COURT OF QUÉBEC

CANADA
PROVINCE OF QUÉBEC
CITY OF MONTRÉAL
« Criminal and penal division »

N^{os}: 500-01-073832-120
500-01-073833-128

DATE : March 12, 2013

BEFORE THE HONOURABLE JUSTICE LORI RENÉE WEITZMAN, J.C.Q.

THE QUEEN
Prosecutor
v.

LUKA ROCCO MAGNOTTA
Accused

TRANSCRIPT OF A JUDGMENT RENDERED ORALLY

(including corrections)

DECISION ON A MOTION TO EXCLUDE THE PUBLIC FROM THE PRELIMINARY INQUIRY PURSUANT TO SECTION 537 (1) (h) OF THE *CRIMINAL CODE*

NOTICE: The present motion is subject to a publication ban prohibiting the publication, broadcast or transmission of any evidence in support thereof.

[1] Luka Rocco Magnotta is charged in file 500-01-073832-120 with one count of first-degree murder of J.L. on May 25th 2012, contrary to section 235 of the C*riminal Code*. He is also charged in file 500-01-073833-128 with the following 4 counts:

1. Improperly or indecently interfering with, or offering an indignity to the body or the human remains of J.L. contrary to section 182 of the C*riminal Code*;

2. Making printing publishing distributing circulating or having in his possession for publication, distribution or circulation obscene matter, contrary to section 163(1)(a) of the C*riminal Code*;

3. Making use of the mails for the purpose of transmitting or delivering anything that is obscene, indecent, immoral or scurrilous contrary to sections 168 and 169 of the C*riminal Code*; and

4. Criminal harassment of Stephen Harper and members of Parliament, contrary to section 264 (1)(3)(a) of the C*riminal Code*.

[2] Prior to the commencement of this preliminary inquiry, upon application by the accused, this court ordered that the evidence to be taken at the inquiry shall not be published in any document or broadcast or transmitted in any way as per the mandatory requirements of section 539 (1) (b) of the C*riminal Code*.

[3] By the present motion, the accused further seeks to have this court exercise its discretion pursuant to section 537 (1) (h) of the C*riminal Code*, in order to exclude members of the public during the preliminary inquiry. The section reads as follows:

> 537. (1) Powers of justice - A justice acting under this Part may :
> (h) order that no person other than the prosecutor, the accused and their counsel shall have access to or remain in the room in which the inquiry is held, where it appears to him *(sic)* that the ends of justice will be best served by so doing;

[4] The grounds supporting this motion, as presented in oral submission fall into two distinct categories.

[5] Firstly the accused submits that his medical history, combined with the medication he is taking warrant that the present preliminary inquiry be held *in camera*. In support of this argument the accused has tendered exhibits R-1 and R-2.

[6] R-1 is a copy of a letter dated March 6, 2013 signed by Dr Roy, the accused's treating psychiatrist at the Philippe-Pinel Institute in Montréal since November 21, 2012. She lists the medication presently prescribed to the accused:

- 30 mg of Mirtazapine (an antidepressant)
- 100 mg 3 times a day and 550 mg at bedtime of Quetiapine (an antipsychotic drug)
- 15 mg of Zopiclone at bedtime (medication to induce sleep)
- 2 mg of Lorazépam twice a day (a tranquilizer)
- 1 can of Ensure per day (a dietary supplement)

Dr Roy also notes that the accused's treating physician at the prison has prescribed:

- 10 mg of Dompéridone 3 times a day
- 40 mg of Pantoprazole twice a day and
- Voltaren Emulgel, an anti-inflammatory cream applied as needed.

[7] R-2 is an unsigned copy of a diagnosis dated April 3, 2003 by Dr Sooriabalan at the Rouge Valley Health System Centenary Health Center Site. It states that a patient named Eric Newman, with the same date of birth as appears on the Information/Warrant for this accused, was a 20-year-old male suffering from paranoid schizophrenia. He was discharged with a recommendation of outpatient follow-up and various medication.

[8] In the second part of his argument in support of a closed court, the accused argues that the publication ban ordered pursuant to section 539 is simply insufficient to effectively preserve his right to a fair trial. According to this argument, the level of media coverage already evidenced in this matter combined with the international scope of the coverage outside the reach of this court's jurisdiction, makes it impossible to properly shield the evidence that will be tendered at this inquiry from the Internet access of prospective jurors.

[9] In support of this argument, the defense refers to two decisions dealing with a request for exclusion of the public. In the case of *Regina V. Sayegh* (no 1)[1], in the Ontario Provincial Court, representatives from the United States media were present in the courtroom and indicated that they intended to publish the evidence given at the preliminary hearing. Judge Wallace found that in view of the absence of any measures he could take to stop the foreign media from circumventing the non-publication order, the exclusion of the public was necessary in order to protect the accused's right to a fair and impartial jury.

[10] The defense also referred to the case of *R. v. Ssenyonga*[2] in which Judge Livingstone of the Ontario Court of Justice refused to order the exclusion of the public as requested by the Crown, despite hearing expert opinion evidence from a psychiatrist who testified that the best interests of the complainants in the sexual assault case required that they not testify in open court. The judge found that the doctor's opinion

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1 [1982] O.J. 3648.
2 [1991] O.J. 2581.

evidence was not of such an "extraordinary or compelling nature" to justify a departure from the open court process.

[11] Furthermore, the defense contends that a publication ban is insufficient in scope as it allows the media to comment negatively about the accused, for example his demeanor in court, and places an undue burden on the defense and the Court to scrutinize media coverage in order to flag any excesses. As support for this argument, the defense tendered exhibit R–4 which they argue is an example of inappropriate media coverage which places the accused's fair trial rights in peril. The article written by Catherine Solyom for Postmedia News on January 10, 2013 notes that at the pretrial hearing:

> Magnotta's defense lawyer, Toronto-based Luc Leclair, will not make any admissions on behalf of his client to speed the process along. Leclair will not make an admission as to the identity of the victim, the identity of the accused or the time and date of the infraction.

[12] The defense submits that this reporting goes beyond the bounds of the publication ban as it includes reference to the evidence.

[13] According to counsel for the accused, in general, the media coverage to date has "vilified the accused" and the tenor of these reports indicates that merely restricting publication to the evidence taken at the preliminary inquiry provides only partial and thus inadequate protection for the accused's rights.

[14] On the issue of inappropriate behaviour by the media, the defense tendered exhibit R–3 which is an e-mail sent by Mr Sirois in his capacity as Director of Judicial Services in the Metropolitan area. This e-mail was sent to all counsel (both Crown and defense) involved in this matter, with a "CC" to the Court. In this correspondence, Mr Sirois refers to a meeting he had with counsel in order to discuss some logistics in the courtroom in the present matter. He explains to the lawyers that he is unwilling to unilaterally accept any specific demands regarding the courtroom set-up as these should be brought to the judge presiding the inquiry. Mr Sirois refers to a request from a journalist to have a reserved seat, which request was denied. He also refers to the presiding judge as having authorized nine places to be reserved for journalists on a first-come first-served basis, with the remaining seats available in the courtroom as well as the closed-circuit TV room on a first-come first-served basis. The defense takes issue with the "shocking" and "inappropriate" request from the media to have reserved seating.

[15] The defense refers to a balancing of interests as mandated by the Supreme Court in the *Dagenais*[3] and *Mentuck*[4] cases, and he argues that the right to a fair trial trumps

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[3] *Dagenais v. CBC*, [1994] 3 S.C.R. 835.

any other rights at stake. In view of all the circumstances, the defense claims that an *in camera* hearing is both necessary for the proper administration of justice and provides the most minimal limits on constitutional rights.

The Crown

[16] In answer to this motion, the Crown argued succinctly that there is a total absence of evidence to support the request made by the defense. Exhibits R-1 and R-2, which refer to medication taken by the accused and a diagnosis of some 10 years ago in no way provide a sufficient foundation to argue for the exclusion of the public.

[17] The prosecutor strongly disagrees with the position advanced by the defense which seeks to have a publication ban apply not only to the evidence but to anything referring to the accused in the courtroom. He points out that section 539 of the C*riminal Code* specifically refers to "evidence taken at the inquiry" and as such, the statutory restriction on publication must not be interpreted as going beyond those terms. Finally, without commenting on the appropriateness of the article filed under R–4, the Crown argues that a judicious response to a reporter overstepping, ignoring or flouting a publication ban is not the draconian exclusion of all of the public for the duration of the preliminary inquiry

Mr Bantey on behalf of the Globe and Mail, the Gazette, Médias transcontinental, Global Television Network, Gesca Ltée, CTV Inc. and the Fédération professionnelle des journalistes du Québec.

[18] Mr Bantey agrees with the defense's characterization of this case as a "high-profile matter placing our entire judicial system on display". It is particularly in view of this profile that the media strenuously oppose any exclusion which would prohibit them from being present to monitor the proceedings as they unfold.

[19] Mr Bantey takes issue with the defense position that constitutionally protected fair trial rights must trump all others. Quite to the contrary, the Supreme Court cases of *Dagenais* and *Mentuck* specifically state that no constitutional right must take precedence over another. In *Dagenais*, the Supreme Court of Canada states specifically that *Charter* 2 (b) rights and 11(d) rights enjoy equal status[5]. Thus, keeping this principle in mind, Mr Bantey argues that the case of *Sayegh*, decided in the earliest days of *Charter* interpretation in 1982, can no longer be persuasive as it predates these clear pronouncements by the Supreme Court.

[20] Mr Bantey suggested that in view of two competing yet equal rights, the judge's discretion must be applied in accordance with the test set out by the Supreme court in *Mentuck* in 1994 and reiterated in *Dagenais* in 2001, providing first instance judges with

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4 *R. v. Mentuck*, [2001] 3 S.C.R. 442.
5 *Dagenais*, paragr. 72.

a two-step test which must be met before a publication ban may be ordered. As stated in *Toronto Star*[6], the *Dagenais/Mentuck* test applies not only when dealing with discretionary orders to ban publication but to all discretionary court orders that limit freedom of expression and freedom of the press in relation to legal proceedings.

[21] Mr Bantey underscores the well-established principle of open courts, enshrined in our democratic society and reiterated in compelling and unambiguous language, in the Supreme Court cases of *Dagenais*, *Mentuck*, *CBC V. New Brunswick*, and *Toronto Star*[7].

[22] With respect to the defense evidence, Mr Bantey refers to the absence of any reliable evidence tending to support the motion. He points out that the letters provided were not even in affidavit form. Yet the Supreme Court decisions place the burden of proof squarely on the party proposing such a limit on the freedom of the press. Furthermore, with respect to any fallout from unscrupulous journalists, these concerns are merely speculative and insufficient to meet the stringent test envisaged in *Dagenais/Mentuck*. The burden on the defense is to establish that such exclusion is necessary in order to prevent real and substantial risk to the fairness of the trial. Mr Bantey submits that this test is simply not met.

[23] With respect to the concerns raised by the defense of simple and unrestricted access to the Internet and possible contamination of the jury pool, Mr Bantey refers to the 2002 case of *R. v. Pickton*[8] in which Judge Stone of the British Columbia Provincial Court faced similar concerns. That case brought considerable and sensational media attention to the case of a man accused of murdering dozens of women involved in the sex trade and hiding their remains on his pig farm in Port Coquitlam B.C. At the preliminary hearing, the accused sought an order excluding the public. He argued that because the American media could not be bound by Canadian law and were entitled to broadcast the details of the preliminary inquiry in the U.S., the leaking of information back into Canada created a substantial risk of contaminating the jury pool. Just as in the present case, the situation was exacerbated in the case of *Pickton* by extensive coverage by the media on the Internet, radio, television and newspapers. Nevertheless, Judge Stone refused the motion to exclude the public and stated:

> I am not prepared to accept, at this stage of the proceeding, that the justice system is so fragile that the appropriate corrective measures cannot be taken so as to ensure that an accused's right to a fair trial is not jeopardized.[9]

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6 *Toronto Star Newspapers Ltd v. Ontario*, [2005] 2 S.C.R. 188, paragr. 7.

7 *Dagenais v. CBC*, [1994] 3 S.C.R. 835; *R. v. Mentuck*, [2001] 3 S.C.R. 442; *CBC v. New Brunswick (A.G.)*, [1996] 3 S.C.R. 480; *Toronto Star Newspapers Ltd v. Ontario* [2005] 2 S.C.R. 188.

8 2002 BCPC 526.

9 *Pickton*, paragr. 32.

[24] Mr Bantey also referred to several examples where it was held that excluding the public was refused as a measure to be reserved for only the "clearest of cases" where compelling evidence establishes its absolute necessity[10].

M^e^ Pageau on behalf of Québécor, Sunmedia Corp. and Agence QMI

[25] Mr Pageau's remarks were brief and he endorsed the submissions made by Mr Bantey. He focused on the importance of the public in the courtroom as underscored by the Supreme Court in *R. v. Vancouver Sun*[11].

Mr Pageau emphasized that the burden of proof rests on the defense and has not been satisfied. As such, he contends that on both parts of the Dagenais/Mentuck test, the application cannot succeed.

Mr Urbas on behalf of the family of the victim

[26] Mr Urbas similarly supports the media's position and specifically argues the importance of allowing the victim's mother, father and sister who have traveled from China, to be present in the courtroom at every stage of the proceedings. These individuals are singularly interested in seeing firsthand how justice is done in Canada and they wish to honour their deceased son/brother by their presence in the courtroom.

ANALYSIS

[27] Unlike the defense request for a publication ban pursuant to section 539(1)(b), the decision to exclude the public during a preliminary inquiry is a discretionary matter. The judge must consider whether it appears to him or her that the ends of justice will best be served by the exclusion of the public.

[28] In exercising this discretion, the judge must consider and balance competing yet equally fundamental Charter rights. The Supreme Court of Canada has unequivocally stated in *Dagenais*, that there is no hierarchy of Charter rights[12].

[29] In this motion, two fundamentally important rights are at stake; the rights of freedom of expression and freedom of the press in section 2 (b) of the Charter, and the right in section 11 (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal. No judge relishes the position of having to encroach on either of these basic rights in any way.

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10 *R. v. Vandevelde*, [1994] CarswellSask 219 (Sask C.A.); *R. v. Pan*, 1994 CANLII 1155 (ON CA); *R. v. Omar,* 2009 ONCJ 780 (CANLII) and *R. v. J.R.*, [2007] A.J. 1567 (A.B. Q.B.).

11 [2004] 2 S.C.R. 332.

12 *Dagenais*, paragr. 72.

[30] The framework for the exercise of this discretion is set out in the two-part test enunciated by the Supreme Court in 1994 in *Dagenais v. CBC* and reiterated in 2001 in *R. v. Mentuck*. In *Mentuck*, Mr Justice Iacobucci, speaking for the Court wrote[13]:

> A publication ban should only be ordered when:
>
> (a) Such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
>
> (b) the salutary effect of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

[31] Although this test was developed in the context of publication bans, it applies to all discretionary actions affecting or limiting freedom of expression by the press during judicial proceedings. This was stated clearly in 1994 by the Supreme Court of Canada in the case of *Vancouver Sun*[14] and confirmed in 2005 in *Toronto Star Newspapers*[15].

[32] The burden of establishing both branches of the test rests with the party seeking to curtail a constitutional right. Thus, on this motion, the defense must establish that the exclusion of the public is necessary and in fact represents the only way to prevent serious risk to the proper administration of justice. The reality of this risk must be "well grounded in the evidence"[16]. The defense claims that the first branch of the test is met as there is a serious risk to the accused's right to a fair trial in the absence of such an order.

[33] It is nothing short of speculation at this juncture to argue that a publication ban is insufficient to protect the accused 11(d) rights. No evidence supports the position that the usual safeguards in place in every trial will not suffice to ensure a fair, impartial and dispassionate jury in this case. Our criminal justice system is based on the unflinching faith in jurors' ability to follow instructions from the trial judge and to ignore information not presented to them at trial[17]. As Judge Stone aptly noted in the case of *Pickton*[18], our justice system is not so fragile that it cannot provide appropriate corrective measures in order to adequately protect the accused right to a fair trial.

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13 Paragr. 32.
14 Paragr. 31.
15 Paragr. 7.
16 *Mentuck*, paragr. 34.
17 See *Dagenais*, paragr. 87; *Corbett* [1988] 1 S.C.R. 670, paragr. 38-39; *Vermette* [1988] 1 S.C.R. 985, paragr. 21.
18 Paragr. 32.

[34] This motion fails to establish any compelling evidence of a real risk to the accused's right to a fair trial, in the absence of an order excluding the public. Moreover, the publication ban already in place is a "reasonable alternative measure" intended to safeguard the accused's section 11 (d) rights.

[35] On the second branch of the *Dagenais/Mentuck* test, the defense must establish that the salutary effects of excluding the public outweigh the deleterious effects on the rights of the public and of the press. In light of the numerous forceful pronouncements extolling the importance of the open court principle, this burden is difficult to meet.

[36] As stated in *Vancouver Sun*:

> 23 This Court has emphasized on many occasions that the "open court principle" is a hallmark of a democratic society and applies to all judicial proceedings.
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> 24 The open court principle has long been recognized as a cornerstone of the common law: […]. The right of public access to the courts is "one of principle turning, not on convenience, but on necessity […].
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> 25 Public access to the courts guarantees the integrity of judicial processes by demonstrating "that justice is administered in a non-arbitrary manner, according to the rule of law" […]. Openness is necessary to maintain the independence and impartiality of courts. It is integral to public confidence in the justice system and the public's understanding of the administration of justice. Moreover, openness is a principal component of the legitimacy of the judicial process and why the parties and the public at large abide by the decisions of courts.
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> 26 The open court principle is inextricably linked to the freedom of expression protected by s. 2(*b*) of the *Charter* and advances the core values therein: *Canadian Broadcasting Corp. v. New Brunswick (Attorney General), supra*, at para. 17. The freedom of the press to report on judicial proceedings is a core value. Equally, the right of the public to receive information is also protected by the constitutional guarantee of freedom of expression: *Ford [page347] v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712; *Edmonton Journal, supra*, at pp. 1339-40. The press plays a vital role in being the conduit through which the public receives that information regarding the operation of public institutions: *Edmonton Journal*, at pp. 1339-40. Consequently, the open court principle, to put it mildly, is not to be lightly interfered with.

[37] As stated in the case of *Toronto Star*[19], "court proceedings are presumptively open in Canada. Public access will be barred only when the appropriate court, in the exercise of its discretion, concludes that disclosure would *subvert the ends of justice or unduly impair its proper administration*".

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[19] Paragr. 4.

[38] In addition, the court must consider the deleterious effect of proceeding behind closed doors in an atmosphere of secrecy and totally free from public scrutiny.

[39] Considering the overall importance of public access to courts, in the absence of evidence of a real, pressing and compelling need to ban any and all members of the public from the hearing, such an encroachment on section 2 (b) Charter rights is intolerable.

[40] Finally, regarding the submissions relating to the accused's medication and previous diagnosis, there is a total absence of evidence of any link between the information in these documents and their effect on the accused's obligation to be present in a courtroom, crowded or otherwise.

[41] To the extent that the accused could have established some adverse medical or psychological reaction to his presence in a public courtroom, this would not automatically satisfy the *Dagenais/Mentuck* test. The Court refers to section 537(1)(j.1) providing for a reasonable alternative measure. Indeed, the Court inquired as to the possibility of a defense request pursuant to section 537(1)(j.1) of the C*riminal Code*, to allow the accused to be out of the courtroom subject to any conditions deemed appropriate by the presiding judge. Presumably, a videoconference system could be set up from the prison. The defense flatly declined to pursue such a request.

FOR THESE REASONS, THE COURT:

DENIES the motion to exclude the public and;

REITERATES the order already in force directing that the evidence taken at the inquiry shall not be published in any document or broadcast or transmitted in any way before the accused is either discharged or before the end of his trial.

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LORI RENÉE WEITZMAN, J.C.Q.

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Date of hearing : March 11, 2013