*R.* v. *Tutin*, *R.* v. *Courtoreille*, 2004 NWTSC 46

Date: 2004 07 22
Docket: S-0001-CR-2004000015
S-0001-CR-2003000108

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- vs. -

RICHARD HARRISON TUTIN

- and -

HER MAJESTY THE QUEEN

- vs. -

DALE ARNOLD COURTOREILLE

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Application by CBC North to set aside ban on publication.

Heard at Yellowknife, NT on July 8, 2004.

Reasons filed: July 22, 2004

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REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE V.A. SCHULER

Counsel for CBC North: Adrian Wright
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Counsel for Gerald Delorme: Emerald Murphy
No one appearing for Francis Yukon, Richard Tutin or Dale Courtoreille

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REASONS FOR JUDGMENT

[1] Richard Tutin and Dale Courtoreille were each charged with various offences arising out of the death of Justin Hai Van Vo. In separate proceedings, each of them pled guilty to being an accessory after the fact to murder and was sentenced by me. At the time of their guilty pleas, I imposed publication bans after consent applications by the Crown and the respective defence counsel. No notice of the application for the publication bans had been given to any media outlets. CBC North has applied to set aside the publication bans. Counsel agreed that the Crown should bear the burden of persuading me that the publication bans should continue. In effect, I am being asked to approach this matter anew.

[2] First degree murder charges are still pending against two others, Yukon and Delorme ("the accused"), arising out of Mr. Vo's death and the same events that resulted in the convictions of Tutin and Courtoreille. They are currently jointly charged and their

trial has been set to begin with jury selection on November 18, 2004, some four months hence. An application for severance is scheduled to be heard on October 25.

[3] There is a ban on publication of the evidence taken at the preliminary inquiries held for Yukon and Delorme pursuant to s. 539 of the Criminal Code. The Crown advises, as it did when I initially imposed the publication bans in the Tutin and Courtoreille matters, that the contents of the Agreed Statements of Fact placed before me on the sentencing hearings for Tutin and Courtoreille were taken in part from the evidence at the Yukon and Delorme preliminary inquiries and in part from the police investigation into Mr. Vo's death.

[4] The bans sought by counsel and granted by me are substantively the same. I will refer to them collectively as "the ban" or "the publication ban". The ban provides that there will be no publication or broadcast of any of the facts adduced or presented at the sentencing hearings and anything in the submissions made and the reasons for judgment which refers to the facts. The ban continues until the earlier of (i) a jury is empanelled in whichever is the last of the other accused's cases to be dealt with in this Court; or, (ii) all of those cases have otherwise been dealt with in this Court.

[5] As I understand it, this is still the ban sought by the Crown. I will simply note that the reference in the ban to "a jury is empanelled" was as suggested by counsel at the time the ban was initially sought. Counsel who sought the ban may wish to consider whether that wording accurately reflects their intent, which may have been that there be no publication or broadcast until a jury is selected, not simply until a jury panel is summonsed from which selection of the final jury of twelve would be made. Presumably after a jury is selected, the trial judge would be asked to instruct the jurors not to listen to or read any media reports relating to the case. In any event, I will refer to this further on.

[6] There was no dispute before me that the Crown has standing to put forward the fair trial interests of the accused. This application brings into consideration those interests and the freedom of expression interests of those affected by the ban. The latter involve the freedom of the press to publish what transpires in the courtrooms of the nation and the corresponding concept of an open court. Section 2(b) of the *Canadian Charter of Rights and Freedoms* provides to everyone, as a fundamental freedom, freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.

[7] The test for ordering a publication ban was set out by the Supreme Court of Canada in *Dagenais v. Canadian Broadcasting Corp.* (1994), 120 D.L.R. (4th) 12. A ban should only be ordered when:

> (a) such a ban is necessary in order to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban.

[8] The Crown as the one seeking the ban has the onus of satisfying the Court that the test is met.

[9] As the Supreme Court of Canada pointed out in *R. v. Mentuck* (2001), 205 D.L.R. (4th) 512, *Dagenais* adopted a new approach which aims to balance both the right to a fair trial and the right to freedom of expression rather than enshrining one at the expense of the other.

<u>Is a publication ban necessary in order to prevent a real and substantial risk to the fairness of the trial?</u>

[10] Every person accused of a criminal offence has the right to a fair trial and to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal: ss. 7 and 11(d), *Canadian Charter of Rights and Freedoms*.

[11] The objective of ensuring that an accused person receives a fair trial by an impartial tribunal, one that is not biased or influenced by pre-trial information about the case, is recognized by several statutory publication bans or similar provisions found in the *Criminal Code* : s. 539(1) [ban on publication of evidence taken at a preliminary inquiry, discretionary if requested by the prosecutor but obligatory if requested by the accused]; s. 517(1) [ban on publication of evidence taken and other information at a bail hearing, obligatory if requested by the accused]; s. 542(2) [summary conviction offence to publish or broadcast report of admission or confession tendered in evidence at a preliminary inquiry]; s. 648(2) [summary conviction offence to publish or broadcast information about portions of trial at which unsequestered jury is not present].

[12] In this case, the information which is the subject of the publication ban is specific information coming from witnesses and the police investigation. It is information that the Crown will rely on to prove its case against the two remaining accused. For that reason, this case is very unlike the cases of *Dagenais*, where the publication ban sought was aimed at a television "docudrama" about events similar to those which gave rise to the criminal charges against the accused Dagenais, and *Mentuck*, where the ban sought was aimed at information about certain undercover investigative techniques used by the police.

[13] There has already been a substantial amount of publicity about the events surrounding Mr. Vo's death and the individuals said to have been involved in it. Crown counsel filed a number of newspaper reports which were published around the time of the arrest of Yukon and Delorme and the others in the early summer of 2003, which characterize the lifestyle and occupations of those individuals in graphic and unflattering ways. The death itself is characterized in some of the articles in a way that emphasizes how unusual the circumstances are in this city and this jurisdiction. I say this not to be critical of what has been published but simply to point out that the circumstances of the death have attracted what I think is fairly described as more than the usual media and public interest.

[14] There were further media reports at the time of the preliminary hearings in the fall of 2003 and also when the Tutin and Courtoreille sentencing hearings took place in March and April of this year.

[15] The Crown's concern is that publicizing the facts put forward on the guilty pleas is highly likely to prejudice potential jurors. Crown counsel points out that Yellowknife and the Northwest Territories as a whole have a small population, approximately 16,000 to 18,000 in Yellowknife and 37,000 in the entire territory. Only a portion of those people would be eligible as jurors. There are few local media outlets and those reach a large portion of the territorial population.

[16] Counsel for CBC North argues that it is speculative to say that potential jurors are influenced by media reports and points out that in *Dagenais*, former Chief Justice Lamer emphasized the reliability of juries and the ability of jurors to follow the explicit instructions of a judge, such as the instruction to ignore all information not presented in court. However, Lamer J. also distinguished cases where the publication ban relates to identifiable and finite sources of pre-trial publicity, saying (at p. 43-44):

> ... More problematic is the situation in which there is a period of sustained pre-trial publicity concerning matters that will be the subject of the trial. In

> such circumstances, the effect of instructions is considerably lessened. Impressions may be created in the minds of the jury that cannot be consciously dispelled. The jury may at the end of the day be unable to separate the evidence in court from information that was implanted by a steady stream of publicity.

[17] I understand the above observation to recognize that there is a very real risk of "tainting" potential jurors when there is sustained pre-trial publicity concerning matters that will be the subject of the trial. This does not suggest that jurors would disregard instructions or disobey their oath; it simply recognizes the difficult job that jurors have in highly publicized cases. The task of a juror is difficult enough without having to try to disabuse himself or herself of things heard or read in the media, especially when those things reflect only part or one side of the circumstances. As stated in *R. v. Flahiff* (1998), 157 D.L.R. (4th) 485 (Que. C.A.), "No judge or jury should have to strain to banish unfair and unsupported publicity from their minds so that they can reach an impartial verdict based on the evidence". I take the reference to unfair and unsupported to mean one-sided, in other words, allegations to which the accused have not yet had the chance to respond. As pointed out in *Flahiff*, the statutory preliminary inquiry and bail hearing publication bans aim to prevent jurors being influenced or their task made more difficult by such publicity.

[18] Tutin and Courtoreille were sentenced on the basis of facts which have not yet been tested by Yukon and Delorme. If there is no ban on publication, Yukon and Courtoreille face the prospect of going to trial with certain facts having already been presented to the public. The context in which they would be presented is also one of having been accepted by the Crown and a Judge. The involvement of Tutin and Courtoreille cannot be characterized as peripheral or incidental to the circumstances which the jury will have to consider in reaching its decision. All this adds substance to the risk that pre-trial publication of the information will prejudice the fairness of the trial. In my view, the absence of a publication ban poses a real and substantial risk to the fairness of the trial.

Will reasonably available alternative measures prevent the risk?

[19] Jury instructions are one alternative measure that CBC North argues would protect trial fairness. I have dealt with those above, and for clarification simply repeat my view that such instructions will not necessarily prevent the risk of unfairness.

[20] CBC North argues that apart from jury instructions, challenges for cause and a change of venue are reasonable alternatives to deal with the effect of pre-trial publicity. It says that the cost, for example of a change of venue to a location outside Yellowknife, is insignificant or irrelevant when the issue is freedom of the press.

[21] I agree that cost should not be determinative. But it is a factor to be considered. It was recognized as such by Lamer J. in *Dagenais*, when he listed (at p. 42) as one of the reasons in favour of ordering publication bans, the saving of financial and/or emotional costs to the state, the accused, witnesses and others of delaying trials, changing venues and challenging jurors for cause. The cost of holding the Yukon and Delorme trial in a community other than Yellowknife would involve transporting by air the more than 30 witnesses the Crown proposes to call (and who Crown counsel advises are largely located in Yellowknife) and providing accommodation for them; that cost alone will be significant.

[22] However, a larger concern in my view is the fact that the Northwest Territories is a small jurisdiction population-wise and occurrences such as murder tend to be news everywhere, not just the community where the event occurred. This was recognized by my colleague Vertes J. in *Germany v. Ebke*, [2000] N.W.T.J. No. 74 (S.C.) (at para. 37), in another case which arose in Yellowknife:

> ... Furthermore, the relatively small population not only of Yellowknife but of the Northwest Territories and the notoriety of these charges would result in any pre-trial publicity being avidly followed, widely disseminated, and remembered. This also rules out the efficacy of a change of venue. Much of the same concern applies to the use of challenges for cause and voir dires in jury selection.

[23] I apply the above observations to this case. In my view it is not speculation, but the reality of living in a jurisdiction with a small population that gives substance to these concerns.

[24] Additional specific circumstances of this case will have an impact on the ease with which a jury may be selected. The jury trial as presently scheduled is expected to take four weeks, which one can anticipate will cause many potential jurors to seek to be excused. As noted, the Crown expects to call more than 30 witnesses, the majority of whom either reside here in Yellowknife or have a direct connection with the city. Personal connections between those witnesses and people on the jury panel, assuming the trial does proceed in Yellowknife, are likely to result in a number of jurors being excused. On a joint trial on the charge of first degree murder, between the two accused and the

Crown, counsel will have a total of 80 peremptory challenges. And, if pre-trial publicity leads counsel to challenge for cause, the jury panel will likely be reduced even further.

[25] If the application for severance is granted, there will be two trials and the above problems of jury selection will be compounded.

[26] For the above reasons, I am not satisfied that there are reasonably available alternative measures that will prevent the risk to trial fairness of pre-trial publicity about the facts upon which Tutin and Courtoreille were sentenced.

Proportionality

[27] The last part of the test is proportionality: do the salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban.

[28] The salutary effects of a publication ban are that the jury will not have prior exposure to the facts and a version of the very events which it will have to consider and pronounce a verdict on. The accused will not go into their trial before a trier of fact which has been exposed to or influenced by information which has not been tested by them.

[29] The deleterious effects are that the public will temporarily not know the facts on which Tutin and Courtoreille were sentenced. However, their pleas, what charges they pled to and their sentences, along with some information as to what sentences were sought, have already been publicized. The lack of knowledge about the facts will last only as long as any ban does. A ban will not prevent public scrutiny of the operation of the criminal justice process in this case, it will just delay it. There can be no doubt that the jury trial of Yukon and Delorme will revive interest in this case and public discussion and scrutiny surrounding it. This is not a case where a publication ban will mean the public does not get a timely opportunity to discuss issues raised by the case as there will be an opportunity to do that when the trial proceeds.

[30] In *Dagenais*, it was recognized that not ordering a publication ban may maximize the chances of individuals coming forward with information about the case. CBC North placed some emphasis on that factor in this case. However, the amount of publicity to date in this case suggests that it is reasonable to think that anyone who had information about the individuals involved, or events at the time Mr. Vo's death took place would in all likelihood have come forward by now.

[31] There is one other factor that should be considered and was the subject of some discussion on this application. There is a ban on publication of the evidence taken at the preliminary inquiries of the two accused still facing trial. Counsel for CBC North argued that that ban is irrelevant and that it would not, in itself, prevent publication of material in the Agreed Statements of Fact filed at the sentencing hearings of Tutin and Courtoreille, which was taken from the preliminary inquiries. His argument is that once the evidence was presented at a sentencing hearing, it lost the protection of the ban.

[32] In my view, the publication ban imposed at the preliminary inquiries continues to prohibit publication of the evidence, notwithstanding that the evidence was used on a sentencing hearing. The situation is really no different than was the case in *R. v. Canadian Broadcasting Corporation*, [1998] N.W.T.J. No. 156 (C.A.) [application for leave to appeal to the Supreme Court of Canada dismissed, [1999] S.C.C.A. No. 33]. In that case, a ban on publication of the name of a complainant in a sexual assault case had been made by a preliminary inquiry judge and confirmed by a judge of the Supreme Court at trial. Under s. 486(3) of the Criminal Code, no time limit is stated for such bans. The media broadcast the complainant's name and identified her as a complainant in a sexual assault case after her identity was revealed at a coroner's inquest into her death. The Court of Appeal held that the ban survived the death of the complainant and (at para. 5) "was effective in prohibiting the publication of restricted information emanating from the coroner's inquest, be it from the coroner himself, from witnesses, or otherwise".

[33] In *R. v. Parent*, [2003] O.J. No. 2038 (Ont. S.C.J.), Ratushny J. also interpreted a s. 539 preliminary inquiry publication ban order "to mean the restriction applies wherever that evidence may be used before each of the accused is either discharged or his trial is ended" (at para. 19).

[34] In my view, it follows that any information from the sentencing hearings which was also evidence at the preliminary inquiries of Yukon and Delorme is still subject to the publication ban imposed at those preliminary inquiries.

[35] I was not told on this application what facts put forward at the sentencing hearings came from the police investigation but were not in evidence at the preliminary inquiries and therefore not covered by any s. 539 ban and, absent any ban imposed in this Court, could be published or broadcast. This, of course, raises the prospect of only some of the facts put forward at the sentencing hearings being published if no ban is imposed in this Court. In the result, the public, including potential jurors, could be exposed to an incomplete, or even misleading picture of those facts, which just adds to the same concerns I referred to above when discussing the necessity of a publication ban. So I find

that in this case it is not an answer to say that since there is already a publication ban or bans in effect with respect to some (in fact, I expect probably most) of the facts, no other ban is necessary.

[36] In weighing the effects of a ban, I find that in the circumstances of this case, the salutary effects outweigh the deleterious effects. I note that in *R. v. Mentuck*, the Supreme Court of Canada said that in dealing with applications for publication bans, the purposes and effects of the proposed ban invoked by the parties must be taken into account in a case-specific manner (at para. 37). The specifics of this case, as outlined above, require the ban so as to protect the fair trial rights of the accused who have yet to be tried. A similar ban was imposed in similar circumstances in this jurisdiction in *R. v. Stromberg*, S.C.N.W.T., July 4, 2002, file no. S-1-CR2002/062 (unreported), albeit on consent without notice to, and therefore in the absence of submissions on behalf of, the media.

[37] I have also considered whether there should be a period of time now when the media should be permitted to publish or broadcast the facts that are not already subject to the s. 539 publication bans, following which a ban would be imposed by this Court for the remaining time before the Yukon and Delorme trial. However, considering that their trial is only four months away, I have decided against that. Four months is not a very long time and it has been recognized that the closer one gets to trial, the stronger the risk of prejudice to trial fairness gets: *R. v. Lake*, [1997] O.J. No. 5446 (Ont. Gen. Div.).

[38] Finally, the requirement for notice to the media when a publication ban is being sought is now set out in a Practice Direction dated July 9, 2004 issued by the Judges of this Court.

[39] For the above reasons, the application made by CBC North is dismissed. The publication bans made in the Tutin and Courtoreille cases and reflected in orders respectively dated March 25, 2004 and April 1, 2004 will continue according to their terms. Counsel may arrange to appear before me if they wish to speak to the wording of the publication bans, specifically whether they should continue until a jury is selected.

V.A. Schuler
J.S.C.

Dated at Yellowknife, NT, this
22nd day of July 2004

Counsel for CBC North: Adrian Wright
Counsel for the Crown: Noel Sinclair
Counsel for Gerald Delorme: Emerald Murphy
No one appearing for Francis Yukon, Richard Tutin or Dale Courtoreille

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