Court of Queen's Bench of Alberta

Citation: R v Lopez, 2021 ABQB 247

Date: 20210330
Docket: 181523283Q2
Registry: Grande Prairie

Between:

Her Majesty the Queen

Crown/Applicant

- and -

Russell Lopez

Accused/Respondent

Restriction on Publication

Identification Ban – See the *Criminal Code*, section 486.4.
By Court Order, information that could identify the Complainant must not be published, broadcast, or transmitted in any way.
NOTE: Identifying information has been removed from this judgment to comply with the ban so that it may be published.

Corrected judgment: A corrigendum was issued on March 31, 2021; the corrections have been made to the text and the corrigendum is appended to this judgment.

Reasons for Decision
of the
Honourable Madam Justice D.L. Shelley

Application

[1] The Applicant applied, pursuant to s 638(1)(b) of the Criminal Code, for permission to conduct a challenge for cause in connection with the selection of the jury in relation to this matter. The basis of the proposed challenge was the gender identification of the Complainant.

[2] I heard the Application on March 12, 2021. On March 15, I wrote to counsel advising them that I was dismissing the Application, with written Reasons to follow. These are my Reasons for that Decision.

Background

[3] Mr. Lopez was charged with two counts of sexual interference. At the time of the alleged offences, the Complainant was a 13 year old who would have been identified as female. The Complainant is now 16 years old, identifies as a transgender male, prefers the pronouns he, him and his, and uses a modified version of his given name from that which he used at the time of the alleged offences.

Legal Principles and Authorities

[4] The Court was not provided with any cases in which the Crown applied to conduct a challenge for cause in similar circumstances. All of the cases involve challenges sought by the Defence. None of them involve challenges on the basis of transgender identity.

[5] The parties in this Application agreed that the leading case is ***R v Find***, 2001 SCC 32 [***Find***]. In that case, the appellant unsuccessfully attempted to challenge the potential jurors for cause on the basis that he was accused of sexually assaulting children. He alleged that the nature

of the charges gave rise to a realistic possibility that jurors would be unable to act impartially. The only evidence submitted by the defence in support of the application was a spontaneous admission by a potential juror that she was unsure she could separate her feelings from the case, as she had children.

[6] The Supreme Court began with an analysis of the jury selection process, concluding that the ultimate requirement of the process is a fair trial, as distinguished from a perfect, or more advantageous trial: "[w]hat constitutes a fair trial takes into account not only the perspective of the accused, but the practical limits of the system of justice and the lawful interests of others involved in the process ... What the law demands is not perfect justice, but fundamentally fair justice" (***Find*** at para 28, citing ***R v O'Connor***, 1995 CanLII 51 at para 193, [1995] 4 SCR 411).

[7] Per McLachlin CJC (as she then was), in order to challenge for cause under s 638(1)(b) there must be a "realistic potential" that people in the jury pool are so partial they are unable to set aside their prejudice and fairly decide between the Crown and the accused despite proper instructions by the trial judge. The test to establish a realistic potential for jury partiality is stated at para 32:

> (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
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> [citations omitted].

This bias must be such that it is capable of unfairly affecting the outcome, as determined in the specific context. It should also be so pervasive in the community that it is possible it is harboured by one or more potential jurors in the pool.

[8] If widespread bias is shown, it must be established that the safeguards included in the trial process are not sufficient to dislodge this prejudice. Bias alone is not sufficient to disqualify a juror, in the absence of evidence of partiality, as noted at para 44:

> To treat bias as permitting challenges for cause, in the absence of a link with partial juror behaviour, would exact a heavy price. It would erode the threshold for entitlement defined in *Sherratt* and *Williams*, and jeopardize the representativeness of the jury, excluding from jury service people who could bring valuable experience and insight to the process. Canadian law holds that "finding out what kind of juror the person called is likely to be – his personality, beliefs, prejudices, likes or dislikes" is not the purpose of challenges for cause: *Hubbert*, *supra*, at p. 289. The aim is not favourable jurors, but impartial jurors.

[9] The challenging party has the onus of establishing the potential for partiality, and must rebut the presumption that the trial process is sufficient to cleanse these biases. This can be done by calling evidence or asking a judge to take judicial notice of facts. The judge may also draw inferences from the proceedings themselves or how biases, if proven, may affect the decision-making process.

[10] The accused in ***Find*** failed to provide evidence sufficient to substantiate his claims. The Supreme Court noted that the scientific and statistical information was by definition not amenable

to judicial notice, and must be proven by an expert and subject to cross-examination. The minimal evidence presented by the accused, which included a single limited study without expert evidence, was insufficient to persuade the Supreme Court. While widespread victimization from sexual assault was one factor to be considered, it was not sufficient to establish that widespread bias would result in prejudice.

[11] Despite failing to establish widespread bias, the Supreme Court noted that these are not “watertight compartments”, and continued to consider the impacts of the alleged biases on juror behaviour. An applicant may submit evidence establishing a link between the bias and its effect on the trial process. The judge may also reasonably infer that some bias by its very nature may prove difficult to set aside. The Supreme Court noted that, if in doubt, the judge should err on the side of permitting the challenge.

[12] The Supreme Court distinguished ***Find*** from ***R v Williams***, 1998 CanLII 782 (SCC), 1998 CarswellBC 1178 (SCC), stating at paras 94-95:

> The first difference is that race may impact more directly on the jury's decision than bias stemming from the nature of the offence. As Moldaver J.A. stated in *R. v. B. (A.)*, *supra*, at p. 441, "[r]acial prejudice is a form of bias directed against a particular class of accused by virtue of an identifiable immutable characteristic. There is a direct and logical connection between the prejudice asserted and the particular accused". By contrast, the aversion, fear, abhorrence, and beliefs alleged to surround sexual assault offences may lack this cogent and irresistible connection to the accused. Unlike racial prejudice, they do not point a finger at a particular accused.
>
> Second, trial safeguards may be less successful in cleansing racial prejudice than other types of bias, as recognized in *Williams*. As Doherty J.A. observed in *Parks*, *supra*, at p. 371: "[i]n deciding whether the post-jury selection safeguards against partiality provide a reliable antidote to racial bias, the nature of that bias must be emphasized". The nature of racial prejudice — in particular its subtle, systemic and often unconscious operation — compelled the inference in *Williams* that some people might be incapable of effacing, or even identifying, its influence on their reasoning. In reaching this conclusion, the Court emphasized the "invasive and elusive" operation of racial prejudice and its foundation "on preconceptions and unchallenged assumptions that unconsciously shape the daily behaviour of individuals" (paras. 21-22).

[13] Bias created by the nature of the offence may instead be more susceptible to control through the trial process. While the Supreme Court acknowledged the myths and biases that surround child and adult complainants in sexual assault cases, these have never formed the basis for a challenge for cause as these misconceptions may be cleared during the trial.

[14] Generally, the accused failed to meet the evidentiary burden to meet the test as established by the Supreme Court. The nature of the challenge on the basis of offence rather than race distinguished it from prior case law. It was noted that bias resulting from offences is generally considered more amenable to the safety mechanisms of trial.

[15] ***R v Alli***, 1996 CanLII 4010, 1996 CarswellOnt 3156 (ONCA), involved allegations that the accused sexually assaulted another male prisoner while in custody. At trial, the accused attempted to challenge prospective jurors for cause due to bias against both homosexuals and visible minorities. As in ***Find***, the Ontario Court of Appeal noted a lack of evidentiary foundation for these challenges, stating no evidence was called supporting either ground.

[16] The Court declined to extend the ratio of ***R v Parks***, 1993 CanLII 3383 (ONCA), 1993 CarswellOnt 119, where challenges for cause were permitted in the absence of supporting evidence because the accused was black. In the absence of supporting evidence, in ***Alli*** the Court of Appeal preferred to find that ***Parks*** should be confined to its facts until such time as an adequate evidentiary foundation has been submitted to permit such an extension.

[17] The Ontario Court of Appeal recently reiterated its concern regarding the limits to judicial notice in ***R v JM***, 2021 ONCA, 150. It confirmed the principle that "since judicial notice dispenses with the need for proof of facts, the threshold for judicial notice is strict (citing ***Find*** at para 48). Citing ***Quebec (Attorney General) v A***, 2013 SCC 5, the Court of Appeal reiterated that "a Court must refrain from taking judicial notice of social phenomena unless they are not the subject of reasonable dispute for the particular purpose for which they are to be used". It pointed out that "matters of which judicial notice may be taken and those that require expert evidence are not compatible. Matters that are the proper subject of expert evidence are, by definition, neither notorious nor capable of immediate and accurate demonstration (citing ***Williams*** at para 54 and *The Law of Evidence*, 8th ed, by Paciocco, Paciocco and Stuesser at p 579).

[18] ***R v Paterson***, 1998 CanLII 14969, 1998 CarswellBC 122, involved an appellant who appealed his conviction for second degree murder, arguing in part that the trial judge erred in refusing to question prospective jurors about bias against homosexuals. The appellant and the deceased were involved in a homosexual relationship which ended shortly before the murder. The Respondent relies on para 71 of ***Paterson***, which noted that the BC Court of Appeal held in ***Williams***, that there must be evidence that the bias:

> [I]ncluded a perception that an aboriginal person is more likely to have been involved in serious criminal conduct than persons of other races. The appellant here presented no evidence at the time of the application that there were biases against homosexual persons <u>which were of particular significance in the context of a criminal trial</u>. [emphasis added]

Paterson predates ***Williams*** and specifically cites the British Columbia Court of Appeal decision which was overturned by the Supreme Court of Canada.

[19] The Respondent also cites ***R v Partak***, 2001 CarswellOnt 9935, 52 WCB (2d) 92. The accused was on trial for first degree murder, and sought to challenge potential jurors for cause on the basis of sexual orientation, as both the accused and the deceased were homosexual. In this case the accused produced an expert, who was a self-described gay activist, as well as media documents and reports gathered from the internet. As these documents were simply attached to the witness' affidavit, the Court concluded that little weight could be given to them. Additionally, four documents relating to hate motivated violence, originating from the Department of Justice, were admitted, but were of little assistance. The Crown challenged this application on the basis that it broke new ground and there was an insufficient evidentiary basis to do so. The Court found that the evidence submitted was not properly proven or tested, as it was incapable of proper scrutiny.

Furthermore, the evidence lacked relevance, as the studies and documents did not relate to the community from which the jury panel would be drawn. Citing ***Find***, the Court found that the strict threshold for judicial notice was not met.

[20] In this application, the Applicant also relies on ***R v Pechaluk***, 2009 CanLII 92191, 2009 CarswellOnt 15675 (ONSC). In that case, the defence was permitted to challenge potential jurors for cause due to bias against women in same sex relationships. The application for challenging potential jurors for cause was not challenged by the Crown, who agreed it was appropriate. The case relates to the wording of the challenge and questions to be asked of potential jurors. It is of some assistance in analysing the test enumerated in ***Find***, as it discussed, likely in *obiter*, the steps of the test. It distinguished between the attitudinal aspect of the challenge, which relates to whether widespread bias exists, and the behavioural component, which asks if the prejudice would affect the juror's impartiality.

[21] While not directly cited by the parties, several cases they rely on cite ***Williams***. In that case, an indigenous man was charged with robbery and intended to challenge potential jurors for cause. The Supreme Court described indifference or partiality as "the possibility that a juror's knowledge or beliefs may affect the way he or she discharges the jury function in a way that is improper or unfair to the accused". Knowledge or bias may lead a juror to believe the accused is more likely to have committed the alleged crime, give less weight to evidence given, or predispose the juror to one of the parties. The Supreme Court noted a flaw in the Crown's submissions, that assumed all people who have racial prejudice can set that bias aside. The Court found that this underestimates this type of prejudice and the underlying stereotyping, and therefore, it "cannot be assumed that judicial direction to act impartially will always effectively counter racial prejudice". Therefore, long standing assumptions learned over a lifetime that the individual may not even be consciously aware of will be more resistant to judicial cleansing (***Williams*** at para 21, citing ***Parks***).

[22] It is an error to dismiss a challenge for cause on the basis that there is no concrete evidence that the potential jurors cannot set aside their biases. The Supreme Court also noted it was incorrect to hold that a widespread racial bias in the relevant community from which the jury is selected cannot alone be sufficient to challenge for cause. Instead, the court should consider the "nature of the evidence and the circumstances of the case" which may allow the court to conclude there is a realistic potential for partiality. While it is irrefutable if evidence establishes, for example, a widespread belief that individuals of the accused's race are more likely to commit the crime, challenge for cause may be permitted absent such links.

[23] Bias and prejudice can be detrimental in several ways, including in crimes with an "interracial element", or a perceived link between the accused's race and the crime. These can affect how jurors assess credibility, and can result in the perception the individual is less worthy. Credibility is also contrasted with the race of both parties, as one group may be perceived as less credible while another perceived as more credible than the average population.

[24] In ***Williams***, the Supreme Court concludes this reasoning at para 30:

> Ultimately, it is within the discretion of the trial judge to determine whether widespread racial prejudice in the community, absent specific "links" to the trial, is sufficient to give an "air of reality" to the challenge in the particular

circumstances of each case. The following excerpt from *Parks*, *supra*, at pp. 378-79, *per* Doherty J.A., states the law correctly:

> I am satisfied that in at least some cases involving a black accused there is a realistic possibility that one or more jurors will discriminate against that accused because of his or her colour. In my view, a trial judge, in the proper exercise of his or her discretion, could permit counsel to put the question posed in this case, in any trial held in Metropolitan Toronto involving a black accused. I would go further and hold that it would be the better course to permit that question in all such cases where the accused requests the inquiry.
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> There will be circumstances in addition to the colour of the accused which will increase the possibility of racially prejudiced verdicts. It is impossible to provide an exhaustive catalogue of those circumstances. Where they exist, the trial judge must allow counsel to put the question suggested in this case.

[25] The Supreme Court clarified that it is also an error to require the moving party to establish at the preliminary stage that the widespread prejudice will certainly result in partiality, as doing so is impossible. It may be inferred that, where it is established that widespread bias exists in the community, prospective jurors may be unable to set aside these prejudices.

[26] Turning to the applicable evidentiary standard, the Supreme Court noted it is not correct to automatically afford racial groups or disadvantaged groups under s 15 of the *Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, the ability to challenge for cause, as the relevant analysis considers the community in question. Therefore, prejudice against indigenous individuals, for example, would be less in a majority indigenous community. However, "absent evidence to the contrary, where widespread prejudice against people of the accused's race is demonstrated at a national or provincial level, it will often be reasonable to infer that such prejudice is replicated at the community level." Therefore, if the jury pool is representative, the evidentiary standard is that the moving party must demonstrate "widespread or general prejudice against his or her race in the community as a condition of bringing the challenge for cause".

[27] The Supreme Court held that the finding of fact, by a judge, of widespread racial prejudice in a community, can be relied on by subsequent judges through judicial notice. Applied to the facts in ***Williams***, the lower courts both found there was widespread bias against indigenous people. However, each level of court noted no reasonable possibility of partiality was demonstrated. In contrast, the Supreme Court noted racism against indigenous people includes stereotypes relating to credibility, worthiness and criminal propensity, which has translated into systemic discrimination in the criminal justice system, meeting the requirements for the test.

[28] The Applicant also cited identified ***PT v Alberta***, 2018 ABQB 496, as authority that transgender students experience verbal and physical harassment in school.

Position of the Parties

Position of the Applicant

[29] The Applicant submits that there is widespread prejudice against transgender individuals and that such prejudice is notorious. Accordingly, the Applicant submits that it has met the test to justify a challenge for cause on the basis that this prejudice will likely have a material bearing on potential jurors' ability to approach the evidence impartially.

[30] The Applicant suggests that the location of the trial, in a Northern Alberta community, makes it likely that such prejudice exists there. In support of this submission, the Applicant suggests that it is reasonably notorious that the community is more conservative than, for example, Calgary.

[31] The Applicant raises two reasons why prejudice against transgender individuals in this area of the Province is likely to affect trial fairness. The first is that negative views in the community in relation to transgender individuals may cause jurors to negatively assess the credibility of the Complainant. In that regard, the Applicant suggests that potential jurors may view transgender identification as a mental illness or mental disorder. It suggests that preconceived notions in relation to the Complainant's change in sexual identity between the time of the alleged offences and trial may affect jurors' perception of the honesty of the Complainant.

[32] The second reason submitted by the Applicant in relation to the effect of the prejudice on trial fairness relates to whether potential jurors may, based on preconceived notions related to transgender identity, attribute the Complainant's change in gender identity to the alleged offences themselves. Therefore, the Applicant submits, the prejudice may also act against Mr. Lopez.

[33] The Crown admits that there is a lack of specific evidence in relation to the nature of this prejudice and its potential effect on the impartiality of jurors in Grande Prairie, Alberta. However, it points to comments in paras 8 and 9 of ***R v Santiago***, 2020 ABQB 446, suggesting that this is support for its position that, where there is difficulty in obtaining evidence, "... judicial notice is often necessary because visible minorities face insurmountable difficulties in bringing forward the necessary evidence to meet the threshold test...".

Position of the Respondent

[34] While the Respondent acknowledges that there is prejudice against transgender individuals, it submits that there is no evidence in relation to the effect of this prejudice in the context of trial fairness. Relying on the rationale in ***Alli***, it submits that the evidence provided by the Applicant in this case is in relation to "generic prejudice" only. It does not share the Crown's concern that issues related to the Complainant's gender identity may operate against Mr. Lopez. It submits that a proper instruction can cleanse the negative effects of such prejudice.

Analysis

[35] The Applicant has submitted little evidence in relation to the nature of the prejudice experienced by transgender individuals. It has provided no evidence regarding how such prejudice might impact juror impartiality. Furthermore, the documentation related to the studies relied on by the Applicant was provided without the ability to challenge the information contained therein, nor to question its authors about how it might have relevance to this application.

[36] Sean Waite's "Should I Stay or Should I Go? Employment Discrimination and Workplace Harassment Against Transgender and Other Minority Employees in Canada's Federal Public Service" (2020) J Homosexuality, relates to the experience of federal public employees. It considers a different population than the one from which the jurors will be chosen. Further, it does not identify the nature of the applicable biases or prejudice; for example, that transgender individuals are considered to be less credible. It reports that transgender federal employees self report workplace harassment and discrimination, albeit to a lesser extent than do some other employees.

[37] Greta R. Bauer & Ayden I. Scheim's "Transgender people in Ontario, Canada: Statistics from the Trans PULSE Project to Inform Human Rights Policy" (2014), relates to Ontario communities rather than Albertan. This study does provide specific examples of discrimination, including failing to accommodate chosen names, workplace discrimination, cessation of medical care, verbal harassment, and physical and sexual assault. This information is consistent with the survey evidence provided by the Crown and sourced from Statistics Canada.

[38] I accept that transgender individuals experience discrimination and harassment, as the Crown's study reports suggest. It might also be possible, given the notoriety of such cases, to take judicial notice that transgender females are often the object of violence and have a disproportionately high murder rate. That transgender individuals experience prejudice and discrimination is not, however, the end of the question that must be decided in this Application. The Applicant must show how prejudice or discrimination against transgender individuals might impact trial fairness, for example, by leading a juror to believe an accused is more likely to have committed the alleged crime, by affecting a juror's assessment of the credibility of a witness, or by predisposing a juror to have either a negative or a positive view of one of the participants that might impair the ability to decide impartially. In addition, there should be some logical basis upon which to conclude that such bias or prejudice might not be capable of being cleansed by an appropriate instruction.

[39] While the Supreme Court has indicated that racial or disadvantaged groups are not automatically afforded the ability to challenge for cause, it has noted that certain types of discrimination have been the subject of such extensive study and expert opinion that courts are better positioned to take judicial notice of the effect of such discrimination and bias in a trial context. Thus far, however, it does not appear that courts are in a position to take judicial notice in relation to the homosexuality of an accused. And it appears that there is no authority in relation to transgender identity. This is not to say that such authority could not be provided. However, in this Application, no expert evidence was provided and the study reports were of limited assistance, in that they were not focused on the relevant community, the context of a trial, or the likely impact on jurors' ability to decide impartially.

[40] The Crown offers two possible ways in which the transgender identity of the Complainant might affect trial fairness. However, the two examples proposed by the Crown are only speculative, as they are not supported by any evidence that prospective jurors, in Grande Prairie or anywhere else, might tend to draw the conclusions suggested by the Crown in its submissions.

[41] I conclude that it is not possible for this Court to take judicial notice that discrimination and prejudice against transgender individuals is likely to result in trial unfairness or that, if it has some effect on juror's perception of either an accused or a transgender witness, such discrimination

or prejudice cannot be cleansed by an appropriate instruction. While the Crown attempted to provide evidence sufficient to meet its burden on this Application, I find that the evidence was not adequate, particularly in relation to how such discrimination and prejudice might impact jurors' ability to decide impartially. I conclude that, as the Crown has not met its burden, the Application must be dismissed.

Heard on the 12th day of March, 2021.
Dated at the City of Grande Prairie, Alberta this 30th day of March, 2021.

D.L. Shelley
J.C.Q.B.A.

Appearances:

Steven Hinkley
Katie Toivonen
for the Crown

Christian Banks
for Mr. Lopez

Corrigendum of the Reasons for Decision
of
The Honourable Madam Justice D.L. Shelley

The name of Mr. Hinkley was changed to reflect his correct first name.