

SUPREME COURT OF NOVA SCOTIA

Citation: *R. v. Johnson*, 2015 NSSC 379

Date: 20151126

Docket: CRH No. 430125 and 445421

Registry: Halifax

Between:

Her Majesty the Queen

v.

Nathan Tremain Johnson

Temporary Deferred Publication Ban:

It is ordered that no person shall publish or broadcast any information in relation to all evidence tendered during this trial, all submissions of counsel, evidence tendered at the preliminary inquiry, verdict in this trial, sentence imposed if a guilty plea is rendered, the reasons for sentence, as well as all evidence, submissions and ruling on this application for a temporary deferred publication ban order. This order is in effect until the conclusion of Randy Riley's trial currently scheduled to be heard in March 2016 and relates to Nathan Tremain Johnson's two matters currently before the Court, C.R. No. 430125 and C.R. No. 445421.

PUBLICATION BAN DECISION

Judge: The Honourable Justice Joshua Arnold
Heard: November 16, 24, and 26, 2015, in Halifax, Nova Scotia
Oral Decision: November 26, 2015
Final Written: February 29, 2016
Counsel: Ian Hutchison and Christa Thompson, for the Applicant
Blair Rhodes, for the Respondent

By the Court:

[1] This decision concerns a request for a discretionary publication ban and applies to the two Indictments before the court relating to Nathan Johnson. During the trial I gave short oral reasons and reserved the right to supplement those reasons in writing. These are my written reasons.

[2] The first Indictment contains the two counts for which Mr. Johnson is currently on trial, including the charge of first degree murder. The second Indictment has eight counts and will be dealt with at the conclusion of the murder trial.

[3] Nathan Johnson and Randy Riley are both charged with the first degree murder of Chad Smith. A severance motion was brought in advance of this trial before another Justice of the Supreme Court of Nova Scotia. That severance motion was granted and Mr. Riley will be tried separately in March 2016. There is a publication ban relating to the severance decision, which is in place until the conclusion of Mr. Riley's trial.

[4] Mr. Johnson's trial commenced November 16, 2015, and is scheduled to conclude December 11, 2015. At the outset of Mr. Johnson's trial, counsel for Mr. Riley made application for a temporarily deferred ban on publication in Nathan Johnson's matters. The initial notice to the media announced that the deferred publication ban was requested in relation to the evidence heard in Nathan Johnson's matter and counsel proposed that it would remain in force until Mr. Riley's trial was concluded. No members of the media objected to this publication ban. During the course of that brief hearing, counsel for Mr. Riley added that they wished to extend the scope of the deferred ban on publication to include the verdict in Mr. Johnson's matter. As a result of this change, counsel were directed to post another notice to the media announcing an extension in the scope of the proposed ban.

[5] Another notice was sent to the media and now a reporter, Blair Rhodes, on behalf the CBC, has raised an objection to the request for a deferred publication ban in relation to the verdict in Mr. Johnson's matter.

[6] In essence, counsel for Mr. Riley has applied for a complete ban on publication of everything pertaining to Mr. Johnson's trial until the conclusion of Mr. Riley's trial. Such a ban would include all evidence tendered during the trial,

all submissions of counsel, evidence tendered at the preliminary inquiry, the verdict in this trial, any sentence imposed if a guilty plea is rendered, the reasons for any potential sentence as well as all evidence and submissions on this publication ban application and this decision.

[7] This application was brought by counsel in an effort to preserve Mr. Riley's right to a fair trial. Over the past week and a half, the jury has heard from certain witnesses whose evidence is admissible in the trial of Mr. Johnson but may not be admissible in Mr. Riley's trial. In particular, Kaitlin Fuller testified that Nathan Johnson confessed to her that: he conspired with Randy Riley to kill Chad Smith; Mr. Riley told Mr. Johnson that a pizza shop employee had hit him over the head with a hammer years ago; Mr. Johnson offered to "go get" the pizza shop employee; Mr. Riley said no, he wanted to kill the pizza shop employee; Mr. Riley and Mr. Johnson were driven by Paul Smith to pick up a gun; Mr. Riley provided Mr. Johnson with surgical gloves; Mr. Johnson discussed with and helped Mr. Riley decide on a suitable location for the murder; Mr. Johnson ordered a pizza to the agreed upon location in an effort to lure Chad Smith so that Mr. Riley could shoot and kill him; when Chad Smith arrived at the location to deliver a pizza Mr. Riley shot and killed Chad Smith; and after Mr. Riley shot Chad Smith, Mr. Johnson helped Mr. Riley hide the gun and gloves used in the shooting.

[8] Mr. Riley intends to proceed with his jury trial, scheduled to commence in this courthouse on March 7, 2016, about three months from now. Mr. Riley's trial is expected to last three weeks. Mr. Riley asks me to exercise my common law jurisdiction to impose a publication ban on all information relating to Mr. Johnson's trial until the conclusion of his own trial in March 2016. He submits that given the proximity of the proceedings to his own trial, the close connection in the evidence between his trial and Mr. Johnson's, other publicity linking Mr. Riley and Mr. Johnson together in this crime, along with the geographic limitations in Nova Scotia, there is a very real risk that prospective jurors will be exposed to, and tainted by, media reporting of the details of the trial of Mr. Johnson. This could include information relating to Mr. Riley that may not be admissible at a trial against him alone.

[9] Mr. Riley contends that there are no reasonable alternatives to a publication ban in the circumstances of this case. He argues that the effect of the temporary ban, the elimination of any tainting of the jury pool summonsed for Mr. Riley's trial by exposure to media coverage of the trial and verdict in Mr. Johnson's case, is of greater significance than the deleterious impact on the media's freedom of

expression, particularly because a publication ban would be time limited rather than permanent.

[10] Counsel for Mr. Riley submitted an affidavit with news reports/articles that were posted prior to Mr. Johnson's trial, and that appear to have been updated during the trial, as well as *R. v. Ebanks*, 2010 CarswellOnt 11150, a decision of Justice Michelle Fuerst of the Ontario Superior Court of Justice.

[11] The CBC argues that a ban is not necessary and a challenge for cause would address any possible harm. The CBC says that challenge for cause has addressed similar issues in other local cases recently and effectively. No evidence was called or tendered by the CBC. All submissions came from Mr. Rhodes during argument. The CBC relies on *R. v. Wournell*, 2002 NSSC 270, *R. v. McClintic*, 2010 ONSC 2944, as well as the unreported decision of *R. v. Joseph James Landry* (NSSC), wherein Chief Justice Kennedy denied a request for a publication ban.

[12] The test governing this application for a common law publication ban is set out in *Dagenais v. Canadian Broadcasting Corporation*, [1994] 3 S.C.R. 835, as well as *R. v. Mentuck*, [2001] 3 S.C.R. 442. According to *Dagenais*, the publication ban sought must be necessary in order to prevent a serious risk to the fairness of the trial because reasonably available alternative measures will not prevent the risk. The salutary effects of the publication ban must outweigh the deleterious effects to the free expression of those affected by the ban. The party seeking the publication ban has the burden of justifying the limitation on freedom of expression.

[13] The facts elicited at this trial relate to the homicide of Chad Smith. Mr. Riley has been charged with first degree murder in that death. Mr. Riley has been featured prominently in the evidence but has not been involved in, or represented at, this trial. He has not had an opportunity to meet the evidence or cross-examine any of the witnesses. Much of the evidence on its face points to the guilt of Mr. Riley as the principal for the murder. Some of that evidence, such as that of Kaitlin Fuller, may not be admissible against Mr. Riley at his own trial. That evidence is highly prejudicial to Mr. Riley, who is alleged to be the principal actor.

[14] Severance was granted in his matter. Severance is often granted to ensure that both or all parties have fair trials and that the evidence admissible against one accused that is not admissible against the other accused is kept completely separate, if jury instructions to this effect would not be adequate. The decision regarding severance in this case is subject to a deferred publication ban in order to preserve the fair trial rights of both Mr. Johnson and Mr. Riley.

[15] However the scheduling and timing occurred, the trial of Mr. Johnson, who the Crown will be arguing was a party to the murder and an aider of Mr. Riley, is taking place chronologically in advance of Mr. Riley's trial. Yet, Mr. Riley is alleged to be the primary participant, allegedly having the motive for the murder and having obtained the gun used to commit the murder and the gloves used to hide evidence. Mr. Riley is also alleged to be the person who shot and killed Chad Smith.

[16] The nature of the charges, the nature of the evidence in this case and the timing of these trials make this a highly unusual situation, one that is not likely to be repeated in the near future. I am satisfied that media publicity of the argument, evidence and/or verdicts, along with the always present possibility of a sentencing hearing being required in Mr. Johnson's case, all in advance of Mr. Riley's trial, would make it difficult, if not impossible, for Mr. Riley to find an impartial jury.

[17] I considered and discussed with the parties the availability of measures alternative to a publication ban. In *Dagenais*, the majority suggested possibilities, such as an adjournment of trial, a change of venue, sequestration of the jury, challenge for cause and/or a strong judicial direction to the jury.

[18] The murder is alleged to have occurred on October 23, 2010. Mr. Riley has been on remand since July 2013. If the trial is adjourned because of these proceedings it is likely, considering the length of the trial (three weeks) and the potential availability of counsel and witnesses, that it would be many months before the trial could be resumed. This has obvious s. 11(b) *Charter* implications.

[19] How would a change of venue assist when it is the CBC making this application? Their ability to distribute the news is national and international. While a change of venue and sequestration of the jury are theoretically available, neither is practical given the anticipated length of this trial. When would sequestering have to commence? Mr. Riley's trial is scheduled to start three months from now. Choosing and sequestering a jury three months in advance of Mr. Riley's trial is not a realistic option.

[20] Where would a change of venue take us? There are a number of Crown witnesses, many of whom I have seen during Mr. Johnson's trial, who live in the Halifax Regional Municipality. The family of the deceased have been in attendance at the trial. The potential hardship to the witnesses, as well as the many family members and friends of the deceased who may wish to attend the trial, is real should there be a change in venue. I am also conscious of the fact that changing the venue of a trial like this has an impact on the community, which has

an interest in the trial of such a serious offence taking place where the crime allegedly occurred.

[21] The obvious fact is that any publicity about these proceedings would occur before the jury pool attends at court if there is no publication ban. While a challenge for cause is often a very effective response to concerns about pre-trial publicity it may be less so when that publicity occurs in relatively close proximity to the trial. In this case there may only be three months separating the conclusion of Mr. Johnson's trial and the commencement of Mr. Riley's trial. While three months is a long time in relation to sequestering, it is a short time in terms of pre-trial publicity.

[22] I am also satisfied that judicial direction to the jury, no matter how strong, will not suffice given the nature of the information heard at Mr. Johnson's trial about Mr. Riley's involvement and the impact of the possible verdicts available to the jury in Mr. Johnson's trial. Mr. Riley's alleged involvement with Mr. Johnson is inescapably intertwined. It is intertwined in the media and it is certainly intertwined in the evidence that has been heard so far during Mr. Johnson's trial.

[23] Mr. Riley is alleged to be the principal actor. The pre-trial publicity would likely create impressions in the minds of potential jurors that could not be consciously dispelled by a judicial direction, challenge for cause or anything else. To impose a publication ban that expires as soon as Mr. Riley's trial begins with the calling of the first Crown witnesses is unworkable in the circumstances of this case given the nature of the information that would become available for dissemination by the media.

[24] The temporary publication ban is necessary in order to prevent a real and substantial risk to the fairness of Mr. Riley's trial because reasonably available alternative measures will not prevent the risk. Therefore, according to *Dagenais*, I must next consider the salutary and deleterious effects of the publication ban.

[25] The most significant salutary effect of the temporary ban is that the impartiality of potential jurors summonsed for Mr. Riley's trial will not be put at risk by pre-trial publicity because of the extensive and highly prejudicial references to Mr. Riley's role in Chad Smith's murder during Mr. Johnson's trial. These factual assertions have yet to be challenged by Mr. Riley. Additionally, reporting the potential verdict or verdicts could gravely prejudice Mr. Riley's right to a fair trial considering the anticipated argument that the Crown will make in relation to Mr. Riley's guilt and considering the pre-trial publicity that has occurred already. The risk that potential jurors will be improperly influenced by information other

than that presented at Mr. Riley's trial, including the verdicts in the case, will therefore be vastly reduced with a publication ban.

[26] The primary deleterious effect, and it is a significant one, is that the media will be denied their expressive rights. Because the public will be denied access to information about a court proceeding through the media, public scrutiny of the criminal justice system is impacted.

[27] The many negative impacts of a ban in this case are minimized because the ban sought is on a temporary or deferred basis rather than a permanent basis. In effect, media dissemination of information about the proceedings will be delayed rather than prohibited. Similar to a preliminary inquiry, reporting is delayed, not prohibited forever. The severance application and decision in these matters was also subject to a delayed publication ban.

[28] I am satisfied that the salutary effects of the ban, preserving Mr. Riley's right to a fair trial, outweigh the deleterious effects to the free expression of those affected by it. There is a proportionality between the positive and negative effects of a time-limited ban. The possible deleterious effect on Mr. Riley is that his right to a fair trial could be infringed. That creates the possibility of permanent harm to him. However, the impact on free expression is temporary. I am satisfied that a deferred publication ban can be properly imposed even though it temporarily limits freedom of expression.

[29] The ban covers both Indictments that Mr. Johnson faces. This publication ban does not impact on the media's ability to report on the evidence tendered at Mr. Riley's trial. The ban on the publication of Mr. Johnson's matters will last only until a verdict is reached in Mr. Riley's trial. The ban will include all evidence tendered at the preliminary inquiry, all evidence tendered during Mr. Johnson's trial, all submissions of counsel during the trial, the verdict in this trial, any sentence imposed if a guilty verdict is rendered along with any reasons for sentence, as well as all evidence and submissions on this application and my ruling on this application.