R. v. *Sayers* and *Elanik*, 2003 NWTSC 12

Date: 2003 02 27
Docket: S-1-CR 2002 000049

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

RONALD FRANK SAYERS and SHELLY MARIE ELANIK

A BAN ON PUBLICATION OF THE EVIDENCE REFERRED TO, SUBMISSIONS AND ARGUMENTS MADE AND THE REASONS FOR THIS RULING WAS MADE ON FEBRUARY 17, 2003

Heard at Yellowknife, NT, February 17, 2003

Ruling filed February 27, 2003

RULING OF THE HONOURABLE JUSTICE V.A. SCHULER

Counsel for Shelly Marie Elanik:	John U. Bayly, Q.C. and Keith Bergner
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RULING ON APPLICATION FOR SEVERANCE

[1] Shelly Marie Elanik and Ronald Frank Sayers are jointly charged with second degree murder. Jury selection for their trial is scheduled to commence on April 14, 2003. Elanik applies for an order that she be tried separately from Sayers. He in turn supports her application. The Crown opposes it. For the reasons that follow, I dismiss the application for severance.

[2] The charge arises from an alleged robbery at a hotel in Inuvik, during which the night auditor was severely beaten, resulting in death. The Crown plans to adduce evidence that around the time the deceased's body was found at the hotel, both accused, who were boyfriend and girlfriend, arrived at an apartment where Sayers' brother was staying. Sayers had in his hands a large rock with blood on it and Elanik had a knife with what appeared to be blood on it. She also had what appeared to be blood on her jacket. Both Sayers' and Elanik's hands were bloody. Both accused told the brother that they had killed a man at the hotel. They or one of them had bags with locks on them which Sayers asked his brother to get rid of, which he did. He also disposed of the rock. He later showed the police where he had disposed of the items.

[3] DNA testing on material taken from the rock was found to match the DNA of the deceased. Elanik had been described by Sayers' brother as wearing white Nike running shoes when he saw them on the night of the killing. A pair of white Nike running shoes were seized from her on her arrest three months later and DNA from blood on them was found to match the DNA of the deceased. Apart from that evidence, the Crown will also seek to adduce expert evidence that shoe prints found at the scene of the killing are consistent with having come from the white Nike shoes seized from Elanik and that it is highly likely that the foot impressions from the seized shoes are the same as impressions found in shoes seized from Elanik on a later date.

[4] The Crown will also seek to adduce evidence of a number of statements made to various individuals by both accused admitting to involvement in the killing. I will refer to these statements further on.

[5] Elanik has indicated through her counsel that she intends to advancethe defence of duress at trial. She wishes to present evidence that she was the victim of physical abuse by Sayers during their two year relationship and that she was forced to participate in the robbery and killing under his threats of violenceto her and their baby.

[6] As Elanik also takes the position that she was only a party to the offence and not the principal actor, issues may arise with respect to whether she is entitled to rely on the s. 17 *Criminal Code* defence of duress, which is excluded in the case of murder for a principal actor but not a party who does not actually commit the offence: *R. v. Paquette*, [1977] 2 S.C.R. 189; or the common law defence, which is available to both a principal actor and a participating party who does not come within s. 17: *R. v. Ruzic* (2001), 153 C.C.C. (3d) 1 (S.C.C.). For purposes of this severance application, however, the distinction is not important.

[7] Elanik has brought this application for severance because she wants assurance that she will be able to adduce the evidence in support of her defence of duress. She concedes that unless she is not permitted to adduce that evidence because of its prejudice to Sayers, a joint trial holds no real risk of prejudice to her. Assuming that she is permitted to adduce such evidence, it is Sayers who wants separate trials. He argues that the evidence would not be admissibleagainst him in a separatetrial and that the risk of prejudice to him from that evidence on a joint trial is great and is likely to result in a miscarriage of justice.

[8] The evidence that Elanik wishes to adduce is set out in the affidavitof one of her counsel. She proposes to call some 15 witnesses, some of whom will testify about specific incidents of violence and threats they observedSayers carry out againstElanik both before and after the offence. Other items of proposed evidence are:

1. evidence of observations of bruises and other injuries on Elanik during her relationship with Sayers;

2. evidence of statements made by Elanik to various people about Sayers' violence;

3. evidence of changes in Elanik's behaviour during her relationship with Sayers or when he was physically near her;

4. evidence that Sayers acted in a possessive manner toward Elanik;

5. evidence of Sayers' guilty plea to and conviction for assault on Elanik prior to the offence with which they are now charged;

6. expert opinion evidence of a forensic psychologist that Elanik was a victim of battered woman's syndrome at the time of the killing.

[9] As counsel did not make full argument on the admissibility of each item of evidence and as it appears that there may be a dispute as to some items, I do not intend in these reasons to make rulings about the admissibility of specific items of evidence. Instead, I will speak generally about evidence of violence or threats of same by Sayers against Elanik during their relationship up to and including the time of the killing, which are available from the testimony of Elanik or other witnesses. I will note here that there may also be an issue about the admissibility of evidence of incidents of violence or threats after the killing.

[10] The test for severance is set out in s. 591(3)(b) of the *Criminal Code*: the court may, where it is satisfied that the interests of justice so require, order that the accused be tried separately. The onus is on the accused requesting severance to show on a

balance of probabilities that the interests of justice require severance by establishing that a joint trial will work an injustice to the accused: *R. v. Crawford* (1995), 96 C.C.C. (3d) 481 (S.C.C.); *R. v. McNamara* (1981), 56 C.C.C. (2d) 193 (Ont. C.A.).

[11] The general principle is that persons accused of the joint commission of a crime should be tried together: *R. v. Crawford, supra; R. v. Suzack* (2000), 141 C.C.C. (3d) 449 (Ont. C.A.). As pointed out in those cases, that presumption applies with particular force where the co-accused are each alleging that the other is the guilty party. Separate trials in those circumstances raise the danger of inconsistent verdicts and the concern that the truth will not be discovered at either trial. The mere fact that a co-accused mounts a "cut throat" defence is not in itself a sufficient basis on which to order severance.

[12] This case does not fall squarely within the category of each accusedblaming the other for the crime and in that sense is not a case of the classic "cut throat" defence. It is sufficiently similar, however, that the same general presumption in favour of a joint trial should apply. Here, Elanik points at Sayers as the principal offender and says that anything she did, she did not of her own free will but under duress from him. For his part, Sayers will, according to his counsel, put the Crown to the proof of its case. He puts forward no positive defence. In the circumstances, it appears that the main issue will not be whether the two accused, or only one of them, was involved at all in the incident, but instead their respective roles in the incident.

[13] Elanik argues that if she cannot put forward the evidence of Sayers' violence to her in support of her defence of duress, she will be denied the ability to make full answer and defence, as provided in s. 650(3) of the *Criminal Code.* Sayers' concernis that the jury will use that evidence as evidence of a propensity on his part to violence and use the prohibited chain of thought that because he has been violent to her he is more likely to have committed the murder charged in the indictment.

[14] It is clear that the Crown, as a general rule, may not lead evidence of an accused's bad character or past violent acts or criminal record to prove that he is guilty of the offence charged. In other words, the Crown is not entitled to prove its case by proving that the accused is the type of person likely to have committed the crime charged.

[15] The same restriction does not apply to a co-accused who seeks to adduce evidence to show that it is more likely that the accused, and not the co-accused, committed the crime: *R. v. Crawford* (1995), 96 C.C.C. (3d) 481 (S.C.C.); *R. v. Kendall and McKay* (1987), 35 C.C.C. (3d) 105 (Ont. C.A.). The various cases submitted by counsel on this application illustrate that a co-accused may do this in a number of ways, for example, by cross-examining the accused on the circumstances of his past criminal convictions, on other incidents of violence, or on the accused's pre-trial silence. The restriction also does not apply where the defence is duress: *R. v. Valentini* (1999), 132 C.C.C. (3d) 262 (Ont. C.A.).

[16] The task of a trial judge presiding over a joint trial in these circumstances is to balance the rights of each accused:

> Where accused are tried jointly, each is entitled to the constitutional protections inherent in the right to a fair trial. Those protections include the right to make full answer and defence and the right to be shielded from evidence which unfairly prejudices an accused. An accused's right to a fair trial does not, however, entitle that accused to exactly the same trial when tried jointly as the accused would have had had he been tried alone: *R. v. Creighton, supra,* at p. 497-98; *R. v. Pelletier* (1986), 29 C.C.C. (3d) 533 (B.C.C.A.). In joint trials, one accused may elicit evidence or make submissions in support of his defence that are prejudicial to the other accused and could not have been elicited or made by the Crown. In those cases, the respective rights of each accused must be balanced by the trial judge so as to preserve the overall fairness of the trial.
>
> ...*R. v. Suzack, supra*, at paragraph 111.

[17] Doherty J.A. went on to say that the authorities fully recognize the need to balance the competing interests of co-accused in a joint trial and that they regard a carefully crafted jury instruction as the best way to achieve that balance (at paragraph 114).

[18] It is clear, therefore, that Elanik must be permitted to advance her defence of duress and to call evidence in support of that defence, notwithstanding that it may be prejudicial to Sayers and subject always to the relevance and admissibility of the evidence she seeks to present.

[19] Sayers submits, however, that even an instruction to the jury on the limits of the use which they are permitted to make of evidence about his violence will not be

sufficient to avoid the risk that the jury will make improper use of the evidence. There is always a risk of that happening, but both trial and appellate courts regularly rely on the ability of jurors to follow and apply difficultinstructions, as pointedout by Doherty J.A. in *Suzack*, quoting from Chief Justice Dickson in *R. v. Corbett* (1988), 41 C.C.C. (3d) 385 (S.C.C.) at 400-401:

> 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 experienceof trial judges is that juries do perform their duty according to the law. ...

[20] As Doherty J.A. goes on to note, the Chief Justice made the above comments in support of his conclusion that the Crown could cross-examine the accused in a murder case on a prior conviction for murder because the jury could properly follow a direction that evidence of the prior conviction went to the accused's credibility only.

[21] At this trial, on the issue of duress, the jury will have to be instructed that evidence of Sayers' past violence to Elanik is relevant to whether she acted under duress on the occasion in question but is not to be used as evidence when they are considering whether the Crown has proved the case against Sayers. The focus of the evidence will be on whether Elanik acted of her own free will, and the instruction will have to make that clear.

[22] This issue should also be considered in the context of the evidence in the case. The Crown's evidence as outlined on this application will reveal a brutal beating and that the accused were seen shortly afterward with blood on their hands and in possession of a rock later found to have the deceased's DNA on it. They also had money bags from the location of the killing, which Sayers asked his brother to dispose of. Both accused made a number of statements indicating that they had committed the offence. For purposes of this application, I will assume that those statements are admissible, although that remains, of course, at least in the case of the statement by Sayers to the police officer, to be determined on a voir dire.

[23] The Crown's case is a strong one as to some participation on the part of both accused in the offence. If, as his counsel indicated, Sayers does not intend to present a

"positive" defence, by which I understand him to mean that Sayers will likely not testify, but will instead put the Crown to the proof of its case, it has to be said that the Crown's case against him is strong enough that the issue for the jury will not be whether he was involved, but rather what role he played as opposedto Elanik. In those circumstances, it is difficult to imagine how evidence of his violence to Elanik could create an injustice. These circumstances do not present a significant risk, to my mind, that the jury might use that evidence to convict Sayers in the face of what might otherwise be an acquittal on the basis of weak evidence, because the evidence of his participation seems to be substantial.

[24] Sayers' counsel submitted that there is a danger that even if there is otherwise insufficient proof of Sayers' guilt, a jury may find him guilty of the murder to, in effect, punish him for his assaults on Elanik. Considering the nature of the assaults on her as outlined in the material before me and the apparent nature of the beating that is the basis of the murder charge, I find that possibility extremely remote and I am confident that a reasonable jury will follow an instruction which will make it clear that that is not a use to which they can put the evidence.

[25] I have referred above to the various statements given by the two accused after the killing. One of the considerations in deciding whether there should be separate trials is the fact that a statement given by one accused is evidence only against that accused and not his or her co-accused. In this case, the Crown will seek to adduce statements made by both accused in each other'spresence to Sayers'brother very close in time to the killing, by both accused in each other's presence to Sayers' sister, by Elanik to two friends on separate occasions, by Sayers to another sister of his and by Sayers to a police officer. Assuming admissibility of the statements, the jury will have to be instructed that statements made by Elanik are evidence against her only and not against Sayers and vice versa [subject to any other instruction about statements made by one accused in the presence of the other and adopted by him or her: *R. v. Dubois* (1986), 27 C.C.C. (3d) 325 @ 341 (Ont. C.A.)].

[26] In relation to the statements, the main concern on the issue of severance is whether evidence of statements made by one accused is likely to be overwhelming and difficult for a jury to disregard when it is considering the guilt of the other accused. In other words, is the amount of evidence the jury will be asked to disregard as against an accused excessive in relation to the amount they are asked to weigh against that accused: *R. v. Trinnear and Frank*, [1970] 1 C.C.C. 227 (B.C.S.C.).

[27] The statements made by Elanik and Sayers are relatively even in number and similar in content. The only real differences are that in one statement to a friend, Elanik talks about Sayers threatening her with violence when she did not want to participate in the offence; and that only Sayers gave a statement to the police. The latter statement is really a response, some hours after a police officer had presented to Sayers his theory of what had happened, that everythingthe police officer had said was true except the part about the rock. The officer's theory as described to Sayers was that they had gone to the hotel, picked up a rock used as a door stopper, encountered the night auditor and that Sayers or Elanik had hit him on the head with the rock until he was dead, then taken the money and left.

[28] Since Elanik admits to at least some participation in the events,I cannot see how Sayers' statement to the police would result in any real prejudice to her.

[29] As to Elanik's statement to her friend, it is the only one of several that makes mention of a threat by Sayers.

[30] As I have stated above, at the end of the Crown's case, the circumstantial evidence along with the various statements is expected to point to both accused being involved in the offence. There is no reason to expect that the evidence will be much stronger against one of the accused than the other. The fact that some of the statements are admissible against only one of the accused does not justify severance. It is generally acknowledged that an effective instruction can be given to a jury that the confession of one accused in a joint trial is not evidence against the co-accused: *R. v. Lane and Ross*, [1970] 1 C.C.C. 196 (Ont. H.C.J.). In this case, since the "confessions" are quite similar in most respects, I am confidentthat such an instruction can be given and is likely to be followed.

[31] One of the reasons a joint trial is preferred in cases involvinga joint enterpriseis to avoid the possibility of inconsistent verdicts. For example, on a separate trial, Elanik might succeed in her defence of duress, testifying that Sayers was the main actor and that she acted only because of threats from him, and obtain an acquittal. On his separate trial, Sayers might succeed in making it look as though Elanik was the main or only actor and obtain an acquittal. Although the likelihood of this is questionable since the Crown can call Elanik if Sayers is tried separately and since Sayers does not plan to mount a positive defence, to avoid any such possibility, it

makes more sense for one jury to make a decision based on the entire picture being placed before it as to the involvement and respective participation of the accused.

[32] For the above reasons, I am not persuaded that the interests of justice require severance. The application for severance is dismissed and the accused will be tried jointly, subject to reconsideration should the evidence at trial warrant it.

[33] Elanik will be permitted to present evidence of Sayers' violence to her so far as it is relevant to the defence of duress. I decline to rule at this point on the admissibility of individual items of evidence as that issue has not been fully argued. If there are objections by the Crown or Sayers to individual items of evidencethat Elanik proposes to call, they may be dealt with during the week of April 7, 2003, which is set aside for voir dire matters.

[34] Counsel for Sayers submitted that if severance is not granted and Elanik is permitted to lead evidence of Sayers' violence, Sayers should be permitted to call his defence, if any, last, despite being named first on the indictment.

[35] Although the general rule is that the accused are called on to present their defences in the order in which they are named in the indictment, the trial judge has a discretion to order otherwise. Since, so far as is known at present, Elanik intends to testify, incriminate Sayers and allege that she acted under duress from him, it seems reasonable to me that she should call her defence first. That may change, however, depending on how the case for the Crown transpires and whetherSayers decidesto call any evidence. So although I am inclined to agree that Elanik should be called on first, I reserve the right to rule otherwise at the end of the Crown's case after hearing argument at that time from counsel.

[36] Sayers also submits that he ought to be entitled to call evidence in response to Elanik's evidence about their relationship and also evidence of her violence against him. Although counsel did not describe any specific evidence, he indicated that the point would be to contradict Elanik's assertion that she acted under duress from Sayers.

[37] Generally, Sayers should be entitled to adduce evidence in response to any allegations Elanik makes against him, subject to the relevance and admissibility of any such evidence. I think it is premature to make a ruling until such time as I know what

evidence Sayers proposes to call and the purpose of that evidence in connection with the defence he is putting forward. Accordingly, I will not rule on that issue at this point.

[38] I have also considered the concern raised by counsel for Elanik about her ability to call evidence to rebut any evidence called by Sayers as to their relationship, particularly since she may not have had disclosure of that evidence from him. Again, I think that is an issue that should be dealt with if and when it arises.

V.A. Schuler,
J.S.C.

Dated at Yellowknife,NT this
27th day of February 2003

Counsel for Shelly Marie Elanik:	John U. Bayly, Q.C. and Keith Bergner
Counsel for Ronald Frank Sayers:	James D. Brydon
Counsel for Her Majesty the Queen:	Bernadette Schmaltz and Caroline Carrasco

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