Date: 2009 09 21
Docket: S-1-CR-2008000056

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

EMRAH BULATCI

Corrected judgment: A corrigendum was issued on September 21, 2009; the corrections have been made to the text and the corrigendum is appended to this judgment.

Restriction on Publication: Pursuant to subsection 648(1) of the *Criminal Code*, no information regarding this portion of the trial shall be published in any document or broadcast or transmitted in any way before the jury retires to consider its verdict.

MEMORANDUM OF JUDGMENT

[1] This memorandum addresses various outstanding items relating to the jury selection process for this trial.

[2] I have already ordered that the defence will be permitted to challenge each prospective juror for cause on the basis of pre-trial publicity. The charge is one of first-degree murder in the death of a member of the Royal Canadian Mounted Police. It was not disputed by the Crown that there was a basis for a challenge for cause due to the widespread publicity and notoriety surrounding this case.

[3] Jury selection will require the summonsing of an extraordinarily large jury panel. Due to its size the panel cannot be accommodated in the Yellowknife Court House so the banquet room facilities of a local hotel will be utilized for jury selection. The plan is to have a main room for the panel and a separate smaller room where the challenge for cause process will be carried out. A number of issues relating to the jury selection process, and the logistics of that process, need to be determined.

Panel Pre-Screening:

[4] The entire jury panel will assemble in the main large room. The accused will be arraigned. After that I will give introductory comments to the entire panel and explain how jurors may be excused due to hardship, or a lack of qualifications, or obvious partiality, i.e., a close connection to the accused, the deceased, or a potential witness. The question, however, is where the pre-screening should take place.

[5] The Crown suggest that the pre-screening should be done in the smaller room as each prospective juror is brought in for the challenge for cause process. The juror would be given an opportunity to ask to be excused before the challenge for cause questions are put to her or him. This would avoid the mass line-up of people wanting to be excused that can be expected if the pre-screening is done in the main room.

[6] The defence suggests that the pre-screening be done in the main room. That way those jurors who are likely to be excused for one reason or another can be heard from right at the start and need not wait around for hours (or days) in anticipation of their name being called.

[7] I prefer the course suggested by defence counsel. The pre-screening will be done in the main large room with the entire panel present.

Challenge for Cause Procedure:

[8] The Crown and the defence are in agreement that all unsworn potential jurors should be excluded from the room where the challenge for cause procedure is to take place until their name is called. The defence, however, also wishes to exclude sworn jurors even though both Crown and defence agree that we should utilize rotating triers of the challenge for cause for each juror.

[9] Section 640(2) of the *Criminal Code* provides that, where a challenge for cause is made on a ground such as pre-trial publicity, the last two jurors sworn, and where no

jurors have been sworn two persons present appointed by the court, "shall be sworn to determine whether the ground of challenge is true". In 2008 amendments were enacted which maintain this procedure but only where no order is made under s. 640(2.1). That section provides:

> (2.1) If the challenge is for cause and if the ground of the challenge is one that is not mentioned in subsection (1), on the application of the accused, the court may order the exclusion of all jurors - sworn and unsworn - from the court room until it is determined whether the ground of challenge is true, if the court is of the opinion that such an order is necessary to preserve the impartiality of the jurors.

[10] If an order for the exclusion of jurors is made under s. 640(2.1), then the "rotating" trier method is replaced by a system of "static" triers, as provided by s. 640(2.2):

> (2.2) If an order is made under subsection (2.1), two unsworn jurors, who are then exempt from the order, or two persons present who are appointed by the court for that purpose, shall be sworn to determine whether the ground of challenge is true. Those persons so appointed shall exercise their duties until twelve jurors and any alternate jurors are sworn.

[11] The static triers method is mandatory where an order is made under s. 640(2.1) excluding both sworn and unsworn jurors. And, such an order may be made if the accused applies for it.

[12] Here, the accused does not apply for such an order. But, the accused is asking that I exercise my discretion in excluding both sworn and unsworn jurors and still use the rotating trier method. Obviously the reason why no formal application is made is that the accused does not want static triers.

[13] The Crown agrees to using the rotating triers method but submits that, while I may have discretion to exclude unsworn jurors, I can only exclude both unsworn and sworn jurors if the accused applies for such an order and then the static triers method must be used. In other words, subsections (2.1) and (2.2) have codified these parts of the challenge for cause procedure and thus limited my discretion as the trial judge.

[14] One may well think that an "application" by the defence, as opposed to a "request" by the defence, is a distinction without a difference. Nevertheless I do not treat the defence position as a formal application as envisaged by s. 640(2.1).

[15] I can accept that the amendments to s. 640 were made with the aim of enhancing the impartiality of the jury. These are measures meant to protect against contamination of the jurors, both sworn and unsworn, from the question and answer format of the challenge for cause process. And there may be benefits to be had from the static triers method. It would certainly be less time-consuming to have only two triers since one would not have to repeat the instructions as each sworn juror rotates into place as a trier.

[16] I can also see the practical purpose of static triers if sworn jurors are excluded. Technically a sworn juror who is excluded cannot remain as a trier (unless the exclusion order itself excludes sworn jurors from the effect of the order for the period that the juror acts as a trier). If the concern is that a sworn juror may be contaminated by hearing something during the challenge for cause of another juror, that concern would apply equally where the sworn juror is acting as a trier.

[17] I cannot, however, think that Parliament meant to limit a trial judge's discretion in the absence of an application by the defence under s. 640(2.1). The application triggers consideration of an order excluding both sworn and unsworn jurors. But it seems to me that even in the absence of an application, a judge may still, in the exercise of his or her inherent jurisdiction, and in the interest of ensuring a fair trial with an impartial jury, make any exclusion order he or she thinks necessary.

[18] Counsel have provided me with the few cases they were able to find that have considered these amendments. In one, *R.* v. *Riley*, [2009] O.J. No. 1851 (S.C.J.), the trial judge held that the amendments had the effect of removing from trial judges their inherent jurisdiction to exclude jurors from the courtroom. This included even the power to exclude only unsworn jurors (something routinely done). If any exclusion order is made, the static triers method must be used. In three others, however, also from Ontario, the judges in each case held that a trial judge's inherent jurisdiction was not restricted. Two of them held that the rotating trier method may be used in conjunction with an order excluding unsworn triers: *R.* v. *Sandham*, [2009] O.J. No. 1853 (S.C.J.); *R.* v. *White*, [2009] O.J. No. 3348 (S.C.J.). The third held that the rotating triers may still be used even where the trial judge, in the absence of a defence

application but as an exercise of inherent jurisdiction, excludes both unsworn and sworn jurors: *R.* v. *Huard*, [2009] O.J. No. 3142 (S.C.J.).

[19] For reasons already given (in paragraph 17 above), I prefer the reasoning in the *Sandham* and *White* cases. In the absence of an order under s. 640(2.1), the mandatory requirement for the use of static triers is not triggered. I am also satisfied that my power to exclude prospective unsworn jurors has not been limited.

[20] With respect to excluding sworn jurors, I need not make a definitive ruling on that in the circumstances of this case. I have concluded that an order excluding sworn jurors is not necessary in the interest of justice. In my opinion the confidence of each juror in their fellow jurors will be enhanced by witnessing the selection process and knowing that each one of their colleagues exhibited the adequate attitude of impartiality so as to warrant selection.

[21] Accordingly, the selection process will proceed as follows:

1. After the pre-screening of the panel in the main room, the names of the first two triers will be drawn from the assembled panel.

2. After the first two triers are selected, they and the "court party" (and the accused) will move into the smaller selection room.

3. I will vet the initial two triers by posing the challenge for cause questions to each of them. If either or both are unacceptable, additional names will be called.

4. As each prospective juror's name is called, that juror will be brought into the selection room where the challenge for cause questions will be put (and if found acceptable by the triers then counsel will be given the opportunity to exercise their peremptory challenges).

5. The rotating triers method will be used.

6. All prospective unsworn jurors will be excluded from the selection process.

7. Those sworn jurors who are replaced as triers by a subsequent sworn juror shall remain in the selection room.

8. Since counsel have agreed that two alternate jurors should be selected, this process will be continued until 14 jurors have been sworn.

Challenge for Cause Questions:

[22] The defence has submitted a list of 16 questions that it says should be asked of each potential juror so as to assess possible partiality due to pre-trial publicity. The Crown has suggested a list of 7 questions.

[23] The modern approach is that the trial judge has a responsibility to ensure that the questions do not risk compromising a potential juror: *R.* v. *Hubbert* (1975), 29 C.C.C. (2d) 279 (Ont. C.A.), aff'd [1977] 2 S.C.R. 267; *R.* v. *Sherratt*, [1991] 1 S.C.R. 509; *R.* v. *Gayle* (2001), 154 C.C.C. (3d) 221 (Ont. C.A.). The questions must be relevant, succinct and fair, that is to say, fair to the juror as well as the parties. The challenge for cause process is not meant to probe the personalities of the jurors nor can it be a fishing expedition.

[24] Recent cases emphasize that the inquiry should probe whether the prospective juror harbours any bias or prejudice towards the accused and, if so, whether such bias or prejudice can be set aside and the case decided on the basis of the evidence. As noted in *Hubbert* (at p. 291), prior information about a case, and even the holding of a tentative opinion about it, does not mean a juror cannot set it aside and follow his or her oath to be impartial.

[25] The type of questioning that should be employed, and its aims, were described as follows by McCombs J. in *R.* v. *M.M.*, [2003] O.J. No. 5962 (S.C.J.), at para. 20:

> In light of the ruling of the S.C.C. in R. v. Williams, [1998] 1 S.C.R. 1128, 124 C.C.C. (3d) 481, where challenge for cause is appropriate, it is preferable, although nor required, that questions be permitted that address the distinction between attitudinal and behavioural partiality. Where the challenge for cause is based upon potentially prejudicial pre-trial publicity, or other similar sources of potential prejudice, it is appropriate to permit questions concerning publicity to address three discrete components, which I will call the "exposure", "attitudinal", and "behavioural" components. The first question or questions should ask whether the

> prospective juror has been exposed to the potential source or sources of bias. If the answer is question is [*sic*] "yes", then the second question should ask whether as a result of that exposure, the prospective juror has formed an attitude or opinion about the case. If the answer to that question is "yes" or is otherwise equivocal, then a third question addressing the behavioural component should be permitted. The third question should address the issue as to whether the prospective juror is able to set aside his or her opinion and decide the case only on the evidence heard in the courtroom and the judge's directions on the law.

[26] In most cases these types of questions can and should be answered by a simple "yes" or "no". In this case defence counsel wants to ask each prospective juror, if they answer "yes" to a question about having formed any opinions about the case, what that opinion is. Crown counsel objects to such a question.

[27] In my opinion, it is not appropriate or necessary to ask a prospective juror what opinion they formed. It is sufficient to ask if they have an opinion and, of course, the ultimate and main question, whether they can set aside any opinion they have formed.

[28] The classic case usually referred to in support of asking for the opinion is that of *R.* v. *Lesso & Jackson* (1952), 23 C.R.N.S. 179 (Ont. H.C.J.). There, two of the most eminent defence counsel in Canadian history, J.J. Robinette and Arthur Maloney, posed exactly that question to each prospective juror in a sensational murder trial. The trial judge, Chief Justice McRuer, allowed the question but expressed concerns about its propriety.

[29] Counsel is entitled to determine whether any potential juror can be impartial. But I do not think it is necessary to ask each juror to articulate his or her opinion. Expressions of such opinion carry the real risk that other jurors will be tainted by those views. It also carries the psychological risk that by articulating an opinion the individual becomes committed to it – and thus more unlikely to think it can be set aside. And, I think the modern trend is to restrict the questions so they can be answered by "yes" or "no", provided of course that they provide a rational basis by which to assess partiality.

[30] I have reviewed the questions submitted by counsel. Having regard to the circumstances of this case, I have reformulated them into 6 questions listed below. The questions will be posed to each prospective juror by defence counsel (since it is the

defence's challenge). The questions, however, will be preceded by a preamble to be posed by myself to each prospective juror:

> Emrah Bulatci has pleaded not guilty to the charge of first degree murder in the death of Cst. Christopher Worden.
>
> You can appreciate that in judging this case each juror must do so without bias, prejudice or partiality for one side or the other.

[31] Then defence counsel will put the following questions with a request that each one be answered simply "yes" or "no":

> 1. Have you read, heard or seen anything about this case or the accused in the media (that is, in newspapers, radio, television or on the internet)?
>
> 2. Have you obtained information about this case or the accused from any other source or person?
>
> 3. Have you participated in any way in activities relating to the death of Cst. Worden, such as attending a memorial service or making a donation to a memorial fund?
>
> 4. Do you or any members of your family have a close personal relationship with a member of the R.C.M.P.?
>
> 5. (If the answers to any of the above questions is "Yes") As a result of what you have seen, heard or read, or as a result of participating in any memorial activity, or as a result of any relationship with the R.C.M.P., have you formed any opinion about the guilt or innocence of the accused?
>
> (6) (If the answer to question 5 is "Yes") If you have formed an opinion about the guilt or innocence of the accused, are you able to set aside that opinion and decide this case only on the evidence you hear in the courtroom and the judge's directions on the law?

[32] If the answers to the first four question are "no", the issue would ordinarily go directly to the triers to decide (without going through questions 5 and 6). If, however, after receiving "no" answers to those first four questions, counsel agree to withdraw the challenge with respect to that particular juror, the juror can be deemed acceptable without the triers having to deal with it: see *R.* v. *Katoch*, [2009] O.J. No. 3456 (C.A.). Then the prospective juror can be put to the peremptory challenge phase directly.

[33] If counsel require further directions, they may speak to me.

"J.Z. Vertes"
J.Z. Vertes
J.S.C.

Dated this 21st day of September, 2009.

Counsel for the Crown: J.D. Cliffe and J. MacFarlane

Counsel for the Defence: L.K. Stevens, Q.C. and D. Rideout

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