IN THE SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Innocente, 2003 NCSC 189

Date: 20030918
Docket: CR 202962
Registry: Halifax

Between:

Daniel Joseph Innocente

Applicant

v.

Her Majesty the Queen

Respondent

Judge: The Honourable Justice Arthur J. LeBlanc

Heard: September 4, 2003, in Halifax, Nova Scotia

Counsel: Daniel Innocente, on his own behalf
James Martin, for the Crown

By the Court:

INTRODUCTION

[1] This is an application by Daniel Joseph Innocente for appointment of counsel or a stay of proceedings until counsel is appointed, pursuant to s. 650(3) of the *Criminal Code* and ss. 7 and 11(d) of the *Charter of Rights and Freedoms.*

[2] Daniel Joseph Innocente and Gilles Poirier are charged that:

> At or near Halifax, in the Halifax Regional Municipality, Province of Nova Scotia, and elsewhere in the Province of Nova Scotia, and Montreal, Province of Quebec and elsewhere in the Province of Quebec between the 25th day of March, 1996 and the 17th day of May, 1996, they did unlawfully conspire together and with Daniel Allen Evans, Mitchel Ernest Shepard, Michael Ogura and Francois German, the one with the other and with others unknown, to commit the indictable offence of trafficking in a narcotic to wit: Cannabis resin and cocaine, contrary to section 4(1) of the Narcotic Control Act and did thereby commit an offence contrary to section 465(1)(c) of the Criminal Code.

BACKGROUND

[3] After a three-week preliminary inquiry in 1998, Mr. Innocente and Mr. Poirier were committed to stand trial before the Nova Scotia Supreme Court. Both accused elected to be tried by judge and jury. The trial started in January 1999. Justice Felix Cacchione presided.

[4] In November 1998 Mr. Innocente applied for a declaration that his s. 7 Charter rights would be infringed if he was required to represent himself at trial. He made a *Rowbotham* application for the appointment of counsel. On November 27, 1998, Cacchione J. denied the application. The trial proceeded, and, after a period of deliberation, the jury reached no verdict. Cacchione J. declared a mis-trial.

[5] The retrial proceeded in February 2000 before Justice Allan Boudreau, beginning with a series of pre-trial motions. Boudreau J. stayed the charge against Mr. Innocente and Mr. Poirier on April 7, 2000, concluding that the Crown and the police had abused the process. The Nova Scotia Court of Appeal set aside the order of Boudreau J. and the matter was set down for re-trial. For the re-trial before Boudreau J. Mr. Innocente had been provided with counsel. Boudreau J. ordered that funds be made available by permitting the legal fees to be charged as an encumbrance on Mr. Innocente's property that had been seized by the Crown.

[6] In addition to this charge of conspiracy, Mr. Innocente was charged with two additional drug conspiracy charges. This trial by judge and jury was held in April 1999. Mr. Innocente represented himself. On April 21, 1999, Mr. Innocente was convicted on two counts of conspiracy to traffic in a narcotic. He was sentenced to seven years on each charge, to be served concurrently. In a decision dated June 7, 2000, the Nova Scotia Court of Appeal confirmed Mr. Innocente's conviction on one count and allowed the appeal on the second count (see 185 N.S.R. (2d) 1).

[7] Mr. Innocente was born on June 8, 1959. He is currently residing at the Sleepy Hollow Correctional Centre, Charlottetown, Prince Edward Island. In 2003

his parole was revoked for violations and a series of additional drug charges laid against him in Prince Edward Island and New Brunswick.

[8] Mr. Innocente was married to Lisa Harrison on August 26, 2001. At the date of Mr. Innocente's affidavit they had three children living with them: Michael, 18; Greg, 15; and Jordan, 13. At the hearing Mr. Innocente stated that Michael was living with his sister. Mrs. Innocente and the other two children live in a rented home at 43 Belmont Street, Dartmouth, Nova Scotia, in the Eastern passage area. As Mr. Innocente is incarcerated, Mrs. Innocente is the sole breadwinner. When his parole was revoked, Mr. Innocente had three years left to serve of his original sentence. Depending on the results of the charges he is facing in P.E.I. and New Brunswick, he may receive additional periods of incarceration.

[9] Mrs. Innocente is employed as a hairstylist on St. Margaret's Bay Road, Halifax. Between January 1, 2002 and January 1, 2003, Mr. Innocente earned about $8,000.00 while Mrs. Innocente took home approximately $15,000.00 in net income. In addition, Mrs. Innocente received approximately $750.00 in Child Tax Benefit monthly.

[10] Mr. Innocente's assets were seized by an order of the Supreme Court on June 26, 1996, pursuant to the "Proceeds of Crime" provisions of the *Criminal Code* (Part XII.2). The Court later authorized Mr. Innocente to sell his house at Granite Cove, Hubley, Nova Scotia. The two mortgages were retired and legal fees and real estate commissions were paid out of the proceeds. The balance was applied to partly satisfy legal fees owing to Warren K. Zimmer, who represented Mr. Innocente in the second conspiracy trial.

[11] Other assets of Mr. Innocente's were seized pursuant to the proceeds of crime provisions. These included a 1993 Coachman Travel Trailer, a Harley Davidson motorcycle, a 1955 Chevrolet automobile, two all-terrain vehicles, an 80 CC Yamaha motorcycle, two antique chesterfields, a chair and two spinning wheels. Mr. Innocente said he has access to a $300.00 vehicle, sideboards, an antique record player an oak table, two antique chairs, an antique recliner, a television, bunk beds and a coffee table.

[12] At the hearing, and at earlier hearings for appointment of counsel, Mr. Innocente states that he does not have full ownership of the assets. He says his wife claims ownership of the 1955 Chevrolet for a loan she made to him, that his mother

owns a high percentage of the Coachman trailer and that his only interest in the Harley Davidson motorcycle is $5,000.00 for parts he purchased when he repaired, with the rest of the interest belonging to his father. None of these other parties have agreed to release their interest in the assets, although none appeared at the hearing or otherwise gave evidence.

[13] Before he was incarcerated in 2003 for parole violation, Mr. Innocente was involved in the purchase and sale of seafood products under the name of D.I.D. Fishers and Brokers. This business is no longer active.

[14] Although no specific and detailed accounting of the monthly expenses was provided at the hearing, Mr. Innocente attached a series of receipts to his affidavit, including rent, oil, electricity, food, gasoline, car maintenance and insurance. Mr. Innocente also maintains that he is in arrears on child support payments but that, although the Maintenance Enforcement Program is seeking more than $13,000.00 from him, this amount may be reduced should he apply to have the arrears adjusted. Mr. Innocente’s explanation is that Mrs. Innocente is now earning income and the Child tax Benefit, which is just about enough to meet expenses. At the

hearing the Crown was not taking the position that Mr. and Mrs. Innocente have sufficient surplus income to permit Mr. Innocente to retain counsel.

[15] I am satisfied that the income that Mr. Innocente claims is currently being earned by Mrs. Innocente and her Child Tax Benefit are the only income available to meet ongoing expenses. I am not prepared to assume that Mr. or Mrs. Innocente have any other secret source of income. Furthermore, I am also satisfied that Mr. Innocente does not have any additional assets apart from those that were seized by the Crown and the few additional assets that are currently in the home occupied by Mrs. Innocente.

Education

[16] Mr. Innocente successfully completed a G.E.D. Grade 12 equivalency. He has no other training. He has no legal training, although he has represented himself at various trials in the Supreme Court (both before a judge and jury and judge alone) and on numerous applications for the appointment of legal counsel before the Provincial Court and Nova Scotia Court of Appeal, as well as in this Court. He has also, on several occasions, sought leave to appeal to the Supreme Court of Canada.

Attempts to obtain assistance from Nova Scotia Legal Aid

[17] Mr. Innocente first contacted Nova Scotia Legal Aid in 1999, seeking funding for counsel for the proceeds of crime trial. His application was denied because the value of his assets exceeded that permitted by the Legal Aid Commission. At the hearing of this application he confirmed that he had not filed a new application for legal aid since his first application was rejected in 1999. He said he contacted Mr. Walter Yeadon at Nova Scotia Legal Aid three times in 2003, and was denied services each time.

[18] The Legal Aid Commission wrote to Mr. Innocente on April 25, 2003, indicating that it would not provide legal aid services. This letter was filed in the application before Glube C.J.N.S. in which Mr. Innocente sought appointment of counsel pursuant to s. 684 of the *Criminal Code* for a Crown appeal for judicial review (see 214 N.S.R. (2d) 295). Mr. Yeadon was present for that application and confirmed that the Commission would continue to deny Mr. Innocente legal aid services despite his claim that he only owned a partial interest in the assets. Based on these statements, the Chief Justice took the position that it was not necessary for Mr. Innocente to make a formal application.

[19] With the present matter set down for trial, Mr. Innocente contacted the Legal Aid Commission again. Mr. Yeadon confirmed that no legal aid services would be provided. Neither this letter, nor the letter of April 2003, specified whether they were in respect of the application for judicial review or in respect of the re-trial.

[20] At the hearing before me, the Crown claimed that the comments of the Chief Justice were not necessarily an accurate representation of the position of the Legal Aid Commission, and that a review of the record of the hearing would indicate a possible different position of the Commission. Since the hearing, the Crown has filed a copy of the record. Mr. Innocente claims that the Crown position is inaccurate and says other parts of the transcript might lead to a different interpretation. I have decided to ignore this transcript of representations and evidence from the application before Chief Justice Glube. Mr. Innocente did not have an opportunity to respond to any questions on this point while he was being cross-examined before me. It would be improper for the Court to review the transcript without having Mr. Innocente comment on the same while under oath.

[21] In preparation for this *Rowbotham* application Mr. Innocente submitted a request to numerous lawyers practicing in the Halifax area to act on his behalf at Legal Aid rates or to accept partial payment of their account on a monthly basis. A significant number of these lawyers indicated that they did not have any interest in acting on his behalf at those rates or through such an arrangement.

ISSUES

[22] The issues to be decided on this applications are as follows:

> **(1)** Will Mr. Innocente's right to a fair trial as guaranteed under ss. 7 and 11 of the Charter of Rights and Freedoms be infringed should he be denied legal counsel to act on his behalf from the conspiracy charge and any related matters?
>
> **(2)** Are Mr. Innocente's financial circumstances such that he is prevented from retaining legal counsel?
>
> **(3)** Is the proceeding sufficiently complex and serious that this will require the appointment of legal counsel to ensure that Mr. Innocente receives a fair trial?

[23] I find that neither Mr. nor Mrs. Innocente have sufficient financial resources to retain legal counsel for Mr. Innocente for this trial.

[24] I find that the lack of a formal application by Mr. Innocente to the Legal Aid Commission in reference to the conspiracy trial is not a prerequisite to a determination of Mr. Innocente's financial status for the purpose of this application.

[25] I find that a conspiracy trial is a complex proceeding, particularly where, as in this instance, Mr. Innocente may advance a number of pre-trial motions and participate in several *voir dires* to determine the validity of warrants for electronic surveillance, warrants for searches and the qualifications of experts being offered as Crown witnesses. In addition, he has indicated he will be presenting a motion for a stay of proceedings based on the special plea of *autrefois acquit* and *autrefois convict*.

[26] I find that Mr. Innocente has sufficient skill and knowledge to present his own case, including the selection of the jury and addressing the jury. However, he will require legal counsel on the special plea of *autrefois acquit* and *autrefois convict*, and the *voir dires* to determine the validity of warrants for electronic surveillance, warrants for searches and the qualification of experts. I am also mindful that if there are other pre-trial motions, including relevant additional

Charter applications, I would be disposed to having Mr. Innocente be provided with legal counsel for such motions or applications.

ANALYSIS

[27] This application concerns Mr. Innocente's right to a fair trial as guaranteed under the *Criminal Code* and the *Charter of Rights and Freedoms*.

[28] Mr. Innocente applied to this Court for a return of seized property in May 1998, in order to retain counsel. Davison J. rejected his application. He then applied in this Court in November 1998 for a declaration that his rights under s. 7 of the *Charter of Rights and Freedoms* had been infringed, as he was required to defend himself. Cacchione J. denied his application.

[29] In 1999 Mr. Innocente applied to the Nova Scotia Legal Aid Commission for the appointment of counsel. This application was denied on the basis that the assets listed were sufficient to meet the cost of hiring a lawyer. He applied again for the appointment of counsel for his upcoming conspiracy trial. This application was denied on the same basis as the 1999 application. He again contacted Legal Aid on

July 14, 2003. The Commission reiterated its position that it would not extend him legal aid services.

[30] The Crown says Mr. Innocente should file a new application for legal aid services, amending his previous application to show only his ownership interest in the assets in which he claims to only have a partial interest. Mr. Innocente says the Commission is fully aware of the fact that others claim interests in some of the seized assets. He also maintains that he did not claim full ownership of the assets listed on his application at the time these assets were disclosed to the Commission, but was providing, as he was asked to do, a list of the assets that had been seized pursuant to the Supreme Court order. Furthermore, he says, the values of these assets have greatly diminished since 1999. Therefore, even if they were released from the seizure order, little or nothing would be achieved. The cost of legal services, he argues, would be much greater than the amount that could be realized from the sale of the assets.

[31] The Crown maintains that the appropriate procedure is to have Mr. Innocente reapply for legal aid, revising both the value of the assets and his

ownership interest in them. Only then would it be possible to properly determine if he is entitled to legal aid services.

[32] I am convinced that the appropriate course is to follow the approach of Glube C.J.N.S. in Mr. Innocente's s. 684 application (214 N.S.R. (2d) 295). At paragraph 25 she said:

> I must make this decision based on the information before me on this application. Although Mr. Innocente has not applied again under s. 462.34 as suggested by Legal Aid, he has filed an affidavit saying others have an interest in the major properties. Whether or not this would make any such application unsuccessful is not for me to say, but he does not at this time have these items in his possession as a possible source of income. As an aside, it would seem reasonable that the value of these items may be less than when they were seized seven years ago. He has outlined the amounts these items were valued at two years ago which is less than the amounts shown in the February letter and he submits that their value would be even less today.

[33] The circumstances in the application before me are substantially the same as they were before the Chief Justice four months before the present matter was heard. I am not persuaded that anything would be gained by requiring Mr. Innocente to make a new application to the legal Aid Commission.

Complexity of the Proceedings

[34] Mr. Innocente maintains that a conspiracy charge is a very complex proceeding and that he does not have the legal background or training to defend himself at the trial. Furthermore, he plans to advance a pretrial motion for a stay on the special plea of *autrefois acquit* or *autrefois convict*. He was previously convicted of conspiracy to traffic in a narcotic. The Crown agrees that this trial will involve two expert witnesses, wiretap evidence and search warrants, and will last five to six weeks. Mr. Burke, co-counsel for Mr. Poirier, has scheduled three weeks of pre-trial motions for additional disclosure.

[35] In reviewing the file, it is clear that Mr. Innocente has represented himself on numerous applications for counsel, both *Rowbotham* applications and s. 684 applications. Mr. Innocente also represented himself in two previous conspiracy trials. In one he was the sole accused. He and Mr. Poirier were jointly tried in the other. In the first trial Mr. Innocente was convicted and sentenced to seven years' imprisonment. The second trial ended in a mistrial. Mr. Innocente was represented at the second trial, pursuant to an order issued by Boudreau J. He appealed the conspiracy conviction to the Nova Scotia Court of Appeal, where he was represented by counsel. His argument on appeal that he had not received adequate

assistance from the trial judge and did not receive a fair trial was rejected by the Court of Appeal.

[36] Mr. Innocente stated that he is facing charges in Prince Edward Island and New Brunswick involving alleged drug offences. He is representing himself in those proceedings, and has requested disclosure of documents. Depending on the results of the charges he is facing in other provinces, Mr. Innocente may be subject to a further jail term. He may be sentenced to a significant further period of incarceration should he be convicted of the charge before this Court.

[37] The state is not obliged to provide counsel as a matter of course: see *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1 (Ont. C.A.) and *R. v. Keating* (1997), 159 N.S.R. (2d) 357 (C.A.). The right to counsel guaranteed by s. 10(b) of the *Charter* does not require the state to provide such counsel at its expense in every case. As Scanlan J. of this Court stated in *R. v. Taylor* (1996), 150 N.S.R. (2d) 97 (affirmed 154 N.S.R. (2d) 378 (C.A.), leave to appeal to S.C.C. dismissed, [1997] S.C.C.A. No. 112) at para. 20:

> Courts must not routinely require the state to fund legal defences based solely on the fact that an accused is indigent or that there is a possibility of incarceration if convicted. The test must be whether an accused is capable of answering the charge with sufficient skill so that the accused will not be deprived of their liberty without being afforded fundamental justice.

[38] According to such cases as *Rowbotham*, *Keating* and the recent decision of the Quebec Court of Appeal in *R. v. R.C. et al.* (No. 500-10-002362-026, June 19, 2003) the need to appoint counsel will not arise if the accused has the financial means to meet the cost of retaining legal counsel. In other words, an accused cannot simply take the position that he will not spend any of his own money and rely upon public funds in order to secure legal services. In *Rowbotham* the Court said, at p. 64:

> As a matter of common sense, an accused who is able to pay the costs of his or her defence is not entitled to take the position that he or she will not use personal funds, but still to require Legal Aid to bear the costs of his or her defence. A person who has the means to pay the costs of his or herd defence but refuses to retain counsel may properly be considered to have chosen to defend himself or herself.

[39] Where an accused establishes that he has insufficient means to retain counsel, the next question is whether or not the accused is equipped with sufficient skills and ability to defend himself. In reaching a conclusion, the court must look at the nature of the charge, the experience of the accused, the length of the trial and

any pretrial motions, the nature of the evidence to be called at trial and the level of education of the accused.

[40] In Mr. Innocente's case, the charge he is facing is complex. Conspiracy is complicated by nature; while Mr. Innocente acknowledged at the hearing that he knew it consisted of a three-step process, this does not alter the fact that the charge is a complicated one to defend. I refer to comments in the decisions in *R. v. Beals* (1993), 126 N.S.R. (2d) 130 (C.A.) and *R. v. Desmoine*, [1988] O.J. No. 2357 (Ont. Dist. Ct.). In *Beals* the court stated at para. 22:

> I would infer the Ontario Court of Appeal recognized that it is not always necessary to a fair trial that an accused be represented by counsel. In the *Rowbotham* case, the accused was charged with an offense of some complexity – conspiracy. The court concluded that the particular accused could not have a fair trial in the circumstances of the case without representation by counsel.

[41] In *Desmoine* the charges involved conspiracy to traffic in drugs. While dealing with a demand for particulars, the court stated:

> In exercising its discretion to order particulars, the court must be satisfied that particulars are necessary to ensure that the accused has a fair trial. Given the fact that the accused is charged with conspiracy, and bearing in mind the complex evidentiary problems that are involved in conspiracy trials, particulars in this case are certainly required to ensure that the accused has a fair trial.

[42] There are, however, other factors that the court should consider in assessing whether the complexity of the case demands the appointment of counsel. In *R. v. Rain* (1998), 130 C.C.C. (3d) 167 (Alta. C.A.), leave to appeal to S.C.C. refused, [1998] S.C.C.A. No. 609, the court ruled that the term of the penalty or potential imprisonment was not, by itself, sufficient to establish that the accused could not have a fair trial without counsel. However, it is a factor for the court to consider. If Mr. Innocente is convicted of conspiracy, he could face a lengthy jail term, particularly where he has already been given a prison term for conspiracy.

[43] Another factor is the length of the trial. Further, although the trial judge is required to provide some assistance to a self-represented accused, it is beyond any doubt that the trial judge cannot provide the same level of assistance as could competent counsel.

[44] In the recent decision of *R. v. R.C. et al.*, the Quebec Court of Appeal discussed the principles of the appointment of counsel and said, at paras. 154-156:

> Given the ultimate relief sought in an application of this kind, the court must first determine whether the applicant can represent him- or herself alone, in which case the application should be dismissed.

> In criminal cases, it will be agreed that the need to be represented by counsel is directly proportional to the importance and complexity of the proceedings and inversely proportional to the accused's ability to represent him- or herself alone and adequately. The more complex and important the proceedings are, the more the accused must have exceptional abilities in order for the hearing to be fair, if the accused represents him- or herself alone.
>
> From this perspective, the court must consider the accused's ability to communicate, his or her level of education, his or her knowledge of the judicial system and any other factor that is likely to inform the court of the accused's profile so that it can determine, in the context of the particular case, whether the accused has sufficient abilities to defend him- or herself alone without being deprived of his or her right to a fair and equitable hearing.

[45] Mr. Innocente is not a novice to the criminal justice system. He has represented himself on numerous applications, trials, applications for leave to appeal to the Supreme Court of Canada and other proceedings. His abilities have been reviewed by other members of this court as well as by the Nova Scotia Court of Appeal. Commenting on Mr. Innocente's competence and ability, Chipman J.A. stated, at 185 N.S.R. (2d) 1, para. 154:

> In considering the ability of the appellant to conduct his own defence in three separate conspiracy trials, Cacchione J. had determined in the Rowbotham application that on the first branch of the test, the appellant had satisfied him that the case was of such a complex nature that it would be difficult for him to adequately represent himself. However, by the time this case came to trial the appellant had the benefit of experience gained in defending himself in matter No. 142212, in which his co-accused was represented by experienced counsel.

[46] Chipman J.A. went on to say, at para. 168:

> My review of the cross-examination conducted by the appellant, the submissions made at various points during the evidence, as well as his summation to the jury, leads me to conclude that the appellant had acquired skill in the art of conducting a defence. In short, I am satisfied that he put up a good defence in the face of a very strong case against him.

[47] Although I have not heard evidence from any experts, Mr. Innocente has indicated that, while he may know terms such as *autrefois acquit* and *autrefois convict*, he does not know their significance or their application. Neither does he know much about others terms he has used, such as double jeopardy and *res judicata*. Given his lack of education or legal training or experience I am prepared to find that for Mr. Innocente it would be very difficult to argue issues relating to warrants for wiretaps, searches of residence and vehicles, and that he would not be sufficiently competent to challenge the qualifications of experts. I am, of course, concluding that someone holding a G.E.D. certificate of Grade 12 equivalency is not competent to deal with these issues despite his prolonged involvement in the criminal justice system.

[48] It is my finding that the pleas of *autrefois acquit* and *autrefois convict* are very complex and intricate and that it would be a substantial difficulty for Mr. Innocente to properly argue the basis upon which the court should agree with his

arguments on those points. Many decisions have dealt with this area of law, not without difficulty. In addition, challenging the warrants for electronic surveillance will require detailed and specific preparation, as will challenging the validity of search warrants. I am also prepared to accept that preparing to cross-examine experts on their qualifications would be equally complex.

CONCLUSION

[49] It is my opinion that Mr. Innocente has acquired sufficient skill and knowledge to present his own case, including the selection of the jury and addressing the jury. However, I do not believe that Mr. Innocente is sufficiently skilled to deal with complex issues of *autrefois acquit* and *convict*, warrants for electronic surveillance, search warrants, and the qualifications of two expert witnesses for the Crown.

[50] I take into account Mr. Innocente's representations to the court, as well as the positions that he advanced before Justice Cacchione and Justice Davison. I am also mindful of the comments of Chipman J.A. that Mr. Innocente has acquired skills and the ability to represent himself in a jury trial.

[51] The application being granted in part, the Crown will arrange to provide legal counsel to Mr. Innocente to prepare and argue the applications I have mentioned, and to represent Mr. Innocente in cross-examination of witnesses respecting the search warrants, wiretap warrants and experts' qualifications. Should there be further pre-trial motions, including *Charter* motions to be made on his behalf, I will hear Mr. Innocente's application in respect of each of these as the need arises. Accordingly, the Crown will not proceed with this matter against Mr. Innocente until such counsel is appointed. Until that time, a conditional stay of proceedings is granted.

J.