IN THE SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Lalo, 2003 NSSC 154

Date: 20021217
Docket: CR 154808
CR 154814
CR 154817
CR 154820
CR 154822
CR 154824
Registry: Halifax

Between:

Her Majesty The Queen

Crown/Respondent

v.

Cesar Lalo

Defence/Applicant

Restriction on publication: Ban on Publication under Section 486 CC (Sexual Assault)

Judge: The Honourable Justice M. Heather Robertson

Heard: December 12, 2002, in Halifax, Nova Scotia

Decision: December 17, 2002 (Orally)**(Re: Joinder Application)**

Written Release: July 23, 2003

Counsel: Catherine Cogswell and Robert W. Fetterly, for the Crown/respondent
Maurice G. Smith, Q.C. and Cindy Murray, for the defence/applicant

ROBERTSON, J.: (Orally)

[1] This a is defence application for an order for joinder of all outstanding charges concerning Cesar Lalo into one indictment pursuant to section 591(1) of the *Criminal Code* or to have a joint trial of the six outstanding indictments pursuant to *R. v. Clunas*, [1992] 1 S.C.R. 595, 70 C.C.C. (3d) 115, 11 C.R. (4th) 238. The Crown seeks an order joining the outstanding charges in the result that two or three trials of manageable size be held in light of estimates of the time required to try the case.

[2] Cesar Lalo currently faces 63 criminal charges in relation to 27 complainants.

[3] Relevant *Criminal Code* provisions:

> Section 591 of the *Criminal Code* provides that any number of counts for any number of offences may be joined in the same indictment.

591. (1) 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) Where there is more than one count in an indictment, each count may be treated as a separate indictment.

(3) 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; and

(b) where there is more than one accused or defendant, that one or more of them be tried separately on one or more of the counts.

(4) An order under subsection (3) may be made before or during the trial but, if the order is made during the trial, the jury shall be discharged from giving a verdict on the counts

(*a*) on which the trial does not proceed; or

> (b) in respect of the accused or defendant who has been granted a separate trial.
>
> (5) The counts in respect of which a jury is discharged pursuant to paragraph (4)(*a*) may subsequently be proceeded on in all respects as if they were contained in a separate indictment.
>
> (6) Where an order is made in respect of an accused or defendant under paragraph (3)(*b*), the accused or defendant may be tried separately on the counts in relation to which the order was made as if they were contained in a separate indictment.

[4] Counsel are in agreement that the court has jurisdiction to try more than one indictment in a single trial. The law is set out in *R. v. Clunas, supra,* at paragraph 33 Chief Justice Lamer stated:

> ...when joinder of offences, or of accuseds for that matter, is being considered, the court should seek the consent of both the accused and the prosecution. If consent is withheld, the reasons should be explored. Whether the accused consents or not, joinder should only occur when, in the opinion of the court, it is in the interests of justice and the offences or accuseds could initially have been jointly charged.

There is no section of the *Code* prohibiting a joint trial of separate informations.

[5] In this case the original indictment dated October 30, 1998 was filed with the court. It contained 136 counts involving a total of 51 complainants. On March 14, 1999 the Crown withdrew the original indictment and presented to the court six new indictments. The total number of counts was then 135 and there were 51 complainants. Since that date charges have been withdrawn concerning 24 complainants reducing the number of counts to 63 and the number of complainants to 27.

[6] In *R. v. Shrubsall [Motion to Sever Counts]* [1999] N.S.J. No. 496 Docket: CR 162262, Saunders, J. canvassed the decision relating to the "interests of justice" often quoted is *R. v. Cuthbert*, 103 C.C.C. 14 (B.C.C.A.). Justice Lambert had listed the six most commonly referred to factors:

> 1. the factual and legal nexus between the counts;

2. general prejudice to the accused;

3. the undue complexity of the evidence;

4. whether the accused wishes to testify on some counts, but not on others;

5. the possibility of inconsistent verdicts; and

6. the desire to avoid a multiplicity of proceedings.

[7] In *R. v. Cross and Lazore*, 112 C.C.C. (3d) 410 Justice Michel Proulx of the Quebec Court of Appeal set out the following factors:

> (1) the sufficiency of the factual and legal connection between the various counts, (2) the risk of coming to contradictory verdicts, (3) the possibility of having recourse to similar act evidence, (4) the complexity and the length of the trial having regard to the nature of the evidence to be called, (5) the prejudice caused to the accused with respect to his right to be tried within a reasonable time, (6) the prejudice caused to co-accused, (7) antagonistic (incompatible) defences, (8) the inadmissibility of evidence against a co-accused, (9) the manifest desire of the accused to testify on certain counts, etc.

[8] Justice Saunders, in comment on the factors set out in *Cuthbert* and *Cross and Lazore* stated:

> Essentially it amounts to a balancing of the accused's right to be tried fairly upon the evidence admissible against him on a given charge without other improper or unduly prejudicial evidence being weighed against him, and the community's right to see justice done in a reasonably efficient and cost-effective manner.
>
> It should be understood that such lists are not static. Every case may bring its own unique features that ought to be kept in mind when the trial judge is asked to consider a motion to sever counts.

[9] Throughout this proceeding counsel have referred to various other authorities, relating to the court's jurisdiction and relating to the conduct of jury trials in the light of various evidence issues. I have reviewed these

authorities in my consideration of this case. They are: *R. v. Marshall*, [1999] N.S.J. No. 135; *R. v. J.E.B.* (1989), 52 C.C.C. (3d) 224; *R. v. Selhi* (1990), 53 C.C.C. (3d) 576; *R. v. Mombourquette* (1992), 117 N.S.R. (2d) 199 (S.C.); *R. v. McClure*, [2001] 1 S.C.R. 445; *R. v. Handy*, [2002] S.C.J. No. 57 (S.C.C.); *R. v. C. (W.B.)* (2001), 153 C.C.C. (3d) 575; *R. v. Litchfield* (1993), 86 C.C.C. (3d) 97 (S.C.C.); *R. v. McNamara No. 1* (1981), 56 C.C.C. (2d) 193 (Ont. C.A.); *R. v. August*, [1996] B.C.J. No. 836 (B.C.S.C.); *R. v. Dickson* (1996), 33 W.C.B. (2d) 209 (Ont.Ct.Gen.Div.); *R. v. Khan* (1996), 108 C.C.C. (3d) 108; *R. v. Burke* (1996), 105 C.C.C. (3d) 205 (S.C.C.); *R. v. O'Connor* (1995), 103 C.C.C. (3d) 1 (S.C.C.); *R. v. Regan* (1998), 174 N.S.R. (2d) 268 at page 275; and *R. v. Roby*, [1998] O.J. No. 5928 and [1999] O.J. No. 1452.

[10] This application is somewhat unique as it is an application for joinder. The defence usually always asks for severance rather than joinder. Nevertheless the factors to be considered remain the same. The trial judge must use his or her discretion in weighing these factors, in light of the particular circumstances of the case.

[11] Counsel have provided the court with some indications of the scope and duration of such a trial. Defence counsel estimate that the trial could last six months. It is not possible to be exact in these estimates and counsel acknowledge that more time could be required.

[12] At a minimum estimate there will be as many as 67 witnesses including the 27 complainants, various family members of the complainants, various law enforcement officers and Family Court officers and expert witnesses and others.

[13] Counsel also agree that an application will likely be made to permit similar fact evidence to be called, both on a count to count basis (complainant to complainant) and with respect to other incidents, where the accused has previously been convicted. Counsel agree that there is a factual and legal nexus relating to these alleged historic sexual offences.

[14] The defence makes this application, aware of the risk of prejudice to their client. For their own reasons they determined that it may be to their advantage to have one trial. I have carefully considered the issue of prejudice to the accused in this application for joinder. The complexity of the case arises not because of the nature of the charges but in the share volume of the factual evidence the jury will have to keep straight as it

pertains to 27 complainants. The jury will also be asked to deal with similar fact evidence. They may have to apply complex instructions differently to some charges than to others. The vary nature of these serious charges will impact on the jury, as many months of evidence is presented. Sexual assault cases are emotionally demanding.

[15] Jury selection in itself will not be an easy task, where a minimum trial duration of six months is contemplated. Keeping a jury together for this period, without risk of a mistrial is of great concern, particularly as the trial is scheduled to begin February 24, 2003 and would proceed during the summer months, when the families of jurors would have scheduled vacations.

[16] In assessing the length of time counsel estimate this trial may take, I am concerned that based on my own experience so far with this case, counsel may engage in serious argument on various issues that arise, throughout the course of the trial. Argument on these motions will not be brief. The jury will have to be excused frequently and possibly for long periods and it will make it all the more difficult for them to keep the evidence and the witnesses straight in their heads. This may also extend the length of the trial. Defence counsel has raised the defence of collusion and fraud and the fact that many complainants share common counsel when pursuing claims for compensation. This they suggest will give rise to the requirement for instruction to the jury, where similar fact evidence may be called by the Crown. Again, argument on issues arising during trial will result in inevitable absences of the jury and probable delays. Defence counsel also raised the issue of a *McClure* application for the production of the complainants' civil litigation file, although they acknowledge the threshold test to be high. Counsel agree that such an application could take weeks in the absence of a jury. Having reflected on these issues during the course of this hearing, Crown counsel suggest that the trial could in fact take eight to nine months, to be completed.

[17] I am aware of the cases which applaud the juries capability to follow complex evidence and attend to detailed instructions, yet in a case of this size and complexity, jurors would be forgiven if they suffered from share fatigue.

[18] I accept that there are some economics of scale achieved, in having a single trial versus several trials, and that the total length of time required to try the

accused on all of the charges may be less if there is a single trial. The court is always anxious to avoid a multiplicity of proceedings.

[19] Counsel addressed two other factors, the issue of whether the accused will testify, and the risk of inconsistent verdicts where more than one trial is held. The defence position on whether the accused wishes to testify on some counts but not others is as follows: "The defence will not raise an issue concerning Mr. Lalo's ability to testify with respect to one charge but not to the others." On the issue of inconsistent verdicts, this is not a situation where different juries can make inconsistent findings on the same set of facts. In this case, the charges are already separated by complainants. No fact to be found will be identical. The evidence of expert witnesses, repeated at separate trials would bare on the charges relating to the separate complainants at each trial. The Crown has also said that similar fact evidence they might seek to introduce would be count to count within the same trial or evidence relating to behaviour where the accused has already been convicted.

[20] In the circumstances of this case, I do not believe it is in the interests of justice to have a single trial on all of the charges, now before the court. This would be too taxing on any jury given the nature of the case, expected duration of the trial, the complexity of similar fact rulings and their application to various counts not to mention the serious issue of a potential mistrial as fatigued jurors might fall away.

[21] The trials of the accused on these charges can however be reduced in number, to manageable sized trials on charges dealing with no more than nine complainants, in the result that all of the charges will be dealt with in three trials, not six. This is made the more obvious and reasonable course, as the existing indictments no longer pertain to 51 complainants and 135 charges but to the reduced number of charges and number of complainants.

[22] I am aware of the defence position of one trial or six trials but not three. They argue that the Crown has failed to make a proper application for joinder of charges or indictments into two or three trials. The Crown did make such a motion for joinder during this proceeding, submitting that the defence had ample notice of the Crown's position stated in pretrial conferences on August 29 and October 16 of this year. I accept the Crown's motion. The defence declined to accept the Crown's proposal that they might be given more time to respond in light of the Crown's motion.

[23] In any event, I do not agree with the defence, when they say that the court cannot now by exercising its own jurisdiction order that three trials be held on the charges now before the court. The court is free to consider every option exploring the matter fully once the application has been made. The court is also free to accept the Crown's motion for joinder. The fact they did not initiate the motion for joinder does not preclude them from argument on the issues and taking a position that the trials must be of a manageable size and thus reduced in number once they had heard from the defence its estimates of trial length, during these proceedings. Their motion is consistent with their earlier stated position.

[24] Pursuant to s. 591 of the *Criminal Code* and *R. v. Clunas*, the court may decide on joinder of the charges as it sees fit, so long as it makes this determination in the interests of justice and explores the reasons for its decision. I have done so.

[25] I will acquiesce to the Crown's request to be heard on the issue of their prosecutorial discretion in determining which of the counts will be joined and which matters should proceed to trial first. I also want to hear from defence counsel their views on how the counts should be ordered, in the three trials that will be held, the first to commence on February 24, 2003.

Justice M. Heather Robertson