

CANADA / JUDGMENT

R. v. Tait

2020 BCSC 1305

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 1305 R. v. Tait

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Tait,

2020 BCSC 1305

Date: 20200902

Docket: 25830

Registry: Nelson

Between:

Regina

And

Jason Tait

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Before: The Honourable Madam Justice Murray

Oral Reasons for Judgment re Challenge for Cause

Counsel for the Crown:

B. McKinley

C. Lo

Counsel for the Accused:

D.G. Butcher, Q.C.

C.A. Fleck

Place and Date of Hearing:

Vancouver, B.C.

August 28, 2020

Place and Date of Judgment:

Nelson, B.C.

September 2, 2020

Introduction

- [1] The accused, Cst. Tait, an RCMP officer, is charged with manslaughter and criminal negligence causing death in connection with the shooting death of Waylon Edey. Both Cst. Tait and Mr. Edey are well known in the area.
- [2] Cst. Tait has elected to be tried by judge and jury. He applies to challenge prospective jurors for cause on the basis of pre-trial publicity and widespread bias against police evidenced by anti-police movements in recent months.
- [3] The Crown agrees that a challenge is warranted on the basis of pre-trial publicity but not on the ground of bias against police.

Issues

- [4] Two issues must be addressed on this application:
 - 1) What questions should be put to the prospective jurors; and
 - 2) What procedure should be followed on the challenge for cause?
- [5] The latter question involves a determination of whether the amendment to s. 640 of the Criminal Code changing the arbiter from lay triers to the trial judge applies retrospectively or prospectively. I understand this to be the first time this issue has been raised in British Columbia.
- [6] I will address each issue in turn.

Issue 1: What questions should be put to the prospective jurors?

- [7] The defence applies to have a number of questions put to prospective jurors. They range from knowledge of and/or connection to Mr. Edey or his family, friends or co-workers, participation in Black Lives Matter or defund police protests/movements, negative personal interactions with police, anti-police beliefs and as mentioned above, pre-trial publicity.
- [8] Much evidence has been put before me on this application.
- [9] It is clear that there has been considerable pre-trial publicity about this case in the immediate area and that residents have strongly held views. I agree with counsel that there must be a challenge for cause regarding pre-trial publicity.
- [10] With respect to a wide-spread bias against police, while evidence was proffered on this application, it need not have been. It is impossible to not be aware of the current anti-police movements in North America arising from what many in the public view as the overuse/misuse of violence by police toward members of the public. In British Columbia, the death of Robert Dziekanski at the Vancouver International Airport in 2007 triggered strong public outcry against police and their use of force. More recently, police shootings of citizens during wellness checks and routine stops in both Canada and the United States have led to protests and distrust of police. Strong anti-police movements have formed, most notable of which are Black Lives Matter and calls to defund police.
- [11] Many articles placed before me link all deaths arising from police shootings together, despite their different contexts. Almost every time a police shooting occurs, past incidents are reviewed. It is in this way, defence argues, that Mr. Edey's death is linked to Black Lives Matter and defund police movements.
- [12] Cst. Tait has the statutory right to an impartial jury: s. 638(1)(b) of the Criminal Code.
- [13] The current climate cannot be ignored; the potential for bias against Cst. Tait is real. I am persuaded that potential jurors must be polled as to anti-police beliefs. I am not so persuaded that the net needs to be cast as widely as suggested by defence counsel to include inquiries into their participation in specific movements.
- [14] In my view, the risk of partiality can be addressed through fewer, more general questions than proposed by defence.
- [15] The defence application for challenge for cause is granted. Prospective jurors will be asked the following questions designed to target partiality on the grounds of pre-trial publicity, anti-police beliefs and a relationship, direct or indirect, with Mr. Edey:
- 1) Did you know Waylon Edey, or do you know, or have you known, any members of his family, or friends, or co-workers?
 - 2) Have you read, seen, heard, written or discussed anything about this case in the newspapers, on radio, television, internet, or social media?

- 3) If the answer to 1) or 2) is yes, do you believe that you could be impartial as between the Crown and defence and decide this case fairly, based solely on the evidence given during the trial?
- 4) Would your ability to judge the evidence in this case without bias, prejudice, or partiality be affected by the fact that the accused is a member of the RCMP who is alleged to have caused the death of Mr. Edey while on duty?

[16] I turn now to consider the issue of how the challenge for cause should be conducted.

Issue 2: What procedure should be followed on the challenge for cause?

[17] Amendments to the Criminal Code came into effect on September 19, 2019, changing the jury selection process. The amendments did away with peremptory challenges and challenges for cause being determined by lay triers. Under the new provision, challenges for cause are to be determined by the trial judge: s. 640(1).

[18] Having decided that there will be a challenge for cause, this court must decide whether the old provisions that allow for rotating lay triers apply or whether the new provisions apply making the trial judge responsible for the determination as to whether a prospective juror is impartial.

[19] Both Crown and defence take the position that the amendments are substantive (versus procedural) and therefore apply prospectively, meaning that the challenge should be performed by rotating triers. In support counsel rely on Ehrcke J.'s ruling in *R. v. Nazarek*, 2019 BCSC 1798, for the proposition that all amendments to the jury selection process, including challenge for cause, apply prospectively.

[20] I disagree that the decision extends to the challenge for cause process for the following reasons:

- 1) Ehrcke J. states in para. 2 of his ruling that the accused has brought a number of pre-trial challenges including an application for challenge for cause. He continues by framing the issue before him as follows:

In advance of ruling on that application, a preliminary issue arose, namely whether the jury selection in this case would proceed in accordance with the new provisions enacted by Bill C-75

[Emphasis added.]

- 2) Ehrcke J. proceeds to discuss this court's decision in *R. v. Subramaniam*, 2019 BCSC 1601, which held that the changes to the jury selection process that eliminate peremptory challenges apply prospectively (para. 9.) Of significance, he notes that the ruling in *Subramaniam* does not deal with the question of whether the changes to the manner of determining a challenge for cause apply retrospectively or prospectively (para. 10);

3) Ehrcke, J. then states that he is bound by Subramaniam and rules that jury selection is to follow the former provisions of the Criminal Code (para. 17.) In doing so, he makes this comment:

[18] It must be assumed that when Mr. Nazarek chose not to re-elect, he did so with the understanding that he would have a trial with a jury selected according to the Criminal Code provisions as they then existed, including the right to peremptory challenges, and he thus acquired a vested right which has not been lost through the enactment of Bill C-75.

[Emphasis added.]

[21] Given the above, in my view it is clear that Ehrcke J. was dealing solely with the peremptory challenge provisions.

[22] Courts in Saskatchewan, New Brunswick and Quebec have held that all of the changes to the jury selection process, including challenge for cause, are substantive in nature and therefore do not apply retrospectively: *R. v. Dorion*, 2019 SKQB 266; *R. v. Leblanc*, 2019 NBQB 241; *R. v. Bebawai*, 2019 QCCS 4393.

[23] The Supreme Court of Canada will soon be considering the application of the challenge amendments. Leave to appeal in *R. v. Chouhan*, 2020 ONCA 40 was recently granted ([2020] S.C.C.A. No. 19) and I understand will be heard in October. Until then, the law in Ontario as decided by their Court of Appeal is that the amendment substituting the presiding judge for lay triers is "purely procedural" and therefore applies retrospectively.

[24] Both Crown and defence argue that this case is wrongly decided and is contrary to the same Court's earlier decision *R. v. Nouredine*, 2015 ONCA 770.

[25] Nouredine involved an appeal of conviction on the basis that the jury was improperly constituted as the trial judge, on his own initiative, ordered that the challenge for cause was to be determined by static triers. Under s. 640 as it then read, challenges for cause were to be determined by rotating triers. The only exception to this rule applied on application of the accused under then s. 640(2.1). No such application had been made. In fact, the accused persons specifically indicated that they wanted rotating jurors. The Ontario Court of Appeal held that the trial judge had deprived the accused persons of their statutory right to rotating triers and quashed their convictions.

[26] Both Crown and defence counsel rely on this decision for the proposition that the right to rotating triers is a substantive right. Again I disagree. In *Nouredine*, the Court dealt with the failure of the trial judge to comply with the provisions of the Criminal Code. The Court did not address whether the right to rotating rather than static triers enshrined in the Criminal Code constitutes a substantive right for the purposes here. As an aside I note that Doherty J.A., who wrote the decision in *Nouredine*, was on the panel in *Chouhan* and agreed with the decision.

[27] Regardless, is *Chouhan* wrongly decided as argued by counsel? I think not.

- [28] The decision in Chouhan comes down to this: the accused's right to challenge prospective jurors is substantive. The mode of conducting the challenge is procedural.
- [29] In reaching that conclusion the Court considered in depth the purpose of s. 640 and whether a change in how the challenge is determined impacts an accused's Charter rights. I find the following points to be of particular significance:
- 1) The requirement of the jury selection process is that it results in a fair trial with impartial jurors: paras. 85 and 152-153;
 - 2) The test for impartiality remains the same under both the old and new provisions: whether a reasonable person, fully informed of the circumstances and relevant considerations, viewing the matter realistically and practically and having thought it through, would conclude that the jury was not impartial: para. 151;
 - 3) The substitution of the presiding judge as the arbiter of the challenge does not compromise the independence or impartiality of the jury. The challenge for cause process is not arbitrary; the standard a judge applies is identical to that applied by lay jurors. A judge deciding a challenge for cause, like lay triers, is presumed to be impartial. This presumption can be only be rebutted with persuasive evidence: paras. 155 and 156;
 - 4) A benefit to the accused under the new provisions is that counsel may be granted the opportunity to make submissions with respect to each prospective juror's impartiality. Counsel has no opportunity for such submissions with lay triers: para. 155.
- [30] I agree with the decision in Chouhan. The change effected by the amendment does not affect the accused's right to challenge for cause. That remains available. The change of trier from lay persons to the trial judge does not affect an accused's substantive rights.
- [31] For the reasons above, I am persuaded that the amendments to the challenge for cause process are purely procedural. As such, I find that the new provisions apply retrospectively.

Conclusion

- [32] Prospective jurors will be challenged for cause on the basis of pre-trial publicity, their relationship with the deceased and anti-police beliefs.
- [33] Prospective jurors will be asked the following questions:
- 1) Did you know Waylon Edey, or do you know, or have you known, any members of his family, or friends, or co-workers?
 - 2) Have you read, seen, heard, written or discussed anything about this case in the newspapers, on radio, television, internet, or social media?

- 3) If the answer to 1) or 2) is yes, do you believe that you could be impartial as between the Crown and defence and decide this case fairly, based solely on the evidence given during the trial?
- 4) Would your ability to judge the evidence in this case without bias, prejudice, or partiality be affected by the fact that the accused is a member of the RCMP who is alleged to have caused the death of Mr. Edey while on duty?

[34] I will be the arbiter of whether the juror is not impartial.

"The Honourable Madam Justice Murray"

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