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R. v. H.

Between
Her Majesty the Queen, respondent, and
V. H., applicant

[2001] O.J. No. 1426

[2001] O.T.C. 278

154 C.C.C. (3d) 158

82 C.R.R. (2d) 181

49 W.C.B. (2d) 428

Court File No. P0061/01

Ontario Superior Court of Justice

Dambrot J.

Heard: April 9-10, 2001.

Judgment: April 21, 2001.

(14 paras.)

Criminal law -- Evidence and witnesses -- Cross examination of accused -- Relevancy -- Credibility -- Civil rights -- Protection against self-incrimination.

Application by the accused, H., to prevent cross-examination of him by Crown counsel. If H. testified in his own defence, the Crown intended to cross-examine him on his refusals to testify at the preliminary hearings of his co-accused and another accused arising out of the same incident. H. indicated this would be a factor in his decision whether or not to testify in his own defence. H. argued that the cross-examination would violate his right not to have incriminating evidence from a previous proceeding used to incriminate him in this proceeding. In addition, he argued that it would violate the prohibition against using answers he was compelled to give. Further, he argued that the cross-examination would be irrelevant. The Crown argued that it compelled H. to testify at the preliminary hearings to further the prosecution of the other accused persons and not to incriminate him.

HELD: Application allowed. The cross-examination was disallowed. Compelling H. to testify at the preliminary hearing of the other accused persons did not violate his rights, given the Crown's purpose. Since H. was silent at the preliminary hearing there could be no incriminating evidence, and no use of it against him. The cross-examination would have marginal relevance, since there were more likely explanations for his refusal than the Crown's theory that he was trying to

avoid making inconsistent statements. The possible prejudice to H. of the cross-examination outweighed its marginal relevance. There was danger some jurors might be inclined to view H.'s refusal as an indication of guilt.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, ss. 7, 13.

Canada Evidence Act, ss. 5, 5(1), 5(2).

Counsel:

D. Fisher and A. Jeffrey, for the respondent.

J. Scarfe and E. Lewis, for the applicant.

1 DAMBROT J.:-- This is an application brought by V. H. to preclude the proposed cross-examination of him by Crown counsel on his refusal to testify at the preliminary hearing of Imo Lewis and Nathanael Williams. A bit of background is necessary to understand the nature of the relief requested.

2 The applicant is being tried for the offence of second degree murder. His co-accused Imo Lewis is being tried for the offence of manslaughter. Both offences arise out of the shooting death of Wayne Brown in Toronto on April 20, 1999. Nathanael Williams is charged with second degree murder arising out of the same incident in a separate indictment, and is scheduled to be tried immediately after this matter is completed. It is alleged by the Crown that Nathanael Williams shot Wayne Brown, and that H. and Lewis are culpable as parties.

3 At the preliminary hearing stage in these proceedings, the configuration of the charges was different. At that time, Lewis and Williams were co-accused, and H. was charged separately. Lewis and Williams were called as witnesses by the Crown at H.' preliminary hearing, and testified about the events that form the subject matter of this trial. H. was subsequently called as a witness by the Crown at the preliminary hearing of Lewis and Williams. After being sworn and answering some innocuous questions, H. refused to answer questions relating to the alleged offence. He refused to answer questions on three separate occasions, and also refused, on each occasion, to provide an explanation for his refusal. He was subsequently charged with three counts of obstructing justice. These charges are yet to be tried.

4 The Crown has now closed its case in this trial. Should H. elect to testify in his own defence, Crown counsel has announced that he proposes to cross-examine him about his refusals, for the sole purpose of attacking his credibility. The questioning of H. contemplated by Crown counsel, I am told, would be designed to expose the fact that H.' goal, when he refused to answer questions at the preliminary inquiry, was to insulate himself from the possibility of being cross-examination at trial on prior inconsistent testimony. This, in turn, it is said, would tend to undermine H.' credibility. In addition, Crown counsel argues that the refusal to testify reveals H.' attitude about the significance of the oath, and once again undermines his credibility. Crown counsel specifically disclaims any interest in advancing evidence of the refusals as post-offence conduct that the jury could consider to be indicative of guilt. H. has asked me to rule on this issue before he elects whether or not to testify in his own defence, indicating that the ruling will be a factor in his decision. In the circumstances, I consider it appropriate to make such a ruling at this time.

5 The position of the applicant is that if he is questioned as Crown counsel proposes, his right under s. 13 of the Charter not to have incriminating evidence testified to in a previous proceeding used to incriminate him in this proceeding would be violated. In addition, he argues that such a cross-examination would violate the prohibition in s. 5 of the Canada Evidence Act against the use in evidence at a criminal trial of answers compelled to be given by him in an earlier proceeding at which he objected to answering on the ground that his answer would tend to incriminate him. Finally, he argues that the proposed cross-examination is precluded because it is irrelevant. It is not probative of his truthfulness at this trial.

6 I will begin with the submission that Charter rights of the applicant would be violated if he were confronted with the proposed cross-examination. In order to examine the claim, I will first examine the position of the applicant when he was called to testify at the preliminary hearing. This is necessary because the applicant would be entitled to vindication if I conclude either that his refusal to testify was derived from a breach of the Charter occasioned by the calling of him

as a witness at the preliminary hearing, or, alternatively, that the use of the refusal in cross-examination at trial would itself be a breach of the Charter.

7 The Supreme Court has authoritatively concluded that a person separately charged with an offence is compellable as a witness at the preliminary inquiry of other persons charged with the same offence, without violation of s. 7 or s. 13 of the Charter, unless it is established that the predominant purpose in compelling testimony is incrimination of the witness. (See *R. v. R.J.S.* (1995), 96 C.C.C. (3d) 1; *British Columbia Security Commission v. Branch* (1995), 97 C.C.C. (3d) 505; and *Primeau v. the Queen* (1995), 97 C.C.C. (3d) 1.) In the circumstances of this case, I am entirely satisfied that the Crown called H. as a witness in order to obtain evidence in furtherance of the prosecution of Williams and Lewis, and not for the purpose of incriminating H.. While the Crown obviously had sufficient evidence to secure an order to stand trial against each of Williams and Lewis without the evidence of H., it is plain that the Crown's case had its frailties. Until Williams testified at H.' preliminary hearing, the identity of the shooter was not plain. Even after he testified, the role played by each of Lewis and H. was not free from doubt, to say the least. The evidence that the Crown did have was plagued by inconsistencies. And while it is beyond dispute in this trial that Williams was the shooter, the evidence of this fact admissible against Williams is once again not beyond dispute. The fact that Williams was called again as a Crown witness in this trial, this time against Lewis as well as against H., and has proved to be one of the two key Crown witnesses, is some confirmation that the Crown's purpose in separating the accused and calling each of them against the other or others was legitimate case building, and not an effort to bring about the self-incrimination of witnesses.

8 If there was no violation of the rights of the Applicant in compelling his evidence at the preliminary hearing, then I fail to see how cross-examining him at trial about his refusal to testify could violate those rights, absent some additional use immunity afforded by the Charter in circumstances such as these. If s. 7 of the Charter afforded H. no right to testimonial silence at the time, then asking him about his silence cannot violate his right to silence now.

9 I turn next to the suggestion that cross-examination on the refusal at trial would amount to a Charter breach regardless of the compellability of H. at the preliminary hearing. It seems to me that this is precluded by the fact that the Crown proposes using the evidence to attack credibility, and not as evidence of consciousness of guilt. In that circumstance, I fail to see how the cross-examination could violate his right against self-incrimination found in s. 13 of the Charter. (See *R. v. Kuldip*, [1990] 3 S.C.R. 618.) Indeed, I do not believe that s. 13 is engaged at all in the circumstances here. Section 13 precludes the use of incriminating testimony given in one proceeding to incriminate in another proceeding. A refusal to testify, however, is not incriminating testimony. In fact, it is not testimony at all. Rather, it is the antithesis of testimony. It is the withholding of testimony. The fact that a refusal is made in the witness box while under oath cannot change its character. It is not testimony, and does not fall within s. 13.

10 Similarly, H. cannot avail himself of s. 5 of the Canada Evidence Act. Section 5(1) removes the former common law right of a witness to refuse to answer questions that may tend to incriminate. Section 5(2) precludes the admission in any subsequent criminal trial of answers compelled by s. 5(1) over the objection of the witness. Once again, a refusal to answer a question is the antithesis of an answer, and falls outside the protection provided by this provision.

11 This brings me to the last argument of the applicant, that this line of questioning is irrelevant. Here, the applicant seems to me to be closer to the mark. I would not say that the evidence is irrelevant; but I do believe that its relevance is marginal. The Crown's logic that H.' refusal to testify bears on his credibility is somewhat strained. Ordinarily, H., as an accused, would be entitled to rest on the "case to meet" principle. Among other things, he would not be obliged to disclose his defence to the Crown before trial, nor would he be obliged to submit himself to pre-trial questioning about the offence under oath by the Crown. The effect of *R.J.S.*, *Branch* and *Primeau* is, in the unusual circumstances of separately charged alleged co-perpetrators of a crime, to deprive the accused of these usual benefits, subject to certain residual protections. To suggest that H.' refusal was intended to preclude cross-examination on a prior inconsistent statement, and that this in turn reflects negatively on his credibility, is to ignore the anomalous position he found himself in at the preliminary inquiry, to focus only on one tiny aspect of what H.' purpose may have been when he refused to answer, and then to draw the worst possible inference from it. While H. was not entitled to refuse to testify, and while he may well be guilty of obstructing justice, it is likely that he refused to answer questions about the offence simply in an effort to preserve the protections usually afforded an accused, even at the risk of a conviction for obstructing justice. What is more, it is perfectly possible that H. believed that he was able to give a consistent account of the events in question, whether truthful or not, at the preliminary inquiry and at trial. If that is so, then the suggestions made by the Crown that his refusal was intended to insulate him from cross-examination on a prior inconsistent statement, and that this in turn reflects adversely on his credibility, would not be available at all. While the inferences that the Crown seeks to draw

from the refusal are not impossible ones, they are not ones that I would readily draw. In particular, the suggestion that the refusal bears on H.' credibility, in my view, largely misses the mark.

12 Similarly, in respect of the Crown's second relevance argument, whatever H.' refusal may say about his respect for the law, it says little, in my estimation, about his truthfulness under oath. On the contrary, this argument comes dangerously close to inviting the jury to draw an adverse inference from prior misconduct on the part of H..

13 For all of these reasons, while I am not prepared to say that the line of questioning proposed by the Crown is completely irrelevant, nonetheless I conclude that it can yield answers that are only marginally relevant at best.

14 Having concluded that the line of questioning proposed by Crown counsel is only marginally relevant, I am compelled to consider what prejudice, if any would flow from it. In my view, there is considerable potential prejudice. If the cross-examination were permitted, in order to properly evaluate whether or not they felt that the refusals reflected on credibility, the jurors would have to be apprised of the contours of the right against self-incrimination. They would have to be told that while an accused has the right to testimonial silence at his own preliminary hearing and trial, he is compellable as a witness at the separate preliminary inquiry of an alleged co-perpetrator. This is dangerous and distracting territory, fraught with pitfalls that would have to be guarded against by meticulous instruction. Not the least of the pitfalls is the danger that some jurors might be inclined to view the refusal as post-offence conduct indicative of guilt. In addition, an inquiry into this area might lead some jurors to wonder whether H. gave a post-arrest statement to the police, and if not, whether this also might bear on his credibility, or even his culpability. If the proposed cross-examination were significantly probative of credibility, then careful instruction of the jury on these issues would be necessary. Since I have concluded that the probative value of the line of inquiry is marginal, then the risk of prejudice should not be run. In short, I conclude that the prejudicial effect of the proposed cross-examination would outweigh its probative value, and I will not permit it.

DAMBROT J.

cp/d/qlfwb