PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Osborne*, 2013 NSPC 67

Date: 20130722
Docket: 2569825
Registry: Pictou

Between:

Her Majesty the Queen

v.

Micah Scott Jacob Osborne

Judge:	The Honourable Judge Del W. Atwood
Heard:	22 July 2013, in Pictou, Nova Scotia
Charge:	Para. 348(1)(b) of the *Criminal Code*
Counsel:	William Gorman, for the Nova Scotia Public Prosecution Service Stephen Robertson, Nova Scotia Legal Aid, for Micah Scott Jacob Osborne

By the Court:

[1] The Court has for decision the case of Micah Scott Jacob Osborne; Mr. Osborne is present. This is an application brought by the prosecution for an order to ban the publication of evidence taken at Mr. Osborne's trial and to ban the publication of any information that might identify any of the witnesses called at Mr. Osborne's trial.

[2] I am informed by the prosecutor that there are a number of alleged accomplices who have been charged separately with trial dates that are pending; some of those cases might turn out to be jury trials, ergo the application for the publication ban.

[3] The decision to charge separately, as opposed to jointly, is a strategic decision that is completely within the control of the prosecution in the exercise of core Crown discretion, subject to the jurisdiction of a court to join or sever. When persons who are alleged to be accomplices get charged separately, these kinds of issues arise.

[4] The question confronted by the Court today is whether the Court ought to ban the publication of evidence taken at this trial–evidence that would ordinarily be subject to full public scrutiny based on the open-courts principle–so as to preserve the fair-trial rights of those who have been charged separately and whose matters might wind up before a jury.

[5] I am satisfied that this Court would have an inherent jurisdiction to grant the application sought by the Crown, recognizing the constitutional protections under section 7 and paragraph 11(d) of the *Canadian Charter of Rights and Freedoms.* I am satisfied that the governing authority on that point is *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*.[1]

[6] The issue is whether a publication ban ought to be granted in this case. Prior to the recess, I referred to a decision out of the Newfoundland and Labrador Supreme Court, Trial Division; that was the case of *R. v. Kenny*.[2] In that case,

---

[1] [1995] 2 S.C.R. 97.

[2] (1991), 68 C.C.C. (3d) 36

Barry J. expressed the view that an accused enjoys a constitutional right to be free from excessive adverse publicity while his or her trial is pending. Kenny was accused of offences at the Mt. Cashel school and sought a stay of the criminal proceedings against him due to the extensive news reporting of the Hughes Inquiry. Barry J. declined to stay the proceedings; however, in rendering his decision, he made a number of comments on what he seemed to believe would be the almost inevitable impact supposedly excessive pre-trial publicity might have on an accused's fair-trial rights.

[7] I will interject here to point out that, in this case, the publication ban is not being sought by Mr. Osborne. The publication ban is being sought by the prosecution. Mr. Osborne is not asserting in any way that trial publicity would affect his right to a fair trial.

[8] In *Phillips*, Sopinka J., rendering the opinion of the majority, saw things somewhat differently:.

> 128 All these considerations form a part of the judicial task in determining an application to restrain an alleged impending breach of s. 11(d). They should not, however, overshadow the true goal of the analysis. What must be found in order for relief to be granted is that there is a high probability that the effect of publicizing inquiry

hearings will be to leave potential jurors so irreparably prejudiced or to so impair the presumption of innocence that a fair trial is impossible. Such a conclusion does not necessarily follow upon proof that there has been or will be a great deal of publicity given to the hearings. Evidence establishing the probable effects of the publicity is also required.

> 129 It is for this reason that I must respectfully disagree with the suggestion made by the trial judge in *Kenny*, *supra*, at p. 351, that an accused enjoys a constitutional right to "be free from excessive adverse publicity while his or her trial is pending". The right which the accused enjoys is a right to a fair trial. If excessive adverse pre-trial publicity will violate this right, then s. 24(1) of the *Charter* requires that judicial relief be given. But relief should only follow satisfactory proof of a link between the publicity and its adverse effects. Negative publicity does not, in itself, preclude a fair trial. The nexus between publicity and its lasting effects may not be susceptible of scientific proof, but the focus must be upon that link and not upon the mere existence of publicity.
>
> 130 Further, the examination of the effects of publicity cannot be undertaken in isolation. The alleged partiality of jurors can only be measured in the context of the highly developed system of safeguards which have evolved in order to prevent just such a problem. Only when these safeguards are inadequate to guarantee impartiality will s. 11(d) be breached. This simple determination requires the resolution of two difficult questions. First, what is an impartial juror? Second, when do the safeguards of the jury system prevent juror prejudice?
>
> 131 The difficulties inherent in defining an impartial jury were pointed out by Newton N. Minow and Fred H. Cate in "*Who Is an Impartial Juror in an Age of Mass Media?"* (1991), 40 American Univ. L. Rev. 631. The authors note (at pp. 637-38) that in the early days of the jury system, jurors were required to be familiar with the facts and parties to a case in order to be eligible to serve. An accused was literally "judged by his peers". Juries and trials became more sophisticated, and it was no longer seen as necessary that individual jurors be familiar with the case. As concern for the individual rights

of the accused developed, it became preferable for jurors to be objective, and this was facilitated if they had no previous knowledge of the facts. However, even before the days of television and mass media coverage, this ideal was criticized by the American writer Mark Twain, as quoted in Minow and Cate, supra, at p. 634:

> [when juries were first used] news could not travel fast, and hence [one] could easily find a jury of honest, intelligent men who had not heard of the case they were called to try -- but in our day of telegraph and newspapers [this] plan compels us to swear in juries composed of fools and rascals, because the system rigidly excludes honest men and men of brains.

132 The objective of finding 12 jurors who know nothing of the facts of a highly-publicized case is, today, patently unrealistic. Just as clearly, impartiality cannot be equated with ignorance of all the facts of the case. A definition of an impartial juror today must take into account not only all our present methods of communication and news reporting techniques, but also the heightened protection of individual rights which has existed in this country since the introduction of the *Charter* in 1982. It comes down to this: in order to hold a fair trial it must be possible to find jurors who, although familiar with the case, are able to discard any previously formed opinions and to embark upon their duties armed with both an assumption that the accused is innocent until proven otherwise, and a willingness to determine liability based solely on the evidence presented at trial.

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. The confidence in the ability of jurors to accomplish their tasks has been put in this way in *R. v. W. (D.)*, [1991] 1 S.C.R. 742, at p. 761:

> Today's jurors are intelligent and conscientious, anxious to perform their duties as jurors in the best possible manner. They are not likely to be forgetful of instructions. The following passage from *R. v. Lane and Ross* (1969), 6 C.R.N.S. 273 (Ont. S.C.), at p. 279, approved in *R. v. Corbett*, [1988] 1 S.C.R. 670, at p. 695, is apposite:
> The danger of a miscarriage of justice clearly exists and must be taken into account but, on the other hand, I do not feel that, in deciding a question of this kind, one must proceed on the assumption that jurors are morons, completely devoid of intelligence and totally incapable of understanding a rule of evidence of this type or of acting in accordance with it. If such were the case there would be no justification at all for the existence of juries. . . . *[Emphasis in original.]*

134 The solemnity of the juror's oath, the existence of procedures such as change of venue and challenge for cause, and the careful attention which jurors pay to the instructions of a judge all help to ensure that jurors will carry out their duties impartially. In rare cases, sufficient proof that these safeguards are not likely to prevent juror bias may warrant some form of relief being granted under s. 24(1) of the Charter. The relief may take many forms. It may be the enjoining of hearings at a public inquiry, a publication ban on some of the evidence given at the inquiry, a staying of the criminal charges, or the imposition of additional protections for the defence at the stage of jury selection: see, as an early example, *R. v. Kray* (1969), 53 Cr. App. R. 412, referred to with approval in *R. v. Hubbert* (1975), 29 C.C.C. (2d) 279, *aff'd* [1977] 2 S.C.R. 267. As this Court has held in the past, this type of relief will not be granted on the basis of speculation alone. Normally the time for assessing whether or not an accused's fair trial rights have been so impaired that s. 24(1) relief is

> required will be at the time of jury selection: *Vermette,* supra; *R. v. Sherratt,* [1991] 1 S.C.R. 509.
>
> 135 It is not necessary to spend time reviewing the proper method of considering a publication ban. That is now set out in the reasons of Lamer C.J. in *Dagenais v. Canadian Broadcasting Corp*. Namely, the publications ban should only be ordered when: (a) such a ban is necessary in order to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and (b) the salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban. This is the test that must be applied in this case.

[12] Recognizing the importance of the open-courts principle, recognizing as well the importance of the fundamental freedoms set out in section 2 of the *Charter*, including the freedom of the press and other media of communication, I am simply not satisfied that a publication ban of the nature sought is warranted in this case. I base this on the limited evidence presented to me this afternoon, which is simply that some of Mr. Osborne's alleged accomplices might have their cases tried in front of juries.

[13] It certainly remains open to those alleged accomplices to bring on their own applications at a later date; but, based on what the Court has heard this afternoon, I am not satisfied, applying the principles set out in the *Phillips* case, that a publication ban is required in the interests of justice.

_____

J.P.C.