

NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Thompson*, 2014 NSCA 111

Date: 20141209
Docket: CAC 418027
Registry: Halifax

Between:

Ivan Santell Thompson

Appellant

v.

Her Majesty the Queen

Respondent

Judge: Chief Justice J. Michael MacDonald
Motion Heard: December 4, 2014, in Halifax, Nova Scotia in Chambers
Held: Motion for state funded legal counsel pursuant to s. 684 of the *Criminal Code* is dismissed.
Counsel: Appellant, in person
Marian Fortune-Stone, Q.C., for the respondent
Edward Gores, Q.C., for the Nova Scotia Department of Justice (Attorney General)

Decision:

[1] The appellant Ivan Santell Thompson was sentenced to a total of three years for eight weapons offences. He has filed an appeal against conviction and asks me to assign counsel to act on his behalf. My authority to do so is set out in the *Criminal Code*, R.S.C., 1985, c. C-46:

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.

(2) Where counsel is assigned pursuant to subsection (1) and legal aid is not granted to the accused pursuant to a provincial legal aid program, the fees and disbursements of counsel shall be paid by the Attorney General who is the appellant or respondent, as the case may be, in the appeal.

[2] The respondent Attorney General concedes that Mr. Thompson lacks sufficient means to retain counsel. The question for me therefore becomes whether it would be in the interests of justice to order state-funded counsel. In **R. v. Morton**, 2010 NSCA 103, I noted that the answer to this question involves potentially five related considerations; namely (a.) the merits of the appeal, (b.) its complexity, (c.) the Appellant's ability to represent himself, (d.) the Court's role, and (e) the Crown's role:

¶4 Here, the Attorney General concedes that Ms. Morton lacks the means to otherwise retain counsel so I am left to complete only the "interests of justice" analysis. As Cromwell J.A. (as he then was) noted in *R. v. Assoun*, 2002 NSCA 50, this inquiry involves a host of considerations including (a.) the merits of the appeal, (b.) its complexity, (c.), the appellant's capability and (d.) the Court's role to assist: . . .

¶5 To Cromwell J.A.'s list I would add a fifth consideration, namely the responsibility of crown counsel to ensure that the appellant is treated fairly. I will now elaborate on each of these five factors.

[3] I will now address each of these considerations.

The Merits of the Appeal

[4] Mr. Thompson must at least raise an arguable issue on appeal. Here are his grounds:

1. The Learned Trial judge failed to properly apply the law surrounding circumstantial evidence;
2. The Learned Trial Judge failed to properly apply the law relating to witness identification;
3. The Learned Trial Judge failed to consider significant inconsistencies contained in the evidence of numerous Crown witnesses; and
4. Any other grounds that the Honourable Court deems just.

[5] It is clear that the first two grounds were live issues at trial. Issues of identification and circumstantial evidence can often be quite tricky. I am prepared to say that Mr. Thompson has raised an arguable issue in these circumstances.

The Complexity of the Appeal

[6] This is not a complex appeal. The main issue at trial involved the identification of a passenger in a car who fled the scene of a roadside stop. To convict, the trial judge relied on the police officer's eye witness evidence, as well as other circumstantial evidence. There were no evidentiary rulings of note.

The Appellant's Ability to Represent Himself

[7] Mr. Thompson has a grade 11 education. He told me that he left school due to family troubles and not as a result of this inability to learn. He did well in English. He also told me that he has read the transcript already without difficulty. He struck me as being well spoken and intelligent.

The Court's Role

[8] As with all appeals, this Court will carefully review the record with a view to detecting reversible error. In **R. v. Grenkow**, [1994] N.S.J. No. 26 (N.S.C.A.), this Court noted:

¶26 Third, 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. There is a problem, of course, in that the appellant may not recognize that he or she has a meritorious point and there is no requirement that a court of appeal dig around in a transcript to discover errors. However, in most appeals where an appellant appears in person, and for the most part those are sentence appeals, any errors will come to the attention of the appeal court. A review of the results of appeals from conviction show that in the past 18 months two appellants representing themselves have been successful.

The Crown's Role

[9] As I noted in **Morton**, *supra*, the Crown has an important role to play when it comes to ensuring that an appellant gets a fair appeal:

¶18 Finally, let me turn to the Crown's duty to ensure that the appellant is treated fairly. Here, the famous quote from the Supreme Court of Canada in *Boucher v. the Queen*, [1955] S.C.R. 16 beginning at page 23 bears repeating:

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.*

[Emphasis added]

¶19 This important tradition exists in Nova Scotia and it includes crown attorneys who handle criminal appeals. We would expect the Crown in this case to assist the Court in ensuring that the appellant receives a fair appeal.

Conclusion

[10] Considering (a.) the narrow issues on appeal, (b.) Mr. Thompson's ability to understand the issues and to articulate his position, (c.) this Court's commitment to carefully review the record and (d.) the Crown's responsibility for a fair process, I am satisfied that Mr. Thompson will receive a fair appeal without legal counsel.

Disposition

[11] The motion for state funded legal counsel pursuant to s. 684 of the *Criminal Code* is therefore dismissed.

MacDonald, C.J.N.S.