SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Rayworth*, 2020 NSSC 7

Date: 20200108
Docket: 489190
Registry: Amherst

Between:

Her Majesty The Queen

v.

Christopher Ward Rayworth and Paul Marcel Sumbu

Severance Decision

Judge:	The Honourable Justice Peter P. Rosinski
Heard:	December 13, 2019, in Amherst, Nova Scotia
Counsel:	Wayne MacMillan, Crown Attorney Jim O'Neil, Defence Attorney for Mr. Rayworth Stephanie Hillson, Defence Attorney for Mr. Sumbu

By the Court:

Introduction

[1] Christopher Ward Rayworth (DOB March 8, 1985) and Paul Marcel Sumbu (DOB June 7, 1988) were arrested on September 29, 2017, and jointly charged on one Information sworn October 2, 2017 with a number of counts contrary to section 5(2) *Controlled Drugs and Substances Act* (CDSA).

[2] Both elected to be tried by a Judge of the Nova Scotia Supreme Court. A preliminary inquiry was held on June 6, 2019, and both were committed to trial by consent. Their trial was set for February 6 and 7, 2020.

[3] Both gave recorded statements to police.

[4] At a pretrial on November 1, 2019 Mr. Rayworth's counsel confirmed that he is not challenging the admissibility of his two statements to police, but he was proceeding with a severance of accused's motion. That matter was scheduled for hearing December 13, 2019. Mr. Sumbu's counsel confirmed that he would be proceeding with a section 10(b) Charter of Rights *voir dire* challenging the admissibility of his statement to police, which it was agreed would be heard at the same time as the Crown's application to prove the voluntariness of his statement as

admissible beyond a reasonable doubt – set for January 10, 2020, but which has now been adjourned to February 6 and 7, 2020 due to Mr. Sumbu's earlier counsel, Alexander McKillop, having withdrawn as counsel due to a personal conflict on November 20, 2019. Ms. Hillson is now his counsel.

[5] These reasons address Mr. Rayworth's severance application, which is opposed by the Crown.

[6] I am not satisfied that the interests of justice require severance .

Background

[7] A summary of the factual circumstances expected at trial surrounding these charges follows.[1]

[8] Police carried out surveillance of Mario LeBlanc's residence at Route 950, 2463 Petit Cap, New Brunswick, between 10:24 AM and 1:15 PM September 27,

[1] There was no preliminary inquiry evidence presented to the court. By agreement, the court has been provided as the basis for its decision making herein: the transcribed statements of both Mr. Rayworth and Mr. Sumbu taken September 29, 2017; the "prosecutors information sheet" authored by Cpl. Tyson Nelson on September 29, 2017; and the "supplementary occurrence report" of Constable A. Graham dated September 29, 2017 and that of Constable J. Munn dated September 29, 2017; and a "general report" by Cpl. Tyson Nelson dated September 29, 2017. These are only the anticipated facts at a joint trial. Should significant differences appear at a joint trial it remains open for either accused to argue that the court's decision herein is no longer supported thereby, and the court may then have to revisit these or other implicated relevant issues.

2017. They observed seven short duration visits by seven different vehicles, which based on information available to them and their experience was consistent with the selling of illegal drugs from the residence. At 1:22 PM a black Volkswagen Jetta with a Nova Scotia license plate (registered in the name of Mr. Rayworth) arrived at the residence. The passenger entered the residence. Two other vehicles arrived at the residence during this time interval. At 1:37 PM the Jetta was still parked in the driveway with a person waiting in the vehicle. At 1:52 PM the Volkswagen Jetta left the residence with both males inside. The police followed the Jetta in a clandestine fashion back to the Amherst, Nova Scotia area, where the registered owner of the vehicle was recorded as living.

[9] The vehicle drove into a gas station parking lot in Amherst at 2:28 PM. At this location police rapidly penned in the vehicle and arrested its occupants, Mr. Rayworth in the driver seat, and Mr. Sumbu in the front passenger side seat.

[10] The police officers involved will say that:[2]

[2] I am informed that at trial a police expert witness will be qualified to speak to indicia of trafficking generally and specifically in this case.

1. 2.8 g of crack cocaine was found in a plastic bag which Mr. Rayworth had retrieved from inside his pants or his lap, and thrown on the floor in front of the driver's seat;
2. 6.4 g of crack cocaine was found in a larger plastic bag located on the ground next to where Mr. Sumbu had been searched originally, yet which was not there previously;
3. 3.5 g of crack cocaine in a small plastic bag was found stuffed into Mr. Sumbu's underwear.

[11] Also found in the vehicle were:

1. 109 g of marijuana from a backpack on the back seat;
2. 1500 mg of hash oil from the black backpack on the back seat;
3. 18 g of shatter from the black backpack on the back seat;
4. 13 g of powdered cocaine from a sandwich bag on the back seat;
5. nine tablets of codeine in the drivers' door (in prescription bottle with the label ripped off);
6. Equate baby powder from the floor behind the driver's seat;
7. digital scales from the backpack on the back seat;

8. four cellular phones from the middle console of the vehicle.

[12] As noted, both Mr. Rayworth and Mr. Sumbu gave statements.

[13] Mr. Rayworth's counsel has indicated that he is not contesting the fact that his statement was provided "voluntarily", and after all proper Charter of Rights' advisements (the informational component) and the implementational component consequent to those advisements.

[14] At a joint trial, if entered as evidence by the Crown, his statement is clearly only admissible as against him.

[15] His statement may fairly be construed in summary:

> At various points in his statement he admits he is a user of both crack cocaine and marijuana, and claims: all the cocaine (p.13 (23) second statement); one bag of cocaine ($350 for "a couple of eight balls" pp. 15 and 20 second statement) - and the entire amount of marijuana (p. 12 second statement), which was not purchased that day in any event (p. 19 second statement) , and that it was all for personal use only; he disavows possession of any of the other items seized (he is not the owner of any of the four iPhones in the car, as he has his own Samsung Galaxy S7 on his person) but does not want to say whose property they are (pp. 6(5) and 14(1) second statement). He confirms that he did not go into the residence in New Brunswick (p.16 second statement). He is adamant that he was not trafficking in either cocaine or marijuana.

[16] At a joint trial, if found to be admissible, and entered as evidence by the Crown, Mr. Sumbu's statement is only admissible against him.[3]

[17] His statement may be fairly construed in summary as stating:

> He is a regular user of marijuana and a very infrequent user of cocaine, and had met Mr. Rayworth 3 to 4 times in the space of three or four months (pp. 33-36). However, although he doesn't "traffic" in drugs, he conceded that he will act as an intermediary between buyers and sellers and make "introductions" for which he gets monetary credit (pp. 24-25 statement; pp. 40-42; 46-47; 61(19)63(2); pp.64-65; see particularly p. 71(2)- (16); and 73(20)-being a reference to him having gone with Mr. Rayworth at 4 AM *and* at 1:15 PM September 29, 2017 to Mario LeBlanc's residence to get drugs for Mr. Rayworth; pp 110; p. 118(16)-119(18)).
>
> Similarly, while he claimed none of the drugs were his (including those found in his pants) he also would not say they are Mr. Rayworth's (pp.81; 93). He claimed all four iPhones in Mr. Rayworth's car were his, and that he has so many of them because he did favours for people who were returning them to the Rogers cell phone location where he works, (namely he bought the phones from them and used them for storing and accessing his huge appetite for music - pp. 36-39).

The general law applicable to severance of accuseds who stand jointly charged

[18] As an introduction, I rely on Justice Duncan's helpful summary in *R v Johnson*, 2014 NSSC 462 (conviction upheld on appeal, 2017 NSCA 64):[4]

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[3] After severance, at Mr. Rayworth's trial, if Mr. Sumbu is subpoenaed and *testifies for the Crown*, Mr. Sumbu's statement can be used by Mr. Rayworth's counsel to cross-examine Mr. Sumbu in accordance with section 10 of the *Canada Evidence Act*. If Mr. Sumbu is subpoenaed and *testifies for the Defence*, in a manner not favourable to Mr. Rayworth and inconsistent with his police statement, Mr. Rayworth's counsel may avail himself of the *Milgaard* processes arising from section 9 of the *Canada Evidence Act*. Mr. Rayworth's counsel may determine it to be in his interests to go on and make application to have any prior (inconsistent) statement of Mr. Sumbu (a non-accused witness) be admitted for the truth of its contents as an exception to the hearsay rule –*R v Youvarajah*, [2013] 2 SCR 720; *R v Bradshaw*, 2017 SCC 35 and *R v Larue*, 2019 SCC 25.

Law

[5] Section 591 of the Criminal Code provides the statutory basis upon which jointly charged accused may seek severance of their trials.

[6] It states:

> 591. …
>
> Severance of accused and counts
>
> (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.

[7] The principles of severance relevant to this application are summarized in R.E. Salhany, *Canadian Criminal Procedure*, 6th ed. looseleaf (Aurora, Ontario: Canada Law Book, 2014) as follows:

> 6.1510 The general rule is that persons jointly charged with the commission of an offence, particularly where the essence of the case is that the accused were engaged in a common enterprise, should be tried together. The trial judge, however, has the discretion to order separate trials if he is satisfied "that the interests of justice so require". An order for separate trials may be directed to take effect either at a specified later date or on the occurrence of a specified event if necessary, in the interests of justice, there is a need to ensure consistent decisions.
>
> …
>
> 6.1520 The usual ground advanced by the defence for seeking a separate trial is that evidence, which may in law be admissible against one accused and not the others, will be heard by the jury and may be considered by them in reaching their verdict. This will often arise where one accused has made a confession implicating one or more of the other accused and which, if introduced by the Crown, would be calculated to prejudice the jury against the other accused.

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[4] A more fulsome review of the "modern jurisprudence" can be found in Justice Arnold's decision in *R v Leggette*, 2015 NSSC 152. His decision was followed by Justice Champagne, (a jury trial involving murder) in *R v Lombardi*, 2017 QCCS 1970, affirmed on appeal 2019 QCCA 562.

> 6.1530 The authorities nevertheless indicate that separate trials will not always be ordered in such circumstances. It is generally assumed that any risk of prejudice can be averted by the trial judge, in his charge to the jury, separating the defences and instructing them to disregard that evidence not admissible against each accused. As Grange J.A. observed in McLeod: "Whether a jury can or cannot rise above such evidence, there is no question that our law presumes they can."

[8] Among the authorities relied upon by Salhany is the often-cited decision of *R. v. Weir* (1899) 3 C.C.C. 351, a decision of Wurtele J. in the Quebec Court of Queen's Bench (as it then was). It sets out the general principles of severance in these terms:

> 6 The general rule is that persons jointly indicted should be jointly tried; but when in any particular instance this would work an injustice to any of such joint defendants the presiding judge should on due cause being shown permit a severance and allow separate trials.
>
> 7 The discretion of the presiding judge must not be exercised in a desultory or immethodical manner, but it must be guided and regulated by judicial principles and fixed rules.
>
> 8 The usual grounds for a severance are:
>
> (1.) - That the defendants have antagonistic defences;
>
> (2.) - That important evidence in favor of one of the defendants which would be admissible on a separate trial would not be allowed on a joint trial;
>
> (3.) - That evidence, which is incompetent against one defendant, is to be introduced against another, and that it would work prejudicially to the former with the jury;
>
> (4.) - That a confession made by one of the defendants, if introduced and proved, would he calculated to prejudice the jury against the other defendants; and
>
> (5.) - That one of the defendants could give evidence for the whole or some of the other defendants and would become a competent and compellable witness on the separate trials of such other defendants.

[19] In *R v Last*, 2009 SCC 45, the court was faced with deciding whether a trial judge erred in dismissing a severance application seeking to have some of the

multiple counts from the indictment severed for separate trials. While there are arguable distinctions between the severance of counts and severance of accuseds joined on the same indictment, nevertheless Justice Deschamps' statements for the court echo the considerations applicable to applications for severance of accused persons:

> [14] It is noteworthy that, save for murder, s. 591(1) of the *Code* places no restrictions on the number of counts that can be tried together on a single indictment. Under s. 591(3)(*a*), however, a court may order that the accused be tried separately on one or more of the counts "where it is satisfied that the interests of justice so require". As noted by this Court in *R. v. Litchfield*, 1993 CanLII 44 (SCC), [1993] 4 S.C.R. 333, the absence of specific guidelines for granting severance requires that deference be afforded to a trial judge's ruling to the extent that he or she acts judicially and the ruling does not result in an injustice:
>
> > The criteria for when a count should be divided or a severance granted are contained in ss. 590(3) and 591(3) of the *Code*. These criteria are very broad: the court must be satisfied that the ends or interests of justice require the order in question. Therefore, in the absence of stricter guidelines, making an order for the division or severance of counts requires the exercise of a great deal of discretion on the part of the issuing judge. The decisions of provincial appellate courts have held, and I agree, that an appellate court should not interfere with the issuing judge's exercise of discretion unless it is shown that the issuing judge acted un-judicially or that the ruling resulted in an injustice. [Emphasis added; pp. 353-54.]
>
> [15] The Court in *Litchfield* integrated the long accepted two separate grounds for intervention: an unjudicial severance ruling or a ruling that resulted in an injustice (see, for example, *R. v. Kestenberg* (1959), 1959 CanLII 506 (ON CA), 126 C.C.C. 387 (Ont. C.A.), leave to appeal refused, [1960] S.C.R. x; and *R. v. Grondkowski* (1946), 31 Cr. App. R. 116 (C.A.), at pp. 119-20). These two grounds involve different inquiries. While the determination of whether the judge acted unjudicially calls for an inquiry into the circumstances prevailing at the time it was made, the review of whether the ruling resulted in an injustice will usually entail scrutiny that includes the unfolding of the trial and of the verdicts (*R. v. Rose* (1997), 1997 CanLII 2231 (ON CA), 100 O.A.C. 67, at para. 17).

[20] More specific to the case of an application to sever accused *persons* from a joint indictment are the recent comments of Justice Quigley in *R v Cummins*, 2018 ONSC 5000:

> Legal Principles
>
> 25 Our law presumes that accused persons who are alleged to have acted together in the commission of an offence are to be tried together:
>
> > The general rule is that prima facie, persons jointly indicted should be jointly tried where the case for the Crown is that the accused acted in concert: *Reg. v. Weir (No. 4)* 3 C.C.C. 351 at 352; *Reg. v. Grondkowski and Malinowski* 31 Cr. App. R. 116 at 119.18
>
> 26 Subsection 591(3) of the *Criminal Code* governs motions for severance. Paragraph 591(3)(b) permits severance of co-accused where the court is satisfied that "it is in the interests of justice to do so."
>
> 27 As Justice Doherty noted in *R. v. Savoury*19, the interests of justice "encompass those of the accused, the co-accused and the community as represented by the prosecution."
>
> 28 In determining whether the interests of justice require the severance of co-accused, I am required to start from the general rule and presumption that individuals in joint criminal ventures are to be tried together. Separate trials in the case of multiple co-accused involved in a single occurrence will be the exception, not the rule. Severance will only be granted in exceptional cases "where a joint trial will work an injustice to the accused."20
>
> 29 As such, as the parties seeking severance, the burden on this application is on Moreira and Cummins to establish, on a balance of probabilities, that severance from their co-accused, Mr. Smith, is in the interests of justice.
>
> 30 There is a long and uniform stream of authority in this country in favour of joint trials. Writing for the Supreme Court in *R. v. Crawford*21, Justice Sopinka articulated the underlying policy reasons for this authority. Separate trials not only involve extra cost and delay, but also create a risk of inconsistent verdicts. In addition, as Pardu J., now J.A., succinctly stated in *R. v. Valentine*22 :
>
> > The truth about the events is more likely to emerge if all are tried together, which is the preferable course, unless there is some prejudice which is so significant as to overcome the presumption.

31 Policy dictates that the "respective rights of the co-accused must be resolved on the basis that the trial will be a joint trial." The trial or preliminary motions judge will only sever where the resolution of the respective rights of the co-accused results in an injustice to one of them.

32 Further, *Crawford* establishes that a conflict between a co-accused's *Charter* protected rights will not override the presumption against severing joint trials, but for exceptional cases. In this case, Crown counsel argues that the respective rights of Cummins and Moreira can be resolved in a joint trial without an injustice to either of them. In his submission, there are no exceptional circumstances present that would require the exercise of judicial discretion in favour of severance. The circumstances here are claimed to militate against severance because it would impede the truth- seeking process and result in the duplication of large amounts of evidence.

33 Even in circumstances where severance is not granted, however, the case law recognizes that there may be need for carefully crafted limiting instructions from the trial judge. Where such instructions can properly be prepared and will be understandable by the jury, there is no need to resort to the exceptional remedy of severance.

34 In considering an application for severance, I am required to turn my mind to our long-standing confidence in the ability of juries to follow and apply difficult instructions. The Supreme Court of Canada has stated that the best way to balance rights and alleviate risks that the jury will misuse evidence is to ensure that jurors have *all* of the information they need along with a clear direction as to how they may use that information.

35 In *R. v. Corbett*,23 the Supreme Court of Canada emphasized that it is inappropriate and legally mistaken to start an analysis from a presumption that a jury is not going to obey the instructions of the trial judge relative to the probative value of any particular piece of evidence. Indeed, at paras. 35 and 38 of *Corbett*, Dickson J., later C.J.C., admonished that as the motions judge, I must start with the exact *opposite* presumption:

> Rules which put blinders over the eyes of the trier of fact should be avoided except as a last resort. It is preferable to trust the good sense of the jury and to give the jury all relevant information, so long as it is accompanied by a clear instruction in law from the trial judge regarding the extent of its probative value.
>
> ...
>
> In my view, it would be quite wrong to make too much of the risk that the jury might use the evidence for an improper purpose. This line of thinking could seriously undermine the entire jury system. The very strength of the jury is that the ultimate issue of guilt or innocence is determined by a group of ordinary citizens who are not legal specialists and who bring to the legal process a healthy measure of common sense. The jury is, of course, bound to follow the

> law as it is explained by the trial judge. Jury directions are often long and difficult, but the experience of trial judges is that juries do perform their duty according to the law. We should regard with grave suspicion arguments, which assert that depriving the jury of all relevant information is preferable to giving them everything, with a careful explanation as to any limitations on the use to which they may put that information.

[21] At paragraphs 39-40, Justice Quigley states:

> 39 Again in *Corbett*, Dickson J. noted that on the trial of co-accused persons, the confession of one is admissible only against that accused, and that the jury must be instructed that such evidence cannot be taken into account in determining the guilt of the co-accused. *The decisions in Olah and R. v. Suzack24 establish that this is the preferable approach when balancing the rights of co-accused where one party has made a statement and the other has not. However, as counsel for Mr. Moreira observed in argument, R. v. Parberry establishes that the rule remains the same even if the evidence of one accused is exculpatory of another.25*
>
> 40 The job of the applications judge, and the factors and criteria that need to be focused on, in considering whether severance should be granted in any particular case are set out succinctly in paras. 16-18 of *R. v. Last* 26 as follows:
>
> > 16 The ultimate question faced by a trial judge in deciding whether to grant a severance application is whether severance is required in the interests of justice, as per s. 591(3) of the *Code*. The interests of justice encompass the accused's right to be tried on the evidence admissible against him, as well as society's interest in seeing that justice is done in a reasonably efficient and cost-effective manner. The obvious risk when counts are tried together is that the evidence admissible on one count will influence the verdict on an unrelated count.
> >
> > 17 Courts have given shape to the broad criteria established in s. 591(3) and have identified factors that can be weighed when deciding whether to sever or not. *The weighing exercise ensures that a reasonable balance is struck between the risk of prejudice to the accused and the public interest in a single trial.* It is important to recall that the interests of justice often call for a joint trial. *Litchfield*, where the Crown was prevented from arguing the case properly because of an unjudicial severance order, is but one such example. *Severance can impair not only efficiency but the truth-seeking function of the trial.*
> >
> > 18 *The factors identified by the courts are not exhaustive. They simply help capture how the interests of justice may be served in a particular case, avoiding an injustice. Factors courts rightly use include: the general prejudice*

> *to the accused; the legal and factual nexus between the counts; the complexity of the evidence; whether the accused intends to testify on one count but not another; the possibility of inconsistent verdicts; the desire to avoid a multiplicity of proceedings; the use of similar fact evidence at trial; the length of the trial having regard to the evidence to be called; the potential prejudice to the accused with respect to the right to be tried within a reasonable time; and the existence of antagonistic defences as between co-accused persons*: *R. v. E. (L.)* (1994), 94 C.C.C. (3d) 228 (Ont. C.A.), at p. 238; *R. v. Cross* (1996), 112 C.C.C. (3d) 410 (Que. C.A.), at p. 419; *R. v. C. (D.A.)* (1996), 106 C.C.C. (3d) 28 (B.C.C.A.), at para. 9, aff'd [1997] 1 S.C.R. 8 (S.C.C.).
>
> [My italicization added]

Why Mr. Rayworth says it would work a serious injustice to him to be tried together with Mr. Sumbu

[22] Crown counsel argues that Mr. Rayworth and Sumbu each "wants to portray the other as having the major role." Moreover, even if Mr. Sumbu testifies at Mr. Rayworth's trial, in Mr. Sumbu's statement he does not expressly suggest that Mr. Rayworth was wanting the drugs for personal consumption, nor does he say Mr. Rayworth was wanting them in order to traffic them. The physical and anticipated police and expert evidence are expected to support the allegation of "possession for the purpose of trafficking". The potential prejudice of a joint trial to Mr. Rayworth's interests, if any, is insufficient to overwhelm the other factors the court has to consider which favour a joint trial.

[23] In oral argument Mr. Rayworth's counsel noted that he recognizes that Mr. Rayworth's jeopardy in relation to being found guilty of simple possession of

cocaine and marijuana is very significant. His defence will be oriented heavily towards establishing that he did not have possession of the drugs *for the purpose of trafficking*. His counsel stated that: "at trial, Mr. Rayworth intends to testify that he has a history of drug addiction and he intended to purchase drugs for his personal use…".

[24] Mr. Rayworth's counsel argues that "the facts of the case indicate that the evidence that could be supplied by Mr. Sumbu would potentially exonerate or raise a reasonable doubt as to the guilt of Mr. Rayworth in relation to the trafficking offence".

[25] At such a severed trial, Mr. Sumbu is compellable as a witness, yet anything he says as a witness likely cannot be used against him at his own trial to incriminate him - s. 5 *CEA*, s. 13 *Charter*, except in a prosecution for perjury or the giving of contradictory evidence; see the evolution of the jurisprudence in this area: *R v Kuldip*, [1990] 3 SCR 618; *R v Noel*, [2002] 3 SCR 433; and *R v Henry*, [2005] 3 SCR 609.

[26] At a joint trial, Mr. Sumbu will *not* be a compellable defence witness, and hence his potential evidence could be lost to Mr. Rayworth.

[27] In oral argument Mr. Rayworth's counsel identified the prejudice that he will face at a joint trial as follows: there is a much greater risk that he will be convicted of trafficking in cocaine and marijuana. Mr. Sumbu's evidence as reflected in his police statement, suggests that *he* at that time, *inter alia*, was in the business of facilitating drug transactions between buyers and sellers,[5] and that in the past he has been involved in drug trafficking. Moreover, of the five cellular phones in the car, Mr. Sumbu claims he is the owner of four of them.

The application of the law

[28] A similar argument was made in the *Cummins* case. Justice Quigley's comments are *apropos* to the case of Mr. Rayworth:

> 60 The core of the defence application is that severance is required, because Mr. Smith then becomes compellable to testify at a trial of Moreira and Cummins. But to my mind, the real question is how would those trials likely play out, and is there any realistic likelihood that Mr. Smith will become compellable. His counsel has plainly indicated he will not be waiving Mr. Smith's section 11(b) *Charter* rights and that he will vigorously resist the introduction of Mr. Smith's statement. That is of no surprise. As such, there is no certainty that the trials will play out as optimistically hoped for by counsel for Moreira and Cummins.
>
> 61 The test is whether it is just, in all the circumstances, to grant the severance. The justice of doing so must take into account all of the evidential considerations. *Stated simply, while the test does focus on the defendants' rights of full answer and defence, that is to be balanced against the truth-seeking function that is at the heart of the public's interest, balanced against whether issues of prejudice arise.*

[5] Notably, Mr. Sumbu does not say he only does so for buyers who then wish to traffic – his statement suggests that he is prepared to do so for personal-use buyers too.

[My italicization added]

[29] Ultimately Justice Quigley concluded that the applicants failed to satisfy him that it is in the interests of justice to grant severance because severance would:

1. effectively prevent the trier of fact from hearing all the relevant evidence relative to the entirety of the events and actions involving the two accused here and their roles in relation to the alleged drug trafficking;
2. raise the prospect and risk of inconsistent verdicts;
3. obstruct the very truth-seeking function that a joint trial is designed to achieve.

[30] Justice Quigley concluded:

> I accept that the trial of these three accused together will create issues, and present some challenges to the trial judge to craft careful jury instructions to navigate through these issues, but it bears remembering that the entitlement of the accused is not to a perfect trial, but to a fair and just trial.32 The likelihood of antagonistic defences calls for a single trial. I am not satisfied on a balance of probabilities that a fair trial, even if not a hundred percent perfect trial, cannot be provided for all three accused without severance and, as such, the interests of justice do not require it. The applications are dismissed.

[31] As Justice Duncan pointed out in *Johnson*:[6]

> [21] Ritchie J. writing in *Guimond v. R.* (1979) 41 C.C.C. (2d) 481 (S.C.C.) held that:
>
> > 50 …. I am of the opinion also that, whenever it is apparent that the evidence at the joint trial of two alleged co-conspirators is substantially stronger against one than the other, the safer course is to direct the separate trial of each, and this is particularly the case when the prosecution is tendering in evidence a damaging statement made by one under circumstances which made it inadmissible against the other.

[32] In *Lombardi*, Justice Champagne characterized the jurisprudence as represented by the following statements:

> 7 Since this section of the Code was enacted, it gave rise to a very important case law1. This Court's understanding of this jurisprudence is the following:
>
> -persons involved in a commission of a crime following the same event should be tried together;
>
> -consequently, there is a strong presumption for joint trials in such circumstances
>
> -the severance of the parties should be ordered only when there is strong evidence from one accused incriminating another accused;[7]
>
> -the Court's decision has to be made by the balancing of the general interest of justice and the right of an accused to have a fair trial;

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[6] I appreciate that some courts, including Justice Arnold in *Leggette* (para. 60), have distinguished *Guimond* "since it deals specifically with concerns unique to the charge of conspiracy", citing *R v Melvin*, (1994) 129 NSR (2d) 391 per Kelly J (SC). Moreover, the evidence here can fairly be described as not such that one of these two co-accused will face a "substantially stronger" case than the other.

[7] With the greatest of respect, I believe the statement that "severance… should be ordered *only* when there is strong evidence from one accused incriminating another accused", while an important factor, is not itself necessarily determinative in any given case.

> -on the whole, the judge has a large discretion, but he should exercise this discretion judicially.

[33] In *Leggette*, Justice Arnold concluded:[8]

> 64 The co-accused are likely to each raise a cut-throat defence, one blaming the other. I believe that based on the information provided in this application Henneberry and Leggette can each have a fair trial if tried together. The truth would most likely be revealed if Leggette and Henneberry are tried together. With separate trials the risk of inconsistent verdicts is real. A clear and careful mid-trial instruction and final instruction will be sufficient to preserve procedural fairness. With such a mid-trial and final instruction there will be no risk of a miscarriage of justice if Leggette and Henneberry are tried together. The application for severance is denied.

[34] Particularly helpful is Mr. Rayworth's counsel's reference to the reasons in *R v RTH*, 2007 NSCA 18, where the court cited with approval one of the leading cases in Ontario, *R v Savoury*, (2005) 200 CCC (3d) 94 (OCA) at paragraphs 27-37:

> 27 The trial judge correctly recognized that an accused's desire to call his co-accused as a witness for his defence could provide the basis for a successful severance application, but that the mere assertion of a desire to call the co-accused did not make severance automatic: R. v. Chow (2005), 195 C.C.C. (3d) 246 at 255-56 (S.C.C.); R. v. Boulet (1987), 40 C.C.C. (3d) 38 at 42 (Que. C.A.); R. v. Torbiak and Gillis (1978), 40 C.C.C. (2d) 193 at 199 (Ont. C.A.); R. v. Agawa and Mallet (1975), 28 C.C.C. (2d) 379 at 387 (Ont. C.A.).

[8] While Mr. Rayworth presently claims that he wishes a separate trial, so he can call Mr. Submu as a witness, who he suggests can exonerate him (of undue risk otherwise of being convicted for trafficking), even at a separate Rayworth trial there is a realistic possibility that when he testifies (as he says he will) that he may testify that not all the drugs are his, and so attempt to portray Mr. Sumbu as the sole "trafficker".

28 *Where an accused seeking severance contends that his right to make full answer and defence will be prejudiced unless the co-accused can be compelled to testify, two factors must be addressed by the trial judge:*

> *Is there a reasonable possibility that the co-accused, if made compellable by severance, would testify?*
>
> *If the co-accused would testify, is there a reasonable possibility that the co-accused's evidence could affect the verdict in a manner favourable to the accused seeking severance?*

29 *If the accused seeking severance can convince the trial judge that there is a reasonable possibility that the co-accused will testify and that his testimony could affect the verdict by creating a reasonable doubt as to the accused's guilt, the trial judge* ***may*** *properly grant severance. It is nonetheless open to the trial judge to exercise her discretion against severance if there are other factors of significant cogency that outweigh the potential impairment of the accused's right to make full answer and defence occasioned by a joint trial. An accused is entitled to a fair trial, but not necessarily the ideal trial from the defence perspective*: R. v. Cross (1996), 112 C.C.C. (3d) 410 at 419 (Que. C.A.), leave to appeal to S.C.C. refused [1997] C.S.C.R. No. 15, 114 C.C.C. (3d) vi.

30 The trial judge's reasons refusing severance focused on the two criteria identified above. Although the Crown argued, based on Shaw's refusal to testify in an unrelated proceeding, that there was reason to doubt Shaw's willingness to testify if severance was granted, I read the trial judge's reasons as assuming that he would testify if rendered compellable. Shaw had testified at the first trial and had given a sworn videotaped statement to the police. In addition, counsel, who had presumably spoken with Shaw, had indicated that Shaw was prepared to testify. Counsel's representations are entitled to some weight: R. v. Boulet, supra, at p. 42.

31 There was good reason to believe that Shaw would testify if compelled to do so. In reaching that conclusion, I place no weight on Shaw's decision not to testify in the joint trial. His decision not to testify in his own trial casts little, if any, light on whether he would testify if compelled to do so at a trial in which he was not an accused. This is particularly true in a case like this where the evidence that Savoury wanted to elicit from Shaw had little or no relevance to the defence advanced by Shaw. Shaw did not hurt his cause by testifying in a separate trial that Savoury was not the person in the back seat.

32 *I am, however, satisfied that the trial judge erred in principle when considering the possible effect of the evidence that Shaw could give if compelled to testify. The trial judge went beyond the limited inquiry into Shaw's reliability and credibility that is contemplated on a severance application. Martin J.A. described that inquiry in these terms in R. v. Torbiak, supra, at p. 199:*

> *If the evidence of a co-accused sought to be elicited on behalf of another co-accused is such that, when considered in the light of the other evidence, it might reasonably affect the verdict of the jury by creating a reasonable doubt as to the guilt of the latter, then precluding him from having the benefit of that evidence* ***may*** *require a separate trial,* [emphasis added] ...2

33 *The trial judge failed to consider what the jury might reasonably take from Shaw's evidence considered in the context of the rest of the evidence. Instead, the trial judge asked herself: "How reliable is Mr. Shaw going to be as a witness?"* She then undertook a detailed examination of Shaw's videotaped statement and his prior testimony, highlighting several inconsistencies between the videotaped statement and his testimony, and between different parts of his testimony.

34 The trial judge's reasons refusing severance reveal potential difficulties with Shaw's credibility and reliability. He had, however, from the moment of his arrest consistently asserted that Savoury was not the person in the back seat who committed the robbery. While some of the inconsistencies alluded to by the trial judge are potentially significant, they are the standard fare that juries regularly grapple with when assessing the reliability and credibility of both Crown and defence witnesses.

35 *The trial judge made her own assessment of Shaw's reliability and credibility, having never seen him testify, and she found both wanting.* On that basis, she refused severance. In doing so, she went beyond her limited responsibilities on the severance application and intruded on the domain of the jury. ***Provided that Shaw's evidence, considered in the context of the rest of the evidence, could reasonably have left the jury with a reasonable doubt as to Savoury's involvement in the robbery, the trial judge was required to leave the ultimate assessment of Shaw's credibility and reliability with the jury*****:** see R. v. Buric (1996), 106 C.C.C. (3d) 97 (Ont. C.A.), aff'd [1997] 1 S.C.R. 535, 114 C.C.C. (3d) 95 (S.C.C.).

36 *The circumstances of this case can be usefully compared to those found in R. v. Agawa and Mallet,* supra. In that case, the co-accused sought severance so that he could compel Mallet, his co-accused, to testify. *In affirming the trial judge's refusal to grant severance, Martin J.A. noted at pp. 387-88 that the proposed evidence of Mallet was "simply not believable" and was "patently unbelievable" when placed alongside the incontrovertible physical and forensic evidence.*

37 *I find nothing "patently unbelievable" in Shaw's assertion that Savoury was not the person in the back seat.* The fingerprint evidence, although a significant arrow in the Crown's quiver, does not render Shaw's evidence sufficiently incredible to allow the conclusion that it could not possibly affect the deliberations of a reasonable jury. In fact, Shaw's testimony provides some modest support for the contention that Savoury may have touched the car when it was parked in front of the house. It is also noteworthy that at the first trial, at which Shaw testified, the jury was unable to reach a verdict on any count.

[My italicization and bolding added]

Why I am satisfied that the interests of justice do not require severance in this case.

[35] The burden is on Mr. Rayworth to satisfy the court that the interests of justice require severance of these accuseds. Mr. Rayworth's counsel argued that this is not an onerous burden – proof of a mere probability – arguably 51% or more likely than not.

[36] However, the "interests of justice" criterion cannot be reduced to asking oneself simply: is it more likely than not that Mr. Rayworth will not receive a "fair trial" in a joint trial.

[37] I note here that such assessments of an *exercise of discretion* by the court should not be characterized as capable of "proof more likely than not". The balance of probabilities standard applies to proof of *facts*. Whether the court is satisfied that the available evidence supports the exercise of its discretion to order severance cannot be said to be analogous to a fact finding *per se*.

[38] Moreover, as noted in the jurisprudence, *even when* there is a reasonable possibility that Mr. Sumbu would testify if compelled, and his evidence could affect the verdict in a manner favourable to Mr. Rayworth at a separate trial for Mr. Rayworth, the question is not whether refusal to sever will render Mr. Rayworth's

trial less than ideally "fair", but whether it will render his trial fundamentally unfair, in that it demonstrably risks a miscarriage of justice.

[39] The interests supporting a joint trial (which can include avoiding the risk of inconsistent verdicts, that the truth-seeking function is better served when all the evidence is heard together, and the avoidance of extra costs and delay of a second trial) can overwhelm a realistic concern about a less than ideally fair trial occurring, but cannot overwhelm a realistic concern about a less than fundamentally fair trial occurring.

Conclusion

[40] I conclude that at a separate trial, there is a reasonable possibility that Mr. Sumbu would testify on behalf of Mr. Rayworth if compelled, and his evidence could affect the verdict in a manner favourable to Mr. Rayworth.[9]

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[9] This is not a case where I am able to assess Mr. Sumbu's ultimate reliability at this stage and conclude that his potential evidence would be "patently unbelievable". That is, I cannot conclude that the reliability of Mr. Sumbu's anticipated evidence (seen in the context of the rest of the anticipated evidence) is so suspect that, it could not reasonably leave a trier of fact with a reasonable doubt about whether Mr. Rayworth had possession of the drugs for the purpose of trafficking.

[41] Nevertheless, I conclude that at a joint trial any diminution of Mr. Rayworth's right to full answer and defence will not be such that he will be deprived of a fundamentally fair trial.

[42] Moreover, when I consider the countervailing interests that favour a joint trial, I am driven to the conclusion that the interests of justice require a joint trial.

Conclusion

[43] The application for severance is dismissed.

Rosinski, J.