



**IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR**

Citation: *R. v. Flynn*, 2018 NLCA 51

Date: August 23, 2018

Docket Number: 201701H0042

BETWEEN:

WILLIAM FLYNN

APPELLANT/APPLICANT

AND:

HER MAJESTY THE QUEEN

RESPONDENT

Coram: White J.A.

Court Appealed From: Provincial Court of Newfoundland and Labrador
St. John's

Application Heard: August 21, 2018

Decision Rendered: August 23, 2018

Counsel for the Appellant/Applicant: Jennifer Curran

Counsel for the Respondent: Iain Hollett

White J.A.:

[1] On July 4, 2017 William Flynn was sentenced to ten years' imprisonment with respect to two pharmacy robberies in 2014 and a convenience store robbery in 2016. Mr. Flynn is currently serving his sentence at the Springhill Institution in Nova Scotia.

[2] Mr. Flynn is appealing his conviction for the two pharmacy robberies and the sentence imposed for the three robberies. The appeal is scheduled to be heard on September 14, 2018. His argument is that the convictions for the pharmacy robberies cannot be supported by the evidence, and that the total sentence imposed for the three robberies is demonstrably unfit.

[3] This application pertains to Mr. Flynn's desire to be present for the hearing of his appeal. Although Mr. Flynn is represented by counsel, he wishes to be personally present for his appeal. While counsel for the Crown does not specifically oppose Mr. Flynn's application, he suggests that unless there is an identifiable benefit in having the appellant physically present, participation in the proceedings by video is a suitable alternative.

Statutory Framework

[4] The right of an appellant to be present for the hearing of their appeal is governed by section 688 of the *Criminal Code*:

Right of appellant to attend

688 (1) Subject to subsection (2), an appellant who is in custody is entitled, if he desires, to be present at the hearing of the appeal.

Appellant represented by counsel

(2) An appellant who is in custody and who is represented by counsel is not entitled to be present

(a) at the hearing of the appeal, where the appeal is on a ground involving a question of law alone,

(b) on an application for leave to appeal, or

(c) on any proceedings that are preliminary or incidental to an appeal,

unless rules of court provide that he is entitled to be present or the court of appeal or a judge thereof gives him leave to be present.

Manner of appearance

(2.1) In the case of an appellant who is in custody and who is entitled to be present at any proceedings on an appeal, the court may order that, instead of the appellant personally appearing,

(a) at an application for leave to appeal or at any proceedings that are preliminary or incidental to an appeal, the appellant appear by means of any suitable telecommunication device, including telephone, that is satisfactory to the court; and

(b) at the hearing of the appeal, if the appellant has access to legal advice, he or she appear by means of closed-circuit television or any other means that permits the court and all parties to engage in simultaneous visual and oral communication.

[5] The entitlement “to be present” in sections 688(1) and (2) is entitlement to be physically present. The discretion of the court to order a remote “appearance” under section 688(2.1) is described as discretion to order a remote appearance “instead of the appellant personally appearing.” As such, section 688 establishes an entitlement to physical presence, but maintains judicial discretion to order remote presence.

[6] The analysis under section 688 can be broken down as follows:

(i) An appellant is presumptively entitled to be physically present at the hearing of their appeal under section 688(1).

(ii) An appellant who is represented by counsel on appeal loses their entitlement if they fall within any of the three exclusions listed in section 688(2).

(iii) Even if an appellant loses their entitlement, the court has authority under section 688(2) to grant leave for the appellant to be physically present.

(iv) If the appellant is entitled to be physically present, either as of right under section 688(1) or because leave was granted under section 688(2), the court retains discretion under section 688(2.1) to order that the appellant instead appear by video for the hearing of the appeal.

Entitlement to be Present under Section 688(1)

[7] Applying this framework to the current case, Mr. Flynn is an in-custody appellant, who is represented by counsel, and who wishes to be present at the hearing of his appeal. He is presumptively entitled to this under section 688(1).

Loss of Entitlement under Section 688(2)

[8] Given the nature of Mr. Flynn's appeal, it does not appear that any of the exclusions listed in section 688(2) have caused Mr. Flynn to lose his entitlement to appear.

Exclusion 1 – Question of Law

[9] Mr. Flynn's argument on appeal is that the Trial Judge made unreasonable findings from the evidence, and that the sentence imposed was demonstrably unfit in the circumstances. While counsel for Mr. Flynn and counsel for the Crown in the materials filed in relation to the appeal itself appear to regard these as questions of law, it is clear that they involve at least some issues of fact, or mixed law and fact.

Exclusion 2 – Application for Leave to Appeal

[10] Although leave is required for the conviction appeal if the question is one of mixed law and fact, and required for the hearing of the sentence appeal, I do not accept that Mr. Flynn loses his entitlement on this basis.

[11] The general practice in this jurisdiction is that leave applications are heard along with the appeal on the merits. It is not uncommon for an appeal to be argued with little to no submissions on whether leave to appeal should be granted. Given this practice, it is not surprising that there is no reference to leave to appeal in the Crown's factum, and only passing reference to it in the "Remedy Sought" section of the appellant's factum.

[12] On this basis, I am unable to characterize the hearing that Mr. Flynn wishes to attend as an "application for leave to appeal." While leave will technically be at issue at the hearing, it is primarily a hearing on the merits of the appeal.

Exclusion 3 – Preliminary or Incidental Matters

[13] Mr. Flynn's stated interest is in appearing for the hearing on the merits of his appeal, and so the third exception is of no relevance to this application.

Leave to Appear under Section 688(2)

[14] Even if the appeal does involve grounds of law alone, I would be prepared to grant leave to appear pursuant to section 688(2). I would grant leave for the reasons outlined in the following section.

[15] If it is accepted that the hearing on the merits of the appeal involves an “application for leave to appeal,” then I would similarly grant leave for Mr. Flynn to be present. I note that Justice Lambert of the British Columbia Court of Appeal granted leave to appear at a blended leave and merits hearing on an appeal of sentence in *R. v. Spence*, 14 W.C.B. 471, [1985] B.C.W.L.D. 3180 (BCCA). Justice Lambert explicitly declined to answer whether or not an appellant has an absolute right to appear at a blended leave and merits hearing.

Appearance by Video under Section 688(2.1)

[16] While section 688(1) creates a statutory entitlement for Mr. Flynn to be present for the hearing of his appeal, section 688(2.1) provides discretion for this Court to order that Mr. Flynn appear remotely by closed-circuit television or other video conferencing means. This discretion must be exercised judicially.

[17] As stated by Lord Sterndale, M.R. in the case of *Ritter v. Godfrey*, [1920] 2 K.B. 47, for discretion to be exercised judicially “there must be some grounds for its exercise, for a discretion exercised on no grounds cannot be judicial.” This commentary on judicial discretion has been previously accepted by this Court: see, for example, *Moray Seafoods Ltd. v. Nasco Canada Ltd.*, 2006 NLCA 29, 256 Nfld. & P.E.I.R. 219.

[18] An exercise of discretion under section 688(2.1) involves a balancing of the interests affected. Counsel for the Crown has submitted that transporting an appellant, particularly an appellant located out of province, will result in incurring public expense. Depending on the timing of when the request to attend is made, it may also introduce scheduling difficulties and delay the appeal. Finally, depending on the circumstances, transporting the appellant may pose concerns for the safety of those involved and the public at large.

[19] These concerns must be weighed against the benefits of having the appellant physically present for the hearing of the appeal. In considering the benefits of physical presence, I am cognizant of the fact that the *Criminal Code* draws a significant distinction between entitlement to appear on appeal and appearance at the first instance trial. Unlike section 688, section 650 is framed not only as an entitlement, but an imperative that the accused attend their trial.

[20] The underlying rationale of section 650 was discussed by the Ontario Court of Appeal in *R. v. Hertrich* (1982), 137 D.L.R. (3d) 400, 67 C.C.C. (2d) 510 (ONCA), leave to appeal to SCC refused, [1982] 2 S.C.R. x, in reasons that were favourably cited by the Supreme Court of Canada in *R. v. Tran*, [1994] 2 S.C.R. 951, 117 D.L.R. (4th) 7.

[21] In *Hertrich*, Justice Martin referred to the accused's presence at trial as being tied to two important objectives:

The essential reason the accused is entitled to be present at his trial is that he may hear the case made out against him and, having heard it, have the opportunity of answering it: *R. v. Lee Kun* (1915), 11 Cr.App.R. 293. The right of the accused to be present at his trial, however, also gives effect to another principle. Fairness and openness are fundamental values in our criminal justice system. The presence of the accused at all stages of his trial affords him the opportunity of acquiring first-hand knowledge of the proceedings leading to the eventual result of the trial. The denial of that opportunity to an accused may well leave him with a justifiable sense of injustice. Indeed, in my view, an examination of the Canadian decisions shows that the latter principle is, in fact, the implicit and overriding principle underlying those decisions. ...

[22] Depending on the circumstances, these objectives may be less applicable on appeal. This is particularly true when the only issues on appeal relate to questions of law.

[23] However, when factual matters are in issue, the objectives outlined in *Hertrich* are entitled to consideration. An appellant who has an intimate knowledge of the factual material can reasonably feel that there is a benefit in being able to speak with counsel during the hearing of an appeal. In cases where leave to appear was required, this has been a relevant consideration in granting leave: see *R. v. Morin* (1993), 12 O.R. (3d) 316, 18 W.C.B. (2d) 324 at paras. 11–12 (ONCA); *R. v. Assoun*, 2005 NSCA 140, 237 N.S.R. (2d) 201 at para. 8.

[24] The right of an accused to consult with counsel at trial has been recognized by this Court as a component of the right to make full answer and defence: see *R. v. Gibbs*, 2018 NLCA 26 at paras. 29, 37. While arrangements can be made for a remotely attending appellant to interact with their counsel, this would not be equivalent to the fulsome ability to consult where the appellant is physically present.

[25] In the current situation, counsel for Mr. Flynn has emphasized the level of interest and involvement he has had with the appeal to date. Mr. Flynn filed his

own notice of appeal and his counsel says that he has continued to closely monitor the matter since she became involved with the appeal.

[26] Mr. Flynn has been convicted of serious offences and is facing a lengthy sentence. This appeal carries great personal significance for Mr. Flynn, and the objectives of fairness and openness from *Hertrich* are entitled to significant consideration.

[27] Although a video appearance may allow for an appellant to observe that they receive a fair proceeding in some situations, I am not satisfied that this would be the case in the current situation. Similarly, while recognizing that transporting Mr. Flynn will result in public expense, I am not satisfied that, in the circumstances, this outweighs the interest of Mr. Flynn being physically present for his appeal.

[28] Accordingly, it is ordered that Mr. Flynn be authorized to attend the hearing of his appeal in person.

C.W. White J.A.