CITATION: R. v. Jha, 2015 ONSC 1064
COURT FILE NO.: CRIM J(S)
DATE: 20150218

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	
HER MAJESTY THE QUEEN	**Andrea Esson** for Her Majesty the Queen
Respondent	
- and -	
NANDINI JHA	**Sharon Jeethan**, Counsel for Ms. Jha
Respondent	
– and –	
Toronto Star Newspapers Limited, Sun Media Corp, Mississauga News, and Metroland	**Daniel Stern**, Counsel for Toronto Star Newspapers and Sun Media **Brian Rogers**, Counsel for Mississauga News and Metroland
Applicant	
	HEARD: February 17, 2015

Reasons for Ruling on Application to Vary Publication Ban

An order has been made prohibiting the publication of the names of any surviving children of Nandini and Saroj Jha in any publication related to this criminal case.

Baltman J.

Introduction

[1] The accused is charged with second degree murder. The deceased is her three year old daughter, Niyati, who died as a result of a complex skull fracture. The Crown alleges that her mother beat her to death. The accused and her husband have three other children, who are currently living with him in Calgary.

[2] There is currently a publication ban in place that prohibits the publication of any information that might identify the victim in this case. This by implication precludes publication of the name of the accused, as she and the victim share the same surname.

[3] The Toronto Star, along with various other publications, has applied to vary or set aside the publication ban. The Star proposes that the ban be narrowed to prohibit only the publication of the names of the surviving siblings. This would allow the publication of the names of the accused and the victim, but not the names of the three remaining children in the family.

[4] The Crown opposes the application and argues that initials should be substituted for the full names of all the family members, including the accused and the deceased. The Defence adopts and supports the Crown's position.

Relevant History

[5] The pre-trial motions in this matter began on January 12th, 2015. At that point the Crown sought an order under s. 486.5 of the *Criminal Code* prohibiting the publication of any information that might identify the deceased. The defence supported the motion and I granted the order requested. The pre-trial motions were completed on January 23rd.

[6] When the trial proper commenced on Monday, February 9th, the matter was not re-addressed by the Crown and as a result the ban remained in place. I was not made aware at that time whether the Crown, who was the applicant on this matter, had notified any of the affected media outlets. On Tuesday February 10, 2015, I was advised that one media outlet had allegedly violated the ban, through an article it posted on line the previous evening.

[7] After considering the matter overnight I returned on Wednesday, February 11, 2015, and advised counsel that upon further reflection I had concerns about the breadth of the existing order, particularly as I was not aware

that the media was given notice of the application and they arguably have standing to make submissions on this point.

[8] I then suggested to counsel that the Order may be overly broad and should be limited to prohibiting the names of the surviving siblings, and pointed out that that was the compromise arrived at by Justice Sproat in *R. v. Hosannah,* 2015 ONSC 380, a recent decision in this jurisdiction that also involved the death of a child. I provided counsel with copies of Justice Sproat's decision. I advised counsel that if they agreed to narrow the Order along the lines of the outcome in *Hosannah*, it was likely not necessary to invite the media to weigh in on the matter as the revised ban would be identical to what the media had sought in *Hosannah*.

[9] Later that day both Crown and Defence advised they would not agree to narrow the ban. I therefore repeated that it would be necessary to alert the media in case they wished to make submissions on the point. I understand that shortly after that the Crown was made aware that certain media outlets already intended to challenge the ban. On Thursday February 12, 2015, I confirmed with Crown that the AG would advise all the necessary media sources that I intended to hear submissions at 10 a.m. on Tuesday February 17, 2015. This was our next sitting day as this trial did not sit on Friday the 13th.

Legal Framework

[10] The case law establishes a two-part test that the applicant must meet before the ban in question can be upheld: *Dagenais v. Canada Broadcasting Corp.,* [1994] 3 S.C.R. 835 and *R. v. Mentuck*, 2001 SCC 76.

[11] First, the applicant must establish that the order is "necessary" to prevent a "serious" risk to the proper administration of justice, because reasonable alternative measures will not prevent the risk. The risk in question must be "well grounded in the evidence". Second, the applicant must establish that the positive effects of the ban outweigh the negative impact on the parties and the public.

[12] Importantly, unless the applicant has first demonstrated a serious risk to a public interest, the court does not consider the second part where competing interests must be balanced. And there is no balancing of competing interests at the first stage; the question is simply whether there is a serious risk to a public interest, without any consideration of societal interests such as freedom of expression and the open court principle.

Analysis

[13] As noted above, the first step is for the applicant to establish a serious risk to the administration of justice that is "well grounded in the evidence". Neither the Crown nor the Defence has filed any such evidence on this application.

[14] That said, I accept the common sense proposition that publicity concerning serious criminal behavior within a family can be harmful to the surviving children. I also agree that protecting vulnerable children from harm to their psyche and well-being is a "public interest" worthy of protection.

[15] The issue, however, is whether there is a serious risk to that interest that can only be addressed by a publication ban. As Nordheimer J. observed at para. 16 of *R. v. Kossyrine and Vorobiov,* 2011 ONSC 6081, the ban has to be *necessary*, not simply preferable or safer.

[16] I am not persuaded that the existing ban is necessary in this case in order to protect members of the accused's family. Numerous details of this case were already reported by many news outlets at the time of the accused's arrest in 2012, including names and family photos. Indeed, it was because of the media attention previously given to this case that both the Crown and defence agreed that prospective jurors would be subject to a challenge for cause based on publicity. Moreover, it is likely that many people who are related or

connected to the family members involved already know that they are the same people entangled in this trial. Consequently, a ban at this stage would have limited benefit.

[17] I accept the Crown's argument that ongoing publicity may cause additional distress to the surviving siblings. However, how much so is unsupported here by any evidence, and is therefore uncertain. This is unlike the decision of *A.B. (Litigation Guardian of) v. Bragg Communications Inc.*, 2012 S.C.C. 46, where the Supreme Court permitted the applicant to proceed anonymously to obtain the IP address of an individual who was posting sexually explicit material about her on the internet. In that case it was clear that A.B. would be identified with the sexualized cyberbullying that had taken place. In this case, the Crown is merely speculating that people will identify the surviving siblings as children of the accused.

[18] I agree with and adopt Justice Sproat's comment at para. 26 of *Hosannah*, where he stated:

> The routine granting of publication bans on the identity of adult accused persons and offenders would be a radical change in the law. If a publication ban is necessary in this case it would be necessary in any case in which a heinous

> crime was committed by a person with children and an uncommon surname.

[19] For those reasons I conclude that a publication ban cannot be considered "necessary" to prevent a serious risk to the public interest in protecting vulnerable children within the meaning of the *Dagenais-Mentuck* test.

[20] Given that conclusion, I am not required to address the second part of the test. However, in case I am wrong on the first part, I will briefly address the competing interests.

[21] On the beneficial side, a full publication ban limits the risk of ongoing exposure of the surviving siblings to hurtful publicity. On the negative side, such a ban has several disturbing effects. Without the names of the accused and the victim, it is more difficult to engage the public and encourage informed debate about the issues at play. It also compels news outlets to either accept the chilling effect of the ban or bring costly and time consuming applications to vary it. And it erodes the open court principle that is fundamental to maintaining citizens' confidence in the justice system.

[22] After balancing those competing factors I conclude that the harmful consequences of the ban sought far outweigh any positive effects it might have.

[23] The publication ban is therefore varied to prohibit only the publication of the names of any surviving children of the accused in any publication related to this criminal case.

[24] One final matter deserves comment. As the Supreme Court observed in para. 49 of *Dagenais*, the issue of giving notice to the media of these motions raises numerous practical problems, including which media are to be given notice, and how such notice is to be effected.

[25] In federal prosecutions much of this difficulty has been avoided by guidelines that have been put in place for federal Crown attorneys. In March 2014 the Public Prosecution Service of Canada issued a guideline[1] from the Director entitled "Sealing Orders and Publication Bans", which states that except for cases where publication bans are mandatory, Crown counsel must advise the court, if necessary, of the common law rule that the media must be notified before any publication ban is ordered. The guideline further notes that several jurisdictions have arranged for a procedure where notice of application for a publication ban may be given to a central clearing house. These include British Columbia, Alberta, Saskatchewan, Nova Scotia, and the North West Territories.

[1] Available at: http://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/p3/ch04.html

[26] However, Ontario has yet to issue such a guideline, despite exhortations to that effect from the Canadian Bar Association[2] and a 2006 Report to the Attorney General[3]. One year later, in 2007, the Ministry of the Attorney General issued a press release on the issue of notification of publication bans, stating that "The Ministry is conducting a cost and technology analysis and will be consulting with the Chief Justices and other jurisdictions to determine how best to proceed."[4]

[27] Such a procedure has yet to be adopted in Ontario. It strikes me as odd that the notification process appears to proceed smoothly in federal prosecutions but not in the provincial domain. Counsel on this motion advised that discussions are currently underway in the provincial realm and a solution is soon expected. The sooner the better, hopefully resulting in a process similar to the one existing in the federal realm, where counsel for the applicant party – which is usually the Crown - notify the appropriate media outlets of the pending application in a timely and efficient fashion.

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[2] Available at: http://www.cba.org/CBA/resolutions/2003res/03-01-M.aspx
[3] http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/pjm/IV.pdf
[4] http://news.ontario.ca/archive/en/2007/05/24/McGuinty-Government-Announces-Webcasting-Of-Court-Proceedings-And-Cuts-To-Photoc.html

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