Court of Queen's Bench of Alberta

Citation: R v Hanaysha, 2022 ABQB 447

Date: 20220629
Docket: 140759911Q1
Registry: Edmonton

Between:

Her Majesty the Queen

Crown/Respondent

- and -

Tareq Hanaysha

Applicant

Reasons for Decision on Mistrial Application
of the
Honourable Mr. Justice Eric F. Macklin

I. Introduction

[1] On June 24, 2016, following trial, I found the Applicant guilty of one count of sexual assault and one count of unlawful confinement. Sentencing was set over to July 19, 2016, pending preparation of a Pre-Sentence Report.

[2] The Applicant failed to attend a scheduled appointment with the Probation Officer for the preparation of the report. He then failed to appear for sentencing, as required, on July 19, 2016. A warrant was issued for his arrest.

[3] On June 20, 2022, an Application was filed on behalf of the Applicant seeking a declaration that he had received "ineffective assistance of counsel that compromised his fair trial rights" and seeking an order directing a new trial to proceed by judge and jury.

II. Applicant's Position

[4] The Applicant submits that he received ineffective assistance from his trial counsel prior to and during his trial. He states that his defence was prejudiced to such an extent as to have caused a miscarriage of justice.

[5] The Applicant argues that the following examples highlight the ineffectiveness of his counsel and collectively resulted in an unfair trial and a miscarriage of justice:

a) Counsel failed to advise the Applicant of his right to a jury trial, a right that the Applicant now says that he wanted;

b) Counsel failed to bring a s 276 application. The Applicant says that his defences were consent and, in the alternative, honest but mistaken belief in communicated consent. Evidence of prior consensual sexual encounters was necessary for him to advance these defences;

c) Counsel failed to remove himself from the record when it appeared he was unable to continue due to irreparable damage to the solicitor/client relationship;

d) Counsel failed to properly prepare for trial by: failing to interview a potentially important witness; failing to interview and prepare the Applicant for his testimony; failing to use materials provided by the Applicant during cross-examination of the Complainant; failing to canvas with the Applicant whether he had any text, electronic or other materials that could aid in his defence; failing to object to text messages adduced by the Crown as prior consistent statements; consenting to an amendment application which had not yet been made; and failing to discuss a challenge for cause application with a racialized client.

III. Crown's Position

[6] The Crown submits that, at all times, the Applicant was competently and effectively represented by trial counsel and there was no miscarriage of justice. The Crown submitted the affidavit of trial counsel's law partner who attended this application for the purposes of being cross-examined on her affidavit by the Applicant's current counsel.

[7] The law partner assisted trial counsel with the Applicant's file though she did not formally appear as co-counsel at trial. She did attend portions of the trial as an observer and was present for the testimony of both the Complainant and the Applicant. For ease of reference, and despite not formally appearing as co-counsel at trial, I will refer to her as "co-counsel".

IV. Trial Decision

[8] The Complainant and the Applicant each testified at trial. The Applicant acknowledged that the Complainant performed oral sex upon him. The Complainant testified that she did not consent to the sexual activity. The Applicant testified and argued that she did consent or, in the alternative, he had an honest but mistaken belief that she had consented.

[9] I considered the evidence of the Complainant and found her to be both credible and reliable. I believed her evidence that she did not consent to the sexual contact between her and the Applicant.

[10] I considered the Applicant's evidence that the Complainant did consent or that he had an honest but mistaken belief that she had consented by analyzing it in accordance with the directions set out in ***R v W(D)***, (1991) 63 CCC (3d) 397. Ultimately, I did not believe the evidence of the Applicant nor did his evidence leave me with a reasonable doubt as to his guilt. I further determined that the whole of the evidence that I did accept also did not leave me with a reasonable doubt as to his guilt.

[11] Accordingly, I was satisfied beyond a reasonable doubt that the Applicant had committed a sexual assault on the Complainant and had unlawfully confined her.

V. Analysis

[12] This was a judge alone trial. I am satisfied that until sentence is imposed, a trial judge retains jurisdiction to consider an application for a mistrial. Accordingly, I am not functus officio and retain the jurisdiction to consider this application.

[13] The anomaly in this case, however, is that such an application would ordinarily have been brought sometime between the conviction date of June 24, 2016, and the sentencing date.

[14] There can be no doubt that the facts and allegations now being advanced by the Applicant in support of his position were fully known or capable of discovery by the conclusion of the trial or, at the latest, by the time of sentencing. Even allowing for unforeseen but reasonable delays, sentencing would still likely have occurred within six months of conviction. During whatever period of time there may have been between the date of conviction and the date of sentencing, there would have been ample opportunity to bring forward a mistrial application.

[15] As indicated earlier, however, sentencing could not proceed as the Applicant failed to appear on his scheduled sentencing date. He had left the jurisdiction and now brings this application four days after the six-year anniversary of the date of his conviction.

[16] In ***R v Sauverwald***, 2019 ABCA 388, the Court considered an argument of delay in the making of a motion for a mistrial and that such delay was indicative of belated consideration of the question of incompetence. The Court accepted the assurance of counsel that there was no "dallying" on the topic of incompetence of counsel (para 141). While I accept that there was no delay in this case on the part of new counsel for the Applicant, there was clearly a lengthy delay caused by the Applicant himself who, as stated, must have had knowledge of most or all of the relevant information relating to the allegations of incompetence as early as the end of trial or, at the latest, by the date even a reasonably delayed sentencing hearing would have taken place.

[17] While the lengthy delay occasioned by the Applicant's own actions is troubling, I will go on to consider the application on its merits. I do so with the conviction that, regardless of the actions of a person convicted, a court should be assured on application that they had a fair trial and that there was no miscarriage of justice.

[18] There is a presumption that trial counsel was competent. There are two components in the approach to consideration of the effectiveness of counsel. The first is a performance component and the second is a prejudice component. To succeed, an Applicant must establish that counsel's

acts or omissions constituted incompetence and second, that a miscarriage of justice resulted. Incompetence is determined by a reasonableness standard. There is a strong presumption that counsel's conduct fell within the range of reasonable assistance and the onus is on the Applicant to establish that the acts or omissions of counsel were not simply the result of reasonable professional judgement. The benefit of hindsight is not a relevant consideration: ***R v GDB***, 2000 SCC 22, paras 26 and 27.

[19] Further, a reviewing court should not go behind a decision made in good faith and in the best interests of his client by counsel during the course of the trial save only to prevent a miscarriage of justice. It is not incumbent upon a defence lawyer to seek and obtain express instructions for each and every decision made in the conduct of the defence but there are some that do require advice and instructions. The failure to do so in some circumstances may raise questions of procedural fairness and the reliability of the result, leading to a possible miscarriage of justice: ***GDB*** para 34.

[20] Where it is alleged that the trial result was unreliable, the applicant must demonstrate a reasonable probability that it would have been different but for the alleged incompetence. A reasonable probability is one that is "sufficiently strong to undermine confidence" in the outcome and "lies somewhere between a mere possibility and a likelihood": ***R v Dunbar***, 2007 ONCA 840 para 23; R ***v Joanisse***, 1995 CanLII 3507 para 64.

[21] The burden on an applicant who claims ineffective representation is threefold. They must prove: (a) the facts on which the claim of incompetence is based; (b) that the representation provided by trial counsel's incompetent; and (c) that the incompetent representation resulted in a miscarriage of justice: ***Sauverwald*** para 15.

[22] In practical terms, "establishing the three-part test is not a low bar." Meeting or exceeding the test usually requires evidence from the applicant (accused) and from trial defence counsel, which would clearly require a waiver of privilege: ***Sauverwald*** para 18. In context, the indication that evidence is usually required from trial defence counsel suggests that such evidence would usually be required to support the position of the Applicant.

[23] In this case, the Applicant did not tender such evidence in his support but, rather, the Crown tendered the evidence of co-counsel in support of its position. In her affidavit, co-counsel states that she "was present before, during, and after [the Applicant's] trial and had communication with him before, during and after the trial". In cross-examination, she testified that, while she was present during the trial, she was not present throughout the trial. She stated that she was present in court when the Complainant and the Applicant each testified.

[24] I will now consider the specific areas in which the Applicant alleges that he received inadequate or ineffective representation from counsel. Before doing so, it is important to recognize that I did not believe the evidence of the Applicant at trial and rejected it. It is also important to note that his affidavit evidence is not supported by the evidence of anyone else.

a) Failure to advise of right to jury trial

[25] The Applicant alleges that he was never told of his right to a jury trial and that it was his choice to be tried before a judge and jury. He states that had he been informed of this right, he would have maintained his election to be tried by judge and jury.

[26] There can be no doubt that it is an individual accused's right to be tried by a judge and jury and their right to elect whether to be tried differently. I would ordinarily have no hesitation

in finding that a deprivation of his right to choose would result in a breach of procedural fairness for the Applicant that could well result in a miscarriage of justice.

[27] I use the word "ordinarily" because, again, this is not an ordinary situation. This kind of application usually requires supporting evidence from trial defence counsel. However, in this case, co-counsel gave contradictory evidence and states in her affidavit that she was present when the Applicant was advised of his right to a jury trial and that he seemed to fully understand this right. She specifically recalls the Applicant advising that he "did not want too many people in the courtroom as his sexual experiences were personal matters". He wanted to be tried by judge alone. She testified that the Applicant was adamant that what happened between he and the Complainant was nobody's business.

[28] Clearly, the evidence of the Applicant on this issue is contradicted by trial co-counsel and I accept her evidence.

b) Failure to bring a s 276 application

[29] The Applicant raised the defences of actual consent and, in the alternative, honest but mistaken belief in communicated consent (I would note that the use of the word "communicated" was not regularly used in this context at the time of trial). He now argues that it was necessary that evidence of prior consensual sexual encounters between the Applicant and Complainant be adduced in order to make full answer and defence. In particular, he states that evidence of prior consensual sexual encounters would have supported his defences of consent or honest but mistaken belief in communicated consent. In order to adduce this evidence, it would clearly have been a requirement for defence counsel to bring an application under s 276 of the *Criminal Code*.

[30] This is not a case where counsel was simply unaware of the need to bring a s 276 application in order to adduce evidence of prior sexual activity between the Applicant and the Complainant. Co-counsel testified during her cross-examination that there was a note in the electronic file indicating that a junior member of the firm did look into the question of whether such an application would be successful and there was a determination that it would not. Accordingly, no such application was brought though it had been considered.

[31] There was evidence at trial that the parties had been in a long-standing relationship of about five years. Even assuming that a s 276 application had not been considered or should have been brought in any event, the question is still whether a s 276 application would have been successful. If so, then the question would be whether the evidence adduced would be sufficient to raise a reasonable doubt that the Complainant had consented or that the Applicant had an honest but mistaken belief that she had.

[32] The Applicant states in his affidavit that he made it clear to defence counsel that his interaction with the Complainant on the day in question was the same as it had been on other occasions when she had consented. It is not clear from the evidence whether there had been any discussions between counsel and the Applicant about the need to bring a s 276 application or its possibility of success.

[33] While Supreme Court of Canada decisions in cases like ***R v Goldfinch***, 2019 SCC 38 and ***R v RV***, 2019 SCC 41 had not yet been heard or pronounced, they do reflect the state of the law both at the time of pronouncement as well as at the time of the Applicant's trial. As the Court stated in ***Goldfinch***, evidence of prior sexual activity will rarely be relevant to establish consent (para 56). It is helpful to remember that in ***Goldfinch***, there was evidence at trial of prior

consensual sexual relations between Goldfinch and the complainant in that case. The Supreme Court of Canada found such evidence to be irrelevant and inadmissible. That is, the evidence was not relevant to the issue of consent.

[34] Further, while prior sexual activity may be relevant to a defence of honest but mistaken belief in communicated consent, the honest but mistaken belief cannot simply rest upon evidence that a person consented at "some point" in the past: ***Goldfinch*** para 62.

[35] On the record before me, and contrary to the Applicant's position, it is not evident that a s 276 application would have met with some or any success. It clearly would not have been successful to support the Applicant's position that the Complainant had consented to the same type of sexual activity in the past. The evidence on the record before me is insufficient to determine the likelihood of success on the issue of honest but mistaken belief in communicated consent. That is, it is unclear whether such evidence would have had any probative value and whether the inability, or failure to attempt, to adduce such evidence interfered in any fundamental way with the Applicant's ability to make full answer and defence: ***RV*** paras 62-64.

c) Counsel's failure to remove himself from the record

[36] At one point during the trial, on June 22, 2016, Applicant's counsel stated that he was unable to continue as his relationship with his client had been irreparably damaged. He stated that he was making an application to be removed as counsel, citing a breakdown in communications and lack of confidence by his client. He further indicated that he was no longer able to adequately provide his client with full answer and defence. He said that they were "at an impasse" at this point (trial transcript: page 71/line 22-page 72/line 1).

[37] It must be noted that counsel had also advised the Court that he had been in contact with the practice advisor at the Law Society of Alberta about the issues he was facing at the time. He had also spoken with other counsel about becoming involved, particularly for the purpose of cross-examination of the Complainant.

[38] Before adjourning court on June 22, 2016, counsel advised the Court that he was hoping to salvage the relationship with the Applicant as he knew "the file very well" and had "known the client for a long time." (tt p 76/ll 16-22). The following day (June 23, 2016), and in answer to my inquiry, counsel stated that he was satisfied that he could continue acting on behalf of the Applicant (tt p 81/ l 26). Whatever ethical or legal issues that may have been the subject of counsel's comments the previous day had obviously been resolved to the point where he was satisfied he could continue to act. It would have been inappropriate for this Court to question counsel as to the nature of the issues that arose or the discussions he may have had with the practice advisor, other counsel or his client, the Applicant. Suffice to say, however, that counsel was taken at his word as he is an officer of the court.

[39] The Applicant argues that I should now simply accept his counsel's statement on June 22, 2016, that he was unable to continue to act and properly defend the Applicant and, consequently, ignore his statement the following day that he was satisfied that he could continue (necessarily implying that whatever concerns may have existed earlier had been resolved). Without any evidence as to the nature of the problems, the discussions that were held, and how the problems were supposedly resolved, I simply cannot accept the bare allegations of the Applicant as sufficient to find that the circumstances at the time were such that trial counsel was unable to continue acting for the Applicant and properly defend him.

d) Failure to properly prepare for trial

[40] The allegations in this respect are that counsel: failed to interview a potentially important witness; failed to properly prepare the Applicant for his testimony; failed to use materials provided by the Applicant in cross-examination of the Complainant; failed to canvass with the Applicant whether there existed any text, electronic or other materials that could aid in his defence; failed to object to text messages adduced by the Crown as prior consistent statements; consented to an amendment application which had not yet been made; and failed to discuss a challenge for cause application with a racialized client.

[41] Before considering these allegations as to whether trial counsel failed to properly prepare for trial, I would reiterate that I have no evidence before me from trial counsel or any other witness to support the Applicant's factual allegations. Many of the Applicant's allegations are, in fact, contradicted by the evidence of trial co-counsel. I would also reiterate the comments of trial counsel on June 22, 2016, that he knew "the file very well" and had "known the client for a long time" (tt p 76/ll 17-19) and on June 23, 2016, that he was satisfied he could continue acting for the Applicant (tt p 81/l 26).

i. Failure to interview a potentially relevant witness

[42] The witness referred to by the Applicant is his former roommate who, he states, could provide evidence that would corroborate his story and contradict certain parts of the Complainant's story. The Applicant swears in his affidavit that to his knowledge, trial counsel never contacted or interviewed the witness. Support for his allegation in this respect could have been obtained from either trial counsel or his former roommate. Further, it may be that the roommate was interviewed but his evidence would not have supported that of the Applicant nor contradicted that of the Complainant.

[43] Simply put, I cannot accept the bare allegation of the Applicant.

ii. Failure to properly prepare the Applicant for trial testimony

[44] The Applicant says that trial counsel failed to interview him and properly prepare him for his testimony and for cross-examination. He states in his affidavit that the only time he sat down with trial counsel was for a brief office meeting for about 30 minutes. He further states that trial counsel did not advise him that he had a choice as to whether to testify. I am not sure how to reconcile these two seemingly, and potentially, diverse concerns but in any event, I do not accept his evidence in this respect.

[45] Co-counsel states in her affidavit that the Applicant attended at trial counsel's office on numerous occasions to discuss the file and that she was present when the Applicant and trial counsel discussed the file and prepared for trial. She further states that she was present when the Applicant "was prepped for his testimony and [the Applicant] was adamant that he wanted to relay his version of events to the Court". She testified that she was present on at least two occasions when the Applicant was in the office, the file was discussed, and he was prepped for trial. She also testified that the electronic calendar indicated that there were nine scheduled appointments with the Applicant, though she was unable to confirm how many he actually attended and for how many she was actually present.

[46] While co-counsel testified that she was present for at least two of the meetings where the file was discussed and the Applicant was prepped, she also acknowledged that she may not have been in the meeting room for the entire time.

[47] Regarding the Applicant's allegation that he was never told that he had a choice whether to testify, co-counsel again states that she was present when the Applicant was prepped for his testimony and he "was adamant that he wanted to relay his version of events to the Court".

[48] I would also note here that the Applicant raises an issue in his affidavit about his first language being Arabic and he retained counsel with the understanding that they would be able to communicate in Arabic. Co-counsel testified that she is fluent in Arabic, and, like the Applicant, it is her first language. She made this clear to the Applicant and, as indicated, she was present for discussions with the Applicant about the trial and his testimony.

[49] The evidence does not support the allegation that the Applicant was not properly prepared.

iii. Failure to use materials provided by the Applicant

[50] The Applicant says that trial counsel failed to use materials provided by him for the purposes of cross-examining the Complainant. The materials relate to civil proceedings between the Complainant and the Applicant.

[51] It is alleged that there are statements contained in the material that would have contradicted the evidence of the Complainant in areas such as the length of her relationship with the Applicant, how their relationship ended and possible threats. While none of these statements necessarily go directly to the substantive issue of consent, it is argued that they do impact on the credibility of the Complainant which, in turn, may then impact on the substantive issue.

[52] At best, it is uncertain how this evidence might have impacted the credibility of the Complainant and whether it could have had any impact on the ultimate result.

iv. Failure to canvass with the Applicant for additional materials

[53] The Applicant says that trial counsel failed to canvass with him whether he had any text, electronic or other materials that could aid in his defence. It is not known precisely what materials are being referred to, what their contents were and, importantly, how they may have helped the Applicant.

v. Failure to object to text messages adduced by the Crown

[54] The Applicant says that the text messages included prior consistent statements of the Complainant. The text messages introduced into evidence at trial involved an exchange of communications between the Complainant and the Applicant.

[55] Rather than being considered as prior consistent statements of the Complainant, the messages sent by the Applicant were considered in relation to his knowledge and position (June 24, 2016: tt p 83/ll 9-33).

[56] The Applicant does not dispute that the text messages were properly admitted at trial. Rather, he argues that trial counsel used the wrong basis for objecting to their admissibility and this evidences a general lack of competence.

[57] While counsel may have objected on the wrong grounds, it was of no consequence as they were properly admissible in any event. I do not accept that this error necessarily evidences a general lack of competence.

vi. Consenting to amendment

[58] The Applicant says that trial counsel consented to an amendment application which had not yet been made. The amendment requested by the Crown related to the dates of the alleged offence set out in the Indictment. The application was made so as to have the dates conform to the evidence. Trial counsel for the Applicant did not object. Indeed, the requested amendment conformed to the evidence of the Applicant. It is difficult to understand how this allegation is suggestive of a failure to provide competent representation.

vii. Failure to discuss a challenge for cause application

[59] The Applicant says that his trial counsel failed to discuss with him a challenge for cause application for a racialized client. This question relates to the allegation of a failure to maintain the Applicant's right to a jury trial which, as outlined earlier, he chose not to exercise. As a consequence, I cannot rely upon his allegation now that he should have been advised of the possibility of a challenge for cause.

Conclusion on failing to properly prepare for trial

[60] It is argued by the Applicant that, while nothing may have turned on any one of the alleged failures outlined, they cumulatively reflect a general incompetence of counsel. That is, they do reflect counsel's general ineffectiveness.

[61] I disagree. The evidence before me does not adequately support the allegations by the Applicant that his trial counsel failed to properly prepare for trial. Even if it can be said that a couple of the allegations might suggest improper preparation for trial, it cannot be said that they cumulatively amount to the level of incompetence.

VI. Conclusion

[62] The Applicant has brought this application for a mistrial six years after conviction on the ground that his conviction resulted from the ineffective or incompetent assistance of counsel.

[63] The Applicant was required to establish three things: the facts upon which the claim of incompetence is based; that the assistance of counsel was deficient; and that this deficiency prejudiced the defence to an extent which constitutes a miscarriage of justice.

[64] The facts brought forward on this application do not support a claim of incompetence nor do they establish that the assistance of counsel was deficient. The evidence for this application does not displace the presumption that trial counsel's conduct fell within the range of reasonable assistance. Further, even if it did, there is insufficient evidence to find that any deficiencies in trial counsel's assistance resulted in an unfair trial for the Applicant and a miscarriage of justice. There is no evidence to found a reasonable probability, or a reasonable possibility, that the trial result would have been different.

[65] One additional point. In his affidavit, the Applicant states that he has "now learned" that his trial counsel had been undergoing some personal difficulties at the time of trial. In support, he attached a newspaper article indicating that, on May 31, 2016, his counsel had pled guilty to a charge of dangerous driving and had received a fine of $1950 and a 90-day driving suspension. The offence date was June 25, 2014. The guilty plea and sentencing took place about three weeks before the commencement of the Applicant's trial and there is no evidence that it somehow affected trial counsel's performance.

[66] The application for a declaration that the Applicant received ineffective assistance of counsel that compromised his fair trial rights is dismissed. His application for an order directing a new trial to proceed by judge and jury is also dismissed.

Heard on the 28th day of June, 2022.
Dated at the City of Edmonton, Alberta this 29th day of June, 2022.

Eric F. Macklin
J.C.Q.B.A.

Appearances:

Mark Huyser-Wierenga
for the Crown/Respondent

Zachary Al-Khatib, Liberty Law LLP
for the Applicant