IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- V -

GLENN KEVIN LARSEN

Transcript of the ruling on defence motion to make opening address after Crown opening address by The Honourable Justice L. A. Charbonneau, sitting in Yellowknife, in the Northwest Territories, on the 12th day of June, 2013.

APPEARANCES:

Mr. A. Godfrey:	Counsel for the Crown
Ms. J. Wynne-Edwards:	Counsel for the Crown
Ms. C. Wawzonek:	Counsel for the Defence
Ms. A. Vogt:	Counsel for the Defence

Charge under s. 236(b) Criminal Code of Canada

THE COURT: Earlier in this trial I heard a motion presented by defence, seeking permission to make an opening statement to the jury immediately after the Crown's opening statement. The Crown opposed that motion. I told counsel the next day that I was granting the motion and would put my reasons on the record later during this trial. These are those reasons.

I have considered the cases submitted by defence, R. v. Allen 2006 ABQB 848 (CanLII) and R. v. Morgan 1197 CanLII 12444 (ON SC), as well as a few others, R. v. Bekar 2003 BCCA 325, R. v. Ekman 2006 BCCA 206, R. v. A.D. [2003] O.J. No. 4900, R. v. Proulx 2012 QueCA 1302, R. v. Paetsch [1993] A.J. No. 366 (Alta C.A.), and R. v. White 2006 ABQB 883.

The parties were not in any disagreement as to the principles of law that apply in a motion like this. The general and well-established rule, as was noted in R. v. Paetsch of the Alberta Court of Appeal, is that the defence makes its opening statement after the Crown has closed its case, if defence is presenting at the trial.

The Court said that while a judge may have the power to direct that defence be permitted to

make an opening statement earlier in the process, this power should only be exercised in special circumstances. That statement was quoted with approval in R. v. A.D., a case from the Ontario Court of Justice. It was also approved by the Quebec Court of Appeal in R. v. Proulx.

It is clear that the discretion exists and should not be exercised routinely or as a matter of course. The reasons for this general rule are the various potential pitfalls of allowing the defence to make its opening statement before it decides whether to call evidence. Those pitfalls were referred to in R. v. A.D. at paragraph 17.

They include the fact that the defence does not have to decide whether it will call evidence until after the Crown closes its case. Since the purpose of an opening statement is to outline evidence that the party proposes to adduce, there is a risk that the defence counsel's instructions could change at the close of the Crown's case and that no evidence will be presented. The Court could never force defence to present evidence so the remedy, in that situation, would be a mistrial.

The second reason is that there is a high risk, if the evidence to be referred to in the defence's opening statement is expected

to come from the cross-examination of Crown witnesses, that it may not in fact materialize in the way the defence hopes or expects.

The third risk is that defence may slip into argument during the opening.

Examples where the discretion has been exercised to let the defence make its opening address early have included situations where the trial is expected to be very lengthy; where the nature of the defence is not likely to be apparent from the cross-examination of Crown witnesses; where the trial is expected to raise complex factual issues; or where there is expected to be significant and competing expert evidence.

Here the defence argued that it did not expect that the result of cross-examination of Crown witnesses would clearly raise the defence of self-defence. Counsel expected to put questions related to self-defence to some of the Crown witnesses, but that the answers would not be helpful to Defence. The Crown argued that the nature of the defence would nonetheless be obvious from the wording of those questions, irrespective of the answers. There is some merit to that argument. It is no different than any case where the defence

puts its theory of the case to the main Crown witnesses, thereby revealing, or at least strongly hinting at, what the defence position will be.

The Crown also argued that although this case was scheduled for two weeks, the nature of the defence would appear early on in the Crown's case through cross-examination of Crown witnesses, and the concern about lengthy proceedings before the defence got to make its opening did not arise, nor did the ones about complex factual issues or competing experts. In short, the Crown argued that there was nothing exceptional about this case that would justify a departure from the rule.

I did find some merit to these arguments, and to be frank thought this was a very borderline case in which to allow an early defence opening. On final analysis, however, I decided that there were good reasons to depart from the standard practice, essentially because I was satisfied that none of the potential pitfalls identified in the caselaw were likely to arise. This was especially so given the undertakings made by defence, which in my view, alleviated these pitfalls for the most part.

The risk of counsel slipping into argument

always exists. As I mentioned during the submissions, I am not convinced the risk is made higher if defence counsel makes its opening earlier than usual in the trial. Any counsel who do so do so at their peril, as I made that clear when I made my ruling, because then they run the risk of having the trial judge correct them in front of the jury. I would add that as it turned out, and as I expected, defence counsel's opening was entirely proper and well within the bounds of what can be included in an opening address.

Defence undertook to call evidence, and although there remained the theoretical possibility that those instructions could change, I did not see it as a likely possibility given the nature of the defence in this case.

The risk of facts referred to in the opening address not materializing are not as high when the defence case is based primarily on the evidence of defence witnesses, as was going to be the case here, as opposed to things that defence hopes to elicit from the cross-examination of Crown witnesses. When that is the case, defence is in a position no different than Crown when it makes its opening address, in good faith, on the basis of evidence it expects to adduce, but without any guarantees

that this will happen.

Finally, the potential imbalance resulting from the defence's statutory right to make an opening statement after the Crown closes its case did not arise here because the defence waived that right on the record. That waiver meant each side would get to make an opening statement to the jury.

In the end, I concluded that it was best to err on the side of allowing defence to make their opening statement early on so the jury would, before hearing any evidence, be alerted to the positions to be advanced by both parties. In the circumstances of this case, where several witnesses were expected to testify, each painting a relatively small portion of a large picture, I was of the view that it was more fair to Mr. Larsen and more fair to the jury for them to have a good understanding of the key issues that the jury would ultimately be called upon to decide.

Those were the reasons why, even recognizing that this was not going to be a particularly long trial, and this was not the clearest of situations to permit an early opening, I decided to exercise my discretion to grant the application.

I thank counsel who argued the motion for their submissions, they were very helpful.

Certified to be a true and accurate transcript, pursuant to Rules 723 and 724 of the Supreme Court Rules.

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Joel Bowker
Court Reporter