COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Rafferty, 2013 ONCA 741
DATE: 20131210
DOCKET: M43090 (C56187)

Rosenberg J.A. (In Chambers)

BETWEEN

Her Majesty the Queen

Respondent

and

Michael Rafferty

Applicant/Appellant

Paul Calarco, for the applicant

Randy Schwartz, for the respondent

Heard: December 2, 2013

On application for an order pursuant to s. 684 of the *Criminal Code* and for an order for extension of time to appeal conviction for sexual assault causing bodily harm and kidnapping entered on May 10, 2013 by Justice Thomas A. Heeney of the Superior Court of Justice, sitting with a jury.

ENDORSEMENT

[1] The appellant applies for an order under s. 684 of the *Criminal Code* for appointment of counsel for his appeal. The appellant also applies for an extension of time to appeal his convictions for sexual assault causing bodily harm and kidnapping. The Crown agrees that the extension of time should be granted.

[2] While Mr. Schwartz opposes the s. 684 application, he fairly concedes that there are a number of factors that favour counsel being appointed. First, there is no dispute that the appellant lacks sufficient means to retain counsel. Second, there is no dispute that the appellant cannot argue the appeal without the assistance of counsel. The 33-year old appellant has a grade 9 education and is currently imprisoned outside of Ontario. He is in segregation and does not have access to a law library. Crown counsel's position is that the appeal lacks merit and, in any event, the issues are relatively straight-forward and could be argued with the assistance of duty counsel as an inmate appeal.

[3] Third, Mr. Schwartz also points out that this is a case that falls within the circumstances identified by Doherty J.A. in *R. v. Bernardo* (1997), 121 C.C.C. (3d) 123 (Ont. C.A.), at paras. 19 and 26:

> Appellate review as provided for by Part XXI of the *Criminal Code* is not an indulgence to be doled out to those who are somehow seen as deserving of the opportunity to challenge their conviction. The salutary purposes underlying broad appellate review on appeals from convictions are engaged and must be served no matter how heinous the crime or despicable the accused. *Detached and reflective appellate review of the trial process is perhaps most important in notorious, emotion-charged cases involving the least deserving accused. It is in those cases that the public eye is most closely focused on the process and the mettle of the criminal justice system undergoes its severest test. By giving the most repugnant appellant full recourse to meaningful appellate review, and by subjecting the apparently most deserving convictions to careful appellate scrutiny the integrity of the process is*

> *maintained* and a commitment to the unbending application of the rule of law is affirmed. [Emphasis added.]
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> …
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> In addition to these considerations, a further practical concern leads me to believe that counsel should be assigned. In inmate appeals, the court expects and receives the full co-operation of counsel appearing for the Crown. Often, the Crown alerts the court to matters which are favourable to the appellant and sometimes even assists the appellant in making his or her submissions. Given the notoriety of this case, and the unspeakable horror of the appellant's crimes (even on his own admissions), it would be unrealistic, and unfair to Crown counsel to expect that he or she would be able, despite best intentions, to provide the kind of assistance to the appellant which is routinely provided to other in-person appellants. It is better for the Crown if this appellant has his own advocate.

[4] This motion turns on whether it is in the interests of justice that the appellant have legal assistance because he cannot effectively present his appeal without the help of a lawyer. In this appeal, the resolution of that issue turns on whether there is merit to the appeal and whether the availability of duty counsel is a suitable substitute for appointed counsel. For the following reasons, counsel should be appointed in accordance with s. 684.

[5] The affidavit of Stacey Nichols contains an outline of the facts and of the proposed grounds of appeal. I have also had an opportunity to review the lengthy charge to the jury and the several rulings that lie at the heart of several of the

grounds of appeal. In my view this material shows that the appeal is an arguable one in the sense explained in *Bernardo* at para. 22.

[6] While there are other grounds of appeal referred to in Ms. Nichols' affidavit, in his submissions, Mr. Calarco focused on three grounds of appeal. The first ground of appeal is the so-called accessory after the fact defence. This is not a defence in the classic sense and is more properly characterized as a submission that the charge to the jury on the use of after-the-fact conduct was deficient. In short, the appellant would argue on appeal that the conduct relied upon by the Crown to show that the appellant was a party to the first degree murder is consistent with the appellant merely being an accessory after the fact to the killing. I agree with Mr. Calarco that on this record it appears that the trial judge's instructions on the issue were deficient. It seems to me that the Crown response is a submission that no substantial wrong was occasioned because of the strength of the Crown's case and the directions on after-the-fact conduct that were given. The burden would be on the Crown to establish that no substantial wrong or miscarriage of justice was occasioned. This will involve a full understanding of the case and the complexities of applying the test in s. 686(1)(b)(iii) of the *Criminal Code*.

[7] The second ground of appeal concerns the failure of the trial judge to give a *Vetrovec* warning in relation to Ms. McClintic. There is no question that the trial judge refused to give this warning because of the position taken by the defence.

Mr. Calarco points out that in making this decision the trial judge was influenced by the concurring reasons of Bastarache J. in *R. v. Brooks*, 2000 SCC 11, [2000] 1 S.C.R. 237. It is arguable that the reasons of Bastarche J. were not the reasons of the majority on this issue and this is one of the rare cases where a *Vetrovec* warning was not a matter of discretion, as discussed in *R. v. Bevan*, [1993] 2 S.C.R. 599, at 614-15, and in the dissenting reasons of Major J. in *Brooks* at para. 80. Arguably Major J. is speaking for a majority of the court on this issue in light of the concurring reasons of Binnie J. at para. 127. The circumstances surrounding the decision whether or not to give the warning are complex. The argument that this was one of the cases where the trial judge should have overridden the tactical decision of experienced trial counsel is a difficult one and would again require a full familiarity with the trial record. Similarly, this may be one of the cases where the proviso can be applied as Binnie J. did in *Brooks*, given the strength of the prosecution's case and the warning that was given by the trial judge in relation to Ms. McClintic's testimony. But, that again would be a matter of some complexity requiring the assistance of counsel.

[8] The third ground of appeal concerns the decision of the trial judge to allow one of Ms. McClintic's prior inconsistent statements to be admitted for its truth in accordance with *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740. In this statement, which was one of several that she gave to the police, Ms. McClintic implicated the

appellant as having actually committed the murder. She did not, however, resile from her position that she was a party to the murder. The situation presented to the trial judge was an unusual one and whether the issues were properly resolved may involve the application of the reasoning in the very recent decision of the Supreme Court of Canada in *R. v. Youvarajah*, 2013 SCC 41. Mr. Schwartz makes a very compelling argument that the trial judge properly exercised his discretion in admitting the evidence. However, I am satisfied that given the novelty of the situation and the argument, the ground of appeal is arguable.

[9] Given Mr. Schwartz's very fair position that the appellant could not argue these grounds of appeal without the assistance of counsel, the issue is whether duty counsel would be an adequate substitute for appointed counsel. A letter from Mr. Russell Silverstein explains the operation of the duty counsel system. He points out that duty counsel is not a substitute for counsel of choice and that duty counsel cannot be expected to argue appeals where the appeal record is extremely large and the issues are sufficiently complex or novel. In my view, this case falls within that category of cases. It may well be that, with the agreement of counsel, the actual record that will be placed before the appeal court will be relatively limited. But, that result can only be fairly achieved with the assistance of appointed counsel familiar with the proceedings at the three-month trial. Duty counsel cannot be expected to perform that task in a case like this.

[10] And, in my view, this is a case of sufficient complexity that duty counsel will not suffice. Duty counsel provide a remarkable service to the court and the unrepresented inmates. They work diligently and provide hours of their time without compensation to assist inmates, including inmates convicted of serious crimes serving lengthy sentences of imprisonment. However, those cases tend to have a limited record and involve one or two discrete points. Duty counsel cannot be expected to take on a case of this complexity involving difficult grounds of appeal, some of which will involve an attack on the tactical decisions made by very experienced trial counsel.

[11] I agree with Mr. Schwartz that although Legal Aid Ontario has refused to fund the appeal, it would be appropriate to refer the matter back to the Corporation pursuant to s. 28(6) of the *Legal Aid Services Act, 1998*, S.O. 1998, c. 26. In my opinion it is desirable in the interests of justice that the appellant be represented.

[12] If legal aid is refused, an order will go appointing Mr. Calarco as counsel, his fees and disbursements to be paid by the Attorney General for Ontario.

[13] As I indicated to counsel at the hearing of the motion, this is a case that would benefit from case management. The Associate Chief Justice has asked me to case manage this appeal. Accordingly, I direct the following:

> 1. If Legal Aid Ontario has not made a decision in this matter by December 31, 2013, I would ask the

> parties to be in touch with Ms. Schirripa to arrange a conference call with me the week of January 6, 2014.
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> 2. Counsel should meet by December 31, 2013 to agree on those parts of the transcript that are required for the appeal. Based on my review of the materials placed before me on this motion it would seem to me that the evidence of McClintic will be necessary as well as the transcript of the pre-charge conference, the addresses of counsel, the charge to the jury and any objections to the charge. This should be the starting point for those discussions. There should be some demonstrable reason why other parts of the transcript are required. If counsel are unable to agree, they should be in touch with Ms. Schirripa to arrange a conference call with me the week of January 6, 2014.
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> 3. It is in the public interest and the interest of justice that this appeal proceed to hearing as soon as possible. I would ask counsel to be in touch with Ms. Schirripa to arrange a conference call no later than the end of May 2014 to arrange a timetable for filing of factums and the appeal book.

[14] As indicated earlier in my reasons, the application to extend time to appeal the convictions for sexual assault causing bodily harm and kidnapping is granted.

"M. Rosenberg J.A."