Ontario Supreme Court
R. v. Bernardo
Date: 1995-02-10

R.

and

Paul Kenneth Bernardo

Ontario Court of Justice (General Division) LeSage A.C.J.O.C.

Judgment – February 10, 1995.

Raymond J. Houlahan, Q.C., for the Crown.

John M. Rosen and Anthony G. Bryant, for accused.

Timothy S.B. Danson, for the French and Mahaffy families.

Peter M. Jacobsen, for Thomson Newspaper (The Globe and Mail), the Toronto Star Newspapers Ltd. and Toronto Sun Publishing Corporation.

Roger K. Harris, for the Canadian Press.

Douglas C. Hunt, Q.C., for the C.B.C.

John K. Lefurgey, for Stephen Williams.

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1 February 10, 1995. LESAGE A.C.J.O.C.: – On January 31, 1995, Mr. Danson, on behalf of the Mahaffy and French families, brought an application, pursuant to r. 27.06 of the *Criminal Proceedings Rules,* before me, for intervenor status in the *R. v. Bernardo* proceedings. Rule 27.06 states:

> Any person interested in a proceeding between other parties may by leave of the judge presiding over that proceeding, or by leave of the Chief Justice or a judge designated by him or her, intervene upon such terms and conditions and with such rights and privileges as the judge, the Chief Justice or his or her designee may determine.

2 Mr. Danson brings this application to the trial court in the language of r. 27.06 the “judge presiding over that proceeding”.

3 Mr. Danson seeks intervenor status for the purpose of joining with the Crown to request, pursuant to s. 486 of the Code, an order to exclude the public from the court, when the videotape evidence, depicting the two deceased girls, Kristen French and Leslie Mahaffy, is presented as evidence. In response to the Crown application, for a ban on the viewing of the videotape evidence, counsel for various media outlets also appeared before me to request intervenor status in order to oppose the Crown's application.

4 After hearing submissions from Mr. Danson, counsel for the various media, Mr. Houlahan, for the Crown, and Mr. Rosen, for the accused, I ruled, with reasons to follow, that intervenor status will be granted to Mr. Danson's clients and the various media outlets present.

However, at that time, I chose to reserve my decision as to whether Mr. Williams, who is an independent author, retained by a publishing company to chronicle the *R. v. Bernardo* and *R. v. Homolka* trial proceedings, shall be given intervenor status in this application.

5 These are my reasons to the above ruling and my decision with respect to Mr. William's status.

Submissions

6 Mr. Danson requests that he be granted intervenor status in the Crown's application to exclude the public from viewing videotape evidence of the two deceased girls. He submits that although the families and the Crown, are seeking the same ultimate remedy, exclusion of the public from portions of the proceedings, it is essential that his clients be given intervenor status because their interests are distinctly different from that of the Crown.

7 Mr. Danson asserts that his clients' (the parents of the deceased) s. 7 and s. 12 *Charter* rights will be infringed if the videotapes are shown to the public. To support his submissions, Mr. Danson referred the court to the decisions of *Edmonton Journal v. Alberta* (*Attorney General*) (1989), 64 D.L.R. (4th) 577 (S.C.C.) at p. 590, and *R. v. Morgentaler* (1988), 44 D.L.R. (4th) 385 at p. 402, in which the Supreme Court of Canada acknowledges that there is a court interest in "the psychological stress or trauma that can arise from violations of a person's emotional or physical integrity." Since the *Edmonton Journal* decision deals with "privacy" rights with respect to matrimonial matters, Mr. Danson submits that his clients, who

have asserted a “privacy” interest with respect to a criminal matter, murder, should be given the same rights.

8 Referring to the Supreme Court of Canada decision *Dagenais v. Canadian Broadcasting Corp.,* [December 8, 1994] [reported at 34 C.R. (4th) 269], Mr. Danson further submits that the rights of the Mahaffy and French families should be given the same constitutional consideration as the right of the media to report, and the accused to have a fair trial.

9 Citing *Dagenais,* at p. 23 [p. 284 C.R.], Mr. Danson suggests that his position is supported by the court’s statement:

> It has been argued before this Court that third parties (specifically, the media) have a range of possible avenues open to them to appeal publication bans.

He submits that the Supreme Court of Canada intends for interested parties to have intervenor status in criminal matters.

10 Mr. Danson submits that his clients, the parents of the deceased girls, have an interest even greater than the interests asserted in the *Dagenais* decision. In *Dagenais,* a ban was sought to prevent the public from viewing a movie which depicted criminal activity remarkably similar to a trial that was about to begin. In these proceedings, the Crown and the parents seek to exclude the public from viewing non-fictional video evidence which depict the two deceased girls. Mr. Danson stresses that his clients will be directly affected, by the aftermath, if these videos are viewed by the public. Hence, Mr. Danson argues, in light of the intervenor status, granted in *Dagenais,* his clients have a right to intervenor status.

11 Relying on the “thin-skull” test, enunciated in *R. v. Creighton* (1993), 83 C.C.C. (3d) 346 [23 C.R. (4th) 189] (S.C.C.) at p. 347 [C.C.C.], Mr. Danson further states that there is a real and substantial risk to these families’ well being if these videos are exposed to the public and therefore, his clients have a direct interest which makes them eligible for intervenor status. To support this position, Mr. Danson advises that he will provide medical evidence which suggests that the public showing of the videotape evidence will have a seriously detrimental effect on both the French and Mahaffy families.

12 Recognizing that the granting of intervenor status to the victims' families may create a "floodgate" scenario for future cases where the families of the victims seek similar status, Mr. Danson points out that the circumstances and the evidence to be presented in this situation are unique. He stresses that a Canadian court has not before been faced with the prospect of similar video evidence. The court, he submits, should grant intervenor status to victims and their families in the rare circumstances such as this where the unusual facts of the case necessitate it. Relying on the Supreme Court of Canada decision of *Operation Dismantle Inc. v. R.* (1985), 18 D.L.R. (4th) 481 at p. 508, Mr. Danson submits that the "novelty of the cause of action" should not "militate against the plaintiffs."

13 To support his proposition that the families have a unique and distinct interest in this issue, Mr. Danson supplied the court with several affidavits demonstrating that his clients possess a different perspective on this issue which cannot be offered by anyone else.

14 Mr. Houlahan, on behalf of the Crown, supports Mr. Danson's intervenor request and points out that the Mahaffy and French families have a distinct interest, separate from the Crown interest. Mr. Houlahan also urges the court to ignore any submissions made by the media in opposition to Mr. Danson's application because only the accused and the Crown have the right to oppose such an application.

15 Mr. Jacobsen, on behalf of The Toronto Star, The Toronto Sun and The Globe and Mail, opposes Mr. Danson's application for intervenor status. He directs the court to *R. v. Lepage,* June 3, 1994, Ontario Court of Justice (General Division), Howden J. [reported at 21 C.R.R. (2d) 67], in which, the court held that the parents of a deceased need not be granted intervenor status since their interests were represented by other parties. Mr. Jacobsen submits that the families of victims can provide their perspective through the Crown. Since this system has worked effectively for years, Mr. Jacobsen argues that there is no need for the parents, in this case, to be treated any differently from other victims and their families. Mr. Jacobsen directs the court to the Crown's application, which is virtually the same as the application filed by Mr. Danson on behalf of the Mahaffy and French families. He submits that since an intervenor is required to offer something new or a different perspective of the issue in dispute, this application for intervenor status should be dismissed.

16 Before concluding Mr. Jacobsen observed that in his research he was unable to uncover case law which suggested that victims are permitted to bring a *Charter* application during a criminal trial.

17 Mr. Rosen, on behalf of the defence, submits that the Code has always promoted that courts be open and accessible to the public. He submits that the parents of the two deceased girls are no different from the parents of other victims of murder.

18 Mr. Rosen suggests that Mr. Danson, through his application for intervenor status, is seeking relief which cannot be granted to an intervenor, in a criminal proceeding. He argues that an intervenor, in a criminal matter, can only assist the court. Mr. Rosen further submits that in order for Mr. Danson to be granted his *Charter* relief, he must first take steps to strike down those sections of the Code which permit open courts and accessibility to the public. No such attempt has been made by Mr. Danson.

19 Mr. Rosen suggests that “parents of the victims” have no right to bring an application. However, if the court wishes to grant them intervenor status, then, it should be granted as an “indulgence”. Mr. Rosen is concerned that if the parents are granted intervenor status, on this application to exclude the public, then, they will present evidence, prior to jury selection, which will be highly prejudicial to his client. If the intervenor status is granted, Mr. Rosen urges the court to recognize that intervenors do not provide evidence. Intervenors in criminal proceedings can only come before the court to provide assistance or a new perspective on the issue.

20 Mr. Jacobsen, for the various print media, seeks leave to intervene in this application to exclude the public from viewing the videotape evidence. Citing from the Chief Justice’s reasons, in the *Dagenais* decision, at p. 48 [p. 307 C.R.], which states:

> (a) At the motion for the ban, the judge should give the media standing (if sought) according to the rules of criminal procedure and the established common law principles with regard to standing.

Mr. Jacobsen argues that the media have an automatic right to intervene whenever a publication ban is in issue and that the Crown application to “ban” the public from viewing the

videotape evidence is a direct infringement of the media's right to free expression as guaranteed by s. 2(*b*) of the *Charter.*

21 Mr. Hunt, on behalf of the C.B.C. and Mr. Harris, on behalf of the Canadian Press and Canadian Broadcast News, both adopt Mr. Jacobsen's position. In addition to Mr. Jacobsen's submissions, Mr. Hunt submits if intervenor status is granted, then, the media outlets opposing the publication ban must be permitted to view the videotape evidence so that full and proper submissions can be made.

22 Mr. Houlahan, on behalf of the Crown, and Mr. Rosen, on behalf of the accused, acknowledge that the recent Supreme Court of Canada decision, *Dagenais,* grants the media the right to intervene when a publication ban is in issue and therefore, do not oppose the media's application for intervenor status.

23 Mr. Lefurgey, on behalf of Mr. Williams, also makes application for intervenor status. Mr. Williams is an author, who has been contracted, by a publishing company, to write a book about the *Homolka* and *Bernardo* proceedings. Mr. Lefurgey submitted that an author's writing is a form of media similar to that provided by any of the media outlets present, in court, for these proceedings.

24 Mr. Lefurgey argued that s. 2(*b*) of the *Charter* does not specify the scope of the term "media" and therefore it does not exclude "an author" from its definition of media. Section 2(*b*) of the *Charter* reads as follows:

> Everyone has the following fundamental freedoms:
>
> …
>
> (*b*) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

25 Mr. Lefurgey also points out that the publishing of books predates the introduction of the newspaper and certainly pre-dates television. In an effort to demonstrate that Mr. Williams is a bona fide media representative, Mr. Lefurgey specified Mr. Williams is employed full-time by a publishing company to follow the *Bernardo* trial proceedings and write a book. Mr. Lefurgey

directs the court to the fact that in the United States true crime reporting, in the form of novels, is used as a learning tool in schools. Mr. Lefurgey also points out that as an author Mr. Williams has a unique perspective to provide to this issue that no other media representative can offer.

26 In response to the court's concern that granting intervenor status to one author will result in a floodgate scenario, Mr. Lefurgey submits that no other authors have come forward even though a day has been set aside to hear submissions regarding intervenor status. Mr. Lefurgey is confident that no other authors are interested in obtaining, nor should they be granted, intervenor status.

27 Mr. Houlahan, for the Crown, challenges Mr. Lefurgey's application for status. Mr. Houlahan submits that Mr. Williams is neither a representative of the media nor a representative of the public. Relying on the fact that Mr. Williams acknowledged, at the *Homolka* proceedings, that he does not represent a media outlet and was subsequently denied access to the courtroom, Mr. Houlahan urges the court to deny Mr. Williams status to intervene in this application.

Conclusion

28 After considering the submissions and the *Dagenais* decision, I am of the view that the media have a right to intervenor status when the issue of publication ban is raised. This is clearly stated by the Chief Justice of Canada, at p. 49 [p. 307 C.R.] of that decision:

> (a) At the motion for the ban, the judge should give the media standing (if sought) according to the rules of criminal procedure and the established common law principles with regard to standing.

29 My decision to grant the Mahaffy and French families intervenor status was not as easy. I am of the view that in general victims and parents of victims do not have a right to intervenor status in a criminal trial. In fact, Mr. Jacobsen provided me with the decision of *R. v. O'Connor* (1993), 22 C.R. (4th) 273 (B.C. C.A.) at p. 282, in which the court stated that:

> It must be regarded as undesirable that persons who are alleged to be the victims of a crime which is alleged against an accused person… at a criminal trial, should be heard as intervenors in the criminal proceedings.

There is no foundation, in statute or at common law, for the proposition that a victim or the families of a victim must be granted intervenor status in the criminal trial.

30 In *A. (L.L.) v. B. (A.),* January 6, 1995, (Ont. C.A.), at p. 4 [reported 37 C.R. (4th) 170, at pp. 174-175], Finlayson J.A. stated that:

> Unlike the state and the accused, the Sexual Assault Care Centre and Women's Outreach, and in fact even the complainant, have no right to be represented at trial by counsel.

As well, Finlayson J.A., further commented at p. 4 [p. 175 C.R.], that when the trial judge exercised his discretion to permit the complainant and the two appellant organizations to make independent representations through counsel it was:

> …*an indulgence*; it did not convert them into parties to the criminal proceedings, with privacy or other constitutional interests that could be protected in separate proceedings collateral to the lis between Crown and subject. (emphasis mine)

31 I am granting the Mahaffy and French families intervenor status for this publication ban application, as an indulgence, because I am of the opinion that these families have a unique and different perspective to offer on the issue being put forward by the Crown, which would not otherwise be presented.

32 At this time, I stress that their status is limited to the application by the Crown for a publication ban. As well, I emphasize that intervenor status for victims and/or their families will be rare. I find the circumstances of this case to be so strikingly unusual that they necessitate the families be given intervenor status.

33 I now turn to Mr. Lefurgey's application for intervenor status for his client Mr. Williams. Mr. Williams is an author contracted to write the chronicle of the *Homolka* and *Bernardo* proceedings. Mr. Lefurgey submits that Mr. William's story is a form of media, included in

s. 2(*b*) of the *Charter.* I am in agreement with Mr. Lefurgey that “freedom of press and other media of communication” as protected by s. 2(*b*) of the *Charter* includes book publishing. I am also of the view that a book author is restricted, like any media outlet, from publishing trial evidence that is covered by a s. 648(1) of the Code publication ban. Hence, Mr. Williams has an interest in the outcome of these proceedings.

34 After considering Mr. Lefurgey’s submission, I am of the view that his request for intervenor status is bona fide. As well, since no other parties, of this nature, have come forward for intervenor status in these proceedings and Mr. Williams as an author offers a different media perspective on the issue of publication, I will grant Mr. Lefurgey, as counsel for Mr. Williams, intervenor status.

35 I now turn to the scope of the intervenor status which I have granted. With reliance on *Lepage,* at p. 8, when intervenor status is granted, in a criminal case, it should be limited to that of “friend of the court.” As well, in light of *O’Connor,* at p. 280, intervention cannot “compromise the right of the respondent to a fair trial.” Therefore, all parties granted intervenor status, in this application to exclude the public from viewing the videotape evidence, will appear as friends of the court. As I ruled, on February 1, 1995, all evidence for this application to exclude the public from viewing the videotape evidence, will be in the form of affidavits. Evidence of public opinion polls, on the very issue in question, or analogous issues, will not be received.

Applications granted.