Citation: R. v. Carlson
2018 BCPC 209

Date: 20180817
File No: 85896-1
Registry: Kelowna

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

REGINA

v.

JEREMY MELVIN CARLSON
also known as
RHILEY MELVIN CARLSON

DECISION
OF THE
HONOURABLE JUDGE M.F. McPARLAND

BAN ON PUBLICATION PURSUANT TO
SECTION 486.4 OF THE *CRIMINAL CODE*

Counsel for the Crown:	Angela Ross
Counsel for the Defendant:	Jacqueline Halliburn
Place of Hearing:	Kelowna, B.C.
Dates of Hearing:	April 30 and August 1, 2018
Date of Judgment:	August 17, 2018

Nature of the Application

[1] This is an application by defence counsel for me to recuse myself from the sentencing hearing in the case of *R v. Jeremy Melvin Carlson* aka *Rhiley Melvin Carlson*. Accordingly I must determine if a reasonable, right minded person armed with all of the relevant information would consider it more likely than not that I would, consciously or unconsciously, unfairly decide the matter. For the reasons stated below, I refuse to recuse myself.

Background

[2] On November 17th, 2017, the offender pled guilty to sexual interference against a young person, AA, between Dec 1st, 2015 and Sept 5th, 2016. A pre-sentence report and psychiatric report were ordered and the sentencing hearing was scheduled for a full day. On April 30th, 2018, the sentencing hearing commenced before me. Crown and defence filed a significant volume of materials and case law on which they intended to rely. By my rough estimate there were approximately 400 pages. I advised counsel at the outset that I had just received the materials that morning and had begun reviewing them but had not yet finished. I asked counsel to keep that in mind when making their submissions.

[3] Near the end of the day, just before 4 p.m., defence counsel advised she wanted to apply to have me recuse myself due to apprehension of bias. Crown had not received notice of the application. There would have been insufficient court time that day to hear the application, for the Crown to prepare its reply or for the court to provide its decision so an adjournment was required. I directed both counsel the application would be made

in writing and enquired how much time was required for each counsel to file its written materials. I canvassed counsel's availability and set deadlines. I directed counsel appear in from of the judicial case manager on May 31st to schedule the date to receive my recusal decision. I obtained a transcript and reviewed the audio recording. There was no difficulty in hearing what was said. The transcript is some 70 pages long and other than a few minor inaudible notations, it is complete. The transcript is certified as being accurate by the official court transcriptionist. Because I knew both counsel were located out of town, I directed the registry to make an audio disc available to both counsel for ease of review.

[4] In her written argument defence counsel requested a further oral hearing despite my earlier clear directions. There were some difficulties and delays in scheduling the matter. Following this I learned defence counsel had renewed its request for further oral argument to the judicial case manager. The judicial case manager contacted me to seek direction. I then directed the matter be scheduled for 2 hours to permit both counsel to make 1 hour of oral submissions on August 1st, 2018, which they did.

Positions of the Parties

[5] The defence argument for recusal may be summarized as follows: defence alleges there is a reasonable apprehension of bias based on the cumulative effect of several issues including the following:

1. The Court was "crying" during the victim impact statement;
2. The Court laughed or "scoffed" when defence stated its sentencing position;
3. The Court "demanded" defence call evidence on an admitted mitigating factor;

4. The Court refused to accept facts as proven by defence;

5. The Court reacted inappropriately to the recusal application, including smiling derisively and insisting the application be made in writing;

6. The Court's tone, facial expression and demeanor throughout the proceedings;

7. Scheduling issues, communicated to defence through the judicial case manager.

[6] Defence relied on the Affidavit of Jennifer Walker, a legal assistant who was not present for the sentencing but who listened to the DARS audio recording. Ms. Walker offered her opinion regarding the quality of audio recording and the court's tone and demeanour and speculated about the court's intention and motivation in its communication with defence. Defence also filed the Affidavit of Paula Houle, the aunt of the offender. Ms. Houle was present during the sentencing hearing. Ms. Houle offered her lay opinion regarding the appropriateness of judicial questioning and expressed other criticism of the Court's conduct. Ms. Houle drew conclusions based on her perception of the sentencing process. Attached to Ms. Houle's affidavit were several published media articles regarding the sentencing. Both affidavits offered the affiant's opinions and drew conclusions on how defence counsel must have felt.

[7] The Crown opposes the defence application for recusal. The Crown disputes the majority of the "facts" alleged by defence as misleading and inaccurate. In the written and oral arguments Crown asserted, *inter alia*:

1. The Judge was not "crying" as was being reported in the media, but rather briefly dabbed a tear from her eye with a tissue. The Crown notes the victim impact statement presented by the distraught mother of the 8 year old victim was highly emotional and moving. The Crown argues there is nothing wrong with the Court having a compassionate or empathetic response to it. The Crown submits that showing empathy does not mean judicial bias.

2. The Court did not scoff/laugh at the defence position. The Court looked somewhat surprised when defence stated its position. The Crown noted the significant disparity in sentencing positions: the Crown seeks 15 to 20 months in custody and 2 years probation while defence seeks a 90 day intermittent sentence. The Crown submits a look of surprise by the Court is not unwarranted given the defence's extremely lenient sentencing position for an offence of this nature;

3. The Crown reiterated that it did not admit the mitigating factor of suicidal ideation as was suggested by defence. The Court did not insist the defence to lead evidence regarding the warned statement. However the Crown notes that it would have been entirely appropriate to do so, pursuant to section 723(3) and 724(3) of the *Canadian Criminal Code*;

4. The Court did not refuse to accept facts proven by defence. In light of comments made in the Pre-Sentence Report, the Court asked both counsel questions regarding treatment availability and how the offender would be classified given her transgender status. After hearing from both counsel the Court acknowledged it could neither predict nor control the classification process.

5. The Crown submits there was no inappropriate reaction to the recusal application either in the transcript or on the audio recording. The Crown also argues the Court is entitled to control its process and direct written argument.

6. There was no evidence the Court used an inappropriate tone of voice, facial expression or demeanour with defence. The audio recording reflects that the Court asked both counsel questions, and asked them to clarify their position but was polite and courteous to both defence and Crown throughout;

7. The Crown submits there is no evidence of bias in the scheduling process that could be attributable to the Court, especially since communications went through the Judicial Case Manager and the Court was not directly involved.

The Law

[8] It is well settled law that the applicant has the onus of proof to establish a reasonable apprehension of bias in order to succeed in an application for a judge to recuse herself. *R v RDS* 1997 3 SCR 484.

[9] The test for judicial bias was originally formulated by the Supreme Court of Canada in *Committee for Justice and Liberty v National Energy Board* 1978 1 SCR 369:

> What would an informed person, viewing the matter realistically and practically -and having thought the matter through- conclude? Would he think that it is more likely than not that the decision maker whether consciously or unconsciously would not decide fairly?

[10] The Supreme Court of Canada explained in *RDS* the test for judicial bias had evolved since the *Liberty* case:

> This test has been adopted and applied for the past two decades. It contains a two-fold objective element: the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case. See *Bertram*, *supra*, at pp. 54-55; *Gushman*, *supra*, at para. 31. Further the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including "the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold":

[11] In the case of *Taylor Ventures Ltd v Taylor* [2005] BCCA 350, the BC Court of Appeal provided judges with a very useful summary of the principles governing recusal, as follows:

> (a) a judge's impartiality is presumed;
>
> (b) a party arguing for disqualification must establish that the circumstances justify a finding that the judge must be disqualified;
>
> (c) the criterion of disqualification is the reasonable apprehension of bias;
>
> (d) the question is what would an informed, reasonable and right-minded person, viewing the matter realistically and practically, and having thought the matter through, conclude;
>
> (e) the test for disqualification is not satisfied unless it is proved that the informed, reasonable and right-minded person would think that

it is more likely than not that the judge, whether consciously or unconsciously, would not decide fairly;

(f) the test requires demonstration of serious grounds on which to base the apprehension;

(g) each case must be examined contextually and the inquiry is fact-specific.

[12] In *R v Maharaj* 2001 OJ No. 2005, Justice Watt distinguished the everyday meaning of bias from the meaning of bias in the legal context. The everyday meaning describes “a leaning, inclination or bent”. For legal purposes “bias” represents something more serious: a predisposition to decide an issue or cause in a certain way, which does not leave the judicial mind perfectly open to persuasion or conviction.” The mere allegation, even a demonstrated possibility of actual or apprehended bias is not enough to disqualify the court from deciding. Something more is required.

[13] In the *RDS* case, the Supreme Court of Canada explained what “more” was required. The applicant must present “cogent evidence” that demonstrates that something the judge has done gives a reasonable apprehension of bias. Comments made by the judge or behaviours displayed must not be viewed in isolation, but rather must be considered in the overall context of the hearing. The Supreme Court of Canada went on to state that allegations of perceived bias will generally not succeed unless the impugned conduct, taken in context, truly demonstrates a sound basis for perceiving that a particular determination has been made on the basis of prejudice or generalizations.

[14] The test for bias is an objective test and is not based on the subjective views of the litigant or his counsel. It focuses on the perception of a reasonable person apprised of all the circumstances. The Supreme Court of Canada cautioned that “Counsel who

appear in criminal courts, whether prosecuting or defending have to be robust. They must be prepared to take the knocks and misfortunes of advocacy. One of the things with which counsel must learn to cope is the judge who is not being entirely fair to them."

[15] Similarly I note the comments of Southin, J.A., as she then was, in the BC Court of Appeal case of *Middlecamp v. Fraser Valley Real Estate Board* [1993] BCJ 1846, at para 11:

> As I believe the Chief Justice of this court has said on more than one occasion, a trial is not a tea party. Bias does not mean that the judge is less than unfailingly polite or less than unfailingly considerate. Bias means a partiality to one side of the cause or the other. It does not mean an opinion as to the case founded on the evidence …

[16] In *R v. RDS,* the Supreme Court of Canada made it clear that bias is a very serious allegation and that finding is not to be entered into lightly :

> **[112]** The threshold for finding of real or perceived bias is high and the grounds for such an apprehension must be substantial. I agree with the Federal Court of Appeal which refused to accept the suggestion that the test be related to the very sensitive or scrupulous conscience."
>
> **[113]** Regardless of the precise words used to describe the test, the object of the different formulations is to emphasize that the threshold for a finding of real or perceived bias is high. It is a finding that must be carefully considered since it calls into question an element of judicial integrity. Indeed an allegation of reasonable apprehension of bias calls into question not simply the personal integrity of the judge, but the integrity of the entire administration of justice. See *Stark*, *supra*, at paras. 19-20. Where reasonable grounds to make such an allegation arise, counsel must be free to fearlessly raise such allegations. Yet, this is a serious step that should not be undertaken lightly.

[17] On the issue of the social context of judging and whether judges should ever show emotion and whether doing so illustrates the judge's bias, the Supreme Court of Canada said this in *RDS*:

> **119** The requirement for neutrality does not require judges to discount the very life experiences that may so well qualify them to preside over disputes. It has been observed that the duty to be impartial does not mean that a judge does not, or cannot bring to the bench many existing sympathies, antipathies or attitudes. There is no human being who is not the product of every social experience, every process of education, and every human contact with those with whom we share the planet. Indeed, even if it were possible, a judge free of this heritage of past experience would probably lack the very qualities of humanity required of a judge. Rather, the wisdom required of a judge is to recognize, consciously allow for, and perhaps to question, all the baggage of past attitudes and sympathies that fellow citizens are free to carry, untested, to the grave.
>
> True impartiality does not require that the judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind.
>
> (Canadian Judicial Council, *Commentaries on Judicial Conduct* (1991), at p. 12.)
>
> It is obvious that good judges will have a wealth of personal and professional experience, that they will apply with sensitivity and compassion to the cases that they must hear. The sound belief behind the encouragement of greater diversity in judicial appointments was that women and visible minorities would bring an important perspective to the difficult task of judging.

[18] In *R v Churchill* 2016 NLCA 29, the Newfoundland and Labrador Court of Appeal addressed the apprehension of bias in the context of a trial judge's interventionist approach and judicial questioning. In doing so it referred to the Ontario Court of Appeal decision in *R v Chippewas of Mnjikaning First Nation v Chiefs of Ontario* 2010 ONCA 47:

> **[16]** Not every case where the judge takes an interventionist approach will be overturned on appeal. As explained by Lamer J., as he then was, in Brouillard at page 44:…. Judges are no longer required to be as passive as they once were; to be what I call sphinx judges. We now not only accept that a judge may intervene in the adversarial debate, but also believe that it is sometimes essential for him to do so for justice in fact to be done. Thus a judge may and sometimes must ask witnesses questions, interrupt them in their testimony and if necessary call them to order.

> **[17]** The effect of the trial judge's interventions on trial fairness depends on the unique circumstances of each case, as explained by the Ontario Court of Appeal in Chippewas of Mnjikaning First Nation v. Chiefs of Ontario, 2010 ONCA 47 (CanLII), 265 OAC 247:
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> > **[230]** A determination of whether a trial judge's interventions give rise to a reasonable apprehension of unfairness is a fact-specific inquiry and must be assessed in relation to the facts and circumstances of a particular trial. The test is an objective one. Thus, the trial record must be assessed in its totality and the interventions complained of must be evaluated cumulatively rather than as isolated occurrences, from the perspective of a reasonable observer throughout the trial: see R. v. Valley (1986), 26 C.C.C. (3d) 207 (Ont. C.A.) at p. 232, leave to appeal to S.C.C. refused, [1986] 1 S.C.R. xiii; and R. v. Stucky (2009), 2009 ONCA 151 (CanLII), 240 C.C.C. (3d) 141 (Ont. C.A.), at paras. 68, 70, 72.
> >
> > **[231]** An examination of whether a trial judge has unduly intervened in a trial must begin with the recognition that there are many proper reasons why a trial judge may intervene by making comments, giving directions or asking questions during the course of a trial. A trial judge has an inherent authority to control the court's process and, in exercising that authority, a trial judge will often be required to intervene in the proceedings.

Application of the Law to the Facts

[19] Applying these well settled legal principles to the present case I cannot accept the defence's contention that there is a reasonable apprehension of bias in the context of this sentencing hearing.

[20] At the outset, the analysis must consider there is a presumption that judges will act according to their oath of office. The presumption can be displaced with cogent evidence that demonstrates that something that the judge has done gives a reasonable apprehension of bias. No such cogent objective and reliable evidence was proffered by defence in this case.

[20] It is important to note that Mr. Carlson pled guilty and accepted criminal responsibility for the offence, and these allegations of judicial bias have arisen in the sentencing context not during the course of a trial, during which the Court would have been required to assess the evidence and make a finding of guilt.

[21] It is also important to note that I am to decide this issue on the basis of admissible evidence. It is trite to say that the submissions of counsel are not evidence. Counsel is an advocate for her client and is not entitled to give evidence in a manner for which she is acting as counsel.

[22] I must apply the law to the facts. The only evidence offered by the defence on the recusal application were two affidavits of Ms. Houle and Ms. Walker, and of course I am to consider the official transcript and the official DARS audio recording.

[23] I agree with Crown's submission that the bulk of the allegations made by defence are simply not accurate, when one compares them against the transcript and the audio recording. I do not purport to engage in a line by line accounting of the inaccuracies. The record both in the form of the transcript and DARS will speak for itself.

[24] On the issue of the Court's empathetic response to the victim impact statement, this was perhaps overstated and sensationalized. The Supreme Court of Canada and the Canadian Judicial Council, Commentaries on Judicial Conduct both agree that judges are human, they are not expected to be robots. There is therefore nothing wrong with the Court showing emotion. Just because a judge demonstrates human compassion, it does not amount to judicial bias.

[25] Both the affidavits tendered were replete with inappropriate opinion, speculation and conjecture. I agree with the Crown characterization by the Crown that much of the affidavits are simply a summary of defence counsel's argument put in the mouth of a lay civilian affiant. Neither affiant can be considered an "objective, reasonable right minded informed person with knowledge of all the relevant circumstances including the traditions and impartiality that form the background and apprised also of the fact that impartiality is one of the duties that judges swear to uphold, and aware of the social reality that forms the background of a particular case" as the case law requires.

[26] Both of the affidavits speculated on how the defence counsel "must have been feeling" in response to the perceived inappropriate conduct by the Court. The affiants speculated on how members of the gallery and members of the media "must have been feeling". Moreover, the affidavits went even further by speculating as to what "must have been in the Court's mind" and as to the Court's rationale for saying certain things and for the Court's actions. A close review of the transcript and the DARS recording confirms that this speculation was both factually unfounded and inappropriate.

[27] Neither of these affiants can be described as an "informed person, with the knowledge of all the relevant circumstances, including the traditions and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties that judges swear to uphold." The affidavits illustrate that the authors do not have the appropriate or requisite experience in criminal courts to understand that it is a natural and appropriate part of the advocacy process for the Court to engage with both Crown and defence counsel, asking questions, seeking clarification, testing the submissions of counsel and having counsel explain and defend their position. It is also

quite appropriate, and indeed expected, for the Court to control its own process by determining how and when legal arguments will be made, set timeframes and to determine whether arguments will be oral or written.

[28] In summary, there is no reliable evidentiary foundation to support a reasonable apprehension of bias from the perspective of an informed reasonable and right minded person who is fully apprised of the facts. The application for recusal is therefore dismissed.

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The Honourable Judge M.F. McParland