

JAILHOUSE INFORMANTS

“There is no present only the immediate future and the recent past”

-George Carlin (1937 -)

Introduction

At the *Sophonow Inquiry*¹ Commissioner Cory stated:

Jailhouse informants comprise the most deceitful and deceptive group of witnesses known to frequent the courts. The more notorious the case, the greater the number of prospective informants. They rush to testify like vultures to rotting flesh or sharks to blood. They are smooth and convincing liars. Whether they will seek favours from the authorities, attention or notoriety they are in every instance completely unreliable. It will be seen how frequently they have been a major factor in the conviction of innocent people and how much they tend to corrupt the administration of justice. Usually their presence as witnesses signals the end of any hope of providing a fair trial.²

Former Chief Justice of Canada, Lamer, sitting as Commissioner examining three cases in Newfoundland and Labrador, concluded that the use of a jailhouse informant contributed to a grave injustice.³ He determined that the recommendations of Commissioner Cory in the *Sophonow Report* be incorporated into the policy and practices of Crown Attorneys in this Province.⁴

Together with all of the other considerations set out in this section, it is important to examine critical factors when the information-provider in question can be categorized as a “jailhouse” or “in-custody” informant. In this respect, notice should be taken of the definition of an “in custody informer”, as set out by the Honourable Fred Kaufman, C.M., Q.C. in his report on the Guy Paul Morin case:

An in-custody informer is someone who allegedly receives one or more statements from an accused while both are in custody, and where the statements relate to offences that occurred outside of the custodial institution. The accused need not be in custody for, or charged with, the offences to which the statements relate. Excluded

from this definition are informers who allegedly have direct knowledge of the offence independent of the alleged statements of the accused (even if a portion of their evidence includes a statement made by the accused).

The use of in-custody informants has been identified as a significant contributing factor in many cases of wrongful conviction⁵. There are several issues to which Crown counsel should pay particular attention when dealing with a jailhouse informant.

Credibility

At pp. 486-487 of the *Kaufman Report*, it is stated that:

jailhouse informant evidence is intrinsically, though not invariably, unreliable and many of us have failed in the past to appreciate the full extent of this unreliability. It follows that prosecutors must be particularly vigilant in recognizing the true indicia detracting from, or supporting, their reliability.⁶

The *Kaufman Report* suggests that at a minimum the Crown should conduct a subjective assessment of the informant's proposed testimony. Counsel should examine: the details of the evidence; the motives for lying; and the possibility of collusion, where there is more than one in-custody informant."⁷

In order to assess credibility, Crown counsel should consider the following factors:

- The background of the informant, which could include an examination of his or her physical and mental profiles. Also relevant is whether or not the informant has claimed receiving in-custody statements in the past; whether or not his or her information has been reliable in the past; whether the informant has testified in the past; whether the informant has been convicted of offences including dishonesty;
- The circumstances of the informant's incarceration, including access to information about the crime in question;

- The circumstances surrounding the giving of the accused's alleged "confession" (when, where and how it was made);
- The circumstances surrounding the disclosure of the alleged statement to the Crown;
- The benefits sought or received;
- The use of tests to ensure reliability, e.g., polygraph examinations;
- The extent to which the statement is corroborated by other evidence. Where there is more than one in-custody informant, such corroboration should be independent of the other informer's statement;
- The specificity of the statement; does it contain details or leads known only to the culprit?

Relationship between the Informant and the Police

Very often in cases involving in-custody informants, the defence alleges that the Crown has taken questionable steps to elicit the testimony of the in-custody informant in order to bolster its own case. In order to assess the circumstances which gave rise to the informant's participation, Crown counsel should seek answers to the following questions:

- Was the evidence solicited by the police?
- Was there a prior association between the in-custody informant and the police officer involved with the investigation?
- Did the police approach the informant prior to his "receiving" the "confession"?
- What were the circumstances surrounding the placement of the informant within the prison facility?
- Did the police provide information to the informant prior to the making of the statement; did they ask leading questions, etc.?

Mandatory Considerations

Commissioner Cory in the *Sophonow Report* stated;

Justice Kaufman in the Morin Inquiry dealt exclusively with jailhouse informants and the harm they occasion. His thoughtful and helpful recommendations are carefully set out in the report. I will adopt them but still go further in my recommendations on this subject.⁸

Crown Attorneys shall, in addition to the considerations set out above, be guided by the following;⁹

1. As a general rule, jailhouse informants should be prohibited from testifying.

They might be permitted to testify in a rare case, such as kidnapping, where they have, for example, learned of the whereabouts of the victim. In such a situation, the police procedure adopted should be along the following lines.

Upon learning of the alleged confession made to a jailhouse informant, the police should interview him. The interview should be videotaped or audio taped from beginning to end. At the outset, the jailhouse informant should be advised of the consequences of untruthful statements and false testimony. The statement would then be taken with as much detail as can be ascertained.

Before it can even be considered, the statement must be reviewed to determine whether this information could have been garnered from media reports of the crime, or from evidence given at the preliminary hearing or from the trial if it is underway or has taken place.

If the police are satisfied that the information could not have been obtained in this way, consideration should then be given to these factors:

Has the purported statement by the accused to the informant:

- a. revealed material that could only be known by one who committed the crime;

- b. disclosed evidence that is, in itself, detailed, significant and revealing as to the crime and the manner in which it was committed; and
- c. been confirmed by police investigation as correct and accurate.

Even then, in those rare circumstances, such as a kidnapping case, the testimony of the jailhouse informant should only be admitted, provided that the other conditions suggested by Justice Kaufman in his Inquiry have been met. In particular, the Trial Judge will have to determine on a voir dire whether the evidence of the jailhouse informant is sufficiently credible to be admitted, based on the criteria suggested by Justice Kaufman.

- 2. Further, because of the unfortunate cumulative effect of alleged confessions, only one jailhouse informant should be used.
- 3. In those rare cases where the testimony of a jailhouse informant is to be put forward, the jury should still be instructed in the clearest of terms as to the dangers of accepting this evidence. It may be advisable as well to point specifically to both the Morin case and the Sophonow case as demonstrating how convincing, yet how false, the evidence was of jailhouse informants.
- 4. There must be a very strong direction to the jury as to the unreliability of this type of evidence. In that direction, there should be a reference to the ease with which jailhouse informants can, on occasion, obtain access to information which would appear that only the accused could know. Because of the weight jurors attach to the confessions and statements allegedly made to these unreliable witnesses, the failure to give the warning should result in a mistrial.

Approval for the Use of the Jailhouse Informant

Where Crown Attorneys have addressed the factors set out above, and are satisfied that the informant evidence is credible, they may recommend to the Director of Public Prosecutions that the informant be called as a witness.¹⁰ No such witness may be called without written approval of the DPP.

Informant Benefits

It is preferable that negotiation of such benefits should not be conducted by a Crown Attorney who is prosecuting the accused. The benefits should never be conditional on whether the Crown obtains a conviction of the accused. ¹¹

¹ *The Inquiry Regarding Thomas Sophonow (2001)* referred to as the *Sophonow Report*, Commissioner Hon. Peter de C. Cory.

² *Ibid* page 63

³ *Lamer Report (2006)*, Office of the Queen's Printer NL.

⁴ *Ibid* page 271.

⁵ See both the *Sophonow Report* note 1 above and the Commission on Proceedings Involving Guy Paul Morin. Toronto: Queen's Printer, 1998 Vol. I, p.601. (The "*Kaufman Report*")

⁶ *Kaufman Report*, Vol. 1, p. 487.

⁷ *Kaufman Report*, Vol. I, pp 607-609. This part of the *Kaufman Report* was referred to with approval by Major J., dissenting in *R. v. Brooks*, [2000] 1 S.C.R. 237.

⁸ Note 1 at 63.

⁹ Where these requirements pertain to investigators Crown Attorneys must ensure that they are carried out.

¹⁰ The recommendation might be for immunity or some other benefit, depending on the circumstances. The DPP may, after consultation, form an ad hoc committee to consider the issues outlined and make a recommendation.

¹¹ *R. v. Xenos* (1991), 70 C.C.C. (3d) 362 (Ont.C.A.); but see *R. v. Naoufal* (1994), 89 C.C.C. (3d) 321 (Ont. C.A.).