

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: R. v. Simpson, 2011 NSSC 251

Date: 20110303

Docket: Amh 321840

Registry: Amherst

Between:

Her Majesty the Queen

v.

Dean Allison Simpson

Decision on Motion for Mistrial

Judge: The Honourable Justice Patrick J. Duncan

Heard: 03 March 2011, in Amherst, Nova Scotia

Written Decision: June 23, 2011

Counsel: Mr. Douglas Shatford, Q.C., for the crown
Mr. Dean Simpson, self represented

By the Court:

[1] The facts on this motion for a mistrial, which is how it's been presented, are as follows: that late yesterday afternoon, after the jury was excused for the day, the crown attorney, Mr. Shatford, advised of a conversation that he had with a sheriff identified as Stacy Hunter, that may have been overheard by a juror. I received representations from Mr. Shatford as well as evidence, sworn evidence from Sheriff Hunter, and concluded at the end of that inquiry that there was no basis upon which I would consider discharging the juror who was thought to have overheard the discussion.

[2] This morning, after the jury was brought in, Mr. Simpson made a comment that caused me to question whether he needed a ruling on a matter of law, and so with his agreement I excused the jury. And so once the jury was excluded, he made this motion for a mistrial. Here was the basis on which he expressed his concerns. I think it is fair to say that Mr. Simpson is representing himself, but while the strength of the legal argument is not increased by the passion with which one speaks, I think it does bear noting that in this circumstance, Mr. Simpson has very strong feelings about what happened, why it is wrong and why the proper result is a mistrial.

[3] In essence, I summarize his points in this way: he advised that Sheriff Hunter is the wife of the lead investigator, who was the first witness for the crown yesterday, being Sergeant Tim Hunter of the Amherst Police, and that in her role as one of the sheriffs in whose care the jury are, Sheriff Hunter was in a position to have regular contact with jurors, and have the opportunity to have contact with them.

[4] Now the more specific concerns that he expressed were first of all that the privacy of the jury conversations was put at risk by the possibility of Sheriff Hunter overhearing them; secondly, that if she did in fact overhear juror conversations, there was an opportunity for her to convey that information to outside, unrelated persons, including, and I think the inference is clear from Mr. Simpson that what he is concerned about is that there would be comments going back to Sergeant Hunter or other police witnesses. The third concern, as I understand his position, is that Sheriff Hunter had the opportunity to influence jurors in an inappropriate fashion, just by virtue of her regular contact. Fourth, that if jurors knew who she was, then there was the potential for their deliberations to be inhibited by the possibility that she would overhear their discussions, and that

perhaps they would be less than frank in their assessments of evidence such as that of Sergeant Hunter, because if they knew that she was his wife and sitting in a position where she might be able to hear them, that they would not want to say anything adverse to him. So these are the concerns as I understand it, that Mr. Simpson has put forward.

[5] In his submission, Mr. Simpson takes the position that even if these things did not happen, he would not feel, could not feel that he was getting a fair trial, and that therefore his section 11(d) *Charter* right to a fair trial has, would have been infringed or denied him.

[6] The crown response has been that the trial should continue with the jury.

[7] And I should say, I left out one part, that this morning, after being alerted to Mr. Simpson's concerns, I had Sheriff Hunter recalled, resworn, and posed a series of questions to her that reflected the concerns of Mr. Simpson. In short, what Sheriff Hunter has testified to is that, and I am not going to go through it in detail, I will summarize it, is yes, that she does have contact with the jurors. She takes roll call, says good morning to them, provides for them in the jury room by supplying

water and fruit and other things, but that otherwise her supervisor and the jury manager, Sheriff Haynes, is the only person who speaks to the jury. She does not have conversations with them. It is not her role to do that. She reviewed again the circumstances under which she had the conversation with Mr. Shatford, which I had previously ruled on.

[8] In cross examination by Mr. Simpson, she described the entryway to the jury room, and the jury room, that there are two doors and what I will characterize as a little vestibule between the two doors going into the jury room. Mr. Simpson forcefully put the question to her that she could be standing in that little area listening without anybody knowing, and while she quite candidly acknowledged that that was a possibility, that she had not done that, and would not do that, I think is the clear inference.

[9] Following her testimony, I heard from Sheriff Brian Haynes, the jury manager, and he, from my perspective essentially confirmed what Sheriff Hunter indicated. I did not go into the same kind of detail with him. I was more concerned with understanding what her general responsibilities and access to the jury would be.

[10] So Sheriff Haynes confirmed essentially that she does have access, but he also confirmed that she would be removed from that duty and put to other, to duties in another courthouse to avoid any future contact. So that is the factual underpinnings for the situation.

[11] Now going back to the crown's submission is, is that there is no evidence to support a conclusion of an improper contact between Sheriff Hunter and the jurors, and that therefore the trial should continue, without any further action being taken.

[12] In my brief recess, I have had an opportunity to review what the applicable law is, and I specifically refer to the cases of *R. v. Sawyer* and *R. v. Pan*, jointly decided at [2001] 2 S.C.R. 344. I also considered the case of *R. v. Khan* [2001] 3 S.C.R. 823. What I am directed by those cases is as follows: First that whether to grant a mistrial or not is a discretion that rests with me. Secondly, and this comes largely from *R. v. Sawyer (supra)* and *R. v. Pan (supra)*, I am reminded in fairly strong terms in that decision that the principle of a jury conducting its deliberations in secret without outside influence or extrinsic influence has deep roots in English law, and that jurors must feel free to express their views in the jury room. There

cannot be any suggestion of tarnish that would undermine a verdict, whether it be an acquittal or a conviction. There cannot be anything that may cast what would be a permanent shadow over the result. The court makes it clear that circumstances or factual situations which put in doubt the integrity of the jury deliberation process, both during the trial and in the actual verdict deliberation process, goes to the very integrity of the jury system, as a decision maker in criminal trials, which is a constitutionally entrenched right. Jury secrecy is a vital and necessary component of the jury system, and the principles of fundamental justice as set out in the *Charter of Rights* include that the integrity of the jury system be preserved.

[13] Let me say at the outset I am absolutely satisfied there has been no improper contact by Sheriff Hunter with the jury. I do not have a bit of doubt about that in my mind. Mr. Simpson, let me finish. I am satisfied that she has not done anything improper in terms of any communication, but I recognize that Mr. Simpson will always question whether that was so. Let me finish, okay. I recognize that Mr. Simpson always would question that was so. For the record, Mr. Simpson just stood up in the middle of my decision, showing some unhappiness, shall we say. I have instructed him to return to his seat and let me complete my decision.

[14] I have considered this very carefully. It is not just Mr. Simpson whose views I would be concerned about. I also have to measure this against the reasonable person on the street, and whether they would share that concern. Mr. Simpson's liberty is at stake in this trial. If the long standing maxim has any meaning, then this is probably one of those situations where it has to be given effect, and that maxim is this: Justice must not only be done, but it must be seen to be done. I am concerned that there is a real apprehension of impropriety. I have already said I do not find impropriety, but I am concerned about the appearance of it in these circumstances.

[15] What are my options, having reached that conclusion? Well, first I can bring the jury in and poll them to determine their ability to render a fair and impartial verdict on the evidence in the trial. To do this, as I assess it, would require that I inform them of the problem, in enough detail that it may in turn create new issues, and it could turn or influence them...it may not influence them at all, but it could influence them against either party. They may, for example, take the view that this was something that the prosecution was party to and that it was improper, and in some way exercise bias against the prosecution, and in particular how they might

assess Sergeant Hunter's evidence. They might, on the other hand, look at it as being an unnecessary interruption and a questioning of their integrity by the accused, in bringing the matter forward. That is the difficulty in bringing them in and trying to assess whether they could be fair about it. I see a great potential for it to turn against either party.

[16] So I am not satisfied either that I can correct any improper inferences they might take. I have actively considered, can I cure this problem in my closing charge or in a mid-trial instruction? I am not satisfied that that will undo the harm that has been done.

[17] The second possibility is to do what Mr. Shatford has suggested, which is simply to carry on with the trial, and that certainly holds some attraction to me, but at the end of the day I do not think that it really addresses the problem that I have expressed, nor does it properly respect the principles enunciated by the Supreme Court of Canada that I have just outlined.

[18] The last option is a mistrial, and I fully recognize that it is not to be done lightly. If I am inclined to do that, it is with great reluctance.

[19] I have concluded that I am satisfied that this trial cannot continue with this jury.

[20] I will provide the decision on the *voir dire* right away, we'll bring the jury back in, and I'll discharge and declare a mistrial, and then we'll reconvene after lunch, depending on what time we get out of here, for the sole purpose of setting a new trial date, and setting any further preliminary issues that are now arising and getting that all out of the way. Understand, Mr. Simpson?

J.