Court of Queen's Bench of Alberta

Citation: R v Barton, 2021 ABQB 442

Date: 20210604
Docket: 120294731Q2
Registry: Edmonton

Between:

Her Majesty the Queen

Respondent
(Crown)

- and -

Bradley Barton

Applicant
(Accused)

Reasons for Decision
of the
Honourable Mr. Justice S.D. Hillier

I. Introduction

[1] The trial in this matter commenced January 11, 2021, and the jury verdict rendered on February 19, 2021 found Mr. Barton guilty of the manslaughter of Ms. Cindy Gladue. Sentencing was set over for preparation of a Pre-Sentence Report and other materials.

[2] On May 20, 2021, the Defence requested postponement of sentencing in order to seek a ruling to investigate concerns of possible jury misconduct depending on the court's assessment of its jurisdiction. Briefs were filed setting out the positions of the Defence to which the Crown made full response. At the commencement of oral submissions, the Court directed and

authorized the Defence to prepare a formal Application *ex post facto* without objection of the Crown. A formal Application has now been filed.

[3] Two alternative remedies are profiled by the Defence:

a) If the Court is not *functus officio* to consider a mistrial, to reconvene the trial for the purpose of inquiring of each of the 13 former jurors whether the allegations made are true and accurate, and as such, whether any of them had misconducted themselves in failing to presume Mr. Barton innocent throughout the proceedings, and caused others to do the same.

If it appears any of the jurors had done so, a reasonable apprehension of bias in the other jury members exists, and a mistrial would be the only effective remedy to prevent a miscarriage of justice;

or

b) If the Court declares itself *functus officio* to consider a mistrial, to nevertheless reconvene the trial to inquire of each of the 13 jurors the same questions so that a timely and reliable record may be preserved for the purpose of assisting the Court of Appeal as to whether Mr. Barton's conviction should be overturned due to a miscarriage of justice for juror misconduct.

[4] Crown responds that the law does not support either remedy. The Court has no jurisdiction to order a mistrial after the jury renders its verdict and is discharged. The common law does not support the power of the trial judge to recall the jury to conduct an inquiry on matters which are intrinsic to jury deliberations including allegations of apprehended bias.

[5] Alternately, if the Court finds that it does have jurisdiction to order an inquiry, Crown states it should decline to do so in these circumstances.

II. Background

[6] This matter was directed for retrial by the Supreme Court of Canada on a manslaughter indictment with reasons for decision issued at 2019 SCC 33.

[7] Upon consent of both Crown and Defence, fourteen jurors and two alternates were selected to attend the first day of the trial. At that time each of the first 14 jurors affirmed the oath to judge the Accused faithfully and give a true verdict according to the evidence. Accordingly, the two alternates were discharged.

[8] As part of the Opening Instructions all jurors were advised, among a number of matters, that:

1. The Accused is presumed innocent and the burden of proof on the Crown is to prove its case beyond a reasonable doubt;
2. Jurors may discuss the case when all together but must keep an open mind and remain cautious in expressing any views, with no conclusions until the end.

3. They must decide the facts based on a full review of all the evidence and the court's instructions;

4. Their affirmation of the oath requires that they listen carefully and decide based only on what is presented in court;

5. What happens and is said in the jury room must always remain secret.

[9] On the morning of January 28, 2021, one of the jurors asked to be excused for health reasons. The request was granted and the trial continued with 13 jurors.

[10] All evidence was completed on February 5 and final arguments were provided by Defence and Crown on February 17, 2021.

[11] Final Instructions to the jury began in the late morning of February 18, 2021. During an adjournment before completion of Final Instructions, the jury officer advised the Court that the following issue had been drawn to his attention:

1. Juror #9 was concerned that Juror #1 had expressed negative statements or disparaging remarks about sex workers and prostitution;

2. Juror #9 also said that if corroboration was needed, we can speak to Juror #2.

[12] Jurors #1, 2, and 9 were isolated from each other and the remaining jurors, pending the Court's consultation with counsel.

[13] As reflected in the transcript from the afternoon of February 18, 2021, (the Transcript") the Court convened with counsel in the absence of the jury, confirmed the process that would be used, questioned four of the jurors and ultimately concluded that Jurors #1 and #9 needed to be excused, which was done.

[14] Importantly, with full input and concurrence of counsel, each of the remaining eleven jurors was advised separately that Jurors #1 and #9 had been excused and then asked to confirm:

> "... yes or no, that no undue influence has been exerted on you and that you remain confident and able to fulfill your oath and try the Accused faithfully and give a true verdict according to the evidence and my instructions to you on the law."
>
> All eleven jurors confirmed without any words of qualification. (Transcript, pp. 50-56)

[15] Final Instructions were completed between 7:30 and shortly after 8 pm that evening, following which the jury was sequestered at the hotel without any evening deliberations. This enabled written copies of the Final Instruction and Decision Tree to be distributed, along with the Exhibits, and for the jury to get a fresh start at 9 am Friday.

[16] The only question raised by the jury on Friday, February 19, 2021 involved clarification of the reference at the end of the Jury Instruction to what "polling" meant. This was explained at about 2 pm and deliberations continued.

[17] At approximately 6 pm the jury officer alerted that the Jury have reached a verdict. Everyone was convened by 6:55 pm. The foreperson provided their Guilty verdict; the jurors were polled separately to confirm their agreement and then discharged.

[18] Sentencing dates for June 1 to 4, 2021 having later been confirmed, Counsel for Defence wrote on May 20, 2021, to request postponement of the sentencing hearing to allow this application for mistrial or investigation, pending a conviction appeal.

[19] The Brief of Defence notes that the anonymous letter was delivered by mail to his office on March 3, 2021 and read by counsel that afternoon.

[20] I decline to set out the text of the anonymous letter. In the Application, I directed that a true copy with the envelope be placed in a larger sealed envelope, marked as Exhibit I-*1* with directions that it not be opened without authorization of this Court or the Court of Appeal. Recognizing the concerns of Crown that the letter may well warrant investigation, the court does not wish to undermine the secrecy of jury communications. The enduring status of a sealing order and publication ban may be subject of further proceedings.

[21] However, to deal with the issues currently before me, I will summarize that five points were listed to justify the view of an alleged juror who chose to remain anonymous that Mr. Barton deserves an appeal. Of those five brief points, even the Defence appears to acknowledge that the first three have no relevance. The last two allege that the presumption of innocence was not given and that Mr. Barton was not given the same respect as the victim without any specifics.

III. Position of the Defence

[22] The Defence asserts that the circumstances support investigation at Queen's Bench either to declare a mistrial before sentencing or in any event to obtain juror recollections post-verdict which may assist an appeal. The oral submissions downplayed the text of the anonymous letter, relying only on points 4 and 5 as corroboration of a concern that arose but was allegedly curtailed during questioning on February 18 as reflected in the Transcript.

[23] As to jurisdiction to consider mistrial post-verdict and jury discharge, Defence fairly acknowledges the issue whether the court is *functus* post verdict and jury discharge, citing the leading case of ***R v Burke***, [2002] 2 SCR 857. Justice Major addressed the common law power to declare a mistrial in order to prevent a miscarriage of justice based on examination of surrounding circumstances as relates to correction of a mis-recorded verdict. The injustice to an accused must be balanced against a variety of factors including: seriousness of the offence, protection of the public, and bringing the guilty to justice (para 75).

[24] Although most decisions including ***R v Ferguson***, 2006 ABCA 36 and ***R v Halcrow***, 2008 ABCA 319 confirm a narrow interpretation of this jurisdiction, Defence cites ***R v Effert***, 2009 ABQB 380 at para 23, where the court asserted that these cases were facts driven.

[25] Based on the Transcript and the later corroboration from the anonymous letter, the Defence urges the court to conclude: that the author alleged to be Juror #1 was alerting the court that Juror #9 was not upholding his oath, not following instructions, and Juror #1 could provide the court "with ample evidence of misconduct on the part of several jurors".

[26] Defence asserts that the evidence supports that:

1. Juror #9 admitted to being quite vocal in the jury room and during breaks in the case;

2. According to Juror #1, he was actively lobbying others to convict Mr. Barton;

3. His opinion would likely have carried considerable weight.

Any other interpretation would be naïve.

[27] Defence seeks to invite Juror #1 to an inquiry to confirm if she is the author and to explain her allegations in detail including whether Juror #9 jettisoned Mr. Barton's presumption of innocence and lobbied other jurors to find Mr. Barton guilty.

[28] Thereafter, Defence would request that Juror #9 and the remaining jurors be asked to respond to determine whether the allegations are *likely* true as would support mistrial on the basis of jury misconduct.

[29] Alternatively, if the court is *functus* then defence urges a similar inquiry to prepare a timely record for review by the Court of Appeal. Referencing ***R v Martin***, 2013 NBQB 321 with citations of ***R v Bains***, 2013 ONSC 950 (***Bains SC***), aff'd 2015 ONCA 677 (***Bains CA***) and relying on ***R v Phillips***, 2008 ONCA 726 and ***R v Lewis***, 2012 ONSC 1074, aff'd 2017 ONCA 216 (***Lewis CA***) the strong evidentiary foundation supports discretion to conduct a post-verdict inquiry.

[30] Defence does not have to actually prove a reasonable apprehension of bias at this stage. It is sufficient to establish that the views and influence exerted by Juror #9 on the remaining jurors constituted extrinsic information which needs to be re-assessed as a matter of fairness.

[31] Jury secrecy only applies to the sequestered deliberations both at common law and as expressed in s. 649 of the Code: ***R v Pan***, 2001 SCC 42 at para 88 as cited in ***R v Levin,*** 2014 ABQB 113 at para 40. Communications at issue here arose before deliberations began; the discussions leading to a verdict can be protected by questions which focus on extrinsic pre-deliberations conduct.

[32] Protection of secrecy to allow for candour cannot justify unfairness and the rationale of protection from harassment, censure and reprisals are not very compelling in a large urban centre. Moreover, the Court already invaded the secrecy of jury discussions by its questioning on February 18, 2021 and the assurances of no undue influence are insufficient because that term was not explained to each juror. This Application simply pursues what was disclosed in the Transcript as reinforced by the anonymous letter.

[33] Finally, the defence asserts that inquiry at this stage is preferable to appointment by the Court of Appeal of a Special Commissioner, in part because of a heavier onus on Mr. Barton and the risks attendant on delay. The lapse of over three months falls within the context of a complicated matter and the impact on memories is a matter of weight.

IV. Position of the Crown

[34] The Crown argues that the law is well settled that a trial judge is *functus* to vary a verdict and declare a mistrial after the jury has rendered its verdict and been discharged, except to correct an erroneously entered verdict: ***Burke,*** at paras 44-52. A series of cases have supported the limited scope for correction, including ***Ferguson*** and ***Halcrow*** from the Alberta Court of Appeal. This case is demonstrably well beyond a cut-off point as to a trial verdict. An application for mistrial cannot await the verdict of a jury: ***R v Henderson,*** 2004 CarswellOnt 4169 (ONCA)

[35] In terms of convening an inquiry to prepare a record for a pending appeal, again the constraints are well-articulated by decisions, relying on ***Phillips,*** and cannot be extended to the

circumstances alleged in this matter, even where jury misconduct such as an apprehension of bias is alleged post-verdict.

[36] As to factors here which speak against any exercise of discretion, the Crown disputes any assertion that the dynamics between jurors on February 18, 2021 can be treated as extrinsic to the secrecy of jury communications in reaching a verdict. An inquiry would unavoidably intrude upon jury secrecy: ***Pan***, at paras 123-126; ***Bains SC***, at para 20*; see also* ***R v Jojic***, 2010 BCCA 577 at para 13. The purposes of jury secrecy apply to all discussions outside the court room, not just during sequestration.

[37] Any input from Juror #9 cannot be characterized as extrinsic: he was a sworn juror and his views were intrinsic to discussions. The excusing of jurors does not change their input at risk that secrecy no longer applies to the point up to their departure. The Transcript reflects the process under s. 644 as required to deal with jury complaints.

[38] In addition:

1. After being advised that Jurors #1 and #9 had been discharged, the eleven remaining jurors confirmed their commitment to their oaths; nothing supports any inference now argued by Defence that they may have been unaware of the meaning of undue influence.

2. Reliability of subsequent juror accounts may be tainted by faded memories, emotion, or any number of human responses: ***Ferguson***, at para 46; ***R v Pan,*** 1999 CarswellOnt 934 at para 172 (CA);

3. Too much time has passed to obtain reliable disclosure from the jurors, due to likely exposure to media or other contacts: ***Burke,*** at para 90. even three days has been noted as "substantial": ***Burke,*** at para 81;

4. The anonymous letter is an unreliable source of information and does not disclose a basis for inquiry: The first three points were irrelevant and the last two are speculative and vague.

V. Analysis

Criminal Code

[39] The following provisions of the *Criminal Code* have some relevance to the assessment of these circumstances, including where the court has discharged jurors before deliberations begin:

1. Section 644 empowers discharge of a juror for "... illness or other reasonable cause";

2. Section 649 prohibits disclosure of "any information relating to the proceedings of the jury when it was absent from the courtroom that was not subsequently disclosed in open court..."

In addition

3. Section 683(1)(e) expresses the power of the Court of Appeal to refer a local investigation to a special commissioner for inquiry and report.

Mistrial

[40] I will deal first with my jurisdiction as the trial judge to declare a mistrial. At this stage, a verdict has been rendered and extant for more than three months. Although the Defence critiques the narrow scope for inquiry set out in ***Burke***, the case law is quite settled.

[41] There is no justification to consider whether an exception should arise on the allegations here, particularly given the tenuous nature of the complaint: anonymity extends from the absence of a name and signature to no return address or means of contact; the author could conceivably be a contact acting with or without the knowledge or support of former Juror #1. Courts attribute little credence to unsolicited comments of an author who is unwilling to self-identify in an apparent effort to be immunized from ever being asked to explain those comments.

[42] I am further informed by ***R v Healy***, 2020 ABCA197 where the Court of Appeal upheld the trial judge who declined to inquire whether jurors conducted deliberations while separated, in part because there was no evidentiary foundation to indicate a breach of instructions to only deliberate together. Although the jury behaviour in that case may have been concerning, the integrity of the jury and the administration of justice remained intact.

[43] From a full review of the case law, this court simply lacks jurisdiction to investigate the alleged basis for a mistrial at this point.

Record for Appeal

[44] On the question of an inquiry to establish a record for the Court of Appeal, a number of fundamental issues arise that are integral to jury trials. The common law addresses jury secrecy on all matters intrinsic to the deliberation process. Section 649 precludes disclosure of any information where jurors are absent from the court room. I do not interpret the reference in ***Levin*** as to the quote from ***Pan,*** para 88 as endorsement of a restriction on the scope of jury secrecy. Even as an *obiter* comment in dealing with the *O'Connor* application at issue, it cannot be supportive of a narrow scope to be applied to protection of jury deliberations.

[45] At minimum s. 649 informs of a broad scope of information which is intrinsic to the deliberations process of free and frank debate. In addition to promoting candour and finality, secrecy protects jurors from harassment, censure and reprisals and public confidence in the administration of justice is preserved: ***Bains CA,*** at para 67. I am unpersuaded that large urban centres diminish the risks associated with these important policy objectives.

[46] The cases do not carve out a temporal distinction between the exchange of views or concerns during the trial as non-confidential because the panel has not yet been sequestered to reach a final verdict: ***Pan,*** at paras 189 and 205. It is unrealistic to expect jurors to refrain from any discussion of what they hear during the trial. As occurred here, jurors are typically advised in Opening Instructions that they may discuss the case together in the jury room with caution against expressing views too early or strongly to make it easier to change one's mind. That advice recognizes that jurors will discuss the case during the trial; there can be no principled basis to distinguish protection of views exchanged among jurors before or after sequestration.

[47] As to the argument that the Transcript already exhibits the invasion of jury secrecy, that sort of questioning is integral to the statutory responsibility under s. 644 to determine whether a juror needs to be discharged for reasonable cause. That process does not undermine protection of jury secrecy under common law and s. 649. Any analogy to post-verdict inquiry is inapt.

[48] The content of the letter does not even hint that any extrinsic material or commentary was introduced to the jury. The last two points allege an interpretation of attitude or approach leading into the final assessment as would logically link to the whole purpose of confidentiality: to promote an open and candid exchange of views in arriving at a fair verdict based on the evidence and the law.

[49] Having addressed the composition of the jury under s. 644 as reflected in the Transcript, and notwithstanding the descriptions extrapolated by the Defence, I decline to make any interpretations or findings as sought. The circumstances here provide no grounds for the court to craft questions on inquiry extrinsic to jury deliberations in order to supplement the Record for Appeal.

Discretion

[50] At risk of overlap with the reasons expressed against further inquiry for mistrial or preparation of a record for appeal, I will address some of the remaining points which relate to the exercise of any residual discretion. In brief review of the factors noted by Major J in ***Burke***, the risk of miscarriage of justice is entirely speculative. The offence is serious, and relates to protection of vulnerable members of the community and a verdict of accountability rendered by a jury of peers.

[51] I note the following additional factors speak against convening a further inquiry by the trial judge:

1. The risk of potential bias was raised directly in the Transcript (Page 44, ll. 33-38),
    a. It was always contemplated that all remaining jurors would be asked whether what they have heard would jeopardize their ability to fulfill their oath (Page 3, ll. 22-27 and Page 5, ll. 34-38);
    b. Counsel provided input on wording, including the specific use of the term “undue influence” (Page 45-46, ll. 17-16);
2. The jurors were also polled after the verdict was rendered, as was explained to them in advance;
3. The letter cannot support re-opening the February 18 questioning issue at this stage: it is an anonymous communication and was delivered to the Defence 12 days after the verdict;
4. If prepared by Juror #1 (a matter of speculation), her perspective written post-verdict is difficult to isolate from her strongly expressed views which led to her discharge; at least three of the five points raised are irrelevant and the others are unsupported generalizations;
5. The Transcript questioning discloses the conflict between Juror #1 and #9, (Page 42, ll.12-13, 34-37; Page 43, ll. 11-22) not with other jurors. The Transcript is available for review by the Court of Appeal, along with the letter if they so order;
6. Since the time of their discharge, the eleven jurors have been entitled to access media coverage and views of non-participants; equally they remain at liberty to compartmentalize the whole experience as best meets their personal needs.

[52] The Court cannot ignore the potential impact on the jurors if they were obliged to re-attend at this point without strong justification. The circumstances of this case obliged these lay persons to see and hear evidence that is undeniably disturbing. After rendering their verdict jurors were urged to seriously consider the counselling services offered in the materials provided to them by the jury officer. It is difficult to anticipate the risk of a proposed inquiry some months later as may impact the coping skills that these former jurors have set in place to get on with their lives.

[53] Further delay in gathering information for the Court of Appeal is offset by all the factors as reviewed. Similar concerns have been identified in prior decisions: ***Lewis CA,*** at para 44.

[54] As expressed by Justice Veit in ***Effert,*** at para 37: "… the objectivity of a review by a group of judges who were not involved in the trial more clearly achieves the standard of excellence towards which the criminal justice system strives...". If an appeal panel determines that further investigation is required, then Section 683(1)(e) is available.

[55] In assessing the impact of the circumstances on the administration of justice, a verdict has been rendered and Mr. Barton remains entitled to pursue his full rights of appeal.

VI. Conclusion

[56] In summary, I have concluded that:

1. I am *functus* to conduct an inquiry for the purposes of any application for Mistrial.
2. I do not have jurisdiction to order a post-discharge inquiry into the contents of the letter received by Defence on March 3, 2021 for the purpose of creating a record for appeal.
3. In all events, having regard to all the circumstances, I am not prepared to exercise any residual discretion to conduct such an inquiry in this matter.

Heard on the 1st and 2nd day of June, 2021.
Dated at the City of Edmonton, Alberta this 4th day of June, 2021.

S.D. Hillier
J.C.Q.B.A.

Appearances:
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