NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. Innocente***, 2003 NSCA50

Date: 20030506
Docket: CAC 189613
Registry: Halifax

IN THE MATTER OF an order of Judge William B. Digby, Judge of the Provincial Court of Nova Scotia, ordering the Federal Crown to commit to guaranteeing funding for counsel for Daniel Joseph Innocente

AND IN THE MATTER OF an application for an order in the nature of *certiorari* and *mandamus* pursuant to the provisions of Part XXVI of the *Criminal Code* and Rule 58 of the Civil Procedure Rules

Between:

Her Majesty the Queen

Appellant

v.

Daniel Joseph Innocente and
His Honour Judge William B. Digby

Applicant/Respondents

Judge:	Chief Justice Constance R. Glube
Application Heard:	May 1, 2003, in Halifax, Nova Scotia, in Chambers
Held:	Application granted.
Counsel:	David Schermbrucker and Angela Harms, for the Crown Daniel J. Innocente, Applicant/Respondent, appearing on his own behalf Walter I. Yeadon, for Nova Scotia Legal Aid

Decision:

[1] This application filed March 22, 2003, is for appointment of counsel under "s. 684 (**Criminal Code**)\Rowbotham\ stay of proceedings until a lawyer is appointed."

[2] Daniel Joseph Innocente, the applicant, is the respondent in a Crown appeal of a decision by Supreme Court Justice K. Peter Richard, dated October 29, 2002.

[3] In May of 1997, Mr. Innocente was charged on two Informations with a number of counts under s. 19.1(2)(a) of the **Narcotic Control Act**, R.S., c.N-1, as amended, dealing with possession of personal and real property, obtained by the indictable offence of trafficking and possession of a narcotic for the purposes of trafficking, and one count of possession of property obtained by crime, s.354(1)(a) of the **Criminal Code**, R.S. c.C-34, as amended. In the fall of 2000, after a Rowbotham hearing, Judge William B. Digby ordered a stay of the charges on the two Informations until November 17, 2000 and added:

> . . . unless prior to that date the Federal Crown commits to providing Mr. Innocente access to counsel for these matters by guaranteeing up to $80,000 to fund lawyers' disbursements, fees and expenses, at rates not to exceed $1,600 for full trial day and $150 per hour for preparation. All funds advanced on behalf of Mr. Innocente to be a debt owing by Mr. Innocente to the Federal Crown; . . .

[4] Following that decision, the Crown brought an application in the Supreme Court of Nova Scotia, for certiorari and mandamus. After a hearing, Richard, J. gave an oral decision dismissing the certiorari application to quash Judge Digby's order and refused to grant an order in the nature of mandamus compelling Judge Digby to proceed with the trial.

[5] On February 13, 2003, Justice M. Jill Hamilton, of the Nova Scotia Court of Appeal, heard, in Chambers, a s. 684 application by Mr. Innocente. By a written decision and an Order dated February 21, 2003 she dismissed his application. After setting out s. 684, she indicated that the Crown conceded that it was in the "interests of Justice" that Mr. Innocente should have legal counsel. The issue then became whether or not Mr. Innocente had "sufficient means to obtain legal assistance." She concluded:

> I am not satisfied I have the whole picture of Mr. Innocente's financial situation. Since the burden is on him to prove he does not have sufficient means to obtain legal assistance himself, his application fails.

After reviewing the evidence provided she stated:

> . . . With the minimal information provided I cannot, with any degree of comfort, estimate his expenses for the last twelve months.

[6] She acknowledged that Mr. Innocente was representing himself and made allowance for that but went on to say he was not a stranger to the process as he had made seven similar applications for counsel over the past five years. She expressed concern about his lack of records and among other things, his failure to go to the power company and telephone company to ask for confirmation of amounts paid over the previous twelve months. She concluded she was not satisfied that he does not have the means to obtain legal assistance for the appeal.

[7] I have no difficulty with the conclusion reached by Hamilton, J.A. on the information she had available to her. It was very incomplete.

[8] On this current application, Mr. Innocente filed three affidavits: one sworn March 24, 2003 and two sworn on May 1, although one of these was filed April 28, 2003. He was also briefly cross-examined. In the affidavit filed April 28, he notes that he has been charged with one count of conspiracy to traffic in ecstasy and one count of conspiracy of possession of ecstasy for the purpose of trafficking (**Criminal Code** s. 465(1(c)). That Information is dated the ___ (blank) day of March, 2003. He states he was arrested on March 25, 2003 (which is the reason he could not swear the April 28 affidavit), he is incarcerated in Sleepy Hollow Correction Centre, P.E.I. and his parole has been revoked. (Mr. Innocente had previously been convicted and sentenced to seven years, but had been on full parole since August 27, 2001.) He attached to his affidavit filed April 28, a copy of a Correctional Services document titled "Addendum to Assessment for Decision" signed by Susan J. Hornby which states in part:

> For the purpose of the Assessment for Decision, this writer interviewed Danny in person at Provincial Correctional Centre PEI on Tuesday, 2003 April 08. The subject declined to discuss the charges he is facing, except to say that he will be entering not guilty pleas. He is aware that he will be on remand for a long time, perhaps a year or more, since he is facing drug conspiracy charges with 23 other

> individuals. He says he understands the reasons the suspension was issued. He was advised by this writer that if his Full Parole is revoked by National Parole Board and he is subsequently found not guilty of the charges he is facing, the parole officer dealing with him at that time will likely be completing another assessment of his risk and he could be re-released to the community, pending NPB review. He has waived his right to a post-suspension hearing with National Parole Board.

[9] Mr. Innocente set out in his first affidavit that he and his family had moved in June 2002, from their house into rental premises at $1000 a month. He attached a number of statements to each affidavit. Many of these had not been submitted in the February application. A number of the bills indicate they are in arrears.

[10] Although the items were not summarized or totalled, the following were among the items included:

- MT & T bills from June 2002 - March 2003 inclusive (the period since moving)
- EastLink bills from June 2002 - March 2003 inclusive (the period since moving)
- N S Power Corp. bills from July 2002-March 2003 inclusive (the period since moving)
- Metro Self Storage bills from January 2003 to March 2003
- Rogers AT & T bills from January 2003 for 2 months
- Cunard’s furnace oil for February 2003
- Grocery slips from October and December 2002 and January, February and April, 2003
- Gas bills, one in June 2002 and from February to April 2003
- Legal bills to several lawyers totalling $36,917.50
- A doctor bill of $305.00

- Child Support arrears of $13,200.00
- Income tax arrears of $33,270.99

[11] In his affidavit, Mr. Innocente also listed a number of debts to family members and others, as well as sales from his fish business for 2002 and from January to March, 2003. These were also not totalled. He listed and testified as to his wife's income. Before he was incarcerated, she was earning approximately $600 every two weeks. She is now working more hours and earns up to $1200 every two week. She also receives approximately $727 a month Child Tax benefit for the three children. Her 2002 tax return showed income of $16,138 which he said included $1000 for tips. He also referred to a s. 462.4 (**Criminal Code**) application he made in November 2002 for the return of certain goods seized as proceeds of crime.

[12] During cross-examination, the Crown gave Mr. Innocente a list of some expenses taken from his affidavits between March 1 and April 27, 2003, totalling $3,550.77 and referred to an additional group of expenses totalling $537.00 for that same period. Counsel suggested they far exceeded the income for that period. Mr. Innocente testified that one amount of $166.80 was actually paid by his father. This still left an amount over $3,900. Mr. Innocente's tax returns show his gross business income as $6,200 for 2001 and $7,581 for 2002. I would suggest that at least for part of 2002, he and his wife's combined income was $2,700 a month. Therefore, considering the amount for March 2003 totalled $1,723.63 and $2,364.14 for April (without deducting the $166.80), it would appear there was enough income to pay the expenses listed by the Crown. Although Mr. Innocente no longer has income, his wife's increased earnings would essentially cover the receipts listed by the Crown for April. I therefore do not understand the Crown's point. If it is suggested that they spent many dollars more than they had in income, in my opinion that appears to be incorrect. If it is suggested they had more money than listed, as Mr. Innocente said, even if there was any extra money, it would not be enough to pay a lawyer. He pointed out that he had offered to pay a lawyer $100 a month to take his case and he was refused.

[13] The Nova Scotia Legal Aid Commission turned down his application on February 27, 2003 and again on April 25, 2003. It appears from my reading of the letters that he was mainly refused legal aid because at some time he had listed

assets in his application totalling $39,700. In his May 1, 2003 affidavit, he claims that the all terrain vehicle, the Harley Davidson motorcycle, and the Coachman Trailer which total more than $34,000, do not belong to him alone. He attached letters indicating that he owed family members money before they would release their interests in these vehicles. His wife lays claim to the ’55 Chevy as security to repay a loan of her children’s money; his father claims the motorcycle; and his mother claims that her son’s interest in the trailer is only $5,000 of the $12,000 price listed. Of course there is no way to test these papers, as the individuals were not before the Court to give evidence. He also claims that their value is less today than when they were seized seven years ago and less than when he made a s. 462.34 (**Criminal Code**) application in 2002, which he said he withdrew because some of the items were not fully owned by him. He claims that he never said to Legal Aid that he owned all these items, rather he says he listed them as the police took them from his possession.

[14] At the Court’s request, and because Mr. Innocente said in his affidavit that Legal Aid would be in Court for this hearing, Mr. Yeadon of Legal Aid appeared. He confirmed that he sent a letter to Mr. Innocente dated April 25, 2003, which had not been received by the date of this hearing. It was written as a follow up to a telephone conversation between Mr. Yeadon and Mr. Innocente on April 3, 2003. The letter confirms the February 27, 2003 decision, that the Commission will not provide legal aid although he is now incarcerated.

ANALYSIS

[15] We are dealing with s. 684 which reads as follows:

> (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.

[16] As stated by Freeman, J.A. in **R. v. Assoun**, [2002] N.S.J. No. 431, ¶'s 11 and 12:

> 11 In Bernardo it was concluded that s. 684:
>
> ... gives a judge of the court and the court concurrent jurisdiction to consider a request for the appointment of counsel: R. v. Foster (1954), 110 C.C.C. 214 at 215 (Ont. C.A.); R. v. Walker (1978), 46 C.C.C. (2d) 124 (Que. C.A.). Where deemed appropriate, the court may exercise its jurisdiction under s. 684 even though a judge of the court has previously refused an application under that section.
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> 12 The standard must be one of highest deference to the previous findings of the court or a judge of the court. Even if I disagreed with the manner in which discretion was exercised on the first application, which I do not, I would not consider myself justified in substituting my own discretion for that of the judge on the first application in the same circumstances. Therefore a change in circumstances must be shown. In the first application a substantial amount of income could not be accounted for. In this application the appellant is putting forward evidence which, if accepted, would account for the funds in question.

[17] The Crown initially submitted that in order to bring this application, the applicant had to show a "material" change in circumstances. No authority was given to confirm that the change had to be "material."

[18] Since the decision of Justice Hamilton, there have been two changes. First, Mr. Innocente has been incarcerated. Whether he is on remand or his parole has been revoked, which it appears that it has, there is no evidence one way or the other that he will be gaining his freedom in the near future. Based on the Assessment previously quoted, it appears more likely that he may not be paroled even if he applies and he testified that he saw no point in applying. His incarceration means he no can no longer buy and sell fish which he claims was the source of his business income.

[19] The second change is that he has filed substantially more information on this application than he did in February for the earlier application. He has to a large extent listened to and responded to the concerns expressed by Justice Hamilton as to missing information. Although the Crown submitted that it was still incomplete and difficult to analyse and I acknowledge that it takes some time and effort to sort out what he has filed, it does include the major expenses and others where he had receipts. Many people would have a difficult time finding receipts for groceries and gas unless paid by credit card or cheque. It appears from those that have been included that this family paid those bills in cash.

[20] Considering these factors, I find that there has been a change which merits consideration of this application, and although it is not necessary that the change be "material", in my opinion, in this case the changes are substantial.

[21] Before me, the Crown again conceded that it is in the interests of justice that Mr. Innocent have counsel for this appeal. I agree that the complexity of the legal issues before the Court are such that Mr. Innocente, who is not a lawyer, would not be able to give meaningful responses.

[22] The remaining issue under s. 684 is whether he "has not sufficient means to obtain that (legal) assistance."

[23] The facts as outlined previously show that the family income is down, that he personally has no income from his fish business, and that he does not have sufficient means to pay a lawyer.

[24] I appreciate that considerable deference should be given to the views of Legal Aid as to a person's eligibility; however that view is not conclusive. (See **R. v. Assoun**, 2002 NSCA 50, ¶'s 45-50). Legal Aid advised Mr. Innocent in July of 1999 to apply to the court to release some or all of the property subject to a Restraint Order. I believe that such an application was brought and some property was released, but again it was suggested in the February 27, 2003 Legal Aid letter that he should pursue such an application relating to the property he had listed. That letter and the April 25, 2003 letter confirm what had been said July 2, 1999, that the Appeal Committee "was not satisfied that you do not have the resources to retain counsel for your ongoing criminal matters."

[25] I must make this decision based on the information before me in 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.

[26] I have given consideration to all of the evidence and find that Mr. Innocente "has not sufficient means to obtain that (legal) assistance." I am prepared to exercise my discretion under s. 684 as I find that the evidence before me establishes on a preponderance of probability that Mr. Innocente does not have sufficient means to obtain legal assistance.

[27] Although Counsel for the Crown submits that if I come to this conclusion, I should adjourn the matter to permit Legal Aid to review Mr. Innocente's application suggesting that is contemplated by s. 684(2), I disagree that this would be a correct interpretation. Also, Legal Aid is not a party to this application and there is nothing in the section that would lead me to send the matter back to the Commission.

[28] I therefore grant the application to have counsel assigned to be paid for by the Attorney General of Canada in accordance with s. 684.

[29] Having made this finding, it is not necessary to consider the balance of the application ". . . Rowbotham\stay of proceedings . . . ."

[30] At the conclusion of the hearing when I indicated that my decision was reserved, the Crown raised the issue of the appeal which is scheduled for May 22, 2003. Mr. Innocente said although he wanted counsel for the appeal, he wanted the appeal to continue on the scheduled date. On that basis, I did not adjourn the appeal. However, if, when counsel has been appointed, either side wishes to apply for an adjournment, they can apply to me for further consideration.

Glube, C.J.N.S.