
CANADA / JUDGMENT

R v. Paquette

2017 BCSC 2202

COURT

Supreme Court of British Columbia

DECIDED

1 December 2017

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2017 BCSC 2202 R. v. Paquette

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Paquette,

2017 BCSC 2202

Date: 20171201

Docket: 32402

Registry: Terrace

Regina

v.

Marcus John Paquette

Before: The Honourable Mr. Justice Bowden

Reasons for Judgment on Rowbotham Application

Counsel for the Attorney General:

K. Chewka

Counsel for the Accused:

A. Penner

Agent for W. MacGregor

Place and Date of Hearing:

Terrace, B.C.

August 15, 2017

Place and Date of Judgment:

Terrace, B.C.

December 1, 2017

Introduction

- [1] The applicant, Mr. Paquette, a 56 year old Registered Forest Technologist, is facing two counts of possessing child pornography, one count of possessing child pornography for the purpose of distribution or sale and five counts of storing firearms contrary to the Criminal Code.
- [2] The applicant has been refused funding by the Legal Services Society to pay for a lawyer to assist him when he goes to trial and he now brings an application for a stay of proceedings pending the appointment of government funded counsel pursuant to R. v. Rowbotham, (1988) 41 C.C.C. (3d) 1 (Ont. C.A.).

Background

- [3] The applicant is employed by Pacifica Resource Management Ltd. His salary is \$80,000 per year. He is married with a 2 year-old daughter. Pursuant to court orders he pays child support for two children from two prior relationships. His wife, Lizzet Armas, has a degree in physiotherapy from Peru but her qualifications are not recognized in Canada. Her only income is the Child Care Benefit.
- [4] The applicant owns a vehicle that he says he purchased for \$1,950 and uses to go to and from work in Terrace, B.C. He also owns a 1981 Sangster boat that he says he has been trying to sell for \$6,500. He also owns a residential property with an appraised value of \$310,000. The mortgage on that property is \$207,000. He filed some financial information that indicates he has been unsuccessful in borrowing funds. A rejection letter from the Bank of Montreal indicates that he did not provide that bank with an appraisal of his residence.
- [5] The applicant was arrested on July 5, 2016. An Information was sworn and filed in the Terrace registry on July 6, 2016. A preliminary inquiry was held from June 7 until June 9, 2017 and he was committed to stand trial. A trial date has not yet been set however the Crown estimates that the trial will require five days. Mr. Paquette's counsel in this application estimates that the trial will require ten days.
- [6] The applicant was refused funding by the Legal Services Society on December 2, 2016 because he did not qualify financially. He requested a review of that decision and the refusal was confirmed on March 23, 2017.

- [7] It appears that the applicant expended considerable funds when his counsel applied for a Rowbotham order in the Provincial Court on January 13, 2017. However, on January 19, 2017, the applicant elected to proceed in Supreme Court before a judge and jury and requested a preliminary inquiry. As a result his application was improperly before the Provincial Court. His counsel was informed by a letter from the respondent that his application would have to be brought in the Supreme Court. After a number of letters from the respondent advising him of the necessity of bringing this application in the Supreme Court, the applicant refiled his application in this court on May 12, 2017.
- [8] The counsel who the applicant has engaged in proceedings to this date will charge \$2,500 per day of trial plus disbursements and taxes. Thus the fee of his counsel for a ten day trial will be \$25,000. Under the Legal Services Society tariff, if the trial takes ten days, the amount payable will be \$10,420. That is the relevant amount for the purposes of this application.

Legal Principles

- [9] In Rowbotham, the court held that the constitutional right to a fair trial in accordance with the principles of fundamental justice under s. 7 and 11(d) of the Canadian Charter of Rights and Freedoms requires state funded legal counsel where the accused wishes counsel, the case involves a serious offence with proceedings too complicated for the accused to address and the accused cannot afford to retain counsel. (see also R. v. Crichton, 2015 BCCA 138)
- [10] In British Columbia, a Rowbotham application requires a consideration of two criteria:
1. Is the assistance of counsel essential to a fair trial, and
 2. Does the applicant have the financial means to retain counsel.
- [11] A stay of proceedings is an extraordinary remedy. It ends a criminal proceedings before the merits are considered and is granted only in the "clearest of cases". It is a rare and exceptional case where a Rowbotham order is made. (Crichton)
- [12] The burden is on the applicant to establish the basis for the order. In addition, because the Charter breach is prospective, the burden is a "very real likelihood" or high degree of probability that the accused will be deprived of a fair trial. (Crichton, at para. 40)
- [13] In determining whether legal representation is essential to a fair trial I must determine whether there is a very real likelihood that the applicant's Charter rights will be breached if he does not have counsel. A number of factors bear on that determination such as the personal abilities of the accused, his education and employment background, his ability to read and his facility with the English language. Other factors to consider are whether a voir dire is anticipated, the substantive law that applies, the expected length of the trial and the likelihood of imprisonment. At the same time, I must also consider that the Crown must make full disclosure to the accused and the trial judge has an obligation to assist an unrepresented accused to some degree.

- [14] The evidence of the applicant to support his position that without counsel he would be deprived of a fair trial is simply his opinion in his affidavit of March 2, 2017, that, "[t]he charges against me are serious and complex" together with a letter from his lawyer expressing his views about the complexity of the bail proceedings and the breach charges that the applicant was facing. His lawyer does not provide any affidavit evidence as to the complexity of the trial.
- [15] In his resume, the applicant describes himself as a Registered Forest Technician with 25+ years of experience and a lifelong learner with good communication skills who is able to work and think in high pressure situations.
- [16] In my view, the applicant has not established with a high degree of probability that there is a real and substantial risk that if he is not represented by counsel he will not receive a fair trial.
- [17] In order for the applicant to establish financial eligibility his financial circumstances must be extraordinary and he must :
1. Provide detailed financial evidence of his financial circumstances including supporting material;
 2. Make efforts to save money; borrow money; obtain employment or additional employment if already employed; seek counsel who will work at Legal Service Society rates; utilize assets owned by him to raise money;
 3. Be prudent with his expenses and show foresight and planning of financial affairs in order to enable the financing of counsel;
- [18] The financial circumstances of the applicant also require a consideration of his spouse's income and assets.
- [19] The inquiry into the applicant's financial circumstances must go back to the time the charges were laid or the time he was arrested. (R. v. Jantzen, 2002 BCSC 196 at para. 11 as referred to in Crichton)
- [20] The applicant bears the burden of providing detailed, independent evidence to support any assertion about his financial circumstances. (R. v. Minnie and Shaw (Victoria 125113-6 S.C. - Edwards J. - 2006).
- [21] While the applicant provided financial information his explanation for e-transfers and cash withdrawals of \$2,300 between July 2016 and December 2016 did not provide detailed support for his alleged transfers to his spouse and child. No explanation is given for numerous transfers, or withdrawals where the source and recipient are not clearly identified.

- [22] Based on the evidence provided, the applicant's ability to save or pay for the cost of counsel as of the date that charges were laid cannot be accurately assessed. It does appear however that the applicant has had access to funds to pay for or contribute to the cost of counsel at least at legal aid rates.
- [23] The financial evidence provided by the applicant which is found in the affidavit of Ms. Heather Lewis appears to be incomplete. Between the time of his arrest in July 2016 and December 31, 2016 it appears that the applicant made a number of discretionary expenditures including at least \$2,000 in restaurant expenses. While he explained that he was reimbursed for some of those expenses by his employer, some of his restaurant expenses were not included in the expense reports that he provided. It appears that he spent about \$450 in restaurants in August 2016 that was not reimbursed.
- [24] Unexplained withdrawals from his bank account from September 2016 until December 31, 2016 totalled \$6,846.68. That amount represents about three quarters of the estimated cost of a seven day trial under the Legal Services Society tariff.
- [25] The applicant has also provided invoices showing that he pays \$159.70 per month for telephone, internet and television and \$200 a month to Telus Mobility. For a twelve month period that amounts to a total of \$4,316.40 of discretionary expenses that would pay for about one-half of the tariff for a seven day trial.
- [26] The applicant has incurred debt as a result of retaining legal counsel to represent him in child protection proceedings. The legal fees in that regard have been \$8,780.80.
- [27] As of March 22, 2017 his legal bills in respect of pre-trial criminal proceedings totalled about \$22,000. By August 9, 2017 his legal bills for pre-trial matters totalled \$31,129.90.
- [28] In my view the applicant has demonstrated a lack of financial prudence in retaining a lawyer who charges in excess of the legal aid tariff and has sought services beyond basic legal representation.
- [29] The documents provided indicate that the applicant has failed to prioritize his expenses so as to be in a position to pay for counsel at legal aid rates.
- [30] The applicant has also failed to establish that he has made all reasonable efforts to use his assets to raise funds including selling the assets such as his Sangster boat and Mitsubishi vehicle and raising funds using the security of his residence. While he unsuccessfully tried to borrow \$42,000 from a bank it is apparent that he did not provide the bank with an appraisal of the value of his residence. Furthermore, he did not attempt to borrow a lesser amount which may have been enough to retain legal counsel for his trial. He has said that he does not need his vehicle because his employer provides one but his wife requires the vehicle because she is learning to drive. That is not an acceptable justification for not selling the vehicle or using it as security for a loan. No evidence of the appraised value of the vehicle was presented.

- [31] There are some similarities between the facts in this case and the facts in *R. v. Mostowy*, 2014 BCSC 2479.
- [32] Mr. Mostowy was a 44 year old self employed general contractor who employed two to six employees. He faced five counts of sexual assault on five different complainants who were all former employees. He and his common law spouse owned a detached home in joint tenancy. Its value was appraised at \$335,000 with a mortgage of \$296,000 leaving him with $\frac{1}{2}$ of the equity of \$19,961. While his annual income was not known, deposits to Mr. Mostowy's joint bank account with his spouse during about 8 months after he was charged amounted to about \$30,000. It seems that his annual income was less than that of the applicant in the case at bar.
- [33] In *Mostowy*, Ker J. said that Mr. Mostowy's financial evidence did not support the conclusion that he was indigent. Like the applicant in this case, Mr. Mostowy did not prove that he had taken reasonable efforts to raise funds to pay legal counsel such as borrowing a lesser amount against the equity of \$103,000, (Mr. Mostowy's equity was \$19,000), by reducing discretionary expenses or selling assets.
- [34] In my view, the financial disclosure does not satisfy me that the applicant is indigent. It appears that he has had and continues to have access to some funds to pay for or contribute to the cost of counsel at legal aid rates. The financial documents submitted show that the applicant has potential for borrowing against his substantial equity and has withdrawn or transferred funds from his account that he could have used to pay legal counsel.
- [35] In *R. v. Malik*, 2003 BCSC 1439, Stromberg-Stein J., as she then was, commented on indigency at para. 33:
- [33] As the principles above suggest, indigency is an inability to pay or contribute to legal fees despite best efforts to prioritize payment of those legal fees by saving, borrowing or otherwise raising funds for such payment, and consequently being incapable of retaining counsel in ample time to ensure a fair trial. However, even where an applicant is found to be indigent, if he is able to contribute to his legal fees, either in whole or in part, presently or in the future, then he has a legal obligation to do so. The provision of legal services at no cost to the applicant is not a Charter right.
- [36] As in *Mostowy*, the applicant has failed to provide this court with evidence sufficient to prove that: (1) he has lacked the means to retain or contribute to the cost of counsel since he determined that he required counsel to defend him; (2) he has behaved proactively and prioritized his legal expenses throughout the time he determined that he needed legal counsel; (3) he has fully explored all avenues of raising funds, making efforts to save, reduce expenses, and borrow against or dispose of assets; and (4) he has made sufficient efforts to locate counsel willing to work at affordable rates. (*Mostowy*, at para. 57)

Conclusion

[37] For the reasons stated the applicant has failed to establish that the assistance of legal counsel is essential to a fair trial in respect of the charges against him and that he lacks the financial means to retain counsel.

[38] The application is dismissed.

"Bowden, J."

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