

# R. v. Ibeagha, [2019] Q.J. No. 7999

Jugements du Québec

Quebec Court of Appeal

Registry of Montreal

The Honourables Louis Rochette J.A., Patrick Healy J.A. and Simon Ruel J.A.

Heard: September 10, 2019.

Judgment: September 16, 2019.

No.: 500-10-006335-168 (500-01-128734-156)

[2019] Q.J. No. 7999 | 2019 QCCA 1534

Between HER MAJESTY THE QUEEN, Appellant -- Prosecutor, and SOLOMON IBEAGHA and CALVIN JOHN DAVID, Respondents - Accused

(24 paras.)

## Counsel

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Pascal Dostaler, DIRECTOR OF CRIMINAL AND PENAL PROSECUTIONS, For Appellant.

Solomon Ibeagha (Absent).

Audrey Cazes-Hardy, For respondent Calvin John David.

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## JUDGMENT

**1** This is a prosecution appeal against acquittals pronounced by the Court of Quebec<sup>1</sup> on counts of trafficking in persons,<sup>2</sup> procuring<sup>3</sup> and advertising sexual services.<sup>4</sup> The sole ground of appeal is that the court erred in concluding that it lacked territorial jurisdiction.<sup>5</sup> The court decided that the alleged offences, if they occurred, were committed entirely in Alberta.

### Facts

**2** As stated in the indictment, the respondents allegedly committed the offences charged in Montreal and "elsewhere in Canada." The theory of the prosecution was that there was a scheme in which two women, the complainants, and the respondents were involved.

**3** The complainants C and A are sisters. The sister C was living with the respondent Ibeagha in an apartment in Montreal and he was her pimp in her prostitution. She invited her sister A to the apartment in Montreal and said that they would dance as strippers. The sister arrived in Montreal and for several days the two women and the respondents caroused. One of the

complainants (A) testified that the other (C) told her after her arrival in Montreal that they would perform escort services and that if she did not respect the respondents things would go badly.<sup>6</sup>

4 In the apartment in Montreal photographs were taken of the complainant A and she was provided with a false driver's permit. The complainants obtained airline tickets and flew to Alberta on 16 September 2015. In Alberta they provided sexual services that were advertised on the internet with photographs of both of them. The complainant C used the telephone of one of the respondents while organising their services in Alberta and both of the respondents contributed, in Montreal and Alberta, to the advertisement of the complainants' services. The nature of these services was determined by the complainant C or by the respondents and proceeds of these services were transferred to the respondents in Montreal. The respondents joined the complainants on 29 September 2015 and assumed active control of the complainants' activities while they were there.

## Judgment

5 The trial judge acquitted the respondents of the three counts on the basis that the Court of Quebec lacked territorial jurisdiction if any of these offences were committed entirely in Alberta.

[19] Le Tribunal est d'opinion qu'il n'a pas juridiction pour des crimes commis en Alberta si aucun des éléments du crime n'est commis dans sa juridiction.

6 With respect to the three counts these are the relevant paragraphs of the judge's reasons.

[27] Le Tribunal conclut qu'il n'a pas de juridiction territoriale sur le 1er chef de l'acte d'accusation porté en vertu de l'article 279.01(1)b) du *Code criminel* car, s'il y a eu crime, il a été entièrement commis en Alberta. Les deux accusés sont acquittés de ce chef d'accusation en ce qui a trait à Montréal.

[...]

[29] Les deux accusés sont acquittés du 3ième chef d'accusation, d'avoir, à Montréal, entre le 9 septembre et 6 octobre 2015, contrevenu à l'article 286.3(1) du *Code criminel*, à la fois parce qu'il n'a pas la preuve qu'à Montréal, l'un ou l'autre des complices a amené A.G.-L. à rendre des services sexuels moyennant rétribution ou recruté, détenu, caché, hébergé, ou exercé un contrôle, une direction ou une influence sur les mouvements d'A.G.-L. S'il y a eu une ou plusieurs de ces formes de commission du crime de marchandisation des activités sexuelles, elles ont eu lieu entièrement en Alberta, compte tenu des conclusions que tire le Tribunal des déficiences du témoignage d'A.G.-L. quant à ce qui s'est dit et ce qui s'est passé à Montréal et sa conclusion qu'elle était consciente et volontaire de se rendre en Alberta pour y faire de la prostitution.

[30] Les deux accusés sont acquittés d'avoir, à Montréal, fait de la publicité pour offrir des services de prostitution contrairement à l'article 286.4a) du *Code criminel*. La preuve établit que la publicité a été entièrement faite en Alberta.

7 Thus the logic of the judge's reasons is that the evidence must establish that at least one of the elements in each of the three offences must have been committed in Montreal in order for the court to have jurisdiction over offences in Montreal and "elsewhere in Canada." Hence the judge's repetition that the Court of Quebec has no jurisdiction if the evidence suggests only that the offences were committed "entirely" outside Quebec.

## Discussion

**8** The statutory foundation for the judge's position, although not stated, is found in section 478(1) of the *Criminal Code*:

Subject to this act, a court in a province shall not try an offence committed entirely in another province.

**9** This general principle is qualified, however, by section 476(b):

For the purposes of this Act,

[...]

**(b)** where an offence is committed on the boundary of two or more territorial divisions or within five hundred metres of any such boundary, or the offence was commenced within one territorial division and completed within another, the offence shall be deemed to have been committed in any of the territorial divisions;

**10** A territorial division is defined in section 2 to include "any province, county, union of counties, township, city, town, parish or other judicial division or place to which the context applies." Territorial jurisdiction over an offence can thus be found in more than one province.

**11** In *Bigelow*<sup>7</sup> the Ontario Court of Appeal considered the basis on which territorial jurisdiction might exist in more than one province or territorial division. The court was concerned with abduction of a child by a parent from Ontario to Alberta and concluded that territorial jurisdiction over an offence might be found in more than one province on one of three grounds:

first, a continuity of operation extending from that province to other provinces; secondly, the commission of an overt act in that province; or thirdly, the registration of effects in that province from acts committed in other provinces.<sup>8</sup>

**12** These principles were stated in *Bigelow* 1982 and the court noted that three categories were not limitative and should not be construed in a "rigid and exclusionary" manner. They have been followed consistently and they have gathered greater force in ensuing years. The court in *Bigelow* noted that some flexibility with respect to territorial jurisdiction is essential in Canada because the constitutional structure of the federal state allocates responsibility for the administration of criminal justice to the provinces. This remains a necessary consideration but it is reinforced by the practical reality that all crime is no longer local and indeed that much criminal activity crosses boundaries either by means of travel or multiple modes of communication.

**13** As recognised in *Bigelow* and restated in subsequent cases, the principle that constrains the extension of jurisdiction to more than one territorial division is that there must be a "real and substantial" link between the jurisdiction of trial and the alleged offence. This is the approach that Canadian courts have adopted in extradition and other transnational matters. As stated in *Libman*, "all that is necessary to make an offence subject to the jurisdiction of our courts is that a significant portion of the activities constituting that offence took place in Canada."<sup>9</sup> The same principle applies where any significant portion of the alleged activities took place in two or more territorial divisions within Canada.<sup>10</sup>

**14** In *Bigelow* the court began with the general proposition that the test for finding jurisdiction in more than one territorial division is whether any element of the offence has occurred in the province claiming jurisdiction. It will be noted, however, that the factors enumerated in *Bigelow* do not refer expressly to an element of the offence as defined in the substantive law. They are not restricted to an element of the *actus reus* or the *mens rea* of an offence. They each refer to matters of fact that could be relevant to the proof of an essential element at trial. They include factual elements that form part of the factual narrative of the transaction in issue. If that threshold can be met, the court of more than one territorial division (or province) can assert jurisdiction and the outcome will follow the strength of the evidence.

**15** With respect to the present case, there was evidence that the scheme continued from Montreal to Alberta and back, and included the presence of the respondents. Thus jurisdiction can be found in Montreal due to the continuity of this operation. Second, the evidence in this case discloses overt acts in Quebec that are "referable to or in furtherance of a criminal plan" extending beyond Quebec.<sup>11</sup> In the present case, for example, there was evidence that in Montreal the respondents received and harboured the two women, took photographs used in advertising and issued directions, received money from the women in Montreal. Third, there was evidence that the scheme at issue in the case generated effects both in Quebec and Alberta and for this reason too territorial jurisdiction could be found in the Court of Quebec.

**16** In the present case the judge did not refer to the extension of territorial jurisdiction that is recognised in the Code and elaborated in *Bigelow*. The omission to do so was a misapprehension of the principles of jurisdiction. The evidence of the scheme in which the respondents were involved between Montreal and Alberta, in conjunction with the breadth of the conduct defined in the offences charged, leaves no question that the Court of Quebec had jurisdiction over the three counts.

**17** The strength of the evidence on the general issue of guilt or innocence is an entirely different matter. It will be seen in the passages quoted above the judge effectively concludes that he had no jurisdiction because the evidence was insufficient to sustain a finding of guilt. It might well be that an acquittal would be justified on the merits after a thorough analysis of the elements of the offences charged and the admissible evidence. But that would not be for lack of jurisdiction. That would be the result if the trier of fact in a court with territorial jurisdiction concluded that the evidence did not prove the charges beyond reasonable doubt. To the extent that the judge declined jurisdiction because the evidence was insufficient it is an error that compels a new trial. For this reason it is unnecessary for the purposes of this appeal to examine the judge's consideration of the substantive elements of the offences charged.

**18** Whether a court has jurisdiction is a condition precedent to a trial of the merits and this is as true of territorial jurisdiction as it is of temporal jurisdiction, jurisdiction over the person or jurisdiction over the subject-matter of an offence. It is a preliminary matter that affects the authority of a court to proceed at trial and ideally should be resolved before the presentation of evidence on the general issue. This does not mean that the issue cannot be raised later in a trial but the question of jurisdiction and the general issue are conceptually distinct. In the present case the question of territorial jurisdiction was only raised by the judge in the final pleadings of the prosecution and in a manner that suggested that territorial jurisdiction was an element of the offence rather than a condition precedent to proceeding on the merits at trial.

**19** Although it was not argued on the appeal, it is an error to acquit in a case where the court

lacks territorial jurisdiction. Such a conclusion presupposes that the court is properly seized of the offence so as to render a decision on the general issue of guilt or innocence. But territorial jurisdiction is not a substantive defence. In a case where the court genuinely lacks territorial jurisdiction the only appropriate remedy is a stay by the prosecution that would permit a competent court in another territorial division to be seized of the prosecution.

## Two Final Points

**20** First, the Court cannot conclude these reasons without noting that the judgment under appeal contains various expressions and observations that might be viewed as injudicious and inappropriate. Judges in all courts must be cautious to avoid the risk that the language they use might be viewed in this way or that it might be understood as a reflection of myths or stereotypes that legislative and judicial measures have sought to eliminate. It is also a reason -- another reason -- why it is preferable in reasons that require detailed and nuanced explanation be written in advance and be neither oral nor extemporaneous.

**21** Second, there are two respondents named in the style of cause. Mr. Ibeagha has not filed an appearance for this appeal although the Court's file discloses that he was given notice and ample opportunity to do so on several occasions. In any event the conclusion of the Court applies to both respondents. Mr. Ibeagha will suffer no prejudice in this court.

## FOR THESE REASONS THE COURT:

**22** **ALLOWS** the appeal;

**23** **QUASHES** the acquittals pronounced in first instance;

**24** **ORDERS** a new trial on Counts 1, 3 and 4 of the indictment.

THE HONOURABLE LOUIS ROCHETTE J.A.

THE HONOURABLE PATRICK HEALY J.A.

THE HONOURABLE SIMON RUEL J.A.

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**1** *R. c. Ibeagha & David*, 2016 QCCQ 15366 (Braun, J.C.Q.).

**2** *Criminal Code*, R.S.C. 1985, c. C-46, s. 279.01.

**3** *Criminal Code*, R.S.C. 1985, c. C-46, s. 286.3.

**4** *Criminal Code*, R.S.C. 1985, c. C-46, s. 286.4.

**5** There were five counts in the indictment. The respondents were found guilty on count 2 but acquitted on counts 1, 3, 4 and 5. There is no appeal against the acquittal on count 5.

**6** There is evidence that this statement was made in Montreal but in an earlier statement to police she evidently said that this statement was made later in Alberta.

**7** *Re Bigelow and The Queen*, (1982) 69 C.C.C. (2d) 204 (Ont. C.A.), leave to appeal refused, October 14, 1982, No 17215, [1982] S.C.C.A. No. 105 (S.C.C.).

**8** *Re Bigelow and The Queen*, (1982) 69 C.C.C. (2d) 204, p. 209.

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- 9 *Libman v. The Queen*, [1985] 2 S.C.R. 178, pp. 212-213.
- 10 See, e.g., *R. v. Hammerbeck*, 1993 CanLII 613 (B.C.C.A.), para 22.
- 11 *Re Bigelow and The Queen*, (1982) 69 C.C.C. (2d) 204, 210.

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