SUPREME COURT OF YUKON

Citation: *Her Majesty the Queen v. Allen and Allen*, 2010 YKSC 28

Date: 20100611
S.C. No. 09-01504
Registry: Whitehorse

Between:

HER MAJESTY THE QUEEN

And

DOUGLAS ALLEN and HEATHER ALLEN

Before: Mr. Justice L.F. Gower

Appearances:

Noel Sinclair	Counsel for Her Majesty the Queen
André Roothman	Counsel for Douglas Allen
Edward J. Horembala, Q.C.	Counsel for Heather Allen

RULING ON ORDER OF DEFENCES

INTRODUCTION

[1] This is an application by defence counsel for Douglas Allen for two forms of relief:

a) that defence counsel for the co-accused, Heather Allen, be allowed to cross-examine the Crown witnesses first, notwithstanding that Douglas Allen appears in the first position on the indictment; and

b) that Heather Allen be put to her election to call evidence first, followed by Douglas Allen.

[2] Crown counsel opposes the application, submitting that conventional criminal procedure dictates that co-accused cross-examine and elect to call evidence in the order they are named on the indictment. Further, although the court has inherent jurisdiction to allow deviations from that conventional procedure, the discretion to deviate must be exercised judiciously and on a principled basis. Finally, says the Crown, the grounds for the application in this case are insufficient to justify a deviation, and therefore no issue of prejudice to the Crown arises.

BACKROUND

[3] Douglas Allen is charged with aggravated assault and assault with a weapon for wounding the complainant, Allan Bullers, with a knife. Heather Allen is charged that at the same time and place she committed an assault on Mr. Bullers, and that she also aided or abetted Douglas Allen in committing an assault on Mr. Bullers.

[4] I take judicial notice that the practice in Yukon, where there are two or more accused on an indictment, is that defence counsel generally proceed in order of seniority, unless they agree otherwise. However, that practice has not universally gone unchallenged by the Crown's office here, and it has from time to time sought to rely on the order of the co-accused on the indictment.

[5] At the preliminary inquiry, for tactical reasons, only Douglas Allen’s counsel cross-examined the complainant.

[6] Presumably for these reasons, defence and Crown counsel each prepared for trial on differing assumptions. Defence counsel agreed that, regardless of the order of the accused on the indictment, Heather Allen’s counsel would cross-examine first, because he is the more senior. There are also tactical reasons for that agreement, which I will get

to in a moment. Crown counsel assumed that defence counsel would proceed in the order of the co-accused on the indictment. It was not until the morning on the first day of the trial that counsel realized they had a disagreement about the issue and defence counsel subsequently submitted their application.

GROUNDS FOR APPLICATION

[7] I am advised that Douglas Allen is Heather Allen's son, and that the complainant lived with the Allens from time to time and was involved in a relationship of several years with Heather Allen. Douglas Allen intends to rely upon a defence of preventing an assault under s. 37 of the *Criminal Code*. He is expected to testify that his actions were dictated by what he knew or perceived about the relationship between Heather Allen and the complainant.

[8] Douglas Allen's counsel submits that he would be disadvantaged by having to cross-examine the complainant first, because Douglas Allen’s knowledge of certain relevant aspects of the relationship between the complainant and Heather Allen is based on hearsay and second-hand information. In other words, as I understood him, counsel said that he would be prejudiced by having to put propositions to the complainant about the relationship, or about specific instances, when Douglas Allen does not have first-hand knowledge of those matters.

[9] Douglas Allen also submits that, if he is required to testify first, he will not know whether his counsel will have an opportunity to cross-examine Heather Allen, since she will not yet have made her election to testify. Further, he may not have an opportunity to elicit evidence from Heather Allen which corroborates his own, in the event she chooses not to testify.

[10] Finally, Douglas Allen submits that, if he is required to testify first, he will be giving his evidence "in a vacuum", since the history and nature of the relationship between Heather Allen and the complainant, and his knowledge or perception about the relationship, is the foundation for his defence of preventing an assault. In other words, he says that it is not simply a tactical issue, but one going to his ability to make full answer and defence.

THE LAW

[11] Unfortunately, there is very little law on this issue.

[12] In Ewaschuk's *Criminal Pleadings and Practice in Canada*, 2d. ed., looseleaf, (Aurora: Canada Law Book, (1987)) at 16:2650, the author refers to what the Crown says is the conventional criminal procedure that co-accused proceed in the order they appear on the indictment:

> "*Accused* should be called upon for their *defence* "in the order their names appear in the information or indictment". Where the seriousness of offences varies, the accused may, with leave, be called upon for their defence in the order of the seriousness of the offences charged against them, the accused with the most serious offence first. In British Columbia, the practice is to list accused alphabetically on an information or indictment."

The two cases cited by the author in support of this proposition are quite old and predate the *Charter* : *R. v. Barber, Fletcher, and Dorey* (1844), 1 Car. & K., 434, 174 E.R. 880 and *R. v. Barsalou (No. 3)* (1901), 4 C.C.C. 446 (Que. K.B.).

[13] *Barsalou* is a 1901 decision from the Quebec Court of King's Bench. It recognized that, in England, the practice was not always in uniform; in some cases, the order of the defences was determined by the seniority of counsel, and in other cases, by the order of appearance on the indictment. In some instances, the order for presentation of defences

was determined by the degree of criminality imputable to each of the accused. However, the court recognized that eventually:

> "… it became the rule that the order of the defences should be in the order in which the names of the accused persons are placed in the indictment when the degree of criminality is the same for all the defendants. (*The Queen v. Barber*, 1 C. & K. page 434), and that in the latter case the judge should call upon the defendants for their defence according to the nature of the charge against each of them individually as disclosed by the indictment or the evidence of the prosecution or by both. But the choice of one or of the other of these two modes is largely left to the discretion of the Judge." (p. 448)

Interestingly, the headnote of the case states:

> "Where several persons are jointly indicted the order in which each of them shall enter upon his defence is generally subject to the discretion of the trial judge."

[14] The Crown provided me with *R.* v. *Suzack*, [2000] O.J. No. 100 (C.A.). *Suzack* is distinguishable from the case at bar because it involved two accused who could not agree on the order of their peremptory challenges in selecting a jury. Suzack submitted that s. 635(2) of the *Criminal Code* arbitrarily gave the co-accused, Pennett, a tactical advantage by requiring Suzack to exercise his peremptory challenges first. Doherty J.A., at paras. 61 and 62, accepted that a tactical advantage of one accused over a co-accused could infringe the constitutional rights of the disadvantaged co-accused, but that tactical advantages and disadvantages are part of the adversarial process:

> "The appellant cannot claim any unfairness as between himself and the Crown, but only that s. 635(2) gave his co-accused a tactical advantage over him. I accept that a tactical advantage may reach constitutional proportions. I also accept that a law which gives one accused an advantage over a co-accused could infringe the constitutional rights of the disadvantaged co-accused, although I would think that laws which favour one accused over another are constitutionally less suspect than a law which favours the Crown over the accused.

> Tactical disadvantages cannot, however, be equated with unfairness in the constitutional sense. Tactical advantages and disadvantages are inherent in the adversarial process. They come and go with the ebb and flow of the process. Where there is more than one accused on trial, the question of which accused will go first, last or somewhere in between will arise repeatedly in the course of the trial (e.g. who will cross-examine Crown witnesses first, who will call a defence first, who will go to the jury first). I do not understand the Charter to demand exact parity at each and every procedural step of the criminal trial process. Indeed, in *R. v. Bain*, supra, at p. 511, Cory J. acknowledged that the Charter did not even require parity as between an accused and the Crown in the selection of the jury."

Interestingly, s. 635(2) of the *Criminal Code* provides that the co-accused shall exercise their challenges "in the order in which their names appear in the indictment <u>or in any other order agreed on by them</u>" (my emphasis).

[15] *R*. v. *Felderhof*, [2003] O.J. No. 4819 (Ont. C.A.), is a case dealing with the court's inherent jurisdiction to control its own process. The facts in the case are important. The Crown argued that the trial judge had interfered with the conduct of its case. On the 67th day of the trial, the Crown brought a motion seeking admission of certain documents. Before the motion had been determined, the trial judge ordered the Crown to call its next witness. The judge held that the application would take a substantial period of time and that he would be in a better position to make determinations on the admissibility of many of the documents as heard more evidence. The Crown appealed that ruling, among others. At para. 57, Rosenberg J.A. upheld the trial judge and made a number of comments about judges' trial management powers:

> "I think something should be said about the trial management power. It is neither necessary nor possible to exhaustively define its content or its limits. But it at least includes the power to place reasonable limits on oral submissions, to direct that submissions be made in writing, to require an offer of proof before embarking on a lengthy *voir dire*, to defer rulings, to direct the manner in which a *voir dire* is conducted, especially whether to

> do so on the basis of testimony or in some other form, and exceptionally to direct the order in which evidence is called. The latter power is one that must be exercised sparingly because the trial judge does not know counsel's brief. However, a judge would not commit jurisdictional error in exercising that power unless the effect of the ruling was to unfairly or irreparably damage the prosecution…" (my emphasis)

In my view, these remarks are instructive because they clearly indicate that a court, in controlling its own process, has the inherent jurisdiction to direct the order in which evidence is called. The use of the words "exceptionally" and "sparingly" would seem to arise from the fact that the trial judge had interfered with the presentation of the Crown's case by directing the prosecutor to proceed with his next witness before the Crown had the benefit of the judge's ruling on the admissibility motion. I would expect it to be a rare situation where a court intervenes and makes directions regarding the presentation of the Crown's case. However, that is not the situation with the case at bar. In this case, I am being invited to intervene to affirm an agreement between defence counsel on the order in which the co-accused wish to proceed.

[16] The other reason that Rosenberg J.A.'s comments are instructive is that they reflect the balancing act which a judge must engage in when deciding whether to exercise a trial management power such as directing the order in which evidence is called. Rosenberg J.A. suggests that such a power should not be exercised where the effect would be to "unfairly or irreparably damage the prosecution". In other words, the analysis must take into account the potential prejudice to the Crown.

[17] *Felderhof* also referred to the decision of the Supreme Court of Canada in *Krieger v. Law Society of Alberta*, [2002] 3 S.C.R. 372, where Iacobucci and Major JJ. made a number of remarks regarding the question of "prosecutorial discretion". At para. 53, Rosenberg J.A. quoted from para. 47 of *Krieger* as follows:

> "Significantly, what is common to the various elements of prosecutorial discretion is that they involve the ultimate decisions as to whether a prosecution should be brought, continued or ceased, and what the prosecution ought to be for. Put differently, prosecutorial discretion refers to decisions regarding the nature and extent of the prosecution and the Attorney General's participation in it. *Decisions that do not go to the nature and extent of the prosecution, i.e., the decisions that govern a Crown prosecutor's tactics or conduct before the court, do not fall within the scope of prosecutorial discretion. Rather, such decisions are governed by the inherent jurisdiction of the court to control its own processes once the Attorney General has elected to enter into that forum.* " (underlining and italics in *Felderhof*)

[18] Rosenberg J.A. then continued, at para. 54, that the power of the trial judge to manage the order in which certain of the Crown's evidence is called does not impact prosecutorial discretion, but rather is simply a matter of the prosecutor's tactics or conduct:

> "In my view, the trial judge's power to manage the trial, including the power to review the order in which certain evidence may be called, properly falls within the area of the prosecutor's "tactics or conduct before the court" and thus does not implicate prosecutorial discretion that is reviewable only on the standard of abuse of process, bad faith or improper purpose..."

[19] In *R. v. Phung*, [2006] O.J. No. 5660 (S.C.), Mr. Phung and Mr. Tran were being tried on charges of first degree murder and attempted murder. Because Mr. Phung was named first on the indictment, his counsel cross-examined first during the trial. Part way through the trial, Mr. Phung discharged his counsel and sought an adjournment to retain new counsel. The court rejected the adjournment on the basis that Mr. Phung was attempting to cause a mistrial and delay the course of justice. However, two lawyers were appointed as *amicus curiae* to assist Mr. Phung for the balance of the trial.

[20] After the Crown had completed its questioning of its fourth witness, the court raised the issue of whether Mr. Phung, because he was unrepresented, ought to be

permitted to cross-examine after Mr. Tran's counsel, notwithstanding the order of the co-accused on the indictment. Mr. Tran's counsel and the *amicus curiae* took the position that cross-examining first would be a tactical disadvantage because there is no right for the first cross-examiner to "re-cross-examine" once subsequent cross-examination is finished. Mr. Tran's counsel also argued that Mr. Phung's discharge of his previous counsel was an irrational act and created a risk that Mr. Phung would do something equally irrational during his cross-examination, which Mr. Tran's counsel would have no opportunity to repair if she was required to cross-examine first. She also submitted that Mr. Phung was the author of his own potential misfortune by attempting to cause a mistrial.

[21] In the result, the court felt that the risk of prejudice to Mr. Tran was sufficient reason to allow Mr. Tran's counsel to cross-examine second. At paras. 26 and 30, the court stated:

> "The court is keenly aware of its obligation to vigilantly guard Mr. Phung's fair trial interests given that he is an unrepresented litigant. The court is equally aware, however, that it is obliged to protect the fair trial interests of all of the parties and to protect the trial process itself.
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> …
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> In conclusion, the court has determined that it should not to interfere with the convention that Mr. Phung should cross-examine first because he is named first on the indictment."

[22] *Phung* is instructive insofar as it refers to "the convention" that a co-accused should cross-examine in the order in which they appear on the indictment. It also recognizes that a court is obliged to protect the fair trial interests of all of the parties, as well as the trial process itself. However, on its facts, *Phung* is distinguishable from the case at bar since it also involved a dispute between co-accused, in that case on the order

of cross-examination, whereas, in the case at bar, defence counsel agree on the change to the order of cross-examination.

[23] The most recent case counsel were able to locate is *R. v. Sandham*, [2009] O.J. No. 4560 (S.C.). While that case also has features that distinguish it from the one at bar, like *Felderhof*, it includes some helpful comments regarding the inherent jurisdiction of courts to control their own process. There were six co-accused in *Sandham* and three objected to the manner in which the Crown had ordered their names on the indictment. At para. 10, the court concluded that the ordering of the names fell within the sphere of prosecutorial discretion. That proposition is not challenged by defence counsel in the case at bar.

[24] However, the court in *Sandham* went on to address the court's inherent power to control its own process and to remedy any perceived procedural unfairness resulting from the sequence of the names on the indictment. Heeney J. began by noting that the issue has received very little judicial scrutiny in Canada, and at para. 5, stated:

> "The impact of the manner in which names are ordered on the indictment is felt throughout the trial. It determines the order in which peremptory challenges will be exercised, the order of questioning of witnesses, the order in which each accused will be called upon to call a defence, if any, and the order in which closing addresses are presented to the jury."

It is interesting that Heeney J. states that the order of names on the indictment "determines" the order of questioning of witnesses and the order in which each accused will be asked to elect whether to call evidence. Clearly, the order of peremptory challenges and the order of closing addresses are codified by the *Criminal Code* at ss. 635(2) and 651(3)[1]. However, the order of questioning of witnesses and electing to call

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[1] And as noted earlier at para. 14, the order in which co-accused exercise challenges can be agreed on by the co-accused irrespective of their ordering in the indictment.

evidence is not codified, but is rather a matter of common law. I interpret Heeney J.'s comments with respect to the latter to be a reference to the "convention" referred to in *R. v. Phung* and alluded to in Ewaschuk's *Criminal Pleadings and Practice in Canada*, supra.

[25] Later in *Sandham*, at paras. 23 and 24, Heeney J., confirms that, notwithstanding the Crown's discretion on the ordering of the names on the indictment, the court retains an inherent power, both under the common law, and as enshrined in s. 11(d) of the *Charter*, to relieve against the consequences that flow from that ordering, if necessary to relieve against procedural unfairness:

> "While the order of the names of the indictment is within the prosecutorial discretion of the Crown, the court retains the inherent power to control its own process and to remedy procedural unfairness. This power exists both at common law, and has been enshrined in s. 11(d) of the *Charter*: see *R. v. Rose* (1998), 129 C.C.C. (3d) 449 (S.C.C.) at para. 130. Thus, notwithstanding the sequence of the names on the indictment, the court retains the power to relieve against the consequences that flow therefrom, if necessary to relieve against procedural unfairness. Accordingly, the court could direct that the accused be called upon in a different order to question witnesses, call their defence, address the jury, and so on.
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> This is recognized by Professor Munday in "Order In the Indictment" (*supra*) at p. 158, where he says the following:
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>> If all counsel in the case, *including prosecuting counsel*, agree that the order may be changed, the trial judge may sanction such a re-ordering of the defendants' names. If counsel are unable to agree amongst themselves, however, the judge retains a residual discretion to override counsel's objections and to permit the defendants to be called in some other order. [*Emphasis in the original.*]" (underlining my emphasis)

ANAYLSIS

[26] Defence counsel would seem to concede that, notwithstanding the practice in Yukon to proceed in the order of counsel's seniority, where co-accused cannot agree, the "default" is to follow the order of the indictment, unless doing so would be procedurally unfair to either accused.

[27] I understood Crown counsel to argue that the two defence counsel have not met their initial "onus" in establishing that there is a principled reason to deviate from the conventional criminal procedure that co-accused will follow the order in which they are named on the indictment. Further, since that initial onus has not been met, there is no need for me to consider the question of whether there is any prejudice to the Crown if I allow the application.

[28] In my view, where the co-accused agree on the order in which they will cross-examine or present their evidence, there is no onus on them to justify a deviation from the order of the indictment. There would only be an onus upon a co-accused seeking a deviation over the objection of another co-accused. In such a case, the court would have to consider the potential for procedural unfairness and possibly the potential for prejudice to the Crown, depending on the circumstances. If co-accused agree on the order in which they wish to proceed, the consent of the Crown is not required. In ordinary circumstances, the Crown has no more say in the presentation of the case or cases for the defence than an accused has in the presentation of the Crown's case. Only if one side or the other raises a credible concern about potential procedural unfairness should the court weigh in.

[29] In any event, it is quite clear from the grounds for the application and the related submissions that the nature of the relationship between Heather Allen and the complainant is going to be central to the defence of both accused and particularly Douglas Allen, who intends to rely on the defence of preventing an assault. Further, since Heather Allen has direct knowledge of the nature of that relationship, and about specific instances of conduct during the relationship, which will likely have a bearing on the

defence of each accused, it makes logical sense for her to be given the initial choice as to whether to call evidence. Assuming she does call evidence, then a context would be laid for the evidence of Douglas Allen as to his perceptions and knowledge of that relationship. While technically Douglas Allen also has a choice on whether to call evidence, given the very nature of his anticipated defence, I do not see how he could proceed without doing so.

[30] Douglas Allen's counsel has also provided an explanation for wanting Heather Allen's counsel to cross-examine the complainant first. Heather Allen's counsel will have the benefit of instructions on instances of conduct during the relationship, based on Heather Allen's direct and first-hand knowledge. He will therefore be able to put suggestions to the complainant based on that first-hand knowledge, which would be difficult, if not impossible, for Douglas Allen's counsel to do, since Douglas Allen would only have second-hand or hearsay knowledge of such instances. At the very least, it seems to me that Douglas Allen's cross-examination of the complainant on such matters would be far less effective if he is required to proceed first. In this regard, while it may ultimately be a tactical advantage for Heather Allen's counsel to proceed first, that is not an insufficient reason to justify a deviation from the convention.

[31] The accused are entitled to a fair trial under s. 11(d) of the *Charter* and to make full answer and defence under s. 7 of the *Charter*. If they have agreed, for tactical and substantive reasons, that it is more advantageous for them to proceed in the order sought, then absent any consequential prejudice to the Crown, it is my view that they should be allowed to proceed in that fashion. Crown counsel has candidly and properly conceded that there would be no prejudice to the Crown if the application is granted in

this case. On the other hand, if the application is not granted, I conclude that there will be prejudice to the accused, who have prepared their case for a number of months on the basis of the reasonable assumption that the usual practice in Yukon of following the order of counsel's seniority would be followed.

CONCLUSION

[32] In the result, I grant both of the orders sought, specifically that:

1. Heather Allen's lawyer shall be allowed to cross-examine first, followed by Douglas Allen's lawyer; and
2. Heather Allen shall be put to her election as to whether she is calling evidence before Douglas Allen is put to that election.

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GOWER J.