Court of Queen's Bench of Alberta

Citation: R v Sandhu, 2018 ABQB 1057

Date: 20181221
Docket: 161032453Q1
Registry: Lethbridge

Between:

Her Majesty the Queen

Crown

- and -

Tejinderpal Singh Sandhu

Accused

Restriction on Publication

Preliminary Inquiry – See the Criminal Code, section 539.

By Court Order, this decision and the evidence given in the preliminary inquiry must not be published, broadcast, or transmitted in any way.

NOTE: This decision is available from the court file, and it may be published after the accused is discharged after a preliminary inquiry or, if the accused is committed to stand trial, after the end of the trial.

Editorial Notice: The restriction on publication ended December 5, 2019.

Decision on the Challenge for Cause Application
of the
Honourable Mr. Justice D.K. Miller

---

1. Background

[1] The Crown alleges the accused had possession of significant amounts of cocaine and morphine in his transport truck when he attempted to enter Canada at the Coutts, Alberta border crossing. This resulted in a four count indictment, including: a charge of possession for the purpose of trafficking in cocaine, possession of morphine, as well as one count of importing cocaine, and one count of importing morphine.

[2] The accused has elected to be tried by judge and jury.

2. Application and Evidence

[3] The accused has brought an application to challenge each juror for cause, and has provided the Court with a brief preamble, and a list of four questions to be asked to each potential juror. The Crown opposes the application.

[4] The Defence application is based on two grounds which would prejudice potential jury members:

1. The specific media coverage of the case; and
2. The widespread media coverage regarding the fentanyl and opiate crisis that is current in Canada.

[5] With respect to media coverage, the Defence offers media articles which describe the seizure from this accused along with two other similar seizures at the same border crossing involving large seizures of cocaine. All three seizures took place within 30 days of each other. In each of the three cases the trucking companies were all located in British Columbia, and the names of the accused persons from the three incidents were reported. All three accused persons are of East Indian origin. The news reports are from Global TV, CTV News, Calgary Herald, and CBC News. The same information has been reported in local Lethbridge, Alberta newspapers as well.

[6] The news stories that relate to this application refer to the following:

- The name of the accused, Tejinderpal Singh Sandhu, and the names of the other accused persons, which are of East Indian origin.
- Reference to the fact that they all worked for trucking companies out of British Columbia.
- All charges involve large quantities of cocaine.

[7] Three of the stories are from news outlets that rank in the top 100 sources for news accessed by Canadians. The three local newspaper stories are readily available to residents of Lethbridge and surrounding area via print or internet. All stories remain available on the internet notwithstanding that they were first published approximately two years ago.

[8] The second aspect of the application relates to the notoriety of the recent fentanyl and opiate crisis that is sweeping Canada and indeed North America. Defence has produced two in-depth feature articles on this issue. One published by the Globe and Mail in June, 2015 and one published by Maclean’s Magazine at the same time. A CBC article reporting on the multi-thousand death toll from fentanyl was produced as well.

[9] Defence argues that there is a common sense inference that can be drawn in the minds of potential jurors from the fentanyl drug crisis, and the accused persons charged with trafficking in

cocaine and morphine. Accordingly, potential jurors need to be challenged to determine if they can truly render an impartial decision. The last two of the proposed questions relate to this aspect of the Defence argument.

3. Proposed Questions by Defence

[10] Defence proposes the following preamble and list of four questions to be put to potential jurors:

> The accused in this trial is Mr. Tejinderpal Sandhu, who was one of three men alleged to have possessed cocaine in a semi-truck that was being hauled across the border at Coutts, Alberta. Furthermore, he is also alleged to be in possession of an opioid drug known as "doda".
>
> 1. Have you heard or read anything about the accused in this case, through either television, newspapers, radio, internet, or any other means? If yes, go to the next question. If no, go to question 3.
> 2. Would what you have heard or read affect your ability to decide this case in a fair and impartial manner based solely on the evidence led in court?
> 3. Have you experienced personally or heard or read anything about the so-called "opioid crisis" and its impact on persons in the community? If yes, go to the next question.
> 4. Would your ability to decide this case in a fair and impartial manner based solely on the evidence led in court be affected by the allegation that the accused was allegedly involved in drug trafficking, including an opioid drug?

4. Legal Framework for Challenge for Cause

[11] The jury trial is a cornerstone of the Canadian Justice system, with both the Prosecution and Defence being entitled to a fair trial. Therefore, it is imperative that a jury be composed of impartial members. To protect the fairness of the jury trial, the *Criminal Code* contains provisions in which a challenge for cause can be applied for, in this case, s 638(1)(b), and if successful, questions may be asked to potential jurors to determine if they hold any prejudices which could impact that trial fairness.

[12] Jurors who have had considerable exposure to reporting on a case, or on related subjects, are at risk of being "not indifferent" or partial to the Crown or Defence, pursuant to s 638(1)(b).

[13] Through a trilogy of cases, the Supreme Court of Canada has given trial courts guidelines in handling challenges for cause under that section: ***R v Sherratt,*** [1991] SCJ No 21 (***Sherratt***); ***R v Williams,*** [1998] 1 SCR 1128 (***Williams***); and ***R v Find,*** [2001] I SCR 863 (***Find***).

[14] ***Sherratt*** provides guidance on how Challenges for Cause should be considered. A moving party must be able to communicate reasons for a challenge which are outside of the mere words of s 638(1)(b), meaning that they must provide more to allow the judge to determine the validity of the challenge and to overcome the presumption that a juror is free from bias. There must be an "air of reality" to the application, but it need not be an "extreme" case. The questions to be asked must not be a "fishing expedition" to obtain personal information about potential jurors, or to over or under-represent a certain class of society. In sum, the threshold question is:

> "...not whether the ground of alleged partiality will create such partiality in a juror, but rather whether it could create that partiality which would prevent a juror from being indifferent as to the result. In the end, there must exist a realistic potential for the existence of partiality, on a ground sufficiently articulated in the application, before the challenger should be allowed to proceed." (***Sherratt*** at paragraph 64).

From this case it can be easily construed that the onus is one of an "air of reality" and therefore a very low bar, which the Defence has to meet.

[15] The Supreme Court of Canada in ***Williams*** sets forth the process that is to be followed in challenge for cause applications. That process is summarized in paragraphs 32 and 33:

> Section 638(2) requires two inquiries and entails two different decisions with two different tests. The first stage is the inquiry before the judge to determine whether challenges for cause should be permitted. The test at this stage is whether there is a realistic potential or possibility for partiality. The question is whether there is reason to suppose that the jury pool may contain people who are prejudiced and whose prejudice might not be capable of being set aside on directions from the judge. The operative verbs at the first stage are "may" and "might". Since this is a preliminary inquiry which may affect the accused's Charter rights (see below), a reasonably generous approach is appropriate.
>
> If the judge permits challenges for cause, a second inquiry occurs on the challenge itself. The defence may question potential jurors as to whether they harbour prejudices against people of the accused's race, and if so, whether they are able to set those prejudices aside and act as impartial jurors. The question at this stage is whether the candidate in question will be able to act impartially. To demand, at the preliminary stage of determining whether a challenge for cause should be permitted, proof that the jurors in the jury pool will not be able to set aside any prejudices they may harbour and act impartially, is to ask the question more appropriate for the second stage.

[16] The onus at this stage of the application is not very high. A reasonably generous approach is to be taken by the Court.

[17] In order to determine if there is "widespread bias", the Supreme Court of Canada has given direction in ***Find***, at paragraph 32:

> As a practical matter, establishing a realistic potential for juror partiality generally requires satisfying the court on two matters: (1) that a widespread bias exists in the community; and (2) that some jurors may be incapable of setting aside this bias, despite trial safeguards, to render an impartial decision. These two components of the challenge for cause test reflect, respectively, the attitudinal and behavioural components of partiality: Parks, supra, at pp. 364-65; R. v. Betker (1997), 115 C.C.C. (3d) 421 (Ont. C.A.), at pp. 435-36.

5. Defence Position

[18] The Defence position is that there is a widespread bias present in the community, as well as widespread media coverage and community knowledge of the current fentanyl/opiate crisis in

Canada, and Southern Alberta in particular. The Defence contends that because of this widespread bias, there is a possibility that some potential jurors may hold prejudices which they may not be able to set aside, even with trial safeguards, including the instructions of a judge.

[19] The Defence has provided this Court with several news articles available to the public on the internet which relate to this specific accused and the charges that he faces, as well as on the current fentanyl/opiate crisis. The Defence further provides information regarding the popularity of those sites hosting the news articles, showing that many of the hosting sites are in the top 100 sources for news accessed by Canadians, and the others are widely available locally.

[20] The Defence contends that because of the popularity of these sites, the "widespread" nature of the test elaborated in ***Find*** is satisfied.

[21] In regard to the reporting of the specific case, the Defence submits that the nature of the reporting has created more than just "an air of reality" of bias, and submits that there is a reasonable likelihood that there has been bias. This is because of the fact that there were sensationalist headlines such as "Border agents make largest cocaine seizure in Prairie Region", and that the media "bundled" the three seizures together in their reporting, since those three seizures happened within a short period of time. The Defence contends that because of that bundling, it is likely that the public could link the three cases together, especially because of the fact that three accused in those cases share a similar ethnic background, and all worked for trucking companies based in British Columbia. This could result in the public being less likely to believe a contention that one driver was ignorant of his cargo and an increased likelihood in believing that each perpetrator was guilty.

[22] The Defence provides ***R v KTD***, [2001] OJ No 2894 ***(KTD)***. In ***KTD***, there was reporting regarding a murder, which was mostly local, within Windsor, Ontario. The reporting was factual, and not inordinate, and there was no real media coverage for a twelve month period prior to the trial. In that case, despite the brief and factual media coverage, the challenge for cause application was allowed, stating:

> "The test is whether there is a realistic potential for partiality. It need not be the extreme case. Applying the "reasonably generous approach" identified in ***Williams***, although the application is at best marginal, the issue is better resolved in favour of the applicant." (***KTD*** at para 15)

[23] The Defence concedes that it is difficult to know for certain that some jurors may be incapable of setting aside their bias to render an impartial decision. However, the Defence submits that since they have shown that there is a realistic potential for bias, that it would be reasonable to conclude that this may have influenced the minds of some jurors to such a degree that they would be unable to set aside their biases even with trial safeguards. Because of that, the Defence submits that the second half of the test in ***Find*** is met, and that when examined with the reasonably generous approach as exemplified in ***Williams,*** the standard has been met, and that the application should be allowed in regard to the case specific reporting.

[24] The Defence further contends that there is widespread bias in the community regarding the current fentanyl/opiate crisis. They have relied upon the news articles referred to previously to satisfy the "widespread" nature of the test, as well as submitting that it is nearly impossible for someone who is remotely up to date on current affairs to not know about the fentanyl or opiate crisis. While the accused is not being charged with any fentanyl related offence, the Defence contends that the presence of morphine within the shipment is an opiate, and there could be an association in the minds of jurors that would result in prejudice. The reporting in the news

articles provided focuses on the impact of fentanyl and other opiates has on the Canadian healthcare system, and the other societal harms that they cause. The Defence contends that this reporting focuses on the sheer amount of death, illness, and poverty that is caused. The Defence submits that this, when combined with a common sense inference of the general public to associate all illicit drugs together, would result in bias.

[25] The Defence further submits that the issue of drugs is so pervasive in our society that it is likely that some potential jurors may not have the ability to put aside everything that they have learned through the widespread reporting on the toll that the opiate crisis has placed upon our society. For those reasons, the Defence submits that the challenge for cause application in regard to the fentanyl/opiate crisis reporting should be granted.

6. Crown Position

[26] The Crown opposes this application, but accepts the Defence position on the state of the law regarding Challenges for Cause.

[27] The Crown impresses the basic presumption of jury impartiality, and states that it is important to remember that an impartial jury does not mean that a juror must be a blank slate, and that their combined life experiences are important in the role that they serve.

[28] In regard to the pretrial publicity faced by the accused, the Crown submits that there were only four articles found, and that the last was updated October 21, 2016, which means that there will have been over two years between the last news report and jury selection. Those reports were factual, with little background information on the individuals involved. The Crown states that they are not alleging any connection between the three seizures, and that the three seizures are differentiated in the article based on names and quantities of drugs seized.

[29] The Crown submits that since the articles are dated, and the information contained therein is neutral, that the test for widespread bias is not met, especially since there was not sensational reporting which would make the case more likely to remain in a juror's mind.

[30] The Crown further submits that the simple fact that there were three trucks from British Columbia driven by drivers from the same ethnic background is not enough to create a bias, since there has been no evidence led by the Defence that there is a widespread belief that all persons of East Indian descent are trafficking drugs.

[31] In regard to the fentanyl/opiate submissions, the Crown takes no issue that there is widespread reporting, and only takes issue with the fact that there is no evidence of fentanyl in this case. The Crown confirms that they will proceed with a charge related to morphine at trial, and that morphine and fentanyl are different drugs with very different effects. The Crown further contends that without that association, any case involving drugs would be subject to a challenge for cause because of their association with opiates or fentanyl. Therefore, the Crown submits that the connection is too remote, and the application must fail on that ground as well.

The Crown further states that if the Court does allow the Application, that they have no objection to the form of questions to be asked.

7. Analysis

[32] Having reviewed the submissions by the Defence very carefully, and having heard the oral argument of both counsel for the Defence and counsel for the Crown, I am persuaded that

the Defence application should at least be partially granted. I am satisfied that the Defence has met the very low evidentiary burden in relation to the concern of the pre-trial publicity about this case. This is combined with the factors that the other arrests are very similar, they are reported within a very close period of time, and the fact that the accused person's names all appear to be of East Indian origin. On this information and the unique factors in this case, and the fact that any prejudice need not be widespread, I am satisfied that the first two questions as proposed by Defence are appropriate for potential jurors. A large part of the basis for making this decision is that the bias or prejudice that may cause a potential juror to not be impartial relates directly to the accused person, Tejinderpal Singh Sandhu. That is not the case as it relates to the second set of questions.

[33] It is important to note that while the Defence has provided evidence of media reporting on the fentanyl crisis, none of the drugs involved in this case are fentanyl. I agree with the Crown's position on this point; the connection is far too remote, and in my view Defence has failed to meet the requisite burden. In fact, by raising the social problem in this context it may, in fact, cause a potential jury to fail to be impartial, and the challenge for cause may thereby have the opposite effect.

[34] Accordingly, the amended preamble and two questions I will permit to be asked in this challenge for cause application, are as follows:

> The accused in this trial is Mr. Tejinderpal Sandhu, who was one of three men alleged to have possessed cocaine in a semi-truck that was being hauled across the border at Coutts, Alberta.
>
> 1. Have you heard or read anything about the accused in this case, through either television, newspapers, radio, internet, or any other means? If yes, go to the next question.
>
> 2. Would what you have heard or read affect your ability to decide this case in a fair and impartial manner based solely on the evidence led in court?

[35] A further meeting shall take place between counsel and myself to discuss the mechanics and procedure of the actual questioning of potential jurors in advance of the commencement of the trial.

Heard on the 15th day of October, 2018.
Dated at the City of Lethbridge, Alberta this 21st day of December, 2018.

D.K. Miller
J.C.Q.B.A.

Appearances:

Dennis C Hrabcak
for the Crown

Brij Mohan
for the Accused

Sukhminder Kalkat
for the Accused