IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *R. v. Phagura*,
2019 BCSC 1130

Date: 20190107
Docket: X080616-2
Registry: New Westminster

Regina

v.

Sukhdev Singh Phagura

Ban on Publication: Pursuant to s. 648(1) of the *Criminal Code*, R.S.C. 1985, c. C-46. This ban restricted the publication, broadcasting or transmission, in any way, of any portion of the trial at which the jury was not present. The publication ban applied until the jury retired to consider its verdict.

Before: The Honourable Mr. Justice Crabtree

Oral Ruling on Defence Application to Dismiss Jury

Counsel for the Crown:	M.A. Fortino B.A. Lane
Counsel for the Accused:	B. Mohan D. Parker, Articled Student
Place and Date of Trial/Hearing:	New Westminster, B.C. December 10, 2018
Place and Date of Judgment:	New Westminster, B.C. January 7, 2019

[1] **THE COURT:** The defendant applied to dismiss the jury members prior to the commencement of the trial on the grounds that there was a realistic apprehension of bias on the part of the members of the jury. The circumstances giving rise to the application arose in the course of excusing Juror Number 11 from the jury and replacing that juror with the remaining alternate juror. The application was filed and heard on December 10, 2018, and marked as Exhibit "A" in these proceedings. The application was dismissed from the bench on December 10, 2018, with reasons to be provided. These are my reasons for dismissing the application.

[2] By way of background, the selection of the jury for this matter took place on November 29, 2018. On that date, 12 jurors and two alternate jurors were selected. Following selection of the jury, proceedings were adjourned to December 10, 2018, the date set for the commencement of the trial.

[3] Following the selection of the jury, Juror 11 became concerned that she may have had prior contact with defence counsel. She made an inquiry and confirmed she had prior contact with defence counsel, a number of years ago. As a result, she contacted Sheriff Services in New Westminster, to inform them of her concern. She advised that she had met defence counsel, Mr. Mohan, approximately 14 to 15 years ago, while he was acting for her husband. She told the Deputy Sheriff that a number of years ago she contacted the police over an incident that occurred at the home. The police attended the home and subsequently arrested her husband. Mr. Mohan was retained and acted for the husband. During the time Mr. Mohan was acting for the husband, Juror 11 met with him.

[4] I was informed by the Deputy Sheriff of the concern raised by Juror 11. The matter was raised with counsel in the presence of Mr. Phagura, on November 30, 2018; and again, on December 10, 2018, prior to the commencement of the trial. Following the conference on December 10, 2018, prior to the commencement of the trial an inquiry was conducted in the presence of counsel and Mr. Phagura. Juror 11 advised that following her selection to serve on the jury, it occurred to her Mr. Mohan may have previously acted for her husband and she went home and discussed the

matter with her husband. He confirmed that Mr. Mohan was his counsel and that she and Mr. Mohan, had met on one occasion.

[5] At the inquiry, Juror 11 confirmed she met Mr. Mohan approximately 14 to 15 years ago and provided the context. Juror 11 was asked whether she had informed or told other jury members of her concern or prior contact with defence counsel. She stated she did not discuss the matter with the jury members after the selection process occurred on November 29. She also advised that she did not discuss the matter with the jurors in the intervening period between November 29 and December 10, 2018. On the basis of Juror 11's prior contact with counsel, the juror was excused and replaced by the second and final alternate juror.

[6] Having excused Juror 11, Mr. Mohan applies to have the entire jury excused or dismissed on the basis that there is a reasonable apprehension of bias arising due to Juror 11's prior contact with defence counsel. Mr. Mohan submits that there is only one remedy by which the court can ensure the fairness of the trial process to Mr. Phagura. The defence argues that there was an opportunity for members of the jury to become aware of the reasons for Juror 11 being excused; namely, that she had met defence counsel and the circumstances under which that meeting took place. He submits there is a possibility for the apprehension of bias or a partiality to be created in the minds of the jury. He further submits that due to the lack of detail of what Juror 11 specifically said and the manner in which the information was conveyed could contribute to the apprehension of bias.

[7] The defendant relies on the Supreme Court of Canada's decision in *R. v. Spence*, 2005 SCC 71 [*Spence*] at para. 21, which states:

> [21] Our criminal law is premised on the ability of 12 jurors to do their job with "indifference" as between the Crown and the accused. ...

[8] Here it is argued that the premise or presumption is rebutted. *Spence* was decided in the context of a challenge for cause; however, the concern identified at that stage of the criminal process runs throughout the trial process.

[9] *R. v. Budai*, 2001 BCCA 349 [*Budai*], addresses circumstances where inappropriate contact between a juror and a defendant took place. In setting out the test for the disqualification of jurors, the court stated at para. 27:

> [27] All judicial officers must be impartial and must be seen to be impartial. This principle is fundamental. Its observance is essential for the proper working of the trial process and public confidence in the administration of justice. In *R. v. Barrow* [1987] S.C.J. No. 84, 38 C.C.C. (3d) 193 at 206, Dickson C.J.C. referred to the requirements of impartiality and fair process as follows:
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> > The accused, the Crown, and the public at large all have the right to be sure that the jury is impartial and the trial fair; on this depends public confidence in the administration of justice.

[10] At paras. 30-32, the Court in *Budai* stated:

> [30] The test for determining whether there exists in any particular case disqualifying partiality or bias has been developed and applied many times by the courts in cases involving judges, arbitrators and inferior tribunals. A remedy will be granted where actual bias is demonstrated (usually a direct pecuniary interest or some other personal interest in the outcome) or, more commonly, where the circumstances give rise to a "reasonable apprehension of bias." See: *R. v. R.D.S.*, *supra*, *Committee of Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369; *Szilard v. Szasa*, [1995] S.C.R. 3; *Ghirardosi v. Min. of Highways for British Columbia*, [1966] S.C.R. 367; *Blanchette v. CIS Ltd.*, [1973] S.C.R. 833; *R. v. Brouillard*, [1985] 1 S.C.R. 39; *R. v. Sussex Justices*, [1923] 1 K.B. 257; *Metropolitan Properties Co. Ltd. v. Lannon*, [1969 1 Q.B. 577 (C.A.).
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> [31] The requirement that there be no reasonable apprehension of bias applies to jurors. See: *R. v. L.H.S.*, [1999] B.C.J. No. 1073 (C.A.), 199 BCCA 307; *R. v. Gumbly* (1996), 112 C.C.C. (3d) 61; *R. v. Masuda* (1953), 106 C.C.C. 122; *R. v. Gough*, [1993] A.C. 646 (H.L.); *R. v. Spencer* (1986), 83 Cr. App. R. 277; *R. v. Putnam, Lyons & Taylor* (1991), 93 Cr. App. R. 281 and *Webb v. R.* (1994), 181 C.L.R. 41 (High Court of Australia).
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> [32] The Supreme Court of Canada recently dealt with the legal test to be applied to determine whether there is a reasonable apprehension of bias in *R. v. R.D.S.*, *supra*. In *R. v. L.H.S.*, *supra*, (as noted above, a juror case), this Court referred at para. 74 to *R. v. R.D.S.* as follows:
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> > Although there were four separate judgments in that case, all members of the Court agreed that the test for ascertaining a reasonable apprehension of bias was that set out by de Grandpré J., speaking in dissent (but not on this point) in *Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369 at 394-5:

> ... The grounds for this apprehension must however, be substantial and I ... [refuse] to accept the suggestion that the test be related to the "very sensitive or scrupulous conscience"

(*R. v. R.D.S., supra*, at paras. 111 and 112).

[11] I will now turn to consideration of the issue, in this particular case. Would a person viewing the matter realistically and practically, and having thought the matter through, conclude that there is a reasonable apprehension of bias in the minds of the jurors, based on the circumstances for excusing Juror 11?

[12] In the course of the inquiry, Juror 11 explained the events that occurred following her swearing in as a juror. Once she satisfied herself that she had met Mr. Mohan a number of years ago, she felt it her duty to raise the matter with Sheriff Services. She contacted a Deputy Sheriff by phone, following her selection as a member of the jury and prior to the date the jury was to return. In taking these steps, she demonstrated the seriousness and solemnity with which she viewed her duties and responsibilities. During the inquiry, Juror 11 stated that she did not raise or discuss the matter with the remaining members of the jury during the intervening period, or earlier on the day she returned to court. These were the only opportunities in which the juror could have raised such matters, and she confirmed she did not.

[13] While not taking issue with what Juror 11 said, Mr. Mohan submits that she was not placed under oath prior to the information being received and that this should cause the court concern; at least, in terms of the process followed. The juror demonstrated the solemnity and seriousness in which she undertook her duty as a juror; and the impartiality expected and required by a member of the public selected for such service. A juror is not a witness; and, in my view, there is no requirement to place a juror under oath or affirmation prior to undertaking the inquiry. As an aside, I note that the juror's oath had previously been administered to Juror 11, upon taking her place on the jury. Accordingly, in my view, not placing the juror under oath or affirmation prior to undertaking the inquiry is not fatal to the process.

[14] In light of information obtained during the inquiry, I am satisfied that there was no information shared regarding the prior contact with or the circumstances giving rise to the contact between Juror 11 and Mr. Mohan, with the remaining members of the jury. The inquiry itself, on December 10, was held in the absence of the remaining jury members and, following the inquiry, Juror 11 was excused. Once excused, Juror 11 did not return to the jury room. As a result, there was no opportunity for any discussion to take place between Juror 11 and the remaining jurors, following her being excused. Finally, once the jury returned to the courtroom, I informed the members of the jury that Juror 11 was excused and the reason the juror was excused had nothing to do with the trial of the matter and nothing should be taken from it.

[15] As noted in the *Budai* decision at para. 27, "All judicial officers must be impartial and must be seen to be impartial"; and by extension, this applies to the members of a jury. Appropriate steps must be taken to ensure the impartiality of each and every member of the jury selected to hear a criminal matter. Where partiality is found to exist, it needs to be addressed.

[16] In this case, there is no basis on which to conclude that any information was communicated to other members of the jury giving rise to a concern over the lack of impartiality. As there is no basis on which to support a finding of reasonable apprehension of bias, the application is dismissed.

"T.J. Crabtree J."