2008 CarswellOnt 7548

R. v. Imona-Russel

William Imona-Russel, Applicant and Her Majesty the Queen, Respondent

Ontario Superior Court of Justice

Nordheimer J.

Heard: December 9, 2008
Judgment: December 10, 2008
Docket: None given.

Counsel: S. Pieters, V. Henry, for Applicant
W. MacLarkey, D. Fisher, J. Forward, for Respondent
W. van der Meide, for Legal Aid Ontario
A. Moustacalis -- amicus curiae

Subject: Criminal

Criminal law.

Nordheimer J.:

1 Mr. Imona-Russel brings this application for an order, commonly referred to as a "Rowbotham" order, requiring the Attorney General to provide funding for counsel to act for him with respect to two separate indictments - one indictment charging seven counts, the most serious of which is aggravated sexual assault, and one indictment charging a single count of first degree murder. At the conclusion of the hearing, I dismissed the application with reasons to follow. I now provide those reasons.

2 Prior to setting out the factual background to this matter, I should address a preliminary issue.

3 At the outset of the hearing, there was some issue raised regarding the material that should properly be before me. Prior to the hearing, counsel for the respondent had asked for the applicant's consent to the release of his legal aid file so that the communications between Legal Aid Ontario and the applicant regarding the history of Legal Aid Ontario's dealings with the applicant could be before the court. The respondent asserted that this material would provide a fuller picture to the court regarding the reasons underlying the refusal by Legal Aid Ontario to allow the applicant to change his counsel. The applicant refused to consent to the release of his file.

4 Under s. 89(1) of the *Legal Aid Services Act, 1998*, S.O. 1998, c. 26, all legal communications between Legal Aid Ontario and an applicant for legal aid services are privileged "in the same manner and to the same extent as solictor-client communications". Absent the applicant's consent, therefore, no reference could be made to the contents of those communications[FN1] . That conclusion does not mean, however, that the court cannot have reference to the plain facts arising from the dealings between the applicant and Legal Aid Ontario. Specifically, the court is entitled to know, and the record before me demonstrates, that the applicant has had a number of counsel of his choice funded by Legal Aid Ontario. The court is also entitled to know the stated reasons of Legal Aid Ontario for its refusal to permit a further change of counsel that gives rise to this application. There is nothing privileged in any of that information.

5 Counsel for the applicant, however, complained that an affidavit from Mr. van der Meide, counsel for Legal Aid Ontario, and filed by the respondent, contained information that violated the privilege between the applicant and Legal Aid Ontario. I wish to make it clear, as I did at the hearing, that in reaching my decision I ignored those matters to which counsel for the applicant took exception. For example, the references in the affidavit to lawyers who contacted Legal Aid Ontario apparently at the instigation of the applicant about the possibility of acting for him. I have instead considered only the factual history regarding the counsel who have been authorized by Legal Aid Ontario over the past three years and the series of changes of counsel that that history reveals.

6 At the same time, however, having refused to consent to the release of his legal aid file, the applicant cannot at the same time suggest to the court that there are innocent or sympathetic explanations for the events that I am about to recount that are not otherwise borne out on the record as it stands.

Background

7 The factual background to this application is as follows.

8 The applicant was initially granted a legal aid certificate in September 2005 under which he retained counsel #1 to defend him on the assault indictment. Less than one month later, the applicant discharged counsel #1. In October 2005, Legal Aid Ontario gave permission to a change of solicitor and the applicant retained counsel #2. When, in July 2006, the applicant was charged with murder, a certificate was issued for that charge and counsel #2 was retained on that indictment as well. In October 2006, the applicant again sought to change counsel to counsel #3. That application was initially denied but Legal Aid Ontario subsequently reconsidered its decision and granted the change. The applicant then retained counsel #3.

9 In February 2007, Legal Aid Ontario was advised by counsel #3 that she had been discharged by the applicant on the murder charge and that she would be seeking to remove herself as his counsel on the assault charge. In March 2007, the applicant designated a lawyer as counsel #4 but she never signed the legal aid certificates before she and the applicant had a parting of the ways. Later in March, the applicant designated counsel #5 and new certificates were issued for that counsel. In June 2007, the applicant once again sought to change counsel. Legal Aid Ontario denied that application. The applicant appealed that decision and the appeal was denied. The applicant further appealed that denial and it too was denied.

10 In September 2007, the Crown brought applications to have *amicus curiae* appointed in both prosecutions. Those applications were adjourned. In December 2007, Legal Aid Ontario reconsidered its position and permitted the applicant to once again retain the counsel who had previously been counsel #3. Notwithstanding that decision, in May 2008, the court appointed *amicus curiae* on the assault charges and in June 2008 the court appointed *amicus curiae* on the murder charge.

11 In November 2008, counsel #6 (formerly counsel #3) once again sought to be removed as the applicant's counsel. The Notice of Application recited, among other grounds, a complete breakdown in the solicitor and client relationship between counsel and the applicant along with the fact that counsel could not continue to represent the applicant "without finding herself in conflict with her duty to this Honourable Court". As a consequence of this development, the applicant sought to change counsel to Mr. Pieters and Ms. Henry. Legal Aid Ontario refused to permit the applicant any further changes of counsel. In the Notice of Refusal, Legal Aid Ontario stated its reason as follows:

You do not qualify for a change of lawyer, because your reason to change lawyers does not meet the criteria for a change as set out by Legal Aid Ontario.

12 Under the heading "Comments", the Notice of Refusal stated the following:

By order dated June 17, 2008 as [*sic*] Amicus has already been appointed to assist with your defence.

13 It is against this history that the applicant now seeks an order requiring the Attorney General to fund counsel of his choosing. His proposed new counsel, Mr. Pieters and Ms. Henry would, depending how one wishes to count the second retainer of counsel #3, either be counsel #6 or counsel #7 for the applicant.

14 It is asserted by the applicant that the only reason for Legal Aid Ontario's refusal to agree to a change of counsel was the appointment of *amicus curiae*. The applicant further asserts that that is an insufficient reason for Legal Aid Ontario's refusal as such an appointment is not a substitute for counsel of one's own choosing. While I accept the second assertion, I do not accept the first. The first assertion is contradicted by the very wording of the Notice of Refusal. Legal Aid Ontario refused the change because the applicant did not meet the criteria for a change. The comment about the appointment of *amicus curiae* was clearly offered as moderating the possible effect of that decision.

Analysis

15 The granting of a *Rowbotham* order is a rare and exceptional remedy. The grounds upon which the court will make an order against the Attorney General requiring funding for counsel are set out in *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1 (Ont. C.A.). Some of the principles set out in that decision and relevant to the application before me are:

> 1. the *Charter of Rights and Freedoms* does not constitutionalize the right of an indigent accused to be provided with funded counsel.
>
> 2. the *Charter* right to a fair trial under ss. 7 and 11(d) may require funded counsel to be provided if the accused wants counsel, cannot afford to pay counsel and the presence of counsel is essential to a fair trial.
>
> 3. the need for such an order would normally arise only in serious and complex cases.

16 There is no dispute here that the applicant cannot afford to retain counsel. There is also no dispute that both indictments involve serious charges. There is a dispute whether the facts and issues underlying the charges are complex. On the material available to me, it would not appear that either the factual or legal issues are complex. That is not, however, the basis upon which I denied the application.

17 Rather, the central issue that this application raises is whether an indigent accused is entitled, under the principle of trial fairness, to repeatedly discharge counsel and then require the state to bear the costs of retaining new counsel. It should be evident, as a matter of common sense, that there is an additional cost associated each and every time counsel is changed because that counsel then has to educate him or herself on the file and prepare for the defence of the charges. Even where, as in this case, former counsel is re-retained, he or she must once again become familiar with the file. In addition, there are almost always delays in the progress of the proceeding caused by such changes.

18 There are three criteria that an accused person must satisfy in order to obtain a *Rowbotham* order. They are:

> (i) the accused person must have been refused legal aid;
>
> (ii) the accused person must lack the means to employ counsel, and;
>
> (iii) representation for the accused person must be essential to a fair trial.

19 In addition, as part of the first criterion, the applicant must establish that he has not

been refused legal aid as a result of anything that he has done or failed to do. In *R. v. Montpellier*, [2002] O.J. No. 4279 (S.C.J.), Gordon J. said, at para. 34:

> It is my view, however, that an applicant cannot come to the Court relying upon Legal Aid refusal when his failure or inaction has been the cause thereof.

20 I agree with that statement. To hold otherwise, would be to allow the indigent accused to be the sole arbiter of when and how often he may choose to change counsel, as in this case, or the sole arbiter of what information he provides to Legal Aid Ontario to satisfy the second criterion. Legal Aid Ontario is obligated, as a government agency, to conserve and guard the expenditure of public funds. The policies and procedures of Legal Aid Ontario are put in place, at least in part, to discharge that obligation. If Legal Aid Ontario is not permitted to have any control over the accused person's decisions regarding changes of counsel, those policies and procedures would be rendered worthless. I would note, in passing, that there have been some notorious instances of abuses of the legal aid system. The court must play its role in ensuring that indigent accused are not permitted to manipulate the legal aid system or to play fast and loose with its rules and then attempt to shelter from the consequences of their actions under a facade of fair trial rights.

21 In both prosecutions, *amicus curiae* have been appointed. I accept that *amicus curiae* is not a substitute for one's own personal counsel. The appointment of *amicus curiae* is not intended to act as a replacement for an accused person's own counsel. What the appointment of *amicus curiae* does do, in a case where the accused person is unrepresented, is militate against any assertion of an infringement of the fair trial rights of the accused person by ensuring that there is counsel available to assist the court and the accused person as needed. As has been pointed out in *R. v. Cairenius* (2008), 232 C.C.C. (3d) 13 (Ont. S.C.J.), the role of *amicus curiae* will vary from case to case. The trial judge has the right to expand or contract that role to fit the demands of the case as it unfolds. Nevertheless, any restrictions on the role of *amicus curiae* does not detract from the fact that the appointment serves its fundamental purpose, that is, to help to ensure a fair trial. On this point, it should be noted that the role of counsel appointed under a *Rowbotham* order is not itself unlimited. It may also be restricted, as was suggested in the *Rowbotham* case where the court noted, at p. 68:

> In our view, however, it was not necessary that her counsel be present in court every day during this very long trial to provide her with adequate legal representation.

22 The applicant says that he has the right to counsel of his own choosing. There is no doubt that the right of an accused person to retain counsel of his or her choosing is a fundamental right. It is a right that is not absolute, however. It is subject to reasonable limitations - see *R. v. Speid* (1984), 43 O. R. (2d) 596 (C.A.). The applicant has on five occasions (arguably six) been given counsel of his choice and he has chosen to squander those opportunities. In my view, the applicant has, as a direct consequence of his own actions, disentitled himself to a *Rowbotham* order. That fact, coupled with the appointment of *amicus curiae* on each of these indictments, means that the applicant has also failed to establish that his fair trial rights will be infringed absent such an order being made.

23 It is for these reasons that I dismissed the application.

FN1. I recognize that it could be said that the applicant has implicitly waived that privilege by bringing this application as he has arguably put his dealings with Legal Aid Ontario in issue. This argument was not raised before me and, given the view I have taken of the evidence that was before me on the application, it is unnecessary to address that issue.

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