SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Maguire, 2010 NSSC 200

Date: 20100521
Docket: CRH 311283
Registry: Halifax

Between:

Her Majesty the Queen

versus

Desmond Thomas Maguire
Ashley Elizabeth Haley

Judge:	The Honourable Justice C. Richard Coughlan
Heard:	May 12, 17 and 21, 2010, in Halifax, Nova Scotia
Decision:	May 21, 2010 (Orally) (Re *Charter* Application and Change of Venue Application)
Written Release of Decision:	July 13, 2010
Counsel:	William D. Delaney and I. Robert Morrison, for the Crown Robert L. Rideout, for the accused, Desmond Thomas Maguire Kevin A. Burke, Q.C. and Allison Kouzovnikov, for the accused, Ashley Elizabeth Haley

Coughlan, J.: (Orally)

[1] Ashley Elizabeth Haley and Desmond Thomas Maguire are charged with the first degree murder of Jennifer Horne. They apply pursuant to ss. 7, 11(d) and 24(1) of the *Canadian Charter of Rights and Freedoms* for an order granting a trial by judge alone or, in the alternative, a change in venue of their trial from Halifax to Kentville, Nova Scotia, or such other location as may be ordered by the Court.

[2] Ms. Haley and Mr. Maguire say extensive and prejudicial pretrial publicity, and activities of family and support groups, have created an apprehension of bias if a jury trial proceeds in Halifax that cannot be remedied through means other than those specified in the order sought.

[3] The relevant provisions of the *Charter* are:

> **7. Life, liberty and security of person -** Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
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> **11. Proceedings in criminal and penal matters -** Any person charged with an offence has the right
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> (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;
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> **24.(1) Enforcement of guaranteed rights and freedoms -** Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

[4] Relevant sections of the *Criminal Code* are:

> **471. Trial by jury compulsory -** Except where otherwise expressly provided by law, every accused who is charged with an indictable offence shall be tried by a court composed of a judge and jury.
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> . . . .
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> **473.(1) Trial without jury -** Notwithstanding anything in this Act, an accused charged with an offence listed in section 469 may, with the consent of the accused and the Attorney General, be tried without a jury by a judge of a superior court of criminal jurisdiction.
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> **599.(1) Reasons for change of venue -** A court before which an accused is or may be indicted, at any term or sittings thereof, or a judge who may hold or sit in that court, may at any time before or after an indictment is found, on the application of the prosecutor or the accused, order the trial to be held in a territorial division in the same province other than that in which the offence would otherwise be tried if
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> (a) it appears expedient to the ends of justice.

[5] Murder, which is dealt with in s. 235 of the *Criminal Code*, is an offence listed in s. 469 of the *Code*.

[6] The question for me is whether Ms. Haley and Mr. Maguire have shown on a balance of probabilities their rights under s. 7 and 11(d) of the *Charter* not to be deprived of liberty except in accordance with the principles of fundamental justice, and to have a fair hearing before an independent and impartial tribunal have been breached.

[7] Ms. Haley and Mr. Maguire were charged on January 2, 2008. A preliminary inquiry was held and the accused were committed to stand trial on May 11, 2009. Ms. Haley and Mr. Maguire made application for a change of venue of the trial which application was scheduled to be heard April 27, 2010. On April 27, 2010, counsel for Ms. Haley stated he was not proceeding with the change of venue application, but rather wished to bring the application pursuant to the *Charter,* which is before the Court today. Counsel for Ms. Haley stated Ms. Haley wished the trial to proceed before a judge without a jury. Mr. Maguire joined in

the application. Counsel for the Attorney General refused to consent to a trial before a judge without a jury.

[8] An accused does not have a constitutional right to a trial by judge alone. An accused has a right to a jury trial (see *Turpin and Siddiqui v. The Queen* (1989), 48 C.C.C. (3d) 8 (S.C.C.)).

[9] In dealing with refusal by the Attorney General to consent to a change in the mode of trial, Finlayson, J.A., in giving the judgment of the Ontario Court of Appeal in *R. v. E.(L.)* (1995), 94 C.C.C. (3d) 228, stated at p. 239:

> ... In my opinion, the authorities have consistently held that the overriding discretion as to the manner in which the Crown conducts a trial can only be overruled when the accused has established that there has been an abuse of process which impairs the fair trial of the accused. ...

[10] And at para. 27:

> ... While I do not believe that the Crown has an unfettered right to withhold consent to a re-election under s. 561(1)(c), the court cannot review this exercise of statutory discretion relating to the mode of trial unless it has been demonstrated on the record that there has been an abuse of the court's process through oppressive proceedings on the part of the Crown. I would think that there would have to be some showing before the trial judge that the Crown had exercised its discretion arbitrarily, capriciously or for some improper motive so as to invite an examination as to whether there was an abuse of process under s. 7 of the Charter. As authority for this statement, I rely by extension on what was said by La Forest J., speaking for the Supreme Court of Canada, in *R. v. Beare* (1988), 45 C.C.C. (3d) 57 at p. 76, 55 D.L.R. (4th) 481, [1988] 2 S.C.R. 387:
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> > The existence of the discretion conferred by the statutory provisions does not, in my view, offend principles of fundamental justice. Discretion is an essential feature of the criminal justice system. A system that attempted to eliminate discretion would be unworkably complex and rigid. Police necessarily exercise discretion in deciding when to lay charges, to arrest and to conduct incidental searches, as prosecutors do in deciding whether or not to withdraw a charge, enter a stay, consent to an adjournment, proceed by way of indictment or summary conviction, launch an appeal and so on.

> The *Criminal Code* provides no guidelines for the exercise of discretion in any of these areas. The day-to-day operation of law enforcement and the criminal justice system none the less depends upon the exercise of that discretion.

[11] Detective Constable Sean Martin, a member of the Halifax Regional Police, testified he was the officer who drafted the judicial authorizations in the investigation which led to the charge before the Court. He thinks there were nine judicial authorizations.

[12] In the case of the first warrant, Detective Constable Martin prepared the Information to Obtain Warrant on December 31, 2007. He contacted Chief Judge Curran and met with Chief Judge Curran, which resulted in the warrant being issued at 1:00 a.m. on January 1, 2008. Detective Constable Martin did not request the Information to Obtain Warrant be sealed, which he described as an oversight on his part. Detective Constable Martin did not consult with his police superiors or Crown counsel as to whether a sealing order should be requested.

[13] In the case of the second warrant, Detective Constable Martin did not seek an order sealing the Information to Obtain Warrant.

[14] In the case of the third warrant, by the time the request for the warrant was made, Detective Constable Martin spoke to other officers and requested the Information to Obtain Warrant be sealed. Chief Judge Curran did not grant the sealing order. In the case of subsequent warrants in the investigation, Detective Constable Martin applied for sealing orders, which were granted.

[15] In support of the application I have been referred to a number of cases.

[16] In *R. v. McGregor* (1992), 14 C.R.R. (2d) 155, a decision of the Ontario Superior Court of Justice, Charron, J., as she then was, held on the facts of the case at p. 165:

> On the particular facts of this case, the exercise of the Crown's discretion in refusing to consent to a trial by judge alone has resulted in an infringement of the accused's right to a trial by an independent and impartial tribunal as guaranteed under ss. 11(*d*) and s. 7 of the *Charter*.

[17] The decision was upheld on appeal by the Ontario Court of Appeal. However, the facts in *R. v. McGregor* were very different from the evidence before me. In that case, there was evidence of the results of a public opinion poll showing 59% of those polled considered a finding of not guilty by reason of insanity was not acceptable. There was also expert evidence adduced in support of the application.

[18] In *Krieger v. Law Society of Alberta*, [2002] 3 S.C.R. 372, the issue before the Court was whether the Law Society had jurisdiction to review the conduct of a prosecutor to determine whether the prosecutor acted dishonestly or in bad faith in failing to disclose relevant information to an accused in a timely manner, notwithstanding his employee, the Attorney General, had reviewed it from the perspective of an employer. The Court found the Law Society did have such jurisdiction.

[19] If evidence of conduct amounting to bad faith or dishonesty is present, that is a situation in which a court could dispense with the requirement of the Attorney General's consent to a trial by judge alone, as there would be evidence of an abuse of process.

[20] In *R. v. De Zen*, [2010] O.J. No. 601, a decision of the Ontario Superior Court of Justice, the facts are very different from the present case. As Brown, J. stated, starting at para. 35:

> Applying that standard, I am of the view that the applicants have established on a balance of probabilities that the conduct of the Crown in this case has resulted in an abuse of process. I am satisfied that the s. 7 *Charter* rights of the applicants have been violated. Objectivity and fairness is an ongoing responsibility of the Crown, at every stage of the proceeding. In my view, the decision of the D.P.P. to invoke s. 568 of the *Criminal Code* to require a jury trial in this case was not made in a fair and objective way. By acting as they did, the Crown in this case has contravened fundamental notions of justice and undermined the integrity of the judicial process. As noted by the Supreme Court in *Krieger* and *Regan*, where Crown fairness and objectivity is shown to be lacking, corrective action may be necessary to protect the integrity of the criminal justice system. In my view, this is one of those cases.
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> In coming to this conclusion, I rely, in particular, upon the following circumstances:

(a) The fact that the Crown had known for an extended period of time prior to issuing the Requirement of the applicants' intention to elect trial in the Ontario Court of Justice;

(b) The fact that the Requirement was imposed only after a specific trial judge had been named;

(c) The fact that the Crown participated in extensive pre-trial discussions focused on how to bring about an expeditious and efficient trial in the Ontario Court of Justice by, *inter alia*, consideration of detailed admissions to be made before the presiding trial judge. This required the expenditure of considerable time and resources by the defence;

(d) The fact that the D.P.P. made this decision without providing any notice whatsoever to the accused;

(e) The fact that the D.P.P. has provided no explanation whatsoever for its exercise of this extraordinary power.

[21] In the cases cited, an abuse of process was found on the facts.

[22] Absent evidence which establishes on a balance of probabilities an abuse of process, showing the Crown has exercised its discretion arbitrarily, capriciously or for some improper motive, I cannot review its exercise of discretion. There is no such evidence before me.

[23] Ms. Haley and Mr. Maguire seek a change of venue of the trial. The murder is alleged to have taken place at Dartmouth, in the Halifax Regional Municipality. Halifax is the place where the trial would normally take place.

[24] In *R. v. Suzack* (2000), 141 C.C.C. (3d) 449, the Ontario Court of Appeal dealt with the issue of change of venue. Doherty, J.A., in giving the Court's judgment, stated at p. 464:

> It is a well-established principle that criminal trials should be held in the venue in which the alleged crime took place. This principle serves both the interests of the community and those of the accused. There will, however, be cases where either or both the community's interests and the accused's interests in a fair trial are best served by a trial in some other venue. Section 599(1)(a) of the *Criminal Code* provides in part:

> 599(1) A court ... upon the application of the prosecutor or the accused [may] order the trial to be held in a territorial division in the same province other than that in which the offence would otherwise be tried if
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> (a) it appears expedient to the ends of justice ...
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> As the section indicates, a change of venue should be ordered where the judge is satisfied that it "appears expedient to the ends of justice". This determination will depend on the judge's assessment of the evidence led on the application and the weighing of the various factors which favour or tell against a change of venue. In short, the trial judge's decision requires an exercise of discretion.

[25] Have Ms. Haley and Mr. Maguire shown on a balance of probabilities there is a fair and reasonable likelihood of partiality or prejudice in the Halifax Regional Municipality, which cannot be overcome by the safeguards in jury selection, including the oath, instructions from the trial judge to the jury panel, jury screening, peremptory challenges, challenges for cause and the rules of evidence?

[26] Nova Scotia is a small province. The largest population centre is the Halifax Regional Municipality. The largest jury pool in the Province is available in Halifax. The Chronicle Herald, the daily newspaper, has a province wide circulation. The television stations broadcast province wide. The publicity in Kentville, or other towns in Nova Scotia, would be the same as in the Halifax Regional Municipality as the daily newspaper and the television stations have province wide circulation and broadcast. The population base in Halifax and the province wide press militates against a change of venue from Halifax.

[27] In reviewing the newspaper articles placed in evidence, it is clear the reporting of details derived from the Informations to Obtain Search Warrant occurred in the period shortly after charges were laid. Since February, 2008, the press reports have mainly dealt with procedural matters. More than two years have passed since details from the Informations to Obtain Search Warrant have been published.

[28] There were Facebook groups established concerning the murder of Ms. Horne. Some intemperate statements were made on these Facebook sites. In the Facebook Articles Booklet entered into evidence in support of the application, it is

set out that there are 1,692 members of Facebook sites. There is no evidence as to the place of residence of the members of the Facebook sites - they may or may not be in the Halifax Regional Municipality. The existence of these Facebook sites do not show an impartial jury could not be had in Halifax. The jury selection process, including the challenge for cause procedure, can be utilized to deal with the Facebook issue.

[29] There were fund raising events held to fund a trust fund said to be established to assist Ms. Horne's parents with funeral costs, counselling and lost income. The applicants have the names of individuals and companies which contributed to the trust fund which can be used in the jury selection process.

[30] After various court appearances, members of Ms. Horne's family gave statements to the press.

[31] The matters raised by Ms. Haley and Mr. Maguire do not show a general prejudicial attitude in the community as a whole so as to justify a change in venue. They can be dealt with by the safeguards in the jury selection process.

[32] This case is similar to the case of *R. v. Suzack, supra*, in that the strongest source of potential prejudice is exposure to the facts of the case. In *R. v. Suzack*, Doherty, J.A., in dealing with such a situation, stated at p. 466:

> Where the real potential for prejudice lies in the evidence which the jury eventually selected to try the case will hear, a change of venue does not assist in protecting an accused's right to a fair trial. The many safeguards built into the trial process itself must provide that protection. Trainor J. properly considered the real source of the potential prejudice to the appellants' fair trial interests in considering whether a change of venue would serve the ends of justice.

[33] Ms. Haley and Mr. Maguire have all the safeguards in the jury selection process, including the oath, instructions from the trial judge to the jury panel, peremptory challenges, challenges for cause and the rules of evidence. It has not been shown on a balance of probabilities that there is a fair and reasonable likelihood of partiality or prejudice in the Halifax Regional Municipality. There is not evidence that despite the available safeguards there is a reasonable likelihood Ms. Haley or Mr. Maguire cannot receive a fair trial in Halifax.

[34] Ms. Haley and Mr. Maguire have not established on a balance of probabilities their rights pursuant to s. 7 or 11(d) of the *Charter* have been infringed.

[35] I am mindful of the words of La Forest, J., in writing for the majority, in *R. v. Vermette*, [1988] 1 S.C.R. 985 at p. 992:

> As regards the motion based on the provisions of the *Charter*, I am completely in agreement with the reasons given by the dissenting judges. In my view, a stay of proceedings was, in this case, premature. It is only at the stage when the jury is to be selected that it will be possible to determine whether the respondent can be tried by an impartial jury. This does not therefore involve substituting our opinion for that of the judge. As Beauregard J. notes, there is no evidence indicating that it will be impossible to select an impartial jury in a reasonable time. This is rather a matter of speculation.

[36] It may be at the stage when the jury is selected it will be possible to determine whether Mr. Maguire and Ms. Haley can be tried by an impartial jury. A *Charter* application may be brought at any time during a trial.

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Coughlan, J.