C.A.C. No. 113625

NOVA SCOTIA COURT OF APPEAL

Cite as: R. v. R. H., 1995 NSCA 89
Hallett, Hart and Freeman, JJ.A.

BETWEEN:

HER MAJESTY THE QUEEN	)	Susan C. Potts
	)	for the Appellant
Appellant	)	
	)	
- and -	)	
	)	Joel E. Pink, Q.C.
	)	for the Respondent
R. H.	)	
	)	
Respondent	)	Appeal Heard:
	)	March 30, 1995
	)	
	)	
	)	Judgment Delivered:
	)	May 8th, 1995
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THE COURT: Appeal allowed per reasons for judgment of Hallett, J.A.; Hart and Freeman, JJ.A. concurring.

HALLETT, J.A.:

This is a Crown appeal from the acquittal of the respondent by a jury on three ancient charges that he committed criminal acts of a sexual nature. The learned trial judge granted a pre-trial motion that s. 651(3) of the **Criminal Code**, R.S.C. 1985, c. C-46 contravenes ss. 7 and 11(d) of the **Canadian Charter of Rights and Freedoms**.

Section 651(3) provides:

> " Where no witnesses are examined for an accused, he or his counsel is entitled to address the jury last, but otherwise counsel for the prosecution is entitled to address the jury last."

The defence called evidence; in accordance with the learned trial judge's ruling the defence counsel was allowed to address the jury last.

The Crown appealed to this court pursuant to s. 676(1)(a) of the **Criminal Code** which provides:

> " The Attorney General or counsel instructed by him for the purpose may appeal to the court of appeal
>
> (a) against a judgment or verdict of acquittal of a trial court in proceedings by indictment on any ground of appeal that involves a question of law alone."

The Crown contends that the trial judge erred in ruling s. 651(3) is unconstitutional. The relief sought, as set out in the notice of appeal is that "the appeal be allowed, the verdict of acquittal set aside and a new trial ordered".

A judge of this court, sitting in chambers on the setting down of this appeal, agreed that a panel of this court would first deal with the constitutional issue and at a later date deal with the appeal from acquittal and the relief sought by the Crown if the learned trial judge were to be found in error in deciding that s. 651(3) of the **Code** is of no force and effect due to the **Charter** infringement.

We have been advised that the issue of the constitutionality of s. 651(3) has been brought before this court with a degree of urgency because some of the judges of the Supreme Court of Nova Scotia are following the ruling of the trial judge and allowing the defence to address the jury last even where the defence has called evidence while other judges of the court continue to apply s. 651(3) in the traditional manner.

The learned trial judge in making the ruling, accepted the reasoning of Melvin J. of the British Columbia Supreme Court, in **R. v. Guyatt** (unreported), September 29, 1994. He held that s. 651(3) infringed the ss. 7 and 11(d) **Charter** rights of the accused; Justice Melvin struck down the section.

With respect to the ruling we are considering on this appeal, the learned trial judge, after reviewing the arguments made by counsel, including a review of the decision of the Ontario Court of Appeal in **R. v. Tzimopoulos** (1986), 29 C.C.C. (3d) 304 and the decision in **Guyatt**, concluded:

> " The problem is well articulated by Melvin J., in **Guyatt**, supra.
>
> For the reasons expressed by him, I am persuaded that s. 651(3) does contravene the **Charter** in that it impairs the right of the accused to make full answer and defence and thus goes to the fairness of the trial. It is not saved by s. 1 of the **Charter**."

In **R v. Guyatt**, supra, Melvin J. gave thorough consideration to the decision of the Ontario Court of Appeal in **Tzimopoulos**, supra and the history giving rise to the enactment of s. 651(3) of the **Code**.

Melvin J. pointed out that generally in the English-speaking world, as a result of legislative initiatives, the accused has the right to address the jury last in all instances; Canada is the exception.

The Law Reform Commission of Canada recommended in a report made in 1982

that the accused have the right to speak last even if the defence calls evidence.

Melvin J. stated at p. 10 of his ruling:

" The Court of Appeal in Ontario [in **Tzimopoulos**] concluded based on the history that:

> 'To hold that our current practice causes unfair hearings is to imply that all trials in Canada in which a defence was called have hitherto been unfair. We are unaware that such a suggestion has ever been made by critics of our criminal procedure. We are not persuaded that the order of addresses prescribed by s. 578(3) offends the principles of fundamental justice guaranteed by s. 7 of the **Charter** or deprives an accused of a fair hearing guaranteed by s. 11(d) of the **Charter**.'

Tzimopoulos was a decision of September 2nd, 1986. My reading of cases in the Supreme Court of Canada since that decision have indicated the general departure from that restrictive analysis. In other words, the **Charter** itself has become of such great significance in the legal structures, the legal system in this country that merely because something was done in this fashion in the past does not mean that it does not now fly in the face of the provisions of the **Charter**. Heretofore the legislature, Parliament, paramount as it was, passed such laws, procedural, substantive as it thought fit. If it was conceived, thought of, or argued as being unfair, there was no remedy.

By the **Charter**, Parliament and the legislatures by their joint efforts, joint governments at the time, have created a document which is the paramount law of the land. Insofar as there are provisions in the existing law which violate the principles of fundamental justice as contemplated by s. 7 of the **Charter** or render a hearing unfair as contemplated by s. 11(d) of the **Charter**, then those provisions may be struck down. That has been done in other decisions. Counsel have touched on some of them in their submissions.

In my view when one considers the adversarial context of these proceedings as I mentioned earlier and the presumption of innocence, a fair hearing calls upon the person who carries the burden of persuasion, in this instance the Crown, to prove its case. It proves its case by calling its evidence; it proves its case by making submissions on the evidence in toto, and then the accused has the opportunity in a fair system relying on full answer and defence to make submissions on behalf of the

> accused regardless of whether or not the accused calls evidence.
>
> I am satisfied that the provision that is under consideration under s. 651(3) of the Criminal Code violates s. 7 of the **Charter** and s. 11(d) of the **Charter** and as a result is struck down and that the order of addresses will be in the order of the burden of persuasion: Counsel for the Crown followed by counsel for the accused."

Position of the Appellant

The Crown submits that s. 651(3) is designed, not to give the Crown a tactical advantage, but is rather an attempt to balance the fair trial interests of the Crown and the defence. The Crown submits:

> " In the event no evidence is called the Crown addresses the jury first. This procedure, it is submitted, is a fair one to both Crown and defence in that both parties are presenting their addresses on the basis of evidence known to both during the trial process. In the event evidence is called by the accused the Crown addresses the jury last. This procedure, it is submitted, is also fair to both Crown and defence. In this circumstance the defence knows prior to the trial what evidence the Crown intends to present. Defence also knows whether it can present evidence to diminish or attempt to diminish the effect of the Crown's case. This of course is unknown to the Crown until its case is closed.
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> When defence does call evidence the Crown is neither given time to investigate the evidence or witnesses tendered nor is it afforded the opportunity to contemplate that evidence and in a measured fashion prepare the cross-examination of these witnesses. The tactical advantage so to speak is firmly with the accused. This also is perceived as fair as it balances the resources of the state versus those of the individual accused.
>
> At the conclusion of defence evidence the Crown is afforded an opportunity to call evidence in rebuttal. The reality of the Crown's ability to utilize this provision is very limited. For example, if defence calls evidence of the accused's good character, the Crown is most unlikely to be in a position to rebut it without further investigation. Therefore, this creates a tactical advantage to the defence in catching the Crown by surprise as it will be unlikely the Crown is given the opportunity for an adjournment.

> Once the opportunity for rebuttal has been given the accused, then the Crown is given the last chance to address the jury. At this time the defence continues with an advantage because:
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> 1.) the Crown did not have the ability to prepare cross-examination in a measured fashion;
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> 2.) the Crown was unable to produce rebuttal evidence; and/or
>
> 3.) the Crown although producing rebuttal evidence was not afforded the opportunity to investigate defence evidence prior to its presentation at the trial.
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> To balance this situation the Crown is given the opportunity for the first time in the entire proceeding to know what defence will say before the Crown is required to respond. This, it is submitted, is not and does not create a tactical advantage to the Crown as stated in **Guyatt** but a balancing of fairness between society and the individual accused.
>
> The addresses themselves are required to be based on the evidence presented. Evidence the defence has known prior to trial and known to the Crown during the course of the trial. The defence cannot, it is submitted, be caught by surprise when the addresses are limited to evidence presented. Perhaps it could be suggested Defence could be at a disadvantage if it only discovered the Crown's theory at the time the address was made by the Crown to the Jury. However, in Nova Scotia it is practice for both Crown and defence to submit their theories to the jury thereby disclosing them to each other."

The Crown, of course, relies on the decision of the Ontario Court of Appeal in **Tzimopoulos**, supra, which upheld the constitutionality of s. 651(3). The Court, while stating that it would be fairer if the accused always had the last word to the jury, concluded that the current practice under s. 651(3) is not so unfair that it can be said to be incompatible with the principles of fundamental justice. Therefore, the Court held s. 651(3) did not contravene the **Charter**. The Crown asserts that this finding is consistent with the views of LaForest J. in **R. v. L.(T.P.)**, [1987] 2 S.C.R. 309 at p. 362 where he stated:

> " It seems to me that s. 7 of the **Charter** entitles the appellant

> to a fair hearing; it does not entitle him to the most favourable procedures that could possibly be imagined."

Position of the Respondent

Counsel for the respondent urges this Court to consider the decision of the Supreme Court of Canada in **R. v. Bain** (1992), 69 C.C.C. (3d) 481. In that case the Court was considering whether or not in selecting a jury the fact that the Crown had 48 stand asides together with a number of challenges violated s. 11(d) of the **Charter**. The Court held that it did. Counsel for the respondent recommends for our consideration the following passage from the decision of Mr. Justice Cory at p. 512:

> " It may well be correct that it would be impossible to prove that a jury selected after the Crown had exercised all its stand-bys and peremptory challenges was in fact biased. None the less the overwhelming numerical superiority of choice granted to the Crown creates a pervasive air of unfairness in the jury selection procedure. The jury is the ultimate decision-maker. The fate of the accused is in its hands. The jury should not as a result of the manner of its selection appear to favour the Crown over the accused. Fairness should be guiding principles of justice and the hallmark of criminal trials. Yet so long as the impugned provision of the *Code* remains, providing the Crown with the ability to select a jury that appears to be favourable to it, the whole trial process will be tainted with the appearance of obvious and overwhelming unfairness." {Counsel's emphasis}

Counsel for the respondent endorses the reasoning of Melvin J. in **Guyatt**, supra.

Existing Jurisprudence

We were advised by Crown counsel that there are decisions of other justices of the British Columbia Supreme Court, both before and after the decision of Melvin J., that take an opposite view to that of Mr. Justice Melvin. In **R. v. Kerr**, March 10th, 1995 Mr. Justice Hall of the Supreme Court of British Columbia dealt with the issue before us. In the course of his decision Hall J. stated:

" Obviously, Melvin J. had to decide the issue on short notice in the course of an ongoing jury trial. I should think therefore that the case falls into the class of what are by the authorities sometimes referred to as *nisi prius* decisions. I note that at the outset of his reasons for judgment in the case of *Guyatt*, Melvin J. stated that, 'We are under certain time constraints, consequently I will deal with this matter now.' So far as can be discerned from his reasons, he did not have the benefit of having cited to him the earlier cases decided by other judges of this Court. That being the case, I did not feel in this case constrained by the principles of *stare decisis* to adopt the conclusion of my colleague Melvin J. that s. 651(3) was constitutionally invalid. My colleague Melvin J. is widely experienced and knowledgeable concerning the principles of the criminal law and I always pay great heed to any judgment of his in this area, but I am doubtful that he would have come to the conclusion he did if he had had the opportunity to consider the earlier decisions of judges of this Court on the very point under consideration.

I should say that I am far from concluding that the particular result reached by Melvin J. in *Guyatt* was necessarily inappropriate having regard to the situation that *Guyatt* was a relatively complicated case involving primarily circumstantial evidence. I think that in a proper case a trial judge could and should exercise a discretion to allow the order of addresses of counsel provided for in sections 651(3) and 651(4) to be reversed in order to afford to the defence the last word to the jury despite the fact that the defence may have adduced evidence. I should think, however, that such cases would be rare and very much the exception. In my view, sections 651(3) and (4) are constitutionally valid and their provisions should be adhered to in most cases."

And at paragraph 21 he stated:

" If an accused person does adduce evidence at a trial, then that evidence will be the last or the most immediate to be placed before the jury. Perhaps it was thought that in order to balance this, sections 651(3) and (4) should be framed as they are. It was noted in *Tzimopoulos* that it might be desirable for the Parliament of Canada to enact legislation requiring the Crown to go first but the Ontario Court of Appeal was unable to reach a conclusion that the provisions of s. 651(3) offended the provisions of sections 7 and 11(d) of the *Charter of Rights*. That was I note also the conclusion reached by Cumming J., Josephson J. and Melnick J. of this Court in cases decided in this court between 1986 and 1993. I take the same view as did those judges."

Justice Hall concluded as follows:

> " In my view, in the absence of special circumstances, the rules concerning the order of closing addresses which are set out in sections 651(3) and (4) should normally apply but I believe that a residual discretion should to be afforded to a trial judge to enable the order to be changed in those cases where such a course is perceived by the trial judge to have an adverse impact on the fairness of the trial."

The only appellate court decisions respecting the constitutionality of s. 651(3) are the decisions of the Ontario Court of Appeal in **Tzimopoulos**, supra, and the Manitoba Court of Appeal in **The Queen v. G.(F.)** (Unreported), April 20th, 1994 (Man. C.A.). The Manitoba Court of Appeal applied the decision in **Tzimopoulos**.

Disposition of the Appeal

Obviously on January 3rd, 1995, when the learned trial judge granted the defence motion she would not have had the benefit of the reasoning of Justice Hall in **The Queen v. Kerr**, supra.

In my opinion the learned trial judge erred in ruling that s. 651(3) of the **Criminal Code** is unconstitutional.

With respect to counsel for the respondent it is my opinion that the decision in **Bain**, supra, must be distinguished on its facts. In that case Cory J., writing for the majority, held that s. 634(2) of the **Code** which provided that in addition to the prosecution's right to challenge four jurors pre-emptorily the prosecution could direct that up to 48 jurors stand aside would lead a reasonable person, fully appraised of the rights of the Crown in the selection of a jury, to

conclude that this provision of the **Code** created an apprehension of unfairness against the accused. Section 634(2) was clearly too heavily weighted in favour of the Crown and offended s. 11(d) of the **Charter**. The Court found it was not a reasonable limit that could

be saved by s. 1 of the **Charter**.

Section 651(3) of the **Code** is a far cry from s. 634(2). The remarks of Cory J. in **Bain**, supra, must be considered in the context of the obvious and marked unfairness of the Crown having 48 stand asides and the accused none. As noted in the decision of the Ontario Court of Appeal in **Tzimopoulos**, supra, studies have shown that the closing speeches by counsel to a jury may not have as great an influence on the outcome of the trial as was commonly believed. There is also a body of opinion that counsel who first addresses the jury has the advantage. If the jury is persuaded by that counsel's argument it is difficult for the counsel who speaks last to move the jurors from an established view. On the other hand there are those who consider the right to speak to the jury last is of great value. It would not appear to be of great significance who speaks first or last.

In **Tzimopoulos**, supra, the Ontario Court of Appeal, after referring to The Law Reform Commission Report that recommended that the **Code** be amended to give the accused the right to speak to the jury last stated at p. 338:

> " The preceding historical and comparative survey supports the conclusion that the appellant's submission is not devoid of merit. Indeed, we believe that it would significantly improve our criminal procedure if Parliament implemented the recommendation of the Law Reform Commission or, and perhaps even preferably, enacted legislation that gave the accused an election whether to address the jury first or last. There are undoubtedly many circumstances in which defence counsel would prefer to go first. No harm to the public interest would occur by giving the accused an option.
>
> The point with which we are concerned, however, is not whether the recommended change would result in a fairer trial. It is, rather, whether, the current practice is so unfair that it can be said to be incompatible with the principles of fundamental justice or to lead to a hearing that contravenes the *Charter*. In weighing the argument it must be remembered that, in fact, it is the trial judge who has the last word, and not counsel, and that there is an obligation on the trial judge to bring to the jury's attention any defence that fairly arises on the evidence, whether mentioned in defence counsel's address or not. Furthermore, there is some suggestion in social science research of the jury process that

> the influence of closing speeches by counsel on outcome may not be as critical as is commonly believed: see, for example, Kalven and Zeisel, *The American Jury* (1966), p. 363. To hold that our current practice causes unfair hearings is to imply that all trials in Canada in which a defence was called have hitherto been unfair. We are unaware that such a suggestion has ever been made by critics of our criminal procedure. We are not persuaded that the order of addresses prescribed by s. 578(3) offends the principles of fundamental justice guaranteed by s. 7 of the Charter or deprives an accused of a fair hearing guaranteed by s. 11(d) of the Charter."

I agree with the reasoning of the Ontario Court of Appeal in **Tzimopoulos**, supra, that s. 651(3) does not infringe the **Charter** rights of an accused. Leave to appeal that decision to the Supreme Court of Canada was refused. The Manitoba Court of Appeal in **The Queen v. G.(F.)**, supra, saw "no basis for departing from the decision" in **Tzimopoulos**. That Court went on to state: "There were other arguments raised on behalf of the accused but we find no merit in them and the appeal is therefore dismissed."

In my opinion the order of speeches as provided for in s. 651(3) does not infringe either the principles of fundamental justice nor the accused's right to a fair trial as provided for in the **Charter**. The learned trial judge erred in ruling that s. 651(3) of the **Code** was unconstitutional. The remaining issues on this appeal will be dealt with at a subsequent sitting of this panel of the Court provided, of course, that the Crown chooses to proceed to the second stage of the appeal.

Hallett, J.A.

Concurred in:

Hart, J.A.

Freeman, J.A.