

COURT OF APPEAL FOR BRITISH COLUMBIA

Date: 20201217
Docket: CA46979

Between:

Regina

Respondent

And

Patrick Henry Fox

Appellant

Before: The Honourable Madam Justice Griffin
(In Chambers)

On appeal from: An order of the Provincial Court of British Columbia, dated
August 19, 2020 (*R. v. Fox*, Vancouver Docket 244069-6-B).

Oral Reasons for Judgment

The Appellant, appearing in person
(via teleconference):

P.H. Fox

Counsel for the Respondent
(via teleconference):

L.Y. Bantourakis

Place and Date of Hearing:

Vancouver, British Columbia
December 17, 2020

Place and Date of Judgment:

Vancouver, British Columbia
December 17, 2020

[1] **GRIFFIN J.A.:** The applicant, Patrick Fox, applies for a limited order under s. 684 of the *Criminal Code*, R.S.C. 1985, c. C-46. Under the terms of the order, counsel would be appointed on a limited basis in order to assist him with a full s. 684 application.

Background

[2] In 2017, the applicant was found guilty by a jury of criminally harassing his former spouse, contrary to s. 264 of the *Criminal Code*, and being in possession of firearms in an unauthorized place, contrary to s. 93(1) of the *Criminal Code*.

[3] Those convictions arose from a campaign by the appellant to “make [his former spouse’s] life as miserable as possible.” Amongst other things, the applicant created a website in his former spouse’s name that contained a very large amount of personal, private information.

[4] In sentencing reasons indexed at 2017 BCSC 2361, Justice Holmes, as she then was, imposed a custodial sentence followed by a three-year probation order. Three key terms of that order were:

13. You must not disseminate, distribute, publish or make publicly available in any manner whatsoever, directly or indirectly, information, statements, comments, videos, or photographs which refer to or depict, by name or description, [your former spouse], [other specified individuals], or any of their friends, relatives, employers, or co-workers.
14. Within 24 hours of your release from custody you will take all necessary steps to ensure that any website, social media page, or other publication, which you have authored, created, maintained or contributed to, which contains any information, statements, comments, videos, pictures which refer to or depict, by name or description, [your former spouse], [other specified individuals], or any of their friends, relatives, employers, or co-workers, including the website published under the domain [redacted], is no longer accessible via the internet or by any other means.
15. You must not use the internet or any computer or cellular network except as required to fulfill condition 14 for the purpose of employment, or for sending personal emails.

[5] The applicant appealed from his conviction and sentence. This Court dismissed that appeal for want of prosecution and repudiation of the jurisdiction of this Court in reasons indexed at 2019 BCCA 211.

[6] This appeal arises from a conviction for breach of Justice Holmes' probation order. The applicant was charged with two counts of failing to comply with a probation order, contrary to s. 733.1(1) of the *Criminal Code*. The first count alleged that the applicant breached his probation order by making publicly available a website containing information about his former spouse. The applicant submits this charge was a charge for a breach of term 13 of his probation order. The second count alleged he accessed the internet or a computer or cellular network, violating term 15 of his probation order.

[7] In August 2020, a provincial court judge convicted the applicant on the first count but acquitted him on the second.

[8] On the first count, there was no dispute that the applicant created the website nor that he was bound by the probation order. However, the applicant argued that he had created the website prior to the probation order coming into effect, and therefore its continued availability did not breach term 13 of his probation order. If there was any breach, the focus, he says, should have been on term 14, but he was not charged with breach of term 14. The judge rejected this argument and found that the terms of the probation order were expansive and prohibited making the information available "in any way whatsoever, directly or indirectly".

[9] On sentencing, the judge imposed a sentence of six months in custody plus six months' probation. After taking into account time served, this left the applicant with one day remaining on his sentence. This was in line with the Crown's sentencing position. Somewhat strangely, the applicant had submitted that a lengthier custodial sentence was warranted.

[10] The applicant filed his notice of appeal on August 24, 2020. On October 29, 2020, Legal Aid BC advised that it had denied his application for legal aid. The

denial was not for financial reasons. At a case management conference on November 9, 2020, the applicant advised this Court that he intended to bring this application.

Applicable Legal Principles

[11] The applicable legal principles on a s. 684 application are well settled. The respondent helpfully set out the principles as summarized by Justice MacKenzie in *R. v. Silcoff*, 2012 BCCA 463 (Chambers):

[20] The overriding purpose of s. 684 of the *Code* is to protect the right to be heard and to ensure the fairness of the proceedings: *R. v. Barton and Federici*, 2001 BCCA 477 at para. 7.

[21] Appointment of counsel under s. 684 is subject to a two-part test, generally considered in the following order:

1. The accused must have insufficient means to obtain legal assistance; and
2. Appointment of counsel must be in the interests of justice.

[22] According to *Applications for a Court-Appointed Lawyer Under Section 684 of the Criminal Code* (Criminal Practice Directive, 19 September 2011), applicants should generally be able to show that 1) they cannot afford to retain counsel for the appeal; and 2) they applied to the Legal Services Society for legal aid and were refused.

[23] The factors to be considered under the requirement of “interests of justice” were summarized in *International Forest Products Ltd. v. Wolfe*, 2001 BCCA 632 at para. 6 and 13, 94 B.C.L.R. (3d) 67 (Levine J.A. in Chambers). They are as follows:

- a. The points to be argued on appeal;
- b. The complexity of the case;
- c. Any point of general importance in the appeal;
- d. The applicant’s competency to present the appeal;
- e. The need for counsel to find facts, research law or make argument;
- f. The nature and extent of the penalty imposed; and
- g. The merits of the appeal.

[24] As to the merits of the appeal, the threshold requirement is an arguable appeal: *R. v. Donald*, 2008 BCCA 316 at para. 15, 258 B.C.A.C. 117 (Saunders J.A. in Chambers).

[25] In determining whether an appeal is arguable, regard must be had to the applicable standard of review on the proposed appeal: *Lin v. British*

Columbia (Adult Forensic Psychiatric Services), 2008 BCCA 518 at paras. 17-18 (Frankel J.A. in Chambers).

[26] Even where 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 at paras. 30-32, 315 B.C.A.C. 238 (Garson J.A. in Chambers).

[27] The Court may consider the opinion of the Legal Services Society that an appeal has no prospect of success, however, the opinion of the Legal Services Society is only one factor: *R. v. Chan*, 2001 BCCA 138 at para. 8 (Finch J.A., as he was then, in Chambers); *R. v. Butler*, 2006 BCCA 476 at paras. 7 and 10 (Rowles J.A. in Chambers).

Discussion

Does the Applicant Have Insufficient Means to Obtain Legal Assistance?

[12] The Crown concedes that he does not have sufficient financial means to obtain legal assistance. The applicant's request for legal aid was not denied for financial reasons, and he deposed to having no income and \$20,000 in debt. He is currently incarcerated.

[13] I am satisfied that the applicant does not have sufficient means to obtain legal assistance.

[14] In my view, the present application turns on the question of whether appointing counsel is in the interests of justice.

Is Appointing Counsel in the Interests of Justice?

[15] The Crown does not take any formal position on this point.

[16] In the present case, the applicant has deposed that he has limited ability to conduct legal research and formulate arguments on appeal, both of which are relevant factors in a s. 684 analysis. He emphasizes that while incarcerated he has no access to searchable case law and any law library he might have access to within a correctional institution has very limited legal digests, which are either out of date or are so limited that they cannot support very effective legal research.

[17] The Crown does note that the applicant is likely competent to present the appeal himself. He represented himself at trial in both the criminal harassment proceedings and the breach of probation trial. He holds a Bachelor's degree and has been a capable self-represented litigant before. I can observe he is articulate and appears focused in his submissions.

[18] The applicant's identified ground of appeal is, in my view, quite uncomplicated and easy enough for him to state, relying on the terms of the judgment, indictment, and probation order. In essence, he simply states that the term of the probation order, which he was charged with breaching, did not state that he was required to remove material published before the probation order came into effect and that the Crown did not prove the website was published after that order. The appeal will turn on, it seems, interpretation of term 13 of the probation order, which prohibited the applicant from making the website publicly available "in any manner whatsoever, directly or indirectly".

[19] Further, I note the penalty imposed is not significant in comparison to other crimes. I am advised and take into account the fact that the applicant now faces new breach charges for breach of the order that arose from this conviction.

[20] I note that this Court did make a limited s. 684 order in the applicant's favour before, in relation to his appeal from a criminal harassment conviction, in reasons indexed at 2018 BCCA 431. However, that was a more serious charge and arguably would be more complicated than a breach of probation order charge.

[21] After weighing the various factors, in my view it is not in the interests of justice to appoint counsel for the limited purpose of preparing for a full s. 684 application. In my view, the applicant is well able to represent himself on what is an uncomplicated appeal from a breach of probation order, where the penalty was not extreme.

"The Honourable Madam Justice Griffin"