ONTARIO COURT OF JUSTICE

DATE: 2019 08 22

B E T W E E N :

HER MAJESTY THE QUEEN

Applicant

— AND —

B.S. (YO)

K.J. (YO)

Respondents

WATERLOO REGION RECORD

CTV, A Division of Bell Media Inc.

Intervenors

Before Justice K. Katzsch
Heard on July 23, 2019
Written Reasons for Judgment released on August 22, 2019

B. Thomas and A. Sethi ..... counsel for the Provincial Crown
R. Gilliland ..... Counsel for the Waterloo Record and CTV News

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KATZSCH J.:

[1] The two young offenders in this matter were originally charged with first degree murder in the homicide of Shaun Yorke. Two adult offenders were also charged in relation to the same offence. It is the theory of the Crown that all four males acted in concert to affect a home invasion robbery, which ultimately resulted in the victim's death.

[2] On May 16, 2019, the two youths appeared before this court and entered guilty pleas to the lesser-included offence of manslaughter in relation to their roles in the death of Mr. Yorke. No facts were presented to the court at the time of the plea, as the Crown indicated that they would likely be seeking a publication ban relating to any facts that referenced the adult accused or specific details relating to the homicide.

[3] The two young offenders are scheduled to complete their sentencing on September 6th, 2019. The preliminary hearing for the two adult accused is set to commence in November 2019, with further dates into December and then January 2020. No dates have been set therefore in relation to a trial in that matter.

[4] The Crown seeks a publication ban covering the majority of the facts to be referenced during the sentencing of B.S. and K.J. Counsel for both B.S. and K.J. take no position on the matter and did not elect to attend or participate in the hearing. Counsel for the two adult accused support the application.

[5] The applicants argue this ban is necessary to meaningfully protect the fair trial rights of the two adult offenders and to ensure the proper administration of justice. Counsel for the media argues the public has a vested interest in knowing the facts upon which the youth are sentenced and that several alternative measures exist to protect the fair trial rights of the remaining accused.

[6] There is no dispute that much of the content of the agreed statement of facts to be submitted at the sentencing for the youths refers (albeit in summary form) to potential evidence in the upcoming trial for the adults. The facts are necessarily intertwined given all four are charged in relation to the same event. This application is based on the proposition that potential jurors in a trial of the adult accused may have their views of the evidence tainted or influenced, based on the publication of the evidence relied upon at this sentencing hearing.

The Test

[7] It is well settled that the analysis must begin with a consideration of the Supreme Court decision in *Dagenais* v. *Canadian Broadcasting Corp*., [1994] 3 S.C.R. 835 and the subsequent ruling in *R*. v. *Mentuck*, [2001] 3 S.C.R. 442.

[8] In *Dagenais, supra*, the test was articulated as:

> (a) The ban must be necessary to prevent a “real and substantial” risk to the fairness of the trial because reasonable alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the ban outweigh the deleterious effects to the freedom of expression of those affected by the ban.

[9] In *R*. v. *J.S.R*. (2008) O.J. No. 4160 (ONSC), Justice Nordheimer (as he then was) considered the request for a publication ban in the first of multiple trials involving the same incident. He noted that the necessity component of the first branch of the *Dagenais* test had three inter-related parts:

> 1. is the risk real and substantial;
>
> 2. are there alternative measures available; and

3. will the ban be effective to prevent the risk to trial fairness?

[10] Following *Dagenais and Mentuck*, it is clear the rights guaranteed by sections 2(b) of the *Canadian Charter of Rights and Freedoms* (freedom of expression, including freedom of the press) and s.11(d) of the *Charter* (the right to a fair trial) are to be accorded equal status. The notion that a right to a fair trial was to be given primacy has been rejected by the Supreme Court. Any decision in relation to a publication ban therefore must reflect a balancing of the interests protected that fully respects the importance of both sets of rights. See *R*. v. *Dagenais, supra,* at para. 72.

[11] Our courts have also been very careful to note that it is correct to have faith in the justice system in Canada and not assume that the jury system is so fragile that corrective or alternative measures cannot ensure the fair trial rights of an accused. As noted by Mr. Justice Cory in the case of *Phillips* v. *Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97 at para. 133;

> I am of the view that this objective is readily attainable in the vast majority of criminal trials even in the face of a great deal of publicity. The jury system is a cornerstone of our democratic society. The presence of a jury has for centuries been the hallmark of a fair trial. I cannot accept the contention that increasing mass media attention to a particular case has made this vital institution either obsolete or unworkable. There is no doubt that extensive publicity can prompt discussion, speculation, and the formation of preliminary opinions in the minds of potential jurors. However, the strength of the jury has always been the faith accorded to the good will and good sense of the individual jurors in any given case.

Real and Substantial Risk

[12] It is not every risk to trial fairness that requires a publication ban. The risk must be real and substantial and should not be based on speculation. As noted by Justice Nordheimer in *R*. v. *J.S.R.;*

> "A publication ban is not justified where there may be just some risk of prejudice to the fair trial rights of the accused or where the asserted risks to a fair trial are merely speculative."
>
> *R*. v. *J.S.R., supra,* at para 30

[13] Here, the applicants note the possible risk that potential jurors in a trial (which is at minimum one year away from today's date) may be tainted or irrevocably biased based on the facts published after these two young offenders are sentenced. This possible risk is said to exist despite the acknowledgment that one or both of the young offenders are anticipated to be witnesses at the trial for the adults and will be expected to be questioned about the fact of their plea and the facts noted in the agreed statement before this court.

[14] It was acknowledged by the Crown that this particular case has not received anywhere near the amount of publicity noted in many of the cases filed before this court. This includes the cases involving Paul Bernardo, the killing of Victoria Stafford and the Boxing Day shooting in Toronto in 2005. Two short articles from the local newspaper were submitted as exhibits on the application, showing the general nature of the extent of the publicity in this case to date. It was also noted that the names of the two adult accused have already been published by the media.

[15] In *J.S.R.*, Justice Nordheimer noted the nature of the risk is informed by the level of publicity in any given case. Specifically, the court stated;

> To some degree, whether any impairment might occur will depend on the nature of the publicity, the extent of the publicity, the duration of the publicity and the likelihood of potential jurors recollecting that publicity and the degree of detail that any such recollections would involve….Without knowing the bounds of any publicity and without any evidence as to the likely ongoing impact of that publicity, the task of determining whether a publication ban is necessary is rendered a rather difficult one.
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> *R*. v. *J.S.R., supra*, at paras. 34-35

[16] I also think it important to note that the proposed agreed statement of facts in this matter is rather short in content and consists of just over two typed pages of facts. Therefore, in addition to the relative minimal amount of publicity in this case, there will also be a finite or limited amount of information available to the media following the sentencing of the youths. One would think this limited amount of information is important to consider when assessing the nature of the risk.

[17] This case is also distinguishable from some of the others, given that the amount of time reasonably expected to elapse between the sentencing of the youths and the trial for the adults is quite lengthy – at least somewhere in the range of twelve-eighteen months.

[18] I note that in the matter of *R*. v. *Puddicombe*, *ibid*, Justice Benotto (as she then was) observed the tremendous amount of media attention to the matter before her and the fact that the trial of the co-accused was set to commence *immediately* following the first accused. Despite this, Her Honour held;

> While these factors are important considerations, they do not elevate the risk to the level of real or substantial.
>
> See *R*. v. *Puddicombe,* [2009] O.J. No. 6472 at para. 15

Reasonably available alternative measures

[19] There are alternative measures available to the applicants in this matter if and when the adult offenders come to the commencement of their trial. These alternatives may include a change of venue, allowing challenges for cause and strong judicial

instructions to the jurors. It was submitted by the applicants that a change of venue would be highly undesirable, although acknowledged that it was an available option for the parties.

[20] The applicants assert the availability of the challenge for cause may not suffice to counteract any possible bias, given the upcoming changes to the legislation following Bill C-75. Nothing specific was noted however about how these potential changes may impede or impair the effectiveness of a challenge for cause in a situation such as this one.

[21] The applicants suggest possible bias on the part of potential jurors may result if they learn in advance that the two youths pleaded guilty and implicated the two adults in the alleged crime. It is suggested this knowledge or bias could not be adequately assessed through the use of a challenge of cause or addressed by a strong judicial instruction.

[22] This issue of an accused pleading guilty and implicating a co-accused, prior to that individual's trial, was squarely before Justice Nordheimer in *R*. v. *Kossyrine and Vorobiov*, *ibid*, and his comments are quite insightful in positing the counter-argument to this suggestion. In addressing this point, the court noted;

> I would add to that the observation that a publication ban in this situation might be counterproductive to the very purpose it is intended to achieve. It seems inevitable that at some point in time the jury will learn of Mr. Ross' guilty plea. Indeed, there is every prospect that Mr. Ross will be called as a witness at the trial by the Crown. If the jurors only learn at that point of the plea, there will be no opportunity to examine whether that information causes any juror to immediately reach a conclusion of guilt regarding the applicants that is incapable of being set aside. On the other hand, if the plea becomes known to prospective jurors before the selection process, the impact of that information can be examined through the challenge process.
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> *R*. v. *Kossyrine and Vorobiov*, 2011 ONSC 6081 at para. 12

The effectiveness of publication bans

[23] The effectiveness of publication bans is an issue that has broadened and evolved in light of the myriad of technological changes that have developed in the last few decades. It is no longer simply a question of information not being broadcast over a radio or printed in a newspaper. Today, there are any number of personal websites, blogs, podcasts and speciality channels through which information can be disseminated. As noted in *R*. v. *J.S.R., supra*, at para. 60, "most, if not all, of these outlets lie outside any effective control of this court".

Salutary effects vs. Deleterious effects

[24] The salutary effects of the proposed ban in this case do not, in my opinion, survive scrutiny. The names of the two adult co-accused have already been published in the media. The fact of there being two adults and two young offenders charged in relation to the homicide has also been published. The fact of the two youths pleading guilty to manslaughter has already been published. The amount of information contained within the proposed agreed statement of facts is somewhat detailed but also relatively short and provided in a summary fashion.

[25] The ban would be imposed for proceedings in September 2019. At this stage, it is not even clear or certain that one (or both) of the adults will be setting trial dates. Any evidence heard at their preliminary inquiry in 2019 and 2020 will be covered by a publication ban and it is not yet a foregone conclusion that the matter will proceed to trial. Many possible outcomes may occur between now and then.

[26] The deleterious effects are obvious. The importance of the ability of the media to report to the public is key to the administration of justice. To quote again from Justice Nordheimer in *R*. v. *J.S.R*., "secrecy is generally antithetical to our system of justice". It was noted in that case that openness permits public access to information about the courts and the practical reality that media reports are often the only method by which members of the community or the public can become aware of what transpired in the local courthouse. The public has a right to this information and any prohibition on the media from reporting is an infringement of their rights under s. 2(b) of the *Charter*.

Conclusion

[27] Given all of the above, I have concluded that a publication ban is not necessary in order to protect the fair trial rights of the two adult accused. The degree to which the fair trial rights of the adult accused may be affected is very much open to debate at this stage and I have difficulty concluding that the risk meets the test of being a real and substantial one.

[28] Given the passage of time between this proceeding and any potential trial for the co-accused, it seems highly likely that other events will capture the public's attention and affect the public's recollection of these proceedings. This conclusion is also supported by the relatively small amount of media attention attracted by this case at this stage.

[29] In addition, I find there are other remedies available to address any concerns that may arise from the publication of the details surrounding these pleas. The challenge for cause procedure remains in effect and can serve to identify any potential jurors who feel their views are irreversibly tainted by pre-trial publicity in this matter. As noted, it is proper to have faith in the justice system and the ability of jurors to reach a verdict based solely on the admissible evidence before them.

[30] It is further appropriate to believe jurors are capable of understanding judicial instructions and that they will perform their duties in accordance with their oath. A

challenge for cause is also possibly desirable to all parties in the adult proceeding, given it seems likely that the fact of these pleas will form part of the Crown's case when the two youth are subpoenaed to testify. It may well be that the fact of this being in the media beforehand is beneficial to the jury selection process vs. detrimental.

[31] I further find the deleterious effects of the publication ban outweigh any salutary effects. The public has a right to know the facts in relation to these proceedings and a right to fairly evaluate whether justice has been done. Open courts are found at the core of democratic societies and imposing a publication ban in this matter would result in an infringement of constitutional rights that is simply not justified in the circumstances.

[32] I should note that, as an alternate plan, the Crown submitted an amended agreed statement of facts suggesting this vetted version of the facts could be appropriate if the court declined to impose a full publication ban. This amended agreed statement is so heavily vetted and redacted however, I find it does not create a viable alternative.

[33] The application for a publication ban is therefore dismissed.

Released: August 22, 2019

Signed: Justice K. Katzsch