

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

In the matter of an application for an order appointing state-funded counsel for the accused

BETWEEN:

HER MAJESTY THE QUEEN

-and-

ROBERT NANDE

REASONS FOR DECISION
OF THE
HONOURABLE CHIEF JUDGE CHRISTINE GAGNON

Heard at:	Hay River, Northwest Territories
Date of oral decision:	November 18, 2015
Date of Written Decision:	December 15, 2015
Counsel for the Crown:	Blair MacPherson
Counsel for the Accused:	Thuc Ahn Tù Pham

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Respondent

-and-

ROBERT NANDE

Applicant

INTRODUCTION

[1] The Applicant is charged with having had care or control of a motor vehicle while impaired and with an excessive blood-alcohol concentration. He first appeared in court on these charges in Fort Liard, Northwest Territories, on September 16, 2015. Mr. Tù Pham sought an order from the court appointing him as counsel for the purpose of making an application for a state-funded counsel, otherwise known as a *Rowbotham* application.

[2] I dismissed the application orally on November 18, 2015, stating that it was premature, and here are my reasons. I felt it necessary to provide written reasons to address a question that had been raised by counsel with respect to how such an application should be presented. Although the process before a criminal court is adversarial in nature, and the court should not interfere to tell counsel how to do their work, there are times where some guidance may be necessary.

THE PROCEDURE

- [3] Counsel filed a written application (Notice of Motion) on November 16, 2015. Counsel also filed an Affidavit outlining the factual basis for the application. In this Affidavit, the Affiant relied on information that counsel supplied him about the applicant.
- [4] Attached to the Affidavit was a copy of a letter addressed to the applicant by the Executive Director of the Legal Aid Commission.
- [5] No factum, authorities or materials were offered in support of the Application.
- [6] Crown filed a factum in response to the application.

LEGAL FRAMEWORK

- [7] Pursuant to section 482(2) of the Criminal Code, the Territorial Court of the Northwest Territories may, subject to the approval of the lieutenant governor in council of the relevant province, and in our case, the Commissioner in council, make rules of court. So far, it has chosen not to.
- [8] To this date, the criminal procedure before the Territorial Court has been rather informal, with notice of motions being brought through a simple request to the Clerk of the Court to place a matter on the docket.
- [9] However, certain applications such as the one brought in this matter, due to the more complex nature of the remedy or order sought, need to be more formal. Recent situations have resulted in judges of our court confirming the need for a written application supported by materials establishing a factual basis, affidavit and authorities when a remedy or order is sought pursuant to section 24 of the *Canadian Charter of Rights and Freedoms*.
- [10] The absence of specific Rules of Court does not mean that counsel is without guidance for the purpose of presenting an application to the Territorial Court.

[11] In the absence of Rules of Court or specific practice direction, the *CRIMINAL PROCEDURE RULES OF THE SUPREME COURT OF THE NORTHWEST TERRITORIES* may and should be referred to by default, with the necessary modifications and adaptations.

[12] The Rules relevant to applications in general are:

19. A notice of motion must set out the following:

- (a) the place, date and time of the hearing;
- (b) the precise relief sought;
- (c) the grounds to be argued, including a reference to any statutory provision or rule on which the applicant relies;
- (d) the documentary, affidavit and other evidence to be used at the hearing of the application; and
- (e) where an order is required abridging or extending the time for service or filing of the notice of motion or supporting materials, a statement to that effect.

25. Unless otherwise ordered, the solicitor for each party to an application shall, not less than 48 hours before the application is to be heard, file and serve a memorandum setting out the cases, statutory provisions and any other authorities the solicitor intends to rely on at the hearing.

26. (1) Evidence on an application may be given by affidavit unless the Code or other applicable statute provides or a judge orders otherwise.

(2) A deponent may state in an affidavit only facts that are within the personal knowledge of the deponent or other evidence that the deponent would be permitted to testify to as a witness in court.

(3) An affidavit may contain statements of the deponent's information and belief with respect to facts that are not contentious, if the source of the information and the fact of belief

are specified in the affidavit; or these Rules do not provide otherwise.

[13] Rule 27 provides that the Deponent may be cross-examined on his or her Affidavit.

[14] In the situation before me, the Respondent's right to cross-examination is rendered meaningless by the fact that the Deponent is relying on hearsay evidence and cannot offer anything other than what he was told by counsel for the Applicant.

[15] Although it is common practice in our jurisdiction to not tender an affidavit sworn by an accused, it seems to me that since the purpose of the application is to demonstrate the circumstances of the Applicant which should justify granting the order for state-funded counsel, the application would have been better served if it were supported by an affidavit of the Applicant himself, on which the Respondent could effectively cross-examine him.

THE MERIT OF THE APPLICATION

[16] The application brought by the accused is based on the decision of *R. v. Rowbotham*, in which the Ontario Court of Appeal stated that a court may order the appointment of state-funded representation, outside of the Legal Aid framework, where the accused shows on a balance of probabilities that:

1. He has been denied legal aid;
2. He has insufficient funds to privately finance his defence;
and
3. Legal representation at trial is essential to a fair trial.

[17] The Crown takes the position that there is a lack of evidence demonstrating even on a balance of probabilities that any of the criteria are met and asks that the application be dismissed.

[18] The main element in the application on which I made my decision is that counsel alleges that Mr. Nande did not seek to appeal the September 30, 2015 decision from the Legal Aid Commission because “based on the reason for the denial, it would not make sense for him to appeal the denial decision any further.”

[19] The jurisprudence is clear that in order to satisfy the criteria for a state-funded counsel, an accused must have exhausted all the appeal options. Saying that it would not make sense to appeal is stopping short.

[20] The legislation provides significant discretion to the Executive Director in deciding whether to provide legal aid services, therefore a conclusion that it does not make sense to appeal is somewhat hasty.

CONCLUSION

[21] As I am not satisfied that the decision to deny legal aid is final, I find that the application is premature and I need not consider the other criteria.

DATED IN HAY RIVER,
THIS 15TH DAY OF DECEMBER, 2015

Christine Gagnon, J.T.C.

Date: 2016 03 18

File: T-2-CR-2015-000529

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