Court of Queen's Bench of Alberta

Citation: R v Way, 2019 ABQB 366

Date: 20190516
Docket: 161444294Q1
Registry: Edmonton

Between:

Her Majesty the Queen

Crown

- and -

Gift Way

Accused

Reasons for Decision
of the
Honourable Mr. Justice Peter Michalyshyn

Introduction

[1] These reasons follow an earlier oral decision dismissing the accused's application for an offence-based challenge for cause at jury selection that took place on April 23, 2019.

[2] The accused's application is based on the submission that there is a widespread bias in Alberta against persons accused of sexual assault. The widespread bias, the accused argues, is that the default response is to believe alleged victims of sexual assault. It is argued further that the widespread bias has largely been created by the 'I believe you' ("IBY") movement.

[3] The accused sought to have the following questions asked during the challenge for cause process:

a. Have you heard of the "I Believe You" campaign, and if so, do you agree with its message of believing people who disclose sexual assault?
b. Do you think people who allege sexual assault should always be believed?

c. Do you think people who allege sexual assault are never responsible for what occurred?
d. Do you think context is irrelevant in cases of sexual assault, for example, whether the person who was sexually assaulted fought back, what the person who was sexually assaulted was wearing, whether alcohol was involved, whether the person who was sexually assaulted has or had a relationship to the perpetrator, and other contextual factors?

The law

[4] The accused acknowledges that several courts, though none binding on me, have rejected similar though not identical applications: ***R v Fuhr***, 2018 ABQB 230; ***R v Shirvastava***, 2018 ABQB 245; ***R v TJ***, 2018 ONSC 5001; ***R v Borne***, 2018 ONSC 3733.

[5] The starting point is ***R v Find***, 2001 SCC 32, [2001] 1 SCR 863. In her introductory paragraphs in ***Find***, McLachlin CJC set the stage as follows:

> [1] Trial by jury is a cornerstone of Canadian criminal law. It offers the citizen the right to be tried by an impartial panel of peers and imposes on those peers the task of judging fairly and impartially. Since our country's earliest days, Canadian jurors have met this challenge. Every year in scores of cases, jurors, instructed that they must be impartial between the prosecution and the accused, render fair and carefully deliberated verdicts. Yet some cases may give rise to real fears that, despite the safeguards of the trial process and the directions of the trial judge, some jurors may not be able to set aside personal views and function impartially.
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> [2] The criminal law has developed procedures to address this possibility. One of the most important is the right of the accused to challenge a potential juror "for cause" where legitimate concerns arise. This Court recently held that widespread prejudice against the accused's racial group may permit an accused to challenge for cause: R. v. Williams, 1998 CanLII 782 (SCC), [1998] 1 S.C.R. 1128. In this appeal we are asked to find that charges of sexual assault of children similarly evoke widespread prejudice in the community and also entitle the accused to challenge prospective jurors for cause.

[6] In ***Find*** the accused did not establish the right to challenge for cause. The court found no basis for the conclusion that charges of sexual assault against children raised a realistic possibility of juror partiality. As such, the court rejected the application for an offence-based challenge for cause.

[7] As noted in ***Find***, s 638(1)(b) of the *Criminal Code* permits a party to challenge for cause on the ground that "a juror is not indifferent between the Queen and the accused". Lack of indifference may be translated as "partiality". Both terms describe a predisposed state of mind inclining a juror prejudicially and unfairly toward a certain party or conclusion.

[8] The test is whether or not there is a realistic potential that the jury pool may contain people who are not impartial, in the sense that even upon proper instructions by the trial judge they may not be able to set aside their prejudice and decide fairly between the Crown and the accused.

[9] The court in ***Find*** was careful to note at para 36 that as to "bias",

> …not every emotional or stereotypical attitude constitutes bias. Prejudice capable of unfairly affecting the outcome of the case is required. Bias is not determined at large, but in the context of the specific case. What must be shown is a bias that could, as a matter of logic and experience, incline a juror to a certain party or conclusion in a manner that is unfair. This is determined without regard to the cleansing effect of trial safeguards and the direction of the trial judge, which become relevant only at the second stage consideration of the behavioural effect of the bias.

[10] Even if bias is shown, the next question is whether it is "widespread":

> …Generally speaking, the alleged bias must be established as sufficiently pervasive in the community to raise the possibility that it may be harboured by one or more members of a representative jury pool… If only a few individuals in the community hold the alleged bias, the chances of this bias tainting the jury process are negligible. For this reason, a court must generally be satisfied that the alleged bias is widespread in the community before a right to challenge for cause may flow. [***Find***, at para 39]

[11] And even if widespread bias is shown, a further inquiry is made, the so-called "behavioural component": will the prospective juror be unable to set aside their bias? The court in ***Find*** said this, at paras 41-44:

> [41] Trial procedure has evolved over the centuries to counter biases. The jurors swear to discharge their functions impartially. The opening addresses of the judge and the lawyers impress upon jurors the gravity of their task, and enjoin them to be objective. The rules of process and evidence underline the fact that the verdict depends not on this or that person's views, but on the evidence and the law. At the end of the day, the jurors are objectively instructed on the facts and the law by the judge, and sent out to deliberate in accordance with those instructions. They are asked not to decide on the basis of their personal, individual views of the evidence and law, but to listen to each other's views and evaluate their own inclinations in light of those views and the trial judge's instructions. Finally, they are told that they must not convict unless they are satisfied of the accused's guilt beyond a reasonable doubt and that they must be unanimous.
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> [42] It is difficult to conceive stronger antidotes than these to emotion, preconception and prejudice. It is against the backdrop of these safeguards that the law presumes that the trial process will cleanse the biases jurors may bring with them, and allows challenges for cause only where a realistic potential exists that some jurors may not be able to function impartially, despite the rigours of the trial process
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> [43] It follows from what has been said that "impartiality" is not the same as neutrality. Impartiality does not require that the juror's mind be a blank slate. Nor does it require jurors to jettison all opinions, beliefs, knowledge and other accumulations of life experience as they step into the jury box. Jurors are human

> beings, whose life experiences inform their deliberations. Diversity is essential to the jury's functions as collective decision-maker and representative conscience of the community: Sherratt, supra, at pp. 523-24. As Doherty J.A. observed in Parks, supra, at p. 364, "[a] diversity of views and outlooks is part of the genius of the jury system and makes jury verdicts a reflection of the shared values of the community".
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> [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.

[12] Proof of widespread bias may be in the form of evidence, or judicial notice of facts, or both, or by way of trial judges' inferences drawn from the case before them.

[13] No one suggests that ***Find*** closes the door on offence-based challenges for cause. It's just that the decided cases have yet to open the door. That day may or may not come. If and when it does, it will likely be supported by an evidence-based finding of widespread bias that a prospective juror will be unable to set aside.

The evidence

[14] Turning then to the evidence, on Mr. Way's application it is argued that the ***Fuhr*** and ***Shirvastava*** cases in particular are distinguishable on the basis of different, more compelling evidence than in the case before me. I do not agree.

[15] Mr. Way refers to two affidavits of Ayat Ghotme – the first filed March 5, 2019, the second March 18, 2019.

[16] The contents of these affidavits were reviewed before me by counsel in oral argument.

[17] The contents of Ms. Ghotme's first affidavit is also summarized in detail in counsel's brief filed March 5, 2019, at pages 10-14.

[18] The March 18, 2019 affidavit was filed in support of explaining the methodology of certain Leger Research in support of the Association of Alberta Sexual Assault Services (AASAS).

[19] Having reviewed Ms. Ghotme's affidavits in detail along with the detailed written and oral submissions of counsel I conclude that:

- the evidence surely reveals that a certain number of Edmontonians have indeed been exposed to "I Believe You" messaging;
- the evidence says nothing with regard to whether any particular number of Edmontonians *accept* "I Believe You" messaging, any more than any particular number of Edmontonians, exposed to the messaging, reject it, or are equivocal;

- even if the evidence supported 'acceptance' of the I Believe You messaging – which it cannot – the evidence falls short that the "I Believe You" campaign's "survivors" are a category of individuals whose complaints have come before the investigating or prosecuting stages of the justice system, or indeed have been substantiated on any measurable basis in a court of law on the criminal legal standard of proof beyond a reasonable doubt.

[20] What's more, the applicant's evidence in the case before me fails to advance the cause that was rejected by Goss J in ***Fuhr***, at para 32*:*

> [32] …Without more, they do not support a finding that there is a realistic possibility that members of a properly instructed jury in a criminal trial would likely be biased so as to favour the evidence of a sexual assault complainant over that of an accused, nor that the campaign may have affected the ability of potential jurors to apply the law on reasonable doubt. I find that the evidence does not establish a realistic possibility of juror partiality entitling the Applicant to challenge for cause.

[21] Likewise, the conclusions of Hollins J in ***Shirvastava***, at paras 20-22:

> [20] Even if I accept that there is increased social media attention to issues of sexual harassment and sexual assault and that the social media message is that such conduct ought not to be tolerated and its perpetrators held to account, it is another matter entirely to say that this creates or represents widespread bias against alleged offenders. There may be, for example, many people who think that the hype around the #metoo and #ibelieveher movements are not well-founded or have gone too far. And of course, there are many people who, believe it or not, do not subscribe to Twitter and who may have no knowledge of or interest in this social media discourse.
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> [21] Similarly, even if I accept that the reporting of sexual offences to the police has increased, that is obviously not the same thing as saying that there is widespread bias in this community towards automatically believing complainants in sexual assault cases. The evidence here falls far short of establishing the widespread bias alleged by the accused.
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> [22] On the second arm of the test, whether individual prospective jurors would be unable to set aside their bias in favour of the complainant in order to render an impartial verdict, I also find that the accused cannot meet this test.

Conclusion

[22] I find, based on the evidence before me, that:

- there is no evidence that as alleged, the "I Believe You" movement "has been successful in implanting its message across Alberta that people disclosing sexual assaults are always to be believed".
- more particularly in the context of criminal law proceedings, there is no evidence of a reasonable possibility of a widespread bias in the community against alleged perpetrators of sexual assault.

[23] Accordingly, the application is dismissed.

Heard on the 14th, 19-21st days of March, 2019.
Dated at the City of Edmonton, Alberta this 16th day of May, 2019.

Peter Michalyshyn
J.C.Q.B.A.

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