SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Sylliboy*, 2020 NSSC 406

Date: 20201104
Docket: Tru. 492051
Registry: Truro

Between:

Her Majesty the Queen

v.

Kevin Brian Sylliboy

Defendant

DECISION
(Motion for Enhanced Court Room Security Measures)

Judge:	The Honourable Justice Jeffrey R. Hunt
Heard	October 30, 2020, in Truro, Nova Scotia
Oral Decision:	November 4, 2020
Written Release:	July 25, 2022 [Release embargoed due to jury election] **Subsequent to this Decision the Defendant re-elected to Judge alone.**
C**harge:**	That he on or about the 1st day of April, 2018, at or near, Millbrook in the County of Colchester, Province of Nova Scotia, did commit second degree murder on the person of James Blair contrary to Section 235(1) of the *Criminal Code of Canada.*
Counsel:	Patrick Young/Jody McNeill, Crown Counsel Zeb Brown, Defence Counsel

By the Court (Orally):

[1] The Court has before it a motion advanced by the prosecution seeking the use of enhanced security measures for the defendant, Kevin Sylliboy. There is a pending jury trial in this matter and these reasons will be embargoed until the conclusion of the matter.

[2] I am going to briefly comment on the evidentiary record, the submissions of the parties as well as the state of the applicable law.

[3] As discussed in submissions, broadly stated, the tension in play here is that between valid security concerns of the persons responsible with security in the courtroom, and the fair trial rights of the accused, as these are explained in case law.

[4] Crown submits that there exist reasonable grounds for concern for the safety of justice system participants if the defendant is not restrained during his courtroom trial appearances. They have set out the level of restraint that they seek [leg shackles and handcuffs]. They argue that he has a lengthy and recent record for violence and is currently serving a federal sentence for same. His most recent convictions for serious violence were registered in connection with

in-custody offences or offences committed during the current incarceration. The underlying facts, they submit, demonstrate that he is prone to spontaneous acts of violence which can result in serious harm.

[5] They have presented documentary evidence respecting various threat risk assessments which have been carried out by the authorities. We have also heard from District Sheriff Wheeldon.

[6] Counsel for the defendant acknowledges a recent record including offences of violence and significant history of disciplinary incidents within the correctional facility. They do not contest the fact that the record, together with the relevant risk assessments, justify increased courtroom security and in particular the use of restraints. The Defence seeks all reasonable measures to prevent the jury becoming aware of the increased security and restraint level.

[7] In assessing a motion with respect to the use of increased courtroom restraints, at least the following are the relevant principles which must be considered:

1. The decision whether an accused will be the subject of elevated courtroom security or restraint measures is within the discretion of the trial judge. The judge must balance the duty to ensure the safety of all

participants in the proceeding with the need to preserve the fair trial rights of the accused in the context of a jury trial and the presumption of innocence: See *R. v. McNeill*, (1996), 91 O.A.C. 363; 108 C.C.C. (3d), 364 (Ont. C.A.) and *R. v. Lalande*, [1999] O.J. No. 3267 (Ont. C.A.).

2. The issue is not to be decided by security staff although their views will be afforded considerable weight. Once the issue of increased security measures is raised the trial judge ought to hold a hearing into the matter and create a record. In such a hearing the prosecution bears the burden of establishing reasonable grounds for imposition: See *R. v. Figueroa*, [2002] O.J. 3146, (SCJ).

3. In making its determination the Court may consider such factors as background of the accused, seriousness of the charges, views and expertise of the security personnel, public and individual interest in achieving a fair and impartial trial: See *R.v. C.(J.A.*), 1998 CarswellOnt. 5204, (SCJ).

4. Any judgment made at the commencement of trial based on a reasonable forecast of future risk or behaviour may be revisited in the course of the trial as events unfold and necessitate a change in the

application of reasonable measures: See *R. v. Young*, 2018 ONSC 1564.

[8] In terms of what we have heard in this case, the Court had the benefit of the evidence of district Sheriff Wheeldon who was called by the crown. Sheriff Wheeldon is an experienced Peace Officer, having served 25 years in the UK in law enforcement before serving now 10 years in Nova Scotia in the Sheriff Services including the past three as District Sheriff for Cumberland, Colchester and East Hants.

[9] In evidence he outlined his responsibilities, including responsibility for security and transport issues. He walked the Court through the risk assessment process and the inputs that go into such assessments. The Sheriff was asked about various assessments that became exhibits including Mr. Sylliboy's Risk Assessment, the Truro Supreme Court Threat Assessment and an OH&S Hazard Assessment and Control form, and I have reviewed these in detail.

[10] The witness provided evidence respecting his own observations with respect to an episode the defendant had when appearing for a provincial court appearance in this matter some months ago. Sheriff Wheeldon described an

"extreme struggle", which took place back in cells which required five deputies to deal with an extremely resistant Mr. Sylliboy.

[11] Sheriff Wheeldon gave evidence about other incidents which would fall into the category of attempted self harm by the defendant and some of these were noted by prosecution in submissions. The Sheriff described the enhanced security steps which have been previously employed for the defendant for his Provincial Court appearances and those which he considered preferable or necessary going forward for his trial appearances.

[12] He was also asked about the security situation as it related to the Truro Supreme Court site at 1 Church Street. He described the limitations of the site and the steps which have been taken in the past to move in custody prisoners in and out of the Supreme Court site. He expressed concern that although with previous in custody defendants the security steps have proven sufficient, he is concerned that with this particular defendant, the escalated risks cause him to conclude that the previously sufficient measures would be inadequate.

[13] Sheriff Wheeldon agreed in cross-examination that he was not alleging that the defendant in his appearances in this matter had engaged in any assaultive behaviour to this point.

[14] I have heard the submissions of the parties and both sides have recognized the tension that exists between the needs of security and the fair trial rights. I am satisfied, when I examine the case law, that the prosecution has fully carried its burden of demonstrating that enhanced security measures and courtroom security are called for. I have no hesitation in concluding that.

[15] Where the more difficult question arises is how far up the ladder, do we go before we tip the balance and impair the fair trial interests of the accused. Case law on these subjects is very interesting. I know counsel would have been reading and examining these, as has the Court. A fair reading of that case law creates a very bright line between leg shackles, which with reasonable care can be shielded from a jury versus handcuffs which cannot.

[16] I have examined the case of *R. v. Barreira*, 2017 ONSC 948. That is the Superior Court of Justice case where a lot of the principles that I outlined at the beginning of my reasons are referenced. It is a good overview of the law. It outlines the fact that the judge must balance the duty to ensure the safety of all participants with the need to maintain the dignity of the accused in the context of the presumption of innocence.

[17] In that case, the crown was seeking ankle belt and handcuffs. The judge in that case examined the situation and had no trouble concluding it was a high-risk situation he was dealing with:

> 49 It is my opinion that the wearing of the leg belt restraints achieves the balance between safety of all participants and the dignity of the accused in the context of the presumption of innocence.

Para. 51:

> 51 Were the accused to wear handcuffs the jury would surely see them, and this could occasion prejudice to the accused. Further I see no need for them as the leg belt restraints and the security present will minimize any remaining security concerns.

[18] In *R. v. Petrin*, 2016 ABQB 171, the senior sheriff in that case in the district that was going to have the trial of that individual, had sought hand and feet restraints. The judge concluded:

> 24 I acceded to this request although directed that the accused was to remain in leg shackles.

So, the only thing approved was leg shackles. He continued:

> I further direct that the prisoner box in the courtroom be set up so as to block the jury's view of the leg shackles.

And carrying on at para. 25:

> I am satisfied that additional security precautions are warranted in this instance. This additional security has been minimally intrusive, and efforts have been made to ensure that the leg restraints are not visible to members of the jury.

[19] In *Hoeg v. Warden of Dorchester Institution*, 2017 NBCA 55, the New Brunswick Court of Appeal, dealing with courtroom security and restraint issues commented:

> 11 The jurisprudence distinguishes jury trials where shackles could clearly affect trial fairness…the court's discretion should be exercised in a manner that balances the interests of a fair trial and a consideration of courtroom security.

[20] I have also found useful the case of *R. v. McArthur*, 1996 CarswellOnt 5034, which contained a very clear overview of the considerations:

> 26 ... The prisoners while in court will not be required to wear handcuffs and, accordingly, they will not be required to wear waistbelts. Ankle shackles will remain on each of the accused throughout. Further in this regard a door or curtain will be constructed on the prisoner's dock so that members of the jury will be unable to observe the ankle shackles of the accused.

They continue:

> Paper and writing utensils were used for communication between the accused and their counsel shall be approved by security personnel.
>
> ....
>
> Vehicles are to be positioned as per the plan so that members of the public and media will not observe the accused enter or exit the courthouse.

[21] The apparent issue was the visibility of heavy restraint as the defendant in that case moved through those public areas. There were measures taken to ensure that the jury and even members of the public would not see the person moving in the heavy restraints.

[22] In *R. v. Heyden*, 1998 CarswellOnt. 5851 you find a reference to the dock that are in use in Ontario. Many cases make this reference and the ability to secure high risk prisoners to the floor of the dock. In this case they had one of the docks that permitted high security individuals to be secured to the floor.

[23] In *R. v. Vickerson*, 2006 CarswellOnt. 475 the defence did not want leg shackles and the prosecution sought them. And the judge at para. 39 says:

> The leg shackles in my view present a major deterrence without which security personnel would lose the advantage and would be placed in "response mode". In my view should Mr. Vickerson remain in leg shackles within the court room a secure environment for the trial participants would be established as opposed to diminished security amounting to no security at all. At the same time Mr. Vickerson's dignity would be maintained within the context of the presumption of innocence as the jury would be unaware that he was wearing leg restraints while in the prisoner's box.

[24] I am also aware of *R. v. W.H.A.*, 2011 NSSC 166 This is a Nova Scotia case where jurors saw leg shackles, and this resulted in a mistrial application. In general, that is different fact situation, but it has been reviewed.

[25] Finally, the Court referred to *R. v. Petrin*, 2016 ABQB 171. In that case the authorities had wanted hand cuffs and leg shackles. Leg shackles alone were permitted. The Court at para. 26 discussed that and the judge says:

> 26 I am satisfied that additional security precautions are warranted in this instance. The additional security has been minimally intrusive, and efforts have been made to ensure that the leg restraints are not visible to the members of the jury. The accused offered no legal authority for the presumption that leg

> restraints somehow undermine the presumption of innocence or offend human dignity.

I suspect this comment was tied into the fact that it was not visible to members of the jury.

[26] I have not been able to find a case where ankle shackles and hand cuffs were permitted in front of a jury. I suspect other parties searched as well. There are multiple cases where ankle restraints are commented upon as reasonable, appropriate, measured, do not tip the fair trial balance, and are a measure which provide the authorities time to respond.

[27] As to the present case, I conclude the prosecution has carried their burden to show that enhanced measures are appropriate and can be done without damaging the fair trial interests of the accused. In this case we have the availability of a portable holding cell at close hand. Mr. Sylliboy will be seated for the trial in the area sought by the Chief Sheriff - which is close to the door of the room with the holding cell.

[28] I have concluded that close deputy sheriff contact is appropriate in this case and will again not offend the fair trial interest. In a trial of this nature, I do not think it would shock the jurors so see that there is a high degree of security,

more security personnel than we would see in a typical situation, and that they are in close proximity. I do not have a concern about that.

[29] I find that the staffing level sought by the Chief Sheriff, which is high, is reasonable and approved. I have found that his request for conducted electrical weapons in the courtroom, in the way he has outlined, are reasonable and are part of the reasonable response in this case. Those are not readily visible, well they are not even apparent to me, and I would not know what piece of the belt that even relates to. I have no concern that the jury would think that there is anything there that would be of concern.

[30] The sheriff sought full face shields (as a result of the spitting). I have no trouble agreeing with that. In the days of covid people are more and more use to seeing full face shields used everywhere in society. I do not think it would be surprising or out of place in this context either. I do not have a difficulty with that.

[31] I think the prosecution has carried their burden of demonstrating that leg shackles but not hand cuffs are required. Mr. Sylliboy will have those leg shackles obscured by a table and skirting or basically a curtaining of the table. I have suggested all the tables be done in the same way, so that one does not

stand out. So, the counsel tables and where Mr. Sylliboy will be seated would be treated the same.

[32] There will be no moving of Mr. Sylliboy in and out of the room in front of the jury. So, the intention will be that Mr. Sylliboy, in fact all of us, would be in our place when the jurors enter. That can also be done at the off-site jury selection and challenge for cause

[33] Finally, I will say this. There exists the right to revisit any of these measures as the circumstances warrant. This is simply a statement of the case law. I will repeat it:

> Any judgment made at the commencement of trial based on a reasonable forecast of future risk or behaviour may be revisited in the course of the trial as events unfold and necessitate a change in the application of reasonable measures:
> **R. v. Young,** 2018 ONSC 1564.

[34] Counsel, that is the determination of the motion for enhanced courtroom security measures for trial.

Hunt, J.