
CANADA / JUDGMENT

R. v. Coban

2021 BCSC 2154

COURT

Supreme Court of British Columbia

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2021 BCSC 2154 R. v. Coban

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Coban,

2021 BCSC 2154

Date: 20211104

Docket: X078463

Registry: New Westminster

Regina

v.

Aydin Coban

Before: The Honourable Madam Justice Devlin

Reasons for Judgment re: Defence Application to Challenge the Jurors for Cause

Counsel for the Crown:

Louise J. Kenworthy

Heather Guinn

Counsel for the Accused:

J. Saulnier

E. Holzman

Place and Date of Hearing:

New Westminster, B.C.

October 5, 2021

Place and Date of Judgment:

New Westminster, B.C.

November 4, 2021

Introduction

- [1] The accused, Aydin Coban, is alleged to have sextorted an underage girl, A.T., over the internet between January 2009 and October 2012. He is charged with several offences under the Criminal Code, R.S.C., 1985, c. C-46 [Code], including extorting and criminally harassing A.T., as well as possession and distribution of child pornography.
- [2] Mr. Coban's jury trial is scheduled to start on January 4, 2022 with jury selection in late December 2021. Pursuant to s. 638 of the Code, Mr. Coban applies to challenge the jurors for cause due to pre-trial publicity and the nature of the allegations against him. In support of his application he filed an affidavit from Karen Ma, dated July 16, 2021 (the "Ma Affidavit"). Exhibits A-K of the Ma Affidavit attach various excerpts of online stories and news articles pertaining to A.T. The defence submits that in *R. v. Chouhan*, 2021 SCC 26 [Chouhan], the Supreme Court of Canada broadened the challenge for cause procedure and the types of questions that may be asked.
- [3] The Crown agrees that Mr. Coban has established a realistic potential that the jury pool may contain people who are not impartial because there has been significant pre-trial publicity related to the case and to Mr. Coban. However, the Crown submits that Mr. Coban has not established that an identifiable bias arises from the nature of the offences, nor has he established the prevalence of this bias, should it in fact exist. Further, they submit Chouhan does not expand the ambit for challenges for cause.
- [4] In addition to Chouhan, counsel have referred me to two post-Chouhan decisions from the Ontario Superior Court of Justice that consider the impact of Chouhan on the challenge for cause process: *R. v. Bhogal*, 2021 ONSC 4925 [Bhogal] and *R. v. Martin*, 2021 ONSC 5333 [Martin].

The Governing Legal Principles

- [5] The parties agree that for the purposes of this application, the recent decision of Chouhan is central, as it dealt directly with recent amendments to the Code that modified the challenge for cause procedure. In Chouhan, the Supreme Court of Canada delivered five judgments and no individual judgment had more than three signatories. At para. 5 of Bhogal, Justice Pomerance summarized Chouhan as follows:

The Chouhan court was fractured on many issues. The judgment consists of five separate sets of reasons. It would appear that seven of nine justices endorsed the use of anti-bias instructions; seven of nine appeared to endorse a modestly liberalized approach to the challenge for cause, albeit one that respects juror privacy; four of nine expressly held that the stand aside power could be used to address reasonable apprehensions of bias; four of nine proposed limits on the challenge for cause; and five of nine proposed limits on the stand aside power, holding that it could not be used to secure a representative petit jury.

[6] In Chouhan, Justices Moldaver and Brown, writing for themselves and Chief Justice Wagner, discussed the need for general anti-bias instructions (at paras. 53-55) and instructions on specific biases and stereotypes (at paras. 56-59) - a majority of the Court endorsed their reasons on these issues: Chouhan at para. 110. Moldaver and Brown JJ. commented on the importance of jury instructions for ensuring that jurors approach their deliberations without bias (at para. 49):

In appropriate cases, therefore, trial judges should consider providing the jury with instructions that will "expose biases, prejudices, and stereotypes that lurk beneath the surface, thereby allowing all justice system participants to address them head-on -- openly, honestly, and without fear" (Barton, at para. 197). Such instructions can add a measure of self-consciousness and introspection that fosters objectivity and fairness over the course of the jury's deliberations (Su, at p. 90).

[7] With respect to general anti-bias instructions, they recommended (at para. 54):

Trial judges should exhort jurors to approach their weighty task with a heavy dose of self-consciousness and introspection. Jurors must identify and set aside prejudices or stereotypes when considering the evidence of any given witness and when reaching a verdict

[8] Further, Moldaver and Brown JJ. directed that where anti-bias instructions are required, they ought to be given early in the process and before the presentation of evidence, and at any other time that the trial judge considers appropriate, such as at the outset of jury selection (at para. 53).

[9] Justices Moldaver and Brown observed that there is a low threshold for raising a challenge for cause - "[t]he accused person or the Crown must merely demonstrate a reasonable possibility that bias or prejudicial attitudes exist in the community, with respect to relevant characteristics of the accused or victim" that "could taint the impartiality of the jurors" (at para. 62). With respect to the challenge for cause, they recognized that "[t]he trial judge necessarily enjoys significant discretion to determine how and under what circumstances the presumption of impartiality will be displaced, and how far the parties may go in the questions that are asked on a challenge for cause" (para. 62). They discussed the focus of the appropriate questions at para. 64:

Appropriate questions on a challenge for cause will ask prospective jurors for their opinion as it relates to salient aspects of the case. For instance, counsel may point to characteristics of the accused, complainant or victim, such as race, addiction, religion, occupation, sexual orientation or gender expression, and ask prospective jurors whether, in light of such characteristics, they would have difficulty judging the case solely on the evidence and the trial judge's instructions, because they hold an opinion about such characteristics that on careful reflection, they do not believe they could put aside. Before posing that question to jurors, trial judges ought to call each individual juror's attention to the possibility of unconscious bias and impartiality. It should be stressed that the mischief is not in acknowledging a difficulty setting aside unconscious bias, but in failing to acknowledge such a difficulty where one exists.

[10] They cautioned at para. 66 that although "the Parks question was never intended to be the only question available on a challenge for cause", trial judges must be mindful in permitting questions beyond the Parks formula "of the fundamental principle of respect for jurors' privacy upon which our system of jury selection has 'long been based'". While the Parks formula permits "limited incursions into juror privacy", they stressed that "further developments in the challenge for cause process must continue to balance 'the accused's right to a fair trial by an impartial jury, while also protecting the privacy interests of prospective jurors'" (at para. 66, emphasis in original). They also emphasized the differences between Canadian and American jury selection processes at para. 66:

It is for this reason that the jurisprudence has long resisted the temptation to move the Canadian law regarding juror privacy closer to that of the U.S. system. In concluding that it is "unclear that the [U.S.] system produces better juries than the Canadian system", this Court has pointed to the high degree of protection of and respect for juror privacy, and our concern to prevent "abuse by counsel seeking to secure a favourable jury, or to indoctrinate jurors to their views of the case" (Find, at para. 27; see also, *R. v. G. (R.M.)*, 1996 CanLII 176 (SCC), [1996] 3 S.C.R. 362). Any future developments should account for these precedents.

[11] Martin J. (writing for herself as well as Karakatsanis and Kasirer JJ.) agreed that Parks did not describe the only questions available on a challenge for cause and recognized that "trial judges are afforded the latitude to depart from the Parks-style formula where appropriate to ensure juror impartiality" (at para. 119). The Supreme Court of Canada has encouraged trial judges to "err on the side of caution and permit prejudice to be examined" through the challenge for cause process, noting that it is "better to risk allowing what are in fact unnecessary challenges, than to risk prohibiting challenges which are necessary": *R. v. Williams*, [1998] 1 S.C.R. 1128, 1998 CanLII 782 (SCC), at para. 22; see also *R. v. Find*, 2001 SCC 32 [Find] at para. 45.

The Proposed Questions

[12] During the hearing, defence counsel advised that he agreed with the Crown's proposed wording for some of the questions. As I canvass the proposed questions, I will identify those that are no longer subject to dispute.

The Preamble

[13] Defence counsel proposed the following preamble:

The victim in this case was a teenaged girl. The allegation is that the accused extorted this teenage girl using her own explicit photos. Child pornography may be presented in court.

As a prospective juror, you bring with you experiences, beliefs, and opinions, some of which may be unconscious. The issue before us today is not whether these beliefs are correct or proper, but whether you can set them aside and judge the evidence presented at trial fairly without bias, prejudice, or partiality. We will now ask you some questions about this issue. Think carefully before answering.

[14] The Crown opposes the use of this preamble for two reasons: First, because it focuses on the nature of the offences. Second, because there is no identifiable bias arising from this case, and therefore, the reference to unconscious bias is unnecessary. The Crown submits the following wording for the preamble:

The offences that Aydin Coban is charged with involve the online extortion and harassment of a young teenaged girl, [A.T.], as well as child pornography.

[15] I agree with the Crown that there is no need for the preamble to detail the type of evidence that is going to be presented in the trial. Subject to some minor refinement, I will incorporate the Crown's version into my opening comments.

[16] I have no concerns including the second paragraph of the defence's preamble in my opening comments. It contains generic comments that are consistent with what the Court in Chouhan proposed.

Question 1

[17] Defence counsel agrees with the Crown's proposed wording for the first question, which is as follows:

Have you seen, heard or read anything about this case, about the accused Mr. Aydin Coban, or the alleged victim [A.T.], in any form of media, for example, from the radio, the television, the internet, newspapers or magazines, or through discussions with others, including discussions on social media?

If yes, go to the next question.

Question 2

[18] Defence counsel agrees with the Crown's proposed wording for the second question, which is as follows:

As a result of anything you may have seen, heard, read, discussed or communicated, have you formed an opinion about the possible guilt or innocence of Mr. Coban?

If yes, go to the next question.

[19] Defence counsel did propose a further question asking specifically what the prospective juror heard, read etc. about the case. However, I am not satisfied that the proposed inquiry would be of any further assistance. The issue is not what the juror read but rather whether, considering what they read, they are able to decide the case in a fair and impartial manner.

Question 3

[20] Defence counsel suggested that the next question read as follows:

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?

[21] However, I agree with the Crown that the question should be more focused. I accept the Crown's proposed question, which reads as follows:

Despite any opinion that you may have formed, would you be able to set that opinion aside and decide the case based only on the evidence presented at trial and the instructions of the trial judge?

Other Proposed Questions

Offence-based questions

[22] Defence counsel included two additional questions regarding whether a juror's ability to decide the case in a fair and impartial manner is affected by (i) the presentation of child pornography and (ii) allegations of an adult male accused of extorting a teenaged girl online using explicit photos of that girl.

[23] While I agree with defence counsel that "the Parks question was never intended to be the only question available on a challenge for cause" (Chouhan at para. 66), I do not consider that Chouhan extended challenges for cause to cases where the challenge is directed towards a particular crime or form of criminal conduct. As Pomerance J. observed in Bhogal, the Court in Chouhan focused on prejudicial attitudes "with respect to relevant characteristics of the accused or victim such as race, addiction, religion, occupation, sexual orientation or gender expression" (Bhogal at para. 39, citing to paras. 62-64 of Chouhan). Pomerance J. observed that she "did not read Chouhan as authorizing offence-based challenges for cause": Bhogal at para. 39. As noted at para. 20 of Martin, I accept that Chouhan was silent as to whether a challenge for cause based on the nature of the offence is permissible.

[24] Therefore, with respect to whether questions pertaining to the nature of the offence are warranted I am guided by the Supreme Court of Canada's comments in Find at para. 70:

Crimes commonly arouse deep and strong emotions. They represent a fundamental breach of the perpetrator's compact with society. Crimes make victims, and jurors cannot help but sympathize with them. Yet these indisputable facts do not necessarily establish bias, in the sense of an attitude that could unfairly prejudice jurors against the accused or toward conviction. Many crimes routinely tried by jurors are abhorrent. Brutal murders, ruthless frauds and violent attacks are standard fare for jurors. Abhorred as they are, these crimes seldom provoke suggestions of bias incompatible with a fair verdict.

[25] In Find, the Court stressed that just because jurors feel strong emotions, which may frequently be the case in serious criminal trials, does not mean they hold a prejudicial bias against the accused. The Chief Justice, writing for the court, explained at para. 71:

One cannot automatically equate strong emotions with an unfair and prejudicial bias against the accused. Jurors are not expected to be indifferent toward crimes. Nor are they expected to remain neutral toward those shown to have committed such offences. If this were the case, prospective jurors would be routinely and successfully challenged for cause as a preliminary stage in the trial of all serious criminal offences. Instead, we accept that jurors often abhor the crime alleged to have been committed - indeed there would be cause for alarm if representatives of a community did not deplore heinous criminal acts. It would be equally alarming if jurors did not feel empathy or compassion for persons shown to be victims of such acts. These facts alone do not establish bias. There is simply no indication that these attitudes, commendable in themselves, unfairly prejudice jurors against the accused or toward conviction. They are common to the trial of many serious offences and have never grounded a right to challenge for cause.

[26] These same comments apply in this case. In my view, the defence's concerns with respect to the nature of the offence can be addressed in the course of directions to the jury. As stated in Find at para. 96, "[o]ffence-based bias has concerned the trial process throughout its long evolution, and many of the safeguards the law has developed may be seen as a response to it."

General question

[27] The defence proposed a general question such as the following, which is based on para. 33 of Martin:

Is there any other reason you can think of that would make it difficult for you to serve as an impartial juror and determine this case on the evidence and the instructions of the trial judge?

[28] I note that the question referred to at para. 33 of Martin was used in another case and was premised on the fact that the trial was held during the COVID-19 pandemic. The court in Martin explained at para. 34:

This question was framed broadly but was premised on the fact that the trial was held during the COVID-19 pandemic. While there was a general instruction about the pandemic protocols, this question facilitated a direct opportunity for a potential juror to focus on any issue, including any concerns about sitting on a jury during the pandemic, with additional requirements imposed to comply with government protocols, that could impact on one's ability to fully and fairly discharge the duties of a juror.

[29] Nonetheless, defence counsel submits that this type of open-ended question would provide a means to obtain more information from the prospective juror that would assist in the inquiry.

[30] I agree with Crown counsel that there is no basis to include this broad-based question in the challenge for cause. Indeed, in my opening comments, I intend to include general comments about COVID-19 protocols and advise the panel that they may address me with any other concerns they have about serving on this jury trial. Therefore, I see no basis to include the proposed general question in the challenge for cause questions.

Conclusion

[31] Subject to something arising in the remaining pre-trial applications that necessitates further consideration, I will ask the following questions on the challenge for cause in addition to the preamble I set out earlier in these reasons:

Question 1:

Have you seen, heard or read anything about this case, about the accused Mr. Aydin Coban, or the alleged victim [A.T.], in any form of media, for example, from the radio, the television, the internet, newspapers or magazines, or through discussions with others, including discussions on social media?

If yes, go to the next question.

Question 2

As a result of anything you may have seen, heard, read, discussed or communicated, have you formed an opinion about the possible guilt or innocence of Mr. Coban?

If yes, go to the next question.

Question 3

Despite any opinion that you may have formed, would you be able to set that opinion aside and decide the case based only on the evidence presented at trial and the instructions of the trial judge?

[32] In the event that counsel wish to make further submissions on the precise language of the questions or other matters related to the challenge for cause procedure, they may raise those matters with me prior to stage 1 of the jury selection.

"Devlin J."

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