

COURT OF QUEEN'S BENCH OF MANITOBA

B E T W E E N:

HER MAJESTY THE QUEEN,)	<u>Counsel:</u>
)	
- and -)	<u>SHEILLA LEINBURD</u> and
)	<u>PAUL R. GIRDLESTONE</u>
ZELJKO MIKIC,)	for the Crown
)	
accused.)	<u>MARTIN D. GLAZER</u> and
)	<u>JOSHUA F. ROGALA</u>
)	for the accused
)	
)	JUDGMENT DELIVERED:
)	MAY 5, 2017

Ruling re challenge for cause

SUCHE J.

[1] Zeljko Mikic is charged with second degree murder in the stabbing death of Baljinder Sidhu on August 5, 2011. He seeks permission to challenge potential jurors for cause, pursuant to s. 638(1)(b) of the *Criminal Code* of Canada, R.S.C., 1985, c. C-46. He asserts that pre-trial publicity about the case has created a realistic possibility for partiality against him.

[2] The right to challenge for cause is not an extraordinary remedy, but is part of the fair trial rights guaranteed by s. 11(d) of the ***Canadian Charter of Rights and Freedoms***. The test to be met was established by the Supreme Court of Canada in ***R. v. Sherratt***, [1991] 1 S.C.R. 509, as follows:

64 ... The threshold question is not whether the ground of alleged partiality will create such partiality in a juror, but rather whether it could create that partiality which would prevent a juror from being indifferent as to the result. In the end, there must exist a realistic potential for the existence of partiality, on a ground sufficiently articulated in the application, before the challenger should be allowed to proceed.

[3] ***R. v. Williams***, [1998] 1 S.C.R. 1128 (S.C.C.), confirmed that this standard is the same as the air of reality test.

[4] ***Sherratt*** also identified that reporting of the circumstances of the case, the details of the proceedings and the fact that the accused has been charged generally are not of a concern. An exception may be if the circumstances of the case were particularly troubling or gruesome. However, reports that misrepresent the evidence, engage in speculation, publish discreditable information about the accused or refer to information that would not be admissible in court do create the potential for partiality. The point in time and the frequency of reporting must also be considered. Obviously, the more notorious the case or the closer to the trial date, the greater the concern.

[5] Here, Sidhu was stabbed after leaving a local bar where a dispute involving a large group of people had spilled out into the street and turned into something of a brawl. In the days following the incident local media reported information about the circumstances and location of the stabbing as well as

details about Sidhu. Several of these reports included a police comment that the incident appeared to be gang related.

[6] Mikic was not charged until January 2013, and his arrest was reported in the media. One report limited the information to a brief description of the circumstances of the stabbing and the police comment that the incident was believed to be gang related. A report in a local newspaper went much further, however. It stated that Mikic had suspected ties to the City's drug underworld, and at the time of his arrest he was on bail as a result of an incident where he attacked an 18-year-old man with a hammer. It also revealed that Sidhu had previously been the target of police surveillance into a suspected organized crime cell and had been found with cocaine and a large amount of cash.

[7] Finally, in February 2015, a local paper reported that Mikic had been committed to stand trial. The report contained a brief description of the incident and the police comment that the individuals involved in the brawl were believed to have gang ties.

[8] Mikic argues that the information which is prejudicial includes the report about Mikic himself, the comment that police believed the matter was gang related, and the information regarding Sidhu's suspected involvement in organized crime.

[9] I agree that these comments about Mikic are prejudicial. While the information about Sidhu's background and criminality normally would not be,

because it was combined with the police opinion that the stabbing was gang related I find the information could contribute to the potential for partiality.

[10] The significant issue, however, is the effect of the passage of time. The information about Mikic and Sidhu was reported in one newspaper in late January 2013, over four years ago. The comment that the matter was believed to be gang related was stated several times in 2011 and was last reported in February 2015. The trial is set for June 2017.

[11] An affidavit was filed by the defence stating that all the media reports in issue remain available online. Mikic asks me to find that this reduces the effect of the passage of time, because at any time a potential juror could immediately access the information. He asserts that in light of the number of people who are continuously online, the prejudicial effect of this reporting has not diminished.

[12] I am of the view that the passage of time has substantially diminished the risk that the prejudicial information will create the risk of partiality. At this point, I do not consider it to be a realistic possibility. I say this because the information about Mikic and Sidhu was only contained in one report in a local newspaper more than four years ago. The comment that the police believed the incident was gang related was made at the time of the stabbing, now almost six years ago, and most recently over two years ago. That particular comment, however, in each instance was made in passing and was never the focus of any report.

[13] The cases relied on by the defence can be distinguished. *R. v. Johnson*, 2009 MBQB 267, and *R. v. Kematch and McKay*, 2008 MBQB 277, involved very different situations. These were, in one instance, a very high-profile, frequently commented upon and troubling case involving the death of a toddler, and the other involved rather gruesome facts which were commented on and speculated about in the media. *R. v. Le*, 2008 MBQB 81, was similar to the present situation, but there the accused's background and criminal history was prominently featured in media reports from the outset. The case also had generated a good deal of media attention and had become somewhat controversial when a material witness was held in custody for several days. The gap in time between the last report and the trial there was approximately a year and a half. In the end, I decided that while the risk was low, any doubt should be resolved in favour of the accused and I permitted the challenge. In this case, however, I do not have the same doubt. I am satisfied that the risk of partiality does not rise to the level of creating an air of reality.

[14] I also disagree that the existence of the information online changes the potential risk. Finding these media reports would require an active search and one would have to have some information about the case to do this. It is important to keep in mind that the form of summons provided to potential jurors does not reveal any information about the cases or the accused persons involved in the selection process. Members of the panel do not learn any of this until they are in court.

[15] I do agree, however, that the notion that online searching is a common practice is something "so notorious as not to be the subject of disputes among reasonable persons", one test for judicial notice described in ***R. v. Koh*** (1998), 42 O.R. (3d) 668 (Ont. C.A.), and the court needs to be conscious of this. While there is no reason in this case to expect that there will be any further reports about it in the media prior to jury selection, should that happen, I would reconsider this request.

[16] Finally, I make a comment about the evidence filed. The affidavit concerning the existence of the media reports online was sworn by the assistant of one of the lawyers, who simply repeats what she was told by the lawyer. This is not acceptable evidence. It is not firsthand information. She could not be cross-examined on the assertions in issue. While I have accepted the affidavit in this case, had any objection been raised by the Crown, I would have ruled it inadmissible.

_____ J.