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(Winnipeg Centre)
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Cited as: 2015 MBQB 157

COURT OF QUEEN'S BENCH OF MANITOBA

BETWEEN:		**COUNSEL:**
HER MAJESTY THE QUEEN,	)	For the Crown:
	)	W. Rustyn Ullrich
Respondent,	)	Danielle Y. Simard
	)	
	)	For the (Accused) Applicant
- and -	)	Michael Frank Okemow:
	)	Andrew J.G. McKelvey-Gunson
	)	
MICHAEL FRANK OKEMOW and EDWARD ARTHUR COUTU,	)	For the (Accused) Applicant
	)	Edward Arthur Coutu:
	)	Daniel Manning
(Accused) Applicants.	)	
	)	Ruling delivered:
	)	October 2, 2015

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BOND J.

RULING ON APPLICATION FOR SEVERANCE

BACKGROUND

[1] Michael Frank Okemow ("Okemow") and Edward Arthur Coutu ("Coutu") are jointly charged on one indictment. Okemow is charged with second degree

murder and attempt to commit murder. Coutu is charged with manslaughter, discharging firearm with intent to endanger life, and aggravated assault.

[2] Their trial was scheduled to proceed before a jury starting on September 21, 2015 and continuing for five weeks. A jury had been selected on August 27, 2015.

[3] On September 16, 2015, at a pre-trial conference, one of Okemow's two lawyers advised the court that he would not be able to proceed with the trial because of medical problems that had recently arisen and that required investigation and treatment on an urgent basis. Okemow sought an adjournment. Coutu did not challenge the basis for Okemow's adjournment request, but he did not consent to the adjournment. He indicated through counsel that he wished to assert his right to a trial within a reasonable time, and made an application for severance from Okemow so that his trial could proceed as scheduled.

[4] The Crown indicated that it was concerned about the delay of the trial, but would not oppose the adjournment in the circumstances. The Crown opposed severance of the accused.

[5] I heard the application on September 21, 2015. I granted Okemow's adjournment application on the basis that one of his two lawyers was unavailable because of unforeseen medical difficulties of an urgent nature and that Okemow

was entitled to the adjournment in the circumstances. I denied the severance application, with written reasons to follow. These are the reasons.

ANALYSIS

[6] The authority for the court to order severance of accused is found in section 591(3) of the ***Criminal Code***, which reads:

> **(3) Severance of accused and counts —** The court may, where it is satisfied that the interests of justice so require, order
>
> (a) that the accused or defendant be tried separately on one or more of the counts; and
>
> (b) where there is more than one accused or defendant, that one or more of them be tried separately on one or more of the counts.

[7] Where the case involves an allegation that two or more accused acted in concert or with a common intention, there is a presumption that it is in the interests of justice for the accused to be tried together. See ***R. v. Savoury*** (2005), 200 C.C.C. (3d) 94 at para. 22 (Ont. C.A.), and ***R. v. Stewart***, 2012 ONSC 1939, [2012] O.J. No. 1447 at para. 24 (QL). The principle was stated by Doherty J.A. in a slightly different way in ***R. v. Suzack*** (2000), 141 C.C.C. (3d) 449 at para. 87 (Ont. C.A.): "I begin with the proposition that persons accused of the joint commission of a crime should be tried together."

[8] The approach to be taken was summarized by Doherty J.A. in ***Savoury***:

> [22] A trial judge may order severance of the trial of a co-accused only if satisfied that "the interests of justice so require": ***Criminal Code***, s. 591(3). The interests of justice encompass those of the accused, the

> co-accused, and the community as represented by the prosecution. The trial judge must weigh these sometimes competing interests and will direct severance only if the accused seeking severance satisfies the trial judge that severance is required. To satisfy that burden, the accused must overcome the presumption that co-accused who are jointly charged and are said to have acted in concert, should be tried together. The policy behind this presumption was described by D.W. [Elliott] in his article "Cut Throat Tactics: The Freedom of an Accused to Prejudice a Co-Accused", [1991] Crim. L. Rev. 5 at 17, and cited with approval by Sopinka J. in ***R. v. Crawford*** (1995), 96 C.C.C. (3d) 481 (S.C.C.) at [497]:
>
> > [I]t is undeniable that the full truth about an incident is much more likely to emerge if every alleged participant gives his account on one occasion. ...

[9] Counsel conceded that the onus is on Coutu in this case to satisfy the court that the interests of justice require severance. He argued, however, that the presumption in favour of a joint trial does not apply to this case. He conceded that there may be a "nexus" between Okemow and Coutu, but argued that "it does not rise to the level of common intention as described by the authorities" and that they cannot be said to have acted in concert.

[10] The Crown argued that Okemow and Coutu are alleged to have acted in concert and to have formed a common intention, and that the presumption should apply. The Crown is relying on section 21 of the ***Criminal Code*** as a foundation for Coutu's liability for the offences charged and asserts that the case is clearly one of a common intention.

[11] The Crown alleges that Okemow shot two men with a sawed-off rifle. One died; the other was seriously injured. The Crown alleges that immediately prior to the shooting, Coutu retrieved a gun for Okemow and handed it over to

him. The Crown's theory is that Coutu retrieved the gun for Okemow knowing that Okemow intended to shoot someone and that Coutu shared that intention. Coutu's alleged liability for manslaughter and aggravated assault is grounded in the application of section 21 of the ***Criminal Code***:

> **21. (1) Parties to offence —** Every one is a party to an offence who
>
> (a) actually commits it;
>
> (b) does or omits to do anything for the purpose of aiding any person to commit it; or
>
> (c) abets any person in committing it.

[12] In most cases, knowledge and intent are generally proved by inferences drawn from circumstantial evidence. The jury in this case will be called upon to consider Okemow's actions and intention in assessing the case against Coutu.

[13] For the purposes of this application, I find that the case against Coutu does involve an allegation of common intention and that the presumption in favour of a joint trial applies.

[14] It is important to recall the policy reasons behind this presumption:

> [59] ... [J]oint trials enhance the truth-finding exercise and preclude the possibility of inconsistent verdicts; they spare all those concerned, and ultimately the community, the expense (financial and emotional), inconvenience to witnesses, and institutional stress associated with multiple trials of the same issues.
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> [***R. v. Sarrazin*** (2005), 195 C.C.C. (3d) 257 (Ont. C.A.)]

[15] ***R. v. Last***, 2009 SCC 45, [2009] 3 S.C.R. 146, is the leading case regarding severance, although it was decided in relation to an application for the

severance of counts in an indictment rather than an application for the severance of accused. In ***Last***, Deschamps J., for the court, wrote (at para. 17), "Severance can impair not only efficiency but the truth-seeking function of the trial." The court went on to provide a non-exhaustive list of factors that may be considered in dealing with a severance application:

> [18] The factors identified by the courts are not exhaustive. They simply help capture how the interests of justice may be served in a particular case, avoiding an injustice. Factors courts rightly use include: the general prejudice to the accused; the legal and factual nexus between the counts; the complexity of the evidence; whether the accused intends to testify on one count but not another; the possibility of inconsistent verdicts; the desire to avoid a multiplicity of proceedings; the use of similar fact evidence at trial; the length of the trial having regard to the evidence to be called; the potential prejudice to the accused with respect to the right to be tried within a reasonable time; and the existence of antagonistic defences as between co-accused persons: ***R. v. E. (L.)*** (1994), 94 C.C.C. (3d) 228 (Ont. C.A.), at p. 238; ***R. v. Cross*** (1996), 112 C.C.C. (3d) 410 (Que. C.A.), at p. 419; ***R. v. Cuthbert*** (1996), 106 C.C.C. (3d) 28 (B.C.C.A.), at para. 9, aff'd [1997] 1 S.C.R. 8 (***sub nom. R. v. C. (D.A.)***).

[16] Some of the factors listed in ***Last*** are neutral in this case. There is no indication of antagonistic defences. There is no prejudice arising from evidence that would be admissible against one accused, but not the other.

[17] The only listed factor that weighs in favour of severance for Coutu is the potential prejudice to him occasioned by the delay caused by Okemow's successful adjournment application. Coutu is being held in custody pending his trial. His counsel indicated that he had not made an application for bail because he would likely not be successful due to his antecedents and personal circumstances, and for strategic reasons related to credit that may be given for

time spent in remand at any future sentencing. The adjournment of this trial will result in a delay of approximately one year, and Coutu will likely remain in custody during that time. However, the delay and additional time spent in custody are not determinative: ***Stewart*** at para. 26. See also ***R. v. Tomlinson***, [2008] O.J. No. 816 (Sup. Ct. J.) (QL).

[18] A number of factors weigh against severance in this case:

- There is a significant legal and factual nexus between the counts. While Coutu is not alleged to have been present for the shooting, the acts of Coutu and Okemow underlying the charges are proximate in time and place. On the Crown's theory, they form a continuum from a confrontation involving Okemow, to Coutu retrieving a gun for Okemow, to Okemow shooting the two victims.

- The evidence is anticipated to be complex. There will be expert opinion evidence from three witnesses related to firearms, ballistics and forensic pathology. The Crown expects to call approximately ten civilian witnesses, and as many, if not more, police witnesses. There may be one or more reluctant Crown witnesses, which could result in an application under section 9(2) of the ***Canada Evidence Act***, R.S.C. 1985, c. C-5, or in a ***Khelawon*** application (***R. v. Khelawon***, 2006 SCC 57, [2006] 2 S.C.R. 787). As noted by the Crown, there may be a number of

evidentiary rulings required during the course of the trial that would have to be repeated if severance were granted.

- If severance were granted, there would be a possibility of inconsistent verdicts. Counsel for Coutu argued that any consideration of the possibility of inconsistent verdicts is speculative and that it is possible for a jury to convict Okemow and acquit Coutu, or vice versa, without those verdicts being inconsistent. The Crown disagreed and argued that if Coutu was to be convicted of manslaughter and Okemow was later acquitted of the murder, those verdicts would be inconsistent because Coutu's guilt is dependent on Okemow being the person who killed the victim. It is true that this is not a "cut throat" defence case, where the risk of inconsistent verdicts is high. See ***Savoury*** at para. 25 and ***Suzack*** at paras. 87-88. However, in my view, given the anticipated evidence of the involvement of Okemow and Coutu, there would be a potential risk of inconsistent verdicts if severance were granted.

- The desire to avoid a multiplicity of proceedings is significant in this case. If severance were granted, a second jury would have to be selected to hear Okemow's trial, the evidence to be called on each trial would be the same, each of the witnesses would be required to testify twice, and evidentiary rulings would have to be made twice. The trial is expected to be lengthy, having been scheduled for a total of 22 days. A second trial would likely take a similar amount of time.

[19] As noted by both the Crown and the defence, no one factor is determinative. The various applicable factors must be weighed and considered together to determine whether the interests of justice require severance. See ***Savoury*** at para. 26.

[20] The delay occasioned by the adjournment is unfortunate, and Coutu's continued detention may be regrettable. However, as I weigh that factor along with the factors relevant to the efficacy of the criminal trial as a truth-finding exercise and the interests of the community in a fair, effective and efficient judicial process, I find that the interests of justice do not require severance in this case.

CONCLUSION

[21] Based on these reasons, Coutu's application for severance is denied.

_____J.