SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Colpitts*, 2017 NSSC 200

Date: 2017-07-26
Docket: CRH 346068
Registry: Halifax

Between:

Robert Blois Colpitts and Daniel Frederick Potter

Applicants/Defendants

v.

Her Majesty the Queen

Respondent

MID-TRIAL RULING
APPLICATION FOR A MISTRIAL

Judge:	The Honourable Justice Kevin Coady
Heard:	July 18, 2017, in Halifax, Nova Scotia
Written Decision:	July 26, 2017
Counsel:	James Martin, Mark Covan and Scott Millar, for the Crown Brian H. Greenspan and Jane O'Neill, Q.C. for Daniel Potter R. Blois Colpitts, Self-Represented

By the Court:

[1] On July 4, 2017 Mr. Potter's counsel wrote to the Court with the following advice:

> Now that we have confirmation that you intend to resume the trial we will be moving for a mistrial and a stay of proceedings.
>
> It is our position that Mr. Potter's ability and right to make full answer and defence has been prejudiced. Further, it is our position that fairness and the appearance of fairness have been irretrievably compromised during the course of the trial. We will argue that Mr. Potter's rights under Section 7 of the Charter have been infringed. We will also rely on Section 11(b) of the Charter delay as set out by the Supreme Court of Canada in *R. v. Jordan* and *R. v. Cody*.

On July 5, 2017, the Court responded as follows:

> Next week I will be prepared to discuss whether I am going to hear your mistrial application. I will hear short, oral submissions as soon as Mr. Colpitts' evidence is completed. At that time, I will expect you and Mr. Greenspan to articulate why you feel that 'Mr. Potter's ability and right to make full answer and defence has been prejudiced and that fairness and the appearance of fairness have been irretrievably compromised during the course of this trial.'

[2] This exchange took place after a three-month break in this trial and days before the commencement of the 145th day of trial. The Crown's case was complete and Mr. Colpitts was set to face a second day of Crown cross-examination. On July 10th, Mr. Colpitts advised the Court that he would be joining Mr. Potter's Application and he has since filed the appropriate Notice. This ruling

does not address mistrial *per se* but, rather, it is about whether this Court will entertain such an application.

[3] It is noteworthy that these Defendants have advanced a significant number of motions during the entirety of this proceeding. These motions have consumed lengthy blocks of time and, for the most part, were not particularly successful. Many of these motions produced significant delay without any corresponding benefits to the trial process. Over the past three-plus years, this Court agreed to hear every application advanced by the Defendants without question. Recent statements by Canadian Courts suggest trial judges should take greater control of trials in an effort to achieve efficiency within the rubric of a fair trial. Twenty-plus years ago, then Chief Justice Lamer commented that criminal trials were becoming so long and complex that they risked collapsing under their own weight. Requiring leave on potentially frivolous or questionable matters is but one way to respond to Chief Justice Lamer's concerns.

[4] The Defendants suggest I am required by law to hear their mistrial applications on their merits. The following statement appears at paragraph 11 of Mr. Potter's notice:

> [11] The Trial Judge's letter of July 5, 2017 places the onus on the accused to justify in advance a position the accused wishes to advance in the same manner

> that the Trial Judge required a demonstration of relevance by Mr. Colpitts prior to calling his witnesses. A trial judge cannot refuse to hear a mistrial application, just as a trial judge cannot refuse to hear an evidentiary objection. Both amount to an improper declination of jurisdiction that compromises the fairness of the trial: *R. v. Garofoli,* [1990] 2 S.C.R. 1421 at 1449;

[5] The Defendants argued orally that support for their position is found in *R. v. DeSousa*, [1992] 2 S.C.R. 944, and, in particular, the following words of Justice Sopinka:

> In exercising the discretion to which I have referred the trial judge should not depart from these policies unless there is a strong reason for so doing. In some cases the interests of justice necessitate an immediate decision. Examples of such necessitous circumstances include cases in which the trial court itself is implicated in a constitutional violation as in *R. v. Rahey*, [1987] 1 S.C.R. 588, or where substantial on-going constitutional violations require immediate attention as in *R. v. Gamble* [1988] 2 S.C.R. 595.

[6] I do not find this language to be of any assistance to the Defendants. Further, there is ample and recent authority for the approach taken by this Court.

[7] Justice Casey Hill of the Superior Court of Justice of Ontario, in an article of April 2012, National Judicial Institute, entitled *The Duty to Manage a Criminal Trial*,[1] stated at paragraph 79:

> The starting point is simple. Justice must be done. The defendant is entitled to a fair trial: and, which is sometimes overlooked, the prosecution is equally entitled to a reasonable opportunity to present the evidence against the defendant. It is not

[1]This paper was relied on in the following trial and appellate court decisions: *Abrams v. Abrams*, 2010 ONSC 2703, *R. v. Auclair*, 2013 QCCA 671, [2013] Q.J. No.. 3349; *R. v. Loree*, 2014 SKQB 186, [2014] S.J. No. 371; and *R. v. Bordo*, 2016 QCCS 477, Q.J. No. 839.

> however a concomitant of the entitlement to a fair trial that either or both sides are further entitled to take as much time as they like, or for that matter, as long as counsel and solicitors or the defendants themselves think appropriate. Resources are limited. The funding for courts and judges, for prosecuting and the vast majority of defence lawyers is dependent on public money, for which there are many competing demands. Time itself is a resource. Every day unnecessarily used, while the trial meanders sluggishly to its eventual conclusion, represents another day's stressful waiting for the remaining witnesses and the jurors in that particular trial, and no less important, continuing and increasing tension and worry for another defendant or defendants, some of whom are remanded in custody, and the witnesses in trials which are waiting their turn to be listed. It follows that the sensible use of time requires judicial management and control.
>
> …
>
> The principle therefore, is not in doubt. This appeal enables us to re-emphasize that its practical application depends on the determination of trial judges and the co-operation of the legal profession. Active, hands on, case management, both pre-trial and throughout the trial itself, is now regarded as an essential part of the judge's duty. The profession must understand that this has become and will remain part of the normal trial process, and that cases must be prepared and conducted accordingly.

And further, at paragraph 85:

> While recognizing that 'no trial is perfect', discharge of the duty to manage a criminal trial contemplates keeping the proceeding focused, ensuring that counsel call only relevant and admissible evidence, and that court time is not wasted with unnecessary down-time or lengthy arguments with jurors excluded from the courtroom.

[8] Similar language is found in *R. v. Hamill*, [1984] 6 W.W.R. 530, 1984 CarswellBC 759, a decision of the Court of Appeal for British Columbia released over thirty years ago. Justice Esson stated at paragraph 87:

> In those cases where the accused does apply to exclude the evidence, it will be for the trial judge to decide what procedure should be followed, but, at the least, counsel for the accused should be required to state with reasonable particularity

> the ground upon which the application for exclusion is made. That much is essential for an orderly trial of the issue. It follows that, if the statement of grounds does not disclose a basis upon which the court could make an order excluding the evidence, the application may be dismissed without hearing evidence.

This passage was reiterated by the same Court in *R. v. Vukelich*, [1996], 108 C.C.C. (3d) 193 at paragraph 25.

[9] In *Chippewas of Mnjikaning First Nation v. Ontario (Minister of Native Affairs)*, 2010 ONCA 47, Justice O'Connor stated at paragraph 232:

> In R. v. Felderhof (2003), 68 O.R. (3d) 481 (C.A.), at para. 40, this Court said:
>
> Whatever may have been the case in the past, it is no longer possible to view the trial judge as little more than a referee who must sit passively while counsel call the case in any fashion they please. Until relatively recently a long trial lasted for one week, possibly two. Now, it is not unusual for trials to last for many months, if not years. Early in the trial or in the course of a trial, counsel may make decisions that unduly lengthen the trial or lead to a proceeding that is almost unmanageable. It would undermine the administration of justice if a trial judge had no power to intervene at an appropriate time and, like this trial judge, after hearing submissions, make directions necessary to ensure that the trial proceeds in an orderly manner. I do not see this power as a limited one resting solely on the court's power to intervene to prevent an abuse of its process. Rather, the power is founded on the court's inherent jurisdiction to control its own process.

[10] The Supreme Court of Canada, in *R. v. Cody*, 2017 SCC 31, touched on the trial judge's responsibility to maintain control of the trial process by assessing the legitimacy of the parties' actions. The Court stated at paragraphs 31 to 35:

> The determination of whether defence conduct is legitimate is 'by no means an exact science' and is something that 'first instance judges are uniquely positioned to gauge' (*Jordan*, at para. 65). It is highly discretionary, and appellate courts must show a correspondingly high level of deference thereto. While trial judges

should take care to not second-guess steps taken by defence for the purposes of responding to the charges, they must not be reticent about finding defence action to be illegitimate where it is appropriate to do so.

Defence conduct encompasses both substance and procedure -- the decision to take a step, as well as the manner in which it is conducted, may attract scrutiny. To determine whether defence action is legitimately taken to respond to the charges, the circumstances surrounding the action or conduct may therefore be considered. The overall number, strength, importance, proximity to the Jordan ceilings, compliance with any notice or filing requirements and timeliness of defence applications may be relevant considerations. Irrespective of its merit, a defence action may be deemed not legitimate in the context of a s. 11(b) application if it is designed to delay or if it exhibits marked inefficiency or marked indifference toward delay.

As well, inaction may amount to defence conduct that is not legitimate (Jordan, at paras. 113 and 121). Illegitimacy may extend to omissions as well as acts (see, for example in another context, *R. v. Dixon*, [1998] 1 S.C.R. 244, at para. 37). Accused persons must bear in mind that a corollary of the s. 11(b) right ‘to be tried within a reasonable time’ is the responsibility to avoid causing unreasonable delay. Defence counsel are therefore expected to ‘actively advanc[e] their clients' right to a trial within a reasonable time, collaborat[e] with Crown counsel when appropriate and ... us[e] court time efficiently’ (*Jordan*, at para. 138).

This understanding of illegitimate defence conduct should not be taken as diminishing an accused person's right to make full answer and defence. Defence counsel may still pursue all available substantive and procedural means to defend their clients. What defence counsel are not permitted to do is to engage in illegitimate conduct and then have it count towards the *Jordan* ceiling. In this regard, while we recognize the potential tension between the right to make full answer and defence and the right to be tried within a reasonable time -- and the need to balance both -- in our view, neither right is diminished by the deduction of delay caused by illegitimate defence conduct.

We stress that illegitimacy in this context does not necessarily amount to professional or ethical misconduct on the part of defence counsel. **A finding of illegitimate defence conduct need not be tantamount to a finding of professional misconduct. Instead, legitimacy takes its meaning from the culture change demanded in *Jordan*. All justice system participants -- defence counsel included -- must now accept that many practices which were formerly commonplace or merely tolerated are no longer compatible with the right guaranteed by s. 11(b) of the Charter.**

[*Emphasis added*]

The Court stated further, at paragraph 38:

> In addition, trial judges should use their case management powers to minimize delay. For example, before permitting an application to proceed, a trial judge should consider whether it has a reasonable prospect of success. This may entail asking defence counsel to summarize the evidence it anticipates eliciting in the voir dire and, where that summary reveals no basis upon which the application could succeed, dismissing the application summarily (*R. v. Kutynec* (1992), 7 O.R. (3d) 277 (C.A.), at pp. 287-89; *R. v. Vukelich* (1996), 108 C.C.C. (3d) 193 (B.C.C.A.)). And, even where an application is permitted to proceed, a trial judge's screening function subsists: trial judges should not hesitate to summarily dismiss 'applications and requests the moment it becomes apparent they are frivolous' (*Jordan*, at para. 63). This screening function applies equally to Crown applications and requests. As a best practice, all counsel -- Crown and defence -- should take appropriate opportunities to ask trial judges to exercise such discretion.

It is this approach that I will utilize in determining whether these mistrial applications will proceed or be dismissed summarily.

[11] It is well established that a mistrial is a remedy of last resort. It is only available when Defendants can establish that irreparable prejudice has occurred during a trial. In *R. v. Burke*, 2002 SCC 55, Justice Major commented at paragraphs 74 and 75:

> There are broad common law powers to declare a mistrial. Mistrials have been ordered or considered as a potential solution in a range of situations: where a jury member is discharged (*R. v. Taillefer* (1995), 40 C.R. (4th) 287 (Que. C.A.), leave to appeal refused, [1996] 1 S.C.R. x; and *R. v. Lessard* (1992), 74 C.C.C. (3d) 552, [1992] R.J.Q. 1205 (C.A.), leave to appeal refused, [1992] 3 S.C.R. vii); where inadmissible evidence is adduced during trial which might influence the jury (*R. v. Woods* (1989), 49 C.C.C. (3d) 20 (Ont. C.A.), leave to appeal refused, [1990] 2 S.C.R. xii); where there is inadmissible communication between a witness and a juror causing prejudice (*R. v. Martineau* (1986), 33 C.C.C. (3d) 573 (Que. C.A.)); where disclosure is made immediately prior to or during the trial

> (*R. v. Antinello* (1995), 97 C.C.C. (3d) 126 (Alta. C.A.); *R. v. T. (L.A.)* (1993), 84 C.C.C. (3d) 90 (Ont. C.A.)); and where the jury had already rendered a verdict but had not decided on the issue of mental disorder, making it impossible for the judge to enter the intended conviction without 'taint' (*R. v. Rondeau*, [1998] O.J. No. 5759 (QL) (Gen. Div.)). The common theme running through this case law is the test of whether there is a [TRANSLATION] 'real danger' of prejudice to the accused or danger of a miscarriage of justice: *Lessard*, *supra*, at p. 562 C.C.C.
>
> In declaring a mistrial, the trial judge therefore turns his or her mind to the question of whether a mistrial is needed to prevent a miscarriage of justice. This determination will necessarily involve an examination of the surrounding circumstances. Injustice to the accused is of particular concern, given that the state with all its resources acts as the singular antagonist of the individual accused in a criminal case. This factor should be balanced against other relevant factors, such as the seriousness of the offence, protection of the public and bringing the guilty to justice. It may be fitting to allow the announced verdict to stand where the period the accused has been at liberty and under the mistaken impression that he or she had been acquitted has been lengthy, and where the charge is not so egregious as to bring the administration of justice into disrepute. As has already been stated, the trial judge is in the best position to assess the circumstances of each individual case and select the most appropriate remedy.

The language "real danger of prejudice" or a "danger of miscarriage of justice" indicates the height of the threshold for granting a mistrial.

[12] Applications for a mistrial call for the exercise of judicial discretion. In *R. v. Chan*, 2009 ABCA 88, Justice Ritter spoke of this at paragraph 16:

> The granting of a mistrial application involves the exercise of discretion and appellate courts should proceed with caution, not lightly interfering with the trial judge's discretion. However, if the discretion was based on an incorrect principle or resulted in a miscarriage of justice, the appellate court may take corrective action: *R. v. Barrette* [1977] 2 S.C.R. 121.

[13] In *R. v. MacDonald*, 2016 ABQB 154, Justice Hughes heard an Application by the Crown for an *Order for Certiorari with Mandamus* in aid to quash the declaration of a mistrial. He canvassed the principles at paragraph 30:

> A trial judge should only declare a mistrial in the 'clearest of cases'. The remedy of a mistrial contemplates a fatal wounding to the administration of justice which cannot be cured by remedial measures.

A mistrial is an exceptional remedy. It is the trial judge who is best suited to determine whether such applications succeed or fail.

[14] The Defendants seek much more than a mistrial. They also seek a stay of the charges alleging breaches of Section 7 and 11(b) of the *Canadian Charter of Rights and Freedoms*. The only breach the Defendants allege is delay. In Mr. Potter's letter dated July 4, 2017 (Exhibit 183) the following statement appears:

> Any reasonable person, well-informed and viewing the circumstances objectively, would have a reasonable apprehension that Mr. Potter has not and cannot receive a fair trial should this trial continue. A mistrial should be declared. Any person would also view the years of delay as unreasonable both for Mr. Potter and the administration of justice in the Province. As a result, a stay of proceedings is warranted under section 24(1) of the Charter.

[15] This amounts to a co-mingling of the principles of post-charge delay and mistrial. As the parties will recall, I heard an extensive delay Application in April 2015 prior to the Supreme Court of Canada's decisions in *R. v. Jordan, supra,* and

R. v. Cody, *supra*. Initially one week was scheduled. The Application, which proceeded along the lines set out in *R. v. Morin*, [1992] 1 S.C.R. 771, ultimately extended from April 20, 2015 until July 10, 2015. A 104-page decision was released on August 12, 2015.

[16] In February 2016, Messrs. Potter and Colpitts filed Notices seeking relief for delay pursuant to Sections 7, 11(b) and 24(1) of the *Charter*. Essentially, they want to argue that *Jordan* and *Cody* have significantly altered the principles respecting post-charge delay and, as such, a new hearing is warranted. The Defendants argued I should stop the trial to hear the Application. The Crown took the position that the Application should not be heard until the trial proper is completed. I ruled the best way forward "is to continue with the trial and deal with these Applications at the end of this trial." (*R. v. Colpitts*, 2017 NSSC 40). The issue of timing has been settled. Consequently, I will not be considering delay in this leave Application.

[17] Applications for mistrial generally involve events related to trial evidence or procedure. Several such examples appear at paragraph 74 of *R. v. Burke, supra* (paragraph 11 herein). The Applications before me are different in that it is the conduct of the trial judge that is being scrutinized. In most applications for mistrial based on the conduct of the trial judge, the issue is alleged bias or inappropriate

intervention in the conduct of the trial. The Applications of Messrs. Potter and Colpitts are different, and apparently unique.

[18] The cornerstone of these Applications involves remarks I made when I adjourned this trial from March 28, 2017 to July 10, 2017. The language I used was as follows:

> This morning I have an announcement to make to all of you. It is one I make with a great deal of regret.
>
> As you know, I was assigned to be your Trial Judge in January 2014 and since that time this prosecution has been primarily my sole focus.
>
> Since that time, I have heard and decided some 18 interlocutory and mid-trial Applications.
>
> And as you also know, I have sat on this Trial for in excess of 140 days since November 26, 2015.
>
> The evidence in this trial has been very challenging, both in content and volume. It has taken a great deal of perseverance to stay on top of things.
>
> I must advise you that this trial has, and continues to have, a significant effect on my personal health and well-being. The consequences of ignoring these concerns is not an option.
>
> The advice I am receiving is that I must take a substantial break to recover, and to be able to complete this trial.
>
> I will be, as of today, on leave from this case and the Court for a period of three months.
>
> We will return on Monday, July 10, 2017 at 9:30 a.m.
>
> To Mr. Colpitts and Mr. Potter, I regret that this development will extend the uncertainty. I expect this to impact you and your families, which is most unfortunate.
>
> Ms. O'Neill, I expect this delay to affect your overall schedule and I regret that.

> And to Mr. Millar, Mr. Covan and Mr. Martin, I know you want this case completed as soon as possible. I recognize this development is something you could do without. I regret that inconvenience.
>
> I want you to know that I made this decision very reluctantly.
>
> And I want to assure you that I had no option. If I don't follow the advice I am receiving, the consequence could be more challenging when it comes to completing the trial.
>
> Thank you all.

[19] Mr. Potter's counsel urged me to listen to my words rather than just reading them. He suggested listening would allow me to appreciate the profound impact these words had on the Defendants. Essentially, he argued that the way the message was delivered created a perception of unfairness and raised concerns about my ability to complete this trial. He suggested the Defendants have lost confidence in the justice system. Mr. Colpitts submitted that when he heard my words it was obvious to him that I was "suffering and troubled." Both Defendants suggested that past rulings – particularly those made during the presentation of Mr. Colpitts' defence – are now suspect, and that I should end the trial before further harm is caused.

[20] I acknowledge that I lacked a degree of composure when delivering the above remarks. It was an unanticipated emotional response to temporarily shutting down the trial when I have spent so much time and energy attempting to keep the process moving forward in the face of many obstacles. That said, I do not share

the Defendants' view that either this involuntary show of emotion, or the adjournment that followed, has irretrievably compromised the actual or apparent fairness of the trial, or prejudiced the ability of either Defendant to make full answer and defence.

[21] Judges are human beings. We are not immune to the physical and mental demands inherent to long trials. Those demands are heightened where, as here, the evidence is of a highly complex and technical nature, the trial involves self-represented litigants, and the proceeding spans a period of years. There may be occasions where the stresses of a long trial adversely impact the health of one or more of the participants and a recess is necessary to resolve those issues. The fact that a proceeding is interrupted for a period of time to address a trial judge's health concern – whether triggered by trial-related stressors or other factors entirely – does not, without more, create a presumption that previous rulings were unfairly influenced by that health issue. Any suggestion by the Defendants that the rulings I made during Mr. Colpitts' defence were motivated by anything other than this Court's duty to prevent Mr. Colpitts from wasting judicial resources is entirely speculative and, in my view, is not supported by the record.

[22] I must also address the Defendants' submission that concerns I raised, primarily in the early stages of the Crown's case, about my understanding of some

very technical evidence indicate that my grip on the evidence is compromised. Again, this is nothing more than speculation. Trial judges are entitled to ask questions, raise concerns about the evidence and, if necessary, put a party on notice that more coherent evidence is needed if that party hopes to establish a fact in issue. In any event, all of the parties in this case will be in a position to evaluate this Court's grasp of the evidence when they review my final decision.

[23] The test for a mistrial is whether there is a "real danger of prejudice to the accused or danger of a miscarriage of justice". I find nothing in the Defendants' submissions that supports either proposition. The Defendants' motion for leave is entirely speculative if not frivolous. These Applications for a mistrial have absolutely no chance of success. The suggestion that the tone and content of my recess remarks have had such an effect on the Defendants' perception is without merit. Consequently, I dismiss these Applications for Leave.

Coady, J.