COURT OF APPEAL OF YUKON

Citation: *R. v. Murphy*,
2015 YKCA 10

Date: 20150506
Docket: 14-YU749

Between:

Regina

Appellant

And

Alicia Ann Murphy

Respondent

Before: The Honourable Madam Justice Bennett
The Honourable Madam Justice Garson
The Honourable Madam Justice Stromberg-Stein

On appeal from: An order of the Supreme Court of Yukon, dated November 21, 2014 (*R. v. Murphy*, 2014 YKSC 62, Whitehorse Docket 08-01518A).

Counsel for the Appellant: P. LaPrairie

Counsel for the Respondent: P. Campbell
M. Dineen

Place and Date of Hearing: Vancouver, British Columbia
April 2, 2015

Place and Date of Judgment: Vancouver, British Columbia
May 6, 2015

Written Reasons by:
The Honourable Madam Justice Bennett

Concurred in by:
The Honourable Madam Justice Garson
The Honourable Madam Justice Stromberg-Stein

Summary:

Ms. Murphy was convicted of second degree murder, and her conviction overturned on appeal. She applied for legal aid for counsel to assist her at the new trial. She requested that Ms. Cunningham, her lawyer on the successful appeal, represent her at the new trial. Yukon Legal Services Society ("YLSS") refused to appoint Ms. Cunningham, and instead appointed out-of-town counsel to represent Ms. Murphy. On application, the trial judge granted a Fisher and Rowbotham order, staying the proceedings until the Crown funds Ms. Cunningham. The Crown appeals the order. HELD: appeal dismissed. In these unusual circumstances, Ms. Murphy reasonably refused to accept the appointed lawyer. The YLSS's decision was a de facto denial of legal aid, and therefore Ms. Murphy satisfied all of the criteria for a Rowbotham application. It is not necessary to address the Fisher application.

Reasons for Judgment of the Honourable Madam Justice Bennett:

[1] Alicia Murphy is charged with second degree murder. On November 21, 2014, the trial judge entered a stay of proceedings of the murder charge, conditionally, until the Crown paid for a specific lawyer, Ms. Cunningham, to represent Ms. Murphy.

[2] The appeal was heard on April 2, 2015. It was dismissed on that date, with reasons to follow.

[3] This is an unusual case requiring unusual measures to achieve a fair trial. This decision should not be taken as a blanket statement regarding right to counsel generally.

[4] Alicia Murphy, a First Nations woman, was charged with the murder of Evangeline Billy on June 21, 2008. Two witnesses testified that she had admitted killing Ms. Billy. Ms. Murphy testified and denied the murder. She led evidence of an alibi. She was convicted by a jury on October 27, 2009. She had been represented at trial by two staff lawyers from the Yukon Legal Services Society ("YLSS").

[5] On appeal, Ms. Murphy was represented by Ms. Cunningham. One of the grounds of appeal was ineffective assistance of counsel. On June 11, 2014, this Court allowed the appeal and ordered a new trial (indexed at 2014 YKCA 7). It did not, however, give effect to the ineffective assistance of counsel argument.

[6] Ms. Cunningham has been Ms. Murphy's lawyer for the past five years. Amongst other things, Ms. Cunningham acted on a *pro bono* basis until legal aid funding was approved for the appeal (2013 YKCA 9 at para. 3). She also prepared and conducted Ms. Murphy's judicial interim release application when the new trial was ordered, again *pro bono*.

[7] Ms. Murphy applied for legal aid for counsel to assist her at the new trial, which is scheduled for June 8 to July 3, 2015. She requested that Ms. Cunningham represent her at the new trial. Ms. Cunningham is on the Yukon legal aid panel for murder cases, and there is no question regarding her competence to represent Ms. Murphy on this murder charge.

[8] Instead, the YLSS appointed a lawyer from British Columbia to represent Ms. Murphy. On July 21, 2014, Ms. Murphy was advised that the appointed lawyer would contact her. He did not. She had not heard from him by the time of the next court date, the next day. Ms. Cunningham appeared for Ms. Murphy at the Court hearing on July 22, 2014, which was a case management conference. Crown counsel told the Court that the appointed lawyer had informed him that he had been appointed to represent Ms. Murphy. Ms. Cunningham advised the Court that she would look into the matter of who would be representing Ms. Murphy.

[9] Ms. Murphy deposes that she was advised by a staff member at YLSS, that the Director wanted the out-of-town lawyer to represent her as he had recently had good results with a first degree murder case in the Yukon. Ms. Murphy understood that his client had pleaded guilty to second degree murder.

[10] On July 31, 2014, Ms. Murphy sent a lengthy letter to YLSS requesting a review of the decision to appoint out-of-town counsel instead of Ms. Cunningham.

[11] In the letter, Ms. Murphy set out her reasons why she wanted Ms. Cunningham to represent her: Ms. Cunningham successfully represented her on the appeal, and she trusts and has confidence in Ms. Cunningham. She also stated why she did not want the out-of-town lawyer to represent her, including the fact that

she does not know him, and that Crown counsel had told Ms. Cunningham that he was preparing a plea position for the appointed lawyer. Ms. Murphy deposes that she has no intention of pleading guilty, and intends to challenge the charge against her. She is very concerned that the appointed lawyer took steps to negotiate a plea position without speaking to her, and she is concerned about being pressured into a plea agreement. She also pointed out that Ms. Cunningham lives in Whitehorse, while the appointed lawyer is located in the interior of British Columbia.

[12] YLSS responded as follows:

> Dear Ms. Murphy:
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> **Re: Yukon Legal Services Society — Appointment of Counsel**
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> I am writing on behalf of the Yukon Legal Services Society ("YLSS") Board of Directors in response to your request that we review the decision of the Executive Director to appoint Mr. [D.C.] as your lawyer. You have also asked YLSS to appoint Ms. Jennie Cunningham as your lawyer.
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> On August 28, 2014, the Board Members met and reviewed your letter dated July 31, 2014. After their review and a discussion surrounding the matter, the Members of the Board decided to uphold the Executive Director's decision to appoint Mr. [D.C.] as your lawyer.
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> This decision was made primarily for the following reasons:
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> 1. Mr. C. is a very experienced criminal defence lawyer. He has been practicing law for almost 30 years and specializes in the representation of people who have been charged with murder. He is a seasoned lawyer with an excellent reputation and is considered to be highly skilled senior counsel; and
> 2. At the request of YLSS, Mr. C. recently represented a young adult male who had been charged with 1st degree murder and did excellent work on behalf of that individual. He is approachable and very easy to talk to. He is thorough, exhibits a high degree of professionalism and uses common sense when resolving matters.
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> You have expressed concern about not being able to choose your own lawyer, despite the fact that two other accused who had been granted Legal Aid coverage (Larue and Asp) were apparently able to choose theirs. Please be advised that while YLSS always tries to consider a client's preference for counsel, this is not, by any means, the only determining factor.
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> YLSS must consider a number of things when appointing counsel, including the level of experience of the lawyer, their expertise in the particular area of law, and budgetary limitations of the Society. YLSS is not required to provide a client with their choice of counsel. In the case of Larue and Asp, the lawyers appointed were experienced in a highly specialized, technical area of

> law, never before done in the Yukon, known as a “Mr. Big” operation. There are very few defence lawyers in Canada who have expertise in this area. Coincidentally, these lawyers were also the preferred choice of counsel for the two accused.
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> You stated that you are “...very upset and confused about the way the assignment of legal aid funded counsel took place. My lawyer was not told about Mr. C. being assigned as my counsel.” Please be advised that Ms. Cunningham has not been appointed or authorized by YLSS to assist you in the new trial. The Executive Director has followed standard practices in accepting and reviewing your application and assigning you with counsel. This included advising you, the client, of your appointed lawyer, Mr. C.
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> You also stated that “...I do not want to be pressured to change lawyers when I am happy with the lawyer I have...”. YLSS is responding to your application for coverage for a lawyer to defend you in this matter. It is your decision to accept or refuse this offer. We recommend that you consider accepting our offer of service because we truly believe that Mr. C. is a good choice for representation of your specific needs. Having said that, should you decide not to accept our offer, you are free to hire your own counsel privately.
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> If you decide to proceed with the appointment of Mr. [C.] to represent you, please contact us at (867) 667-5210 so that we may advise Mr. [C.] of your decision. If you choose not to accept YLSS’s appointment, we would appreciate you letting us know at your earliest convenience.
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> If you have any questions, please do not hesitate to contact the office at the number noted above and ask to speak with the Executive Assistant, Shannon Rhames.

[13] It is clear from the letter that there is no explanation whatsoever for why YLSS would not appoint Ms. Cunningham. She meets all the criteria in the letter. In addition, she clearly has a long and abiding relationship with Ms. Murphy.

[14] It is also not stated why YLSS would prefer to retain an out-of-town counsel, and pay for his travel, meals, hotel and related costs rather than retain local qualified counsel. On the appeal, the Crown submitted that there was no evidence of these costs, and suggested that perhaps the out-of-town counsel would pay these expenses himself. With respect, we are not required to keep our heads in the sand. Common sense is, from time-to-time, permitted to dictate our deliberations, and one can draw a common sense inference that YLSS will be paying additional expenses for out-of-town counsel. This is not a case where counsel with a particular expertise is required that would justify extra expense, such as is referred to in the letter above.

[15] The usual practice is to appoint counsel of choice if he or she meets all the necessary criteria (see 2014 YKSC 62 at paras. 31−32). No explanation was ever given as to why that practice was not followed here.

[16] Crown counsel at the hearing before the trial judge (who is not counsel on the appeal) did not deny that he was discussing a plea with the out-of-town counsel. The details are not terribly clear, but since the Crown could have clearly stated that he was not discussing a plea, if that was the case, it is assumed that the plea was on the table, and clearly without Ms. Murphy's input.

[17] Ms. Murphy brought an application which she characterized as a "*Rowbotham*" or a "*Fisher*" application for Ms. Cunningham to be funded by the government as her counsel. In granting the order to stay the proceedings until Ms. Cunningham is funded, the trial judge concluded that Ms. Murphy had no "genuine choice" of who would represent her. While I would uphold the order made by the trial judge, I would do it on a more narrow basis than "genuine choice".

[18] An accused has a right to counsel of choice (*R. v. Crichton*, 2015 BCCA 138 at para. 22). An accused does not, however, have an absolute right to state-funded counsel of choice. The Ontario Court of Appeal has concluded that the right to state-funded counsel of choice is limited to counsel who are competent to take the case, willing to accept the retainer offered (including a legal aid certificate), available to represent the client within a reasonable period of time, and not suffering from any conflict of interest (*R. v. McCallen* (1999), 43 O.R. (3d) 56 at para. 40; *R. v. Speid*, 3 D.L.R. (4th) 246). This Court has not decided this question.

[19] In *R. v. Peterman* (2004), 70 O.R. (3d) 481 (C.A.), the Ontario Court of Appeal concluded that where competent counsel was available in the jurisdiction where the trial was taking place, the accused was not entitled to out-of-town counsel at extra expense based on a prior relationship.

[20] The trial judge in that case had ordered out-of-town travel expenses for lead counsel and a junior to assist him. In overturning the decision, the Court of Appeal concluded that the judge was not entitled to review the reasonableness of the decisions made by Legal Aid. Her jurisdiction was limited to whether the accused's right to a fair trial was imperilled because of the conditions imposed by legal aid (para. 25). At paras. 26−30, the Court said:

> [26] The *Charter* guarantees to a fair trial and fundamental justice mean that the state must provide funds so that an indigent accused can be represented by counsel where counsel is required to ensure that the accused person has a fair trial. Further, within reason, the court will protect an accused's right to choose his or her counsel. As this court said in *R. v. Speid* (1983), 43 O.R. (2d) 596, 7 C.R.R. 39 (C.A.) at p. 598 O.R.:
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> > The right of an accused to retain counsel of his choice has long been recognized at common law as a fundamental right. It has been carried forth as a singular feature of the Legal Aid Plan in this province and has been inferentially entrenched in the *Charter of Rights* which guarantees everyone upon arrest or detention the right to retain and instruct counsel without delay. However, although it is a fundamental right and one to be zealously protected by the court, it is not an absolute right and is subject to reasonable limitations.
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> [27] Absent compelling reasons, such as a disqualifying conflict of interest or incompetence, the courts will not interfere with an accused's choice of counsel. Further, the courts will avoid actions that result in accused persons being improperly or unfairly denied the opportunity to be represented by their counsel of choice. See *R. v. McCallen* (1999), 43 O.R. (3d) 56, 131 C.C.C. (3d) 518 (C.A.) at pp. 531-32 C.C.C.
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> [28] However, the right of an accused person to be free of unreasonable state or judicial interference in his or her choice of counsel does not impose a positive obligation on the state to provide funds for counsel of choice. See *R. v. Prosper*, [1994] 3 S.C.R. 236, 92 C.C.C. (3d) 353 at pp. 267-68 S.C.R., p. 374 C.C.C.; *R. v. Rockwood* (1989), 49 C.C.C. (3d) 129, 42 C.R.R. 369 (N.S.C.A.); *R. v. Ho*, [2004] 2 W.W.R. 590, [2003] B.C.J. No. 2713 (C.A.); and *Québec (procureur général) v. C. (R.)* (2003), 13 C.R. (6th) 1, [2003] J.Q. no. 7541 (C.A.).
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> [29] There would appear to be two exceptions to this general proposition. First, in some unique situations it may be that an accused can establish that he or she can only obtain a fair trial if represented by a particular counsel. In those unusual circumstances, the court may be entitled to make an order to insure that the accused is represented by that counsel. This was the case in *R. v. Fisher* and the genesis of the so-called *Fisher* order. But in making the order, Milliken J. recognized that he was faced with a unique case, and he suggested at para. 20 that the circumstances that led him to make the order might not occur in Saskatchewan "in another thirty years".

[21] Refusing to fund counsel of choice when an accused has a prior relationship with that counsel is not necessarily enough to deprive an accused of a fair trial. At para. 31, Rosenberg J.A. said this:

> [31] The respondent's case is not unique and it is not of the same order of complexity as the *Fisher* case. It is an arson case expected to last seven days in which there may be up to 30 Crown witnesses, one of whom was a former accomplice. If this is the level of complexity that would justify a *Fisher* order, virtually every accused facing a jury trial could claim an entitlement to state-funded counsel of choice. That is simply not the law. As to the respondent's relationship with his counsel, it is not unusual for accused to have prior professional relationships with a lawyer. The fact that counsel had a prior relationship with the respondent and that the respondent had confidence in him similarly did not demonstrate an entitlement to state-funded counsel of choice. See *R. v. Bruha*, [2003] 1 W.W.R. 339, [2002] N.W.T.J. No. 72 (S.C.). I have set out earlier a paragraph from the affidavit of junior counsel where he attempts to explain the basis for the application. There is nothing in that paragraph that could justify a conclusion that this case was so difficult, and that counsel's relationship with the respondent was so special, that only Mr. Wrock could handle it.

[22] The trial judge in the present case carefully considered the decision in *R. v. Bruha*, 2002 NWTSC 58. In *Bruha*, the accused had been represented by specific counsel at his bail hearing and preliminary inquiry. He was unable to pay for his trial, and was approved for legal aid funding. However, the accused's counsel was not able to work under the Territorial legal aid plan as he was a resident of Alberta rather than the Northwest Territories. The accused applied for state funding of the same counsel, and his application was denied. The trial judge in the present case found that *Bruha* was distinguishable as Mr. Bruha had a choice of counsel among counsel resident in the Northwest Territories, whereas Ms. Murphy was being compelled to accept the out-of-town counsel.

[23] The trial judge concluded, based on a sound foundation of evidence, that Ms. Murphy would not accept the out-of-town counsel as she did not trust him. She had supportable reasons for not trusting him, as he apparently discussed a plea

negotiation without her permission. The trial judge found that Ms. Murphy's concerns about being pressured into a plea deal were "objectively as well as subjectively understandable" (para. 34). I note, parenthetically, that appointed counsel has not participated in these proceedings, and these findings are based on the record before the trial judge. The appointed counsel's competence is not questioned.

[24] At the time YLSS appointed out-of-town counsel, Ms. Murphy had just been released from spending five years in prison. She said she felt she would be pressured to accept a plea bargain, and that she mistrusted the lawyer appointed for her. In addition, one of her grounds of appeal had been ineffective assistance of counsel. She trusts Ms. Cunningham and has had a long and successful legal relationship with her.

[25] The trial judge found that Ms. Murphy reasonably refused to accept a lawyer whom she understandably did not trust. YLSS stated in their letter that if Ms. Murphy decided not to accept their offer, she was "free to hire [her] counsel privately" (para. 42). In other words, Ms. Murphy's options were to accept counsel whom she understandably did not trust, or to receive no assistance from legal aid.

[26] I need not decide the issue of the right to state-funded counsel of choice, as the trial judge concluded that in this context, YLSS's decision was a *de facto* denial of legal aid. The judge concluded that given the *de facto* denial, Ms. Murphy satisfied all of the criteria necessary for a *Rowbotham* order. In my respectful view, there was

a body of evidence on which he could make this finding. Given this conclusion, it is not necessary to address the *Fisher* order.

[27] As noted, the appeal is dismissed.

"The Honourable Madam Justice Bennett"

I agree:

"The Honourable Madam Garson"

I agree:

"The Honourable Madam Stromberg-Stein"