Date: 19990723
Docket: C.A.C. 155817

NOVA SCOTIA COURT OF APPEAL

Cite as R. v. Innocente, 1999 NSCA 20

BETWEEN:

DANIEL J. INNOCENTE	)	
	)	for the appellant
Appellant/ Applicant	)	
- and -	)	
	)	
HER MAJESTY THE QUEEN	)	Paula R. Taylor
	)	for the respondent
Respondent	)	
	)	
	)	
	)	Application Heard:
	)	July 23, 1999
	)	
	)	Decision Delivered:
	)	July 23, 1999
	)	
	)	

BEFORE THE HONOURABLE JUSTICE GERALD FREEMAN
IN CHAMBERS

FREEMANJ.A.:

[1] This is an application by the appellant pursuant to s. 684 of the **Criminal Code** for the assignment of counsel to represent him on the appeal of his conviction for conspiring to traffic in narcotics. The trial, which lasted 10 days, was by Judge and Jury. He also appeals his sentence of seven years on each count to run concurrently. The appeal is scheduled to be heard on October 5, 1999.

[2] The grounds of appeal from conviction, prepared by the appellant without counsel, are as follows:

> I was forced to do the trial without counsel.
> I feel the jury error in their decision.
> The verdict is unreasonable.
> The judge made a mistake when he refused to grant an adjournment and deprived me of any right to be represented by a lawyer when I had 3 lawyers that would take my case.
> The judge failed to assist me in my defence.
> The judge failed to order disclosure of information to allow proper cross examination of Greg Hennebury.
> The judge failed to order that I should be represented by counsel and any other grounds that are in the transcript.

[3] At the hearing before me, at his request and with the consent of the Crown his notice of appeal was amended to include an appeal from sentence which had been inadvertently omitted. He had previously filed the following as the grounds of appeal from sentence:

> I had know lawyer.
> I had know access to a computer to find case law.
> The judge use the wrong case to refer to and rely on.
> It is excessive.
> I was never ask to have the 9 weeks I spent in jail taken off the sentence .
> Judge erred in applying sentencing principles
> such other grounds that appear on the sentencing.

[4] The relevant section of the **Code** is as follows:

> 684. (1) A court of appeal or a judge of that court may, at any time, assign counsel to act on behalf of an accused who is a party to an appeal or to proceedings preliminary or incidental to an appeal where, in the opinion of the court or judge, it appears desirable in the interests of justice that the accused should have legal assistance and where it appears that the accused has not sufficient means to obtain that assistance.
>
> (2) Where counsel is assigned pursuant to subsection (1) and legal aid is not granted to the accused pursuant to a provincial legal aid program, the fees and disbursements of counsel shall be paid by the Attorney General who is the appellant or respondent, as the case may be, in the appeal.
>
> (3) Where subsection (2) applies and counsel and the Attorney General cannot agree on fees or disbursements of counsel, the Attorney General or the counsel may apply to the registrar of the court of appeal and the registrar may tax the disputed fees and disbursements.

[5] In addition to the drug charges, the appellant is facing trial in relation to a charge under the proceeds of crime sections of the **Code,** and as a result all his assets, including his home and vehicles, were restrained pursuant to order of the Supreme Court. An application heard by Justice Davison on May 15, 1998, to release a portion of the assets to assist in paying legal expenses of the appellant's drug trial was dismissed. In November, 1998, Justice Cacchione ordered certain personal property, including a 1959 automobile, a motorcycle, and a number of antiques associated with Mr. Innocente's antique business, be restored to him. His home, in which he has a substantial equity, remains subject to the restraint order. He estimates the market value at $375,000 to $400,000 but has it listed for sale at $450,000

[6] A further application before the trial judge, Justice Cacchione, for the appointment of counsel to assist the appellant in the drug trial was dismissed. Both

judges indicated that the appellant had not satisfied them that he lacked sufficient means to retain counsel. Likewise, Nova Scotia Legal Aid has denied his application for legal assistance for the appeal on the basis that “the Appeal Committee is not satisfied that you do not have the resources to retain counsel for your on going criminal matters.”

[7] His girl friend lives in the home with her two children. Her only income is about $1,200 a month social assistance. She testified to struggling to keep up mortgage payments on the home from the sale of the personal property restored to Mr. Innocente, who says he has exhausted his credit from friends and family meeting daily expenses.

[8] I must determine, if it is desirable in the interest of justice, that he should have legal assistance on the appeal. The cases I have considered are **R. v. Bernardo** (1997) 121 C.C.C.(3d) 123 (Ont. C.A.) and **R. v. Grenkow** (1994) 127 N.S.R. (2d) 355 (C.A.).

[9] In **Grenkow**, Justice Hallett, in Chambers, formulated the test on this type of application as follows:

> Before assigning counsel to an appellant on an application under s. 684 of the Code the chambers judge would have to be satisfied that (i) the appellant was refused legal aid for the appeal by Nova Scotia Legal Aid although qualified on financial grounds; (ii) the appeal has a reasonable chance of success; and, (iii) the appellant, due to the complexity of the appeal issues or the inability of the appellant to articulate the grounds, requires the assistance of counsel, in other words the appellant could not have a fair hearing of the appeal without the assistance of counsel. These would be minimum requirements; each application would turn on its facts.

[10] The first part of this test is inapplicable in this case because Nova Scotia

Legal Aid has refused assistance in this case, for financial reasons whereas Ms. Grenkow's application for legal aid was refused on the basis that her appeal had little merit. Another distinction here is that the appellant did not have counsel at the trial. With respect to the second part of the test, Justice Hallett indicated earlier in his decision, that where legal aid has been refused on grounds that the appeal has little merit, counsel should not be appointed unless the appellant can satisfy the Court that the appeal has a reasonable chance of succeeding. I would conclude however that where Legal Aid has been denied without a review of the merits of the case, that the appellant only has to show that he has an arguable case. In that respect I agree with the following statement form **Bernardo** at paragraph 22:

> In deciding whether counsel should be appointed, it is appropriate to begin with an inquiry into the merits of the appeal. Appeals which are void of merit will not be helped by the appointment of counsel. The merits inquiry should not, however, go any further than a determination of whether the appeal is an arguable one. I would so limit the merits inquiry for two reasons. First, the assessment is often made on less than the entire record. Second, any assessment beyond the arguable case standard would be unfair to the appellant. An appellant who has only an arguable case is presumably more in need of counsel than an appellant who has a clearly strong appeal.

[11] Although without a record of the trial proceedings it is difficult to make an assessment, in my opinion the appellant has shown that he has at least raised an arguable issue on appeal. In the present case the court is not assisted by evidence of an independent assessment of the merits of the appeal; In Grenko there was the determination of lack of merit by Nova Scotia Legal Aid, and in **Bernardo** legal aid authorities were provided with a letter of opinion, by an independent appellate counsel, that the appeal had merit. Mr. Innocente has raised the issues that he was deprived of counsel because his request for a two-week adjournment was refused, and that the trial

judge did not “order disclosure of information to allow proper cross examination of Graig Hennebury.” On the sentencing the trial judge described Mr. Hennebury as “an informant” and as an “accomplice at law” on whom the Crown’s case was heavily dependent; he gave the jury a Vetrovic warning to look for confirmatory evidence, and considered that such evidence was present.

[12] In my view these two issues are arguable on their face, although I would hesitate to say they have a “reasonable chance of success” if that is measured by prospects of upsetting a jury verdict. They are nevertheless of such a nature that in my opinion “it appears desirable in the interests of justice” that the appellant should have legal assistance on the appeal. They contain suggestions that the appellant, subjectively at least, considers he was not fairly tried. If the accused is properly represented so the trial process can be carefully reviewed on the appeal, these misgivings will be dispelled whether the appeal is allowed or dismissed, and the reputation of the administration of justice will be enhanced.

[13] The next part of the test mandates a consideration of the complexity of the case. As noted by Doherty, J.A. in **Bernardo** at paragraph 24:

> Having decided that the appeal raises arguable issues, the question becomes - can the appellant effectively advance his grounds of appeal without the assistance of counsel? This inquiry looks to the complexities of the arguments to be advanced and the appellant's ability to make an oral argument in support of the grounds of appeal. The complexity of the argument is a product of the grounds of appeal, the length and content of the record on appeal, the legal principles engaged, and the application of those principles to the facts of the case. An appellant's ability to make arguments in support of his or her grounds of

> appeal turns on a number of factors, including the appellant's ability to understand the written word, comprehend the applicable legal principles, relate those principles to the facts of the case, and articulate the end product of that process before the court.

[14] In this case the Crown does not seriously argue that some of the issues that might arise on appeal are not complex, for they include the admission of wiretap evidence, disclosure matters, the overall trial fairness of the unrepresented accused, and the treatment in the jury charge of the evidence of an unindicted co-conspirator. The Crown's position is that Mr. Innocente has funds to pay a lawyer.

[15] The necessary scrutiny of the trial process involves issues of law and procedure, and Mr. Innocente is not legally trained. He has been convicted of serious offences and deprived of his liberty for seven years. It is not desirable in the interests of justice that he represent himself on the appeal.

[16] The outstanding issue then becomes a point not conceded by the Crown and which was not in at issue in either **Bernardo** or **Grenkow**, that of whether the appellant is without financial means to obtain legal assistance. While I agree with the Crown that when this question was addressed by Davison J. and Cacchione, J. in pre-trial motions there was sufficient evidence to conclude that the appellant probably had sources of funds that had not been revealed and with which he could pay counsel, now that the appellant is incarcerated I am persuaded that he does not have access to sufficient resources to retain counsel. All of his assets, other than what remains of the personal property returned to him, are covered by the proceeds of crime restraining order and he

obviously does not have a source of income while imprisoned. The antiques in his possession, which he claims need repairs, did not translate into funds to retain counsel at his trial, and I am not satisfied they can be made to do so for the appeal, now that he is in prison.

[17] There is no evidence that the cash flow or avenues of credit that seemed evident before trial have continued. There is no evidence that new assets have been acquired since the conviction. The prospect that a relative or friend would give or loan sufficient funds is remote in these circumstances. The Crown's position boils down to consideration of the equity in the house.

[18] The Crown argues that the present application is premature and that Mr. Innocente should make further efforts to realize on that equity before applying to have counsel appointed. Specifically, it suggests he should make an application under s. 462.34 of the **Criminal Code** to release the house from the restraining order so it can be sold. However it does not suggests that it would consent to such an application. I am not convinced such an application is necessary, because of the Crown's restraining order already in effect. If Mr. Innocente were to follow the procedure recommended by the Crown his defence would come out of the value of the house. If the Crown pays his legal expenses and eventually realizes on the equity in the house, the bottom line with be the same.

[19] Mr. Innocente's assertion before trial that he could not afford a lawyer gained credibility from subsequent events. No provision was made for a lawyer, and he was

not represented. While he is not entirely without assets, it appears to me on a balance of probabilities that he does not have sufficient means in his present circumstances to obtain the assistance of counsel.

[20] I am persuaded that the interests of justice require that the appellant be represented by counsel in order to have a fair hearing of the appeal and I would therefore grant the application to assign counsel to be paid by the Attorney General of Canada in accordance with s. 684. The applicant has filed letters from possible counsel indicating the legal fees in question for the appeal may be on the order of $20,000, perhaps higher. I would leave it to the counsel chosen by Mr. Innocente to apply for an order appointing the person who has agreed to act on his behalf. Probably the date for the hearing of the appeal will have to be changed, but I will leave that to the appellant's counsel to make the appropriate application so that the new date will be suitable to him.

Freeman, J.A.