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Docket: CR 154808
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CR 154824

IN THE SUPREME COURT OF NOVA SCOTIA
[Cite as: R. v. Lalo, 2001 NSSC 169]

Between:

HER MAJESTY THE QUEEN

- versus -

CESAR LALO

DECISION RESPECTING DEFENCE APPLICATION TO QUASH

BAN ON PUBLICATION UNDER SECTION 486 CC (SEXUAL ASSAULT)

Editorial Notice

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

Heard: **at Halifax, before the Honourable Justice M. Heather Robertson on October 11, 2001**

Date of Written Decision: **November 7, 2001**

Counsel: **Bernadette Macdonald, for the Crown**
Maurice G. Smith, Q.C. and Cindy Murray, for the defence

ROBERTSON, J.:

[1] This is a defence application to quash six indictments that contain all of the outstanding charges against the accused, Cesar Lalo. Defence counsel submit that the Crown had no authority to unilaterally sever the original single indictment containing 136 counts and involving 51 complainants (SH 150003) which was filed by the Crown in the Provincial Court on October 30, 1998 and replace it on March 15, 1999 with the six indictments before this court. They say that the original single indictment was preferred against Cesar Lalo upon his first appearance before the trial judge at the pre-trial haring held on January 5, 1999 or at the latest on February 11, 1999 at the commencement of the application for funded counsel. They argue that by the replacement of the original indictment with six new indictments and the subsequent withdrawal of the original indictment, the proceeding relating to the original indictment was brought to an end. They argue further that the Crown has disregarded the provisions of sections 574 and 577 of the *Criminal Code* and therefore any trial on the charges contained in the six indictments would be a nullity. Therefore, they submit these charges must be quashed.

FACTS

[2] The accused, Cesar Lalo presently faces 73 criminal charges in relation to 31 complainants before this court. The criminal charges are alleged to have occurred over a 22 year period from January 1, 1967 to November 1, 1989. The criminal charges are "historic sexual assaults" which occurred principally while the accused was a youth court probation officer (1975 onward) or at an earlier time when he was a child protection worker for the City of Dartmouth.

[3] On September 9, 1998 the Crown and Mr. Brian Smith, Q.C. who acted on an appearance by appearance basis, appeared before the Honourable Judge Patrick Curran for the purpose of a preliminary inquiry, scheduled from that date to January 29, 1999. On September 9, 1998 the Crown withdrew all of the outstanding informations alleging offences against Cesar Lalo and proceeded on a single consolidated information containing 133 criminal charges and relating to 49 complainants. At the request of defence counsel, the preliminary inquiry was adjourned to September 17, 1998 pending the outcome of a defence application for a conditional stay of proceeding in the Supreme Court.

[4] That application was heard on September 15 to September 18, 1998 before the Honourable Justice Suzanne Hood. In an oral decision delivered on September 18 (written form of the decision released October 9, 1998) the defence

application was denied. The accused was ordered to represent himself at the preliminary inquiry. He was allowed one month to prepare for this inquiry. Accordingly, on September 17, 1998 Judge Curran adjourned the preliminary inquiry to October 19, 1998. On that date, Cesar Lalo appeared before Judge Curran representing himself. Also, on that date a new information (sworn October 7, 1998) alleging three offences in relation to two additional complainants was before the court. Cesar Lalo was arraigned on these charges and elected trial by judge and jury. Mr. Lalo waived his right to a preliminary hearing and was ordered to stand trial on all the charges before the court.

[5] The matter was before Crownside on October 30, 1998. Brian Smith, Q.C. appeared on behalf of the accused. The Crown presented a single 133 count indictment to the court. A second application for a stay of proceeding was scheduled for February 9, 10, and 11, 1999. The single consolidated information actually referred to 137 criminal charges, however, there was numerical error and there were no counts by #'s 81, 82, 83 and 84. At Crownside on November 13, 1998 and November 27, 1998 the matter of trial dates was addressed. On both occasions, the accused was present with his counsel Mr. Brian Smith, Q.C. Again, Mr. Lalo was present represented by Mr. Brian Smith, Q.C. A pre-trial conference was held before me on January 5, 1999. This was the first time the accused was before me. No trial dates were set pending the outcome of the second application for a conditional stay of proceeding.

[6] On February 9, 10, and 11, 1999 a defence application for state funded counsel of choice was heard before the court. The application was dismissed. An oral decision was provided on February 11, 1999. A written decision was released on March 12, 1999.

[7] On March 15, 1999 a pre-trial conference as held. Mr. Maurice Smith, Q.C. and Ms. Cindy Murray, lawyers with Nova Scotia Legal Aid, appeared with Mr. Lalo. At that time the Crown withdrew the single indictment and presented six indictments to the court. A copy of each of the indictments was provided to defence counsel. They had been provided notice of the Crown's intention to present six indictments by way of facsimile correspondence dated March 12, 1999. At this pre-trial conference, defence counsel noted that Nova Scotia Legal Aid had not yet been formally retained. The court set a trial date in relation to the first indictment; November 4, 1999 or in any event "before

Christmas" of that year. Nova Scotia Legal Aid was formally retained by the accused on April, 1, 1999.

[8] Case state conferences were held on June 7, 1999 (in person); August 3, 1999 (in person); August 30, 1999 (telephone conference call); September 30, 1999 (telephone conference call);November 1, 1999 (telephone conference call); December 20, 1999 (telephone conference call); and February 18, 2000 (in person). On this last date hearings were set down for the following defence applications: stay of proceeding; production and disclosure of the report entitled "Report of the IIU (Police and Public Safety Division, Nova Scotia Department of Justice) Regarding the Investigation into Allegations of Abuse for Former Residents of Residential Youth Facilities" (hereinafter referred to as the "Chambers Report"; production and disclosure of "files re "institutional abuse" relating to those who are also complainants in the *Lalo* matters"; production and disclosure of "all P.S.R.'s" given by any of the complainants up to and including the present date." The latter three applications were subsequently adjourned *sine die*. On August 27, 2001 these defence applications were scheduled to be heard from February 25, 2001 through to April 30, 2002.

[9] The defence application for a stay of proceedings took place on May (29, 30, and 31), June (1, 7, 12, 13, 14, 15, 19, 20, 26, 27, 28, 29, and 30) and September (11, 14, 15, 18, 19, 20, 21, 26, 27, 28, and 29) of 2000. The defence application for the production of the "Chambers Report" pursuant to section 278.1 to section 278.91 of the *Criminal Code* was heard within the stay application. The court ordered that the report be provided to the Crown and the defence with restriction as to its use. On February 16, 2001 the court issued a written decision denying the defence application for a stay of proceedings. Case status conferences were held on March 12 and May 14, 2001 (in person).

[10] A case status conference was also held on July 3, 2001. The defence gave notice of its intention to bring the present application, which was then heard on October 11, 2001.

CRIMINAL CODE **PROVISIONS**

[11] The applicable provisions of the *Criminal Code* are as follows:

574. (1) **Prosecutor may prefer indictment -** Subject to subsection (3) and section 577, the prosecutor may prefer an indictment against any person who has been ordered to stand trial in respect of

(*a*) any charge on which that person was ordered to stand trial, or

(*b*) any charge founded on the facts disclosed by the evidence taken on the preliminary inquiry, in addition to or in substitution for any charge on which that person was ordered to stand trial,

whether or not the charges were included in one information.

576. (1) **Indictment -** Except as provided in this Act, no indictment shall be preferred.

577. Direct Indictments - In any prosecution,

(*a*) where a preliminary inquiry has not been held, an indictment shall not be preferred, or

(*b*) where a preliminary inquiry has been held and the accused has been discharged, an indictment shall not be preferred or a new information shall not be laid

before any court without,

(*c*) where the prosecution is conducted by the Attorney General or the Attorney General intervenes in the prosecution, the personal consent in writing of the Attorney General or Deputy Attorney General,

591. (1) **Joinder of counts -** Subject to section 589, any number of counts for any number of offences may be joined in the same indictment, but the counts shall be distinguished in the manner shown in Form 4.

(2) **Each count separate -** Where there is more than one count in an indictment, each count may be treated as a separate indictment.

> (3) **Severance of accused and counts -** The court may, where it is satisfied that the interests of justice so require, order
>
> > (*a*) that the accused or defendant be tried separately on one or more of the counts;
>
> **645.** (5) **Questions reserved for decision in a trial with a jury -** In any case to be tried with a jury, the judge before whom an accused is or is to be tried has jurisdiction, before any juror on a panel of jurors is called pursuant to subsection 631(3) and in the absence of any such juror, to deal with any matter that would ordinarily or necessarily be dealt with in the absence of the jury after it has been sworn.

CROWN'S POSITION

[12] The Crown argues that pursuant to section 574 (1) of the *Criminal Code*, the Crown filed a single indictment with the Supreme Court and that following this, pursuant to the same section, the Crown exercised its prosecutorial discretion and elected to proceed with six trials, hence the six indictments, in relation to the charges upon which Cesar Lalo had been ordered to stand trial.

[13] They do acknowledge that with respect to the charges relating to alleged abuse against three complainants, Z. N., E. M. and J. W. M. the time frames involved have been extended from those stated on the original indictment.

[14] The Crown submits that it exercised its discretion prior to Mr. Lalo having retained legal counsel and well in advance of any trial dates. They say further that their action related to the organization and timing of trials and was consistent with decisions of the Supreme Court of Canada in *R.* v. *Chabot*, (1981), 55 C.C.C. (2d) 385 (S.C.C.) and *R.* v. *Litchfield*, (1993), 86 C.C.C. (3d) 97 (S.C.C.) as well as the provisions of the *Criminal Code*.

ANALYSIS

[15] In *Chabot, supra,* the issue before the court was whether or not an accused could challenge or quash a committal for trial (by way of a prerogative writ) after an indictment has been filed with or presented to the Superior Court. The

court ruled that the defence was entitled to issue such a challenge up to the time the indictment was read to the accused and he entered a plea at the outset of his trial. Further the time of entering the plea constitutes the actual preferment of the indictment.

[16] Chief Justice Brian Dickson said at p. 390:

> I agree with counsel for the Crown that where an indictment is preferred pursuant to s. 507 [am. 1974-75-76, c. 93, s. 63] without the intervention of the Grand Jury, there are not separate acts of preferral of a bill of indictment, and presentment of an indictment. There is but one act, that act being the placing by the appropriate authority of "an indictment in writing setting forth the offence" before the trial Court. This act constitutes the commencement of the trial and is a combination of the steps of preferral and presentment.

[17] The court then noted that there are three views on the precise moment the indictment becomes the operative document:

> 1. The simple act of signing and filing the indictment with the Court Clerk does not constitute preferment of the indictment sufficient to bar the right of the accused to challenge his committal order.
>
> 2. Preferment of the indictment *may* occur when the indictment is before a trial Court constituted to try the accused (*R.* v. *Elliott*, *supra*).
>
> 3. Alternatively, preferment *may* occur when the indictment is read to the accused in open Court and he is asked to plead to the charge (re *Beeds*, *supra*).

[18] The court then noted that no uniform practice prevails within the various provinces. The court said at p. 394:

> Procedures differ as between Provinces and indeed, at times from jurisdiction to jurisdiction within the Provinces and even within a single jurisdiction. This is not surprising. In the absence of statutory or other directives it is natural and proper that practices and procedures should develop to meet local needs and conditions.
>
> In very general terms the normal procedure appears to be the following:

(a) The indictment is usually prepared almost immediately after the committal for trial and is at once filed with the Clerk of the relevant Court; it should be noted, however, that in some jurisdictions it is never filed; in others, an unsigned copy of the indictment is filed and the indictment is not signed until the opening of trial.

(b) The accused may or may not be informed when the indictment is filed with the Court. A number of the Provinces indicated that, as a courtesy, a copy of the indictment is mailed to the accused or his counsel, but British Columbia, Quebec and a number of federal prosecutors indicated that they did not inform the accused when the indictment is filed.

(c) In general, the indictment is first placed before the Court in which the trial is to be held on the actual trial date itself. At this time the accused is arraigned and a formal plea is entered, but this practice is not uniform and some jurisdictions have a separate "arraignment date" at which time the accused is asked to plead to the charge.

(d) In a very limited number of jurisdictions an Assignment Court is held for the purpose of fixing trial dates.

[19] The court concluded that the simple act of filing an indictment with a clerk could not operate as a bar to the rights of an accused to challenge his committal by way of *certiorari*. The court further concluded at p. 396:

> It might be thought that the question as to whether the indictment is preferred when it is before a trial Court, or when the accused has actually been arraigned on the charge, is of purely academic interest. The general practice, subject to exceptions is that the accused is arraigned when he appears at trial. In the interests of clarity, however, I would hold that an indictment based upon a committal for trial without the intervention of a Grand Jury is not "preferred" against an accused until it is lodged with the trial Court at the opening of the accused's trial, with a Court ready to proceed with the trial.

[20] The Crown in this case relies on *Chabot* and says its prosecutorial discretion essentially involved the organization, management and timing of the trials, a discretion it exercised well in advance of any plea and well in advance of any preferment. In response to the Crown's decision to so exercise its discretion they say the defence is entitled to challenge that decision by making an application to sever or join the indictments pursuant to section 591 of the *Criminal Code*.

[21] In *R.* v. *Litchfield*, the Supreme Court of Canada found that the Chambers judge had no jurisdiction to divide or sever the counts since the indictment had not been preferred against the accused at the time of the application. Only a trial judge has jurisdiction to make such an order. The Alberta practice had been to take pleas on arraignment even though that may be months before a judge and jury were empanelled.

[22] Iacobucci, J. said at p. ?:

> According to the Chabot test, the indictment against the respondent was not preferred until it was lodged with Hope J. at the opening of the respondent's trial. Therefore, McDonald J. had no jurisdiction to divide or sever the counts since the indictment had not been preferred against the respondent at the time of the application. A further conclusion is that no one except the trial judge ever has jurisdiction to divide or sever counts since an indictment is only preferred at the opening of an accused's trial.
>
> This does not mean that an accused must wait until the actual trial date to bring an application to divide or sever counts. Once a trial judge has been assigned to the matter, the indictment **can** be preferred against the accused by lodging it with the trial judge. Since Chabot, the Criminal Code has been amended such that in jury trials the trial judge need not be ready to proceed with the trial to deal with matters such as the validity of the indictment. Section 645(5) of the Criminal Code provides:
>
> > 645(5) In any case to be tried with a jury, the judge before whom an accused is or is to be tried has jurisdiction, before any juror on a panel of jurors is called pursuant to subsection 631(3) and in the absence of any such juror, to deal with any matter that would ordinarily or necessarily be dealt with in the absence of the jury after it has been sworn.
>
> Thus, under s. 645(5), the trial judge can deal with matters concerning the indictment prior to the selection and calling of a jury, in the case of a jury trial. It was always open to a trial judge in the case of a trial by

> judge alone to hear pre-trial motions before preparing to hear evidence. The judge hearing the application for severance of counts in an indictment would either have to have been assigned as the trial judge or else would be seized of the trial upon the preferring of the indictment and the subsequent hearing of the severance application.
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> The statement in s. 591(4) of the Criminal Code that a severance order may be made "before or during the trial" is not deprived of its meaning under this approach to jurisdiction. A severance application brought after the indictment is preferred but before the court is constituted to begin hearing evidence would be brought before the trial.

[23] Justice Iacobucci went on to say that only trial judges can make orders for division and severance of counts in order to avoid injustices and to ensure that such earlier orders made by a Chambers judge are not immunized from review.

[24] The applicant relies on *Litchfield* to assert that the law since *Chabot* has now been modified to the effect that now once a trial judge is assigned and the indictment presented to that judge, it is then preferred and the judge is seized with the matter and the trial process is underway.

[25] However, *Litchfield* acknowledged the varying practices throughout the provinces and asserted that simple presentation can not shall constitute preferment. Further, the trials involving a judge alone the judge always has the jurisdiction to hear pre-trial motions before preparing to hear evidence. In trials involving a judge and jury, a judge can hear pre-trial motions pursuant to section 645(5) of the *Criminal Code*. The accused in *Litchfield* had elected to be tried by judge alone.

[26] Section 645(5) of the *Criminal Code* was implemented subsequent to *Chabot*. It established that Superior Courts have the jurisdiction to hear applications prior to preferment and prior to the beginning of the trial. It does not, however, establish that such pre-trial application constitute the beginning of a trial.

[27] In this case, the Crown elected to proceed with six indictments rather than one prior to the accused retaining legal counsel, prior to the trial date being set and prior to the accused entering a plea. The Crown exercised its discretion respecting the organization of these criminal charges. It is inaccurate for

defence counsel to suggest that the accused had never been before a Provincial Court or had the opportunity to elect mode of trial or avail himself of a preliminary inquiry or been committed to stand trial. Indeed, the accused had been arraigned, waived his right to a preliminary inquiry, elected to be tried by judge and jury and ordered to stand trial on the charges that the accused is now before the court to answer.

[28] Thus far in this proceeding two pre-trial applications have been heard and decided; an application for funded counsel on February 9, 10 and 11, 1999 (a matter that could have been heard by a judge other than the trial judge) and a defence application for a stay of proceeding that commenced on May 29, 2000 more than a year following the six indictments being presented to the court.

[29] Although the first pre-trial conference before the trial judge was held on January 5, 1999 preceding the application for funded counsel, it cannot be said that the court was ready to proceed with the accused's trial. On that date no trial date had been set nor had the accused retained counsel. Indeed to the date hereof, no trial dates have been set, in light of the number of defence applications scheduled but not yet heard and further defence applications intended but not yet scheduled.

[30] The *Litchfield* case cannot be interpreted to mean that the trial has commenced in every case where a trial judge has heard a pre-trial motion pursuant to s. 645(5) or held a pre-trial conference. In the more recent decision *R.* v. *Begrand-Fast* v. *Derksen,* 140 C.C.C. (3d) 554, the Saskatchewan Court of Appeal considered the exercise of prosecutorial discretion where the Crown preferred two new indictments charging the accused separately after a pre-trial conference had been held pursuant to s. 625.1(1) of the *Criminal Code*. Section 625 reads as follows:

> **625.1** (1) Subject to subsection (2), on application by the prosecutor or the accused or on its own motion, the court, or a judge of the court, before which, or the judge, provincial court judge or justice before whom, any proceedings are to be held may order that a conference between the prosecutor and the accused or counsel for the accused, to be presided over by the court, judge, provincial court judge or justice, be held prior to the proceedings to consider the matters that, to promote a fair and expeditious hearing, would be better decided before the start of the proceedings, and other similar matters, and to make arrangements for decisions on those matters.

> (2) In any case to be tried with a jury, a judge of the court before which the accused is to be tried shall, prior to the trial, order that a conference between the prosecutor and the accused or counsel for the accused, to be presided over by a judge of that court, be held in accordance with the rules of court made under section 482 to consider such matters as will promote a fair and expeditious trial.

[31] The court considered the intent of s. 625.1(1) and refused to expand the section beyond its literal meaning. The court said at para [10]:

> It does not expressly or by implication require that an indictment even be filed before the pretrial conference is held. The wording of s. 625.1 does not provide any basis for the trial Court to interfere with the proper exercise of prosecutorial discretion.

> ¶¶ 11 In R. v Power, [1994] 1 S.C.R. 601 the Supreme Court of Canada endorses the need for respect for prosecutorial authority. The Court confirms both the existence of prosecutorial discretion and that its exercise is not subject to the control of the Court beyond the Court's power to control an abuse of its process. L'Heureux-Dubéé J., speaking for the majority, writes that "my colleague invites the courts of appeal to invade the exclusive domain of the Crown and to interfere with prosecutorial discretion, as well as to foster rulings based on pure speculation as to what might have happened had the prosecution chosen a different path. This, in my view, is not only impermissible and contrary to the rule of law but also contrary to the interest in a good and efficient administration of justice" (at pp. 619-620). Later, after reviewing the reasons for her opinion, including the need for the tribunal to remain impartial, she states "as a matter of principle and policy courts should not interfere with prosecutorial discretion" (at p. 621).

> ¶¶ 12 To use the words of this Court in R. v. McArthur (1995), 134 Sask. R. 221, "something more" would be required to bring prosecutorial discretion to an end. In this case, something more than the holding of the pretrial conference is required. To end the Crown's discretion in this matter, the Court would have to find bad faith on the part of the prosecutor or some improper motive or action taken for an arbitrary purpose.

> In the present case there is no basis upon which to find any bad faith on the part of the prosecutor, improper motive or act of arbitrary purpose.

[32] On January 5, 1999 the Court has raised the issue of possible prejudice to the accused given the sheer volume of the charges and number of complainants, as well as the issues of management of a jury trial then estimated to be a year in length. On February 11, 1999 the Crown responded to those concerns and spoke to the proposed exercise of its prosecutorial discretion in dividing the proceeding into six trials. It was clear from the outset of this discussion that the court and the Crown anticipated subsequent motions for severance and joinder that might be brought by defence counsel once they were retained. This would be done in the ordinary course of the trial process.

[33] The actions of the Crown in this case have not resulted in any delay of the proceedings or prejudice to the accused nor can they be characterized as an abuse of process. The determination of the Crown to proceed with six trials and hence present six indictments on March 15, 1999 was the result of the proper exercise of Crown discretion in accordance with the authorities cited herein and the provisions of the *Criminal Code*.

[34] The application to quash the indictments is dismissed. The six indictments are properly before the Court and constitute the operative documents in relation to the outstanding charges against the accused.

J.