R v Cameron

Overview

1. This problem explores a criminal defendant's right to effective assistance of counsel in plea negotiations with the Crown, the *Charter*-imposed duty on the government to provide criminal defendants with counsel in certain circumstances, and the constraints on the Crown's ability to advance potentially inconsistent theories of liability against different accused.

2. Stewart is a city in the province of Falconer, a common law province in the country of Flavelle. Flavelle and Falconer have a system of government, Constitution, judicial system, Criminal Code, and common law history identical to that of Canada and Ontario, respectively.

3. Flavelle's highest court is the Supreme Court of Flavelle. All Canadian legislation is binding on the Supreme Court of Flavelle, but the Court is not bound by Canadian jurisprudence. However, decisions of Canadian courts, particularly the Supreme Court of Canada, are considered highly persuasive.

4. The Superior Court of Falconer and the Court of Appeal for Falconer have jurisdiction over all issues raised in their respective decisions below.

(A) The Falconer Legal Aid System

5. In 1998, the Falconer government passed the *Legal Services Act,* which established Falconer Legal Aid ("**FLA**"). FLA provides legal assistance to Falconer residents who are unable to afford counsel. Eligibility is determined through a variety of factors, including income.

6. FLA operates a variety of services. It provides duty counsel for unrepresented persons in criminal, youth or family law courts, and funds poverty law services that aid low-income residents in obtaining or maintaining social and financial assistance.

7. The FLA also operates a province-wide legal ‘certificate’ system. Falconer residents who meet FLA’s eligibility criteria and face sufficiently serious charges are issued certificates, which function as vouchers for legal services. Certificate holders may solicit legal services from counsel of their choice, who then negotiate a mutually acceptable retainer with FLA.

(B) The Shaffer Report

8. In 2008, Michelle Shaffer, the Attorney General of Flavelle, issued a Report on Access to Justice (the “**Report**”) that reviewed the effectiveness of legal aid services across the country. The Report included the following findings:

   (a) Flavelle’s legal aid services were typically delivered through certificate systems or clinic systems;
   (b) neither system, in any of Flavelle’s provinces, was adequately addressing Flavelle’s burgeoning ‘access to justice’ crisis. Flavellians were being cut off in increasing numbers from the legal aid system due to low state funding and strict eligibility criteria;
   (c) Flavelle’s provincial governments were not doing enough to combat the access to justice crisis. They were not providing robust funding for legal aid services, nor were they updating their existing policies in light of the evolving challenges confronting the most vulnerable segments of society. For example, the legal aid eligibility cut-off for a single person in Falconer had remained static at $12,000 for the past twenty years, despite rising inflation;
   (d) criminal defendants were particularly disadvantaged by lack of access to legal aid. Around 90% of convictions in Falconer were registered through guilty pleas. Unrepresented defendants “desperately needed” access to legal services to redress the power imbalance they faced in plea negotiations with the Crown, a need that was going “sorely unmet” in the status quo.
   (e) community legal clinics and *pro bono* services were stepping in to assist criminal defendants unable to access state-funded legal aid programs. However, these not-for-

profit services were frequently overburdened and struggling to handle the volume of cases that "fell through the cracks" of existing legal aid systems.

(C) Facts of *R v. Cameron*

I. Background Facts

9. Cameron is a resident of Stewart. He lives with his younger brother, Manas Vinnie, and his daughter Maggie in a small house in downtown Stewart. Cameron works as a delivery person for Ned's Fine Eatery, a restaurant in his neighborhood. He has been employed at Ned's since 1998.

10. The cost of living in Stewart rose rapidly from 1998 to 2013. As a result, Cameron had difficulty making ends meet on his annual salary of $25,000 from Ned's. His attempts to find a second job were unsuccessful.

11. On December 6, 2012, Vinnie approached Cameron with a proposition. Vinnie suggested they rob the house of a wealthy family, the McAlisters, who would be away on Christmas vacation beginning on December 8, 2012.

12. The Crown and Cameron disagree on the outcome of this conversation. At Cameron's trial, the Crown contended that he accepted Vinnie's proposition. Cameron argued that he explicitly rejected it.

II. The Theft at the McAlister Residence

13. On December 28th 2012, Officer Chiao of the Stewart Police Service was on patrol in the McAlisters' neighbourhood. At 10:43 pm, he noticed that the windows on the second floor of the McAlister residence were shattered. There was no evidence of forced entry through any other part of the residence. Upon further investigation, Officer Chiao discovered clear evidence of a burglary inside the premises.

14. Officer Chiao solicited eye witness accounts from five of the McAlisters' neighbors. The eye-witness accounts varied significantly. Two neighbors (Donald and Mike) claimed they had seen a man closely resembling Vinnie fleeing the McAlister residence on foot. Another neighbor (Jill) told Officer Chiao that she had seen a man closely resembling Cameron fleeing the scene of the crime. The two remaining neighbors (Hilary and Bill) provided descriptions of two men they had seen leaving the McAlister residence on the night of the robbery. One description closely resembled Cameron. The other bore a moderate resemblance to Vinnie.

15. The Stewart Police subsequently received a tip from one of Cameron's neighbors. On the basis of this tip, the Stewart Police successfully applied for a warrant to search Cameron and Vinnie's residence. They discovered silverware bearing the McAlister family crest in the garden shed. The total value of the silverware was between $10,000 and $15,000.

16. Vinnie and Cameron were arrested on January 16th, 2013. They were subsequently charged with breaking and entering and theft under s. 348 and s. 332 of the *Criminal Code*, respectively.

III. Cameron Secures Representation Through City Law Services

17. Cameron could not afford to retain private counsel following his arrest. Instead, he sought representation through FLA.

18. Cameron's application to FLA was denied because his annual income of $25,000 fell narrowly above the $21,000 cut-off for a parent with one child established in the *Legal Services Act*. His subsequent appeal of FLA's decision was rejected. FLA referred Cameron to City Law Services ("**CLS**"), a community clinic in Stewart that provides free legal services to the residents of Stewart and the neighboring towns of Langille and Dineen (an area with a combined population of 400,000 people).

19. CLS was established in 2010 by four prominent criminal defence lawyers who left their private firms to assist Stewart residents unable to obtain representation through FLA. The clinic employs four staff lawyers (the clinic's founding members) and two students.

20. The four founding members of CLS are committed to ensuring accessible legal representation for as many people as possible. Accordingly, the clinic maintains a significantly higher eligibility cut-off ($40,000) than FLA, and makes a concerted effort to minimize rejections for eligible applicants.

21. CLS enjoyed considerable success upon its inception and quickly became FLA's most frequent referral for defendants who were ineligible for state-funded legal aid. However, within two years, the clinic found itself operating significantly over capacity. The four founding members often worked gruelling hours and handled a rapidly-growing volume of cases. Recent financial problems have prevented them from hiring more lawyers to alleviate their workload.

22. Cameron successfully obtained representation through CLS in April 2013. His lawyer, John Doe, was an experienced but overworked criminal defence attorney. Because of the high volume of cases handled by the four lawyers at CLS, Mr. Doe was generally only able to devote one to two hours to any individual file.

IV. Plea Negotiations

23. Mr. Doe negotiated with the Crown on Cameron's behalf. He informed the Crown that his client could not afford jail time or a criminal record in light of his precarious financial situation and because a criminal record would have devastating consequences on his already bleak employment prospects.

24. The Crown offered Cameron a favorable plea deal on July 8, 2013. In exchange for a guilty plea, the Crown offered to charge Cameron with theft under $5,000, and to elect summarily on the charge. The offer was to expire two weeks after it was made.

25. The maximum penalty for a summary conviction for theft under $5,000 is 6 months in prison and a $5,000 fine.

26. The two weeks following the Crown's offer were the busiest in CLS' short history. Mr. Doe docketed over 170 hours of work during that span. He fell ill with a fever near the middle of the second week, but chose not to take time off work.

27. As a result of his strenuous workload, Mr. Doe failed to communicate the Crown's offer to Cameron. The offer expired and the case proceeded to trial. The Crown sought a conviction for breaking and entering and for theft over $5,000, a straight indictable offence carrying a maximum penalty of ten years in prison.

C. Judicial History

28. Because both Cameron and Vinnie faced a potential sentence of more than five years in prison, each was afforded the opportunity to elect to be tried by a jury of their peers. Vinnie opted to exercise this right, while Cameron did not. Vinnie brought an application under s. 591(3)(b) of the *Criminal Code* to sever his trial from Cameron's. The application judge granted severance on multiple grounds, including the fact that only Vinnie's case would be heard by a jury, and that certain evidence—not relevant to this appeal—that the Crown would likely lead at Cameron's trial would unduly prejudice Vinnie's jury. As such, their trials proceeded separately.

I. Proceedings at the Falconer Court of Justice: Vinnie's Trial

29. The Crown's case against Vinnie relied on circumstantial evidence, particularly the recovery of the McAlister silverware from the residence shared by Vinnie and Cameron. The Crown also called Donald and Mike as witnesses. Both men testified that they had seen one man who closely resembled Vinnie fleeing the McAlister residence on the night in question.

30. The prosecutor in charge of Vinnie's trial anticipated that Vinnie would place responsibility for the robbery on Cameron's shoulders. Having disclosed all material witness statements to Vinnie, the prosecutor also expected Vinnie to call Jill as a defence witness.

31. The prosecutor did not want to lend any credence to Vinnie's theory that Cameron had been involved in the robbery. As a result, she opted not to call on Hilary and Bill—the neighbors who had seen two men fleeing the McAlister residence—as Crown witnesses. In the prosecutor's view, Hilary and Bill's eye-witness descriptions did not match Vinnie closely enough to satisfy the 'beyond a reasonable doubt' standard. Their testimony had the added disadvantage of confirming Vinnie's claim that Cameron had been present at the scene of the crime. Accordingly, the prosecutor made a strategic decision to construct the Crown's case without testimony from those two witnesses. In her opening address before the jury, the prosecutor claimed that Vinnie—and Vinnie alone—was responsible for the theft of the McAlisters' silverware.

32. Vinnie opted to testify in his defence. As predicted, he placed sole responsibility for the theft on Cameron, and called on Jill as a witness to buttress his defence theory. She testified that she had seen a man closely resembling Cameron fleeing the McAlister residence on the night in question.

33. Vinnie did not call on Hilary and Bill as witnesses. In his lawyer's view, Hilary and Bill's eye witness descriptions contained incriminating details that might allow a jury to conclude that Vinnie had committed the robbery together with Cameron. He was confident that Jill's testimony would be sufficient to raise a reasonable doubt as to his client's guilt. Consequently, Hilary and Bill were not called as witnesses by the Crown or the defence in Vinnie's trial.

34. The Crown attacked Vinnie's theory in cross-examination by arguing that Cameron could not have participated in the burglary, and that the presence of the stolen goods at the residence could only be explained through Vinnie's involvement. In particular, the Crown indicated through questioning that Cameron lacked the physical agility necessary to break into the McAlisters' second floor window. The Crown also attempted to undermine Jill's credibility and reliability.

35. In closing, the Crown raised an alternative argument that Cameron may also have participated in the burglary and simply not been seen by the two Crown witnesses, Donald and Mike. Crown counsel's exact words in framing this argument were:

> "Ladies and gentlemen of the jury, the defendant has argued that his brother, Scott Cameron, is responsible for this burglary. But he has given you no reason to doubt the two eye-witnesses who identified him as the sole burglar, nor has he explained how Cameron could have reached the McAlisters' second floor window. Even if the defendant has convinced you that Scott Cameron was involved in this burglary, you must still vote to convict. Mr. Cameron and the defendant could very well have committed this crime together. Mr. Cameron may not have been seen by Mr. Donald and Mr. Mike as he made his getaway. None of the evidence before you is inconsistent with the proposition that the defendant and Mr. Cameron are both responsible for breaking and entering into the McAlister residence and stealing their silverware. Evidence of Mr. Cameron's involvement is not evidence of the defendant's innocence."

36. The jury found Vinnie guilty of breaking and entering and of theft over $5,000. He was sentenced to three years' imprisonment.

II. Proceedings at the Falconer Court of Justice: Cameron's Rowbotham *Application*

37. Prior to his trial, Cameron discovered that Mr. Doe had failed to communicate the Crown's plea offer before it expired. Furious, he consulted with duty counsel about his options for securing alternate representation. He subsequently brought an application to secure funding for counsel (referred to in Falconer as a "*Rowbotham*" application) before Wyngaarden J. to have the Crown pay the reasonable legal fees ($15,000) of counsel of his choosing.

38. Cameron raised two points in support of his *Rowbotham* application. First, he argued that he had lost all confidence in Mr. Doe after his failure to communicate the Crown's plea offer. Second, Cameron contended that he lacked the means to fund counsel without government assistance. In support of this argument, Cameron provided Wyngaarden J. with monthly financial statements from the time of his arrest, documents indicating that he had an annual income of $25,000, and evidence that he had unsuccessfully applied for a second mortgage on his home after learning of Mr. Doe's error during plea negotiations.

39. The Crown opposed Cameron's application. Crown counsel did not suggest that Cameron was obligated to retain Mr. Doe as trial counsel after his error in plea negotiations. Rather, she argued that Cameron had not demonstrated an inability to pay legal fees for counsel of his choosing. Although she conceded that Cameron's annual financial income was only $25,000, Crown counsel nevertheless argued that he had financial resources sufficient to retain counsel. Crown counsel principally relied on the fact that Cameron held $34,684.82 worth of equity in his home. She claimed that had Cameron sold his house and moved in with his retired parents in their spacious bungalow on the outskirts of Stewart, he would have raised enough money to fund counsel of his choosing.

40. Cameron responded to the Crown's position by emphasizing that he could not have sold his home without immense personal sacrifice. He argued that the move would have forced his daughter into a significantly less well-funded school district and seriously imperiled his own employment at Ned's, which was an hour and a half away from his parents' bungalow by car. It was well-known that the owner of Ned's hired workers almost exclusively from within the restaurant's neighbourhood, since they could be available on shorter notice on particularly busy nights. Cameron also noted that no restaurants near his parent's home had posted job openings for the past year.

41. Wyngaarden J. rejected Cameron's *Rowbotham* application. He accepted that Cameron held strong, sincere and objectively reasonable reservations about Mr. Doe, such that a functioning solicitor-client relationship was "virtually impossible". Wyngaarden J. found that trial fairness would be seriously threatened if Mr. Doe represented Cameron. Wyngaarden J. also took judicial notice of widespread criticism of CLS' funding and workload, and accepted that immense work pressures had directly contributed to Mr. Doe's ineffective assistance, bolstering the reasonableness of Cameron's subjective lack of faith in his ability to provide effective representation.

42. However, Wyngaarden J. held that Cameron had failed to demonstrate that he lacked the means to fund counsel. He expressed sympathy for Cameron, stating that he "had no doubt" that Cameron was providing an accurate picture of the consequences that would have befallen his

family if he sold his house. However, Wyngaarden J. noted several references in Flavellian case law to the "exceptional" nature of *Rowbotham* orders and stated that:

> *"Flavellian jurisprudence indicates that Rowbotham orders should only be granted where an accused person has exhausted all other possible routes of funding. In this case, I find that Mr. Cameron had other possible routes of funding open to him. The burdens associated with those routes, while significant, do not constitute the sort of exceptional circumstances needed to justify a Rowbotham order."*

43. Having lost all faith in Mr. Doe due to his error in plea negotiations, Cameron elected to appear *pro se* at his trial.

III. Proceedings at The Falconer Court of Justice: Wyngaarden J. presiding

44. At Cameron's bench trial, the Crown contended that he had been an active participant in the burglary. Cameron testified that he had explicitly refused to take part in the burglary, and had played no role in its design or execution. He claimed no knowledge of how the stolen goods had appeared at his residence, but presumed that they had been placed there by Vinnie.

45. The Crown called Hilary and Bill to the stand. They each testified that they had seen two men fleeing the McAlister residence on the night in question, and provided a description of one of the men that closely resembled Cameron.

46. Cameron was unable to cast doubt upon the testimony of the Crown witnesses through cross-examination.

47. Cameron called Donald and Mike to the stand as defence witnesses. The Crown did not dispute the two men's testimony regarding Vinnie's involvement in the theft. However, during cross-examination, both Donald and Mike admitted that that they could not say with certainty that a second perpetrator had not been involved.

IV. Decision of Wyngaarden J.

48. Wyngaarden J. convicted Cameron of breaking and entering and of theft over $5,000 contrary to ss. 348 and 332 of the *Criminal Code*, respectively. He sentenced Cameron to four years' imprisonment. In his decision, Wyngaarden J. relied on the "credible and reliable" testimony of the Crown witnesses and stated that he had "no hesitation" in finding that Cameron's guilt had been established beyond a reasonable doubt. He found that both Donald and Mike were credible witnesses, but that "their testimony was not incompatible with the Crown's theory of liability". Wyngaarden J. also clarified that he had not relied on any evidence submitted on the *Rowbotham* application when adjudicating Cameron's trial.

V. Proceedings at the Falconer Court of Appeal

49. The law firm of Snap, Crackle and Pop took on Cameron's case *pro bono* following his conviction, and argued his appeal before a three judge panel of the Falconer Court of Appeal.

50. Before the Court of Appeal:

(a) Cameron argued, for the first time, that he had not received effective assistance of counsel during plea negotiations. The Court of Appeal allowed Cameron to adduce fresh evidence in support of his claim.

(b) The Crown conceded that Cameron had not been informed of his right to appeal Wyngaarden J.'s *Rowbotham* application decision prior to trial. As a result, both parties agreed that Cameron was entitled to raise that issue along with his other grounds of appeal.

(c) Cameron claimed that the Crown's theory of liability in his trial amounted to an abuse of process, given the Crown's theory of liability in Vinnie's trial.

VI. The Decision of the Court of Appeal for Falconer (Lewis J.A. for the majority, joined by Legge J.A.; Williams J.A. dissenting)

51. Writing for a majority of the Court of Appeal, Lewis J.A. upheld Cameron's conviction. While acknowledging that plea bargaining played an "increasingly prominent role" in the administration of justice, and also accepting that Mr. Doe's conduct fell well short of an objective standard of reasonableness, Lewis J.A. held that no miscarriage of justice had occurred in Cameron's case. She found Cameron's first ground of appeal to be derivative of his second and third grounds, noting:

> *"Mr. Cameron has not established that his trial suffered from procedural deficiencies, and has not provided this Court with any reason to doubt the substantive reliability of Wyngaarden J.'s verdict. Accordingly, his first ground of appeal is bound to fail. This is because the Charter does not grant criminal defendants a constitutional right to a plea deal. While the Crown may be prohibited in certain circumstances from deviating from the terms of a plea offer, there is no general obligation on the Crown to enter into plea negotiations with the accused, or to maintain an existing plea offer upon which the accused has not acted.*
>
> *While I agree with Mr. Cameron that criminal defendants are entitled to effective assistance of counsel in the plea bargaining process, I do not accept that a conviction pursuant to a full and fair trial constitutes a "miscarriage of justice" for the purposes of the effective assistance of counsel test. While Mr. Cameron did not receive effective assistance of counsel in the plea bargaining process, his subsequent conviction is nonetheless in accordance with s. 7 of the Charter. The alleged prejudice flowing from Mr. Doe's failure to communicate the Crown's plea offer is that Mr. Cameron has been convicted pursuant to a full and fair trial—a deprivation of liberty that is, by definition, in accordance with the principles of fundamental justice."*

52. Mindful of a potential appeal of her judgment, Lewis J.A. conceded that Cameron would likely have accepted the plea deal had it been offered to him (a factual finding with which Legge J.A. and Williams J.A. agreed). However, in light of her conclusion on the proper scope of the right to effective assistance of counsel, she held that Cameron was not entitled to a remedy.

53. Lewis J.A. also rejected Cameron's submissions on his failed *Rowbotham* application. She expressed substantial agreement with Wyngaarden J.'s reasoning and accepted his conclusion that Cameron had other means available to him to finance counsel, adding that significant deference was owed to the government's economic decisions with respect to the provision of public funds for legal services.

54. On the abuse of process issue, Lewis J.A. agreed that it was "unseemly" that separate Crown prosecutors had advanced seemingly inconsistent theories at Vinnie's and Cameron's respective trials. However, because the Crown had advanced alternative arguments at Vinnie's trial, and it was unclear which theory had been accepted by the jury, she found that the arguments advanced against Cameron did not amount to abuse of process. In any event, she concluded that any inconsistency would not justify displacing Wyngaarden J.'s clear finding of guilt.

55. Williams J.A. authored an impassioned dissent. She would have reversed Cameron's conviction on all three grounds raised on appeal.

56. Williams J.A. drew upon the Shaffer report in addressing her colleagues disposition of Cameron's first ground of appeal, noting:

> *"The majority's decision is insensitive to two disturbing trends in our criminal justice system. On the one hand, criminal defendants face a well-documented and widely recognized 'access to justice' crisis that is depriving them of the resources they require to navigate a complicated, unfamiliar and frequently hostile legal environment. On the other hand, the decisions of greatest consequence to those defendant's lives—decisions with potentially destructive impacts on their physical and mental well-being, their financial prospects and their family's future—are increasingly made beyond the supervision of judges,*

> *in a system where Crown prosecutors are the guardians of life, liberty and security of the person. If our Charter guarantees are to mean anything in the real world, they must apply with equal force to the plea bargaining process as it rapidly replaces the criminal trial as the arbiter of a defendant's most fundamental rights."*

57. Williams J.A. concluded that Mr. Doe's failure to communicate the Crown's plea offer to Cameron was "undoubtedly" a miscarriage of justice, as it had the effect of substituting a conviction under one offence with a conviction under a more serious crime.

58. Turning to Cameron's second ground of appeal, Williams J.A. rejected Wyngaarden J.'s "unfounded" conclusion that Cameron had adequate means to pay for counsel of his choosing:

> *"Mr. Cameron falls within a financial "no man's land": between outdated, unrealistic FLA eligibility criteria on the one hand, and genuine financial capacity to secure legal representation without undue personal sacrifice on the other. As a result, he was told that he should have sold his home, compromised his daughter's education, and imperilled his capacity to provide for his family, all to secure his basic Charter-protected right to a fair trial. The increasing number of individuals in Mr. Cameron's unfortunate position renders Wyngaarden J.'s approach to Rowbotham orders untenable. The judiciary cannot shirk its responsibility to protect Charter rights by labelling Rowbotham orders as 'exceptional'."*

59. Williams J.A. laid out an alternate approach to assessing financial capacity under the *Rowbotham* test that was "sensitive to the Shaffer Report's findings". On her approach, *Rowbotham* applications would be informed by and assessed through three overarching goals: promoting access to justice, minimising coercion and preserving public confidence in the justice system. Under this approach, Williams J.A. found that Wynngarden J. erred in rejecting Cameron's *Rowbotham* application. She stated that asking Cameron to risk his job and compromise his daughter's education to fund his legal defence would be viewed as "coercive, unrealistic and manifestly unfair" in the eyes of a reasonable, similarly-situated member of the public.

60. Finally, Williams J.A. dissented from her colleagues' disposition of the abuse of process issue. She contended that the strength of evidence against Cameron was irrelevant because the factually inconsistent theories advanced at the two trials had thrown the administration of justice into disrepute. In addition, she stated that the prosecutors had failed in their constitutional responsibility to exercise their discretion in a just manner.

61. Williams J.A. would have dismissed the case against Cameron on the grounds that it could not be prosecuted without the Crown engaging in an abuse of process. In the event that she was wrong on that point, she would have remitted Cameron's case to the Falconer Court of Justice, compelled the Crown to re-offer its initial plea bargain, and allowed the Court of Justice to exercise its discretion to accept or reject the plea. If the plea was accepted, Cameron would be sentenced under the summary conviction provisions of s.334 of the *Criminal Code*. If not, given the other procedural deficiencies at Cameron's trial, a new trial would be held where the Falconer government would be required to pay the reasonable legal fees of Cameron's counsel of choice.

D. Issues on Appeal

62. Cameron appeals the Falconer Court of Appeal's decision as of right to the Supreme Court of Flavelle. Three substantive issues are contested on this appeal:

    (a) Was the Appellant's right to effective assistance of counsel infringed during plea negotiations with the Crown?

    (b) Did the application judge's rejection of the Appellant's *Rowbotham* application infringe section 7 of the *Charter*?

    (c) Did the Crown's conduct in prosecuting the Appellant amount to an abuse of process?