

CANADA / JUDGMENT

R. v. Sipes

2012 BCSC 850

COURT

Supreme Court of British Columbia

DECIDED

6 June 2012

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2012 BCSC 850 R. v. Sipes

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Sipes,

2012 BCSC 850

Date: 20120606

Docket: 66431-2

Registry: Kelowna

Regina

v.

Dale Gordon Sipes, Leslie Podolski, Sheldon Richard O'Donnell

Peter Manolakos and Douglas Corey Brownell

Pursuant to s. 486.5 of the Criminal Code, R.S.C. 1985, c. C-46, information that could identify certain witnesses may not be published or broadcast in any manner. The content of these Reasons for Judgment complies with the existing publication bans.

Before: The Honourable Mr. Justice Smart

Applications for Severance and Mistrial

Reasons for Judgment

Counsel for the Crown:

D.A. Jardine, P.M. Favell,

G.G. Matei, D. McLaughlin,

J.M. Robinson, A.S. Burton,

C.G. Giles, M.M. Salaysay,

S. Nahal

Counsel for the Accused Sipes:

M.K. Woodall, M.A. Nathanson,

G. Ng

Counsel for the Accused Podolski:

R.C. Claus, M.R. Jetté,

G. Docolas

Counsel for the Accused O'Donnell:

G. Orris, Q.C., C.L. Bauman

Counsel for the Accused Manolakos:

R.A. (Sandy) Ross, P. Doherty,

A. Rinaldis

Counsel for the Accused Brownell:

C.R. Purves, B.L. Hickford

Place and Date of Judgment:

Vancouver, B.C.

June 6, 2012

I. INTRODUCTION

- [1] Peter Manolakos applies for severance or, alternatively, a mistrial. He points to four grounds he submits, when considered cumulatively, are of such prejudicial effect that he can no longer receive a fair trial. The fourth ground concerns evidence of another murder given by a Crown witness, Cameron Coutts.
- [2] Dale Sipes also applies for a mistrial as a result of Coutts' evidence of another murder.
- [3] I gave my decision dismissing both applications on Tuesday, May 29, 2012, and said I would give my reasons later in writing. These are my reasons. I have also included in my reasons an instruction I gave to the jury on May 30, 2012 after I heard further submissions from counsel.

II. APPLICABLE LEGAL PRINCIPLES

[4] Severance is governed by s. 591 of the Criminal Code, R.S.C. 1985, c. C-46. Subsection 591(3) states that a court may order severance of counts or accused where it is satisfied that the interests of justice so require. The onus is on the applicant. The case law delineates different factors a court may consider in assessing whether the interests of justice require severance: *R. v. B. (M.O.)* (1998), 123 C.C.C. (3d) 270 (B.C.C.A.); *R. v. Last*, 2009 SCC 45; *R. v. Hamilton*, 2011 ONCA 399; and *R. v. Blacklaws*, 2012 BCCA 217.

[5] One factor is the timing of the application. When severance is sought at or near the end of a trial this will be a significant consideration. This was explained in by Proulx J.A. in *R. v. Cross* (1996), 112 C.C.C. (3d) 410 (Que. C.A.), at p. 420:

... [T]he burden on an accused who brings a motion for separate trials at the end of the prosecution's case is very heavy. It must be remembered that he has the obligation of satisfying the Court that the superior interests of justice command that his motion be granted.

See also *R. v. Suzack* (2000), 141 C.C.C. (3d) 449 (Ont. C.A.), at para. 105.

[6] An application for a mistrial is governed by the common law. The case law provides that a trial judge has discretion to declare a mistrial but that he or she should only do so "in the clearest of cases" and where there has been a "fatal wounding of the trial process", which cannot otherwise be remedied: *R. v. Dueck*, 2011 SKCA 45, at para. 30; *R. v. Arabia*, 2008 ONCA 565, at para. 52; and *R. v. Lising*, 2004 BCCA 33, at para. 59.

[7] Justice Doherty articulated when a trial judge should exercise his or her discretion to order a mistrial in *R. v. Chiasson*, 2009 ONCA 789, at para. 14:

A mistrial is appropriate where that remedy is necessary to prevent a miscarriage of justice: *R. v. Burke*, [2002] 2 S.C.R. 857 at para. 75. Other less extreme remedies, such as an appropriate mid-trial instruction, should be considered and rejected as inadequate before a mistrial is granted: *R. v. Toutissani*, [2007] O.J. No. 4364. ...

[8] In considering whether to grant declaration of mistrial, I must assess the possible impact of the evidence on the jury and the effectiveness of "any corrective measure which has been brought, or could be brought ... to remedy the irregularity": *R. v. Khan*, 2001 SCC 86, at para. 80. In considering the possible impact of the evidence, the applicant is entitled to advance his or her case "on the basis of the real possibility of the worst-case scenario": *Khan*, at para. 33.

[9] The Crown argues that severance of either Manolakos or Sipes would have the effect of granting a mistrial as they would have to be tried before another jury. For this reason, it submits that I should apply the criteria for granting a mistrial. I agree. In my view, at this stage of the trial, it would only be in the interests of justice to grant severance if I am satisfied that Manolakos or Sipes could not otherwise receive a fair trial. Put differently, the applications should be granted if necessary to prevent a miscarriage of justice.

- [10] The legal principles applicable when assessing the potential prejudicial effect of admitting evidence, as well as the remedial use of limiting instructions, were considered in my discreditable conduct decision: *R. v. Sipes*, 2011 BCSC 640, at paras. 59 to 71. I have applied those principles on this application.

III. MANOLAKOS' APPLICATION

A. Doug Sweitzer Calls

- [11] Manolakos argues that as a result of the tendering of the un-redacted version of call 16 (Exhibit 178) and an additional wiretap call (Exhibit 179), the jury has evidence before it that indicates he had some mala fides towards Doug Sweitzer and was aware of uncharged acts of violence. He submits the evidence is highly prejudicial as it tends to prove propensity. He argues that the evidence was admitted as a result of the cross-examination of [Content Redacted] (the "witness") by Sipes, and would not have been admitted had he been tried alone.
- [12] The Crown submits evidence that Manolakos expressed an intention to use violence is of little prejudice when considered in the context of evidence the jury had already heard prior to the tendering of the un-redacted and additional call. It points to: Ron Sparks' evidence that Manolakos instructed him concerning degrees of violence to be used; Jessie Martin's evidence that he was told by Manolakos that if he let the line go down he would get his "ass kicked"; evidence of Manolakos threatening to send Sheldon O'Donnell over to beat the witness's head in (call 18); evidence about seeing "uncle Dale" (call 33); and the witness's evidence that Manolakos would instruct him to fix problems by using violence if necessary. The Crown says in the circumstances of this case the calls are of negligible additional prejudice. The Crown also points to the fact that Manolakos was allowed to tender and cross-examine upon an additional related wiretap call (Exhibit 180) for the purpose of neutralizing any prejudicial inference the jury might conclude from the other two calls.
- [13] Whether an accused is tried alone or with others, he or she is entitled to a fair trial. This includes being protected from evidence that unfairly prejudices him or her. However, a joint trial is not the same in all respects as a trial of a single accused. In a joint trial a trial judge must attempt to balance the right of each accused to a fair trial (Suzack) and the important policy reasons that underlie joint trials for those charged with offences arising out of the same events (*R. v. Crawford*, [1995] 1 S.C.R. 858, at para. 30). See also: *R. v. Lergie*, 2010 ONCA 548, at paras. 88-90.
- [14] I considered the admissibility of this evidence during the Crown's application to re-examine the witness: *R. v. Sipes*, 2012 BCSC 80, at paras. 97-136, and said at para. 135:

With respect to the prejudicial effect of admitting this evidence, in the context of this case, the prejudice is not significant and can be adequately dealt with by way of a limiting instruction.

- [15] Nothing has occurred since to cause me to reconsider what I said concerning the prejudicial effect of this evidence as against Manolakos.

B. Inability to cross-examine the witness on phone records

- [16] Manolakos argues that his inability to cross-examine the witness on certain phone records leaves him in a position where his ability to fully answer the allegations against him have been compromised.
- [17] The Crown says given that Manolakos failed to satisfy the court of the importance of cross-examination on the phone records, the inability to cross-examine the witness cannot found an application for severance as it carries no prejudice. The Crown also notes that Manolakos can call this evidence in the defence case.
- [18] I considered the importance of cross-examination of the witness by Manolakos on these records when considering an application by the defence to recall him: *R. v. Sipes*, 2012 BCSC 348, at paras. 39-54. Although I allowed the witness to be recalled for some cross-examination, I did not allow cross-examination on the May 2005 phone records. I said, in part, at para. 51:

... The proposed cross-examination is more in the nature of the discovery. Manolakos is hopeful something of importance will emerge but can point to nothing specific. For these reasons, I am not satisfied of the importance of cross-examination on the [Content Redacted] records.

- [19] Again, in my view, the prejudice to Manolakos that results from this decision is not significant for the reasons I have stated. In addition, Manolakos has the option of calling this evidence as part of his case if he wishes.

C. Exhibit 274

- [20] As part of the Crown's application to re-examine [Content Redacted] (the "second witness"), I considered the admissibility of a seven-page excerpt from the second witness's police statement of [Content Redacted] 2006. On May 4, 2012, I gave oral reasons allowing this excerpt to be tendered as an exhibit. It was subsequently entered and marked as Exhibit 274.
- [21] Manolakos submits that admission of this evidence is of grave prejudice to him and that a limiting instruction will not cure the prejudice. In particular, he says the inference the jury will reach on a fair reading of the evidence is that the Kelowna Hells Angels severed their relationship with him because his drug dealing methods were too violent. He submits evidence that demonstrates he is too violent for even a notoriously violent group like the Hells Angels is extremely prejudicial. He says the evidence was admitted as a result of Doug Brownell's cross-examination of the second witness, and would not have been admitted had he been tried alone.

[22] The Crown says that Exhibit 274 is not evidence against Manolakos. It notes that the jury was given an oral instruction to that effect when the evidence was tendered, and that the jury will be also given a written instruction setting out the limited use of this evidence - i.e. that it is only relevant to assessing the second witness's credibility and is not admissible against Manolakos. It submits that a fair reading of the passage indicates there is a past connection between Manolakos and a member of the Kelowna Chapter of the Hells Angels. The Crown says there is nothing in the complained of passage at p. 94 that cannot be cured by a limiting instruction. It says we must have confidence in the jury's ability to understand and apply instructions and refers me to what I said in my discreditable conduct decision at paras. 59-71. It also submits that a joint trial is not the same as a trial alone and that when prejudicial evidence is admitted as a result of actions by a co-accused the proper remedy is a limiting instruction: *Suzack*. The Crown says this evidence is not of sufficient prejudice to create a risk that the jury will not properly apply the instruction.

[23] The passage in the second witness's statement at p. 94 that Manolakos points to as being of particular prejudice states:

I've heard of Peter's been involved with Hans since Hans been a prospect, but like I said Hans is pretty straight up kinda guy. Doesn't like getting involved in anything, violence, anything that Peter ever did that was stupidity, Hans frowned upon, dealt a lot with it and you know finally went and approached his brothers for obviously Peter, right.

[24] I agree with the Crown's submissions. Violence is part of the drug world and the "business model" used by the Greeks to operate their business. It is part of the circumstances and context in which these alleged murders occurred. The Crown's case cannot be sanitized if the jury is to have the information necessary to assess the allegations in the indictment. The fact that the Greeks used violence in operating its business is clear from the evidence the jury has heard throughout this trial.

[25] Most importantly, the jury has been and will be again instructed as to the limited use they may make of this evidence; that is, that it is not admissible against Manolakos and is not admissible for its truth.

[26] I am satisfied that the prejudice to Manokalos caused by this evidence has and will be adequately dealt with by a limiting instruction. If I had not been, I would not have admitted this evidence for the purpose for which it was admitted.

D. Coutts' evidence

(i) Background

[27] Some background is necessary in order to put the prejudice associated with Coutts' evidence in context. The Crown applied to tender evidence of the homicide of Belinda Scott as post-offence conduct against Sipes, O'Donnell and Manolakos on the Thom count. I ruled evidence of the factual circumstances surrounding Scott's murder inadmissible on the basis it was highly prejudicial: *R. v. Sipes*, 2011 BCSC 640, at paras. 296-309. I did allow the Crown

to lead evidence of Scott's presence at the campground leading up to and immediately following the Thom homicide as her presence was inexorably linked to the narrative of events surrounding the Thom homicide and the Crown's case against Brownell.

[28] As a result the jury has heard evidence from a number of witnesses (Tim Williams, Maria Dyck, Ian Oakes and Kim Norrish) that Scott was Ron Thom's girlfriend and that they were observed staying together in a tent at the Sandy Beach campground. The jury has also heard from these and other witnesses that the following members and associates of the Greeks were also staying at the campground: Coutts; Kirby; Shystar; and Benny.

[29] In particular, Oakes' evidence was:

- he, Thom and Scott were sleeping in the tent;
- he was awoken in the night when Brownell attended the tent;
- Brownell had a conversation with Thom and Scott, and then Brownell and Thom left;
- he was awoken again in the early hours of the morning when Brownell returned to the tent;
- Brownell was agitated and told Scott "I'm sorry, things got so fucked up", shots were fired and he had to leave Thom behind, and gave Scott a hug;
- Brownell told him if he ever said anything about him being there that he (Oakes) would receive a bullet in the head;
- later that morning, he and Scott took a bus into town;
- Scott spoke to a group of individuals, broke down crying and then left with them;
- he was told Thom had been found dead;
- he was scared;
- he stayed with a friend for the evening, spoke to police the next day and left the province;
- he never went back to the campsite to retrieve his tent;
- he took the statement about a bullet in the head as a warning from Brownell;
- although speculation, he thought Brownell was also at risk of getting a bullet and he told the police that on more than one occasion; and
- he was being truthful when he spoke to the police and told them it was not Brownell he was worried about, it was the people Brownell was connected to.

[30] The jury has also heard evidence that Brownell took Thom from the campground and drove him up to Commonage Road where he was shot to death by Sipes and O'Donnell. There is also a body of evidence to support that Brownell: did not know Thom was going to be shot; was almost caught in the spray of bullets; left the scene in a panic; and thought he was going to be killed.

[31] The jury has also heard evidence that:

- Brownell's cousin, Mike Robatzek, was a full patch member of the White Rock chapter of the Hells Angels;
- a close associate of the Robatzek family, Rick Huhn, resided in Vernon and was responsible for looking out for Brownell;
- there was a history of friction between the Robatzeks and Manolakos; and
- Huhn thought the Greeks set up Brownell and was angry.

(ii) Coutts' evidence

[32] Coutts testified that he met Manolakos in 1998 at Kamloops Regional Correctional Centre. He said he and Manolakos had a good relationship and that after he was released in 2000 he went to Vernon and began working for the Greeks. He said he used intimidation and violence on hundreds of occasions. Although he moved to Alberta in 2001, over the next four years he was in Vernon regularly to purchase drugs from the Greeks to sell in Alberta or to visit. He said he would do enforcement work and attend meetings when he was in Vernon. Coutts has a lengthy criminal record. A copy was entered as Exhibit 282.

[33] The evidence that triggered this application was provided by Coutts during his examination in chief on May 23, 2012, immediately before the morning break. I have listened to a recording of his evidence. The relevant exchange is:

Q: Was there a time when you stopped associating with this group?

A: Yes sir.

Q: Can you tell us roughly when that occurred?

A: It would have been May/June of 2005.... it was when the murders ... two people were murdered in the campground where I was and that was pretty much ... the end of my friendship.

[34] Other witnesses have testified in this trial that have information concerning the murder of Scott. They were directed by the Crown not to disclose this evidence and did not do so. The Crown provided the same direction to Coutts. Manolakos fairly acknowledges that the evidence was elicited through no fault of the Crown and that the answer was unexpected. Coutts was anticipated to say that his involvement with the group came to an end when he was arrested in Alberta.

(iii) Positions of Counsel

[35] Manolakos submits that the prejudice associated with this evidence, even when considered alone, ensures that he can no longer receive a fair trial. He says in light of the evidence that has already been adduced at trial, the jury will certainly conclude from Coutts' evidence that Scott was murdered by the Greeks in June 2005.

- [36] Manolakos says this evidence is extremely prejudicial given evidence that he was the directing force for many acts and, in particular, given the allegation that he ordered the homicide of Thom. He argues the jury will conclude that: the Greeks were responsible for a second murder in connection to the campground following the Thom murder; the victim was Scott; and Manolakos directed that murder. He says the jury will be highly troubled by the murder of Scott, an innocent woman who happened to be in the wrong place at the wrong time. Manolakos says the evidence is of such extreme prejudice that despite any limiting instruction the jury will improperly use this evidence against him on the Thom count.
- [37] He points to evidence he says supports his concern that the jury will conclude that Scott was the second murder victim. He says given Oakes' evidence, the jury knows she was a witness to the taking of Thom and that she, like Oakes, was in danger because of what she saw. He says the inference will only be strengthened by Coutts' anticipated evidence that she was present the day before Thom was murdered when senior members of the Greeks visited Thom, a visit which prompted Coutts to believe Thom was going to be beaten and to advise Thom to leave the campground. Manolakos notes that Scott will not be called as a witness despite having more important evidence to give than Oakes.
- [38] He says not only will the jury conclude Scott was murdered it will also conclude the murder was carried out by the Greeks. Manolakos argues it is the only inference to be drawn from the existing body of evidence. He says the inference is strengthened given Coutts' evidence that he stopped associating with the Greeks after the two murders. He says it makes little sense that he would stop associating with the Greeks because of a murder unconnected to them. Second, he says given Coutts' evidence that he ended a six-year friendship with Manolakos after two people were murdered in the campground, it is clear that, in Coutts' mind at least, he is responsible.
- [39] Manolakos says the prejudice is increased in light of Coutts' extensive criminal history. He says Coutts was involved in the trafficking of drugs, and in hundreds of acts of intimidation and violence on behalf of Manolakos. Coutts is also anticipated to testify of his knowledge of the Hewison murder - a murder carried out by members of the Greeks in March 2005 - and his involvement in disposing of the vehicle used the night of the murder. Manolakos says Coutts did not sever his friendship over this murder. He says the fact Coutts, a career criminal who was not opposed to violence, or the Hewison homicide, severed his friendship with Manolakos over two murders in June 2005 is highly discreditable. Manolakos says it leaves with the jury the highly prejudicial inference that he is too violent for a person the likes of Coutts.
- [40] While Manolakos submits the jury will conclude that Scott was the second murder victim, he says even if they only go so far as to include a second person was murdered by the Greeks at the direction of Manolakos, there is still significant prejudice and the same concern that the jury will use this evidence against him on the Thom count.

- [41] He says Coutts' evidence alone supports the conclusion that he can no longer receive a fair trial. He says when considered alongside the prejudice associated with Exhibit 274, the prejudice is overwhelming. Manolakos says the jury is left with the impression that he is too violent for the Hells Angels and hardened criminals like Coutts. He submits the evidence is of such extreme prejudice that despite any limiting instruction the jury will improperly use this evidence to find him guilty on the Thom count. He says in light of the current state of the evidence it is impossible for him to have a fair trial.
- [42] Manolakos submits that apart from the existing prejudice associated with Coutts' unexpected response, there is prejudice going forward. He says that Coutts has painted himself as a witness who came forward out of a sense of public duty. He says this may cause the jury to have comfort in his evidence, yet, because his motive is linked to a second murder he is not in a position to challenge it without risking eliciting more evidence of the Scott homicide. He argues that evidence of Coutts' motive bolsters his credibility and renders any evidence which potentially makes him a Vetrovec witness of little consequence. He says given the significance of Coutts' evidence against him on the Thom count, his inability to challenge him significantly prejudices him in his defence.
- [43] Finally, he submits that Coutts' has demonstrated that he will volunteer evidence of the Scott homicide despite directions from the Crown. He says this carries with it a real risk that more prejudicial evidence will emerge. He says given he is the only accused who will have to challenge Coutts' evidence, if he is severed, that risk is significantly curtailed.
- [44] Sipes, O'Donnell and Podolski support Manolakos' application for severance. They have a concern that cross-examination by Manolakos risks the emergence of more prejudicial evidence that will put their fair trial rights at risk. Brownell takes no position on this application.
- [45] The Crown submits the extent of the prejudice relates to the strength of the inference that can be drawn from Coutts' evidence. It submits it is not a foregone conclusion that the jury will infer that Scott was murdered, nor that the Greeks were responsible for a second murder. The Crown argues that when considering the potential prejudice that flows from Coutts' answer, it is critical that counsel and the court not be influenced by information concerning the Scott murder that is not before the jury.
- [46] The Crown submits there is no evidence that Scott is dead. It notes that she is not the only person associated with the campground who is not being called as a witness. Any concern regarding an unexplained absence applies equally to Kirby, Benny and Shystar, thus making Scott's status no different. It also notes that given Kevin Couture is not being called as a witness Scott is not the only person with important evidence to give concerning the Thom murder whose absence will remain unexplained. It says it is possible the jury will conclude that Scott fled the jurisdiction as Oakes did. It submits the leap the defence make from Scott's unexplained absence to the conclusion that she was killed is too great.

- [47] The Crown also argues that it is significant that Coutts' evidence does not mention a possible perpetrator of the second murder. It says assuming the jury infers Scott was the victim, the Greeks are not the only or the obvious perpetrator. It says given Oakes' evidence that he was afraid of the people connected to Brownell, evidence of Brownell's connection to the Hells Angels and the fact that Scott was a witness to Brownell's involvement in the Thom murder, the jury is more likely to conclude that Brownell and/or the Hells Angels are responsible for her death. It submits as there is no evidence the Greeks knew she was in the tent when Brownell came; Scott is not a person of special status to the Greeks in the mind of the jury.
- [48] It also notes the jury has heard evidence of two additional murders unconnected to the Greeks that were committed by members or associates after they had left the group. It says evidence of these peripheral homicides lessens the risk the jury will conclude the Greeks are responsible.
- [49] The Crown also argues the jury will not necessarily conclude that Manolakos was involved in this second murder. It notes the jury has heard evidence of four homicides involving the Greeks and there is no evidence Manolakos was involved in two of them. It says for this reason, even assuming the jury concludes the Greeks were responsible, it will not necessarily conclude Manolakos directed the murder.
- [50] Finally, it says that apart from evidence that the murder is related to the campsite, the jury has heard nothing of its circumstances. It submits that as the assault on Bryce occurred close by, the jury is more likely to conclude Coutts is referring to Bryce than Scott.
- [51] In response to Manolakos' concern that Coutts has created a Vetovec shield by the inference that he has come forward as a matter of public duty or conscience, the Crown submits that Coutts' motive for testifying was always going to be an issue. It points to passages in Coutts' statements where he tells the police that Scott "didn't deserve to die" (September 8, 2005, at p. 32) and that the Scott "thing just hit me the wrong way" (October 22, 2008, at p. 23). The Crown submits that given Coutts' apparent motivation for coming forward is intertwined with the murder of Scott this area was always going to be difficult and potentially dangerous. It says that Coutts' unexpected answer only marginally increases the prejudice associated with cross-examination in this area.
- [52] Finally, the Crown submits that the concerns about prejudice going forward are premature. It says it has again spoken to Coutts regarding not disclosing evidence of the Scott homicide and is confident he will abide by this instruction.
- [53] In reply, Manolakos submits the Crown's logic concerning what conclusions the jury may draw from this evidence is lacking as it ignores the link between Coutts' evidence and him leaving the group and severing his friendship with Manolakos.

- [54] He concedes that notwithstanding Coutts' evidence, his cross-examination concerning any motive was fraught with difficulty. However, he says given Coutts' evidence of the second murder, he is now entirely precluded from addressing the issue as it would only serve to exacerbate the prejudice.
- [55] Brownell submits that the evidence does not support an inference that the Hells Angels committed the murder.

E. Analysis

- [56] This trial commenced with the jury on May 30, 2011. Over the last year the jury has heard much evidence of discreditable conduct including evidence of three murders not charged on the indictment. Concerning two of the five murders - one charged on the indictment and one not - the jury has heard no evidence that Manolakos had involvement in either. The jury has also heard cross-examination that disclosed the theory of the defence is that another murder and the Thom murder were committed by [Content Redacted] without the knowledge or participation of any of the accused.
- [57] What the jury might conclude concerning Coutts' evidence of a second murder has to be assessed from what it knows from the evidence it has heard, not what counsel and the court know. It must also be assessed from the perspective of what the jury could reasonably infer or conclude.
- [58] At present, the jury does not know Scott will not be testifying. This is significant when assessing what the jury may have concluded, if anything, from Coutts' direct examination about a second murder.
- [59] While the jury will learn in the next few weeks that Scott is not being called to testify, it will also learn that a number of other individuals are not being called to testify, even though on the evidence the jury has heard these individuals would appear to have relevant and material evidence to give. These individuals include: Couture; Huhn; Sweitzer; Mike Weir; Renata Shaw; William Mastop; Art Fisher; Christian Smith; other named persons who were camping at the Sandy Beach campsite when Thom and Scott were there; and others who were present at Kin Beach when Thomas Bryce was assaulted. In fact, the jury heard evidence from Devan Shaw that his mother, Renata, was outside the courtroom during his testimony, but will learn that she is not being called as a witness, despite having important evidence to give concerning the events leading up to the Thom murder. In the circumstances there is no reason for, and therefore it is very unlikely that, the jury will ascribe any particular significance to the failure of Scott to testify.
- [60] For the jury to identify the victim of the second murder referred to by Coutts, it would have to engage in speculation. If it did, it could come to any number of possible conclusions, none of which would be clear on the evidence. It could conclude the second murder had nothing to do with the Thom murder, was an act of retaliation by others for the Thom murder, was an act committed by non-Greek members to protect Brownell or, given the

defence theory, was committed by [Content Redacted]. Even if it concluded the murder was linked to the Thom murder and the Greeks, it is not obvious who the victim is as many individuals present at the campground at the time of the Thom murder are not testifying.

- [61] For all of these reasons, I am satisfied that it is highly unlikely the jury would conclude that Scott was murdered by the Greeks, and even more unlikely it would conclude that this occurred at the direction of Manolakos given there is no evidence connecting him to some of the murders. The evidence is too unclear, there are too many other possibilities, and too much speculation would be required for the jury to reasonably come to that conclusion.
- [62] Further, this jury has been repeatedly told not to speculate, to keep its focus on the charges of the indictment, and not to use evidence of other acts of discreditable conduct for any improper purpose. The jurors were selected after a challenge for cause process during which they promised they could and would decide the charges on the indictment fairly and impartially notwithstanding evidence that the accused were members of a criminal gang involved in drug trafficking.
- [63] Our jury system functions on the basis that a jury will follow instructions. The presumption applies even to evidence that may be highly prejudicial or instructions that require intellectual discipline by the jurors: see, for example, *R. v. Corbett*, [1988] 1 S.C.R. 670; and *Suzack*. Despite this presumption, there will be instances where a trial judge will not be satisfied that an instruction will be sufficient. This is not one of those times.
- [64] While it is possible the jury has concluded a second murder was committed by members of the Greeks, I am confident the jury will follow my instructions to disregard Coutts' evidence of a second murder and not to speculate about it, just as it will follow my instructions not to use evidence admissible on one murder count against that accused on another murder count, and not to use evidence admissible against one accused against any other accused.
- [65] Thus, I am satisfied Manolakos will receive a fair trial and the jury will fairly and impartially decide whether Manolakos committed any of the offences with which he is charged, using only the evidence that is properly admissible against him.
- [66] I conclude that Manolakos' right to a fair trial has not been compromised by Coutts' evidence, the admission of Exhibit 274 and the other evidence referred to in grounds one and two.
- [67] If I was not satisfied that he could receive a fair trial, I would have granted the application, notwithstanding that it arises at the end of the Crown's case. Expediency and cost cannot override an accused's right to a fair trial.

IV. SIPES' APPLICATION

A. Ruling regarding Coutts' evidence concerning Scott

- [68] Sipes' application for a mistrial arises out of a ruling concerning evidence the Crown is permitted to lead from Coutts going forward. During submissions following Coutts' evidence of the two murders, Sipes submitted that he would not be applying for a mistrial provided the Crown would not be permitted to lead any evidence from Coutts that mentioned Scott.
- [69] The Crown agreed not to lead evidence that: when Dale and the second witness were visiting Coutts later in the morning of the Thom murder, Coutts saw Scott stick her head out of the tent; or that the second witness and Dale said they were concerned Scott had seen Brownell get Thom from the tent and that she was a witness (see paras. 92-93 of Coutts' will state). The Crown maintained its intention to lead evidence that Coutts saw Thom and Scott at the campsite the day before the Thom murder and gave them a ride to the store, and members of the Greeks came to the campground and spoke to Thom (paras. 76-78). It submitted that this latter evidence concerning Scott is innocuous and given that numerous witnesses have given evidence of Scott's presence at the campground it would be strange for Coutts, who was camping in close proximity, not to mention her. The Crown says it would be unfair to the credibility of Coutts and the other witnesses for Coutts to be precluded from giving this innocuous evidence.
- [70] Sipes submitted that if Coutts was permitted to give any evidence concerning Scott this would exacerbate the existing prejudice to the point of resulting in his inability to receive a fair trial. He said given Coutts' unsolicited comment, any mention of Scott will direct the jury's attention to her specifically. The substance of Sipes' submissions focused on the existing prejudice as a result of Coutts' evidence; that is, prejudice that he already faced regardless of whether Coutts would give any further evidence. For instance, Sipes submitted that on the current body of evidence the jury would undoubtedly conclude that Scott was murdered by the Greeks. As this potential prejudice exists regardless of whether Coutts is permitted to give any evidence concerning Scott I will address these submissions when considering the mistrial application.
- [71] Podolski agreed that all of Coutts' evidence referencing Scott should be eliminated as it makes important connections between the murder of Thom and the female that was with him. He says it draws attention to Scott at a time when the jury will be speculating about who else was killed. While he concedes that as it stands the jury could draw the conclusion it was Scott, he submits that excising any reference of Scott from Coutts' evidence going forward will prevent the inference from getting stronger.
- [72] O'Donnell agreed that all references to Scott should be excised.
- [73] Brownell said that given the Crown will not be leading the evidence set out at paras. 92-93 of Coutts' will state, he has no concerns concerning Coutts' evidence.

- [74] On May 25, 2012, I advised counsel orally of my decision to permit Coutts to give evidence of his observations and interactions with Scott prior to the murder and said I would give brief reasons later.
- [75] I do so now. I largely agree with the Crown concerning this evidence. I see little, if any, prejudice to admitting this evidence because the jury has already heard evidence that Scott was present with Thom at the campsite in the days leading up to the Thom murder. The jury will not have forgotten they were together living in the tent during this time. As such, for Coutts to omit any reference to Scott's presence at the campsite on May 30, 2005 would do nothing to alleviate any potential prejudice to Sipes caused by Coutts' answer. Further, to omit any reference to Scott's presence might be confusing for the jury and might affect its assessment of his credibility or the credibility of other witnesses.
- [76] In my view, omitting any reference to Scott the day before the murder is not going to impact on the potential prejudice to Sipes caused by Coutts' evidence. Either a mistrial is necessary or it is not, and omitting the evidence Sipes suggests is not going to decide that.
- [77] Given my ruling it was necessary to hear Sipes' application.

B. Submissions of Counsel

- [78] Sipes submits that when Coutts' unsolicited answer is considered in light of the evidence already adduced at trial, there is no doubt the jury will conclude the Greeks murdered Scott. He reviews much of the same evidence and makes similar submissions to Manolakos in support of his argument. For this reason I will not repeat what has been set out above. Sipes did however make submissions concerning the specific prejudice to him flowing from Coutts' evidence.
- [79] Sipes argues evidence that the Greeks are responsible for the murder of Scott is particularly prejudicial to him given evidence that: (i) he was an enforcer for the group; (ii) he participated in the shooting of Thom; (iii) he was present at the campground and made incriminating comments following the Thom murder; and (iv) later in the day following the Thom murder, Sipes threatened to "take care of" Coutts. He argues that evidence of threat to kill, right on the heels of evidence of his alleged involvement in the killing of Thom, and close in time to the murder of a potential witness to the Thom murder, is highly prejudicial. He says given this evidence he can no longer receive a fair trial and the only remedy is a mistrial.
- [80] The Crown's submissions are set out above. I do not propose to repeat them.
- [81] In reply, Sipes says that evidence of the peripheral murders does not lessen the prejudice as they are not committed close in time to June 2005, nor are they connected in any way to the campground. He says there is also no possibility the jury will conclude Coutts was talking about the Bryce homicide as it occurred some eight months prior, nor is there any evidence that Coutts has any knowledge of the Bryce incident.

- [82] He also notes that many Greeks, including senior members, knew of Scott's presence in the tent at the campground. For this reason he submits it is unrealistic to suggest the Greeks would not consider her a potential witness.

C. Analysis

- [83] I will be brief. Largely for the reasons I gave for denying Manolakos' application I also deny Sipes' application. I am satisfied that an instruction to the jury is sufficient to address the potential prejudice, and that Sipes' right to a fair trial has not been compromised. Also, I see no connection between the alleged threat made by Sipes concerning Coutts and Coutts' evidence about two murders.
- [84] Sipes' application for a mistrial is denied.

V. INSTRUCTION TO THE JURY

- [85] The impugned evidence was the last evidence the jury heard from Coutts before the morning recess on May 23, 2012. The witness had been told that these were the last questions before the recess. The questions and answers were given without any reaction from counsel, the court, or the witness. The jury was excused for the day after the break without any suggestion it was linked in any way to that evidence. Being excused for a day or days without explanation has occurred frequently during this trial. In my view, it is very unlikely the jury has connected the last questions and answers with the adjournment.
- [86] While the continuation of Coutts' evidence was delayed to hear the evidence of an expert due to scheduling constraints, to repeat the evidence in an instruction at the outset of the continuation of Coutts' evidence would, in my view, risk emphasizing it and connecting it as the reason for the adjournment.
- [87] With the exception of Manolakos, the accused have requested that no instruction be given to the jury and have argued that to do so will only highlight an answer that may have gone largely unnoticed. In my view, the evidence cannot simply be ignored in the hope that its significance will be missed by the jury. The jury has heard potentially prejudicial, inadmissible evidence. In order to ensure the jury does not misuse the evidence or engage in speculation, an instruction must be given. While it may go without saying, the jury cannot understand and apply an instruction it has not heard.
- [88] For reasons I have already given, I am satisfied that an instruction is necessary and will fulfil its purpose. The question is when it should be given and what it should contain so as to fulfil its purpose without unnecessarily emphasizing the evidence that two people were murdered that were connected with the campground.

[89] After giving my decision on May 29, 2012, I provided counsel with a proposed draft instruction and invited them to make submissions the following morning concerning the content and timing of the instruction. After receiving submissions from all counsel, I gave an oral instruction to the jury late in the afternoon of May 30, 2012. I read the instruction to the jury twice. The instruction was read after the jury returned to the courtroom from the afternoon recess and prior to the commencement of cross-examination by a second accused.

[90] This is the instruction I gave:

During Mr. Coutts' direct evidence he told you he stopped associating with the Greeks around May or June 2005. He referred to two murders that he said had occurred around that time and connected that to the end of his relationship with the group.

You have evidence before you concerning the shooting of Ron Thom. This is, of course, one of the counts on the indictment before you. You have no evidence of any second murder committed during this time and there is no such charge on the indictment.

Any other murder that Mr. Coutts thinks might have occurred during this time is not relevant to the charges in this case or to the guilt or innocence of any of the accused. You must disregard this testimony. You must not speculate about it or consider it further.

It is critical that you disregard this evidence. Your responsibility is to fairly and impartially decide the charges on the indictment. To do that you must only rely on the evidence that is properly before you.

VI. CONCLUSION

[91] For the above reasons, Manolakos' application for severance and alternatively a mistrial, and Sipes' application for a mistrial, are denied.

"SMART J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/SC/12/08/2012BCSC0850.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/r-v-sipes-2012-bcsc-850>

Prepared on 29 October 2026 · Esheria