CANADA / JUDGMENT

R. v. Sater

2015 BCCA 125

COURT
British Columbia Court of Appeal

DECIDED
20 March 2015

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2015 BCCA 125 R. v. Sater

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Sater,

2015 BCCA 125

Date: 20150320

Docket: CA041868

Between:

Regina

Respondent

And

Cory Sater

Appellant

Before:

The Honourable Mr. Justice Frankel

(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated January 3, 2014 (R. v. Sater, 2014 BCSC 330,

New Westminster Docket X076436-2).

Counsel for the Appellant:

E. Purtzki

Counsel for the Respondent:

M.J. Brundrett

Place and Date of Hearing:

Vancouver, British Columbia

February 27, 2015

Place and Date of Judgment:

Vancouver, British Columbia

March 20, 2015

Summary:

Application granted under s. 684 of the Criminal Code appointing counsel to act on a conviction appeal. Application for a retroactive order to compensate pro bono counsel for acting on the application refused.

Reasons for Judgment of the Honourable Mr. Justice Frankel:

Introduction

[1] Cory Sater was convicted by a judge of the Supreme Court of British Columbia sitting without a jury on seven charges arising out of a motor vehicle collision that left two people dead and another seriously injured. He received an effective global sentence of seven and one-half years imprisonment. Mr. Sater wishes to appeal some of those convictions and the global sentence. The Legal Services Society has agreed to fund the sentence appeal, but denied funding for the conviction appeal. Mr. Sater now applies under s. 684 of the Criminal Code, R.S.C. 1985, c. C-46, for an order appointing counsel to represent him on the conviction appeal. Such an appointment would require the Attorney General of British Columbia, if the Legal Services Society maintains its present position, to pay for the legal fees and disbursements associated with that appeal.

[2] For the reasons that follow, I order the appointment sought. However, I decline to make the order retroactive, such that it would cover the legal fees and disbursements associated with making this application.

Factual Background

[3] The offences occurred in the early morning hours of February 19, 2011. The circumstances are discussed in considerable detail in the trial judge's reasons, which are indexed at 2014 BCSC 330. It is enough to say that Mr. Sater, who had consumed a substantial amount of alcohol just prior to the event, struck a disabled vehicle and three people standing close to it, killing two of them and seriously injuring another. Mr. Sater did not stop. He turned himself in to the police the following day.

[4] Mr. Sater was charged as follows under the Criminal Code:

· One count of failing to remain at the scene of an accident (s. 252(1.3)(b)).

· Two counts of impaired driving causing death (s. 255(3)).

· One count of impaired driving causing bodily harm (s. 255(2)).

· Two counts of driving a motor vehicle with a blood alcohol concentration in excess of 80 milligrams causing an accident that resulted in death (s. 255(3.1)).

· One count of driving a motor vehicle with a blood alcohol concentration in excess of 80 milligrams causing an accident that resulted in bodily harm (s. 255(2.1.)).

· Two counts of dangerous driving causing death (s. 249(4)).

· One count of dangerous driving causing bodily harm (s. 249(3)).

[5] At the conclusion of the trial, Mr. Sater pleaded guilty to the charge of failing to remain at the scene of an accident. For its part, the Crown conceded there was no basis on which to convict Mr. Sater on the counts of driving with a blood alcohol concentration over 80 milligrams.

[6] The trial judge found Mr. Sater guilty on the charges of impaired driving and dangerous driving causing death and bodily harm. In reasons indexed as 2014 BCSC 1036, the judge imposed the following sentences:

· Five years (concurrent) on each of the two charges of impaired driving causing death.

· Three and one-half years (concurrent) on the charge of impaired driving causing death.

· Five years (concurrent) on each of the two charges of dangerous driving causing bodily harm.

· Three and one-half years (concurrent) on the charge of dangerous driving causing bodily harm.

· Two and one-half years (consecutive) on the charge of failing to remain at the scene of an accident.

[7] Mr. Sater's proposed grounds of appeal focus entirely on the three dangerous-driving related convictions. He contends the trial judge failed to properly apply the standard for dangerous driving set out in R. v. Beatty, 2008 SCC 5, [2008] 1 S.C.R. 49, and R. v. Roy, 2012 SCC 26, [2012]

2 S.C.R. 60. In essence, his position is that although he may have been driving negligently, the manner of his driving did not reach the level of being criminally dangerous. He also proposes to argue that impaired driving alone cannot establish liability for dangerous driving.

Analysis

Should Counsel be Appointed?

[8] Section 684 provides, in part:

(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.

(2) Where counsel is assigned pursuant to subsection (1) and legal aid is not granted to the accused pursuant to a provincial legal aid program, the fees and disbursements of counsel shall be paid by the Attorney General who is the appellant or respondent, as the case may be, in the appeal.

[9] The approach to be taken on an application under s. 684 is well known. It was summarized as follows by Madam 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).

See also: R. v. Bath, 2013 BCCA 126 at para. 12, 335 B.C.A.C. 144 (Chambers).

[10] In this case, I am satisfied that the grounds Mr. Sater intends to raise are at least arguable, that he requires the assistance of counsel to properly present those grounds of appeal, and that he does not have the means to privately retain counsel.

[11] What remains is whether there is any utility to this appeal given that Mr. Sater does not challenge the three impaired-driving related convictions. In particular, he does not challenge the two impaired driving causing death convictions for which he received concurrent sentences of five years' imprisonment.

[12] The Crown points out that that the impaired driving causing death offences are by far the more serious convictions. This is evinced by the maximum penalties provided in the Criminal Code. While the maximum penalty for dangerous driving causing death is 14 years, the maximum penalty for impaired driving causing death is life imprisonment. For completeness, I should mention that dangerous driving causing bodily harm and impaired driving causing bodily harm are both punishable by a maximum of 10 years.

[13] The Crown's position is that the dangerous-driving related convictions did not have an impact on the trial judge's decision to impose the five-year sentences and are unlikely to have an impact on this Court's consideration of the fitness of those sentences. In effect, the Crown says the trial judge determined five years was a fit sentence for impaired driving causing two deaths and then imposed a concurrent sentence of the same length for the related, but less serious, dangerous driving causing death offences. This is further reflected

in the three and one-half years concurrent sentences on the impaired driving and dangerous driving causing bodily harm charges.

[14] Whether it would be appropriate to require the state to bear the costs of a conviction appeal in circumstances where, because of related convictions arising out of the same incident, success on the appeal would have no effect on punishment is a matter I do not have to decide. I say this because the Crown has left open the possibility that on the sentence appeal it may argue Mr. Sater's moral culpability is greater because he drove both while impaired and in a dangerous manner. Put otherwise, the Crown may take the position that it is the combination of the two offences that makes the five-year sentences appropriate.

[15] In that the Crown may rely on the dangerous-driving related convictions to support the sentences imposed on the impaired driving convictions, it cannot be said the former convictions are of no consequence. Mr. Sater's prospects of success on his sentence appeal may well be enhanced if the dangerous driving convictions are set aside.

[16] I, accordingly, consider it appropriate to appoint counsel under s. 684.

Should the Appointment be Retroactive?

[17] In his written memorandum, Mr. Sater requests that any appointment made under s. 684 "be made retroactive to include all matters concerning this appeal, including this application for court-appointed counsel". I take this to be a request that the terms of appointment provide for the payment of the fees and disbursement of counsel who have appeared for Mr. Sater on this matter up to and including the hearing of this application. The Crown opposes such an order.

[18] Proceedings in this Court were initiated on May 30, 2014, by the filing of a notice of appeal and notice of application for leave to appeal. That notice was filed by Rishi T. Gill as counsel for Mr. Sater. It indicated that all of the impaired driving and dangerous driving convictions were being appealed along with the seven and one-half years sentence.

[19] A case-management hearing was held on September 29, 2014. Mr. Gill appeared and advised me that legal-aid funding had been granted for only the sentence appeal and counsel other than him would be looking into whether a s. 684 application should be brought with respect to the conviction appeal. I adjourned the matter to November 6, 2014, for an update,

[20] On November 6, 2014, both Mr. Gill and Eric Purtzki appeared. I was advised that: (a) Mr. Sater wished to proceed with a s. 684 application for his conviction appeal; (b) Mr. Gill would be obtaining the material needed for that application from Mr. Sater; and (c) Mr. Purtzki would be arguing the application. I adjourned the matter to December 3, 2014, for a further update.

[21] The December 3, 2014 hearing was brief. Mr. Purtzki advised me that Mr. Gill would be meeting with Mr. Sater later that day to obtain material for the s. 684 application. He asked for another appearance before the end of the year to confirm that the materials have been filed and to set a date for the hearing of the application. Mr. Purtzki stated that given his commitments, the application would likely not be heard until February of 2015. I adjourned the matter to December 22, 2014.

[22] An affidavit sworn by Mr. Sater before Mr. Gill was filed on December 19, 2014.

[23] At the hearing on December 22, 2014, Mr. Purtzki raised the possibility of my making a limited (interim) appointment under s. 684 authorizing him to look into the matter further with a view to bringing on an application for a "full" appointment. He suggested a date be set for the hearing of an application for a limited appointment. Following discussions with counsel, I adjourned the matter to February 27, 2014, for the hearing of a limited-appointment application. That was done on the understanding that if Mr. Purtzki decided to proceed with an application for a full appointment at that time, then he would provide advance notice to Crown counsel and the registry.

[24] On February 20, 2015, Mr. Purtzki filed a written statement on behalf of Mr. Sater, seeking an order for a full appointment only with respect to the dangerous driving convictions. On February 25, 2015, the Crown filed its statement in reply. A joint book of authorities was also filed that day.

[25] The only authority cited to me on the question of making a retroactive s. 684 order is R. v. Jaycox, 2012 BCCA 105, 316 B.C.A.C. 274 (Chambers), wherein Mr. Justice Chiasson, in appointing counsel who had previously acted for Ms. Jaycox to act for her on the appeal, stated:

[12] I order that Mr. John Green be appointed counsel for the appellant and that his appointment be retroactive to include all matters concerning this appeal. If the Legal Services Society is not able to grant legal aid to the appellant, I direct that Mr. Green be funded by the Attorney General of British Columbia pursuant to s. 684 (2) and (3) of the Criminal Code.

[26] Jaycox is unusual in that both the s. 684 application and an application for leave to appeal (this was a summary conviction matter) came on for hearing at the same time. The Crown took no position on the s. 684 application. Mr. Justice Chiasson reserved on both applications. He first released reasons granting leave to appeal and then released reasons appointing counsel.

[27] There are, however, other authorities which touch upon the issue of making a s. 684 appointment retroactive.

[28] Prior to Jaycox, a retroactive appointment had been made in R. v. Moghaddam, 2003 BCCA 552, 188 B.C.A.C. 74 (Chambers), wherein Mr. Justice Donald stated:

[13] Mr. Stevenson represented the applicant at the summary conviction appeal and appeared in this application pro bono. His submissions were helpful. Accordingly, I make the appointment effective for the present application, nunc pro tunc.

[29] A division of this Court discussed this issue in obiter in R. v. Edwards, 2002 BCCA 412, 173 B.C.A.C. 111. In that case, counsel appeared pro bono on behalf of Mr. Edwards and sought an order under s. 684 for the full appointment of counsel to advance a conviction appeal. Counsel also sought a retroactive order appointing counsel for the limited purpose of making the application for the full appointment. Both applications were dismissed by a judge in chambers: 2001 BCCA 663. Another counsel, again acting pro bono, then brought an application for review of that decision. The review application was dismissed for want of jurisdiction. In doing so, the Court, for the following reasons given by Mr. Justice Esson, declined to make a retroactive order in favour of pro bono counsel:

[9] The final aspect of the matter is that Mr. Carroll suggested that in the event the application is refused we should make a retroactive order under s. 684 requiring the Attorney General to reimburse him for his pro bono efforts in bringing this application. I am not satisfied that we have any power to make such an order. Certainly, I have never heard of a case in which an order has been made under that section which is other than prospective. Nor am I persuaded that it would be in the interests of justice, even if we have such power, to create a precedent of that kind.

[30] A retroactive order was made in R. v. Bernardo (1997), 121 C.C.C. (3d) 123 (Ont. C.A.). However, the facts in that case are exceptional. Mr. Bernardo was appealing two convictions for first degree murder. After being refused legal aid, he applied under s. 684 for the appointment of counsel. Anthony G. Bryant, who acted for Mr. Bernardo at trial, appeared on his behalf on that application, which was refused by a judge in chambers. Sometime later, a three-judge panel of the Court of Appeal asked Mr. Bryant to appear before it on Mr. Bernardo's behalf on two motions brought by Mr. Bernardo, one of which was an anticipated further application for the appointment of counsel. Although the Court determined that counsel should be appointed, Mr. Bryant declined to accept the appointment as it was not his practice to appear on an appeal when he had been trial counsel. The Court, however, decided that it was appropriate in the circumstances that Mr. Bryant's fees and disbursement on the two motions be paid by the Attorney General of Ontario. In that regard, Mr. Justice Doherty stated:

[39] The court was assisted by Mr. Bryant's submissions on these motions. I would make an order under s. 684(2) that his fees and disbursements referable to these motions be paid by the Attorney General.

There is no discussion in the reasons concerning the authority to make a retroactive order and nothing to indicate what, if any, position the Crown took in that regard.

[31] In my view, the order to compensate Mr. Bryant was made in recognition of the fact that the Court, in asking Mr. Bryant to appear on behalf of Mr. Bernardo, had, albeit informally, made an interim order appointing him counsel on the two motions.

[32] In R. v. X.Y., 2007 ONCA 189, 46 C.R. (6th) 261, counsel appeared pro bono on behalf of an appellant in an unsuccessful sentence appeal. At the hearing of the appeal, counsel had requested that an order be made appointing him under s. 684. In declining to do so, Mr. Justice Armstrong stated:

[30] Even if it can be said that there was an arguable case, based on [R. v. John Doe, (1999), 142 C.C.C. (3d) 330 (Ont. S.C.J.)], it cannot be said that the appellant could not have effectively advanced his two grounds of appeal without the assistance of counsel. Indeed, during the course of the argument, the appellant made articulate interjections from time to time.

[31] While the court was assisted by the submissions of Mr. Williams on behalf of the appellant, this is not a case in which the court should make an order under s. 684(1). That said, Mr. Williams is to be commended for taking on this case on a pro bono retainer.

[33] In R. v. Cassidy (1992), 131 A.R. 394 (C.A.), counsel appeared pro bono on behalf of an appellant seeking an order for the appointment of counsel on a conviction appeal. In granting that application, Mr. Justice Kerans made it clear that the appointment was prospective only:

[5] We want to make it clear that the counsel that we are now appointing is from today, not including today, and our order is that counsel for Mr. Cassidy who proceeds with this appeal will be paid on the Legal Aid tariff. We leave it for the Government and Legal Aid to decide out of whose budget this cost will come.

[34] Like Esson J.A. in Edwards, I have doubts as to whether s. 684 permits an order to be made for the payment of legal services that have already been performed. However, and in any event, I do not think such an order is appropriate in this case.

[35] Mr. Purtzki and Mr. Gill stepped forward and provided their services to Mr. Sater in connection with this application on a pro bono basis, i.e., without expectation of remuneration. In doing so, they acted in the best traditions of the bar. This tradition has a long and venerable history, as reflected in the following from an article by Mr. Justice Major, then a member of the Supreme Court of Canada, entitled "Lawyers' Obligation to Provide Legal Services" (1995), 33 Alta. L. Rev. 719 at 720:

It has long been part of the duty and tradition of the legal profession to provide services gratuitously for those who require them but cannot afford them. The profession, recognizing its commitment to the larger principle of justice, has traditionally not let such cases go unanswered merely because the individual is impecunious. Instead, the profession has collectively accepted the burden of such cases, thereby championing the cause of justice while at the same time sharing the cost that such cases entail. This is a tradition which dates to the very inception of the profession in medieval Europe in the thirteenth century.

[36] Without question, the pro bono services provided by Mr. Purtzki and Mr. Gill were of benefit to Mr. Sater. Further, I would be remiss if I did not acknowledge those services were of assistance to me, in particular, Mr. Purtzki's written and oral submissions. However, I consider it to be wrong in principle to compensate counsel after-the-fact for having stepped forward in fulfillment of their duties as members of the legal profession.

[37] As it happens, in this case, the request for retroactive compensation arises in respect of a s. 684 application that is being granted. However, if compensation is to be ordered in favour of pro bono counsel who successfully advances s. 684 applications, then I am unable to see a principled basis on which to refuse retroactive compensation when the application is unsuccessful. Whatever the result, counsel's efforts will have benefited the applicant and been of assistance to the Court.

[38] I, therefore, conclude that there is not a principled basis on which to make a retroactive appointment in this case.

Disposition

[39] I order the appointment of counsel to conduct Mr. Sater's appeal from his convictions on the charges of dangerous driving causing death and dangerous driving causing bodily harm, counsel's fees (based on the prevailing legal-aid tariff) and disbursement to be paid from the date of this order.

"The Honourable Mr. Justice Frankel"

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