COURT OF APPEAL OF YUKON

Citation *R. v. Gaber,*
2017 YKCA 5

Date: 20170525
Docket: 16-YU802

Between:

Regina

Respondent

And

Michael Gaber

Applicant

Before: The Honourable Madam Justice Stromberg-Stein
(In Chambers)

On appeal from: an order of the Supreme Court of Yukon, dated June 17, 2016 (*R. v. Gaber,* 2016 YKSC 26, Whitehorse Registry No. 14-01508)

Oral Reasons for Judgment

Counsel for the Appellant:	D. Tarnow
Counsel for the Respondent:	E. Marcoux
Place and Date of Hearing:	Vancouver, British Columbia May 25, 2017
Place and Date of Judgment:	Vancouver, British Columbia May 25, 2017

Summary:

Application for appointment of counsel under s. 684 of the Criminal Code. Held: Application dismissed. The applicant has not provided adequate documentation evidencing insufficient means. The grounds of appeal have little merit as they challenge discretionary and fact-intensive findings. It is not in the interest of justice to appoint counsel.

[1] **STROMBERG-STEIN J.A.**: Mr. Gaber applies pursuant to s. 684 of the *Criminal Code*, R.S.C. 1985, c. C-46, for appointment of counsel. In fact, his application is more specific than that. He seeks the appointment of his trial counsel David Tarnow as well as an order directing the Attorneys General of the Yukon or Canada to provide the necessary funding subject to an assessment of counsel's bill. Even if this Court concludes that there should be an order appointing counsel pursuant to s.684, there is no entitlement to state-funded counsel of choice. This Court does not direct the appointment of a specific state-funded counsel save in very narrow, unusual or rare circumstances which, in my view, do not exist in this case. There is nothing in this case, in my view, to suggest that no other counsel would be able to protect Mr. Gaber's fair trial rights: see *R. v. McDiarmid*, 2015 YKCA 19; *R. v. Gagnon*, 2006 YKCA 12. Further, this court will not meddle in the payment of counsel's fees from the public purse. Those matters are properly left to Legal Services.

[2] Mr. Gaber is appealing his conviction for possession of methylphenidate (Ritalin) for the purposes of trafficking, contrary to s. 5(2) of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19. He was convicted by Mr. Justice Veale on June 17, 2016. He was sentenced to two years' imprisonment, together with ancillary orders, on September 28, 2016. He is no longer incarcerated having been released on parole on April 19, 2017, and he resides in a half-way house in Kamloops.

[3] On April 6, 2017, Mr. Justice Groberman granted Mr. Gaber an extension time to appeal.

Background

[4] Mr. Gaber worked as a Corrections Officer at the Whitehorse Correctional Centre. On December 26, 2013, Mr. Gaber arrived for his shift and was searched in a boardroom. A condom filled with 59 pills subsequently identified as Ritalin was found in his pocket.

[5] The discovery led to a search of Mr. Gaber's car. The search yielded a vacuum-sealed package containing tobacco and marihuana, as well as a bag with $5 and $20 bills.

[6] The RCMP attended and arrested Mr. Gaber. He was then given his first *Charter* warning and asked to speak with a lawyer.

[7] At trial, counsel for Mr. Gaber contended that his ss. 8, 9 and 10(b) *Charter* rights were infringed by the detention and search that led to the discovery of the Ritalin and marihuana. He sought to have the drugs excluded under s. 24(2).

[8] In reasons indexed as 2015 YKSC 38, Veale J. excluded from evidence the marihuana, but admitted the Ritalin. The judge found the search of Mr. Gaber in the boardroom was outside the ambit of the search authority granted by s. 22 of the *Corrections Act*, *2009*, S.Y. 2009, c. 3. Further, s. 22(3) required Mr. Gaber to consent, which the judge found he did not provide. Accordingly, the judge found the search was not authorized by law and was therefore unreasonable, and constituted a breach of s. 8 of the *Charter*.

[9] The judge also found Mr. Gaber was detained from when the pills were discovered. The failure to provide Mr. Gaber his right to counsel at that point amounted to a breach of his s. 10(b) rights. However, noting that virtually all of the submissions focused on ss. 8 and 10(b), he did not find a breach of s. 9.

[10] The judge then considered whether to exclude the evidence under s. 24(2) based on the framework from *R. v. Grant*, 2009 SCC 32. He considered the first factor, the seriousness of the *Charter*-infringing conduct, supported the exclusion of

the drug evidence because of the seriousness of the s. 10(b) breach, the flawed institutional policy that led to the s. 8-infringing vehicle search, and the overall pattern of disregard or ignorance of the *Charter* and the *Corrections Act*. Second, he found the three breaches had differing impacts on Mr. Gaber's *Charter*-protected interests, with the s. 10(b) breach having had a significant impact on his right to silence, as well as on his liberty and autonomy interests. Third, he observed the reliability of the drug evidence was not at issue, which weighed in favour of its admission. Balancing the s. 24(2) factors, the judge concluded the admission of the marihuana would undermine public confidence in the rule of law and excluded it. However, he admitted the Ritalin:

> [66] In balancing the s. 24(2) factors with respect to the Ritalin evidence, although there were multiple *Charter* breaches in the course of the investigation, including the s. 8 breach that led to the discovery of the Ritalin, the conduct of Superintendent Curtis and Deputy Superintendent Wooding prior to locating this evidence was less egregious than their conduct afterwards. Again, the impact of the state conduct on Mr. Gaber's *Charter*-protected interests was minimal, and the drug evidence is reliable and critical to the Crown's case. In the context of the allegations and the profound breach of public trust that a conviction for these offences would represent, in my view a reasonable person informed of the relevant circumstances and the values underlying the Charter would conclude that the exclusion of the Ritalin would more negatively impact the administration of justice than its inclusion.

[11] Mr. Gaber was convicted in reasons indexed as 2016 YKSC 26. The primary issue at trial was whether the Crown had established the substance was methylphenidate. Both Crown and defence called expert witnesses. For the defence, Ms. Perry was critical of the analyses performed by the Crown expert, Ms. Jaswal. However, the judge found Ms. Jaswal had met the testing requirements, and agreed with the Crown that Ms. Perry was comparing Ms. Jaswal's procedures to the higher standard required for scientific experiments. The judge noted the case boiled down to whether the Certificate of Analyst was proof of the substance, or if "evidence to the contrary" raised a reasonable doubt about whether the pill in question contained methylphenidate. On the record before him, he was not prepared to conclude Ms. Perry's exacting standard provided evidence to the contrary to displace the Certificate of Analyst. He was satisfied the pills contained methylphenidate and

found Mr. Gaber guilty of Count 1 of possessing methylphenidate for the purpose of trafficking, contrary to s. 5(2) of the *CDSA*. He acquitted him of Count 2 of the indictment, relating to trafficking in marihuana, as no evidence was presented.

[12] Mr. Gaber was sentenced to two years' imprisonment for reasons indexed as 2016 YKSC 50.

Application for appointment of counsel

[13] Mr. Gaber's application for an order appointing counsel is pursuant to s. 684 of the *Criminal Code*:

> **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.

[14] There are two requirements for appointment of counsel under s. 684(1), as expressed in *R. v. Baig* (1990), 58 C.C.C. (3d) 156 at 158 (B.C.C.A. Chambers):

> There are two requirements for the appointment of counsel under s. 684(1). First, that "in the opinion of the court or judge it appears desirable in the interests of justice that the accused shall have legal assistance". Second, "where it appears that the accused has not sufficient means to obtain" . . . legal assistance. Both requirements must be met before an order under s. 684(1) may be made.

[15] Although these principles are derived from decisions of the Court of Appeal for British Columbia, they are equally applicable to the appointment of counsel in the Yukon: see, for example, *McDiarmid* at paras. 6-8.

[16] Mr. Gaber relies on Madam Justice MacKenzie's helpful summary of the relevant principles in *R. v. Silcoff*, 2012 BCCA 463 at paras. 19-24 (Chambers).

[17] The purpose of this section is to ensure the accused has the opportunity to put his position before the court: *R. v. Barton and Federici*, 2001 BCCA 477 at para. 7.

Insufficient means

[18] The second branch of the s. 684 test is ordinarily considered first. This entails a consideration of the applicant's ability to retain counsel on his own behalf: *International Forest Products Ltd. v. Wolfe*, 2001 BCCA 632 at para. 5 (Chambers). The applicant bears the onus of demonstrating insufficient means and cannot ordinarily meet this burden absent supporting documentation: *R. v. Schiel*, 2012 BCCA 1 (Bennett J.A. in Chambers).

Interests of Justice

[19] The first branch of the s. 684 test requires consideration of whether legal assistance would be in the interests of justice. The principles were summarized by Madam Justice Levine in *International Forest Products Ltd* at para. 6:

> [6] Whether it is "desirable in the interests of justice" that counsel be assigned requires consideration of such factors as the points to be argued on appeal; the complexity of the case; any point of general importance in the appeal; the applicant's competency to present the appeal; the need for counsel to marshal facts, research law or make the argument; the nature and extent of the penalty imposed; and the merits of the appeal.

[20] The interests of justice are at the core of a s. 684 application and afford the court considerable discretion in fashioning an appropriate response: *United States of America v. O'Brien*, 2009 BCCA 217 at para. 28 (Chambers).

[21] The complexity of the case is a product of the grounds of appeal, the length and content of the record, the legal principles engaged and the application of those principles to the facts: *R. v. Bernardo* (1997), 105 O.A.C. 224. Where the grounds of appeal involve complex *Charter* and exclusion issues, counsel may be appointed: *R. v. Andel*, 2013 BCCA 84 at para. 21 (Chambers).

[22] Even if an appeal is not complex, the Court may appoint counsel where an applicant is unable to present his arguments in a helpful manner: *R. v. White*, 2011 NLCA 14 (Chambers). Level of education is relevant to the applicant's ability to present the appeal: *R. v. Baig* (1990), 58 C.C.C. (3d) 156 (Chambers). However, a low level of formal education will not necessarily justify appointment of counsel

where the applicant's intelligence and ability are apparent: *R. v. Rose*, 2012 BCCA 298 at para. 16 (Chambers). The court will consider whether an appellant can effectively prepare and argue his grounds of appeal, including by preparing written and oral argument following a thorough review of the record in light of the applicable legal principles and their application: *R. v. Butler*, 2006 BCCA 476 (Chambers). In addition, an accused's incarceration is relevant because it affects his or her ability to prepare for the appeal: *R. v. Sharpe*, 2005 BCCA 236 (Chambers).

[23] On the merits, the question is whether the appeal presents arguable issues, and not whether the applicant will succeed: *International Forest Products Ltd.* at para. 41 (Chambers). Regard must be had to the applicable standard of review: *Lin v. British Columbia (Adult Forensic Psychiatric Services)*, 2008 BCCA 518 at paras. 17-18 (Chambers). Even if the other factors favour the appointment of counsel, it will not be in the interests of justice to appoint counsel where an appeal has no merit: *R. v. Hoskins*, 2012 BCCA 51 (Chambers). The Court may consider legal aid's opinion that an appeal has no prospect of success, but this opinion is only one factor because of the different criteria that apply to legal aid's statutory mandate as compared to the s. 684 criteria: *R. v. Chan*, 2001 BCCA 138 at para. 8 (Chambers); *Butler* at para. 7.

[24] In this case, the Crown opposes the application to appoint counsel on the basis Mr. Gaber has failed to demonstrate he has insufficient means to obtain a lawyer and on the basis the appointment of counsel is not in the interests of justice since the appeal has no merit.

[25] I first address the means branch. There is little information regarding Mr. Gaber's present financial circumstances, employment prospects and employment. He has been released from custody. I have just been referred to his affidavit of May 9, 2017, indicating his living situation and lack of success in his job searches. However, I have no detailed information about what those job searches entailed. His father funded his trial costs but he passed away in 2016. Mr. Gaber has said nothing about any possible inheritance to himself or to his mother. He says his

mother cannot afford to fund the appeal but he has provided no financial evidence in support of his assertion. He has not said what efforts he has made to borrow from friends or family other than his mother, including from his wife from whom he is separated but not divorced. He has not provided evidence about his wife's financial circumstances or provided details of what happened to the proceeds of sale from the family home. His application to the Yukon Legal Services Society was rejected not for financial reasons but for lack of merit on December 12, 2016, which rejection was upheld on March 23, 2017.

[26] In short, Mr. Gaber has provided inadequate evidence to substantiate that he has insufficient means for the purpose of a s. 684 application. That is the end of the matter but I will also address the interests of justice aspect of this application.

[27] Mr. Gaber says that it would be in the interests of justice to appoint his trial counsel as counsel for the appeal because Mr. Tarnow has spent a great deal of time with the defence expert in preparing for trial. Mr. Gaber says he is 48 years old and has a Grade 12 education. He was employed as a corrections officer for 5.5 years. He says he has no public speaking skills and cannot handle his appeal on his own. He believes it is complex because of the legal issues concerning exclusion of evidence, which he says he cannot argue. He also says he does not understand the relevant case law. Further, he says the question regarding the differing expert opinions on the drug analysis done by Health Canada is complex.

[28] As to the merits, Mr. Gaber raises two principal grounds of appeal. He contends the judge misapplied the *Grant* test and erred in holding that the balancing of the relevant factors under s. 24(2) weighed in favour of admitting the Ritalin. In addition, he argues the judge erred in numerous respects in rejecting his submissions regarding the reliability of the drug evidence. He points to two errors in particular, including (1) the judge erred in law in finding he had not raised "evidence to the contrary"; and (2) the judge erred in law or in mixed fact and law when he failed to consider or misapprehended the defence expert's evidence and its

implications. He points to a number of ways that he says the Crown witness' laboratory was not adhering to the appropriate standards.

[29] With respect to the first ground of appeal, the refusal of the judge to exclude the drug evidence pursuant to s. 24(2) (see para. 66 of the judge's reasons for judgment), the trial judge correctly identified and applied the law (*R. v. Grant*, 2009 SCC 32) relating to s. 24(2). He analyzed the *Grant* factors, weighing and balancing these factors considering the relevant evidence. The standard of review in relation to s. 24(2) is deferential. The trial judge's conclusions with respect to s. 24(2) will not be interfered with unless they were based on a wrong principle or the discretion was exercised in an unreasonable manner: *Grant* at para. 93. Mr. Gaber notes *Grant* has been considered by the Supreme Court of Canada very recently in *R. v. Paterson,* 2017 SCC 15, where Mr. Justice Brown commented that when considering the seriousness of the alleged offence it "has the potential to cut both ways": para. 55. However, *Paterson* has not changed the law in respect of the standard of review, which remains deferential.

[30] With respect to the second ground of appeal, evidence identifying the drug as Ritalin, the trial judge essentially considered the evidence of both experts. Mr. Gaber had challenged the reliability of testing done at an ISO accredited Health Canada Lab. The judge accepted the evidence of the Crown's expert that she had followed standard operating procedure in testing and identifying the drug, and rejected the evidence of the defence expert. This is a question of fact which, absent palpable and overriding error, will not be overturned on appeal.

[31] In short, I am of the view his grounds of appeal have very little merit.

Conclusion

[32] Mr. Gaber bears the onus of demonstrating insufficient means and has not discharged this burden in the absence of more fulsome evidence and supporting documentation. Given the issues raised on appeal, and considering the applicable standards of review, based on the material before this Court at this time, there appears to be little merit to the appeal. There is nothing to suggest Mr. Gaber would

be unable to deal with this appeal on his own despite his expressed concern about his abilities. He will have the benefit of Mr. Tarnow's written argument on this s. 684 application, which has thoroughly canvassed the facts, issues and legal principles, which can form the basis for his factum, should he wish. Balancing the relevant considerations, I do not think it is in the interests of justice to grant Mr. Gaber's s. 684 application.

[33] I would dismiss Mr. Gaber's s. 684 application.

"The Honourable Madam Justice Stromberg-Stein"