

CANADA / JUDGMENT

R. v. Zakuti

2021 BCSC 2405

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2021 BCSC 2405 R. v. Zakuti

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Zakuti,

2021 BCSC 2405

Date: 20210421

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Registry: Kamloops

Regina

v.

Sevim Zakuti

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Before: The Honourable Madam Justice Donegan

Oral Ruling on Defence Application

for Severance of Counts

Counsel for the Crown:

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Counsel for the Accused:

J.D.A. Watt

Place and Date of Hearing:

Kamloops, B.C.

April 19-20, 2021

Place and Date of Judgment:

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April 21, 2021

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Introduction

- [1] This is an application by the accused, pursuant to s. 591(3) of the Criminal Code, R.S.C. 1985, c. C-46 [Code] seeking severance of counts in relation to the current eight-count indictment, with the effect of having three separate trials in relation to each of the three complainants to whom the indictment relates.
- [2] The Crown opposes the application and has indicated its intention to apply to have the evidence of the three complainants, J.C., C.G. and T.W., treated as count-to-count similar-fact evidence at trial.

Background

- [3] Mr. Zakuti's four-week jury trial is scheduled to start on Monday with phase one of jury selection tomorrow morning at 10:00 a.m. Mr. Zakuti had originally been facing a 21-count indictment, alleging sexual assault and related charges involving four complainants, J.C., C.G., T.W. and E.T., offences involving one of the complainant's boyfriends, as well as several firearms-related charges, all alleged to have occurred in Merritt, B.C., between July 25 and August 15, 2019.
- [4] The trial in respect of the original 21-count indictment was to have begun this week, but Mr. Zakuti asked that the start date be delayed one week in order for his recently-retained counsel, Mr. Watt, to bring this application for severance of counts. Mr. Watt filed his written application on March 29, 2021.
- [5] On Friday last week, April 16, 2021, the Crown decided to sever the 21-count indictment into three separate indictments: one with eight counts relating to the allegations made by J.C., C.G., and T.W. (the -10 indictment); another with seven counts relating to allegations made by E.T. (the -11 indictment); and five counts relating to allegations made by Mr. V. and the various firearms charges (the -12 indictment).
- [6] The Crown intends to prosecute the -10 indictment first and use the trial time currently scheduled. The accused maintains his application and seeks an order severing the counts relating to each of the three complainants on this particular indictment and the resulting direction, of course, for separate trials in relation to them.

- [7] I heard the application over the last two days. Other than with respect to a discrete point where I was referred to short passages from preliminary inquiry transcripts, the factual basis upon which I am to base my decision has been presented through the submissions of counsel, based upon their knowledge of the complainants' various police statements and preliminary inquiry evidence.
- [8] I will begin by outlining the anticipated evidence.

Anticipated Evidence

Generally

- [9] The Crown alleges that Mr. Zakuti found himself in Merritt in 2019, around the time of an annual music festival at the end of July and into the first weeks of August. His vehicle had broken down. While it was being repaired, he stayed in a room at the Prince Motel and had interactions with the three complainants. They knew him as Sebastian. He is alleged to have had someone with him, a person he referred to as his brother. His interactions with the complainants and others revolved around obtaining and using drugs.
- [10] Mr. Zakuti is alleged to have sexually assaulted the three complainants at some points during the timeframe alleged, with the assaults ranging from unwanted touching to forced oral sex, to forced vaginal intercourse. All of the complainants are women in their late twenties or early thirties who were struggling with addiction issues at the time. They have known one another for years, with various levels of friendship, as I understand it.
- [11] The counts pertaining to the fourth complainant, E.T., have already been severed into a separate indictment. I was not told much about E.T.'s allegations, other than that they involve allegations of sexual assault over a period of days and include an instance of pointing a firearm. I was told that E.T. was the first complainant to report matters to police. She told the other complainants that she had gone to police and asked them to do so as well.
- [12] The Crown alleges that Mr. Zakuti exerted a measure of control over these three vulnerable complainants through fear and intimidation. He told two of them that he held some sort of sway with the police; threatened to harm another and her dogs; and suggested to another that he had a family member that was a gangster.

Counts 1-5: Allegations Involving J.C.

- [13] Counts 1 through 5 of the -10 indictment are allegations involving J.C. They are allegations of sexual assault, unlawful confinement, uttering threats to injure an animal, uttering threats to J.C., and common assault.
- [14] J.C. was the first of the complainants to meet the person who identified himself as Sebastian, who the Crown alleges is the accused before the court. J.C. alleges five instances of sexual violence by Sebastian during the timeframe set out in the indictment. The sexual violence incidents are all encompassed in one count.

- [15] The first instance is alleged to have occurred the night J.C. first met Sebastian. J.C. alleges that while she was either walking or riding a bike on the street, Sebastian and the person he identified as his brother pulled up in a car and asked her to go party with them. She agreed to go because she wanted to do drugs. She had never met the men before. They drove around looking for drugs and ended up driving to another city, either Kelowna or Kamloops, in the middle of the night. They were all doing drugs.
- [16] At some point on the trip back to Merritt, while his brother was sleeping, J.C. alleges that Mr. Zakuti stopped the car on a dark road, pulled J.C. out of the truck, and "forced oral sex" on her. I was not told if this means he performed oral sex on her without her consent, or if he forced her to perform oral sex on him, but in any event the allegation is that he forced the sexual contact on her without her consent. J.C. also alleges that the accused made a comment before this, something to the effect that he would pay her for sex.
- [17] After this event occurred, J.C. alleges that the accused drove her back into Merritt and they stopped at one of the motels they had been at earlier looking for drugs, the All Seasons Motel. This is where J.C. alleges the second instance of sexual violence occurred. She alleges that Mr. Zakuti paid someone to leave their hotel room so as to leave him alone there with J.C. While in the room, J.C. alleges that he had vaginal intercourse with her without her consent.
- [18] The third incident of sexual violence is alleged to have occurred when J.C. was in a motor vehicle, again with Mr. Zakuti. She says they were driving around looking for car parts and/or drugs. They were doing drugs. She alleges that oral sex was performed in the vehicle before he drove her back to another motel, the Prince Motel. Again, I am unclear about the details of the act in question.
- [19] J.C. was homeless and suffering from a drug addiction at the time. One of J.C.'s friends, someone who went by the nickname of "J", was renting a unit at the Prince Motel, so J.C. stored her things and kept her dogs there. She also spent time at the motel doing drugs with others. J.C. introduced Mr. Zakuti to her group of friends there. There is a suggestion that on this particular night, the group of friends she introduced Mr. Zakuti to may have included one or more of the other complainants, although this is unclear.
- [20] Mr. Zakuti was renting a room at the Prince Motel. J.C. alleges that she was sexually and physically assaulted by him in that room as well. I was not provided the particular details of the fourth and fifth incidents of sexual violence alleged, but was advised that J.C. alleges vaginal penetration and oral sex. J.C. also alleges that Mr. Zakuti was aggressive with her on the last occasion, including some punching and kicking which led to the single count of assault that is found in Count 5.
- [21] J.C. also alleges that at some point during this timeframe, Mr. Zakuti uttered threats toward her and her pets. I was not advised of the details or the circumstances of those particular threats.

[22] Through counsel, Mr. Zakuti has expressed a provisional intention to testify in relation to these five counts. He denies the allegations and, given the seriousness and the number of allegations made by J.C., he expects that a jury will want to hear from him.

Counts 6-7: Allegations Involving C.G.

[23] Counts 6 and 7 are allegations involving C.G. They are allegations of sexual assault and unlawful confinement. C.G. is expected to testify that she met a man called Sebastian through her friend J.C. at the Prince Motel at some point during the timeframe alleged. He was there with his brother. She had never met the men before. She was homeless at the time, living in a local park. She was suffering from a drug addiction and hung around J's room at the motel.

[24] C.G.'s anticipated evidence is unclear at this point. She is expected to testify about one incident in Sebastian's motel room. She had been there doing drugs with him and his brother and, at one point, when she was in the washroom with the door open, Sebastian came into the doorway and would not let her leave. It is unclear if the brother was still in the room or not.

[25] In her statement to police, I am told that C.G. alleges that Sebastian choked her and hit her in the head a couple of times and lifted her up and smashed her back against the faucet, causing her pain in her back. C.G. alleges that Sebastian pulled her shorts and underwear down and started having sex with her. C.G. then blacked out from panic.

[26] I am advised that at the preliminary inquiry, C.G.'s evidence was not as clear. She did not testify about a sex act occurring, but rather blacking out in the bathroom, going somewhere else in the motel, feeling sore, and thinking from a "feeling or energy" she got that the act had occurred. Crown counsel describes her as having "frozen up" at the preliminary inquiry.

[27] According to his counsel, Mr. Zakuti provisionally does not intend to testify provisionally at this point in relation to the two counts involving C.G. C.G.'s allegations are unclear and he intends to rely upon cross-examination to support an insufficient or no-evidence motion on these counts at trial.

Count 8: Allegations Involving T.W.

[28] Count 8 is a count that involves T.W. It is a charge of sexual assault.

[29] T.W. also met the person she knew as Sebastian at the Prince Motel. Like the others, she was suffering from a drug addiction at the time. She alleges that on one occasion during the timeframe of the indictment, she ended up in vehicle alone with the accused. It is unclear if they were doing drugs specifically at this time, but it was part of their general circumstances. T.W. alleges that Mr. Zakuti drove her out of town somewhere and stopped at a pullout. He tried kissing her. He told her how much he liked her, and then started to put his hand up her skirt. She pushed his hand away and said "no" multiple times before he eventually stopped. It was daylight and there was another vehicle stopped at the pullout.

- [30] T.W. alleges that he then drove her back to the motel. He offered her money for sex at some point, but she was unclear when this was. At a later time, back at the motel, he asked her to clean his room. She had a boyfriend at the time who was not there that day and when she was cleaning the room, T.W. alleges that the accused told her things like her boyfriend was cheating on her and did not love her anymore. The Crown does not recall from the statements or evidence if the two were smoking drugs in the room, but again advises it was part of T.W.'s lifestyle and was a feature that was present in her testimony at the preliminary inquiry. T.W. no longer wanted to be in the room and wanted to leave. When she went to leave, she alleges that Mr. Zakuti stood in the doorway and told her to stay. His brother walked in while this occurred, which gave her the opportunity to leave and she did.
- [31] According to his counsel, Mr. Zakuti provisionally does not intend to testify in relation to Count 8 either. His view, at least right now, is that the allegations involve, at best, an unwanted intention to have sexual contact, which shows that Mr. Zakuti stopped when rebuffed. He intends to rely upon cross-examination in support of an insufficient or perhaps no-evidence motion on this count at trial.
- [32] As I indicated, the trial of this matter is scheduled for four weeks (less two days where court is not sitting), commencing on Monday. At this point, the Crown expects to call about 11 witnesses, which includes the three complainants, as well as other police officers. There is no expert evidence to be called. Counsel agree that the credibility of the complainants and the reliability of their evidence are expected to be the central issues at trial.

Discussion

Overview of Legal Principles

- [33] Section 591(3) of the Code governs the severance of counts and provides:

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;
- [34] The onus is on the accused to establish on a balance of probabilities that the interests of justice require an order for severance: *R. v. Arp*, [1998] 3 S.C.R. 339, 129 C.C.C. (3d) 321 at para. 52.
- [35] The trial judge enjoys a broad discretion in deciding whether to sever. The question involves balancing the risk of prejudice to the accused and the public interest in a single trial. The obvious risk when counts are tried together is that the evidence admissible on one count will influence the verdict on an unrelated count. On the other hand, it is in society's interest that justice is done in a reasonably efficient and cost-effective manner. Further, severance can impair not only efficiency, but the truth-seeking function of a trial: *R. v. Last*, 2009 SCC 45 at paras. 16-17 and 21.

[36] The Court in Last, at para. 18, identified a list of factors that may be weighed when deciding whether or not to sever:

- 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 on 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,
- if applicable, the existence of antagonistic defences as between co-accused persons.

[37] I will discuss the legal principles engaged by each of the relevant factors in more detail when I consider each factor, but here I will say only that it is incumbent upon me to consider and weigh cumulatively all of the relevant factors to determine whether the interests of justice require severance: Last at para. 44.

[38] Counsel have referred me to several authorities where these principles and factors were considered and applied in unique contexts. I have reviewed these authorities, and others not referred to by counsel, and will provide a few examples here. None of these authorities is on all fours with the case at bar. In fact, some of the authorities are quite factually different, but they are helpful examples of how other courts have applied the principles and factors in the balancing process that I am to undertake.

Examples from the Authorities

a) Authorities Where Severance Refused

[39] In *R. v. Mastronardi*, 2014 BCCA 302, the Court upheld the trial judge's decision to refuse severance in regard of the stand-alone counts of fraud and extortion in a 12-count indictment involving six women that included counts of sexual assault. The accused was a fraud artist who preyed on vulnerable women. He met his victims through internet dating sites. His initial meetings with most of the victims involved sexual encounters after which he would tell them about his Sicilian roots.

[40] The Court agreed with the trial judge that there was a strong legal and factual nexus between the counts. They found the accused had acknowledged a "unique, extensive, and highly unusual pattern of behaviour in introducing himself to the complainants and in

controlling them thereafter". All of the scenarios involved manipulation and control of vulnerable women through escalating forms of physical, emotional, or sexual abuse, and often all three. He was found to have exploited each of the complainants in an effort to gain complete domination over their lives, and used his position to obtain money, sexual favours, and to perpetrate physical violence. The factual nexus of his offending conduct with all of the victims was evident in the common modus operandi which he employed with each of them to garner their initial trust.

- [41] The legal nexus with respect to the sexual assault and extortion charges was found likely to be on the issues surrounding consent, while the fraud charges all involved allegations of very similar, manipulative conduct that was likely to raise similar legal issues of deceit and deprivation: para. 28.
- [42] As to severance of the particularly brutal sexual assault count in that case, the Court of Appeal upheld the trial judge's finding that in the circumstances, the prejudicial effect could be limited by a careful instruction to the jury: para. 33.
- [43] In *R. v. Sharma*, 2014 BCSC 658, there were a range of allegations, from sexual assault, to unlawful confinement and theft, involving nine women over a period of about 17 years. All but two of the complainants were sex-trade workers. The trial was expected to proceed by jury. Counsel in that case agreed that the most important factor in deciding whether the interests of justice required severance was consideration of the potential admissibility of similar-fact evidence from count to count: para. 46.
- [44] Justice Schultes dismissed the application for severance. He found the Crown's similar-fact application had some possibility of success. He also found a strong factual nexus. Although the accused had identified distinct defences between the counts, the court nevertheless found there was a strong legal nexus across the sexual assault counts and in regard to identity evidence as well. Although the accused expressed an interest in testifying on certain counts, Schultes J. found that this was not a determinative factor, especially given the possibility he found of admission of the similar-fact evidence.
- [45] In *R. v. Lai*, 2017 BCSC 538, Schultes J. dismissed an application for severance of counts as well. This case involved four counts of sexual assault involving two complainants, one year apart. Factual similarities included the complainants' ages, their social interactions with the accused, that the accused provided them with drinks and they subsequently lost consciousness. However, there was an identity issue in relation to the counts related to only one of the complainants. The accused elected to be tried by judge alone.
- [46] Justice Schultes found the accused had identified an objectively reasonable basis to provisionally intend to testify in relation to the counts pertaining to one of the complainants and not the others. There were inconsistencies in her statements regarding dates and locations and the absence of forensic evidence linking the accused to the sexual activity. However, with respect to the other complainant, there was evidence of the presence of GHB in her urine and semen on her underwear. Again, the court found the accused had an

objectively reasonable basis to testify on the latter counts and not the former.

- [47] Schultes J. found that, when considered separately from the viability of a similar-fact application, the degree of factual and legal connection between the counts relating to each complainant did not weigh in favour of a joint trial. However, he ultimately concluded there was some possibility of success in the similar-fact application. In reaching that conclusion, Schultes J. found that the particular circumstances went beyond a generalized proposition of what a drugging-based sexual assault would look like, and into a particularly distinctive set of circumstances. This factor weighed heavily in his refusal of severance. Overall, his balancing exercise led him to dismiss the application for severance.
- [48] In *R. v. Mavros*, 2012 BCSC 2115, aff'd 2017 BCCA 435, Ehrcke J. dismissed the accused's application for severance. In this case, the accused was charged with 21 counts related to sexual offences involving two different complainants. The incidents occurred more than a year apart. The first involved a sex-trade worker who did not know the accused and the second involved a woman who was in a relationship with the accused. The accused elected to be tried by judge alone.
- [49] Justice Ehrcke found that there was a possibility that similar-fact evidence could be introduced in relation to the two sets of charges. He found that because it was not a jury trial, there was a diminished risk that permitting the counts to be tried together would result in irreparable prejudice if the similar-fact application, yet to be heard, was not successful. Justice Ehrcke did not consider the accused's intention there objectively reasonable, for reasons specific to that case.
- [50] In *R. v. Reddemann*, 2016 BCSC 442, Verhoeven J. dismissed the accused's application for severance. Among other charges, the accused was charged with sexual assault arising from two incidents involving sex-trade workers. The incidents took place one or two months apart, in the same general location. The circumstances of the attacks were very similar as both involved the use of a knife and the physical appearance of the perpetrator was similar. Justice Verhoeven found there was some likelihood of success that similar-fact evidence would be admitted. He found there was a strong legal and factual nexus. The accused in that case was also found to be likely to testify in relation to both instances and to all counts. The accused there argued that there may be some evidence of collusion between the complainants, but the court found the issue could be addressed in the evidence of the complainants at trial.

b) Authorities Where Severance Granted

- [51] In *R. v. B.*, 2020 ONSC 1462, Justice Schreck granted the accused's application for severance. The case involved two complainants. One complainant was a neighbour to whom the accused occasionally sold drugs. When she did not pay, he sexually assaulted her. A few days later, he attempted to do so again. The second complainant was a sex-trade worker who did not know either the accused or the other complainant. The accused arranged to have sex for money and, while at the accused's residence, he sexually assaulted her and stole her wallet.

The incidents all occurred within a few days of one another. The accused elected to be tried by judge and jury.

- [52] Schreck J. found that there was not a strong factual nexus, despite the clear temporal nexus. After applying the principles of similar-fact evidence, the court concluded that the similar-fact application was unlikely to succeed. Further, although this was not a significant factor, the court found that it may be objectively justifiable for the accused to testify on some counts but not others. Although the defence did not clearly articulate the basis for this strategy, the court commented that it may be advantageous as there was arguably some motive of one of the complainants to fabricate evidence of indebtedness. Further, the court relied upon the significant risk of propensity reasoning, writing:
- [36] The jury would inevitably wonder why two complainants who did not know each other would independently accuse the applicant of sexual assault.
- [53] In *R. v. Tinco Zambrano*, 2018 ABQB 575, Justice Hollins granted the accused's application for severance of counts. The accused was a massage therapist at a spa in Calgary and was alleged to have sexually assaulted two of his clients during their massages. The incidents happened about seven weeks apart. He was charged with two counts of sexual assault. The Crown's opposition to severance was largely based upon its intention to lead similar-fact evidence in order to establish the accused's *modus operandi*.
- [54] Justice Hollins found the factual and legal nexus between the counts to be relatively weak. Factually, Justice Hollins found there to be some overlap in the incidents that took place (they took place at a massage studio in the course of a massage, and some of the accused's comments during the incidents were similar), but she concluded the assaults themselves were very different. Hollins J. observed that one complainant alleged prolonged massage of her buttocks, touching the crotch area of her underwear, and the accused offering to massage her breasts and groin. The other complainant alleged much more intrusive assaultive behaviour, including touching her anus and vagina, digital penetration, and oral sex.
- [55] Justice Hollins found that the risk of prejudice to the accused favoured severance. The accused had indicated his desire to advance different defences to the two allegations. For the first, he indicated that he did not intend to testify on his own behalf, but would rather rely upon cross-examination of the complainant to establish his defence that the touching was not of a sexual nature. If severed, he indicated that he would re-elect trial by judge alone.
- [56] Regarding the second allegation, the accused indicated that he intended to testify to establish that the complainant consented to the sexual contact or, alternatively, that he had an honest but mistaken belief in consent. If severed, he wished to retain his election of trial by judge and jury for that count.

- [57] Justice Hollins found that there were practical and plausible reasons for the accused's expressed intentions and that he had provided a subjective intention that was objectively justified. The court also found there that the likelihood of a successful similar-fact application was low, finding its prejudicial effect outweighing its probative value. In addition to the logistical prejudice to the accused, the court found real risks of moral and reasoning prejudice, such that in the balancing exercise, Hollins J. found the interests of justice required severance.
- [58] In *R. v. A.D.*, 2019 ONSC 2479, the accused was charged with two counts of sexual assault, elected to be tried by judge and jury and applied to sever the counts. The counts related to two separate complainants - his wife and another woman with whom he was in a relationship. His wife alleged that from June 2012 to December 31, 2015, the accused sexually assaulted her many times, often aggressively, forcefully holding her down to have intercourse with her against her will. The accused and the second complainant were in a relationship from August 2015 to November 2016. This complainant alleged that the accused sexually assaulted her regularly during the relationship by touching her sexually while she was asleep. She described that he would often try to initiate sex with her and would be quite persistent, and when she did not agree, she would go to sleep and often awake sore with her bedclothes undone or in a different position than when she went to sleep. On some occasions, she would wake to find ejaculate on her. The accused admitted in two letters he wrote to the second complainant to touching her while she slept and, the first complainant said that the accused admitted to sexually touching his girlfriend as well.
- [59] The court granted severance. In the balancing process, the judge found that there was no strong factual nexus between the two counts, and the fact that there were common witnesses did not import a factual nexus between them. The court found that absent a successful similar-fact application, there was no need to lead evidence relating to one count to understand or determine the truthfulness of the other count. The court also found that the Crown's intended similar-fact application was unlikely to be successful given the differences in the expected evidence. The court also considered that the delay a second trial would cause was significantly mitigated by the fact that there was enough time to have both trials conducted in the currently-allotted trial time.
- [60] Ultimately the court in *A.D.* concluded that, while there were efficiencies to having a single trial, there was a significant risk that strong probative evidence on the count involving the accused's girlfriend would be improperly used by the jury in determining guilt or innocence on the count involving the accused's wife, and found the interests of justice required severance.
- [61] Informed by all of these principles, I turn now to consider the factors in this case.

Factors in this Case

a) General Prejudice

- [62] In *Last*, Deschamps J. agreed with the accused's counsel that there was a significant risk of prejudice to the accused as a result of both credibility cross-pollination and prohibited propensity reasoning. The existence of two complainants who had no relation to each other alleging two separate incidents of sexual assault, created a risk that the credibility of each complainant would be improperly bolstered. Similarly, if the jury found the accused not credible while testifying with respect to one set of counts, the Court observed that the jury might presume that he was also not credible with respect to the other. The Court concluded that having the counts together on one indictment would create a risk that the jury would engage in prohibited propensity reasoning. If the jury were to find that the Crown had satisfied the burden of proof for one set of offences, the jury might infer the accused was the kind of person who would commit these types of crimes and thereby convict him of the second set of offences: paras. 36-40.
- [63] The Court held that while a limiting instruction can limit the risk of inappropriate cross-pollination or propensity reasoning, courts should not resort to a limiting instruction unless there is a valid reason to do so. As with the accused's intention to testify, the limiting instruction is but one factor to consider in the balancing exercise: para. 46.
- [64] In *R. v. Z.W.C.*, 2021 ONCA 116, the Ontario Court of Appeal discussed the factors a court may use to assess the prejudicial effect of evidence:
- [104] In assessing the prejudicial effect of the evidence, the trial judge may consider a variety of factors, including: (a) how discreditable the conduct is -- the more inflammatory and egregious the conduct, the greater the likelihood of moral prejudice: *Lo*, at para. 114, citing *Handy*, at paras. 83, 100 and 140; (b) the extent to which the evidence may support an inference of guilt based solely on bad character; (c) the extent to which the evidence may confuse the jury; and (d) the ability of the accused to respond to the evidence: *Luciano*, at para. 233, citing *R. v. B. (L.)* (1997), 35 O.R. (3d) 35 (C.A.), leave to appeal refused, [1997] S.C.C.A. No. 524.
- [65] Mr. Zakuti submits there is a significant risk of moral prejudice: the danger that the trier of fact will conclude that he is a bad person and, therefore, likely to have committed the offences charged. Mr. Zakuti further submits that there is a significant risk of credibility cross-pollination and reasoning prejudice: the danger that the jury will think that if he did something with one complainant, he is more likely to have done it to another. Mr. Zakuti argues that these risks are heightened if the Crown's similar-fact application is unsuccessful.
- [66] Mr. Zakuti emphasizes that while a limiting instruction can limit the risk of inappropriate cross-pollination or propensity reasoning in some cases, courts should not resort to a limiting instruction unless there is valid reason to do so. He asserts that there is simply no valid reason to do so in this case.
- [67] The Crown submits that the potential prejudicial effect is not outweighed by the probative value of the evidence. The Crown intends to seek to have the allegations of each complainant tendered as similar-fact evidence on the others, as relevant to establishing

identity, to establishing the actus reus of the offence in terms of establishing a modus operandi, and as relevant to the credibility of the complainants. As our Court of Appeal has observed in both *Mastronardi* and *R. v. Blacklaws*, 2012 BCCA 217 [*Blacklaws* (C.A.) at para. 62, a carefully-crafted limiting instruction, the Crown argues, is in accordance with the reasoning in *R. v. Corbett*, [1988] 1 S.C.R. 670, 34 C.R.R. 54, could address any risk of potential prejudicial effect.

[68] I think the risk of prejudice to Mr. Zakuti in having a joint trial is significant because of the dangers of credibility cross-pollination and prohibited propensity reasoning. The morally repugnant nature of the allegations, the significant disparity between the nature of the allegations and, as I will discuss further, the fact that the similarities between them are largely generic would all, I think, contribute to this increased risk. While the court would maintain its gatekeeping function throughout the course of the trial and a carefully-crafted limiting instruction could potentially limit the risk of inappropriate cross-pollination or propensity reasoning, the court needs to ensure that after balancing all of the relevant factors, the interests of justice nevertheless require a joint trial. The risk of prejudice here is high.

b) Factual and Legal Nexus Between the Counts

[69] Nexus simply means "connection or link": *Lai* at para. 43.

[70] A legal and factual nexus between the counts and the potential for admissibility of similar-fact evidence on all counts weigh heavily in favour of a single trial: *Mastronardi* at para. 27.

[71] In *Last*, the Court found that the factual and legal nexus between the two counts of sexual assault were extremely thin. In the first incident, the complainant knew the accused, the alleged assault occurred in the accused's home, and the accused threatened the complainant with a gun. In the second, the complainant did not previously know the accused, the alleged assault occurred at the complainant's home, and no gun was used. At para. 32, *Deschamps J.* found:

[32] I agree with the dissenting judge that the factual and legal nexus between the two sets of counts is extremely thin. The fact that the two incidents occurred in London approximately one month apart is of very limited significance in this case. This was the city where Mr. Last resided and worked. The attacks on the women were not closely connected in any meaningful way. While the charges were similar, the theory of the defence was completely different: consent was at issue in one and identification in the other. The theory of the Crown that the two incidents were part of the same transaction was not supported by the facts. Rather, the attacks were separate incidents. The trier of fact would not need to know about one in order to understand the other. The circumstances surrounding the charges were not sufficiently similar in character to have supported a similar fact evidence application. Accordingly, there was no truth-seeking interest in trying the counts together.

- [72] In *R. v. Blacklaws*, 2013 SCC 8 [Blacklaws (S.C.C.)], the Court fully adopted the dissenting reasons of Chief Justice Finch in the Blacklaws (C.A.) Court of Appeal decision (2012 BCCA 2170). Chief Justice Finch upheld the trial judge's refusal to order severance, including the judge's analysis as to legal and factual nexus at para. 36:
- [36] With respect to the present case, there are also a number of prominent similarities between the incidents, as the trial judge observed. It is true, as the appellant asserts, that the allegation of sexual assault in one incident, but not the other, represents an important distinction between them. However, the appellant indicated no authority stating that such a difference is necessarily decisive. Given the many factors that the trial judge was required to balance, and the high degree of discretion involved, in my view it was open to the judge to find that the factual nexus between the two incidents was a factor militating against severance.
- [73] Chief Justice Finch also found there was no reason to disturb the judge's analysis on legal nexus. The trial judge noted there was no serious issue about identification; that the accused would likely testify with respect to each incident, that he would dispute the complainant's versions of events, and that the defence in both cases was likely to be consent: paras. 37-40.
- [74] Mr. Zakuti argues that the factual and legal nexus between the counts is very weak. He emphasizes that many of the factual similarities relied upon by the Crown, such as the general circumstances of his being at the motel, the drug consumption, and the timeframe, to name a few, are quite generic. He submits there are many more differences, including the way the complainants are alleged to have met him and the various events that are alleged to have occurred between them. He emphasizes that the alleged incidents are completely separate incidents. There is no overlapping of transactions or essential elements in common. The jury does not, he argues, have to understand what happened to T.W., for example, to understand what happened to C.G. or J.C., or vice versa.
- [75] The Crown submits the factual nexus is strong. Counsel points to the overall circumstances, including that Mr. Zakuti was staying for a period of time at a motel that was a drug-activity hub. He met three vulnerable and drug-addicted women who spent time there, did drugs with each of them, used strategies to control them, including threats to one of them, and made suggestions that he held sway with police and/or had connections to a gang to some of them. He also got them alone (in a motel room and/or vehicle), and sexually assaulted them. The Crown argues that the differences in the number and nature of the assaults between the complainants are as a result of the circumstances of the encounters and of the circumstances of the particular complainants.
- [76] The Crown did not address the existence of a legal nexus between the counts directly, but I infer this is because the argument is subsumed within the Crown's argument that these counts are likely to be admissible as similar-fact evidence.
- [77] I agree there are some general factual similarities involved here, which include:

- the accused is previously unknown to the complainants;
- the ages and personal circumstances of the complainants;
- the alleged incidents occurred in the context of what I will call the drug subculture in Merritt, in this case centred largely at the Prince Motel;
- the incidents occurred in locations where the complainants were alone or isolated from others in motel rooms and/or vehicles;
- the accused made comments to the effect that he held sway with police and had connections with a gang member; and
- the incidents occurred during the same two to three-week timeframe in the summer of 2019.

[78] However, there are a number of factual differences as well, including:

- the manner in which the complainants met or were introduced to the accused;
- the number of incidents involved with each complainant; and
- the nature of the sexual violence allegations.;
- J.C.'s allegations involved very intrusive sexual violence, including oral sex, vaginal penetration, culminating in an event with pronounced physical violence as well;
- the allegations involving C.G. are rather unclear at the moment, but taken at their highest they involve vaginal intercourse during most of a time when C.G. was blacked out, with some physically assaultive behaviour as well;
- the allegations involving T.W. are very different. She alleges that the accused was persistent in trying to kiss and touch her in a vehicle, but eventually stopped his conduct after she told him no several times;
- he is alleged to have threatened only one of the complainants and her dogs, but not the other two;
- he is alleged to have confined, in the course of his conduct, two of the complainants but not the third;
- he is alleged to have offered two of the complainants money for sex at some point, but not the third;
- he is alleged to have made comments about having connections to the police to two of the complainants, but not the third;
- he is alleged to have had discussions with one complainant that he had a family member that was a gangster, but not with the other two; and
- some of the locations are different (there was a motel room at the All Season, a motel room at the Prince Motel, and a vehicle).

- [79] Overall, when I consider them separately from the viability of the similar-fact application, I find the degree of factual and legal connection between the counts relating to each complainant to be somewhat weak. The connection between the counts, either in terms of the circumstances in which they arise or the legal issues that they present, are not in themselves close enough a factor that makes trying them together more in keeping with the interests of justice. While there are generally factual similarities - similarities I would consider to be of a generic nature -- I do not see any factual overlap in any of the counts or in any of the allegations. The alleged incidents are all separate incidents.
- [80] I find that the trier of fact would not need to know about the alleged incidents involving any of the other complainants in order to understand the alleged incidents relating to the others. Absent the similar-fact issue, I see no legal nexus between the counts. There are no overlapping counts or essential elements in common, such as to raise the risk of inconsistent verdicts if severance occurred.
- [81] Overall, this factor favours severance.
- c) Complexity
- [82] Both parties agree that this case is not particularly complex. I consider this to be a neutral factor.
- d) Intention of the accused to testify on some counts
- [83] The accused's intention to testify on some counts but not others should be objectively justifiable. This was explained by Justice Deschamps in *Last* at para. 26:
- [26] Both the Crown and the defence submit that the accused's intention should be objectively justifiable. This requirement is, indeed, a threshold. The accused's expression should have both a subjective and an objective component. However, while a formulaic expression of a subjective intention is not sufficient in and of itself to discharge the accused's burden to have the counts severed, the trial judge should not substitute his or her own view for that of the accused and determine that the accused should testify or not. Rather, the trial judge must simply satisfy him- or herself that the circumstances objectively establish a rationale for testifying on some counts but not others. The burden on the accused is to provide the trial judge with sufficient information to convey that, objectively, there is substance to his testimonial intention. The information could consist of the type of potential defences open to the accused or the nature of his testimony: *Cross*, at p. 421. However, the accused is not bound by his stated intention; he remains free to control his defence, as the case unfolds, in a manner he deems appropriate.
- [84] However, an accused's intention to testify is not determinative. Deschamps J. discussed this at para. 27:

- [27] While an accused's provisional intention with respect to testifying is certainly a consideration which should be given significant weight, it is but one factor to be balanced with all the others. An accused's stated and objectively justifiable intention to testify on some but not all counts is not necessarily determinative of a severance application. It can be counterbalanced by other circumstances that the judge finds may prevent the accused from testifying, or be outweighed by factors that demonstrate that the interests of justice require a joint trial.
- [85] Where an accused states only a "vague possibility" of testifying on one of the charges against him, the court is not obliged to give that factor great weight in determining severance: *R. v. Legebokoff*, 2014 BCSC 705 at para. 46.
- [86] In *Legebokoff*, Parrett J. reviewed the law pertaining to an accused's intention to testify and adopted the court's summary in *R. v. Violette*, 2008 BCSC 665 at para. 49:
- [49] Romilly J., at para. 49 in *Violette*, summarized the principles he derived from the authorities to that point of time:
- [49] To summarize:
1. The accused's desire to testify on some counts but not others is a factor which must be considered, but is not a determinative factor: see *McMath and Roopnarine*.
 2. A "vague possibility" of testifying on some counts only does not receive great weight in determining the issue of severance: see *Santos, L. (D.H.), Smith, and August*.
 3. "Positive intention" or a "genuine present desire to give evidence" on the trial of the counts will receive greater weight: see *McClory, Santos, and Clyne*.
- [87] Mr. Zakuti submits that he has an objectively justifiable reason to testify on some counts and not others. If severance is not granted and if he is compelled to testify on some counts, he will be cross-examined on all of the allegations, whether he wishes to or not.
- [88] The Crown responds that Mr. Zakuti's indication about his decision to testify on some counts and not others is a mere assertion at this stage and should have little weight in my analysis. Mr. Zakuti has expressed a provisional subjective intention to testify on some counts and not others. I am satisfied that the circumstances, as explained to me by his counsel, objectively establish a rationale for provisionally intending to testify on the counts involving J.C. and not the others.
- [89] J.C.'s evidence, as I understand it at this stage, will involve a number of serious allegations of sexually violent behaviour over a number of days and a number of instances. They may well cry out for an explanation. Mr. Zakuti denies the events occurred. His counsel's explanation for his provisionally not intending to testify on the counts involving C.G. and T.W. are objectively reasonable as well.
- [90] This factor weighs in favour of severance.

e) Possibility of inconsistent verdicts

- [91] Counsel express no concern for the possibility of inconsistent verdicts. Given the different circumstances of each of the complainant's allegations, I share that view, but I would add one, albeit minor, point.
- [92] As the court observed in *Lai*, the Crown's case here will depend substantially, if not entirely, on credibility and reliability findings for each complainant on the critical points of their evidence. In other words, credibility findings will be closely related to the eventual verdicts. To borrow the words of Justice Schultes at para. 60:
- [60] To the extent that a single trier of fact assessing both could avoid the possibility of the complainants' evidence being treated differently as a similar-fact witness in the others' trial than in their own trial, this is a factor that weighs against severance
- [93] That was a point made in *R. v. Walter*, 2011 ABQB 585 at para. 72. In any event, this point is a relatively minor factor in the analysis.

f) Avoiding a multiplicity of trials

- [94] The interests of justice require that the administration of justice be as efficient and cost-effective as possible. Consideration should be given to whether it is in the interests of justice that witnesses and complainants be subjected to having to testify more than once.
- [95] There will already be three jury trials arising from the original indictment. There will be some overlap with civilian and police witnesses. The Crown has also signalled its intention to seek a similar-fact ruling with respect to the allegations of these three complainants at the trial involving the allegations made by E.T. If the indictment before me (the -10) is severed further as a result of this application, the Crown has signalled an intention to perhaps seek to adduce similar-fact evidence in the severed trials there as well. The end result is that there may be an additional two trials, which will cause some of the witnesses, including these vulnerable complainants, to testify multiple times.
- [96] This factor certainly weighs against severance. However, just as an accused's provisional intention to testify on some counts and not others cannot trump the other factors, nor can the desire to avoid multiplicity of proceedings. It is a factor to balance, along with all others.

g) Similar-fact evidence

- [97] This factor drew much of counsel's focus. It is a factor to consider along with all others.
- [98] In *Last, Deschamps J.* commented that in many cases, a ruling allowing similar-fact evidence will favour a joint trial since the evidence on all incidents would have to be introduced in any event: para. 33. In *R. v. R.C.*, 2020 ONCA 159 at para. 39, the Court held:

- [39] Where a judge carefully considers the viability of an anticipated similar-fact application at the time of the severance application and concludes that it appears to have sufficient merit, it will be difficult to establish that the judge erred by refusing to sever
- [99] On a severance application, a trial judge only needs to assess whether the similar-fact application has some possibility of success. This is a considerably lower threshold than actually deciding about the admission of the similar-fact evidence. A judge does not need to go so far as to predict the result of such an application at the time of the severance application: *Blacklaws (C.A.)* at paras. 42-44, per Finch CJBC (dissenting); *aff'd* 2013 SCC 8.
- [100] The Crown is not required to bring a similar-fact evidence application at the time of the severance application. Such an application may, the court in *Last* observed at para. 34, best be done once all of the Crown's evidence has been tendered. However, Deschamps J. cautioned at para. 33 that "in view of the different burden in a similar-fact evidence application, the issue has to be considered carefully in the context of a severance motion".
- [101] In doing so, the Court cited *Arp* and made comments at para. 52:
- [52] However, where the similar acts are alleged as part of a multi-count indictment, the consideration of the admissibility of similar fact evidence will have to be taken into account in deciding whether the counts should be severed. Nevertheless, the trial judge should be careful not to confuse admissibility with severance. A motion to sever under s. 591(3)(a) of the Code must be brought by the accused, who bears the burden of establishing on a balance of probabilities that the interests of justice require an order for severance. Yet the burden of demonstrating that similar fact evidence should be admitted must be borne by the Crown. These respective burdens may involve the consideration of similar factors, but as Lord Scarman noted in *R. v. Scarrott* (1977), 65 Cr. App. R. 125 (C.A.), at p. 135, "[i]t does not follow that because a multi-count indictment has been allowed to proceed that therefore the evidence given will be evidence on all the counts contained in the indictment". Thus, to paraphrase the Manitoba Court of Appeal in *R. v. Khan* (1996), 49 C.R. (4th) 160, at p. 167, notwithstanding the trial judge's refusal to sever the counts in a multi-count indictment, it remains open to him or her, as the evidence progresses at trial, to determine as a matter of law that evidence on one count is not admissible as similar fact evidence on the other counts. The assessment of similar fact evidence and the determination of its probative value and admissibility places an onerous burden on the trial judge. It is a task that must be undertaken with great care.
- [102] In *Blacklaws (C.A.)*, Chief Justice Finch discussed the distinction between the analysis to admit similar-fact evidence and the severance analysis at para. 42:
- [42] The appellant is correct in saying that the test for admitting similar-fact evidence is more stringent, and requires a closer legal and factual nexus, than the test for determining whether multiple counts should be joined or severed. However, the trial judge was not required to actually apply the test for admitting similar-fact evidence during his deliberations on the severance application: he only had to assess whether it could "possibly"

be met in the future. This is a considerably lower threshold, and I do not consider that the trial judge made an error in finding that it was met in the circumstances of this case.

- [103] Justice Schultes discussed the essential principles that must be applied in any forecast of the likely admissibility of similar-fact evidence in Sharma, and he discussed this thoroughly at paras. 52-59:
- [52] It is well known that evidence of an accused's disposition to commit offences is generally excluded, but can be admitted in exceptional circumstances where its probative value exceeds its prejudicial effect. The probative value of the evidence that is capable of overcoming the prejudicial effect arises from the objective improbability that the similar acts to be relied on are the product of coincidence: *R. v. Arp*, [1998] 3 S.C.R. 339, at paras. 41-44.
- [53] The degree of similarity required to achieve the necessary probative force differs according to the issue that the evidence is led to prove. Where it is intended to prove the identity of the accused as the offender, a high degree of similarity is required. This can be derived from a unique common feature that renders the act strikingly similar, as the phrase is sometimes used, or by a number of significant similarities taken together. In the case of identity, the trial judge must first be satisfied, on a balance of probabilities, that the same person committed all of the acts in question. If that test has been met, the judge goes on to consider whether there is some evidence linking the accused to the similar facts. This does not require evidence linking the accused to each of the acts: see *Arp* at paras. 45, 48, and 56.
- [54] Generally, evidence linking the accused to such acts is not considered at the first stage, but in practice some evidence may be relevant at both stages. For example, the appearance of the offender may be part of the finding that the offences were likely all committed by the same person, but may of course also serve to link the accused to some or all of the offences: see for example *R. v. MacCormack*, 2009 ONCA 72 at para. 58, and *R. v. Johnson*, [2006] O.J. No. 4262 (S.C.J.) at para. 50.
- [55] When similar fact evidence is offered to prove matters other than identity, the factors that drive the cogency of the evidence are not the same, see *Handy* at para. 78, and that there is no longer the focus on "strong peculiarity or unusual distinctiveness underlying the events being compared", see *Handy* at para. 81. But the essential requirement of evidence making it improbable that the events are the product of coincidence remains. Important connecting factors are the proximity in time of the similar acts, the extent to which they are similar in detail, the number of them, the circumstances surrounding them, any unifying distinctive features, any intervening events that detract from the inference that the conduct was ongoing, and any other relevant unifying factors: *Handy* at para. 82.

- [56] A frequent basis for the admission of similar fact evidence is to support the credibility of complainants in circumstances where it will be under attack by the defence. The probative force of the reasoning here is the inherent improbability of several complainants making essentially the same allegations or same kinds of allegations. The seminal case for that is *R. v. B.* (C.R.), [1990] 1 S.C.R. 717 at para. 41.
- [57] Not surprisingly, the inference that coincidence is improbable in those circumstances can be effectively undermined by evidence indicating that there has been collusion among any of the complainants: *Handy* at para. 104.
- [58] There are two particular kinds of prejudice that can be caused by similar fact evidence against which the probative value available must be balanced. Moral prejudice is the danger that the trier of fact will conclude the accused is a bad person and therefore likely to have committed the offences charged. Reasoning prejudice is the danger that the trier of fact will be distracted from their primary task in the case before them by the additional evidence: *Handy* at para. 100.
- [59] Obviously, reasoning prejudice is much less of an issue when the proposed similar fact evidence comes from counts on the same indictment, since the trier of fact will be considering all of the evidence from each count in any case: *MacCormack* at paras. 69-70.
- [104] I agree with this summary.
- [105] The Crown has expressed its intention to have the evidence of each complainant in the -10 indictment used as similar-fact evidence in relation to the other for three purposes. Counsel advises that one purpose is in order to establish the *modus operandi*; in other words, to support the inference that the accused has a method he has used to commit multiple offences in a similar manner. This is relevant to proof of the *actus reus* of the offences. The second purpose expressed is to establish the improbability of coincidence, in order to support the credibility of the complainants, which will be a central issue at trial. Finally, towards proof of identity.
- [106] At the risk of repeating myself, I think it is important to outline the Crown's expression of the significant similarities in the circumstances and manner of the assaults. Counsel identifies Mr. Zakuti's presence in the community and at the motel, his use of the name Sebastian, the presence of his brother, using drugs with the complainants, his offering of money for sex to two of them, the close timeframe of the allegations, the similar vulnerabilities of the complainants, the locations, and his control of the complainants by fear and intimidation by holding himself out to have connections with gangs and within the police department.
- [107] Again, the differences the Crown emphasizes that are seen in the seriousness of the assaults are only due to the response of the complainant to what was occurring. J.C.'s experience was the worst, the Crown argues, because she had nowhere to go and her belongings and animals were at the motel. C.G.'s experience was only the one time, because

she was able to leave the motel. The events involving T.W. occurred in circumstances that allowed her outcome to be better, it is argued; they occurred in daylight with another vehicle at the pullout, and then later at the motel his brother came into the room when she was trying to leave.

- [108] The Crown submits that overall it has met the relatively low burden of establishing the possibility the application might succeed. Mr. Zakuti takes the opposite view.
- [109] I agree with Mr. Zakuti. Upon application of the factors outlined in *R. v. Handy*, 2002 SCC 56, and based on the information I have been provided about this expected evidence (which I appreciate can always change at trial), I think at this stage the Crown's similar-fact application does not have the possibility of succeeding.
- [110] While there is certainly proximity in time, the alleged similarities of the acts are, to my mind, not very similar at all, nor are the number of occurrences and the manner in which they occurred. As I outlined earlier, there are some circumstances surrounding the occurrences that are similar, but these similarities are quite generic, not distinctively unifying, and some are not common, in any event, to all three complainants.
- [111] The facts I have been provided in this application have not been overly detailed or specific, and that is not any criticism, it is perhaps due to the uncertainty about how the evidence will unfold. I am left to do the best with what I have been given and simply do not see the similarities relied upon by the Crown as having strong peculiarity or unusual distinctiveness to have a possibility of being used as proof of identity. Nor do I think there are sufficient connecting factors or unifying features beyond the generic that would allow the Crown to successfully argue that coincidence is improbable.
- [112] I also consider the potential for innocent collusion as a viable factor in this case. All three complainants are friends who have known each other for a long time. E.T. influenced the others to go to police. C.G. testified at the preliminary inquiry that E.T. told her that her daughter had been threatened and had asked C.G. to give a statement. T.W. testified that she spoke with all of the other complainants separately before she gave her statement to police. She said E.T. told her everything that happened to her, that she talked to C.G. about everything that had happened at the Prince Motel, and that she talked to J.C. about it as well, but J.C. provided her with very few details. J.C. testified that she talked to E.T. before she gave her statement to police, and that E.T. asked her to speak to police because E.T.'s daughter was approached and she was fearful she was in danger. Inconsistent with the other evidence, J.C. denied speaking to T.W. and C.G.
- [113] The possibility of even innocent collusion is a factor that is to be weighed here.
- [114] As was stated in *Handy*, "Care must be taken not to allow too broad a gateway for the admission of propensity evidence or, as it is sometimes put, to allow it to bear too much of the burden of the Crown's case": para. 115.

[115] Bearing in mind that I am only assessing the possibility of success and am, in no way predetermining the outcome of a formal application which may well arise on a different body of evidence, I cannot see it possible for the Crown to successfully argue this application on the facts presented here.

[116] I consider this to be a factor weighing against a joint trial and in favour of severance.

h) Trial length

[117] Mr. Zakuti submits that the severed counts should not take too much longer to try separately than the currently allotted trial time. Crown counsel disagrees, reminding me that these are jury trials that will have to be separately scheduled and, as was argued under the factor of avoiding a multiplicity of proceedings, the other trials would feature the other complainants as proposed similar-fact witnesses and there would be overlap of other civilian or police witnesses.

[118] The Crown has, in my view, correctly identified the practical effects of severance under this heading. I do not necessarily see each individual trial taking four full weeks to be heard. Overall, given the number of trials and their realistic lengths, I find this factor weighs against severance, but not strongly so.

i) Trial within a reasonable time

[119] Mr. Zakuti raises no concern about any delay arising from the severance he seeks. The severance he seeks is in addition to the severance the Crown has already done through the three new indictments. Having five separate trials will, he argues, reduce the length and complexity of each trial. The additional four trials can, he believes, be heard within the 30-month ceiling outlined in *R. v. Jordan*, 2016 SCC 27 which, on its face at this point, appears to be March 2022.

[120] The Crown responds that further severance of counts will result in delay that will not respect Mr. Zakuti's s. 11(b) Charter rights. If the application is granted, there will be four additional jury trials to be scheduled before March 2022, when the ceiling is reached. The Crown believes each trial will still require a considerable amount of time, given the overlap of witnesses and prospect of similar-fact evidence applications. I think this is a realistic assessment. With the court's current availability, having all trials heard in the next 11 months seems highly unlikely.

[121] Nevertheless, I do not consider the risk of delay arising from separate trials to be a factor of any significant weight here. If additional trials were required, counsel would have to consider Mr. Zakuti's custodial status and prioritize any trial time that is offered in the coming months.

[122] In any event, and importantly, as Justice Schultes observed at para. 82 in *Lai*, I would find it very surprising that an accused who sought severance of counts in these circumstances would then seek to evade responsibility for any delay that may result in the accounting process down the road.

Conclusion

[123] Balancing all of these factors, I conclude that overall Mr. Zakuti has established that the interests of justice require the severance of counts he seeks. Most of the factors I have discussed militate in favour of separate trials for the counts relating to each complainant. While I am very mindful of the difficulties and inconveniences separate trials will cause these vulnerable complainants and other witnesses, and the stress that they are likely to cause to an already overburdened court system, I find the significant risk of prejudice to the accused in the circumstances of this case outweighs any benefits to the administration of justice in trying the counts together.

[124] I am satisfied that Mr. Zakuti has met the burden upon him. I order that the accused be tried separately on one or more of the counts in the -10 indictment as follows: Counts 1 through 5 inclusive will be heard together; Counts 6 and 7 will be heard together; and Count 8 will be on a separate indictment.

"S.A. Donegan J."

DONEGAN J.

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