SUPREME COURT OF YUKON

Citation*: R.* v. *Labelle,* 2010 YKSC 73

Date: 20101102
Docket S.C. 09-AP008
Registry: Whitehorse

BETWEEN:

HER MAJESTY THE QUEEN

Respondent

AND:

MARIE SUZANNE LABELLE

Appellant

Before: Mr. Justice L.F. Gower

Appearances:
David McWhinnie — Appearing for the Respondent
Marie Labelle — Appearing on her own behalf

REASONS FOR JUDGMENT
DELIVERED FROM THE BENCH

[1] GOWER J. (Oral): This is an application by Ms. Labelle for the appointment of counsel. It is my understanding that the summary conviction appeal provisions in the *Criminal Code* incorporate by reference s. 684 of the *Criminal Code*, which is the section on which the application is based.

[2] It is my understanding that Ms. Labelle was charged that on February 21, 2009 she failed and refused to provide a breath sample into an approved screening device, contrary to s. 254(5) of the *Criminal Code*. I am advised that that matter went to trial in Whitehorse on May 25 and May 28, 2009. She was convicted and the punishment was a $1,000 fine plus a 12 month driving prohibition.

[3] Ms. Labelle filed a Notice of Appeal in this court on September 2, 2009, on her own. The grounds of appeal are written in her handwriting over some three pages, raising a number of matters. The principal issue that she speaks about there is that she had asked her counsel at the time, Ms. Colleen Harrington, to call her medical doctor, Dr. Mary Hanna, to testify about the fact that Ms. Labelle had been to see her doctor in the days before and immediately after the offence date. She was then complaining of shortness of breath and similar symptoms, as though she might have been experiencing an allergic reaction or asthma. Ms. Labelle thought that was relevant to her defence, which was her inability to provide a proper breath sample because of that medical ailment.

[4] What exactly happened as between Ms. Labelle and Ms. Harrington during the trial is not entirely clear because we only have Ms. Labelle's side of the story, and not Ms. Harrington's. What I am told by Ms. Labelle is that, after the conviction, but before the sentence was imposed, she and her lawyer went outside the courtroom to have a discussion, and, as a result of that discussion, Ms. Harrington found it necessary to withdraw as Ms. Labelle's counsel.

[5] Ms. Labelle has applied to Legal Aid for counsel to be appointed to represent her on this appeal. A merits opinion was obtained from Mr. Gordon Coffin. Over a two-page opinion letter, dated June 7, 2010, Mr. Coffin failed to clarify whether he had obtained a transcript of the evidence. However, he does talk about the evidence of the police officer, who testified that she was well trained in the use of an approved screening device, and that when someone is providing a breath sample, a sound is heard. The officer apparently testified that she heard no sound and therefore concluded that Ms.

Labelle was not exhaling any air into the machine. Later in the letter, Mr. Coffin said that on the evidence of the police officer regarding the sound heard when a person exhales into the approved screening device:

> "… it appears that the trial judge concluded that even a shallow breath would have created a sound even if insufficient to register as a sample. No evidence was called to contradict Constable Dunmall's testimony on that point and I am not aware if any such evidence could be called."

I take it from that passage in the opinion, that Mr. Coffin may have been interpreting the evidence or the Reasons for Judgment as to what may have appeared to the trial judge. However, that that interpretation may not be shared by an appeal court, depending on the review of the transcript.

[6] The law in this area is relatively straightforward. I refer to the case that was cited by the Crown in submissions, *R.* v. *Chan,* 2001 BCCA 138 (Chambers), as well as the cases of *R.* v. *Aiwekhoe*, [2000] B.C.J. No. 869, and *R.* v. *Weismiller,* [1994] B.C.J. No. 2656. I extract from those cases, all from the British Columbia Court of Appeal, that the factors that I should consider on this type of an application are:

(1) The accused's financial ability to retain counsel on her own behalf;

(2) Whether legal aid would be granted to the accused;

(3) The level of education of the accused and her competency to defend herself;

(4) The complexity of the case;

(5) Whether the case is one where the assistance of counsel is necessary in order to martial the evidence;

(6) Whether the case is one which may result in a term of imprisonment, and

(7) Whether there is a likelihood of success on the appeal.

[7] As for the accused's financial ability, there is really no issue here. Since she filed her initial application for indigency status on July 23, 2010, it appears that she has been on social assistance throughout and cannot afford to retain counsel on her own behalf.

[8] As for whether legal aid would be granted, it is clear that legal aid has been denied, and that Ms. Labelle appealed that denial to the Yukon Legal Services Society, which met as a board and confirmed the denial.

[9] As for the level of education of the Appellant, Ms. Labelle has a Grade 10 education. As to her competency to defend herself, she claims in earlier materials to have been suffering from post-traumatic stress disorder and depression, and has had difficulty in putting her materials before the Court on this application. Perhaps the best evidence of that, and I do not have the exact number, but there have been numerous appearances before this Court, going back as far as January 21, 2010, when Ms. Labelle was originally before the Court seeking counsel. We are now into November and only today was the application finally heard, largely because of the difficultly that Ms. Labelle had in martialing the materials that she needed to put before the Court just to get through this threshold application. It is my finding that that difficulty also goes to her ability to represent herself on the appeal and her need for legal counsel in that regard.

[10] As for the complexity of the case, I accept what the Crown has said in this application in that wherever the effective assistance of counsel is raised as an appeal

ground, the matter is undeniably complex and will require an objective and conservative assessment by counsel for the Appellant, as to whether the ground should even be pursued. For that reason alone, I would think that this case calls out for counsel to be appointed for Ms. Labelle. Similarly, whether this is a case where the assistance of counsel is necessary in order to martial the evidence, I would answer in the affirmative for the same reason.

[11] Obviously, this is not a case which may result in imprisonment, but that is only one of the factors.

[12] As for the final factor regarding the likelihood of success, it is my view that, although the opinion of the Legal Services Society is one that may be considered, again it is only one of the factors in this type of a test. The question of whether or not the Appellant will succeed on the appeal is not the proper question at this stage; rather, it is whether the appeal presents arguable issues. I find that it does.

[13] Accordingly, I conclude, pursuant to s. 684, that it appears desirable in the interests of justice that the Appellant should have legal assistance; that she does not have sufficient means to obtain that assistance; and that counsel should be assigned to represent her on this appeal. I will leave it to Crown counsel to draft the terms of this order and to forward it to the appropriate authorities for the administrative arrangements to be made.

[14] Counsel, have I omitted anything?

[15] MR. MCWHINNIE: No, sir. In the circumstances, I wonder whether leave could be given to the Crown simply to forward the draft order directly to the Court for review, and a delivery once it's filed, assuming it could be filed without the necessity of having Ms. Labelle sign off on it.

[16] THE COURT: That seems appropriate.

_____

GOWER J.