this last date he pled guilty to the breach of recognizance charge and all of the firearm charges. Sentencing was scheduled for March 3, 2008. He also elected trial in Provincial Court on the remaining charges, pled not guilty and his trial was set for March 3, 2008.

[18] However, on March 3, 2008, there was no trial. Instead the appellant pled guilty to all of the assault and abuse charges and sentence was adjourned for all charges to March 31, 2008. A Pre-Sentence Report was ordered.

[19] On March 31, 2008 the Crown sought a total sentence of five years incarceration less eight months credit for time the appellant had spent on remand. The defence advocated for a sentence in the range of two to three years. The trial judge sentenced the appellant to a total sentence of four years, less eight months for time spent on remand, allowing for a 2-1 credit.

ISSUES

[20] The issues, as framed by the appellant, are:

I. Should the materials filed by Mr. Messervey be admitted as fresh evidence?

II. Has there been a miscarriage of justice as a result of:

a. Mr. Messervey having ineffective assistance of counsel throughout the proceedings in Provincial Court? or

b. Mr. Messervey's guilty pleas being invalid?

Before setting out my analysis of these issues, it is useful to refer to some of the general principles that govern the admission of fresh evidence and an appellate court's role when faced with an allegation of ineffective assistance of counsel.

[21] The principles are uncontroversial. For a claim of ineffectiveness of counsel to succeed, it must be established that trial counsel's acts or omissions constituted incompetence, and a miscarriage of justice resulted. 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 with the benefit of hindsight. 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.*, 2000 SCC 22, [2000] 1 S.C.R. 520 at paras. 26-29.)

[22] The trial record may not contain all of the necessary information to properly assess an appellant's claim of ineffectiveness of counsel. Fresh evidence is frequently sought to be adduced on appeal to provide the necessary context to complaints of counsel's performance, including the content of discussions between counsel and the appellant. Where the proposed fresh evidence goes to challenge some aspect of the trial process, the traditional strictures on admission of fresh evidence on appeal set out in *Palmer v. The Queen*, [1980] 1 S.C.R. 759 are somewhat relaxed (*R. v. Nevin*, 2006 NSCA 72, at para. 4). The necessarily nuanced approach to the admissibility of fresh evidence was recently reviewed by this Court in *R. v. West*, 2010 NSCA 16.

[23] No objection was made by either party to this Court provisionally admitting the proffered evidence to determine the issues raised by the appellant. The

affidavit evidence and the cross-examinations are, therefore, provisionally admitted.

ANALYSIS

[24] The appellant suggests that Mr. Peacock was incompetent in five ways: he did not have the appellant plead guilty to the charge of breach of the terms of his recognizance; he should have been aware of the existence of further important information that had not been disclosed, and *a fiori* did not properly pursue full disclosure; he did not follow up on an application to have the appellant assessed under s. 672.11(b) of the *Criminal Code*; he did not properly communicate with the appellant, particularly in the days prior to trial, and did not properly prepare for trial; and lastly, in how the decision was handled for the appellant to plead guilty. For the reasons that follow I am far from convinced that, even if some of the complaints have substance, there has been any miscarriage of justice.

Failure to plead Guilty to the Breach

[25] The appellant suggests that the only charge that was causing him to remain in custody was that of the breach of the terms of his recognizance. The theory is, if the appellant had pled guilty, he would have been sentenced for what he says was a relatively minor breach and then released on his original recognizance.

[26] This may well have been an appropriate course of action to pursue, but it is one that had no guarantee of success. The endorsements on the Information show that the adjourned dates following the appellant's arrest were not only for a show cause hearing on the breach charge, but also to hear a Crown application to revoke the terms of his release on the primary charges. That intended application may or may not have been successful.

[27] Furthermore, the suggestion of incompetence is one made with the benefit of hindsight. As Major J. emphasized in *R. v. G.D.B.*, the wisdom of hindsight has no place in assessing counsel's tactical advice or decisions. Lastly, the appellant fails to identify how this caused the appellant to suffer from a miscarriage of justice. He pled guilty, and when sentenced, was given a 2-1 credit for the time he spent on remand.

Failure to properly pursue disclosure

[28] Attached in the appellant's affidavit is a copy of the "Confidential Instructions for Crown". Of course there is nothing confidential at all about this document. It is commonly referred to as the 'Crown Sheet'. This document was prepared by the investigating officer, Cst. Wagner. It contains a detailed three-page summary of the evidence. On a separate page is a list of materials said to have been attached to the 'Crown Sheet'. These include various witness statements and notes of police officers. At the bottom of the list is a notation that a copy of Patricia Ryan's witness statement and Claudine Ryan's medical reports were to follow.

[29] Mr. Peacock candidly admits he was unaware that additional disclosure was pending. He never asked for anything further. Medical information was provided to Mr. Peacock on March 3, 2008, the morning of the scheduled trial, as an attachment to a letter from the Crown, bearing the same date. By consent it was marked and also tendered as an exhibit at the appeal hearing.

[30] The information was in the form of a report prepared by a radiologist who interpreted x-rays of Claudine Ryan of November 26, 2007. The radiologist reported no recent or remote fractures. No statements by Ms. Ryan were tendered before this Court about any claimed injuries. There is a reference in Cst. Wagner's General Occurrence Report suggesting that Ms. Ryan believed she had suffered untreated broken ribs, an injury to her right arm and had a "bad right knee".

[31] The other disclosure particular, the videotaped statement taken from Patricia Ryan, is no longer available. Cst. Wagner's evidence is she took the statement on November 16, 2007. She made detailed notes of the statement, at the time and shortly afterwards, and these notes accurately and thoroughly disclose the information obtained from Patricia Ryan. She completed the 'Crown Sheet' on or about December 18, 2007. At that time she was unaware she could not locate Patricia Ryan's statement. She does not recollect ever telling trial Crown counsel she had lost the statement.

[32] While it is difficult to endorse Mr. Peacock's lack of diligence in pursuing full disclosure, the appellant has failed to identify any prejudice, and hence no miscarriage of justice, from this failure. The appellant was not charged with

assault causing bodily harm. The medical records establishing no fractures might tend to discredit the complainant's subjective belief she had suffered actual harm, but the fact remains that the appellant gave a full statement admitting all of the essential elements of the offences charged. The appellant makes no suggestion of inaccuracy or potential argument over admissibility of his statement. In cross-examination before us the appellant testified he recalls what he told Cst. Wagner, and that he told her the truth, which was "probably" consistent with what he told Mr. Peacock.

[33] The same analysis applies to the failure to discover the loss of the videotaped statement of the complainant's daughter. Patricia Ryan would have been an important, but in these circumstances, hardly a key Crown witness. According to Cst. Wagner's notes, Patricia Ryan could confirm many of the details of the abusive relationship. She could testify to details of the incident where the appellant was brandishing a firearm and chased her away with a hammer. She could also confirm the use of locks on the master bedroom and the passing of the key to her for safekeeping. The appellant has not produced any evidence that Cst. Wagner's notes are in any way inaccurate. He did not contest Wagner's assertion that her notes were complete. Again, the details about what Patricia Ryan was expected to be able to testify to, were admitted by the appellant in his detailed videotaped statement he had given to Cst. Wagner.

[34] Furthermore, the appellant does not even suggest that awareness of counsel's lapse in obtaining these items of disclosure would have had any effect whatsoever on his decision to plead guilty.

Failure to pursue an assessment under s. 672.11(b)

[35] The appellant argues that trial counsel failed to pursue medical evidence to support an application for an assessment order under s 672.11(b) of the *Criminal Code*. He also suggests that counsel failed to ensure he was able to receive proper instructions from his client, and failed to thoroughly address concerns over the appellant's mental condition and 'overall level of sanity' before sentencing.

[36] Some additional background is necessary to provide context to these complaints. The appellant appeared in court on numerous occasions, each time consenting to remand. February 5, 2008 was one of those appearances. Mr.

Peacock told the presiding judge that he was seeking an order under s. 672.11(b) based on conversations with the appellant. Peacock said that the substance of his conversations with the appellant were that the appellant had "experienced a medical condition related to advanced diabetes". In a nutshell, there was a suggestion the appellant blacked out during the incidents that formed the subject matter of the spousal abuse charges. Counsel was careful to stress the request was not in relation to any issue of fitness, but whether he was criminally responsible at the time of the various incidents.

[37] Section 672.11 provides:

> **672.11** A court having jurisdiction over an accused in respect of an offence may order an assessment of the mental condition of the accused, if it has reasonable grounds to believe that such evidence is necessary to determine
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> (*a*) whether the accused is unfit to stand trial;
>
> (*b*) whether the accused was, at the time of the commission of the alleged offence, suffering from a mental disorder so as to be exempt from criminal responsibility by virtue of subsection 16(1);
>
> (*c*) whether the balance of the mind of the accused was disturbed at the time of commission of the alleged offence, where the accused is a female person charged with an offence arising out of the death of her newly-born child;
>
> (*d*) the appropriate disposition to be made, where a verdict of not criminally responsible on account of mental disorder or unfit to stand trial has been rendered in respect of the accused; or
>
> (*e*) whether an order should be made under section 672.851 for a stay of proceedings, where a verdict of unfit to stand trial has been rendered against the accused.

[38] The presiding judge naturally enquired where he might find reasonable grounds to believe that the accused suffered from a mental disorder at the time of the commission of the offences. Concern was also expressed that the accused had been in custody for some period of time and why this was just now being raised. Trial counsel then narrowed his suggestion that the appellant blacked out only in

relation to the assault with weapon incidents. Court recessed in order for counsel to take further instructions from the appellant.

[39] When court resumed, the Crown pointed out that the accused had given a lengthy, detailed statement recounting the events covered by the various assault with weapon charges. There was no suggestion in the statement of any blackouts, and the fact of the statement and its details belied such a claim. Trial counsel then advised the judge the blackout claim related to the two incidents that occurred when the complainant was in the vehicle with the accused – the assaults with a baseball bat and the board. The judge expressed doubt that without some medical evidence he could say there were reasonable grounds to order an assessment under s. 672.11(b).

[40] Court again recessed for Mr. Peacock to discuss the matter further with the appellant. After the break, trial counsel advised the judge that consent to speak with the appellant's family physician would be obtained and sought a return date of February 18, 2008.

[41] It is common ground that Peacock met with the appellant on February 14, 2008 at the Central Nova Scotia Correctional Facility in Burnside. The appellant signed a consent form permitting his physician to disclose medical information to Mr. Peacock. A copy was appended to Peacock's affidavit. It shows some alterations to the typed words, changing the spelling of his physician's name and deleting the address. These changes appear to have been initialled by the appellant.

[42] It is entirely unclear what, if anything, Mr. Peacock did with this form. The appellant and Mr. Peacock concur that at the meeting of February 14, 2008 it was agreed the appellant would plead guilty to the firearm charges and the breach of the terms of his recognizance, and not guilty to the spousal abuse charges.

[43] On February 18, 2008 the transcript shows this is exactly what happened. With respect to the s. 672.11 application, Peacock advised the judge that there had been an error in the doctor's name, and this is why he did not have the medical information, and "So with respect to that application, we'll not be proceeding with that application today. If information comes in that's germane to that application certainly I can bring it forward at a later date".

[44] Election addresses were waived, elections were entered for trial in Provincial Court. Guilty pleas were entered as planned on all charges except the charges pertaining to spousal abuse. For those, pleas of not guilty were entered and an early trial date requested due to the appellant being on remand. March 3, 2008 was set for sentence and trial. As already noted, on March 3, the appellant pled guilty to the remaining charges and sentence was adjourned for all charges to March 31, 2008. I will explore later the conflicting evidence surrounding the entry of the guilty pleas on March 3.

[45] The Crown at the sentencing hearing recited the facts surrounding the various charges. No dispute was taken by the defence to the facts at the time, nor has the appellant suggested otherwise in this Court. At one point during submissions, the Crown referred to the justification of "AIDS prevention", offered by the accused for locking his spouse in their bedroom, as an example of how disordered the appellant's thinking was. Other examples were his justification for the assaults – to get her to tell him the truth, and his claim of compassion in striking the victim with the flat side of the board, rather than the side with the nail sticking out. The Crown submissions triggered request for clarification from the trial judge. He enquired if the Crown were suggesting the appellant had a mental disorder or psychological problems. The Crown took the view that the appellant had demonstrated paranoid thinking but did not have a clinical disorder.

[46] A Pre-Sentence Report dated March 27, 2008 had been prepared. Leaving aside the disparaging remarks by the victim about the appellant, the appellant's brother suggested to the probation officer that the accused has "something wrong with his mind" and he "needs help". The appellant himself told the officer that he had been a heavy marijuana smoker for a number of years, and consumed small amounts of cocaine for the last three years. The appellant wondered if the use of drugs had contributed to a certain degree of paranoia with respect to his common law spouse. The probation officer suggested the appellant may have mental health issues that need to be addressed.

[47] Mr. Peacock, in his sentencing submissions, hedged his bets. With respect to the issue of a disorder, he cautioned that no one in court was qualified to really get into a psychological discussion. He said it was clear that the appellant had a belief in the facts as he perceived them to be, based on representations from others

and from what he observed himself. From the complainant's view, the beliefs were irrational. Peacock said he did not know if there is a psychological issue or if the appellant would benefit from insight or investigations. If it were a form of mental health issue, then that may be a mitigating factor. Ultimately, and not surprisingly, the trial judge found the conduct of the appellant to have been unjustified and based on an unrealistic perception of reality.

[48] None of the complaints now voiced by the appellant have any merit. First of all, the appellant has not even attempted to tender any evidence suggesting that the appellant was suffering from a mental disorder at the time of the commission of these offences. He does not intimate that there was any evidence available in February 2008 to demonstrate reasonable grounds to trigger an assessment pursuant to s. 672.11, nor does the appellant suggest that at the time he entered his pleas of guilt he had any misapprehension of the process or did not understand what he was doing.

[49] In my opinion, the appellant has not demonstrated any prejudice from this claimed failure by counsel. If an assessment had been pursued, it may not have been of any real assistance to the appellant, and in fact may have simply confirmed the apparent lack of insight by the appellant into his criminal conduct. In addition, the appellant apparently has not pursued any mental health assessment nor attempted to demonstrate how one would have had an impact on the proceedings.

[50] Evidence of mental or other health difficulties, short of being capable of establishing an accused was not criminally responsible, are generally irrelevant to the issue of guilt. Such evidence can be highly relevant on sentence, demonstrating a reason (hopefully treatable) for the conduct that brought an accused into conflict with the law. Here the appellant does not even suggest there is any such evidence available. In fact, in cross-examination before this Court, he confirmed his view that there is nothing wrong with his mind.

[51] Most importantly, the appellant has abandoned his appeal from sentence, making the suggestion of ineffectiveness of counsel, for those issues relevant to the sentencing proceeding, completely moot. The appellant has therefore failed to demonstrate any prejudice.

Preparation and Communication Pre-Trial

[52] The appellant swears in his affidavit that Peacock did not meet with, nor even speak with him from the day he entered not guilty pleas to the morning of his trial on March 3, 2008. He also claims he had advised Peacock that he had witnesses who could testify on his behalf in respect of the charges.

[53] Mr. Peacock does not dispute any of these basic facts. Appended to his affidavit was a copy of his time records. It is his practice to make such entries when representing a client. There are in fact no time entries between February 18 and March 3, 2008. The entry for March 3 is for 2.7 hours, broken down as being .70 for travel and 2.0 hours for attendance at court. Nonetheless, Mr. Peacock avers in his affidavit that he was prepared to proceed to trial.

[54] No trial occurred because the appellant changed his plea to guilty. The evidence is scant as to what was done by counsel to prepare for trial, and while it is difficult to condone the admitted lack of communication, I am again not satisfied the appellant suffered any prejudice, let alone a miscarriage of justice. The appellant fails to identify who these witnesses were and how their evidence would be in any way relevant to any trial issues. He makes no suggestion that anything trial counsel did or did not do had any impact on his decision to plead guilty. As a consequence, this argument ultimately has no merit.

The Decision to Plead Guilty

[55] The appellant and Mr. Peacock give somewhat different accounts of their discussions that culminated in the pleas of guilty. The gist of the appellant's account is that he felt pressured into pleading guilty and did so only because he believed the Crown had agreed to recommend a sentence of three years, less one year credit for remand time, for a total sentence of two years. Mr. Peacock says he told the appellant the Crown refused to enter into any joint recommendation on sentence, and that the starting point for the Crown was a sentence of three years. Peacock emphasized he would argue that a two to three year sentence was appropriate. Before considering these divergent accounts and their import, it is first useful to refer to some of the basic principles on the entry and subsequent scope to withdraw a guilty plea.

[56] A guilty plea in open court is a formal admission of all of the essential elements of the charges. There are significant consequences that flow from such a plea. The accused has given up her right to fair trial conducted before an impartial and independent tribunal. She is no longer presumed to be innocent. There is consequently no longer a burden on the Crown to prove any aspect of the offences, save aggravating facts disputed by the accused at the time of sentence.

[57] A trial judge has a discretion whether to conduct an inquiry before accepting a guilty plea, or once tendered, to permit withdrawal. (See: *Brosseau v. The Queen*, [1969] S.C.R. 181, [1969] 3 C.C.C. 129; *Thibodeau v. The Queen*, [1955] S.C.R. 646; and *Adgey v. The Queen*, [1975] 2 S.C.R. 426, 13 C.C.C. (2d) 177.) The *Criminal Code* seeks to encourage an inquiry by trial judges before accepting a plea. Section 606 provides in part:

> **606.** (1.1) A court may accept a plea of guilty only if it is satisfied that the accused
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> (a) is making the plea voluntarily; and
>
> (b) understands
>
> (i) that the plea is an admission of the essential elements of the offence,
>
> (ii) the nature and consequences of the plea, and
>
> (iii) that the court is not bound by any agreement made between the accused and the prosecutor.
>
> (1.2) The failure of the court to fully inquire whether the conditions set out in subsection (1.1) are met does not affect the validity of the plea.

[58] In the case at bar, there was no inquiry by the trial judge before accepting the appellant's pleas of guilt. However, as directed by s. 606(1.2) the failure to conduct an inquiry does not dictate invalidity. In fact, the appellant does not suggest the trial judge made any error of law, or otherwise failed to exercise his discretion appropriately. There was no indication then, or at any later time, of anything that might call into question the validity of the pleas in the trial court. It

was only after sentence that the appellant now says his pleas are invalid and he should be permitted to withdraw them.

[59] This Court also has a discretion to permit an appellant to change a guilty plea on appeal. An oft quoted expression of this power is that of Dickson J., as he then was in *Adgey v. The Queen*, supra. He wrote (pp. 189-90):

> This Court in *R. v. Bamsey* (1960), 125 C.C.C. 329 at p. 333, [1960] S.C.R. 294, 32 C.R. 218, held that an accused may change his plea if he can satisfy the appeal Court "that there are valid grounds for his being permitted to do so". It would be unwise to attempt to define all that which might be embraced within the phrase "valid grounds". I have indicated above some of the circumstances which might justify the Court in permitting a change of plea. The examples given are not intended to be exhaustive.

[60] The circumstances referred to by Dickson J. in *Adgey* were explained by this Court in *R. v. Melanson* (1983), 59 N.S.R. (2d) 54, where Pace J.A. said:

> [6] The appeal against conviction would necessitate allowing the appellant to change his plea of guilty to one of not guilty. A review of the authorities indicates that an appeal court may permit a change of plea if the appellant can satisfy the court that valid grounds exist for permitting such change. Valid grounds may be shown if it appears that the appellant did not fully appreciate the nature of the charge or the effect of his plea or upon inquiry it is shown by the evidence that the appellant never intended to admit facts which are an essential ingredient of the offence charged. Valid grounds may also be shown if upon the admitted facts he could not in law have been convicted of the charge. See: *Adgey v. The Queen*, (1975), 35 C.R.N.S. 426; *Brosseau v. The Queen*, [1969] S.C.R. 181; *R. v. Bamsey*, [1960] 5 C.R. 294.

[61] Hallett J.A. in *R. v. Hirtle* (1991), 104 N.S.R. (2d) 56 (para. 15), accepted that improper inducements or threats, or a miscarriage of justice could also support allowing a change of plea at trial or on appeal. In *R. v. Lamoureux* (1984), 13 C.C.C. (3d) 101 (Que.C.A.), the Court permitted an appellant to withdraw his guilty plea on appeal. The appellant's trial lawyer admitted he had in fact pressured the appellant to plead guilty and that the appellant at no time wanted to plead guilty.

[62] The Supreme Court of Canada endorsed the decision by Brisson J.A. of the Quebec Court of Appeal in *R. v. Laperrière* (1995), 101 C.C.C. (3d) 462, [1996] 2

S.C.R. 284, 109 C.C.C. (3d) 347 where guilty pleas were entered due to pressure from trial counsel who had been personally implicated as a suspect in related charges.

[63] In the absence of a significant legal error in a withdrawal application before a trial judge, the power of an appeal court to permit the withdrawal of a guilty plea on appeal is tied to s. 686(1)(a)(iii) – that there has been a miscarriage of justice. The onus is on the appellant to demonstrate the requisite grounds that call into question the validity of the pleas. These issues have been canvassed on a number of occasions by this Court. Two examples will suffice. In *R. v. Murphy* (1995), 138 N.S.R. (2d) 231, Chipman J.A., for the Court, wrote:

> **[9]** Despite his guilty pleas, the appellant is asking this Court to give leave to withdraw them. In support of his application, he states that he entered the guilty pleas on the advice of counsel on the understanding that a joint recommendation for a short custodial sentence had been worked out with the Crown. The record and, in particular, the statements of counsel for the appellant as well as the Crown, belies this suggestion. Appellant's counsel had suggested to the trial judge that a custodial term in the range of 60 to 90 days should be considered. Crown counsel submitted that an appropriate sentence would be a lengthy stay at a provincial institution or a very brief stay at a federal institution.
>
> **[10]** This Court will permit the withdrawal of a guilty plea only in exceptional circumstances. Such circumstances include, but are not limited to, a basic misunderstanding by the accused of the nature of the charge or the effect of his plea, that he never intended to admit guilt or that there was a serious question as to his mental state at the time of entering the plea. Such grounds are difficult to substantiate if at the time of entering the guilty plea, the accused was represented by counsel and the plea made in open court in the presence of the accused. See **R. v. Melanson** (1983), 59 N.S.R. (2d) 54; **R. v. Boutlier** (1986), 75 N.S.R. (2d) 157; **R. v. Alchorn** (1988), 86 N.S.R. (2d) 371, all decisions of this Court.
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> **[11]** None of the circumstances warranting the granting of leave to withdraw a guilty plea appear in this case. The appellant concedes that he intended to plead guilty. The only misunderstanding under which he may have laboured related only to the sentence that would be imposed. In the circumstances, leave to withdraw the plea should be refused.

[64] In *R. v. Neven*, 2006 NSCA 72, (2006) 245 N.S.R. (2d) 52, guilty pleas were permitted to be withdrawn. The issue was raised for the first time on appeal. There had been an appropriate inquiry by the trial judge about the voluntariness of

the plea. The appellant claimed he had been pressured by threats he says were made by the police to arrest, charge, and incarcerate members of his family. Bateman J.A., writing for the Court, referred with approval to the decision of the British Columbia Court of Appeal in *R. v. Temple*:

> [16] In **R. v. Temple** [1995] B.C.J. No. 331 (Q.L.) (B.C.C.A.) the appellant applied on appeal to withdraw the guilty pleas on which he had been sentenced. It was his submission that the pleas were not truly voluntary and that he had been wrongly advised in the court below that he could not withdraw his pleas. Southin, J.A. discussed "a miscarriage of justice" as it relates to a questionable guilty plea:
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> > ¶ 46 In many of the cases in which a plea of guilty has been allowed to be withdrawn, it has been, quite simply, because the accused did not admit to an essential element of the offences of which he was charged. See *Adgey v. R.*, [1975] 2 S.C.R. 426 for the principle. See also *R. v. Hughes* (1987), 76 A.R. 294 and *R. v. Fraser and Louie* (1971), 5 C.C.C. (2d) 439 (B.C.C.A.). There is nothing in the record before us and there is nothing in the fresh evidence to show that the appellant disputed, either in court or out of court to his counsel, any of the essential ingredients of the offences to which he pleaded guilty. He did dispute that the assaults were sexual assaults and that dispute was resolved by the amendment to the charges. He disputed the charges concerning Mr. Schmid and those charges were stayed. By what happened on the 22nd February and 29th September, he admitted the essential ingredients of the charges which remained.
> >
> > ¶ 47 That does not, of course, end the matter. A miscarriage of justice occurs if counsel has "pressured" an accused who does not admit his guilt to pleading guilty (see *R. v. Lamoureux* (1984), 13 C.C.C. (3d) 101 (Que. C.A.)), if the accused appears to have been thrown, so to speak, to the wolves by counsel who is in a conflict of duty (see *R. v. Stork and Toews* (1975), 24 C.C.C. (2d) 210 (B.C.C.A.)) or if the accused did not understand what was happening (see *R. v. Meers* (1991), 64 C.C.C. (3d) 221 (B.C.C.A.)).
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> > ¶ 48 These are merely illustrations. The term "miscarriage of justice" does not admit of closed categories.
> >
> > ¶ 49 <u>I do not doubt that if, by some means, the Crown extorted a plea, for instance by an unlawful threat of some sort, that too would be a miscarriage of justice</u>. ... (Emphasis added)

[65] Bateman J.A. was satisfied, after weighing all of the factors, that the appellant had met the burden of demonstrating his plea was invalid because it was not voluntary.

[66] I now return to the evidence the parties have submitted relevant to the suggestion that the appellant should now be permitted to withdraw his guilty pleas. The appellant swears in his affidavit that on the morning of his trial he was asked by Mr. Peacock what he expected to happen at trial. The appellant says he answered "to be found not guilty as I am not guilty". He then claims Peacock told him he would not represent him at trial due to what the appellant had said to the police. The appellant says he was upset with Peacock for not telling him earlier so he could have looked for another lawyer. He claims Peacock said that if the appellant fired him, it did not mean the court would wait for the appellant to get another lawyer. In other words, the court may force him to go ahead without a lawyer. Peacock then offered to talk to the Crown to see what they would be seeking on sentence. Twenty minutes later, Peacock came back and told him the Crown was seeking three years less one year for remand time, for a total sentence of two years. Despite his expression of being treated unfairly and being the victim in the case, he told Peacock he would plead guilty.

[67] After pleas were entered and his sentence set over to March 31, 2008 for the preparation of a Pre-Sentence Report, the appellant says he felt he made "a big mistake in pleading guilty" and the next day tried to reach Mr. Peacock by phone. He was unsuccessful, despite trying every day for a week, being put off by Peacock's receptionist that he was busy and unavailable to speak with him. During sentence, the Crown recommended five years and not the net two years he had been told.

[68] Mr. Peacock's affidavit sets out a significantly different account on key points. He says he did ask the appellant what he hoped to gain by going through a trial. He does not set out what response the appellant gave. Peacock says he advised the appellant he would likely end up with a longer sentence if he did not accept responsibility for his actions and plead guilty.

[69] Peacock swears that the appellant authorized him to discuss a plea arrangement, and even proposed that he was willing to plead guilty on the assault charges if the Crown would agree to a two year sentence and drop the unlawful

confinement and uttering threats charges. When Peacock discussed a possible plea arrangement, the Crown would not agree to drop any charges or agree to any joint recommendation. The only concession was that if the appellant pled guilty the Crown would accept the facts as set out in the appellant's videotaped statement. To Mr. Peacock, this was a favourable concession. The appellant does not suggest otherwise.

[70] Peacock says the appellant accepted his advice to change his plea to guilty. He also says he advised the appellant there was no deal with the Crown as to length of sentence. The Crown would be seeking federal time, and he would argue that a two to three year sentence was appropriate. There would be no guarantee it would not be higher.

[71] Mr. Peacock was adamant that at no time did the appellant seek to contact him after the pleas were entered. Phone messages are forwarded to lawyers in his office by a software program, and he received no message from the appellant until after the sentence hearing. In cross-examination in this court, he was also adamant he would not and did not pressure the appellant by any suggestion that he would withdraw and leave him to the mercy of going to trial on his own.

[72] Although not strictly relevant to resolving the differing versions over what Mr. Peacock told the appellant, the trial Crown Attorney set out in her affidavit that at no time did she ever indicate the Crown would seek a period of three years, let alone that length of sentence less one year for remand time.

[73] Taken at its highest, the appellant suggests that his pleas of guilty were not voluntary, but produced by unfair pressure by trial counsel. However, it is not only important to realize what the appellant has said, but what he has not said. He does not say he had any misunderstanding about the nature of entering the plea, nor any misunderstanding that ultimately the matter of sentence was for the trial judge. Significantly, he does not dispute the facts alleged by the Crown at the sentencing hearing – either then or before this Court. The appellant does not contest that the facts alleged before the trial judge were essentially what he had told the police in his three hour plus statement. The appellant's bald assertions in his affidavit that he expected to be found not guilty at trial, as he was not guilty, are not borne out by the evidence.

[74] Let me explain. The appellant does not mention before this Court any defence to the charges. The appellant's statement essentially forecloses any defence. As mentioned earlier, there is no suggestion of any issue casting doubt on the admissibility of the statement. Neither does the appellant contend what he told the police in his statement was inaccurate or untrue. In fact, the contrary is evident. The probation officer who interviewed the appellant for the preparation of a Pre-Sentence Report said "... the subject took responsibility for the offences and said he was sorry for what he had done to the victims...".

[75] At the sentence hearing the appellant raised no protest that his plea was involuntary nor sought to discharge trial counsel. In fact, after sentence had been passed, the appellant raised no protest but said: "Your Honour, may I say something? From the beginning, I spoke the truth to the RCMP and they noted that." Indeed in this Court, he again readily admitted, without qualification, that he had told the truth to the RCMP. There may well be instances where the seeming inability of an appellant to identify a viable defence will not preclude relief where a court is satisfied that a plea was truly involuntary, or some other valid ground exists, such that upholding the plea would constitute a miscarriage of justice. This is not one of those cases.

[76] The claims by the appellant that Mr. Peacock unfairly pressured him into pleading guilty are simply not credible. The evidence of the appellant is inconsistent internally, and improbable. For example, in his affidavit, he swears that Peacock told him the Crown's position was one of three years imprisonment less one year credit for time spent on remand. By March 3, 2008 the appellant would have spent approximately 2.5 months on remand. It is difficult to accept that anyone would have realistically suggested he get 4 times the usual credit for time served. Even if one figures another month on remand until the sentence hearing, it would still amount to more than 3 times the usual credit. Furthermore, his evidence on this issue varied. During cross-examination, the appellant testified to his belief he was to get a two-year sentence less remand time, for a net sentence of 16 months imprisonment.

[77] If the story of the appellant were true about the improper pressure, and being completely misled by Peacock as to the Crown's position on sentence, it is strange that the appellant said nothing to the probation officer about being unfairly treated.

Instead, as mentioned above, he told the probation officer he accepted responsibility for what he had done and expressed remorse.

[78] During the sentence hearing on March 31, 2008 the Crown made its recommendation for a five year sentence, less a 2-1 credit for time served. Court broke to deal with other matters, and then recessed. Yet, the appellant does not say he voiced or even tried to voice any complaint to Mr. Peacock over the Crown's recommendation.

[79] I have little doubt Mr. Peacock advised the appellant that he should plead guilty. That advice may have caused the appellant to feel pressure to plead guilty. It came on the morning of his trial. However, conviction seemed inevitable. By the appellant's own words, which he still adopts as true, he assaulted the complainant as alleged and unlawfully confined her. Perhaps it would have been better had trial counsel had a frank discussion with the appellant before the morning of the trial, or reduced to writing in some way the instructions he received from the appellant to plead guilty. Nonetheless, the failure to do so does not alter the essential fact that the appellant knew the consequences of pleading guilty and instructed his trial counsel to do so on his behalf. There is no basis to conclude that he did not understand that he was admitting to the essential elements of the offence, or that the evidence available to the Crown did not support the offences. The only basis to suggest a potential miscarriage of justice is the appellant's claim that he was unfairly pressured into pleading guilty by threats of abandonment by trial counsel and being misled about the length of the Crown's sentence recommendation. The sole evidence supporting such a claim is that of the appellant, which is not credible. Accordingly, I would dismiss the motion to adduce fresh evidence and the appeal.

Beveridge, J.A.

Concurred in:

Bateman, J.A.

Farrar, J.A.