R v Nande and Brule, 2020 NWTSC 52

Date: 2020 12 17
Docket: S-1-CR 2020 000118

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

-and-

JORDAN NANDE

-and-

LISA LEONA BRULE

MEMORANDUM OF JUDGMENT

[1] This is the Crown's application for a publication ban. It is in respect to an Agreed Statement of Facts ("ASF"), which forms the evidentiary basis for convictions entered against the defendants, Jordan Nande and Lisa Brule, on a charge of being accessories to murder after the fact in the death of Breanna Menacho.

[2] The Canadian Broadcasting Corporation ("CBC") opposes the application. The defendants took no position. Devon Larabie, who is charged with Ms. Menacho's murder separately, joins the Crown in the application.

[3] On December 7, 2020 Mr. Nande and Ms. Brule pled guilty to being accessories to murder after the fact. As noted, the charges stem from the murder of Breanna Menacho, with which Devon Larabie is charged separately. That charge is outstanding.

[4] On December 9, 2020 the Crown read in the ASF and convictions were entered against Mr. Nande and Ms. Brule. They were sentenced. The Crown sought and was granted a temporary publication ban with respect to the ASF to maintain the *status quo* pending determination of this application. None of the guilty pleas, the convictions or the sentences imposed on Mr. Nande and Ms. Brule are subject to the ban.

[5] No date for Mr. Larabie's trial has been set. A preliminary inquiry has been set for June 22, 2021. If it is committed for trial, it is anticipated that it will proceed to be heard by judge and jury in Yellowknife. The Crown proposes that if granted, the publication ban would remain in place until such time as there is re-election by Mr. Larabie or a jury has been selected.

[6] The criteria for a publication ban in the nature of what is sought here are well-known. They were set out in *Dagenais v Canadian Broadcasting Corp* [1994] 3 SCR 835, 1994 Canlii 39 and reformulated somewhat in *R v Mentuck,*(2001) SCC 76 at para 32, [2001] 3 SCR 442. First, the ban must be necessary to prevent a serious risk to the proper administration of justice, because reasonably available alternative measures will not prevent the risk. Second, the salutary effects of the ban must outweigh the deleterious effects on the rights and interests of the parties and the public, including the right to free expression, the right of the accused to a fair and public trial and the efficacy of the administration of justice.

[7] It is for the applicants, in this case the Crown and Mr. Larabie, to demonstrate that both aspects of the criteria are met. The *Charter*-protected right to free expression, including the right of the press to publicize court proceedings, is at stake. Accordingly, the evidentiary burden is a heavy one. This was reinforced by Iacobucci, J. in a number of places in *Mentuck,* including at paras 34 and 39:

> 34 I would add some general comments that should be kept in mind in applying the test. The first branch of the test contains several important elements that can be collapsed in the concept of "necessity", but that are worth pausing to enumerate. One required element is that the risk in question be a serious one, or, as Lamer C.J. put it at p. 878 in *Dagenais*, a "real and substantial" risk. That is, it must be a risk the reality of which is well-grounded in the evidence. It must also be a risk that poses a serious threat to the proper administration of justice. In other words, it is a serious danger sought to be avoided that is required, not a substantial benefit or advantage to the administration of justice sought to be obtained.
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> [. . .]
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> 39 It is precisely because the presumption that courts should be open and reporting of their proceedings should be uncensored is so strong and so highly valued in our society that the judge must have a convincing evidentiary basis for issuing a ban [. . .]

[8] The Crown argues that if the contents of the ASF are published, it will interfere with Mr. Larabie's right to a fair trial by prejudicing potential jurors. They suggest that there is a relatively small pool of individuals who are eligible to serve as jurors and if the details of the ASF are disseminated by media, there is a real risk

that an already limited pool of potential jurors will be diminished to the point where it may be impossible to select a jury. They also suggest that potential jurors, once exposed to the information, will be incapable of disregarding it and thus it will be impossible for them to be truly impartial.

[9] The evidence the Crown relies on is the ASF itself, an affidavit from a legal assistant in the Crown's office in Yellowknife and the reality, which cannot be disputed, that this is a city and territory with a relatively small population. In support of its legal argument, the Crown tendered, along with *Mentuck*, this Court's decision in *R v Tutin,* 2004 NWTSC 46. The Crown also emphasized in argument that the publication ban would be limited to the ASF and would only be in place until a jury is selected or a re-election occurs.

[10] The affidavit the Crown filed provides that the defendants in this case were scheduled to enter pleas on December 7, 2020 and that it is factually connected to Mr. Larabie's matter. It contains no other evidence supporting the Crown's and Mr. Larabie's argument that there is a substantial risk that his right to a fair trial will be threatened if the ban is not granted.

[11] With respect to the contents of the ASF, the Crown argued that the details provided are graphic and brutal. As such, potential jurors who read or listen to them will surely remember them. Moreover, the reality of the internet age is that news stories are continuously circulated and remain accessible indefinitely after publication has occurred.

[12] I agree that the details in the ASF are disturbing, to say the least. I also agree that in the internet age, the public has indefinite access to what is reported by media outlets. Further, it is a matter of public record that the Northwest Territories and its communities, including Yellowknife, have relatively small populations. All of that said, however, there is an insufficient evidentiary basis to demonstrate that a publication ban is *necessary* to prevent a serious risk to trial fairness or that other measures to protect Mr. Larabie's right to a fair trial which are not reasonably available.

[13] It is convenient to start by saying that a change of venue is not a reasonably available measure in this case. I have already noted that the Northwest Territories has a small population. As stated by Schuler, J. in *Tutin,* ". . . occurrences such as murder tend to be news everywhere, not just the community where the event occurred". It can be safely said that regional centres outside of Yellowknife do not have large populations and the number of potential jurors is limited by simple arithmetic. Further, while some centres, such as Hay River, Fort Simpson and Fort

Smith, are accessible by road all year, they are all a relatively far distance from Yellowknife. Finally, accommodations in those communities are limited, which could pose challenges for the accused, counsel, witnesses, family members of the accused and the victim, and others who wish to attend the proceedings.

[14] The other potential measures are reliance on the jurors' oaths or affirmations, appropriate jury instructions, the ability to direct the Sheriff to issue summonses to a greater array of potential jurors and the challenge for cause process. In my view, all three of these, but particularly the challenge for cause process, are available to protect Mr. Larabie's right to a fair trial.

[15] The contention that the minds of potential jurors will be so poisoned by the contents of the ASF that it will be too difficult to select an impartial jury is entirely speculative. This is something that the Court is being asked to accept as fact without an evidentiary foundation. It is premised on a number of assumptions. First, that potential jurors will learn of details of the ASF, form an opinion and become so entrenched in their views that they will be unable to set them aside. That, in turn, could lead many of them to request to be excused from duty.

[16] Second, or in the alternative, it requires the Court to assume that regardless of whether a potential juror believes or says the information gained through publicity will not influence their decision, their minds and views will nevertheless be irreversibly tainted by media reports. Taken to its logical extreme, that argument requires the Court call into question the utility and validity of the challenge for cause process.

[17] Third, and relatedly, this argument assumes that those who are selected as jurors will not comply with their oath or solemn affirmation to try Mr. Larabie's case without prejudice or favour and further, that they will not comply with the trial judge's instructions.

[18] This view is not supported by any evidence. Moreover, as pointed out in *R v Kossyrine,* 2011 ONSC 6081, 2011 CarswellOnt 10589, it is a view which has been rejected by a number of other courts:

> [10] It is contended that if Mr. Ross' plea of guilty is published, along with the surrounding facts that he acknowledged, it will be impossible for the applicants to get a fair trial. I do not agree. To accede to that contention, is to accept the proposition that the jurors selected to decide this case will not honour their duties and obligations as jurors. That proposition has been consistently rejected by all levels of court, most especially by the Supreme Court of Canada. *Dagenais* is one such case. Another is *Phillips v. Nova Scotia (Commission of Inquiry into the*

> *Westray Mine Tragedy),* 1995 CanLII 86 (SCC), [1995] 2 S.C.R. 97, where Cory J. remarked, at para. 133
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> > I cannot accept the contention that increasing mass media attention to a particular case has made this vital institution either obsolete or unworkable. There is no doubt that extensive publicity can prompt discussion, speculation, and the formation of preliminary opinions in the minds of potential jurors. However, the strength of the jury has always been the faith accorded to the good will and good sense of the individual jurors in any given case.

[19] There is also no evidence to support the argument that the challenge for cause process will not identify those jurors who have formed an opinion and who will not or cannot set it aside to decide the facts. This is not the first time there has been widespread publicity in a notorious case in the Northwest Territories. For example, *R v Bulatchi,* 2009 NWTSC 63, where the accused was charged with the murder of an RCMP officer in Hay River, the challenge for cause process was used as part of the jury selection process. There was widespread publicity surrounding the events before the trial. In addition to using the challenge for cause process, an "extraordinarily large jury panel" was summonsed and the venue was changed to Yellowknife from the smaller centre of Hay River. A jury was successfully selected through that process. There is no reason that the same approach could not be taken here, nor any evidence that it would not be successful.

[20] I have considered carefully Schuler, J.'s reasons in *R v Tutin.* Factually, it is very similar to this case, but it is nevertheless distinguishable. The challenge for cause process was not seriously explored as an option in *Tutin*. The focus was on change of venue and reliance on instructions to the jury as alternative measures. The challenge for cause process was simply mentioned in passing. Further, that case was decided a number of years ago, prior to the cases provided by counsel for CBC, which considered the feasibility of the challenge for cause process as an alternative in more detail, including *R v Larue,* 2012 YKSC 15, *R v Kossyrine, supra.*

[21] The Crown and Mr. Larabie have not demonstrated that a publication ban is necessary under the first branch of the test set out in *Dagenais* and *Mentuck.* Given this, it is unnecessary to consider whether the salutary effects of the ban must outweigh the deleterious effects on the right to freedom of expression and the public's interest. I would note, however, that the importance of the open court principle in a free and democratic society cannot be underestimated. It is a key element in holding the administration of justice accountable to justice system participants and the public at large. As stated by Fish, J. in *Toronto Star Newspapers v Ontario,* 2005 SCC 41 at para 1, [2005] 2 SCR 188, "In any constitutional climate,

the administration of justice thrives on exposure to light – and withers under a cloud of secrecy”.

[22] Accordingly, the application for the publication ban is dismissed.

K. M. Shaner
J.S.C.

Dated at Yellowknife, NT, this
17th day of December 2020

Counsel for the Crown:	Mr. Blair MacPherson
Counsel for Devon Larabie:	Mr. Evan McIntyre
Counsel for the Canadian Broadcasting Corporation:	Ms. Tess Layton

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THE HONOURABLE JUSTICE K. M. SHANER