R. v. *Bruha*, 2002 NWTSC 58

Date: 2002 09 24
Docket: CR 2002000062

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

Respondent

- and -

PAVEL PAUL BRUHA

Applicant

Application for the appointment of state-funded counsel for the accused and for the fixing of an appropriate rate of compensation for such counsel's services.

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE J.Z. VERTES

Heard at Hay River, Northwest Territories
on September 20, 2002

Reasons Filed: September 24, 2002

Counsel for the Applicant (Accused): Brian A. Beresh
Counsel for the Respondent (Crown): Loretta N. Colton

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REASONS FOR JUDGMENT

[1] This is an application for the appointment of state-funded counsel for the accused and for the fixing of an appropriate rate of compensation for such counsel's services. For the reasons that follow, the application is dismissed.

[2] The applicant accused has been committed to trial, before a judge and jury, on a charge of manslaughter. He has been represented to date by Mr. Brian A. Beresh, of Edmonton, Alberta. Mr. Beresh is a highly reputed and able criminal defence counsel with over 25 years of experience. He was retained privately for this case and has been paid $62,000.00 for his services so far. This no doubt included significant disbursements since Mr. Beresh travelled to this jurisdiction for attendances at the accused's bail hearing and preliminary inquiry. The accused has now exhausted his financial resources and cannot pay for Mr. Beresh's further services.

[3] The accused has been approved for coverage by the Territorial legal aid plan and there is experienced counsel willing to represent him on the basis of the legal aid

tariff of fees. The accused, however, does not wish to be represented by anyone other than Mr. Beresh. He has developed a great degree of trust and confidence in Mr. Beresh's abilities. Mr. Beresh, for his part, submitted that the case is so complex that forcing new counsel on the accused at this point would endanger his right to effective representation. He also submitted that the accused has a right of choice of counsel. Finally, he submitted that the current legal aid rates are inadequate to cover the cost of what Mr. Beresh says would be the reasonably necessary services for the defence of this case.

[4] This is not simply a question of Mr. Beresh being unwilling or unable to work for the applicable legal aid rates. The accused, while he has a choice of counsel, is limited to choosing counsel resident in the Northwest Territories. This is not some policy decision by the administrators of the legal aid plan; it is mandated by legislation. The *Legal Services Act*, R.S.N.W.T. 1988, c-L-4, s.40, provides:

> 40. Where an eligible person is charged with an offence, other than a prescribed offence, for which the maximum penalty is life imprisonment, the eligible person may for his or her defence select any lawyer who is resident in the Territories and prepared to act on behalf of the eligible person.

[5] When this application came on for hearing I inquired of counsel as to whether the administrators of the legal aid plan should be involved in this proceeding. I was told that copies of the filed material were provided to them but the administrators gave no indication of any intention or desire to intervene on this application. Mr. Beresh, in any event, informed me that, notwithstanding some of the arguments outlined in his written brief, he was not advancing any issue as to the validity of any provision of the *Legal Services Act* or the adequacy of the legal aid rates within the context of legal aid representation *per se*. He sought no remedy as against the legal aid service. He was also not raising any issue as to the availability of competent counsel within the jurisdiction. In light of these representations I proceeded with the hearing without the participation of a representative for the legal aid service.

Legal Principles:

[6] The Crown conceded that this court has inherent jurisdiction to appoint counsel to represent an accused who cannot afford private counsel and for some reason is unable to obtain assistance through available legal aid programmes. This jurisdiction,

however, is to be exercised only where it is clear that counsel is necessary for a fair trial. This is not only a common law right but a constitutional one as well. Many cases have held that the right to a fair hearing, as protected by s.11(d) of the Charter of Rights and Freedoms, and the fundamental principles of justice when liberty interests are at stake, as engaged by s.7 of the Charter, impose a positive constitutional obligation on governments to provide counsel in those cases where it is necessary to ensure a fair trial: *J.G.* v. *Minister of Health and Community Services (New Brunswick)*, [1999] 3 S.C.R. 46 (at para. 107); *R.* v. *Rowbotham* (1988), 41 C.C.C. (3d) 1 (Ont.C.A.); *R.* v. *Rain* (1998), 130 C.C.C. (3d) 167 (Alta.C.A.), application for leave to appeal to S.C.C. dismissed [1998] S.C.C.A. No. 609. The remedies that are available to the court are an order that the prosecuting authority pay for the costs of counsel for the accused or a conditional stay of proceedings until state-funded counsel is provided.

[7] Counsel also agreed that, to be meaningful, the fair trial right of an accused is not satisfied merely by the appointment of any counsel. Counsel must be sufficiently qualified to deal with the issues with a reasonable degree of skill. The right to counsel is a right to the *effective* assistance of counsel: *R.* v. *G.D.B.*, [2000] 1 S.C.R. 520 (at para. 24).

[8] Finally, counsel agreed that an order appointing counsel is not to be made as a matter of routine. There must be significant circumstances that make such an order essential to a fair trial: see *R.* v. *Fisher*, [1997] S.J. No. 530 (Q.B.); and *R.* v. *Chan*, [2000] A.J. No. 1225 (Q.B.). The determination of whether representation by counsel (and any particular counsel) is essential must be made on a case-by-case consideration: see *Rain* (*supra*), at para. 67.

[9] It is precisely because these types of orders are rarely made, and only in exceptional cases, that I do not accept Crown counsel's concerns that an order as sought here would set a dangerous precedent and open the floodgates to numerous similar applications, thereby imposing undue burdens on the Crown and undermining the local legal aid programme. There is no evidence from anywhere in Canada to support this floodgates argument.

[10] There was a significant point on which counsel did not agree. Mr. Beresh contended that an accused enjoys a right not just to the effective assistance of counsel but also to a choice of counsel. In his written brief, Mr. Beresh relied on several

foreign authorities to support this proposition. He conceded during oral argument, however, that Canadian authority does not go so far. Indeed, Canadian jurisprudence on the issue does not support the proposition that an accused has a constitutional right to publicly-funded counsel of his choice. At the most, an accused's right is to *competent* publicly-funded counsel: *R.* v. *Howell* (1995), 103 C.C.C. (3d) 302 (N.S.C.A.), at 324-325, affirmed [1996] 3 S.C.R. 604; *R.* v. *Rockwood* (1989), 49 C.C.C. (3d) 129 (N.S.C.A.), at 134; *R.* v. *Robinson* (1989), 63 D.L.R. (4th) 289 (Alta. C.A.), at 324.

[11] The relevant case law demonstrates that there is effectively a two-step test for determining whether a particular accused is entitled to state-funded counsel: a "means test", which requires the accused to demonstrate that he cannot obtain counsel either privately or through legal aid; and a "necessity test", which requires a determination that the accused faces charges that are sufficiently serious and complex to necessitate legal representation. There is therefore a need to adduce evidence in relation to five factors: (i) indigence; (ii) the denial or unavailability of legal aid coverage; (iii) the seriousness of the charge; (iv) the complexity of the case; and (v) the capacity of the accused to represent himself at trial.

[12] In this case there is evidence of indigence. The accused said, and it was not disputed, that he has exhausted his financial resources and is unable to borrow further from any source.

[13] The seriousness of the charge is self-evident. If convicted, the accused faces a possible maximum penalty of life imprisonment.

[14] The capacity of the accused to represent himself is not an issue. This is not a case (like so many reflected in the case law) where the result of not making the order sought is that the accused must go to trial unrepresented. He may if he chooses to do so, but he need not. He has been approved for legal aid coverage and counsel is prepared to act for him.

[15] The only two factors that require serious consideration are those addressing the effect of legal aid availability and the complexity of the case. In many ways this application rests to be resolved by the answer to the following question (borrowed from the previously-noted *Rockwood* case): Has the accused shown that the case does not fall within the legal aid plan or that it is of such a nature that his Charter rights

would be infringed if he were defended with the services available to him under that plan? I am also mindful that the fairness of the trial is the ultimate consideration.

Legal Aid:

[16] In the question formulated in the preceding paragraph, the phrase "fall within the legal aid plan" is used. This is taken from an oft-quoted passage in the *Rowbotham* decision of the Ontario Court of Appeal (*supra* at 65-66):

> The right to retain counsel, constitutionally secured by s. 10(b) of the Charter, and the right to have counsel provided at the expense of the state are not the same thing. The Charter does not *in terms* constitutionalize the right of an indigent accused to be provided with funded counsel... In our opinion, those who framed the Charter did not expressly constitutionalize the right of an indigent accused to be provided with counsel, because they considered that, generally speaking, the provincial legal aid systems were adequate to provide counsel for persons charged with serious crimes who lacked the means to employ counsel. However, *in cases not falling within provincial legal aid plans, ss. 7 and 11(d)* of the Charter, which guarantee an accused a fair trial in accordance with the principles of fundamental justice, require funded counsel to be provided if the accused wishes counsel, but cannot pay a lawyer, and representation of the accused by counsel is essential to a fair trial. [Emphasis in original.]

[17] This passage has been endorsed by several other appellate courts that have consistently held that the right to state-funded counsel only arises where an accused has been unable to obtain legal aid coverage or, for some other reason, does not "fall within the legal aid plan". The availability of legal aid is a critical factor. The Supreme Court of Canada has stated explicitly that a person seeking an order appointing state-funded counsel should first exhaust all possible avenues for obtaining state-funded legal assistance: see *J.G.* (*supra*), at para. 103. That was in the context of child apprehension hearings but there is no reason to think that such a requirement would not also be explicitly extended to the criminal context. There is strong authority already to the effect that an accused must satisfy the court that he has exhausted all possible routes to obtain counsel to the extent necessary to ensure a fair trial: *R.* v. *Drury*, [2000] M.J. No. 457 (C.A.), at para. 33, application for leave to appeal to S.C.C. dismissed [2000] S.C.C.A. No. 619.

[18] Mr. Beresh referred me to the decision of the senior judge of this court, Richard J., in *R.* v. *Warren*, [1994] N.W.T.J. No. 93, as being relevant to this issue. In that

case Warren was charged with nine counts of first-degree murder. He had been represented by privately-retained counsel from Vancouver. Prior to trial, Warren ran out of funds for his defence. He applied for legal aid coverage, was approved, but, as in this case, he too was confronted by the requirement that his counsel be resident in the jurisdiction (as per s. 40 of the *Legal Services Act*). The director of the legal aid plan thus rejected his request to have his Vancouver counsel appointed to act. Warren unsuccessfully appealed that decision to the Legal Services Board. He then applied for an order appointing his Vancouver counsel and requiring the Crown to pay counsel's fees at the applicable legal aid rates.

[19] Richard J. granted the order sought. He referred to such factors as the complexity of the case (an anticipated three-month trial with some 50 Crown witnesses) and the fact that the trial was scheduled to start in 7 weeks' time. He also referred to "special circumstances", those being the major impact of the alleged crimes on the community and the "real possibility or probability" that Warren would be unable to obtain representation by local counsel due to conflicts of interest or an unwillingness to act. Richard J. concluded that, for these reasons, Warren's case did not fall within the legal aid plan. He wrote (at para. 12):

> In the present case the accused Roger Warren wishes to be represented by counsel at his trial. He is unable to pay for counsel. By virtue of the nature of the charges and the complexity of the upcoming trial his representation by counsel is essential to a fair trial. Because of the special circumstance that I have already referred to and the provisions of s. 40 of the Act enacted by the legislature, in my view Mr. Warren's "case" (i.e. this specific application for state funded counsel) does not come within the territorial legal aid plan. The criteria described in Rowbotham for an exercise of the Court's inherent jurisdiction are present here.

In my respectful opinion, the "real" probability that Warren was not going to be able to obtain representation is what caused his case to go outside of the parameters of the legal aid plan. This is no different than the situation where an accused can find no lawyer to accept a legal aid appointment (as was the case in *R.* v. *Gero*, [2002] O.J. No. 3409). But that is not the case here.

[20] The accused here is well aware that an experienced resident defence counsel is willing to take on his case and that he has been approved by legal aid. No issue was taken as to this lawyer's competence to represent the accused. I have no doubt that

there are other competent counsel, also resident in the jurisdiction, willing to act on his behalf. What the accused is nonetheless saying is that he wants only Mr. Beresh to represent him. But, most cases that have considered the issue have held that the right is not to publicly-funded counsel of choice, but publicly-funded counsel willing to serve within the legal aid system.

[21] In this case, the accused did not appeal the legal aid director's refusal to appoint Mr. Beresh as his counsel. He could have done so and ordinarily such a failure to do so would likely be fatal. In the circumstances of this case, however, I do not consider such failure to be pertinent since any appeal would be pre-determined by the legislation.

[22] Mr. Beresh argued as well that, in any event, the residency requirement in the legislation is an artificial and irrelevant requirement if the operative principle is the right to effective representation. But, by the stance taken by Mr. Beresh to the effect that there is no issue with the availability and competence of members of the local bar, the very opposite conclusion can be drawn, i.e., that the legislation does not materially affect the right to effective representation.

[23] All legal aid plans have regulations and restrictions. Those are by and large political and policy-making decisions. Whether other jurisdictions have residency requirements is not in evidence. But Mr. Beresh chose not to attack the validity of this requirement in any event. It must be assumed that the legislature had rational reasons for enacting it. To require accused persons who seek public-funding for their defence to comply with such requirements does not seem to me to be *per se* unfair.

[24] I also do not see this situation as one where the state is attempting to force a particular lawyer on the accused. This I think was implicit in Mr. Beresh's submission that the prosecutor's insistence that an accused be represented only by legal aid counsel is an intrusion on the independence of the Bar somehow and an unjustified interference with the accused's rights. In some ways this argument may have more force if the same government were directing both the prosecution and the legal aid plan. But that is not the case in this jurisdiction. The prosecutor is the federal Department of Justice; the legal aid plan comes under territorial jurisdiction.

[25] In any event a careful reading of the *Legal Services Act* shows that the accused is not compelled to accept any particular lawyer appointed by legal aid. Section 40

entitles him to choose *any* lawyer resident in the Territories and willing to take on his case. It need not be one selected by the legal aid administrators. I conclude this from the distinction drawn in the statute as between the legal aid director "appointing" lawyers from a panel while an accused under s. 40 may select any lawyer without reference to the panel. But I took from the evidence that the accused has no particular complaint with the lawyer presently appointed by legal aid; he simply wants to be represented by Mr. Beresh and only Mr. Beresh.

[26] I do agree in one aspect with Mr. Beresh's argument that the legislated residency requirement is irrelevant. There was nothing said on this application as to whether Mr. Beresh was prepared to continue with the case on a legal aid basis if the residency requirement were removed (as happened in *Warren*).

[27] For these reasons, with respect to the first part of the question formulated earlier, my conclusion is that the accused has failed to show that this case does not fall within the legal aid plan.

Complexity of the Case:

[28] While I have titled this section as "complexity of the case", it is really a consideration of several interlocking issues: complexity, the relationship between counsel and client, the perception of the administration of justice, and the effect of having to change counsel and to work under legal aid rates. All these points are relevant to the second part of the question I posed: Has the accused shown that his rights would be infringed if he were defended with the services available under the legal aid plan?

[29] Mr. Beresh described this case as a unique and exceptional one. I am not convinced of that.

[30] The accused was originally charged with second-degree murder. He was jointly charged with one Stromberg. The basic allegation is that these two acted together in a beating of the victim which resulted in death. The preliminary inquiry was held over three days in May, 2002. At the conclusion of the preliminary inquiry the Crown sought and obtained a committal of both accused on manslaughter. No doubt that concession on the part of the Crown was in part the result of the work done by Mr. Beresh and his co-counsel in the cross-examination of the Crown witnesses. Since

then the co-accused Stromberg has pled guilty to manslaughter and was sentenced to a term of four years imprisonment.

[31] Mr. Beresh listed a number of issues which he described as making this case complex:

> (a) the admissibility of a statement given by the accused to an undercover officer placed in his cell;
>
> (b) the credibility of the co-accused Stromberg (apparently he gave numerous contradictory statements);
>
> (c) the apparent formation and alleged abandonment of intent by the accused; and,
>
> (d) the treatment of evidence from what counsel referred to as a number of "unreliable" witnesses.

There are approximately 3000 pages of disclosure material. The Crown is anticipating calling 20 to 30 witnesses and the trial is expected to take two to three weeks. Mr. Beresh said that he has retained a private investigator who has already uncovered additional information that will have to be reviewed.

[32] While certainly there are a number of legal issues in the case, I do not identify anything so unusual that another counsel could not address them. I agree with Crown counsel's submission to the effect that obviously the case requires experienced counsel, but otherwise there is nothing particularly unusual.

[33] I note that no trial date has yet been set and the accused is not in pre-trial custody. There should thus be no impediment to new counsel being able to take sufficient time to acquaint himself or herself with the material (even though it may be voluminous). It would certainly be less time-consuming if Mr. Beresh were to continue as counsel, but nowhere do I see mere convenience as one of the critical factors on this type of application.

[34] Mr. Beresh emphasized the trust that has been built up in the solicitor-client relationship. The accused stated in his affidavit filed on this application: "...I have

developed a very strong trust relationship with him and do not trust anyone else to represent me at my trial"; and, "As a result of my trust and faith in Mr. Beresh I want him to represent me and would gladly pay him if I could find the money for that purpose". Mr. Beresh also pointed to the *Warren* case where similar expressions of trust by the accused were considered.

[35] I agree that it is important and helpful for there to be a strong bond of trust in the solicitor-client relationship. But it does not necessarily follow that such a bond cannot be forged with a new counsel or that any new counsel would not provide effective representation without as strong a bond. The issue is trial fairness, not the feelings of the accused.

[36] This is related to Mr. Beresh's further argument that the accused's perception of justice is especially critical because of his particular background. I agree that everyone, including an accused, a witness, a victim, or merely an observer, must perceive justice as being done. But is it fair to conclude that just because the accused is not represented by the counsel of his choice, when the public is expected to pay for it, that there is a reasonable perception that justice is being denied? I think not. The reasonable, well-informed observer would look primarily at what is actually done, not necessarily who is doing it. Was the trail fair? That is the question. Is the same reasonable observer bound to conclude that being represented by a legal aid lawyer is somehow second-rate representation? Again I think that is an unreasonable assumption.

[37] All this is not to deny the sincerity and legitimacy of the accused's feelings. But I do not think those feelings can be determinative on an application such as this. Otherwise there would be no point in legal aid plans implementing any controls or directives on the allocation of their resources.

[38] Finally, there is the issue of the adequacy of the rates paid by legal aid. The argument was that no lawyer can be expected to conduct a thorough job on legal aid rates and thereby the failure to appoint counsel jeopardizes the accused's right to a fair trial. The difficulty I have with this argument is that it is speculative. Mr. Beresh may think, quite reasonably, that he could not conduct this defence adequately at legal aid rates. But yet he offered no estimate as to the anticipated costs up to and for the trial.

[39] In *Chan* (*supra*), Binder J. of the Alberta Court of Queen's Bench noted that the accused must demonstrate that the legal aid tariff would probably impede the effectiveness of counsel to the extent that the hearing would be rendered unfair. That has not been demonstrated here; it has merely been assumed that counsel will have to cut corners.

[40] I wish to make it clear that Mr. Beresh is not seeking some exorbitant fee. He is suggesting a fee of $175 per hour. I am sure that, compared to what I can assume to be the going rate for counsel of his experience, this is a significantly reduced amount from his normal fee. But that is not the issue. The issue is whether the fairness of the trial would be jeopardized by the requirement to work at legal aid rates. This has not been demonstrated to my satisfaction.

[41] I was told by counsel that in this jurisdiction the legal aid tariff provides for an hourly fee of $117 per hour for experienced counsel. This compares favourably with what the reported cases show as the applicable rates in other jurisdictions: $77 per hour in Alberta, as per *Chan*; $87.94 per hour in Ontario, as per *Gero*. So I think any assumption about the adequacy of legal aid rates to fund an effective defence is speculative. I am also confident that any difficulties encountered with respect to fees and disbursements would be treated in a flexible manner by the legal aid administrators considering the seriousness of this case.

[42] I acknowledge that the court has the discretionary power to set appropriate fees when appointing counsel. This is an inherent part of the need to ensure trial fairness. But all the cases where such steps were taken were highly exceptional ones where such remedies were clearly in the interests of justice. In general, I respectfully agree with the comments of Rowe J. in *R.* v. *D.P.F.*, [2000] N.J. No. 110 (S.C.), at paras. 45-46:

> It is clear that an accused does not have an unfettered right to state-funded counsel of his choice. Nor does an accused have a right to unlimited funding for his counsel. What is equally clear is that the court has inherent jurisdiction to appoint counsel at public expense where that is important for a fair trial. (Of course, counsel cannot be forced on the accused; he has the right to defend himself and if he chooses to do so he should not be heard to complain that thereby he failed to receive a fair trial.)
>
> I approach with wariness the prospect of ordering the payment of counsel other than strictly in accordance with the Legal Aid scheme. The case law is clear in general,

> provincial legal aid schemes accord with the Charter and fulfill the requirement at common law for the provision of counsel where this is necessary for a fair trial. In addition, the courts should show restraint in ordering the commitment of public funds; ordinarily, that is for those who are elected.

[43] For these reasons, I also conclude that the accused has failed to demonstrate that the nature of the case is such that his Charter rights would be infringed if he were defended with the resources available to him under the legal aid plan. He may prefer Mr. Beresh, and it may be more convenient to continue with Mr. Beresh as his counsel, but those are not the guiding criteria.

[44] Therefore, the application is dismissed. What happens from here on is really up to the accused. He can go with the legal aid counsel already appointed; he can select some other resident lawyer to represent him on a legal aid basis; or, he can work out some new arrangement with Mr. Beresh. What he chooses to do is no business of the court unless, of course, it affects the fairness of the trial or the reasonable progress of these proceedings. It goes without saying, however, that if for some reason it turns out that the accused is unable to obtain local representation on a legal aid basis, due to the unwillingness or inability of counsel to act, then he may renew this application.

J.Z. Vertes
J.S.C.

Dated this 24th day of September, 2002.

Counsel for the Applicant (Accused): Brian A. Beresh

Counsel for the Respondent (Crown): Loretta N. Colton

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