IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. Canning, 2010 NSPC 59

Date: 20100924
Docket:2052215-17/2061807-812/2142245-47
Registry: Sydney

Between:

Her Majesty the Queen

v.

Kenneth Paul Canning

DECISION ON ROWBOTHAM APPLICATION

Judge:	The Honourable Judge A. P. Ross
Written decision:	September 24, 2010
Counsel:	Mr. Glenn R. Anderson, Q.C., for the Attorney General Mr. Darcy MacPherson, for the Crown Mr. Kenneth Canning, self-represented

Reason for Decision

Rowbotham application

[1] Kenneth Paul Canning is accused of committing a number of sexual offences against four separate people between 1980 and 2009. In some of the charges the complainants are said to be under fourteen years of age. He has elected trial in provincial court. He applied for legal assistance through the Nova Scotia Legal Aid program but was refused, both initially and on appeal. Subsequently he made an application to the court for the appointment of state-funded counsel (a Rowbotham application). This is a decision on that application.

[2] R. v. Rowbotham (1988) 41 C.C.C. (3d) 1 (Ont. C.A.) and cases which followed it have established a right of an accused to apply for a stay of proceedings on the basis of an apprehended breach of sections 7 and 11(b) of the Charter. A successful applicant will be granted a stay of proceedings until legal counsel is provided by the province to assist the accused in making full answer and defense. The applicant will have to demonstrate that he is indigent, cannot receive a fair trial without legal counsel, and has exhausted all possible routes to obtain counsel through Legal Aid and privately.

[3] Roughly speaking a Nova Scotia Legal Aid lawyer is provided to accused who are receiving social assistance or are in an equivalent financial position. The Legal Aid commission in this province (and its counterparts elsewhere) assess a large volume of applications every year. They use funds budgeted by government for this purpose. They apply standards and procedures which have been carefully developed and can be uniformly applied; yet these standards can be changed if necessary. It is one of many areas in which governments are politically accountable for how they spend tax dollars. Recognizing this context various courts have said that Rowbotham orders will be granted sparingly.

[4] Responding to the application is the Attorney General of Nova Scotia. The Public Prosecution Service, which will present the case for the Crown at trial, has maintained a watching brief.

[5] The matter of legal representation for Mr. Canning has occupied a considerable part of the proceedings to date. Charges concerning three of the complainants were laid in June of 2009. He first appeared in court on these on July 23rd, 2009. Counsel from Nova Scotia Legal Aid appeared with him a number of times thereafter but only to request adjournments so that his application for assistance could be processed. On February 3, 2010, charges concerning a fourth complainant were laid. On February 4, 2010, the accused still without counsel. I declined a sixth request to adjourn, entered an election of judge and jury on behalf of the accused and scheduled a preliminary hearing for June of 2010. The matter was docketed for a status report in May. On June 1, 2010, the accused, still unrepresented, re-elected his mode of trial to provincial court (eliminating the need for the preliminary hearing) and pled not guilty. On June 10, 2010,

this Rowbotham application was begun. Trial dates have yet to be set pending the resolution of the matter of legal representation.

[6] I here note that on June 1, 2010, the Crown (PPS) initiated an application under s. 486.3 to have counsel appointed to cross-examine the complainants on behalf of the accused. I will return to my ruling on s. 486.3, which I have held in abeyance until the Rowbotham aspect was settled, at the end of these reasons.

[7] Mr. Anderson, for the Attorney General, has been most helpful to the court and to the accused in bringing this application forward. He supplied the accused with a two-page outline which described the test he would have to meet, the sort of evidence he should present, and the criteria which courts typically employ in arriving at a decision.

[8] Although it is the accused's application, with his rights and interests at stake, it is the respondent who has actually provided much of the relevant evidence. At the outset the accused provided written authorizations permitting access to his banking records and to documents in the Legal Aid file. The respondent then procured these records, provided them to the court under cover of affidavit, and arranged for witnesses to appear for examination. It also supplied various property records, a Separation Agreement entered into between Mr. Canning and his wife, and certain pieces of correspondence. All this has been obtained and organized and provided to the applicant and the court, according to a timetable agreed to on June 10, 2010. The respondent has also provided a book of legal authorities. Mr. Canning had an opportunity to read this material in preparation for the hearing, which was scheduled for and held on August 31, 2010.

[9] On August 31st, Mr. Canning brought himself, but little more, to court. He took the stand to give a brief account of his circumstances and to submit to questioning. He called no other witnesses.

[10] An applicant seeking a Rowbotham order has a legal onus to meet. He also has an evidentiary onus in the sense that much of the information which is relevant to a decision is uniquely within his control. A court expects full and frank disclosure of present financial circumstances and any other relevant personal information. Obviously Mr. Canning is in the best position to tender this to the court. Where his obligation is not met, with no obvious explanation for the omission, one cannot help but consider the possibility that the applicant would prefer the information not be disclosed lest it hurt his case.

[11] I recognize that the ensuring reasons are relatively brief, but I believe that they are sufficient given that, in my view, Mr. Canning's application falls well short of what is needed to succeed.

Ability to receive a fair trial

[12] Relevant in Rowbotham applications is the ability of the applicant to prepare for trial and conduct a defense on his own, which in turn requires an examination of his literacy, communication skills, familiarity with court procedures, the seriousness of the charges and the complexity of the trial. For instance in R. v. Stephen-Patriquen [2004] N.S.J. No. 179 the decision to grant the application seems partly to have turned on the fact that the trial would hear forensic accounting evidence, something which the accused would have great difficulty understanding and responding to on his own, coupled with the somewhat unusual *mens rea* requirement of one of the offences. Other things besides expert testimony can complicate a case, but it severs as one example of the sort of thing courts should be concerned about.

[13] There is nothing before me to indicate that expert witnesses will be called by either side in this case. Mr. Canning is not compelled to reveal possible defenses, but he has not said anything, even in general terms, about the nature of the evidence he may wish to present. One presumes the complainants will testify for the Crown, and there may be other witnesses to corroborate or bolster the Crown's case. It is possible Crown may seek to introduce a statement given by Mr. Canning; if so, certain threshold requirements will have to be proven, including voluntariness. Witness statements will be available to the accused well prior to trial, and indeed they may already have been disclosed.

[14] I do not wish to suggest that mounting a defence in a case like this is a simple matter. Even in the most basic of cases defences can be poorly presented and cross-examination ineffectual. An accused would, in nearly every case, benefit from the assistance of legal counsel. This being said, and recognizing the serious nature of the allegations, it appears nonetheless to be a trial where the issues are accessible to layperson and the evidence will be easy to comprehend. This is not to say that the issues will be easy to decide, or that it will be easy to determine the facts from the evidence.

[15] The meager evidence before me fails to establish that Mr. Canning, if he is required to go to trial self-represented, will not get a fair trial. If this were critical to the disposition of this application I would likely have sought more information from the parties than was presented at the hearing. However the other parts of the Rowbotham test are, in my view, the shoals upon which Mr. Canning's application founders.

The applicants current financial situation

[16] A successful applicant will have to show that he is indigent. Poverty is a relative thing. It would cause most people some financial hardship to finance a defence. The law does not require that an accused make himself destitute to pay for a lawyer, but there must be a willingness to make significant sacrifice.

[17] On June 10th, 2010, at the outset of the application the Attorney General filed an outline of what an accused should provide in the line of financial information. It suggested that such information be given in a sworn affidavit and filed prior to the hearing. The accused gave authorizations to the Attorney General which permitted access to his bank records at the Sydney Credit Union and Bank of Montreal, and as well to the documents he filed with his application for Legal Aid. Mr. Anderson was then able to gather and provide much relevant evidence to the court. I presume the accused provided the copy of the Separation agreement which I have before me - contained, again, in materials compiled by the respondent. However there is still much about Mr. Canning's financial situation which is unclear, or unknown.

[18] After some prodding, and well after the July 9th deadline which was set in court, Mr. Canning did set out some of his monthly expenses in an email to Mr. Anderson. At no time did he present to the respondent, or to the court, documentation to support those expenses.

[19] Some entries in the bank statements undoubtedly reflect expenses but he has not brought forward cancelled cheques, bill, deposit slips or other documents to identify the nature of these transactions. Two of the accounts (Credit Union) are joint accounts with his wife Evelyn (from whom he is now separated). From these accounts mortgages are paid on two separate properties. Another account at the Bank of Montreal was jointly held with Evelyn Canning until July 30 of this year. Mr. Canning has another account at BMO in his own name. He has spoken in very vague and general terms about what some of the activity on these accounts *might* be for. He cites his wife's continued use of the accounts as one reason why he is not able to get a clear grasp of his financial dealings, but I have no evidence from her, either in person or by affidavit, confirming or clarifying the entries in the accounts. A concerted effort on Mr. Canning's part could have shed much more light on the situation.

[20] There are also two joint accounts at BMO between the accused, his mother and his sister, into which, according to the accused, his mother's income is deposited. There is nothing improper about Mr. Canning's family having an account from which to handle their mother's financial affairs, but some further detail of the transactions on this account would not be too much to expect.

[21] The accused was asked to provide copies of his income tax returns for the past two years. He has not done so. He represented at one stage of the hearing that they had not been filed owing to the disruption in his life, separation from his wife, etc.

[22] In an email of July 27, 2010, Mr. Canning gives a brief outline of his current monthly expenses, which he says total $878. He says his only income is a CPP disability pension of $681. In his Legal Aid application of July 17, 2009, he shows pension income at $664.41. In a letter appealing their denial dated December 11, 2009, he says his CPP pension is $681 and states that a private pension he had been receiving from PennCorp. of $800 per month was cut off "as of September". He testified

that this was done when the company was advised of the charges he is facing. In loan applications to the Credit Union in February and July of 2008 he shows a "gross monthly income" (separate from his wife's) of $1015, the PennCorp income of $800 and "rental income" of $1850 for a total income of $3665 per month. He evidently lost the rental income when, in 2009, he deeded the rental properties to his wife.

[23] Putting the rental income aside - I will return to that matter below - there are still significant gaps and inconsistencies in Mr. Canning's current financial picture. The onus is on him to portray it in clear terms. I perceive only a limited and partial fulfillment of Mr. Canning's obligation to outline his personal financial circumstances in such a way as to allow for a full evaluation of it. But even assuming that Mr. Canning is now indigent, as he claims, he unnecessarily so, as will appear.

Attempts to obtain legal counsel, privately or through legal counsel

[24] To obtain the relief which he seeks here the accused must show that he has taken all reasonable steps to obtain legal counsel either privately or through Legal Aid. Despite the misgivings I have already expressed concerning first two aspects of the Rowbotham test it is on this third ground which Mr. Canning's application most obviously fails.

[25] In an early Charter case, R. v. Trembley [1987] 2 S.C.R. 435, the Supreme Court considered the conduct of an accused who was asserting a breach of his right to counsel. While the context was very different than here, the case nevertheless appears to lend support to the proposition that a person asserting a Charter right may be required to show that s/he was diligent in the exercise of the right.

[26] In the loan applications from February and July of 2009, noted above, Mr. Canning shows total assets of nearly $350,000 and a net worth, after liabilities, of $240,000. Today it appears assuming the financial disclosure is complete, that he has next to nothing - a nice truck subject to a loan, but little else.

[27] The Canning family home, since 1990, was at Atlantic St., Sydney. The accused's mother gave him a second property at Sheriff Ave in 2005. This had been his mother's house which, according to the accused, was converted to rental units in order to help with the costs of her health care. He may well have assisted his mother, but the rental income of over $1300 per month was shown to be his on the above loan applications. His mother now lives in a senior's home. Mr. and Mrs. Canning had previously acquired, in 1998, a third property on Connaught St. from which they derived rental income.

[28] The first of the charges against the accused was laid on 6 June 2009. Further charges were laid on June 25th. He was questioned by police that same month, and I was provided with that portion of the statement in which he discusses the fact that he

has the Sheriff, Atlantic and Connaught St. properties. His first appearance in provincial court was 23 July 09.

[29] He made a written application to Legal Aid on 17 July 09 in which he shows under the heading “home” two items - one valued at $90,000 with $63,000 owing; a second at $25,000 with “unsure” about the amount owed and a note that it is a rental. He shows his rental income at $500. He notes that he ‘will be moving as of July 23/09".

[30] Documents from Property Online (Service Nova Scotia) now show Evelyn Canning as present sole owner of Atlantic St. Mr. Canning deeded his interest over on 2 September 09; the deed was registered on 10 September 09. The assessed value is $95,600. The records also show an outstanding mortgage to the Credit Union from 2005 in the initial amount of $61,000.

[31] The records show Evelyn Canning as present sole owner of Sheriff Ave. Again the accused deeded his interest on 2 September 09, registered 10 September 09. The assessed value is $61,000. A mortgage to the Credit Union is noted at an initial amount of $44,600.00

[32] The records show Evelyn Canning as the present sole owner of Connaught St. The assessed value is $43,300. Again, Mr. Canning deeded away his interest in this on 2 September 09, registered 10 September 09.

[33] A Separation Agreement dated 11 September 09 states that “differences have arisen between the husband and wife by reason thereof they have agreed to live separate and apart” and that “the parties have not cohabitated together since June 6, 2009". The agreement recites that they were, at separation, the joint owners of Atlantic St. which had a mortgage at nearly $51,000 and of Sheriff Ave. with a mortgage of $40,600 which generated rental income of $1375 monthly, and of Connaught Ave. which generated rental income of $500 monthly. It states that Mr. Canning had annual income (disability benefits) of $17,000 and that Evelyn Canning had annual income (disability benefits) of $11,500. They agree to split payments on the vehicle loan. They agree to each be responsible for payments on one of two credit cards. Mr. Canning is permitted to stay in Atlantic St. - the agreement acknowledges the interim release order of this court which required him to remain there - until such time as the court permits him to move to a new address.

[34] The Agreement stipulates no consideration to Mr. Canning for these transfers of interest. At the hearing on August 31, 2010, he confirmed this. Neither party to the agreement is required to pay any maintenance or support for the other.

[35] Mr. Canning testified that his wife allowed him to stay at Atlantic St., after he deeded it over to her, so long as he paid the utilities and mortgage. The Credit Union was never advised of the change of ownership. The account from which the mortgage is paid will remain joint so long as the mortgage is outstanding, according to the

manager. As things stand now Mr. Canning is in no position to borrow money. The Agreement stipulates that Mrs. Canning would use her “best efforts” to have Mr. Canning removed from the mortgages. Needless to say the parties could not bind the mortgagee , and it is hardly surprising that Mr. Canning is still jointly liable for this indebtedness. The Agreement includes the usual clauses as to the finality of the settlement, releases of future rights and claims, understanding and voluntariness, etc.

[36] Attached to the Separation Agreement is a waiver of independent legal advice signed by Mr. Canning in which he confirms that the solicitor who prepared the agreement advised him to secure the services of a lawyer and gave him a copy of the agreement to discuss with a lawyer prior to signing it. In it he states that he does not wish to obtain legal advice, is not under any undue influence, understands the nature and effect of the document, and is executing it voluntarily.

[37] One can speculate on Mrs. Canning’s motives, but it is neither necessary nor appropriate for me to do so. It appears Mr. Canning gave virtually everything away to his wife, including property he had been given by his mother in 2005 specifically so that it could be converted into apartments and thus generate income for his mother’s benefit. His explanation for this curious and self-defeating behaviour is twofold.

[38] Firstly, he said he wanted his wife to be “looked after for life” given that she had only a small disability pension. At one point he cited the fact that his wife had cancer. Later he clarified that his wife was diagnosed with this in 2004. Upon separation, Mrs. Canning moved to Fort MacMurray with the couple’s youngest son. According to the accused she began work out there in November of 2009. I have the sense she secured it through a family contact. One of the affidavits filed indicates that as of August 4, 2010, she was still working, as a payroll scheduler. Mr. Canning, meanwhile, seems to lack the means to get a job.

[39] Secondly, he says his wife took unfair advantage. He testified that “as of June 09 my wife took full control.” In his July 27/10 letter to Mr. Anderson he says “as I look back now I probably was duped out of any interests I had in the family properties.” At the hearing he testified that “in retrospect I agree I could have re-financed one of the properties to pay for a lawyer.” As to how this could happen, he points to threats, harassment and vandalism at the hands of unknown persons in the summer of 2009 and the death of a sister in late July of that year. He says these caused him extreme stress and confusion. He attributes both his poor decision making, and the inaccuracies and omissions in his Legal Aid application, to this.

[40] I have no doubt whatsoever that Mr. Canning was under considerable stress once the police began their investigation, and particularly after he was charged. He was admitted to the mental health unit of the regional hospital for about three weeks, from late July to August 14, 2009. He says his family doctor thought he was discharged too early. At the same time, he had a family doctor, and siblings, and was not without family support. One sister provided him with security cameras for his house. His Legal

Aid application was made on July 17, 2009, prior to his first court appearance. He would know that a lawyer could be a source of advice for many of the issues he was facing.

[41] Mr. Canning may have felt pressure from any number of directions - from the police, from the public, and from his wife - but he had legitimate interests in significant assets and did not forfeit these upon being charged. I am not persuaded that his state of mind was such that he was incapable of appreciating the situation he was in, the need for legal advice and his legitimate interests in the three houses. Nor do I understand how the forgoing factors would have caused him, on July 17, 2009, to understate his rental income by more than $1500 per month in his application for legal assistance. While “the lady at the window” may indeed have told him that he did not have to remember every single detail in filling out his application his income and assets were critical pieces of information and the failure to disclose these fully was entirely Mr. Canning’s doing.

[42] R. v. Keating (1997) 159 N.S.R. 357 (C.A.) and other cases state that an accused seeking the relief Mr. Canning seeks here must show that he has exhausted all possible routes to obtain legal counsel. I have not read a case quite like this one, where the accused, in effect, foreclosed his route to private counsel by giving away assets and sources of income. Mr. Canning’s present situation was a foreseeable result of his own deliberate actions. He divested himself of his assets just as the need for legal advice arose. The consequences of this should have been apparent to Mr. Canning. Here he seeks a remedy predicated on his right to counsel, yet he squandered the very means to exercise this right. In the result he is left with few assets, little income, and a poor case.

[43] The Charter guarantees certain rights, but it does not guarantee that a person will act in his or her best interests. A right may be conferred but a person is also expected to exercise it responsibly. The Charter does not render a person immune from the consequences of his actions .

[44] The application for a stay of proceedings, pending provision of a lawyer to Mr. Canning by the Attorney General at public expense, is denied.

[45] In the result Mr. Canning will likely be self-represented at trial. The court can, without taking sides, give direction to the accused to help him navigate the unfamiliar terrain of a criminal trial.

S. 486.3 application

[46] I have, along with Mr. Canning’s Rowbotham application, an application by the Crown (represented in this instance by the Public Prosecution Service) for an order under s. 486.3 in respect to each of the four complaints, who I will refer to as E.L., B.T., S.R., and C.L. In distinction to a Rowbotham order which would, in essence, require the

province to provide Mr. Canning a lawyer for his entire trial, s. 486.3 permits the trial judge to appoint counsel for a specific purpose, namely, to cross-examine a vulnerable witness. The interest at stake here is not Mr. Canning's fair trial or counsel rights but the ability of the witness to give a full and candid account from the witness stand.

[47] Factors which the court must take into account include the age of the witness, the nature of the offence and the relationship between the witness and the accused. Each of the four complainants has testified how they feel about the prospect of Mr. Canning personally cross-examining them on their evidence. E.L. expressed a need for a screen so that he would not have to look at the accused, and said that he would have difficulty concentrating if exposed to direct questioning by Mr. Canning. E.L. is under 18. C.L. is over 18 but still indicated a strong preference to be questioned by a lawyer rather than by Mr. Canning himself, saying it would affect is answers. S.R. would rather a lawyer do the questioning, but could not say that it would impede his ability to give full answers were Mr. Canning to conduct cross-examination personally. B.T. said it made no difference whatsoever whether Mr. Canning or a lawyer asked him questions.

[48] Mr. Canning submitted that a person should be able to face his accusers directly and ask them questions. His Rowbotham application leads me to think, however, that he is not averse to having the help of a court-appointed lawyer.

[49] The test is not met simply by a witness expressing a wish. There must be reason to think that there is actual need for the requested order. The rationale is not to spare a witness some discomfort, but to prevent the injustice which would occur if the witness were unable to speak the whole truth.

[50] I am not of the opinion (to adopt the wording of the section) that the administration of justice requires that Mr. Canning should cross-examine E.L.; with respect to C.L. I am of the opinion that the court will not get a full and candid account unless cross-examination is conducted by a lawyer. I am not of the opinion that counsel should be appointed for the cross-examination of S.R. or B.T.

[51] I earlier ruled on this s. 486.3 application but held any order in abeyance pending the outcome of the Rowbotham application which, if granted, would have made the s. 486.3 application moot. Having rejected the Rowbotham application, I order, under the authority of s. 486.3, the appointment of legal counsel to conduct cross examination of E.L. and C.L. I will hear submissions from the parties on 28 September 10 as to how this measure should be implemented.

Dated at Sydney, Nova Scotia this 24 day of September, 2010.

Judge A. Peter Ross