THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. Jessome, 2003NSPC039

Date: August 8, 2003
Registry: Sydney

BETWEEN:

HER MAJESTY THE QUEEN

v.

JOSEPH GLENN JESSOME

DECISION

Judge:	Ross, J.P.C.
Counsel:	Andre Arseneau, for the Prosecution Self Represented Defendant
Heard:	April 15, 2003 June 18, 2003 at Sydney, Nova Scotia
Decision Delivered:	August 8, 2003

[1] Joseph Glenn Jessome, the Defendant, is self-represented on a charge of assault causing bodily harm allegedly occurring March 18th, 2001, at Sydney. As Judge Ryan conducted a pre-trial on January 23, 2003, the matter was set over before me for trial. The proceedings commenced with a Charter Application heard on April 15th and June 18th, 2003. This is a decision on that Charter Application issued prior to hearing any evidence in chief on the scheduled resumption date of September 23rd, 2003.

[2] Although Mr. Jessome initially raised other concerns, including a possible breach of s. 11(d) of the Charter, his final argument resulted on a violation of his right to silence under s. 7 of the Charter. He asserts that this right was breached when a lawyer whom he had consulted about the events of March 18th, 2001, while these were still under investigation, disclosed, without Mr. Jessome's approval, certain matters to the police and suggested they be followed up. The Defendant contends that this alone led police to two witnesses and to additional evidence which the Crown now proposes to employ against him at his trial. As a remedy he seeks a stay of proceedings, or in the alternative an order that these two witnesses not be permitted to testify and that evidence derived from the follow up investigation be excluded from the trial.

FACTS

[3] Shortly after the events giving rise to the investigation, the Defendant was contacted by Constable Hugh MacDonald of the Cape Breton Regional Police Service to request that he give a statement. Mr. Jessome declined. He then decided to speak to a lawyer about whether he should give a statement, and for general legal advice.

[4] The lawyer whom Mr. Jessome consulted is Mr. David Iannetti. He is engaged in a private practice which includes a considerable amount of criminal defence work and also an engagement with the federal Solicitor General as a Standing Agent to do prosecutions under specific federal Statutes, including the Controlled Drugs and Substances Act. Mr. Jessome was likely unaware of this at the time he consulted Mr. Iannetti, and now sees these roles as potentially conflicting. For instance, he is concerned that Mr. Iannetti would have dealt with

the investigating officer as a Crown Prosecutor on other matters and thus have had some extra influence over Constable MacDonald not possessed by other lawyers.

[5] Mr. Jessome stated that while he was in Mr. Iannetti's office for the initial consultation, Mr. Iannetti contacted Constable MacDonald by phone and suggested that he speak to the bouncers at a nearby establishment, disclosing that the events under investigation may have started in the bar. Mr. Jessome says he was surprised that Mr. Iannetti disclosed information to the investigating officer and suggested a particular line of investigation. While he apparently knew that Mr. Iannetti was contacting Constable MacDonald, he thought he would simply be reinforcing his position, earlier given personally, that he would be remaining silent and thus unavailable for a statement.

[6] Up to this point Constable MacDonald, the investigating officer, had obtained at least two statements and had dealt with the complainant. He had not spoken to the bouncers. His attempts to interview further witnesses had been unsuccessful. He said that he had returned a number of times without obtaining any additional statements.

[7] Subsequent to the phone call with Mr. Iannetti, Constable MacDonald did, in June and July, obtain statements from two persons who were inside the bar on the date in question. On August 29th, 2001, an information was sworn alleging the charge of assault causing bodily harm against the Defendant.

[8] Mr. Iannetti testified that he recalled meeting with Mr. Jessome at his office on a Sunday for one to two hours, and recalls phoning Constable MacDonald to speak about the investigation. To Mr. Iannetti's recollection, this call was placed after he had discussed the events with Mr. Jessome and in the belief that Mr. Jessome knew that it would be in his best interest for the police to speak to the bouncers about prior events in the bar, as this might shed some light on the behaviour of the complainant. Mr. Iannetti stated that it was his belief Mr. Jessome was amenable to him contacting Constable MacDonald to suggest the investigation be pursued in this particular way. Three days after this call, Constable MacDonald did indeed return to the scene. He later obtained statements as mentioned in the preceding paragraph.

[9] Mr. Iannetti did not consider that he was in any sense acting as a Crown Attorney or using any influence as such when speaking with Constable

MacDonald. He pointed out the fact that he has no connection with the Provincial Public Prosecution Service which is conducting the prosecution of the present Criminal Code charge against the Defendant.

[10] For his part, Constable MacDonald testified that later on the same day of the alleged assault he procured two statements and made arrangements for a third, but that none were obtained from bouncers inside the bar. He said he returned several times to the bar in an effort to meet with the bouncers, but had no success in doing so as they were not working. His notes of April the 8th confirm that he spoke with Mr. Iannetti who wanted him to speak with the bouncers concerning the events inside the bar. His notes indicate unsuccessful attempts to contact some of these people on April the 11th and 26th. The complainant had wanted the officer to speak with someone named "Jamie" but evidently no one on staff was known by this name.

[11] However, Constable MacDonald went on to testify that this did not frustrate nor exhaust his efforts, and he stated quite forcefully that he would have persisted with his investigation in the absence of any phone call from Mr. Iannetti. He termed it a coincidence that one of his attempts to contact a bouncer occurred shortly after Mr. Iannetti's call. He recalled that it was his impression, after Mr. Iannetti's call, that speaking with the bouncers might produce evidence helpful to Mr. Jessome. He stated that Mr. Iannetti did not tell him anything that Mr. Jessome had said, but merely suggested that he interview possible witnesses. He indicated he had had similar suggestions from defence counsel in other matters. On the question of whether he would have procured statements from the bouncers if it were not for Mr. Iannetti's call, he said "I would have been speaking to those people eventually anyway."

[12] From the evidence, the Defendant's submissions, and what may be judicially noted, the basis for the Charter application may be put in point form as follows:

- Mr. Jessome was a person under investigation for a criminal offence
- who had exercised his right to remain silent in the face of police questioning
- consulted a member of the local bar engaged in criminal defence work
- a lawyer who worked under license from the Provincial Barrister's Society

- an entity created and regulated by public statute and for the public good to assist persons in conflict with the law
- who told his counsel certain things then unknown to police
- whose counsel then disclosed to the police certain information given to the lawyer in confidence
- which information was later exploited by the police in laying charges
- and which the Crown now seeks to use to incriminate the Defendant, thus putting him in jeopardy of penal sanctions

[13] Mr. Jessome argued his case forcibly, but politely and without apparent rancour. However, I find that his application falls short of proving an infringement of his Charter rights for the following reasons.

[14] Firstly, it is not abundantly clear that Mr. Iannetti spoke to the police without his client's approval, nor that he disclosed information to the police or suggested further avenues of investigation without the apparent or implied consent of his client. Mr. Jessome appears completely genuine in his belief that Mr. Iannetti should not have undertaken to make such suggestions to Constable MacDonald without first obtaining specific approval to do so. Were this aspect of the matter more critical to the eventual disposition of the application, greater consideration of the scope of implied consent and the nature of the trust between solicitor and client might be called for. (Mr. Jessome has never questioned Mr. Iannetti's *bona fides*.) However, in light of the reasons which follow, I think it is unnecessary to examine this aspect with further analysis or additional evidence.

[15] Second, I am not satisfied that the evidence of the particular witnesses would not have been obtained but for the telephone call placed by Mr. Iannetti to Constable MacDonald. Constable MacDonald himself is very clear about this. Any inference which I might draw from the timing of his return to the scene (three days after Mr. Iannetti's call) and the statements subsequently obtained cannot be sustained in view of his unequivocal testimony to the contrary. While it is quite possible that Mr. Iannetti's call caused him to revisit the matter sooner than he would have otherwise, I am not satisfied, even on a balance of probabilities, that he would have let the matter hang in abeyance indefinitely. Bouncers in a local drinking establishment from which the Complainant and Defendant had exited would be logical and obvious witnesses to interview in the ordinary course of a police investigation. It is not unusual for statements from material witnesses to be

taken weeks or even months after the events in question. There is no reason not to believe Constable MacDonald when he says that these persons were simply unavailable at an earlier time when he attempted to locate them.

[16] Third, and perhaps most fundamentally, I am not satisfied that the Charter applies to the actions undertaken by Mr. Iannetti in this case. Section 32 provides that the Charter applies to the Parliament and Government of Canada, and to the Legislature and government of the provinces. The Supreme Court of Canada has dealt with the application of Section 32 in a number of instances, most recently in R. v. Buhay, [2003] S.C.J. No. 30. That case concerned private security guards who did a search of a locker at a bus station. The Court found that the search could only come under Section 8 Charter scrutiny if the guards could be categorized as a "part of government" or as performing a specific government function, or if they could be considered state agents. The Court stated:

> Apart from a loose framework of statutory regulation, they are not subject to government control. Their work may overlap with the government's interest in preventing and investigating crime, but it cannot be said that the security guards were acting as delegates of the government carrying out its policies or programs. Even if one concedes that the protection of the public is a primary purpose which is the responsibility of the state, this is not sufficient to qualify the functions of the security guards as governmental in nature. To this effect, this Court, in Eldridge [1997] 3 S.C.R. 624 held, at paragraph 43 "the mere fact that an entity performs what may loosely be termed a "public function" or the fact that a particular activity may be described as "public" in nature will not be sufficient to bring it within the purview of "government" for the purposes of Section 32 of the Charter...In order for the Charter to apply to a private entity, it must be found to be implementing a specific governmental policy or program"

[17] As to whether a particular actor is a "agent of the state", the Supreme Court said in R. v. Broyles [1991] 3 S.C.R. 595 that a case-by-case analysis should be undertaken. Broyles was a right to silence case under Section 7 in which a friend of the accused was enlisted by the police to visit the accused and engage him in conversation. In the present case, Mr. Iannetti was not engaged by the police. Rather, he was engaged by the Defendant. As Crown counsel said in its submissions "Mr. Iannetti was a private actor chosen by the Defendant".

[18] The privilege which exists between solicitor and client is a very important one, protected by the law in various ways. However, this does not convert the

actions of a solicitor (even those characterized by the Defendant as negligent) into actions of the state. Whatever the potential damage done to Mr. Jessome's case - whatever the actual or supposed undermining of his desire to remain silent- this was not a breach of his Section 7 Charter right because the protections afforded by the Charter do not apply in circumstances such as these.

[19] In Buhay, supra, the Supreme Court pointed out that even in the absence of a Charter breach, judges have a discretion at common law to exclude evidence obtained in circumstances such that it would result in unfairness if the evidence was admitted at trial, or if the prejudicial effect of admitting the evidence outweighs its probative value (see para. 40). There, the Court did not go on to consider this aspect since the Appellant had not advanced his case in this way. In the present case, Mr. Jessome, likewise, has rested his application on the Charter. However, given that he is self represented, I will go somewhat further than did the Supreme Court in Buhay and say that this does not appear to be a situation where the Court's common law discretion should be exercised. The evidence as it concerns firstly the unauthorized disclosure of information to the police, and secondly as it concerns the likelihood of discovery of these witnesses and their evidence even in the absence of Mr. Iannetti's intervention, lacks the probative force necessary to support the use of any such common law discretion.

[20] For the foregoing reasons, Mr. Jessome's application for a Charter breach and a stay of proceedings or exclusion of evidence is denied. Such evidence is admissible at the instance of the Crown at the trial.

DATED at Sydney, N.S. this 8th day of August, 2003.