IN THE SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Scott, 2004 NSSC 12

Date: 2004/01/19
Docket: Cr. No. 200210
Registry: Kentville

Between:

Her Majesty the Queen

v.

Jennifer Madeline Scott

D E C I S I O N

Judge:	The Honourable Justice A. David MacAdam
Heard:	November 25, 26, 27, 27, 2003 and December l, 2, 3 4, and 5, 2003, in Kentville, Nova Scotia
Written Decision:	January 19, 2004
Counsel:	Shane G. Parker, for the Crown Brian V. Vardigans, for the Defence

By the Court:

[1] Following selection, the jury was dismissed with instructions to return in a week. On their return, one of the jurors handed a note to the Sheriff's officer for delivery to the Judge. In the note, he said he had been spoken to during the weeks' adjournment. Upon being invited to amplify on his note, he indicated he had been at a local hardware store when he was approached by a lady who he recognized as being present at the Court House on the day of jury selection. The lady told him of a statement she said was made to her by the accused following selection of the jury. The juror indicated he had given some credibility to the lady's statement in that he had, on leaving the Court House, observed her in conversation with the accused.

[2] The juror was excused and replaced by the first alternate selected on the day of jury selection. The trial then commenced with the accused being placed in the charge of the newly constituted jury, followed by the opening address to the jury. The Crown was asked to have the matter of the conversation between the lady, and the former juror further investigated.

[3] Following a number of days of evidence, the Crown reported the police had completed their investigation. Included with Crown's oral report was a written statement obtained from the lady. In the statement, in addition to acknowledging having spoken to the former juror about what the accused had said to her, she stated the former juror had himself said:

> He said that they all basically knew she was guilty. They were just following the process. It wasn't the exact words he used.

[4] The Crown indicated it wished to call this lady as a witness, since on the basis of her statement, she would be able to testify to an "apparently" incriminatory statement allegedly made to her by the accused.

[5] Counsel for the accused then informed the Court, if the lady was called, he would wish to call the former juror. Counsel said after receiving a copy of the statement, he had contacted the former juror, who denied ever saying to the lady what she alleged in her statement. He wished to call the former juror for the purpose of challenging the credibility of the lady, in the event she was called by the Crown to testify as to any incriminating statement she says the accused had made to her.

[6] Crown counsel objected to the calling of the former juror, maintaining his evidence as to his alleged statement was collateral to the evidence by the lady, of the alleged incriminatory statement to her by the accused. I immediately ruled that since both allegations were contained in the same

statement, and related to what the lady was saying she had said to and heard from the former juror, and in view of the very real issue of her credibility in the circumstances, the Defence should be able to challenge her credibility by calling the former juror. The "integrity" of her complete statement was in issue. Although I declined to read the portion of the statement relating to the alleged statement by the accused, it was apparent from the positions being taken by counsel that it was, to some extent at least, inculpatory.

[7] I then decided that both the former juror and the lady should be brought in, sworn and examined on the question of what the former juror did, or did not say to her.

[8] The former juror denied ever making the statement attributed to him by the lady. The lady repeated the substance of what she said in her statement as to what the former juror had said. She said she was a member of the jury panel and following jury selection had gone outside to be picked up by her boyfriend. She was first approached by a person identified to her as the boyfriend of the accused who she knew as a friend, or former friend, of her own ex-boyfriend. The accused then entered into conversation with her, making the statement she later communicated to the former juror.

[9] She says during the ensuing week she was at work when she noticed the former juror. She approached him inquiring as to how he was doing. She told him what the accused had said to her at which time the former juror had made the statement to the effect it didn't matter anyway, as the jury had already decided she was guilt, and they were just going through the process.

[10] After representation by counsel, I decided to continue with the evidence. Consideration was given to polling the jury as to whether the jury, or some members of the jury, had a discussion about the guilt of the accused on the day of jury selection. Since the statement by the former jury was alleged to have been made during the interval between the day of jury selection and the date scheduled for their return, it was only in the brief period following selection of the jury during the time when the sheriff's officers had instructed them on the procedure for returning, that this could have occurred, since this was the only time the jury would have been together.

[11] Initially I had concerns that a question addressing any discussions they had on that day might be judicial intrusion into their deliberations. Whether any such discussions could be interpreted as being part of the jury's deliberations, and therefore, not subject to public disclosure, was not further addressed. The jury were reminded again, as they had been in the opening address, that they were to decide the case only on the evidence presented in

Court and to put aside anything they might have otherwise heard about the events involved in the trial.

[12] As the evidence continued, further consideration was given as to whether a question or questions could be drafted for the members of the jury that would obtain their response on whether they had heard any members of the jury make statements to the effect they had decided the guilt of the accused, and were just going through the process. In order to avoid the jury speculating on whether the Crown or the Defence was behind the questioning, I created two questions, one as to whether they had discussed the innocence of the accused, and the second as to whether they had discussed the guilt of the accused. Additionally, the sheriff's deputies who had contact with the jury, from the time of selection to their dismissal on that day, were to be asked whether they had overheard any such statement or comments by any members of the jury.

[13] After the deputies denied overhearing any such comments, the following pre-amble, questions and caution were addressed to each individual juror, following their being sworn:

> One of my main responsibilities is to ensure that all parties receive a fair trial, with the issues of guilt or innocence decided by a fair and impartial jury, and only on the basis of evidence presented, under oath, in court.
>
> Recently, I have been informed of an allegation that the jury, or some members of the Jury, may have, on the day the Jury was selected, discussed the guilt or innocence of the accused.
>
> I will therefore ask you two questions. My questions only relate to any discussions or statements on the day they jury was selected, that is, November 25, 03.
>
> My first question is; are you aware of any members of the Jury saying anything to the effect, they basically knew the accused was innocent, and they were just following the process?
>
> My second question is; are you aware of any members of the Jury saying anything to the effect, they basically knew the accused was guilty, and they were just following the process?
>
> Please do not discuss with the other members of the Jury the questions I have just asked you. The Sheriff's officer will take you to a separate room until I have asked each of the members of the Jury these questions.

[14] With each juror answering each question in the negative, two issues remained to be determined.

ISSUES

1. Should there have been a mistrial on the basis the accused's right to a fair and impartial trial was in jeopardy?

2. Should the Crown, if it wished, be permitted to call the lady to testify as to what she says the accused said to her.

1. **Should there have been a mistrial on the basis the accused's right to a fair and impartial trial was in jeopardy?**

(A) The decision to poll the Jury:

[15] Initially, because of *s. 649* of the *Criminal Code* wherein members of the jury are prohibited from disclosing any information relating to the proceedings of the jury when it is absent from the courtroom, the jury members were not polled.

[16] Further consideration, as previously noted, was subsequently given, and the jurors were asked the two questions. As well, the two deputies who had been in contact with the jury following selection, were individually brought into Court and asked whether they were aware or had overheard any such discussion and both responded in the negative.

[17] In conducting the poll of the jury regard was had to the Supreme Court of Canada decision in *R. v. Pan; R. v. Sawyer,* [2001] 2 S.C.R. 344, at para 59 where Justice Arbour, on behalf of the Court stated:

> Evidence indicating that the jury has been exposed to some information or influence from outside the jury should be admissible for the purpose of considering whether or not there is a reasonable possibility that this information or influence had an effect upon the jury's verdict. Such evidence should be admissible regardless of whether it is a juror or someone outside the jury who offers the evidence. However, while jurors may testify as to whether or not they were exposed to extrinsic information in the course of their deliberations, the court should not admit evidence as to what effect such information had upon their deliberations.

[18] The inquiry was, therefore, to determine if the jury on the basis of extrinsic evidence or information, may have reached some conclusion as to the guilt

of the accused, before the trial had even commenced. At the time the jury not only had not heard any evidence in Court, but had not yet received the formal opening address.

[19] In *R. v. Blackwell* [1995] N.L.O.R. No. 2376 Justice Morland on behalf of the English Supreme Court of Judicature, Court of Appeal (Criminal Division), in rendering the approved judgment of the Court, at paras 38 and 39 commented:

> [38] Counsel for each appellant submitted that the Judge erred in not carrying out an investigation into whether or not information, not evidence before the Jury, had been relayed by the member of the public to the juror supposedly his fiancee, into whether or not they had discussed the case between them and into whether or not any information had been relayed by that juror to the jury as a whole. Because the Judge carried out no investigation when faced with the concern expressed by all Counsel he was in no position to exercise his discretion not to discharge the whole Jury.
>
> [39] The interests of justice require that a criminal trial is conducted in an atmosphere devoid of intimidation and unfairness and any feeling of intimidation or unfairness. It is essential that jurors, witnesses and defendants are spared from improper outside pressures and approaches.

and at paras 51 - 54:

> [51] If there is any realistic suspicion that the Jury or one or more members of it may have been approached or tampered with or pressurised, it is the duty of the Judge to investigate the matter and probably depending on the circumstances the investigation will include questioning of individual jurors or even the Jury as a whole. Any such questioning must be directed to the possibility of the Jury's independence having been compromised and not the Jury's deliberations on the issues in the case.
>
> [52] When the Judge has completed his investigations whether relating to the activities of people outside the Jury or the Jury collectively or individually the Judge is in a position to make an informed exercise of judicial discretion as to whether or not the trial should continue with all twelve jurors or continue after the discharge of an individual juror, or the whole Jury may have to be discharged.

> [53] In our judgment in this case the trial Judge's exercise of his discretion was not a proper exercise of discretion because he did not have the information required. (See Lord Ackner in R. v. Spencer [1987] A.C. 128 at page 145c).
> [54] In our judgment the trial Judge had not only the power but the duty to make the necessary investigation so that he could make an informed exercise of discretion.

[20] Having regard to the responsibility of the presiding trial judge to ensure all parties, and in particular the accused, receive a fair trial, with the jury deciding guilt or innocence on the basis of the evidence presented and not on any preconceived notions or opinions, I decided to poll the jurors. The reasons of the Supreme Court of Canada in *R. v.Corbett* [1998] 1 S.C.R. 670 although specifically relating to the issue of the accused having a previous conviction for an offence of a similar nature, emphasizes the role of the trial judge in ensuring a trial fair to all parties. With this in mind, the questions were framed to ask of any discussion of "guilt" or "innocence" to ensure no adverse speculation, as might have occurred if the only question related to the allegation made of the former juror by the former panel member.

(B) In the circumstances should a mistrial have been declared?

[21] Recognizing the jury had been counselled on the need to decide the case only on the evidence presented, and to put aside any opinions they had or gossip or rumours they heard, and would be again in the Court's address, at issue is whether trial fairness required a declaration of a mistrial.

[22] As already noted, the jurors and sheriff's deputies denied knowledge of any discussion by any member of the jury, along the lines of the statement attributed to the former juror by the former panel member.

[23] The test for a mistrial has been stated as being whether there is a "reasonable apprehension of bias". Cumming, J.A. In *R. v. Budai* (2001), 153 C.C.C. (3d) 289 at p. 302:

> The test for determining whether there exists in any particular case disqualifying partially or bias has been developed and applied many times by the courts in cases involving judges, arbitrator and inferior tribunals. A remedy will be granted where actual bias is demonstrated (usually a direct pecuniary interest or some other personal interest in the outcome) or, more commonly, where the circumstances give rise to a "reasonable apprehension of bias". See *R. v. R.D.S., supra*,

> *Committee for Justice and Liberty v. National Energy Board, [1978] 1 S.C.R. 369; Szilard v. Szasa,* [1995] S.C.R.3; *Ghirardosi v. Min. of Highways for British Columbia,* [1966] S.C.R. 367; *Blanchette v. CIS Ltd.,* [1973] S.C.R. 833, 36 D.L.R. (3d) 561; *R. v. Brouillard, ...*
>
> > The requirement that there be no reasonable apprehension of bias applies to jurors. ...

[24] MacKenzie, J.A. at p. 312, after noting that in *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484, at p. 531, Justice Cory stated an alleged bias must contain a "two-fold objective" element in that the person considering the alleged bias must be reasonable and the apprehension itself must also be reasonable in the circumstances of the case, concluded:

> In summary, there must be a real likelihood or probability of bias demonstrated, and not a mere suspicion, in the minds of reasonable, right-minded persons.

[25] On the other hand, it is not necessary that actual prejudice or bias be established. Martin, J.A. in delivering the reasons of the Ontario Court of Appeal, in *Regina v. Hertrich, Stewart and Skinner* (1982), 67 C.C.C. (2d) 510, at p. 543 commented:

> I am, however, unable to accept Mr. Watt's submission that the showing of actual prejudice to the appellants is essential to constitute a miscarriage of justice within s. 613(1)(a)(iii) of the *Code*. A miscarriage of justice within s. 613(1)(a)(iii) of the *Code* occurs where there is an appearance of unfairness in the trial of an accused: see *R. v. Masuda* (1953), 106 C.C.C. 122, 17 C.R. 44, 9 W.W.R. (N.S.) 375.

[26] Having examined each of the jurors, I was satisfied there had been no pre-judging of either the guilt or innocence of the accused. If I was in error, then I was also satisfied the jurors in deciding the case would do so on the basis of the evidence presented in Court. To the extent they may have had any prior opinions or notions, or heard any rumours or gossip, they would cast them aside and decide guilt or innocence on the basis directed by the Court, namely, on the evidence presented, and after considering counsel's addresses and my charge.

[27] In *R. v. Lawrence* 2001 Carswell N.S. 80, 192 N.S.R. (2d)43 (NSCA), leave to appeal to the Supreme Court of Canada, refused, 2001 Carswell NS 269 [2002] N.S.R. (2d) 200, a prospective juror stated she didn't know why they were having a trial as the accused was drunk and on the wrong side of the road. The statement by the prospective juror only came to the attention of

the trial judge following the accused's conviction on a number of offences, including impaired driving causing death.

[28] Justice Flinn in delivering the reasons of the Court, referenced the test for finding a reasonable apprehension of bias, outlined by Justice Cory in *R. v. S (R.D.)*, [1997] 3 S.C.R. 484 at pp. 530-531. After citing Justice Cory's reference to "the sound observation of de Grandpré , J. in *Committee for Justice and Liberty v. National Energy Board* , [1978] 1 S.C.R. 369 that the "grounds for this apprehension must ... be substantial ...", he quotes Justice Cory:

> Nonetheless the English and Canadian case law does properly support the appellant's contention that a real likelihood or probability of bias must be demonstrated, and that a mere suspicion is not enough.

[29] Justice Flinn, at paras 106-112, reviewed the process involved in concluding whether there is a reasonable apprehension of bias:

> In this case, both the type and source of the alleged bias are highly relevant to the question of whether a reasonable person, fully apprised of the circumstances, would apprehend bias as a result of the comment revealing the prospective juror's knowledge and opinion concerning the case.
>
> I turn first to the source of bias alleged. Deane, J. in *Webb v. R.* (1994), 181 C.L.R. 41 (Australia H.C.) suggested at (para.) 12 that allegation of juror bias may be grouped into four main (although at times overlapping) categories related to the source of the alleged bias: disqualification by interest, disqualification by conduct, disqualification by association and disqualification by extraneous information. The source of the alleged bias is relevant to how a reasonable person would react to an allegation in particular circumstances. For example, with respect to disqualification by interest or association, the age old maxim that one cannot be a judge in one's own case will be relevant. Such situations are recognized as ones of "obvious partiality" as that term is used in connection with s. 632 of the *Criminal Code* and do not arise from the prospective juror's lack of understanding of the criminal trial process or the role and duty of the jury. The appearance of bias in such a case cannot likely be removed by the judge's instructions or cautions. Much the

same may be said about bias based on conduct. Allegations of misconduct by or in relation to jurors will generally involve actions by jurors after they have received cautions and directions from the judge or improper actions by others that compromise the integrity of the jury's deliberations. Further instructions from the judge will provide modest, if any, assurance that the fault which has already occurred will be corrected. To the extent that the juror's misconduct might be thought to arise from ignorance of the process, the fact that it has occurred gives rise to serious doubts that future instructions will be more successful in undoing it than those already given were in preventing it.

Unlike the situations just discussed, the allegation of bias in this case falls into Deane, J.'s fourth category in which the source of the alleged bias is extraneous information. The concern is that a previously held opinion, expressed before the juror has received instruction from the judge or taken the oath of office, has prevented the juror from behaving impartially.

Special considerations are relevant with respect to this sort of allegation. The first is that a reasonable person would not expect a prospective juror to come to court having heard nothing about the case. As the Ontario Court of Appeal said in *R. v. Hubbert* (1975), 29 C.C.C. (2d) 279 (Ont. C.A.); aff'd [1997] 2 S.C.R. 267 (S.C.C.), "Prior information about a case, and even the holding of a tentative opinion about it, does not make partial a juror sworn to render a true verdict according to the evidence." As noted earlier, knowledge of and opinions about the case (i.e., the attitudinal component of bias) do not alone constitute partiality. Partiality consists of the inability to put them aside.

The second is that the statement by this prospective juror suggesting extraneous knowledge was made before taking the oath. It is common experience that people in informal settings may engage in "loose talk" which is quickly forgotten when they, themselves, undertake the solemn duty and responsibility of judging. Here, the statement was made before there was any instruction about the process, before the taking of the juror's oath and before detailed instructions on what was

expected by the judge. The strong statements of view made by this juror are, of course, troubling. However, they were made by a *prospective* juror. They were not made by a professional judge who would be taken at the time of making such remarks to understand the process and his or her responsibilities in it. Nor were they made by a selected and sworn juror who, at the time they were made, had taken the oath of office and received appropriate instruction about his or her role and responsibilities. These circumstances are ones which a reasonable person would take into account in assessing whether the juror was partial.

The nature of the alleged bias is also relevant to this assessment. The bias alleged here has been referred to as "specific" bias because it relates to the particular facts of the case. Concerns about bias based on extraneous knowledge tend to arise from unreflective comment and in absence of knowledge or understanding of the trial process or the juror's role. A reasonable person, fully apprised of the circumstances, could attribute statements of this kind to lack of knowledge concerning the trial process and the juror's role rather than to any inability of the prospective juror to judge impartially. Moreover, a reasonable person could think that an allegation of bias based on extraneous knowledge is likely to be overcome by the taking of the oath of office and proper judicial instruction on the role and responsibilities of jurors. The situation, and the reasonable perception of it, might be different where it is alleged that there was some deep-seated, generic bias, such as racial prejudice. Such bias tends to be deeply ingrained, difficult to put aside even with conscious effort and less likely to yield to judicial instruction: see *R. v. Williams*, [1998] 1 S.C.R. 1128 (S.C.C.), at 1138.

Finally, any challenge after the fact must be placed in the context of the detailed and comprehensive provisions relating to jury selection in the *Criminal Code*. After the fact inquiries concerning a juror's alleged bias resulting from extraneous information must be undertaken with great circumspection. There can rarely be anything resembling a full inquiry into or investigation of the allegation. Moreover, in cases other than those of obvious partiality, the *Code*

> entrusts the determination of juror partiality, when challenged prior to trial, to other jurors, not to judges. A judge will rarely be doing a service to the jury system by increasing judicial intrusion into jury deliberations. As Dickson, C.J. said in *R. v. Barrow*, [1987] 2 S.C.R. 694 (S.C.C.), at 714, "The *Code* sets out a detailed process for the selection of an impartial jury. ... Overall it is a comprehensive scheme designed to insure as fair a jury as possible and to ensure that the parties and the public at large are convinced of its impartiality. *Any addition to this process from another source would upset the balance of the carefully defined jury selection process*." Where there is no other evidence of juror misconduct and the alleged bias arises from statements by a prospective juror evidencing knowledge or opinions about the case and is raised after the fact, the results of a properly conducted jury selection process should be set aside only in compelling circumstances.

[30] In *R. v. Lawrence*, supra, after reviewing the oath taken by the juror, the occasions when the trial judge reminded them of their duty to decide the case only on the basis of the evidence heard, including excerpts from the trial judge's opening remarks to the jury, his remarks during the course of the trial, and at the conclusion in his address to the jury, and additionally the "clear and careful instruction with respect to the presumption of innocence, and the onus on the Crown in a criminal case to prove the guilt of the accused beyond a reasonable doubt", this ground of appeal was dismissed.

[31] In the present circumstance the jury heard many of the same directions and instructions as did the jury in the case of *R. v. Lawrence*. Even had there been some discussion, I was satisfied the comments of Flinn, J.A., at para. 126, were equally applicable in the instant case:

> While the uninformed may have suspicions, in my opinion, and in the circumstances of this case as I have described them, an informed person would not conclude that the statement in question, of Juror No. 12, raises a reasonable apprehension of bias such that the appellant would not have received a fair trial from the 12-member jury panel.

[32] In conclusion , I was satisfied with the jury's responses in that there had been no discussion of the guilt of the accused in the very brief period of time from when they were selected to when they left the Courthouse premises,

after being instructed by the Sheriff's Officers on the procedure to be followed on their return, approximately one week later.

[33] On the other hand, to the extent any members of the jury may have had any opinions or heard any gossip or rumours, and whether expressed to the other members of the jury or not, I was also satisfied on the analysis, and for the reasons expressed by Justice Flinn in *R. v. Lawrence,* supra, that there was no basis to conclude the accused would not receive a fair and impartial trial. An informed person would not conclude the circumstances here present raised any reasonable apprehension of bias.

2. **Should the Crown be permitted to call the lady to testify as to what she says the accused said to her?**

[34] Ordinarily the Crown would be permitted to call as a witness a person who says, even as late as the day of jury selection, the accused made an inculpatory statement. Unique, in this circumstance, was the expressed intention of the defence to call the former juror to deny another statement made by the intended Crown witness. Having regard to the circumstances, and as noted earlier, I determined this evidence was not collateral, and would be very relevant on the defence's effort to challenge her credibility on the statement she attributed to the accused.

[35] The jury on hearing this evidence would have to weigh the evidence of the two witnesses, the lady and the former juror, on the statement she attributed to the former juror. Apart from the former juror, the only persons who knew whether or not the jury, or some of the them made comments to the effect they had already decided she was guilty, was the jury itself. They were, therefore, privy to information that was only available to them. If they, or some of them, were not truthful on the poll, they would be the only ones who would be aware whether the former juror was likely telling the truth in saying he never made any such statement to the lady panel member.

[36] If the jury discussed the guilt of the accused, or something equivalent, logically they would question the credibility of the former juror and consequently more likely find the lady panel member was telling the truth in saying what she said the accused said to her. On the other hand, if they had no such discussion, as they each responded during the inquiry on the matter, then they would likely find the former juror credible when he said he never

made the statement attributed to him by the lady panel member. In that circumstance, they would likely find against the credibility of the lady panel member, and very possibly also on the issue of any statement she says the accused made to her.

[37] The jury is told the parties are entitled to know all the evidence presented to and considered by the jury. In this circumstance that would not be the case. The jury would have access to important information that was not known or available to the parties. Such a circumstance, in the submission of defence counsel, would affect trial fairness.

[38] Prior to ruling in Court, Crown counsel advised that it withdrew its request to call the lady panel member, thereby obviating the necessity to rule on whether the former juror could be called, and permitted to testify in regard to matters that only he and the jury would be privy.

[39] For the record, had Crown not withdrawn its request to call the lady panel member, and in view of the trial judges mandate to ensure trial fairness, I would have ruled against the Crown being permitted to call her as a witness.

J.