

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *R. v. Fox*,
2017 BCSC 1369

Date: 20170803
Docket: 27178
Registry: Vancouver

Regina

v.

Patrick Fox

Before: The Honourable Madam Justice H. Holmes

Reasons re Severance of Counts

Counsel for the Crown:

M. Myhre

Appearing on his own behalf:

P. Fox

Place and Date of Hearing:

Vancouver, B.C.
May 23, 2017

Place and Date of Judgment:

Vancouver, B.C.
August 3, 2017

INTRODUCTION

[1] By memorandum of May 26, 2017, I advised the parties that I would not order separate trials for the two charges on the indictment, and that reasons would follow. These are the reasons.

BACKGROUND TO THE APPLICATION

[2] Mr. Fox was charged with criminal harassment, contrary to s. 264 of the *Criminal Code*, (count 1), and being in possession of a firearm at a place other than authorized, contrary to s. 93(1) of the *Code* (count 2).

[3] During a pre-trial conference, I asked the Crown to consider whether a joint trial of the two counts may have prejudicial effect for Mr. Fox that could not be remedied by an instruction to the jury. My concern was to ensure a fair trial. As I will explain, it appeared at that time that certain evidence that would be admissible concerning count 2 would not be relevant to the issues concerning count 1 but could affect the jury's consideration of those issues.

[4] The charge of criminal harassment in count 1 alleged that, in 2015 and through to the end of May 2016, Mr. Fox, through numerous emails to his former spouse, Desiree Capuano, and numerous blog posts on a website he created, threatened and intimidated Ms. Capuano to the point that she reasonably feared for her safety. The Crown alleged that, among other things, Mr. Fox made statements that caused Ms. Capuano reasonably to fear that Mr. Fox would sneak across the border into the USA, where Ms. Capuano lives, would bring his guns into the USA, and would shoot her.

[5] The firearms charge in count 2 alleged that in late May 2016, Mr. Fox had approximately 25 boxes sent from a depot in Burnaby, BC to Los Angeles, California, and that American agents there found four restricted firearms inside a computer in one of the boxes. The Crown alleged in addition that Mr. Fox crossed into the USA without presenting himself at a port of entry, and, after he was arrested

and detained for several weeks in the USA before being transferred into RCMP custody, acknowledged to RCMP officers that he had done so numerous times.

[6] There was no suggestion that Ms. Capuano knew about Mr. Fox's alleged transfer of firearms to the USA, or the allegedly surreptitious entry that led to his detention. The evidence of those events, while relevant to and admissible in support of the charge in count 2, could not provide evidence of Ms. Capuano's state of mind for the purposes of count 1. The evidence would not have been admissible to show that she feared for her own or others' safety, or that her fear was reasonable.

[7] The potential danger I foresaw, however, was that, when considering (for the purposes of count 1) whether Ms. Capuano own belief was reasonable, the jury would improperly rely on the evidence (admitted to support count 2) that Mr. Fox did exactly what Ms. Capuano feared he would do.

[8] At the next pre-trial conference, Crown counsel indicated that the Crown considered the evidence relevant to an aspect of count 1 as well. Nonetheless, in fairness to Mr. Fox, who was representing himself without counsel, the Crown suggested that the Court hear an application for severance of the two counts, the Crown opposing severance but setting out the governing principles and considerations. Mr. Fox agreed to that course of action. At that time he also opposed severance, but during the hearing of the application, which took place that afternoon, he said he was indifferent, so long as any second trial could follow promptly after the first.

[9] After hearing the application on May 23, 2017, I reserved my decision. It was agreed that the parties would be advised by memorandum whether severance would be ordered or not, with reasons to follow. This course of action was necessary because the jury selection would take place shortly after the application, and there would be no opportunity for the parties to appear before then.

DISCUSSION

[10] As the Supreme Court of Canada noted in *R. v. Last*, 2009 SCC 45, at para. 1, the Crown enjoys a large discretion in deciding to include more than one count in an indictment. However, a court may nonetheless order that counts be tried separately if “the interest of justice so require”: s. 591(3) of the *Code*. The interests of justice “encompass the accused’s right to be tried on the evidence admissible against him, as well as society’s interest in seeing that justice is done in a reasonably efficient and cost-effective manner”: *Last* para. 16.

[11] As the Court noted in *Last*, at para. 16, “the obvious risk when counts are tried together is that the evidence admissible on one count will influence the verdict on an unrelated count”. That was precisely the concern that led me to raise the matter. I raised the matter in large part because Mr. Fox was self-represented at the time.

[12] However, after hearing submissions I came to the view that the interests of justice did not require the two charges to be separately tried. This was mainly because the Crown explained how the evidence about Mr. Fox shipping his guns and crossing into the USA would be relevant to the charge of criminal harassment in count 1, as well as to the firearms charge in count 2. I will explain.

[13] For the charge of criminal harassment (count 1), the Crown would tender, among much other evidence, evidence that Ms. Capuano was afraid that Mr. Fox would surreptitiously cross the border into the USA and shoot her, based on various communications to her, including the following:

1. an email in which Mr. Fox explained to Ms. Capuano that he would have no qualms about shooting her, were it not for the risk of being caught; I note that the email went on to say that to shoot her would be illegal and immoral, and that Ms. Capuano should not take the email as a threat;
2. an email in which Mr. Fox reminded Ms. Capuano that he had a Canadian firearms acquisition licence;

3. a blogpost in which Mr. Fox discussed the logistics of his sneaking into the USA with firearms and shooting Ms. Capuano (although the blog indicated that this would be impossible to do without being caught); and
4. numerous statements showing his clear and continued hatred of her, and his goal of making her life as miserable as possible and, if possible, driving her to suicide.

[14] Mr. Myhre explained that, in the context of this evidence, the evidence supporting the firearms charge (count 2), about Mr. Fox shipping his firearms into the USA and surreptitiously entering would also be relevant to the charge of criminal harassment (count 1). As was the case in *R. v. Taylor*, 2014 BCCA 138 (where evidence was admitted to show the accused's purpose and his persistence in a criminal harassment), the evidence could properly help establish the character of the accused's conduct. For example, it could help show that some of Mr. Fox's emails to Ms. Capuano amounted to "threatening conduct", which is one of the forms of conduct that grounds the s. 264 offence of criminal harassment. It could also help show that Mr. Fox acted intentionally, in the sense that he meant his communications with Ms. Capuano to instill fear in her and harass her, states of mind which are (or form part of) the essential elements of the offence.

[15] I agreed that the jury could properly use the evidence for these purposes.

[16] The Court in *Last* identified various factors which, along with other factors, may help a court assess how the interests of justice will be served in a particular case: see *Last* para. 18.

[17] An important factor in this case favouring a joint trial was the factual nexus between the two charges. Common to both charges were themes of Mr. Fox's potential threat to Ms. Capuano, and sustained efforts to unsettle her as much as possible. My initial concern that the evidence in support of count 2 had no relevance to the charge in count 1 had been removed, as I have explained.

[18] Avoiding the burden of two trials was also a consideration. While each trial would be relatively brief, the trial on count 2 particularly so, their aggregate length would be considerably longer and more demanding of the criminal justice system than would be a joint trial. This is mainly because two juries would have had to be separately empanelled and selected in pre-trial proceedings, and, in the two jury trials, certain portions would be duplicated, such as substantial parts of Crown and defence addresses, and the judge's opening and closing instructions to the jury.

[19] An important factor also, particularly given the origin of the application, was potential prejudice to Mr. Fox. This could have arisen from the taint (or moral prejudice reasoning) that evidence of illegal shipping of firearms could have had on the jury's view of the evidence supporting the criminal harassment charge. Additionally, the jury could have misapplied the evidence, in the way I described earlier, by using the evidence to support a conclusion that Ms. Capuano's stated fear for her safety was a reasonable one.

[20] I concluded, however, that these and any other forms of potential prejudice could be prevented by clear instructions to the jury about how they could and could not use the evidence about the firearms. I concluded also that any prejudice arising from the simple joinder of the charges would be minimal.

[21] In all the circumstances, the interests of justice did not require the two charges to have separate trials.

CONCLUSION

[22] As indicated in my memorandum of May 26, 2017, no order for severance was made.

"The Honourable Madam Justice H. Holmes"