R. v. H.A.T.

Ontario Judgments

Ontario Superior Court of Justice

M.N. Varpio J.

Heard: March 2, 2022.

Judgment: March 4, 2022.

Court File No.: 8340/20

[2022] O.J. No. 1153 | 2022 ONSC 1417

Between Her Majesty the Queen, and H.A.T., Accused/Applicant

(15 paras.)

Counsel

Trent Wilson, Counsel for the Crown.

Bruce Willson, Counsel for the Accused.

BAN ON PUBLICATON PURSUANT TO SS. 517 AND 486.4 OF THE CRIMINAL CODE OF CANADA

REASONS ON SEVERANCE APPLICATION

M.N. VARPIO J.

1 The accused stands charged with four offences: two counts of sexual assault, one count of unlawfully possess a firearm and one count of willfully causing suffering to a dog. He has elected to be tried by judge and jury and his trial is set to begin May 30, 2022.

2 It is alleged that the accused engaged in a lengthy pattern of abusive conduct towards his wife whereby he sexually assaulted her over 30 times between 2008 and 2020. He is also charged with kicking and attacking his dog after the dog had an accident on the floor, thus causing the dog to die from internal injuries.

3 The accused brings an application to sever the animal cruelty charge from the indictment as he claims the presence of the charge on the indictment may cause prejudice to him.

ANALYSIS

4 Section 591(3) of the Criminal *Code of Canada* states: Severance of accused and counts

(3) The court may, where it is satisfied that the interests of justice so require, order

(a) that the accused or defendant be tried

separately on one or more of the counts; and

(b) where there is more than one accused or defendant, that one or more of them be tried separately on one or more of the counts.

5 The onus is on the accused to show, on a balance of probabilities, that the interest of justice requires severance, or that the interest in a fair trial outweighs the interest of society to avoid a multiplicity of proceedings: *R. v. McNamara* (1981), 56 C.C.C. (2d) 193 (Ont. C.A.).

6 The decision to sever a count is discretionary: *R.v. Lictchfield* (1993), 86 C.C.C. (3d) 97 (S.C.C.) at 111.

7 The courts have opined as to what factors must inform the exercise of the judge's discretion. In *R. v. Last* [2009] SCJ No 45 at paras. 17 and 18, the Supreme Court of Canada outlined certain factors to consider:

> Courts have given shape to the broad criteria established in s. 591(3) and have identified factors that can be weighed when deciding whether to sever or not. The weighing exercise ensures that a reasonable balance is struck between the risk of prejudice to the accused and the public interest in a single trial. It is important to recall that the interests of justice often call for a joint trial. Litchfield, where the Crown was prevented from arguing the case properly because of an unjudicial severance order, is but one such example. Severance can impair not only efficiency but the truth-seeking function of the trial.
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> The factors identified by the courts are not exhaustive. They simply help capture how the interests of justice may be served in a particular case, avoiding an injustice. Factors courts rightly use include: the general prejudice to the accused; the legal and factual nexus between the counts; the complexity of the evidence; whether the accused intends to testify on one count but not another; the possibility of inconsistent verdicts; the desire to avoid a multiplicity of proceedings; the use of similar fact evidence at trial; the length of the trial having regard to the evidence to be called; the potential prejudice to the accused with respect to the right to be tried within a reasonable time; and the existence of antagonistic defences as between co-accused persons: *R. v. E. (L.)* (1994), 94 C.C.C. (3d) 228 (Ont. C.A.), at p. 238; *R. v. Cross* (1996), 112 C.C.C. (3d) 410 (Que. C.A.), at p. 419; *R. v. Cuthbert* (1996), 106 C.C.C. (3d) 28 (B.C.C.A.), at para. 9, aff'd [1997] 1 S.C.R. 8 (sub nom. *R. v. C. (D.A.)*).

8 The Court of Appeal of Ontario dealt with a situation in *R. v. B.M*. [1998] O.J. No 4359 where the accused was charged with over 40 counts of sexual assault and two counts of bestiality. The accused sought to sever the bestiality counts, and the trial judge dismissed the application. In overturning the trial judge, Rosenberg J.A. stated at paras 25 to 27:

> In my view, the trial judge erred in principle in refusing to sever the bestiality counts. The remaining bestiality count should be severed at the new trial. The delay in bringing the application was not a relevant consideration in the circumstances. This is not a case where the application for severance is brought for the first time in the course of the trial. In such cases there is a heavier burden on the accused to demonstrate some prejudice has arisen in the course of the trial: *R. v. Cuthbert* (1996), 106 C.C.C. (3d) 28 (B.C.C.A.) affirmed by the Supreme Court of Canada (1997), 112 C.C.C. (3d) 96; *R. v. Cross* (1996), 112 C.C.C. (3d) 410 (Que. C.A.), leave to appeal to S.C.C. refused (1997), 114 C.C.C. (3d) vi. In the present case, the application was brought prior to trial. It did not result in any prejudice to the Crown, nor did it interfere with the presentation of the case.
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> Cases like this, where the allegations are particularly sordid and the complainants particularly sympathetic, provide a severe test of our criminal justice system: *R. v. R. (A.J.)* (1994), 94 C.C.C. (3d) 168 (Ont. C.A.) at 180. There was a heavy onus on the Crown and the trial judge to ensure the appellant received a fair trial. In my view, the trial judge placed too much emphasis on the similarity of the charges and his view that the jury would not be inflamed by hearing the bestiality allegations. The bestiality charges were similar to most of the other counts only in the broadest sense that they involved a form of sexual behaviour. They were of a very different nature in all other ways. There was no need for the bestiality charges to be tried with the more serious counts: there is no nexus between them. Neither incident was necessary for the unfolding of the narrative and the evidence of bestiality was inadmissible on the other counts. Moreover, the jury was already faced with the daunting task of attempting to deal with the many other counts. While objectively less serious than the allegations of sexual and physical abuse, the allegations of bestiality reveal the appellant as a person capable of great depravity who seems to be completely unable to curb his sexual impulses. It

was essential that the jury not be unnecessarily diverted from their task by evidence calculated only to show the appellant to be a deviant personality.

Joining the bestiality counts with the other counts served only to invite the jury to engage in the forbidden line of reasoning that the appellant was the type of person likely to commit acts of sexual misconduct. Thus, faced with an indictment including these charges, the trial judge should have granted the severance application.

9 This case is quite similar to the fact situation in *R. v. B.M.*, although the case for severance is stronger in *R. v. B.M*. than in the instant case because the severed count in *B.M*. was of a sexual nature. Accordingly, the potential for a jury to engage in the forbidden reasoning that "the appellant was the type of person likely to commit acts of sexual misconduct" was exceedingly high. In the case before me, the impugned count is not sexual in nature and the risk of engaging in the forbidden logic is not as great. Nonetheless, and as will be seen, the risk of enflaming the jury is considerable in the in the circumstances.

10 There is complexity to the Crown's evidence in that the jury will need to sift through a considerable amount of evidence regarding 30-odd instances of sexual assault. As noted in *B.M.*, situations "where the allegations are particularly sordid and the complainants particularly sympathetic, provide a severe test of our criminal justice system". In this case, the jury will hear from a woman who alleges that she suffered through years of abuse. The complainant will testify that she became pregnant on at least one occasion as a result of the sexual abuse. The emotional tenor of that evidence will undoubtedly be high and the Crown theory will undoubtedly involve submissions that this marriage was a long-lasting exercise of control and abuse as engaged by the accused. Calling evidence about animal cruelty, when coupled with this complexity, heightens the prospects that a jury will be enflamed and make the intuitive leap that the accused is a "bad person" capable of committing all the acts alleged.

11 Also, as in *B.M.*, there appears to be no need for the animal cruelty charges to be tried with the allegations of sexual misconduct. The animal cruelty charge does not appear to be intrinsically linked to the sexual assault counts, nor would animal cruelty appear (at first blush) to be capable of supporting a similar fact evidence application in the circumstances. The nexus between the animal cruelty and the sexual assault counts, therefore, is not strong.

12 When I consider these two sets of facts, it is clear that there will be a strong emotional pull for the jury to engage in the forbidden logic that the accused is a bad person, likely to kick dogs to death and sexually assault his wife. Put another way, the risk of prejudice to the accused is sufficiently great that severance is necessary because:

1. The evidence involving the sexual assaults is relatively complex given the number of alleged instances of said abuse;
2. The evidence involving the killing of the dog is emotionally powerful;
3. The evidence regarding the dog is seemingly not linked to the sexual evidence in a way that makes it necessary for narrative or other purposes; such that
4. The likelihood of the jury engaging in prejudicial reasoning is strong.

13 While I accept that there is generally a powerful presumption that cases should not be bifurcated for the reasons elucidated earlier in these reasons, the risk of prejudicial reasoning in this case is such that the applicant has proven on a balance of probabilities that the count of animal cruelty ought to be severed from the indictment as the risk of the jury in engaging in propensity reasoning outweighs the benefits of keeping the charge on the indictment.

14 It should also be noted that, had the evidence involving the sexual assault been less complex, I might well have dismissed the instant application as the risk of engaging in propensity reasoning would have been lessened and limiting instructions might well have addressed any concerns.

CONCLUSION

15 Application granted.

M.N. VARPIO J.

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