Date: 1999 08 16
Docket: CR 03301

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

Respondent

- and -

BUD WAYNE WEAVER

Applicant

Application to challenge for cause each member of the jury panel, pursuant to s.638.(1)(b) of the Criminal Code.

Heard at Yellowknife, NT, on August 9, 1999

Reasons filed: August 16, 1999

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE J.E. RICHARD

Counsel for the Respondent: Bernadette Schmaltz

Counsel for the Applicant: Robert H. Davidson

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REASONS FOR JUDGMENT

[1] At the time scheduled for jury selection, the accused through his counsel made application to challenge for cause each member of the jury panel, pursuant to the provisions of s.638(1)(b) of the Criminal Code. I denied the application giving brief reasons and an indication that more detailed reasons would be provided subsequently. Those reasons follow.

[2] There are two bases on which it is being suggested that the prospective jurors are not indifferent between the Crown and the accused:

a) pre-trial publicity, and
b) generic prejudice involving bias against persons charged with sexual abuse.

[3] The questions sought to be asked of each prospective juror are as follows:

1) What kind of work do you do?

2) Have you read about this case in the newspapers or heard about it on radio or television?

3) Have you heard about this case from anyone such as family, friends or other members of the panel?

4) Have you discussed this case with anyone?

5) Have you formed an opinion as to the guilt or innocence of the accused?

6) As His Lordship will tell you, in deciding whether or not the Crown has proved the charges against an accused person, a juror must judge the evidence of all witnesses without bias, prejudice or partiality, that is, the jury must decide the case with an open and fair mind. In this case where the complainants are the stepdaughters of the accused and were adolescents living in the family home with the accused and with their mother and allege that they were sexually assaulted by the accused, their stepfather. Knowing this about the charges against the accused, do you believe you can set aside any preconceived biases, prejudices or partiality that you may hold and decide this case with a fair and impartial mind?

7) Have you or any member of your family or friends ever been a victim of sexual assault or sexual abuse such that you would be unable to be impartial as between the prosecution and the defence in this case?

8) Do you have any opinions or feelings as a result of anything you have seen or heard in the newspapers, on radio or in television, which you cannot set aside and which will affect your ability to try this case impartially?

9) Do you have any opinions or feelings, given the alleged sexual offences against young persons in this case by their stepfather within the family home, which you cannot set aside and which will affect your ability to try this case impartially?

10) Do you have any opinions or feelings as a result of involvement with any program or fund-raising effort related to sexual abuse which you cannot set aside and which will affect your ability to try this case impartially?

11) Please answer this question with a “yes” or “no”. Do you have any opinions or feelings, based on anything we have not asked you about, which will affect your ability to try this case impartially?

[4] The threshold test is this: Is there a realistic potential that a prospective juror holds personal beliefs or attitudes that he/she cannot set aside and that would prevent him/her from hearing the evidence and deciding the case in a fair and impartial manner? Or, put another way, is there a realistic potential that the jury panel may contain people who are prejudiced and whose prejudice cannot be set aside on directions from the presiding judge?

[5] A careful examination of the evidence adduced in support of this application indicates that the threshold test is not satisfied here.

[6] There is a presumption of impartiality in each member of the jury panel. *R. v. Williams* [1998] 1 S.C.R. 1128. There is also a presumption that a juror, once sworn, will perform his/her duties in accordance with his/her oath. *R. v. Hubbert* [1977] 2 S.C.R. 267. Neither of these presumptions is displaced by the evidence on this application.

[7] Firstly, I deal with the issue of pre-trial publicity. It is only in very special circumstances that pre-trial publicity would cause a judge to permit a challenge for cause. *R v. Keegstra* [1991] A.J. No.232 (Alta.C.A.).

[8] My review of the newspaper articles attached to the accused's affidavit does not satisfy me that the publicity has been unusual in any way, and certainly not extensive nor excessive nor prejudicial. Most of the newspaper articles are quite dated. The most recent is dated May 1, 1998, more than fifteen months ago. In half of the articles the accused's name does not appear. Very few details of the criminal allegations against the accused are given. The articles are not "front page" but are relatively short articles on page 11, page 19, etc.

[9] People read newspapers. The notion that a prospective juror might have read about the case is of little significance. The public's recollection is short. In any event, jurors are intelligent beings, "well able to put from their minds something they heard elsewhere". *R. v. Mahow* (1975) 20 C.C.C.(2d) 513 (B.C.C.A.). Jurors do so week in, week out in this jurisdiction in deciding cases fairly and impartially.

[10] The accused's personal opinion in his affidavit that it will be very difficult for him to obtain a fair trial is insufficient foundation, in itself, for granting the application by reason of pre-trial publicity.

[11] I turn now to the issue of generic prejudice. For this submission, the accused relies solely on a paper entitled "Jury Research - Presentation of Findings" attached as an exhibit to the accused's affidavit. In support of this submission, counsel refers to several Ontario decisions both prior to and subsequent to the *Williams* decision in the Supreme Court of Canada last year.

[12] With the greatest of respect, the Jury Research paper is of no value or assistance to the accused on this application. It is simply a series of data tables which record the frequency of chosen responses to certain prepared questions, which questions relate to being a potential juror at a hypothetical sexual assault trial and which questions were asked by telephone of 400 interviewees chosen at random in the Greater Toronto area of the province of Ontario. For example, one of the questions asked, and the permitted responses, is:

> Suppose that you learned that a man and a woman had been charged with conspiracy to commit murder and sexually assaulting a young woman who complained she was drugged, held hostage in the apartment of the man and gang raped by four people. Knowing the nature of the charges against them, how easy or difficult would it be to set aside any negative feelings you might have about this kind of behaviour, and decide the case with a totally fair and open mind? Would you say that it would be ...very easy, somewhat easy, somewhat difficult, very difficult, don't know?

[13] From this paper the Court is asked to infer that there exists, among the members of the jury panel, a widespread bias against persons charged with sexual assault.

[14] I have many concerns about using this paper as an evidentiary basis in support of the accused's application for a challenge for cause. In particular:

1. The survey was conducted by a market research company whose expertise presumably is marketing and advertising in the consumer world. There is no actual opinion offered, expert or otherwise, as to the interpretation of the data presented. Nor is there any scientific basis proffered for forming <u>any</u> opinion of widespread bias among prospective jurors.

2. The survey was conducted in the Greater Toronto area of the province of Ontario. Toronto is not Canada, is certainly not Yellowknife. The relevant community is the community from which the jury pool is drawn.

3. The paper does not indicate who commissioned the survey, and why.

4. The questions are skewed to elicit a negative response against the accused; e.g., words such as “gang rape”.

5. The interviewee is not permitted an open or discretionary response. For example, one logical response to such questions would be, “It would depend entirely on the evidence in the particular case”, yet that choice of response is not available to the interviewee.

This evidence simply falls short of that required to justify a challenge for cause on the basis of generic prejudice.

[15] In this jurisdiction, a challenge for cause is not granted merely because the charge against the accused is in the sexual assault category.

[16] It is said that the *Williams* decision has reopened the door to offence-based challenges. In each of *R. v. C.B.* [1998] O.J. No. 5519; *R. v. D.C.* [1998] O.J. No. 5542; *R. v. J.F.S.* [1998] O.J. No.5217; and *R. v. Carty* [1999] O.J. No. 2298, all decided post-*Williams*, such a challenge was permitted. However in each of those cases the presiding judge determined that there existed a factual foundation to justify

the challenge, either through evidence presented or *via* judicial notice of earlier findings of widespread prejudice in the respective community. No such factual foundation exists on the within application.

J.E. Richard,
J.S.C.

Dated at Yellowknife, NT, this
16th day of August 1999

Counsel for the Respondent: Bernadette Schmaltz
Counsel for the Applicant: Robert H. Davidson

CR 033031

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