SUPERIOR COURT OF JUSTICE

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TOTAL PAGES (INCLUDING COVER PAGE): Nine

MESSAGE:

CITATION: R. v. KOSSYRINE & VOROBIOV ONSC #6081
COURT FILE NO.:
DATE: 20111013

ONTARIO

SUPERIOR COURT OF JUSTICE
Toronto Region

B E T W E E N:	
HER MAJESTY THE QUEEN	*G. J. Tweney,* for the respondent
Respondent	
- and -	
DMITRI KOSSYRINE and IVGENY VOROBIOV	*L. Cohen,* for the applicant, Dmitri Kossyrine
	L. O'Connor, for the applicant, Ivgeny Vorobiov
Applicants	
	I. Fischer, for Toronto Star Newspapers Limited and Canadian Broadcasting Corporation
	HEARD: October 12 & 13, 2011

NORDHEIMER J. (orally):

[1] Mr. Kossyrine and Mr. Vorobiov seek an order banning publication of a guilty plea entered into yesterday by Mr. Ross.

[2] The applicants and Mr. Ross were all jointly charged with first degree murder and were scheduled to commence their trial about three weeks ago with jury selection. However, jury selection was postponed as a consequence of the possibility that Mr. Ross might wish to plead

guilty to the offence, a reality that only crystallized late last week. Jury selection is now scheduled to proceed next week with the two applicants remaining as accused.

[3] The applicants seek a ban on the publication of Mr. Ross' guilty plea until such time as their trial is completed. That is estimated to be about two months from now. The applicants argue that the publication of Mr. Ross' guilty plea may taint prospective jurors and colour their attitudes towards the applicants. In that regard, it should be noted that it is alleged that Mr. Ross was, in essence, the "ringleader" of a plot to murder the deceased, Glen Davis. Mr. Davis was a cousin of Mr. Ross but it is said that their actual relationship was much more akin to that of uncle and nephew. It is further alleged by the prosecution that Mr. Ross recruited the applicants, and perhaps others, to commit this murder.

[4] Notice was given to various media outlets regarding this application. Counsel for the Toronto Star and the CBC appeared on the application, admittedly on relatively short notice. Not surprisingly, the media respondents oppose the granting of a publication ban. In contrast, the Crown supports the publication ban sought by the applicants.

[5] Given the immediacy of the issue, all counsel made their submissions in a concise manner, for which I thank them. Similarly, my reasons are being delivered in a very short time frame. As a consequence, I am not able, nor do I consider it to be necessary, to engage in the type of detailed analysis of the issues raised that I did in *R. v. J.S-R.* (2008), 236 C.C.C. (3d) 519 (S.C.J.). The parties need to know where they stand in relation to this issue and the media, of course, should not have their right to report on proceedings in this court delayed for any greater period of time than a court believes is absolutely necessary in order to protect other rights. It is recognized that applications for publication bans naturally engage a balancing exercise between the rights of the press under s. 2(b) of the *Charter* and the rights of an accused to a fair trial under s. 11(d) – see *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835.

[6] In *Dagenais*, Lamer, C.J.C., at para. 73, established a two part test that had to be met in order for a publication ban to be made. That test is:

> (i) Such a ban is necessary in order to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and

(ii) The salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban.

[7] In terms of the first prong of the test, there has already been some media attention given to this case. Indeed, there was sufficient earlier media attention that both the Crown and defence had agreed beforehand that prospective jurors would be subject to a challenge for cause based on publicity. In other words, prospective jurors are already going to be subject to questioning regarding their exposure to any media reports about this case and whether, if exposed, those reports have impacted on their ability to consider the evidence fairly.

[8] The issue then is whether the publication of the guilty plea by Mr. Ross, given both its significance and its proximity to the jury selection process, will so infect the pool of prospective jurors that a publication ban is necessary to ensure a fair trial because no lesser remedy will suffice.

[9] I am not satisfied that there is a real and substantial risk that the publication of Mr. Ross' guilty plea, and all that goes with it, will so taint the pool of prospective jurors that it justifies the extreme remedy of imposing a publication ban until the trial of Mr. Kossyrine and Mr. Vorbiov reaches the stage of jury deliberations. The fact that Mr. Ross has pleaded guilty to his participation in the plan to kill Mr. Davis does not establish that either of the applicants had a role in that plan. Had Mr. Ross not pleaded guilty, the jury would, in the fullness of the trial, have heard about Mr. Ross' role in these events. They would have been called upon to reach a conclusion respecting that role. At the same time, the jury would have been told that they had to consider each of the accused persons separately and only make a finding of guilt against an accused person if they were satisfied beyond a reasonable doubt that the evidence relating to that accused person established guilt. In other words, the jurors would have been told, in effect, that if they were convinced beyond a reasonable doubt regarding Mr. Ross' role, that, by itself, would not justify the jury coming to the conclusion that either or both of the applicants was guilty. The jurors are required to reach independent and separate conclusions regarding the guilt of the applicants regardless of Mr. Ross' guilt.

[10] It is contended that if Mr. Ross' plea of guilty is published, along with the surrounding facts that he acknowledged, it will be impossible for the applicants to get a fair trial. I do not

agree. To accede to that contention, is to accept the proposition that the jurors selected to decide this case will not honour their duties and obligations as jurors. That proposition has been consistently rejected by all levels of court, most especially by the Supreme Court of Canada. *Dagenais* is one such case. Another is *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy),* [1995] 2 S.C.R. 97, where Cory J. remarked, at para. 133:

> I cannot accept the contention that increasing mass media attention to a particular case has made this vital institution either obsolete or unworkable. There is no doubt that extensive publicity can prompt discussion, speculation, and the formation of preliminary opinions in the minds of potential jurors. However, the strength of the jury has always been the faith accorded to the good will and good sense of the individual jurors in any given case.

[11] In addition, the contention that there needs to be a publication ban in order to protect the fair trial rights of the applicants ignores, or at least gives little effect to, the challenge for cause process. The fundamental rationale for that challenge process is to identify persons who have been exposed to publicity about the case, and who have formed opinions as a consequence, that they are not prepared to put aside in deciding the case. The situation here would appear to be the preeminent example of why we permit challenges for cause based on publicity. If we do not believe in the efficacy of the challenge process, then we should cease to engage in it. Until such a result is decreed, however, I consider the effectiveness of that process coupled with the recognized effectiveness of jury instructions as sufficient to ensure that a fair and impartial jury can be empanelled in this case. As Dickson, C.J.C. said in *R. v. Corbett*, [1988] 1 S.C.R. 670 at p. 693:

> Moreover, the fundamental right to a jury trial has recently been underscored by s. 11(f) of the *Charter*. If that right is so important, it is logically incoherent to hold that juries are incapable of following the explicit instructions of a judge.

[12] I would add to that the observation that a publication ban in this situation might be counterproductive to the very purpose it is intended to achieve. It seems inevitable that at some point in time the jury will learn of Mr. Ross' guilty plea. Indeed, there is every prospect that Mr. Ross will be called as a witness at the trial by the Crown. If the jurors only learn at that point of the plea, there will be no opportunity to examine whether that information causes any juror to immediately reach a conclusion of guilt regarding the applicants that is incapable of being set

aside. On the other hand, if the plea becomes known to the prospective jurors before the selection process, the impact of that information can be examined through the challenge process.

[13] In terms of the second prong of the test, the role of the media is critical to the dissemination of information to the public regarding the events that take place within the court system. In *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 Cory, J. said, at pp. 1339-1340:

> It is only through the press that most individuals can really learn of what is transpiring in the courts. They as 'listeners' or readers have a right to receive this information. Only then can they make an assessment of the institution. Discussion of court cases and constructive criticism of court proceedings is dependent upon the receipt by the public of information as to what transpired in court. Practically speaking, this information can only be obtained from the newspapers or other media.

[14] The citizens of Toronto should know that Mr. Ross has admitted to his participation in a murder that took place in this city. Like any other event within the court system, they are entitled to have that information as soon as it occurs. While a delay in the publication of that information can be justified in order to ensure that other rights are promoted, such an drastic remedy should only be resorted to if it is shown to be absolutely necessary. That showing is not been made in this case.

[15] The Crown asserts that if a publication ban is not imposed in this case, then no case will ever warrant a publication ban. Perhaps others can foresee every eventuality that might arise in the course of criminal proceedings in this country in the future, but I cannot. The fact is that the Supreme Court of Canada set a very high bar for the granting of publication orders. Whether any case can surmount that bar is a matter to be determined as each case is presented.

[16] In a similar vein, both the Crown and the defence in the course of their submissions referred to the imposition of a publication ban as being the safer route. Expressions such as "erring on the side of caution" or "out of an abundance of caution" were used in an attempt to justify the request for a ban. The test, of course, is not whether it is safer to impose a publication ban. If that were the test, then publication bans would routinely be granted. The test is whether it is necessary to do so. If we were to simply chose the safer route when these issues arise and

impose publication bans because they provide an additional preventative measure to protect the fair trial rights of the accused, it would lead to a result where the right of the public to be informed on a timely basis about significant events occurring in the justice system through the freedom of the press enshrined in s. 2(b) of the *Charter* is relegated to secondary status. That result was, of course, expressly rejected in *Dagenais*.

[17] It is at this point that I mention the ongoing concern regarding the efficacy of publication bans. It was also a concern recognized in *Dagenais*. It is more of a concern now than it was then. As I said in *J.S-R.*, at para. 60:

> That concern has only been exacerbated in the almost fifteen years since *Dagenais* was decided. We can now add to the list of holes through which information can slip the realities of blogs, podcasts, satellite radio, specialty television channels, websites such as "YouTube" and "facebook", and the ever increasing number of personal websites. Most, if not all, of these outlets lie outside any effective control by this court.

[18] Finally, I appreciate the point made by the applicants and the Crown that the proximity of this plea to the jury selection increases the risks associated with publication. I agree that that is a concern but a concern is a very much different thing than establishing a "real and substantial risk". I note in that regard that there have been many highly publicized trials conducted in this country, all of which proceeded without the imposition of publication bans.

[19] I did consider whether a narrow form of ban limited to precluding the media from mentioning the names of the applicants in conjunction with the guilty plea might be warranted. However, neither of the applicants nor the Crown saw any particular benefit to that step. I would be loathe to place a restriction on the press in the absence of any of the parties concerned seeing any utility to it.

[20] I agree with counsel for the media that the accused are entitled to an impartial jury not an uninformed jury. The fact that members of the jury may have read about this case, and the allegations in it, is only problematic if they have formed fixed opinions that they cannot disabuse themselves of. That is precisely what the challenge for cause process is designed to reveal. That process coupled with jury instructions regarding the need to decide the case based only on the

evidence heard in the courtroom and not on any other information are the type of reasonable alternative measures that are capable of preventing the risks that the applicants identify.

[21] The application for a publication ban is dismissed and the temporary ban imposed yesterday is lifted.

NORDHEIMER J.

Released: October 13, 2011

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B E T W E E N:

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- and -

DMITRI KOSSYRINE
and IVGENY VOROBIOV

REASONS FOR DECISION

NORDHEIMER J.

RELEASED: October 13, 2011