SUPREME COURT OF NOVA SCOTIA
Citation: R v. W. H. A., 2011 NSSC 165

Date: 20110429
Docket: CRAT 336695
Registry: Antigonish

Between:

Her Majesty The Queen

v.

W. H. A.

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

Restriction on publication: Section 486.4 of the *Criminal Code*

Judge: The Honourable Justice Peter P. Rosinski

Heard: April 18, 2011, in Antigonish, Nova Scotia

Counsel: Catherine Ashley, for the Provincial Crown
Coline Morrow, for the Accused

By the Court:

Introduction

[1] Section 11 of the *Charter of Rights* reads in part:

> "Any person charged with an offence has the right...
>
> (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and **impartial tribunal**...
>
> (f) to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for 5 years or a more severe punishment."

[2] At its core an "impartial" trier of fact in a criminal case requires that:

> The trier of fact
>
> 1. Be impartial; **and**
>
> 2. Be perceived to be impartial.

[3] Therefore Mr. A. is entitled to a trial by a jury whose jurors are each,

1. Impartial or indifferent as to the outcome between Mr. A. and the Queen; **and**

2. Perceived to be impartial or indifferent as to the outcome between Mr. A. and the Queen.

[4] Mr. A. applied to the Court April 19, 2011, pursuant to s. 638(1)(b) for permission to challenge every potential juror on the basis that the jurors may not be indifferent between the Queen and Mr. A. as to the outcome.

[5] Mr. A. has requested that he be allowed to question all potential jurors as follows:

1. Do you know directly or indirectly anyone involved in this case?

2. Do you have any beliefs or opinions about black men and the commission of crime, particularly crime involving sexual assault, that would prevent you from judging the evidence in this case without bias, prejudice or impartiality?

3. Have you formed any opinions with respect to the guilt or innocence of the individual being charged with respect to this incident?

4. Do you believe that you are capable of reaching a fair and objective verdict based solely upon the evidence presented at trial and any legal instruction provided to you by The Court?

[6] I make the following rulings as to these proposed questions:

1. This concern is adequately covered in the "specific exemptions" process;

2. This concern is reasonably arguable, although the form of the question is not fulsome enough in that it does not touch on the inter racial aspect that Mr. A. identifies in his pre-trial brief.

3. This concern is adequately covered by the oath the jurors take before assuming their position as triers of fact **and** my instructions to them during the trial.

4. This concern is also adequately covered by the oath jurors take before assuming their position as triers of fact **and** my instructions to them during the trial.

The concern that Mr. A., as an adult African Canadian male, who is charged with sexual assault upon a 17 year old Caucasian female, will not receive a fair trial without the opportunity to challenge potential jurors.

[7] The existing case law establishes the following propositions:

1. The proper approach for a judge is to ask/consider:

(a) "Candidates for jury duty are presumed to be indifferent / impartial" per McLachlin, J. (as she then was) *R v. Williams* [1998] 3 SCR 1128 at para. 13.

(b) "... racial prejudice interfering with juror's impartiality... involves making distinctions on the basis of class or category without regard to individual merit. It rests on preconceptions and unchallenged assumptions that unconsciously shape the daily behaviour of

individuals. Buried deep in the human psyche, these preconceptions cannot be easily and effectively identified and set aside, even if one wishes to do so. For this reason, it cannot be assumed that judicial directions to act impartially will always effectively counter racial prejudice... where doubts arise, the better policy is to err on the side of caution and permit prejudices to be examined. **It is better to risk allowing what are unnecessary challenges, than to risk prohibiting challenges which are necessary...**"; - *Williams* paras. 21-22.

(c) However, "before the Crown or the Accused can challenge and question them, they must raise concerns which displace that presumption". - para. 13 *Williams*.

2. To rebut that presumption there must exist "a realistic potential for [the existence of] partiality" - para. 23 per Binnie, J. In *R v. Spence* [2005] 3 SCR 458.

3. This requires satisfying the Court that:

(i) a widespread bias exists in the community; **and**

(ii) some jurors **may be** incapable of setting aside this bias, despite trial safeguards, to render an impartial decision.

- para. 26 *Spence*

- paras. 32-33 *Williams*

4. To so satisfy the Court, the party may rely on:

(i) Evidence

(ii) Judicial Notice

- para. 54 *Williams*

- para. 56 *Spence*

5. Once this threshold is passed, one must draw the "fairness" line more precisely.

- para. 76 *Spence*

- paras. 53, 55 - 56 *Williams*

The challenge question(s) should succintly set a foundation upon which the triers can fairly and precisely come to a decision regarding "whether the candidate in question **will be** able to act impartially" - para. 33 *Williams*.

Why the Challenge for Cause ought to be allowed in this case.

[8] Mr. A. has not put any “evidence”, in the form of affidavits / testimony, before the Court to support his position.

[9] He does however, rely on history, and judicial notice.

[10] The Crown argues that the “materials as provided by Mr. A. do not establish that there is a realistic potential for partiality” in the community - p. 2 of pre-trial brief dated April 23, 2011.

[11] The “community” in this case is the area from which the potential jury members are drawn. According to s. 2(2) *Juries Act* / s. 2(d) *Juries Regulations*, that area is Antigonish and Guysborough Counties.

[12] I have only had a short interval of time within which to consider of what facts I can take judicial notice; that is facts accepted as proved, without the need for evidence.

[13] I am unaware of any studies regarding the existence of a widespread racial prejudice in the community per se.

[14] However, the presence of a widespread racial prejudice against African Canadians in Nova Scotia has been documented in the past and may lead to a conclusion of a realistic potential for partiality. - *R v. Parks* (1993) 84 CCC (3d) 353 (Ont CA) per Doherty, JA at para. 47; which case was approvingly cited in *R v. Lawrence* 2001 NSCA 44 at para. 105 by Flinn, JA for our Court of Appeal; *R v. Spence* [2005] 3 SCR 458 at paras. 33 and 73 per Binnie, ; *Barton v. Sobeys Group Inc.* 2009 NSSC 75 (in which Coughlan, J. allowed a challenge for racial prejudice in a civil case proceeding in Digby County - see especially paras. 16 - 17); *R v. Smith* 2003 NSSC 355 per MacAdam, J. who was following up a preliminary finding on this issue by Cacchione, J.

[15] I find, given the limited information available to me, that it is appropriate for me to conclude that in the “community” there were historically areas that were specifically settled by African Canadians - e.g. Lincolnville, Sunnyville, Tracadie and Linwood.

[16] There is no reason why the existence in Nova Scotia of racial prejudice would not also be present in this "community" also. I prefer to "risk allowing what are unnecessary challenges than to risk prohibiting challenges which are necessary".

[17] I conclude there is a realistic potential for partiality (racial prejudice) in the case at Bar.

[18] Moreover, I am persuaded that allowing a Challenge for Cause is appropriate in the interests of justice here because:

1. The concern over a racial prejudice factor is increased where the accused is a mature "black" male and the complainant is a 17 year old "white" female - *R v. DC* (1999) 139 CCC (3d) 258 (Ont CA) at para. 7; *R v. Spence* supra at para. 52;

2. There are at least 3 benefits to allowing such a question - *R v. Parks* supra at para. 92, per Doherty, JA;

3. Similarly as Binnie, J. Stated in *Spence* supra at paras. 75 - 77:

> "Trial fairness trumps technicalities. If the trial judge were persuaded that the appearance of fairness to [the Accused] required the full *Parks* question, he ought to have permitted it, regardless of his recollection of the *Parks* question, the state of the social science or the nuanced limits of judicial notice."

[19] My sense of the circumstances here is that the appearance of fairness to Mr. A. requires that the Challenge for Cause be permitted.

The Form of the Question

[20] Mr. A. has proposed:

> "Do you have any beliefs or opinions about black men and the commission of crime, particularly crime involving sexual assault, that would prevent you from judging the evidence in this case, without bias, prejudice or partiality?"

[21] In *R v. DC* (1999) 139 CCC (3d) 258 (Ont CA) an accused black man was to be tried by jury for a sexual assault on a young white female. He proposed an offence appropriate variation of the "standard *Parks* question" which refers to the inter-racial aspect - para. 2. The "standard *Parks* question" reads:

> "Would your ability to judge the evidence in the case without bias, prejudice or partiality be affected by the fact that the person charged is black and the deceased is a white man?"

[22] In *DC* the trial judge refused to allow a reference to the victim being a white female. The Ontario Court of Appeal ordered a retrial on this issue - para. 8.

[23] The Crown in the case at Bar proposed the following question:

> "Would your ability to judge the evidence in the case without bias, prejudice or partiality, be affected by the fact that the person charged is African Nova Scotian and the complainant is Caucasian?"

Conclusion

[24] I believe the appropriate form of the question should be as follows:

> "Would your ability to judge the evidence in this case without bias, prejudice or partiality, be affected by the fact that the person charged is a black male, and the complainant is a white female?"

[25] I realize that I could ask a supplementary question:

> "If yes, are you able to set aside any bias, prejudice or partiality you have, and give an honest and true verdict according to the evidence and my instructions?

However, I decline to do that in order to ensure it more likely that the potential jurors are impartial.

[26] Therefore, I order that the Challenge for Cause will be restricted to this one question.

J.