SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Gooch*, 2022 NSSC 171

Date: 20220620
Docket: CRH No 507413
Registry: Halifax

Between:

Her Majesty the Queen

v.

Jeffrey Scott Gooch

***ROWBOTHAM* DECISION**

Judge:	The Honourable Justice Scott C. Norton
Heard:	June 13, 2022, in Halifax, Nova Scotia
Decision:	June 20, 2022
Counsel:	Jeffrey Gooch, self-represented Myles Thompson, for Attorney General of Nova Scotia Alex Keaveny for the Crown, attending but not participating

By the Court:

Introduction

[1] Jeffrey Scott Gooch is charged with a single offence of criminal negligence causing death contrary to section 220(b) of the *Criminal Code*. This charge arises from a workplace death that occurred on March 13, 2018, at a construction site where Mr. Gooch was allegedly the supervisor and foreman responsible for workplace safety.

[2] Mr. Gooch has applied for an order seeking a conditional stay of the charge pending agreement by the Attorney General of Nova Scotia ("AGNS") to provide legal defence funding (in accordance with the Legal Aid tariffs). This sort of application is generally referred to as a *Rowbotham* Application, named for the decision of the Ontario Court of Appeal where it was first granted. The AGNS opposes the application and asks that it be dismissed.

[3] At the conclusion of the hearing of the application on June 13, 2022, I advised that the application was granted, and a conditional stay was ordered with written reasons to follow. These are those reasons.

Background

[4] Following a Preliminary Inquiry, on April 30, 2021, the charge against Mr. Gooch was dismissed. Mr. Gooch was represented by Stanley MacDonald, Q.C. at the Preliminary Inquiry. The Crown then preferred an Indictment, dated June 18, 2021. Trial dates for a trial by judge alone were scheduled for May 2022 and pre-trial applications were scheduled for February 1 and 2, 2022 to determine the admissibility of a statement provided by Mr. Gooch to Labour and Advanced Education officers; a written report made by Mr. Gooch to his employer; and CCTV footage of work on dates other than the offence date. On January 10, 2022, Mr. MacDonald withdrew as counsel for Mr. Gooch who advised the court that he was seeking to obtain counsel from Legal Aid. Due to various delays in obtaining a decision on his application for legal aid, the pre-trial application dates and trial dates had to be adjourned. On February 8, 2022, Mr. Gooch advised that he had been told that his application for legal aid had been denied and the process for a *Rowbotham* application began.

[5] Mr. Gooch filed his application on March 24, 2022. Attached to the application was a letter from Legal Aid Nova Scotia ("LANS"), dated February 24, 2022, confirming the denial on the basis that he did not meet their financial eligibility requirements. He appealed. His appeal was denied by letter from LANS, dated May 19, 2022, on the bases that he did not meet the financial eligibility requirements, as his household income exceeded the criteria; and, that *Occupational Health and Safety Act* charges are not included in the menu of services for which legal representation is provided. It appears that Mr. Gooch may not have clearly identified that the charge he is facing, although arising from a workplace incident, is under the *Criminal Code*.

[6] The Crown has confirmed that in the event of a conviction, the Crown will be seeking incarceration for Mr. Gooch.

[7] Mr. Gooch filed with the court a package of documents including information regarding his ability to represent himself at trial, his income, expenses, property, assets, liabilities, and efforts to retain public and private legal counsel.

[8] At the hearing on June 13, 2022, Mr. Gooch testified with respect to his circumstances including his financial situation. The documents he filed were made exhibits. He was cross-examined by counsel for AGNS.

Law

[9] In a *Rowbotham* Application, the central concern is whether an accused can receive a fair trial based on the nature of the case and the financial means of the accused. The application is made for a conditional stay of proceedings, pursuant to section 24(2) of the *Canadian Charter of Rights and Freedoms* ("*Charter*") until funding for counsel at Legal Aid rates is provided to the applicant by the province. The rationale for the stay is that there is an apprehended breach of the rights of the accused under sections 7 and 11(b) of the *Charter*. The applicant must establish 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.

[10] In *R. v. Rowbotham*, [1988] O.J. No. 271 (C.A.), the Ontario Court of Appeal held, at para 183:

> 183 … In our opinion, those who framed the *Charter* did not expressly constitutionalize the right of an indigent accused to be provided with counsel, because they considered that, generally speaking, the provincial legal aid systems

> were adequate to provide counsel for persons charged with serious crimes who lacked the means to employ counsel. However, in cases not falling within provincial legal aid plans, ss. 7 and 11(d) of the *Charter*, which guarantee an accused a fair trial in accordance with the principles of fundamental justice, require funded counsel to be provided if the accused wishes counsel but cannot pay a lawyer, and representation of the accused by counsel is essential to a fair trial.

[11] And at para 194:

> 194 In our view, a trial judge confronted with an exceptional case where legal aid has been refused who is of the opinion that representation of the accused by counsel is essential to a fair trial may, upon being satisfied that the accused lacks the means to employ counsel, stay the proceedings against the accused until the necessary funding of counsel is provided.

[12] In *R. v. Rushlow*, 2009 ONCA 461, Justice Rosenberg, writing for the Ontario Court of Appeal said:

> 19 In considering whether to appoint counsel, the trial judge is required to consider the seriousness of the charges, the length and complexity of the proceedings and the accused's ability to participate effectively and defend the case. Because of the pervasiveness of legal aid, it will be the rare and exceptional case that the court will find it necessary to appoint counsel. This does not mean that counsel is only required in exceptional cases. Rather, it is the fact that legal aid is available for accused who cannot afford a lawyer that Rowbotham orders are exceptional.
>
> 20 Courts have considered a number of factors in determining whether appointing counsel is essential in view of the complexity and seriousness of the case. Generally, the courts look at the personal abilities of the accused, such as their education and employment background, their ability to read and their facility with the language of the proceedings. The courts will also consider the complexity of the evidence; the procedural, evidentiary and substantive law that applies to the case; the likelihood of especially complex procedures such as a voir dire; the seriousness of the charges; the expected length of the trial; and the likelihood of imprisonment: see *R. v. Wood,* [2001] N.S.J. No. 75, 191 N.S.R. (2d) 201 (C.A.); *R. v. Wilson,* [1997] N.S.J. No. 473, 163 N.S.R. (2d) 206 (C.A.); *R. v. Hayes,* [2002] N.B.J. No. 356, 253 N.B.R. (2d) 299 (C.A.); *R. v. Drury,* [2000] M.J. No. 457, 150 Man. R. (2d) 64 (C.A.); *R. v. Rain,* [1998] A.J. No. 1059, 223 A.R. 359 (C.A.); and *R. v. Chemama,* [2008] O.J. No. 368, 2008 ONCJ 31.
>
> 21 In considering whether counsel is essential, the court will also take into account the prosecution's duty to make full disclosure and the trial judge's obligation to assist the unrepresented accused: see *R. v. Wilson* and *R. v. Keating,* [1997] N.S.J. No. 250, 159 N.S.R. (2d) 357 (C.A.).

> [Emphasis added]

[13] Justice Rosenberg also stressed, at para 24:

> 24 In my view, the trial judge applied too stringent a test. This court has never said that a *Rowbotham* order is limited to an extreme case where Legal Aid's decision is completely perverse and there is a substantial possibility of lengthy imprisonment. The passage from *Rowbotham* quoted by the trial judge is from the reasons of the trial judge in that case. This court did not endorse that test. Nor need the case be one posing "unique challenges". The authorities hold that the case must be of some complexity, but a requirement of unique challenges puts the threshold too high. It is enough that there is a probability of imprisonment and that the case is sufficiently complex that counsel is essential to ensure that the accused receives a fair trial.
>
> [Emphasis added]

[14] It is recognized that that supply of Legal Aid resources is not inexhaustible. LANS determines the provision of legal aid by considering financial eligibility, coverage, and merit. The government is politically accountable for its funding of public interest litigation and its provision of legal aid. Courts should not second-guess the spending priorities of government. As Judge Ross observed in *R. v. Canning*, 2010 NSPC 59, at para 3:

> [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.

The Essential Elements

[15] The court's determination of whether to conditionally stay proceedings pending the appointment of publicly funded counsel depends on the applicant satisfying all three of the following conditions, on the balance of probabilities:

1. The applicant is ineligible for or has been refused legal aid and has exhausted all appeals for re-consideration of his eligibility;

2. The applicant is indigent and unable to privately retain counsel to represent him; and

3. The applicant's right to a fair trial will be materially compromised absent funding for counsel.

The applicant must adduce evidence of each of these factors including a basis to establish the likelihood of a *Charter* violation.

Analysis

1. *The applicant is ineligible for or has been refused Legal Aid and has exhausted all appeals for reconsideration of his eligibility*.

[16] The AGNS concedes that there is sufficient evidence before the court to establish that Mr. Gooch has been refused legal aid and has exhausted all appeals available to him. Mr. Gooch has satisfied this condition of the *Rowbotham* test.

2. *The applicant is indigent and unable to privately retain counsel to represent him*.

[17] Mr. Gooch provided the court with a cost estimate for his trial provided to him by his then counsel, Stanley MacDonald, Q.C., in July 2021. At that time, it was anticipated that the trial would require five days and three days for the pre-trial applications. Mr. MacDonald estimated fees and taxes of $125,000 without experts and with experts perhaps $150,000. In March 2022, Mr. Gooch discussed proceeding to trial with more junior counsel from Mr. MacDonald's office at a projected cost of $35,000 in fees, disbursements, and taxes. There is also some evidence that his employer was prepared to contribute $5,000 towards his legal fees, and also pay for an expert report. In cross-examination, Mr. Gooch said that he believed the offer to pay for the expert was still available but the contribution to his legal fees was not.

[18] Mr. Gooch provided income tax information for him and his common law spouse for the 2021 tax year. He also provided information that he recently applied for and is awaiting payment of Employment Insurance Benefits.

[19] Based on his 2021 income and current expenses, and assuming tax and other mandatory deductions, the AGNS calculated that his net income exceeded expenses by $1,200 per month. The AGNS argues that, with prudent savings, he could have saved $14,400 in 2021 for his legal defence. Mr. Gooch testified that the gross income on his tax return for 2021 was about $8,000 higher than average. He has only been able to work two months in total since January 2022, due to a combination

of insufficient work and his inability to attend work full-time due to anxiety and lack of focus caused by the incident leading to the charges. He testified that he now goes to work "scared". He has sought counselling and has tried medication to assist with his symptoms but neither has proven able to overcome his symptoms. The analysis done by the AGNS also does not account for the fact that he had to pay for the preliminary hearing, which he testified cost $75,000 and that he has paid in full. He also has a new daughter and with his spouse's return to work, they have childcare expenses and the cost of travel to and from work that was not part of the budget in 2021.

[20] The AGNS asserts that given the limited financial disclosure provided and the limited information on his efforts to obtain private counsel, together with the lack of information on efforts to save, reduce expenses, and take on additional employment, the court should not find that Mr. Gooch has met the test.

[21] Mr. Gooch applied for a loan and was denied. He has asked his friends, family, and his boss, but no one can provide him with this amount of money. He spent his life savings on the preliminary hearing that resulted in his discharge.

[22] While Mr. Gooch's financial documents were not presented in a sophisticated manner and were not as detailed as someone with more financial acumen might provide, I am satisfied that the evidence provided to the court was provided in a sincere and good faith effort to establish the facts necessary for the court to determine the application. I find the evidence establishes on the balance of probabilities that Mr. Gooch does not have the financial means to retain private counsel.

[23] The authorities say that an applicant is not required to become destitute; but there is a requirement that he or she demonstrate a willingness to make sacrifices. In this case I am satisfied by the evidence that it is probable that Mr. Gooch has exhausted all reasonable means to retain private counsel and that he is sincere that he has no financial ability to do so.

[24] Mr. Gooch has satisfied the second condition of the *Rowbotham* test.

3. *The applicant's right to a fair trial will be materially compromised absent funding for counsel.*

[25] The authorities establish that there are several factors that should be considered in determining whether the applicant's evidence establishes a "very real likelihood" or "high degree of probability" that his rights to a fair trial will be infringed in the absence of representation by counsel.

(a) Seriousness and Complexity of the Offence

[26] The applicant must be facing a charge that is serious and sufficiently complex. It is necessary to examine the nature of the charge, the complexity of the trial which requires consideration of the anticipated evidence and the nature of the trial itself, including the likely presence of complicated procedures such as a *voir dire*, a Charter application, and other legal and evidentiary matters. The length of the trial is also a consideration, as the longer the proceeding, the more necessary counsel may be. The age, education, and capacity of the applicant to understand the court proceedings is also a relevant consideration. The role and responsibilities of the Crown regarding disclosure and the Court's responsibility to assist an unrepresented accused and whether that obligation of assistance would be adequate are also to be considered: *R. v. Innocente*, 2001 NSSC 190.

[27] In the present case the applicant is charged with criminal negligence causing death. The *Criminal Code* provides that upon conviction the court can impose a penalty of life imprisonment. The Crown has advised that if a conviction is entered, they would be seeking incarceration of Mr. Gooch. The AGNS concedes, and in my view, there is no question, that the charge is serious.

[28] The AGNS submits that the trial will not be "overly" complex. The AGNS points to the fact that Mr. Gooch had counsel during the preliminary hearing and, without evidence as to what took place at that preliminary hearing, prophesies that as a result Mr. Gooch would have an understanding of the evidentiary issues and substantive law related to this case. That is like saying that if you watch an appendix surgery you would have an understanding of how to perform the surgery yourself.

[29] With respect, the charge of criminal negligence is one of the more complex charges in criminal law. The elements to this charge were recently canvassed by Justice Chipman in *R. v. Gardner*, 2022 NSSC 154, at paras. 222:

Criminal Negligence Causing Death – the *Criminal Code*

[222] Sections 219 (1), 219 (2) and 220 read as follows:

> 219 (1) Every one is criminally negligent who
>
> (a) In doing anything, or
>
> (b) In omitting to do anything that it is his duty to do,
>
> Shows wanton or reckless disregard for the lives or safety of other persons.
>
> 219(2) For the purposes of this section, "duty" means a duty imposed by law
>
> 220 Every person who by criminal negligence causes death to another person is guilty of an indictable office …

Wanton or Reckless Disregard

[223] In *Gardner* [*R. v. Gardner*, 2021 NSCA 52], Justice Beveridge explained what is meant by "wanton or reckless disregard" with reference to authorities from the Ontario Court of Appeal and Supreme Court of Canada:

> [65] Various terms have been used to describe what is meant by "wanton or reckless disregard". Cory J.A., in *R. v. Waite, supra*, whose decision was adopted as a correct statement of the law by three members of the Supreme Court, described the term:
>
> > [62] ... The word "wanton" means "heedlessly". "Wanton" coupled as it is with the word "reckless", must mean heedless of the consequences or without regard for the consequences. If this is correct, then it is immaterial whether an accused subjectively considered the risks involved in his conduct as the section itself may render culpable an act done which shows a wanton or reckless disregard of consequences. ...
>
> [66] The Ontario Court of Appeal in *R. v. L.(J.)* (2006), 204 C.C.C. (3d) 324 referred, with approval, to the comments of Hill J. in *R. v. Menezes*, [2002] O.J. No. 551 (QL), where he wrote:
>
> > [72] Criminal negligence amounts to a wanton and reckless disregard for the lives and safety of others: Criminal Code, s. 219(1). This is a higher degree of moral blameworthiness than dangerous driving: *Anderson v. The Queen* (1990), 53 C.C.C. (3d) 481 (S.C.C.) at 486 per Sopinka J.; *Regina v. Fortier* (1998), 127 C.C.C. (3d) 217 (Que. C.A.) at 223 per LeBel J.A. (as he then was). This is a marked and substantial departure in all of the circumstances from the standard of care of a reasonable person: *Waite v. The Queen* (1989), 48 C.C.C. (3d) 1 (S.C.C.) at 5 per McIntyre J.; *Regina v. Barron* (1985), 48 C.R. (3d) 334 (Ont. C.A.) at 340 per Goodman J.A. **The**

> **term wanton means "heedlessly" (*Regina v. Waite* (1996), 28 C.C.C. (3d) 326 (Ont. C.A.) at 341 per Cory J.A. (as he then was)) or "ungoverned" and "undisciplined" (as approved in *Regina v. Sharp* (1984), 12 C.C.C. (3d) 428 (Ont. C.A.) at 430 per Morden J.A.)) or an "unrestrained disregard for consequences" (*Regina v. Pinske* (1988), 6 M.V.R. (2d) 19 (B.C.C.A.) at 33 per Craig J.A. (affirmed on a different basis [1989] 2 S.C.R. 979 at 979 per Lamer J. (as he then was)). The word "reckless" means "heedless of consequences, headlong, irresponsible": *Regina v. Sharp*, supra at 30**.
>
> [Emphasis added by Justice Beveridge]

Standard of Care

[224] Beveridge, JA comprehensively reviewed standard of care at paras. 67 – 76 of *Gardner*. As he stated at the outset of his review:

> [67] For any trier of fact to wrestle with the issue of whether the acts or omissions of an accused amounted to a marked and substantial departure from the requisite standard of care requires awareness of what that standard is and how it is established.

[225] As with the initial trial, the Crown did not tender expert evidence about the standard of care of a reasonable and prudent booking officer. In the result, I am left to draw inferences from the evidence about what the standard of care was and hence whether the two accused's acts or omissions amounted to a marked and substantial departure from it.

Marked and Substantial Departure

[226] In *Gardner*, Justice Beveridge distinguished criminal negligence from civil negligence by requiring moral blameworthy behaviour, reasoning:

> [77] Criminal negligence is nonetheless negligence--a breach of the appropriate standard of care. Constitutional norms dictate criminal negligence be differentiated from civil negligence by requiring morally blameworthy behaviour--that is, behaviour that was a marked and substantial departure from the standard of care a reasonable person would have observed in all of the circumstances.
>
> [78] The second thing that distinguishes penal from civil negligence is for the latter, liability is determined on a purely objective basis. The former operates under a modified objective test.
>
> [79] The modified objective test requires the court to be alive to the possibility that the accused's honestly held and reasonable perception of the circumstances are such that a reasonable person might not have appreciated the risk or could and would have done something to avoid the danger (see: *Beatty*, *supra*, at paras. 37-38; *R. v. Tutton*, *supra*, at para. 45).

> [80] That is, the state of mind of the accused is not, as in civil cases, irrelevant. It can lead to acquittal if it creates a doubt that a reasonably prudent person would have appreciated the risks with the act or failure to act (see, for example: *R. v. Beatty*, *supra* at para. 43; *R. v. Doering*, *supra* at para. 93; *R. v. Ibrahim*, 2019 ONCA 631 at paras. 33-34).
>
> **Causation**
>
> [227] Finally, and picking up on Justice Beveridge's guidance at para. 81 of *Gardner*, I must also determine if the acts or omissions of the accused amounted to a significant contributing cause of the victim's death.

[30] In addition to the complexity of the law relating to the charge itself, in this case we know that there is both a *Charter* challenge and a *voir dire* relating to the admissibility of evidence. In addition, the Crown evidence will include expert evidence requiring a determination of the technical legal requirements for its admission: *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23.

[31] In my view, these issues would cause a junior lawyer at the bar significant difficulty. The AGNS' argument that these issues would not be "overly complex" for Mr. Gooch is overstated and rejected. I was taken by Mr. Gooch's evidence that these charges are daunting, and he feels "lost". It was obvious from his testimony and appearance that these charges are having a significant adverse impact on his mental and physical health.

[32] Although the anticipated length of trial is five days, and the pre-trial applications will require an additional two days. If the matter was not so complex, this factor alone would not tip toward the requirement for counsel.

[33] Mr. Gooch's first language is English. He completed high school and obtained college level training in a trade. However, he is not a sophisticated man in academic study or research. He has no legal training. Although he may be able to read, write, and understand how to make submissions to the court, as argued by the AGNS, this does not mean that he can understand the complexity of the legal tests and nuances of issues of admissibility of evidence and the application of the *Charter*. It is somewhat ironic that this argument was made by the AGNS at the same time as criticizing the quality and extent of the evidence presented on the application.

[34] Mr. Gooch has satisfied the third condition of the *Rowbotham* test.

Conclusion

[35] In summary, I conclude that there is a "high degree of probability" that Mr. Gooch's right to a fair trial will be infringed in the absence of representation by counsel. I am mindful that the court has a duty to assist self-represented individuals. In this case, it will be more difficult for the court to provide assistance because the nature of the legal issues raised in the case are complex, including a *voir dire*, *Charter* rights, and expert evidence. I am satisfied on the balance of probabilities that Mr. Gooch has established the required factors exist for his *Rowbotham* application to be granted.

[36] I order a conditional stay of the charge against Mr. Gooch pending the AGNS' agreement to provide legal defence funding in accordance with the legal aid tariffs.

[37] Order accordingly.

Norton, J.