COURT OF APPEAL OF YUKON

Citation: *R. v. J.J.P.*,
2019 YKCA 16

Date: 20190917
Docket: 18-YU829

Between:

Regina

Respondent

And

J.J.P.

Appellant

Restriction on publication: A publication ban has been imposed under section 486.4 of the *Criminal Code* restricting the publication, broadcasting or transmission in any way of evidence that could identify the complainants or witnesses.

Corrected Judgment: The text of the judgment was corrected at paragraph 3 on October 7, 2019.

Before: The Honourable Mr. Justice Butler
(In Chambers)

On appeal from: An order of the Supreme Court of Yukon, dated June 28, 2018 (*R. v. J.J.P.*, 2018 YKSC 30, Whitehorse Dockets 17-01513; 16-01514; 16-01514A; 16-01514B; 16-01513; 17-00700).

Oral Reasons for Judgment

Counsel for the Appellant:	F. Mahon H. Khosa
Counsel for the Respondent (via Videoconference):	N. Sinclair
Place and Date of Hearing:	Vancouver, British Columbia September 17, 2019
Place and Date of Judgment:	Vancouver, British Columbia September 17, 2019

Summary:

The applicant applies for the appointment of counsel for his sentence appeal. He pleaded guilty to 25 sexual offences involving children. The sentencing judge dismissed the Crown's application to designate him a dangerous offender, found him to be a long-term offender, sentenced him to 16 years in prison and imposed a 10 year long-term supervision order. The Crown appealed the dangerous offender ruling and the applicant appealed the sentence. The Yukon Legal Services Society appointed counsel to act on the applicant's behalf in responding to the Crown appeal but denied him legal aid for his proposed appeal. Held: Application granted. The applicant identified arguable grounds of appeal relating to the terms of the custodial sentence and supervision order. It was in the interests of justice to assign counsel given the complexity of the identified grounds, the length of sentence and the overlap between the two appeals.

Nature of the Application

[1] **BUTLER J.A.**: J.J.P. applies for an order pursuant to s. 684(1) of the *Criminal Code*, R.S.C. 1985, c. C-46, that counsel be assigned to act on his behalf in his sentence appeal.

Background

[2] The circumstances of this application are somewhat unusual. In October 2017, J.J.P. pleaded guilty to 25 sexual offences involving children: 11 counts of sexual interference; nine counts of making child pornography; three counts of voyeurism; and two counts of possessing and accessing child pornography. The offences occurred over a period of five years against 11 girls under the age of 14. Most of these girls were close friends of J.J.P.'s daughter.

[3] The Crown sought an order declaring J.J.P. to be a dangerous offender. On June 28, 2018, in reasons indexed as *R. v. J.J.P.*, 2018 YKSC 30, Justice Veale dismissed the Crown application to declare J.J.P. a dangerous offender but found him to be a long-term offender and sentenced him to 16 years in prison followed by a long-term supervision order of 10 years.

[4] On July 27, 2018, the Crown filed a notice of appeal from the dismissal of the dangerous offender application (the "Crown Appeal"). J.J.P. applied to Yukon Legal

Services Society (“YLSS”) for legal aid and Vincent Larochelle was assigned to act on his behalf in responding to the Crown Appeal.

[5] On July 30, 2018, J.J.P. filed a notice of appeal to appeal the sentence on the grounds that it is demonstrably unfit and that the sentencing judge erred in calculating credit for pre-sentence custody (the “J.J.P. Appeal”). J.J.P. applied to the YLSS for counsel to be appointed. On August 13, 2018, YLSS notified J.J.P. by way of letter that his application for legal aid was denied. In that letter, the YLSS advised that the pre-sentence custody calculation “would likely be dealt with” by Mr. Larochelle as part of the Crown Appeal.

[6] J.J.P. appealed the denial of legal aid to the YLSS Board of Directors. By way of letter dated September 25, 2018, the Board advised J.J.P. that it was upholding the decision to deny legal aid coverage because the J.J.P. Appeal lacked merit. The letter also noted that Mr. Larochelle was assigned “to assist you in responding to the Crown’s appeal, which includes addressing the issue of the pre-sentence custody calculation.”

Applicable Law

[7] Section 684(1) of the *Criminal Code* provides:

> 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.

[8] Before making an order under the section, two requirements must be met: it must appear that the appellant has insufficient means; and it must appear desirable in the interests of justice that the accused should have legal assistance: *R. v. Butler,* 2006 BCCA 476 at para. 3.

[9] The interests of justice component is to be considered on a case-by-case basis, taking into account factors relevant to the personal circumstances of the accused, as well as broad societal concerns: *R. v. Ellis,* 2018 YKCA 4 at para. 7.

Those concerns include the fundamental principle that both sides in a legal dispute have a right to be heard and that the court has a duty to fully hear and consider those opposing views: *R. v. Barton,* 2001 BCCA 477 at para. 7.

[10] The factors usually considered under the requirement of interests of justice are summarized in *International Forest Products Ltd. v. Wolfe,* 2001 BCCA 632 at para. 6 and *R v McDiarmid,* 2015 YKCA 19 at para. 15:

- The complexity of the case;
- The points to be argued on appeal;
- 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 argument;
- The nature and extent of the penalty imposed; and
- The merits of the appeal.

[11] With regard to the merits of an appeal, the observation of Justice Rowles in *Butler* at para. 7 is relevant here:

> [7] ... the factors the court considers when determining whether counsel ought to be appointed under s. 684(1) of the *Criminal Code* are not the same criteria the Legal Services Society applies under its statutory mandate.

Further, for an application under s. 684(1), the merits of the inquiry need not go any further than deciding that the appeal in question is arguable: *International Forest Products Ltd.* at para. 41. There are two reasons for this: the assessment is made on less than the full record; and any requirement beyond that standard would be unfair to the accused because an appellant with an arguable case is more in need of counsel than one with a clearly strong appeal: *R. v. Bernardo* (1997), 121 C.C.C. (3d) 123 at para. 22.

Disposition

[12] For the following reasons, I am of the view that counsel should be assigned to J.J.P. for the J.J.P. Appeal.

Insufficient means

[13] It is evident that J.J.P. does not have sufficient means to obtain counsel for himself. In his affidavit, J.J.P. has sworn that he has no income, expenses, or debts and that the total value of his personal property is $500. Counsel for the Public Prosecution Service suggests that J.J.P. provided insufficient evidence to show insufficient means. I reject that submission. He is presently incarcerated at the Pacific Institution in Abbotsford and has been in custody for more than four years. Further, I can take into account the fact that YLSS granted his application for legal aid for representation in the Crown Appeal. I am satisfied that J.J.P. has demonstrated that he does not have the financial means to retain counsel on his own behalf for the J.J.P. Appeal.

[14] At issue then, is whether it is in the interests of justice that J.J.P. be appointed counsel for the J.J.P. Appeal. In assessing whether it is in the interests of justice to assign counsel, I have considered the grounds of appeal set out in the notice of appeal and those mentioned by counsel on this application. I have also taken into account the possibility that the grounds of appeal may be expanded or refined once counsel has an opportunity to consider the extensive record that was before the court on sentencing.

[15] J.J.P. lists two grounds: the sentence was demonstrably unfit; and the sentencing judge erred in the calculation of pre-sentence custody. In his affidavit, J.J.P. indicated that he wishes to challenge the constitutionality of the long-term supervision order, but I understand that he is not pursuing that ground. In the notice of motion, J.J.P. refers to two more grounds of appeal: 1) the sentencing judge erred in assessing the concept of an “inflationary floor” in determining the sentence; and 2) the judge erred in assessing the concept of risk. I was advised that counsel intends to argue that the judge misunderstood or misapplied the extent to which the appellant is likely to benefit from therapy he will receive in custody. He says this is relevant because it informs the concept of risk and the protection of the public which are central to the terms of the custodial sentence and long-term supervision order.

[16] I turn now to the factors to be considered on this application.

The complexity of the case

[17] The reasons for sentence are lengthy and detailed. The judge described the numerous offences committed by the appellant. In imposing the sentence, he considered and relied upon the opinion of Dr. Lohrasbe who provided a psychiatric assessment for the court pursuant to s. 752.1 of the *Criminal Code*. The reasons comment at length on Dr. Lohrasbe's opinions regarding the appellant's pedophilia and his risk of future offending. The reasons also consider Dr. Lohrasbe's opinion on the possibility of managing the appellant's risk in the community.

[18] There is little question that these issues are complex both factually and legally. In addition, the legal issues regarding a fit sentence are complicated, in part because of the number of offences and the need for the court to consider proportionality or totality.

[19] An additional factor contributes to complexity in this case. The Crown Appeal of the dismissal of the dangerous offender application will proceed. J.J.P. has counsel to represent him in the Crown Appeal. The issues to be considered in that appeal clearly overlap with the issues that arise on the J.J.P. Appeal. The factual issues are very much overlapping. This adds procedural complexity which would be difficult for someone without legal training to handle. I agree with the characterization of the complexities set out in the submissions of the appellant:

> 25. Initial discussions have been engaged with the Crown concerning the process of presenting the appeals in court, and it appears that submissions would unfold as follows: the Crown would proceed first with its appeal, then the applicant would respond, and also present his appeal, essentially blending the submissions. The Crown would then respond and the applicant may then reply (an also perhaps the Crown if it wished). This process would not be workable if the does not have counsel for his appeal, and counsel would be in the position of being unusually constrained in terms of presenting argument, as it is inevitable that the response to the Crown's appeal would entail part of the argument that the applicant wishes to advance in his appeal.

The points to be argued on appeal

[20] I have already set out the points that the appellant currently intends to advance on appeal. As noted, these may be amended if counsel is assigned.

Any point of general importance in the appeal

[21] While the issues are of importance to the appellant, I cannot say that he has identified an issue that is of general importance.

The applicant's competency to present the appeal

[22] As set out in the psychiatric assessment, the applicant is an “anxious and fragile” 49 year old man. He has no legal training and did not graduate from high school. Dr. Lohrasbe describes him as a man of average intelligence. Counsel for the respondent argues that the issues in question are relatively simple. While a lawyer may find them to be simple, I accept that the issues identified by counsel for the applicant are sufficiently complex that someone with his anxiety and lack of education may have difficulty representing himself.

The need for counsel to marshal facts, research law or make argument

[23] As I have indicated, the appeal will turn on consideration of the sentencing judge’s assessment of the psychiatric evidence, the concept of management of the appellant’s future risk, and the legal authorities. It is evident that the applicant would benefit from the assistance of counsel to carry out these tasks. The Court would also benefit from submissions of counsel.

The nature and extent of the penalty imposed

[24] The offences in question are serious and the prison sentence and long-term supervision order are very lengthy.

The merits of the appeal

[25] This is the central concern raised by the respondent. Counsel says that the designation of the appellant as a long-term offender is not a serious issue on the facts of this case. While the terms of the custodial and long-term supervision orders can be questioned, he argues there is little merit to the grounds raised by the appellant. Further, the YLSS assessed the prospects of the appeal and concluded that the appeal does not meet the standard for funding.

[26] While I can take into account the decision of the YLSS, that is only one factor to consider. The test to be applied under s. 684(1) is different from that used by the YLSS. As noted in *International Forest Products Ltd.*, the applicant only has to raise an arguable appeal.

[27] I agree with the submission of the respondent that the issue of credit for pre-trial custody does not require the assistance of counsel; indeed it appears that the Crown concedes this ground of appeal. I also agree that the issue of the appellant's designation as a long-term offender lacks significant merit. However, I cannot agree that the issues raised by the appellant about the length and terms of the custodial sentence and long-term supervision order are without merit. As counsel argued, the sentence and supervision orders are very lengthy. The assessment of risk in these cases is a difficult task for a sentencing judge. Of course, that assessment informs the terms of the sentence. The appellant has identified issues that he wishes to pursue that go to the heart of those terms.

Summary

[28] It is my conclusion on assessing the factors relevant to the appointment of counsel under s. 684(1) that it is in the interests of justice to assign counsel to act on behalf of J.J.P. in the J.J.P. Appeal. Accordingly, I grant the order sought.

[29] I should note before concluding that I make no comment regarding the choice of counsel. I understand that will be pursued by the applicant with the YLSS.

[Discussion with counsel re: draft order]

[30] **BUTLER J.A.**: Counsel is at liberty to apply and appear back before me for clarification of the order.

"The Honourable Mr. Justice Butler"