Ontario Supreme Court
R. v. Gervais,
Date: 2001-12-14

Her Majesty the Queen, Respondent

and

Andre Gervais and Carmen Bailey, Applicants

Ontario Superior Court of Justice A. Campbell J.

Heard: December 6, 2001

Judgment: December 14, 2001

Robin Flumerfelt, for Crown

Berk Keaney, for Gervais

Michael Lacy, for Carmen Bailey

A. Campbell J.:

Further Pretrial Rulings

1 These further pretrial rulings address the most recent motions in this second-degree murder case scheduled to proceed in Sudbury on January 7.

Defence Opening

2 The usual practice is for the Crown to open at the beginning of its case and for each defendant, if he calls evidence, to open at the beginning of his case. Is this one of those unusual cases where the defence should open to the jury immediately after the Crown?

3 Counsel referred to a number of cases. The basic principle is set out in *R. v. Sood,* [1997] O.J. No. 5385 (Ont. Gen. Div.) (Donnelly J.) at para 2:

> Any deviation from standard procedure of the defence opening to the jury upon the Crown case closing is through judicial discretion premised on special circumstances. The longstanding practice does and should remain[1]…

4 This is not a special case like:

Sood, supra, where the retrial gave an added measure of predictability of the evidence and the Court of Appeal in ordering the retrial noted significant features of the Crown's case which justified a defence opening preview.

R. v. Scott [2001 CarswellBC 2467 (S.C.C.)], November 9, 2001, Hennessy, J., where the learned judge initially ruled that the usual practice should be followed, and then, after the Crown opening, reversed the ruling for curative reasons and permitted the defence to open immediately after the Crown.

R. v. Barrow (1989), 48 C.C.C. (3d) 308 (N.S. T.D.), another retrial, where Nathanson J. acknowledged that in most cases it might be dangerous to permit the defence to open immediately after the Crown.

R v. T. (G.J.), [2000] N.J. No. 379 (Nfld. T.D.), a complex DNA trial where expert evidence was expected from both Crown and defence

R. v. Roby, [1998] O.J. No. 5518 (Ont. Gen. Div.), with 48 complainants and 66 counts of sexual assault over three decades. Paisley J. noted that a defence opening immediately after the Crown would shorten the trial by reducing the need for repetitious cross-examination designed to bring home to the jury the purpose of the questions asked.

5 None of those special circumstances applies here.

[1] See also *R. v. Paetsch*, [1993] A.J. No. 366 (Alta. C.A.) where Kerans J.A. noted "While a judge may have power to direct otherwise, this power should only be exercised in special circumstances." The danger of a potential mistrial is obvious in any case where the defence opens immediately after the Crown. In a few earlier Ontario cases where the defence was permitted to open to the jury immediately after the Crown. These cases include *R. v. Edwards* (1986), 31 C.R.R. 343 (Ont. H.C.) per Barr J. where defence counsel was required to undertake to call evidence. Vannini D.C.J. in *R. v. Vitale* (1987), 40 C.C.C. (3d) 267 (Ont. Dist. Ct.) refused to permit the defence to open immediately after the Crown because defence counsel could not at that stage know whether or not a defence would be called. The softening of the requirement that the defence make such an undertaking was discussed by Howden J. in *R. v. MacDonald*, [1999] O.J. No. 5444 (Ont. S.C.J.), in the context of a suggestion that the test in each case was whether the special circumstances really justified the departure from the norm. The dangers of a defence opening immediately after the Crown are pointed out in cases such as *R. v. Dickhoff*, [1996] S.J. No. 547 (Sask. Q.B.) per Hrabinsky, J. and *R. v. Shergill*, [1997] O.J. No. 143 (Ont. Gen. Div.) where Ferguson J. allowed the early defence opening on consent.

6 To paraphrase what Howden J. said in *MacDonald,* supra, a defence opening immediately after the Crown in this case would not add significantly to the defence ability to focus its position early in the trial through the cross-examination of Crown witnesses.

7 If either defendant wishes to open to the jury they may do so in the ordinary fashion after the end of the Crown case at the beginning of the defence case. This could of course change should the Crown in opening go beyond a mere preview of the evidence to be proved.

Position of the Accused in Court

8 Although the *Criminal Code* is silent on this issue, the following principles emerge[2]:

1. The customary position of the accused in the courtroom is in the dock

2. The trial judge has discretion as to the position of the accused in the courtroom in individual cases

3. The presence of the accused in the dock does not violate his or her *Charter* rights.

9 Exceptions may arise where the presence of the accused in the dock manifestly precludes him from making full answer and defence.

10 One example is the hearing-impaired accused who cannot hear from the dock. Other examples can arise with unrepresented accused. Some judges take the view that the accused in complex commercial fraud cases should be able to sit at the counsel table to assist counsel with voluminous documents, but others find that this direct participation by the accused tends to distract both counsel and jury.

11 None of these exceptions applies in this case.

12 Everyone in the courtroom including the judge, the accused, the counsel, the jury and the court officials, have a different role in the proceedings and a clearly designated place in the courtroom.

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[2] *R. v. Faid* (1981), 61 C.C.C. (2d) 29 per Harradence J.A. at p. 40, [1981] 5 W.W.R. 349, 30 A.R. 616 (Alta. C.A.), reversed on other grounds [1983] 1 S.C.R. 265, 2 C.C.C. (3d) 513, 33 C.R. (3d) 1 (S.C.C.); *R. v. Power* (1992), 101 Nfld. & P.E.I.R. 265 (Nfld. C.A.) per O'Neill J.A. at p. 268

13 Some of the historic reasons for the dock had to do with the need to distinguish the accused from the others present in court and provide him or her with a clearly assigned place in the same way as the jurors, the judge, the witness, the clerk, and others involved in the trial. Although some cases refer to security as a potentially important factor there is no evidence in this case of any security problem involving Gervais, who is out of custody or Bailey, who is in custody.

14 In some courtrooms the courtroom and dock configuration and size may make it more suitable for the accused to remain out of the dock[3]. That is not the case here in Sudbury and experience with the large jury courtroom shows that the dock is a perfectly suitable place for the accused.

15 The modern functional reasons for the dock have to do with the focus of the trial. If the accused remain in the dock they remain at centre stage. The focus of the trial remains on them. The trier of fact is able to observe their responses to the evidence as it unfolds. The jury and indeed the judge and counsel are on balance less likely to be distracted by communications between accused and counsel.

16 All accused should be treated as equally as possible in the courtroom, whether they are in custody or on judicial interim release. It defeats that principle if an accused in custody remains in the dock when an accused on judicial interim release sits elsewhere.

17 If counsel feel that the position of the accused in the courtroom might prejudice the jury, counsel can ask the judge for an appropriate direction. Some judges as a matter of course direct the jury that everyone in the courtroom has their traditional and individual place, including the judge and the jurors and the accused, that the accused like the judge and the jurors sits in the place traditionally reserved for him, and they cannot take that against the accused who are presumed innocent. For instance:

> Mr. D. is the accused person before the court, the defendant. Sometimes we use the word defendant, sometimes the word accused. Sometimes we may refer to him by his name, Mr. D.

[3] Experience suggests this may be the case with some of the courtrooms in the Central East region.

Don't take anything against him by the use of the word defendant or accused. As you are now well aware, he is presumed innocent until proven guilty beyond a reasonable doubt, and the fact that someone calls him accused or defendant doesn't mean anything.

Notice that Mr. D. has his own place in the courtroom. That's the place reserved for the defendant, where defendants regularly sit. He has his place in the courtroom just like you have your place in the jury box and the witnesses have their place in the witness box and I have my place, and counsel have their table and the reporter, and the registrar, and the deputy have their own place.

So don't take anything one way or another in relation to Mr. D. because he's sitting in the place of the courtroom especially reserved for him.

18 Some feel the dock is an anachronism that should be abolished. Some feel that a "stigma" attaches to the accused who sits in the dock[4]. Others point out that this view is supported by nothing more than feeling or conjecture, unsupported by any evidence[5]. Some say that the accused is no more stigmatised in the dock than is the jury in the jury box or the witness in the witness box. There are views to the contrary and a number of orders have been made in individual cases to permit defendants to sit outside the dock[6]. Despite these views there is a strong current of judicial opinion that the dock is ordinarily the best place for the accused[7].

19 Practical difficulties will arise when judges are subjected to constant motions to decide the position of the accused in individual cases. Further problems will arise if trial judges are drawn into disputes about the security requirements of individual accused involving evidence about the accused or even from the accused, including sensitive prejudicial information which would not ordinarily come to the attention of the trial judge.

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[4] *R. v. Shergill*, [1997] O.J. No. 250 (Ont. Gen. Div.) per Ferguson J. at para 17-18, 21: see also *R. v. Kinkead*, [1999] O.J. No. 1742 (Ont. S.C.J.) per LaForme J. at para 9-12 referring to recommendation 83 of the Commission of Proceedings Involving Guy Paul Morin, Report, v. 2 (1998), pp. 1167-8.
[5] *R. v. Heyden*, [1998] O.J. No. 6253 (Ont. Gen. Div.) per McIsaac J. at para 4, 7-9. See also *R. v. B. (C.)*, [1998] O.J. No. 5519 (Ont. Gen. Div.) per Caswell J. at para 6.
[6] *R. v. MacDonald*, [1999] O.J. No. 5444 (Ont. S.C.J.) per Howden, J.: *R. v. D. (K.T.)*, [2001] O.J. No. 2892 (Ont. S.C.J.) per Donnelly, J.
[7] *R. v. Heyden*, supra, *R. v. B. (C.)*, supra, *R. v. R. (W.J.)*, [1999] O.J. No. 4091 (Ont. S.C.J.) per Quinn, J. at para 8-10.

20 Although there is no evidence of any particular security concern in this case, there is no evidence that this is one of those unusual cases where either defendant should sit at counsel table or elsewhere in the court.

21 The place for these accused in this trial is in the regular dock reserved for that purpose.

Motions dismissed.