

Superior Court of Justice

B E T W E E N:

HER MAJESTY THE QUEEN

(Respondent)

- AND -

ANTONIO PROVOLONE

(Applicant)

REASONS FOR JUDGMENT

ASIAGO, J.:

The History of Proceedings

1. On July 7, 2007, Matt's Gas Bar was robbed. A lone attendant was working the midnight shift when a man wearing what was described as a dark blue or black ski mask approached him, pointed what appeared to be a gun and demanded all the money in the register. The attendant was warned not to try to trigger any alarms or resist; otherwise he would be shot. The gas attendant agreed, fearing for his safety. The gunman fled. The incident was recorded on video tape by means of a security camera. This and other robbery prevention devices installed at the gas bar allowed the police to begin an investigation which came to centre upon the accused, Mr. Provolone.

2. The accused was arrested at his home on De Grassi Street two months later. A search warrant was executed at the time and a bored out replica .357 magnum revolver was recovered in a crawl space at the premises. A forest green ski mask was found amongst winter clothing in a closet. No money was recovered.
3. The accused was granted bail under very strict conditions. There is no indication he did not comply with them. A two day preliminary inquiry was held before Justice Mozzarella of the Ontario Court of Justice in May of this year. This resulted in the accused being ordered to stand trial on charges including robbery using a firearm, threatening death, possession of a weapon for a purpose dangerous to the public peace and disguise with intent. The most serious of these, the robbery charge, carries a minimum four year prison sentence. The accused was represented by counsel at the preliminary inquiry. Sadly, counsel suffered a heart attack after the preliminary and could not continue with representing the accused.
4. As a result, in July of this year, the Ontario Legal Aid Corporation (OLAC) issued a new certificate to the accused to allow him to retain new counsel. However, between the time of the illness of previous counsel and the issuance of a new certificate, the Criminal Counsel Association of Ontario (CCAO) called upon its members to enter into a boycott of the legal aid plan to protest what they described as unduly low fees for legal work. Thus, when the trial commenced before me, the accused was unrepresented. I determined that the matter should proceed if possible. A judge has a duty to help an unrepresented accused present his or her defence, while not becoming an advocate for that person. The

accused insisted he wanted a lawyer but could not find one.

5. The trial commenced and it became very clear, very quickly, that despite my best efforts I would not be able to carry out the role of judge and assist the accused. The accused was unable to articulate any *Charter* issues, recognize defences, question witnesses or properly present his case. I felt it unfair to the accused to continue in this situation with the jury that had been selected. The accused was simply not capable of conducting his own defence, even with the limited help I could give. I suggested that the jury be excused and the accused should bring an application for a court-appointed lawyer and/or a stay.
6. I therefore appointed *amicus curiae* to assist me in determining whether the trial could proceed. I granted intervenor status to the OLAC and to the CCAO. The Crown, of course, responded. I heard arguments from all parties; what follows is my decision on the accused's application.
7. The accused – through *amicus* – argued that he had a right to state funded counsel and he sought a stay of all charges if counsel was not appointed at rates set by the court. In submissions, *amicus* invoked s. 7, s. 11(d) and s. 24(1) of the *Charter*:

Section 7:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Section 11(d):

Any person charged with an offence has the right... to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

Section 24(1):

Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

8. The Crown responded the *Charter* only applies to actions of the state, and thus, the *Charter* was not engaged on these facts. In the alternative, if the *Charter* applied, the Crown contended that there was no breach of s. 7 or s. 11(d) because the state already provides funding for a legal aid plan. Lastly, if a breach of s. 7 or s. 11(d) occurred, the Crown submitted that this infringement is a reasonable and justifiable limit prescribed by law. The Crown invoked s. 32(1) and s. 1 of the *Charter*:

Section 32(1):

This Charter applies:

- a) *to the Parliament and government of Canada in respect of all matters with the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and*
- b) *to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.*

Section 1:

The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Issues

9. The issues and arguments raised by both sides are framed broadly into four chief queries:
 - I. Does this case engage sufficient state action? (i.e. Does the *Charter* apply?)
 - II. Does the accused have a right to state funded counsel and does the lack of state funded counsel in this case impair his fair trial rights?
 - III. If his *Charter* rights have been breached, are the actions of the state a reasonable limit on the rights of the accused?
 - IV. What remedies are available to this court, given these unique circumstances?

Application of the *Charter*

10. The Crown argued that the *Charter* does not apply on these facts, submitting that it is the actions of private individuals – specifically criminal lawyers who refuse to work on legal aid certificates – which have deprived the accused of counsel before this court. Essentially, this case lacks government action. *Amicus* disagreed, maintaining that it is the government’s chronic inadequate funding of legal aid that has, in effect, deprived the accused of his fair trial rights. If the government had only instituted rates that allowed criminal lawyers to adequately represent him, the accused would have had access to the much-needed legal representation at trial.
11. The words of s. 32(1) give a strong message that the *Charter* is confined to government

action. That said, in some situations, the government can be said to sufficiently partake in a decision to make it an act of government. Here, the government's choice to restrict legal aid funding constitutes sufficient government action to fall under *Charter* scrutiny. Furthermore, I find that the trying of the accused for a breach of the state's law by a state agent (the Crown) before a state constituted court – makes this all a state function. Therefore, I find that the *Charter* does apply.

Right to State-Funded Counsel and Fair Trial Rights

12. A person has the right to counsel in any proceeding, or upon arrest or detention. However this right does not necessarily mean that the state must pay for a lawyer in any and all situations. For example, a wealthy person cannot simply demand that the state pay for his or her lawyer. That is not the case here; the accused cannot afford to hire a lawyer. The fact that he was granted a legal aid certificate is demonstrative of this. According to the Crown, the accused thus has the capacity to obtain counsel and the immediate ability to do so. The state has funded a legal aid program for people in these situations. I must, the Crown submitted, defer to the state's allocation of scarce public resources and not become involved in a political battle between lawyers seeking more funding and the legislature. *Amicus* on the other hand has argued, passionately, that the reality of the situation is that the accused cannot proceed to trial in these circumstances. To say that he must find a lawyer willing to take a legal aid certificate or face trial alone (already shown to be an unacceptable situation) is to say that unfair trials are permitted in this country.

13. I find that there is some merit in each of these arguments. As a broad principle, a person does not have the right to court-appointed state funded counsel where the state has provided for a funding mechanism which allows counsel to be obtained. That is, where a legal aid plan has been created, and the accused is eligible for legal aid, the state does not have to provide more funding in order to provide counsel for an accused. To hold otherwise would require a court to become a manager of a public budget, something that the courts are not equipped to do.

14. I find that, as a general principle, an accused does not have the right to state funded counsel in these circumstances. Therefore, there is no breach of s. 7. The Crown and the OLAC have argued that this puts an end to the issues, *amicus* and counsel for the CCAO do not agree. Nor do I. The fact of the situation is that I still have an individual who is facing a potential penitentiary sentence before me who does not have a lawyer and cannot, practically, find one. That may not be the Crown's problem, but it is certainly mine. What can this court do to ensure a fair trial?

15. Despite the general principle enunciated, I find that the accused has a right to state funded counsel in this particular case as the impact upon him would be too great if counsel were not provided. Another way to put this is that as a part of the administration of justice or control of the court's own process, any judge has both the power and duty to ensure a fair trial. I find, on this basis, that the accused's s. 11(d) *Charter* rights were breached.

Section 1

16. Having found a *Charter* violation, it is now necessary to examine whether this infringement is a reasonable and justifiable limit on the rights of the accused. The provision of a legal aid plan is prescribed by law. The Crown argued that the state is permitted to make resource allocation decisions as it sees fit, and the need to limit funding is a pressing and substantial objective, as the state does not have limitless financial resources. I agree.

17. Where the Crown fails in its argument lies in a proportionality analysis. While I agree that the state must be permitted to create a legal aid scheme that functions within budgetary constraints, if the amount allocated to legal aid is so modest that the indigent are unable to secure counsel, the legal aid scheme is rendered insignificant and of little value. *Amicus* submitted extensive evidence of what it has characterized as “the government’s chronic refusal to address the legal aid shortfall”. If those whom legal aid seeks to protect cannot obtain counsel, the state must do more.

Remedies

18. Having found that the accused’s s. 11(d) *Charter* rights have been breached and the breach cannot be saved by s. 1, I must still determine the appropriate remedy. Three possible possibilities were proposed. One is that the Crown, through the Ministry of the Attorney General, must pay for the accused’s Court-appointed lawyer, at a rate I

determine. Another is that the trial be adjourned to await a lawyer who will be willing to take this case on a legal aid certificate, perhaps waiting until the boycott concludes. A third possibility, requested by the accused, is that all charges be stayed.

19. I pause to note that the Attorney General has taken the position throughout these proceedings that even if counsel is appointed, it simply will not pay more than legal aid rates. This engages a serious issue of the powers of a court to enforce its orders and an issue of contempt of court for disobeying a court order.
20. *Amicus* strongly opposed the second option, arguing that an adjournment is indefinite and could be quite prolonged – given the current boycott and apparent lack of resolution on the horizon. The accused is highly unlikely to find a lawyer willing to take on the legal aid certificate at this time, and he should not have to await the outcome of the boycott. He has a right to a trial with minimal delay. Although no delay as yet has occurred, one can envision that his s. 11(b) right to be tried within a reasonable time may be infringed if he were forced to wait for a resolution to the boycott.
21. The last alternative – the stay of all charges – is vigorously opposed by the Crown, stating that this will allow an accused person to go free based not on the conduct of the state, but due to the conduct of a group of individuals who are engaged in a political and/or economic protest of the way the state has allocated resources to the criminally accused. The Crown argues that to grant a stay is not permitted by s. 24(1) of the *Charter* since only if a right is infringed by a state actor can a *Charter* remedy be forthcoming.

22. The Crown also argues that I cannot grant a remedy which fails to take into, and give high import to, the public interest in the prosecution of offences, particularly firearms offences. In other words, the public interest in the prosecution of a gun charge is of such weight that the court is circumscribed from granting anything but a minor remedy. I do not agree. The remedies available under s. 24(1) are used to vindicate individual rights, not the rights of the community.
23. Having found that in this particular case the right of the Applicant to a fair trial cannot be vindicated without ordering that counsel be paid, I would order that the Attorney General pay counsel who is to be appointed by the court at a rate determined by me. However, in light of the obstinate refusal of the Attorney General to consider payment at a fair rate, I find myself in a predicament. Adjourning the trial to await the resolution of the boycott does not seem feasible, as I agree with *amicus* that this could delay the trial indefinitely. This only leaves me with the third possible remedy, a stay of all charges.

Conclusion

24. I find that the accused's s. 11(d) *Charter* rights were breached, the infringement is not justified under s. 1, and the application to stay all charges is hereby granted.

Asiago, J.