SUPREME COURT OF NOVA SCOTIA
Citation: *R v. Marr,* 2019 NSSC 198

Date: 20190510
Docket: Hfx No. 482693
Registry: Halifax

Between:

Her Majesty the Queen

Appellant

v.

Jolene Holly Marr, Francis Eileen Bignell

Respondents

Decision

Judge: The Honourable Justice John P. Bodurtha

Heard: April 17, 2019, in Halifax, Nova Scotia

Oral Decision: May 10, 2019

Written Release: August 12, 2019

Counsel: Leonard MacKay, for the Federal Crown
Richard Norman and Sarah Shiels, for the Respondents

By the Court (orally):

Background

[1] The Respondents, Jolene Marr and Francis Bignell, are members of the Sipekne'katik band. They were charged with two sets of alleged contraventions of s. 7 of the Aboriginal Communal Fishing Licenses Regulations. Ms. Marr was also charged with obstructing a fisheries officer contrary to s. 62 of the *Fisheries Act*.

[2] By oral decision of Judge MacDonald, on October 19, 2018, she granted the Respondents' request for a court order, ordering the government to provide funding for counsel at the Respondents' trial and staying the proceeding until the government provided funding for trial counsel for the Respondents.

[3] By notice of appeal dated November 26, 2018, the Crown appealed the order of Judge MacDonald and advised the court that it would not provide counsel for either Respondent. In this application, it was the Crown's position that either the appeal on the merits would reverse Judge Macdonald's decision, or if the appeal was unsuccessful the stay would continue.

[4] The Respondents have brought an application pursuant to s. 684 of the *Criminal Code* for counsel to be assigned to represent them on the Crown's appeal of Judge MacDonald's order. In *R. v. Kelsie*, 2016 NSCA 72 (N.S.C.A. [In Chambers] at paragraph 11), Justice Farrar reviewed s. 684 and considered the test for funding as follows:

> There are two inquiries under s. 684(1):
>
> i. whether the Respondents have sufficient means to obtain legal assistance; and,
>
> ii. whether it is desirable in the interests of justice that the Respondents have legal assistance (*R. v. Martin*, 2015 NSCA 82 (N.S.C.A. [In Chambers]) at para. 16).

[5] The Crown in this application concedes that the Respondents are not eligible for Nova Scotia Legal Aid assistance, and do not have the means to retain private counsel. As a result, this Court will focus on the second inquiry, whether it is desirable in the interests of justice that the Respondents have legal assistance.

[6] Justice Farrar in *R. v. Kelsie*, supra, para. 13 discussed a number of considerations to consider in determining whether it is in the interests of justice to appoint counsel. Those considerations are as follows:

i. the merits of the appeal;
ii. the complexity of the appeal;
iii. the appellant's capability;
iv. the Court's role to assist; and
v. the responsibility of Crown Counsel to ensure that the applicant is treated fairly (*R. v. Martin*, supra, para. 18.)

The merits of the appeal

[7] A consideration of the merits of the appeal requires the Judge hearing the application to look at the merits of the appeal and determine whether the case raises arguable grounds, which are too complex for the accused to advance. The merits inquiry should not go any further than determining whether the case raises an arguable issue (*R. v. Bernardo*, 1997 CarswellOnt 4956 (ONCA)).

[8] This is not your traditional application, as the Respondents were successful on their Rowbotham application before Judge MacDonald. They asserted since it is the Crown's application it is the Crown that must show an arguable issue.

[9] As the test applies to the Respondents, it is not surprising they would concede that Crown has an arguable issue. However, the Crown maintains it is still necessary for the Respondents to overcome the burden as it remains on them for this part of the test.

[10] I find the Respondents do have an arguable issue because of their potential defences to the charges.

The complexity of the appeal

[11] This factor was addressed in *Bernardo*, at paragraph 24. It reads as follows:

> Having decided that the appeal raises arguable issues, the question becomes - can the appellant effectively advance his grounds of appeal without the assistance of counsel? This inquiry looks to the complexities of the arguments to be advanced and the appellant's ability to make an oral argument in support of the grounds of appeal. The complexity of the argument is a product of the grounds of appeal, the

> length and content of the record on appeal, the legal principles engaged, and the application of those principles to the facts of the case. An Appellant's ability to make arguments in support of his or her grounds of appeal turns on a number of factors, including the appellant's ability to understand the written word, comprehend the applicable legal principles, relate those principles to the facts of the case, and articulate the end product of that process before the court.

[12] This is a complex appeal with issues ranging from the Respondents' right to silence, and the Respondents' right to make full answer and defence to the charges against them. The appeal raises Indigenous constitutional issues, s. 11(d) of the *Charter* and the United Nations Declaration on the Rights of Indigenous People. These are complicated matters for experienced counsel, let alone, self-represented litigants.

[13] I disagree with the Crown's submission that "the appellants' appeal is easily disposed of with no assistance from defence counsel". There are significant legal issues that require counsel's assistance. In particular, the Crown raised before this Court, and intends to raise on appeal, that the Respondents must show there is an "air of reality" to their defence that forms the basis for their Rowbotham application. The air of reality will be a live issue on appeal because the Respondents believe the Crown is not entitled to know their defence, or at least as much of the defence as the Crown wishes to have knowledge of prior to the hearing. To deny the Respondents the opportunity to have counsel argue that issue on the appeal of Judge MacDonald's decision is not in the interests of justice.

The Respondents' capability

[14] The Respondents each filed an affidavit laying out their education, experience with the court system, and their confidence in their ability to represent themselves. Ms. Marr is a high school graduate, and Ms. Bignell has two university degrees. Both Respondents have limited experience with the Court system. Ms. Marr, at paragraph 29 of her affidavit, states that she is not capable to represent herself. It reads:

> I do not feel capable of representing myself in this proceeding. I believe that I have a right to go fishing, but I do not have enough education and knowledge about the law to defend myself properly. I believe that if I was provided with a lawyer who understood my Treaty rights, and was properly informed about my case, that I could defend myself against the fishing charges.

[15] Ms. Bignell, in paragraphs 18-20 of her affidavit, describes how she does not feel capable to represent herself, and speaks of her confusion with the process to date, her fears of facing the matter alone, and her desire to have counsel.

[16] I agree that where the accused cannot ‘effectively present’ the appeal without the assistance of counsel or, alternatively, where the court cannot ‘effectively decide’ the appeal without the assistance of counsel acting for the accused; counsel must be assigned to act for an accused (*Bernardo*, supra, at para. 21).

The Court's role to assist

[17] I agree and am bound by the decision from our Court of Appeal in *R. v. MacPherson*, 2018 NSCA 87 (N.S.C.A. [In Chambers] at para. 42) that the court, along with the Crown, has a role to assist self-represented litigants to ensure the self-represented litigant receives a fair appellate hearing.

[18] The court has a role in assisting self-represented litigants. However, this case involves complex constitutional arguments which would unduly expand the court's role to present complex constitutional arguments on behalf of the self-represented accused.

The responsibility of Crown counsel to ensure that the applicant is treated fairly

[19] I have no doubt in my mind that the Crown would meet its ethical obligations and ensure that the Respondents are treated fairly. However, it is often an unfair position and an unrealistic position to put the Crown in. The Crown would be forced to advocate its case, and at the same time aid the Respondents in making theirs. In this case, where on the appeal of Judge MacDonald’s decision there may be novel arguments with respect to the level of defence that must be filed in support of a Rowbotham application, and constitutional arguments, it is more suitable to have the Respondents represented by counsel.

Conclusion

[20] After reviewing the evidence, I conclude that in order for the Respondents to effectively present their interests on appeal they must be represented by counsel.

[21] The nature of the appeal will involve, but not be limited to, Indigenous constitutional issues, s. 11(d) of the *Charter*, the United Nations Declaration on the Rights of Indigenous People, and the evidentiary lengths an applicant must show on a Rowbotham application.

[22] The Respondents' trial will be complex, and they should have the benefit of counsel. The Respondents' application for counsel pursuant to s. 684 of the *Criminal Code* is granted.

[23] There will be no award as to costs because I do not find this to be an exceptional circumstance warranting costs against the Crown.

Bodurtha, J.