

(ONTARIO)
SUPERIOR COURT OF JUSTICE

B E T W E E N:

HER MAJESTY THE QUEEN

- and -

RUSSELL IMONA-RUSSELL

REASONS

THURSDAY, JANUARY 8, 2009

— Before THE HONOURABLE MR. JUSTICE MOYAHON, sitting without
a jury, at the Metropolitan Toronto Court House, Courtroom
4-7, 361 University Avenue, Toronto, Ontario

A P P E A R A N C E S:

MS. JULIA FORWARD)
MS. JANNA HAROWITZ) — Counsel for the Crown
)
IAIN MACKINNON, ESQ.) — Counsel for CBC and CTV
)
FERHAN JAVED, ESQ.) — Amicus Curiae

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THURSDAY, JANUARY 8, 2009

— Upon commencing at 10:00 a.m.

THE REGISTRAR: Please be seated.

THE COURT: Good morning, counsel. All right.

These are my oral reasons on the publication ban application.

ORAL REASONS — PUBLICATION BAN

McMAHON, J. (ORALLY):

[1] This is an application brought by the accused, Mr. Imona-Russell, seeking a publication ban on his name, age, ethnicity, HIV status and any details that disclose the fact that he is charged with not only these charges before the court but also will be facing trial on a charge of first-degree murder. Mr. Imona-Russell seeks a publication ban on any of this information until the jury on his first-degree murder trial is sequestered, sometime in the fall of 2009.

[2] The position of the Crown is that they support Mr. Imona-Russell's application to a limited extent. The Crown submits that I should ban the publication of the accused's name until the jury is deliberating on the first degree murder trial.

1
2 [3] The accused's application has been served on the Toronto
3 print, radio and television media outlets. The only media to
4 respond has been the CBC and the CTV. Counsel for the CBC and
5 CTV represented by Mr. MacKinnon, has advised this court that
6 neither of his clients at this time have an intention at present
7 to cover this trial or report on the trial. It is the position,
8 however, of the media outlets, both CBC and CTV, that they
9 oppose any ban on the publication of this information as they
10 oppose the ban in criminal trial proceedings.

11
12 [4] In considering this application, it is necessary to briefly
13 set out the background and evidentiary record that is before me
14 to support this application.

15
16 [5] The accused, Mr. Imona-Russell, was initially charged with
17 seven counts in the spring of 2005. It is alleged that he,
18 knowing he was infected with the HIV virus, had consensual
19 unprotected sex with the complainant without disclosing he was
20 HIV positive. He is also alleged to have forced intercourse
21 upon the complainant against her will in March of 2005. Lastly,
22 he is alleged to have assaulted the complainant, to wit: a
23 drill, at this time. These allegations resulted in the accused
24 being charged with counts of aggravated sexual assault, sexual
25 assault, and assault with a weapon.

1 [6] In the summer of 2005, Mr. Imona-Russell was released on
2 bail to face trial on those seven counts. While on bail, he was
3 charged with the first-degree murder of a young woman. He is
4 alleged to have stabbed this other woman to death, subsequent to
5 being released on bail on the seven counts that are now before
6 me. Mr. Imona-Russell is now detained in custody, pending
7 trial, both on the seven counts before me and the second
8 indictment charging him with one count of first-degree murder.
9

10 [7] The trial on the first set of charges, the seven-count
11 indictment, commenced before me on January 5th of '09. It is
12 expected that this trial will be completed within the next
13 month. The accused is presently scheduled to proceed to trial
14 on the first-degree murder case, with pretrial motions being
15 heard in June of this year. It is scheduled to proceed with a
16 jury in the second day of September of '09.

17
18 [8] On the evidentiary record before me filed on this
19 application, it would appear there have been a few articles in
20 the mainstream newspapers, in particular the Globe & Mail,
21 dealing with the fact that the accused was out on bail on sexual
22 assault charges when he is alleged to have committed a
23 first-degree murder. There also appears, based on the
24 evidentiary record, to be a Blog under the name "Angry in the
25 Great White North." I have looked at the material. This Blog

1 site has many postings, most which appear to be factually
2 incorrect. The Blog postings make reference to both sets of
3 charges. There is no evidence before me as to the number of
4 individuals who would access this Blog. It would be hard to
5 imagine such a Blog site that I have observed here have any
6 significant readership.

7
8 ANALYSIS:

9
10 [9] The issue on this application is the balancing of two
11 fundamental rights guaranteed by our *Canadian Charter of Rights*
12 *and Freedoms*. On the one hand, Mr. Imona-Russell, pursuant to
13 section 11(d), is guaranteed the right to a fair trial. On the
14 other hand, section 2(b) guarantees freedom of expression,
15 including the freedom of the press.

16
17 [10] Under the rights, Mr. Imona-Russell is entitled to a fair
18 trial on his charge of first-degree murder, scheduled to proceed
19 in September. He is entitled to an impartial jury who will
20 decide whether he is guilty or not guilty, based only on the
21 evidence the jury hears and the legal instructions of the trial
22 judge, an impartial jury is a jury which will not be swayed by
23 any prior media reports of the case and make their decision
24 objectively, based on the evidence and the instruction.
25

1 [11] Balancing that equally, the public has a right to know
2 what transpires in our criminal justice system. Freedom of
3 expression, including the freedom of the press, plays an
4 integral role in our criminal justice system. Our criminal
5 justice system must be open and transparent. All the
6 participants must be accountable through public scrutiny.
7 Reporting on criminal trials is an essential part of ensuring
8 that the public is informed and that the participants are
9 subject to public scrutiny. The public scrutiny ensures public
10 confidence in the administration of justice. See *CBC v. New*
11 *Brunswick A.G.* (1996), S.C.J. No. 38, S.C.C.; also *Toronto Star*
12 *v. Ontario*, (2000) 2 S.C.R., 188 S.C.C.

13 The issue on this application is balancing these
14 two fundamental rights guaranteed by our *Charter of Rights and*
15 *Freedoms*. It is clear from the direction of the Supreme Court
16 of Canada in *Dagenais v. the Canadian Broadcasting Corporation*,
17 [1994], 3 S.C.R. 385 that the rights under Section 2(b) and
18 Section 11(d) should be treated as equal with neither having a
19 priority over the other. It is the duty of the trial judge to
20 attempt to balance the rights in a fashion that hopefully
21 protects both the rights of a fair trial and the freedom of
22 expression.

23
24 [11] Chief Justice Iamer in *Dagenais* stated the principle as
25 follows at Paragraph 72:

1 It would be inappropriate for the Courts to
2 continue to apply a common law rule that
3 automatically favoured the rights protected by
4 11(d) over those protected by section 2(b). A
5 hierarchical approach to rights, which places
6 some over others, must be avoided both when
7 interpreting the *Charter* and when developing the
8 common law. When the protected rights of two
9 individuals come into conflict, as can occur in
10 the case of publication bans, *Charter* principles
11 require a balance to be achieved that fully
12 respects the importance of both set of rights.

13
14 [12] Pursuant to Her Majesty in *Dagenais*, the burden is upon
15 the applicant, Mr. Imona-Russell, to satisfy the court of the
16 following three components.

- 17
18 1. that a publication ban is necessary in order
19 to prevent a real and substantial risk to the
20 fairness of his first-degree murder trial
21 scheduled for September, 2009;
- 22 2. there are no reasonable alternative measures
23 that will prevent the risk;
- 24 3. the salutary effects of the publication ban
25 outweigh the deleterious effect to the free

1 expression of those affected by the ban.

2
3 [13] The Supreme Court of Canada has made it clear that when
4 assessing whether there is a real and substantial risk to the
5 fairness of trial, such risk must not be speculative and must be
6 well grounded in the evidence before the Court (see *Dagenais*
7 *supra* in *R. v. Mentuck*, [2001] S.C.J. No. 73 S.C.C.

8
9 [14] In the case at bar, based on the evidentiary record before
10 me, there has been very limited media coverage of this trial and
11 the fact Mr. Imona-Russell is on outstanding charge for
12 first-degree murder. As shown in the Application Record, there
13 have been simply a few articles in the Toronto newspaper, one
14 Blog site, and no other media coverage to date, based on the
15 record. I recognize that the media's interest in a case may
16 change as a trial proceeds. However, I must make my decision on
17 the evidentiary foundation before me at this time.

18
19 [15] I do not find that the applicant has satisfied this Court
20 that the publication ban is necessary in order to prevent a real
21 and substantial risk to the fairness on this trial, on the trial
22 of first-degree murder scheduled for September 2009.

23
24 [16] I reach this conclusion for the following reasons: While
25 there has been some media coverage to date, it can only be

1 described as very limited. Any risk to Mr. Imona-Russell
2 receiving a fair trial on the murder charge can be eliminated by
3 the use of a properly worded Challenge for Cause based on
4 pretrial publicity. The vehicle of Challenge for Cause based on
5 publicity can be used to ensure that 12 jurors can be found in
6 the City of Toronto with a population of over three million who
7 will be able to decide Mr. Imona-Russell's guilt or innocence,
8 based only on the evidence and not to be tainted by newspaper or
9 other publications that may have taken place many months before
10 the trial.

11
12 [17] The Challenge for Cause that is the vehicle available here
13 will ensure that Mr. Imona-Russell receives a fair trial in the
14 same manner as the Challenge for Cause has worked to ensure the
15 fair trials of others, to cite a few, *R. v. Bernardo*, *R. v. Roy*,
16 *R. v. Khan*, and *R v. J.S.R.*

17
18 [18] For these reasons, I would dismiss Mr. Imona-Russell's
19 application for a publication ban. I would comment, however,
20 that my decision is based upon the evidentiary record before me
21 at this time. Obviously, should the media coverage become more
22 intense in the future, Mr. Imona-Russell may wish to bring
23 another application in the pretrial motions scheduled in June of
24 this year on his murder trial. This would allow
25 Mr. Imona-Russell an opportunity to have a matter reconsidered,

1 should the evidentiary foundation change. For these reasons I
2 would dismiss the publication ban application.

3 Okay. So, Mr. MacKinnon, I appreciate your
4 assistance on this matter.

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C E R T I F I C A T E

I hereby certify the foregoing
transcript to be a true and
accurate, verbatim transcription
of the proceedings, taken in stenotype shorthand
and produced with the aid of computer-aided
transcription, to the best of my skill and ability.

Michael Cornwall
OFFICIAL COURT REPORTER

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Regulation 587/91, Courts of Justice Act,
January 1, 1990.
