

ONTARIO
SUPERIOR COURT OF JUSTICE
(Summary Conviction Appeal)

B E T W E E N:

HER MAJESTY THE QUEEN

Respondent

- and -

PUNITHRAJ NADA

Appellant

Richard Gayne, for the Respondent

Peter J. Connelly, for the Appellant

HEARD: January 16, 2006

BENOTTO J.

[1] Mr. Nada appeals his conviction in the Ontario Court of Justice for failing to provide a breath sample to a police officer. There are two bases for the appeal:

1. That the trial judge erred in not granting Mr. Nada an adjournment; and
2. That the trial was unfair because the trial judge did not provide adequate assistance.

[2] Clearly, the decision as to whether or not to grant an adjournment of a trial is within the discretion of the trial judge. It should not be lightly interfered with. This is particularly so when the courts throughout the province are struggling to meet increasing work loads with fewer resources.

[3] Mr. Nada, while being represented by an agent, Mr. Keston, been granted adjournments of two previous trial dates: April 2, 2004 and September 29, 2004. Central to Mr. Nada's defense was the fact that he suffered from asthma. Indeed, the matter had been adjourned apparently so that Mr. Keston could obtain medical records. At the second trial date, Mr. Nada realized that Mr. Keston was not a lawyer. Still, because he had paid him already, a trial date was set for March 8, 2005.

[4] About six weeks before trial, Mr. Nada and Mr. Keston had a falling out. Almost immediately, he applied for legal aid. He was denied legal aid and retained a lawyer privately. On March 8, he appeared with a letter from counsel requesting a further adjournment to a date his counsel was available. The letter was from Mr. Fitzmaurice, an experienced trial counsel who confirmed he had been retained.

[5] Mr. Keston had not, as required, removed himself from the record. Instead he appeared on March 8 to do so. Mr. Nada, with his letter in hand, clearly assumed he would be granted an adjournment.

[6] At this point in the proceedings, the transcript reveals that the trial judge said:

...I am not going to grant yet another adjournment. Mr. Nada you knew that this was up for its third trial date. To wait and retain counsel only a week before that third trial date is simply unacceptable. Counsel has already indicated to the Court that the (sic) did his utmost to try to get a hold of you to get those medical letters prior to today, but you did very little, if anything, to try to assist him. So either you are going to be representing yourself today or counsel is going to be assisting you. I will leave that for the two of you to discuss before we start this matter.

After a further exchange, the Court states:

...this is the third trial date, so no, the matter is not going to go over yet again.

[7] Mr. Nada and Mr. Keston then have a discussion outside of the Court. Upon return, Mr. Keston advised that Mr. Nada did not want him to represent him. At this point, the following exchange takes place:

THE COURT: Okay, all right. Your counsel has indicated that you don't wish him to represent him today. I want to make sure you understand that what that would be is that you would be representing yourself today. Is that your wish?

THE ACCUSED: Yeah, in fact I have spoken to another counsel and he has actually given me a letter and he has requested for an adjournment to have a trial.

THE COURT: Right, I already know that I have already told you earlier this morning that the adjournment is not being granted because this is the third trial date. So you have two choices today: you can allow the lawyer who is here today to represent you on the trial and to assist you, or you can represent yourself. Which is it?

THE ACCUSED: Then I'm prepared to continue the case with the present lawyer.

[8] The trial then begins with some discussion about the medical report. Mr. Nada then asks to address the court. Again he indicates that he already arranged with another counsel to represent him. The Court states:

THE COURT: Okay. I have already indicated for the same reasons Mr. Nada, this is the third trial date, that if you were going to change counsel that you should have found someone who was going to be available to proceed to the trial today. Each adjournment has been at your request and I am not adjourning it again for a third time. The agent who is present here today is only here because he has not brought an application to be removed from the record in advance of the trial date and so because of that you can have the benefit of his advice today, even though you probably should not have that benefit. But it is entirely your choice. If you do not wish to have the benefit of his advice you may certainly proceed and deal with this matter on your own today, but we are starting the trial right now. The clerk is going to read the charge to you. Your only choice now is do you wish to have the agent assist you today or are you going to represent yourself today? Which do you choose?

THE ACCUSED: I – I – two or three times even today we went outside and had discussion but he was not very accommodating, he was hostile towards me. So he may have some sickness or anything like that but he is actually not listening to me and to proceed according to my wish.

THE COURT: Okay. Does that mean that you are choosing to represent yourself on the trial right now then?

THE ACCUSED: I am not prepared to defend myself and conduct the trial today because I have already retained the counsel and ...

THE COURT: I am not going to go through this again. You have two choices and two only. All I want to hear is whether it is going to be you or your agent. Which of those two is it?

THE ACCUSED: I most respectfully request Your Honour to grant me another date so that I could be well represented by a counsel.

THE COURT: If you do not choose yourself, representing yourself today or your agent, I will excuse the agent. Give me an answer now or you will be representing yourself. May I have the Information please?

THE ACCUSED: I'll defend myself.

THE COURT: All right. Mr. Kesten I am removing you as agent for Mr. Nada.

MR. KESTEN: Thank you.

THE COURT: And Mr. Nada is going to be representing himself on this matter.

[9] The trial then proceeded with Mr. Nada representing himself. A review of the transcript indicates that he did not appreciate how to cross-examine, or to marshal arguments. While the trial judge did offer some assistance, he seemed resigned to the fact that the trial was really passing him by.

[10] In refusing the adjournment the judge was exercising discretionary powers. However, in this case, the trial judge never heard argument on the issue. It was clear from the exchange at the outset that the trial judge had decided not to grant a further adjournment. This, in itself was not only unfair in fact; it had the appearance of unfairness. Also, by not hearing argument, the court did not consider that:

- Mr. Nada did not realize initially that the “agent” Mr. Kesten was not a lawyer;
- Mr. Nada parted company with Mr. Kesten after a falling out;
- Mr. Nada had not failed to “assist” Mr. Kesten, he thought he had changed counsel;
- Mr. Nada had with reasonable dispatch in applying for legal aid and retaining a lawyer;
- He did not obtain legal aid but arranged to privately retain Mr. John Fitzmaurice, an experience criminal counsel;
- Mr. Fitzmaurice was not available on March 8 for trial. Although another lawyer from the firm had been offered, Mr. Nada wanted Mr. Fitzmaurice to represent him.

[11] Mr. Nada was given a “choice” which was to represent himself or work with a non-lawyer who he called hostile. A new trial date was never considered.

[12] There was no suggestion that Mr. Nada was deliberately abusing the system for his own advantage. Mr. Nada’s decision to hire an experience trial lawyer was a good one given the issues in his case including *Charter* issues arising from the warrantless search. He was simply not prepared to represent himself and clearly taken aback with the position he found himself in.

[13] The granting of an adjournment is within the discretion of the trial judge unless the court has failed to exercise it in a judicial way, or unless the refusal results in a miscarriage of justice. On both of these grounds, the appeal is allowed. The court had predetermined the result, provided a choice which was no choice at all, and the trial was, in the result, unfair to him. The entire process had both the reality and the appearance of unfairness.

[14] The appeal is allowed and a new trial is ordered.

BENOTTO J.

Released: January 18, 2006

COURT FILE NO.: 100/05

DATE: 2006/01/18

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REASONS FOR JUDGMENT

BENOTTO J.

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