2009 CarswellOnt 2367

R. v. Steele

Her Majesty The Queen v. Richard Steele

Ontario Court of Justice

P. Taylor J.

Heard: February 18, 2009
Judgment: February 18, 2009
Docket: None given.

Counsel: D. DeSantis, for Crown
S. **Pieters**, for Accused

Subject: Evidence; Criminal

Evidence --- Witnesses — Exclusion of witnesses.

Cases considered by *P. Taylor J.*:

R. v. Aziga (2008), 2008 CarswellOnt 4300 (Ont. S.C.J.) — referred to

R. v. Brown (1998), 1998 CarswellOnt 4762, 164 C.R.R. (2d) 1 (Ont. Gen. Div.) — considered

R. v. Gervais (2001), 2001 CarswellOnt 4899, 49 C.R. (5th) 177 (Ont. S.C.J.) — considered

R. v. Lalande (1999), 124 O.A.C. 94, 138 C.C.C. (3d) 441, 1999 CarswellOnt 2702 (Ont. C.A.) — considered

R. v. Shergill (1997), 22 O.T.C. 277, 1997 CarswellOnt 882 (Ont. Gen. Div.) — referred to

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11
Generally — referred to

***P. Taylor J.*:**

72 THE COURT: Can I see the Information, please? Richard Ashbourne Steele is before me today for trial. He is five discreet criminal offences. Most of which involve alleged assaultive behaviour against a person by the name of Tasandra Morgan. After his arraignment and plea I made the normal order excluding witnesses. Following which Mr. Pieters, who acts for the accused, requested that Mr. Steele be allowed to sit at the Counsel table. Mr. Pieters says that this is necessary to assist with the preparation of the defence, that it is critically important that he be able to communicate with his client. The Crown opposes the application.

73 Analysis: issues concerning security in a courtroom are matters that are within the discretion of the trial judge. There are relatively few cases that deal with this issue. Many of the cases, including one referred to by Mr. Pieters in the course of his submission, focus on jury

trials where there is a very real concern about perceptions and inference drawing. As Donald S. Ferguson in his work Ontario Courtroom Procedure wrote, "The various concerns about the accused sitting in the dock are summarized in *R. v. Shergill*, [1997] O.J. No. 250 (Ont. Gen. Div.). The most fundamental concern held by most Defence Counsel and some judges is that the jury may draw an adverse inference if the accused is in the dock.

74 "This concern was acknowledged by former Justice Fred Kaufman, who recommended that absent the existence of a proven security risk persons charged with a criminal offence should be entitled, at their option, to be seated with their Counsel rather than in the prisoner's dock. See the commission on proceedings involving Guy Paul Moran, executive summary and recommendation. Queen's printer 1998 at page 73, recommendation 83."

75 Concerns about perception are not apposite in this case. Juries return what is called a general verdict. They simply say guilty or not guilty. They do not give reasons for their finding, and therefore there is a concern that they may be subtly or unsubtly affected by things that they see in the courtroom, including where the prisoner sits, because it is impossible to determine what has influenced them because they only return a general verdict. Here I am sitting as a judge alone. Unlike juries, assuming for the sake of argument people might be influenced. I am not influenced by the fact that I see people in custody. For me it is a daily occurrence. Indeed, in this jurisdiction because I sit on judicial in term of these hearings I am more than aware that people are detained pending their trial, because as part of my judicial duties I occasionally make that order.

76 More importantly, unlike a jury I am required by law to give reasons for my decision making. Those reasons have to allow each party, the Crown and the Defence, to understand what I am doing and why I did it. If I am engaged in some form of prohibited reasoning it will become abundantly clear during the course of my reasons. Either because I will make a conclusatory statement unsupported by any evidence. Simply saying the accused is guilty or the accused is innocent. Or during the course of my reasoning as it relates to my decision making it will become clear that I have engaged in fundamentally flawed reasoning.

77 Equally importantly our law presumes that judges sitting alone can disabuse their mind of inadmissible evidence. Were it not so we would have to declare a mistrial every time a judge ruled that evidence was inadmissible. During the course of the hearing it appears that Counsel have conflated two concepts. The one concept is the concept of restraints, and clearly the issues of restraints the onus is on the Crown to show why a prisoner ought to be in restraints. Mr. Steele, from my observation, is not under any form of restraint in this courtroom. The issue as to where Mr. Steele sits in the courtroom causes the onus to shift to the Defence.

78 In *R. v. Gervais*, [2001] O.J. No. 4942 (Ont. S.C.J.), the late Justice Archie Campbell at paragraphs eight to 10 reviewed the case law and listed a number of principles that emerge on the issue of where in the courtroom an accused should sit. The customary position of the accused in the courtroom is in the dock. In individual cases the trial judge has a discretion as to the position of the accused in the courtroom. The presence of the accused in the dock does not violate the accused's *Charter* rights. Exceptions may arise where the presence of the accused in the dock manifestly precludes him or her from making full answer and defence. For example, a hearing impaired accused who cannot hear from the dock, a self represented accused. In cases of complex commercial fraud some judges allow the accused to sit beside and assist Counsel. Although, other judges find that this distracts both Counsel and the jury.

79 Justice Campbell stated at paragraph 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. Others point out that this view is supported by nothing more than a feeling or conjecture unsupported by any evidence. Some say that the accused is no more stigmatized in the dock than is the jury in the jury box or the witness in 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. Despite these views there is strong current of judicial that the dock is ordinarily the best place for the accused."

80 Justice Ferguson writes in his work, "In the end it is an unusual case where an accused is permitted to sit at Counsel table or elsewhere in the courtroom." He also refers to a decision of Justice of Appeal Borans (ph) in *R. v. Lalande* (ph), [1999] O.J. No. 3267 (Ont. C.A.), at paragraphs 18 and 19: "Where an accused sits during his or her trial is within the discretion of the presiding judge to be determined in the interests of a fair trial and courtroom security."

81 I have heard Mr. Pieters submissions. He indicated that there was a need to have his client properly instruct, that he and Mr. Steele would not object to Mr. Steele being shackled at the Counsel table. In my view it is inappropriate to have Mr. Steele sit at the Counsel table. The placing of him in leg shackles, in my view, is a far greater intrusion on his liberty interest. As a compromise and to allow him to assist his Counsel more directly I will direct that he be given pen and paper. The pen and paper will be given back by him to his Counsel at the end of each court session. It will not be observed or reviewed by anyone other than his Counsel.

82 I am fortified in my view in addition by the fact that at present it appears that there is but a single witness for the Crown. This is not, at least on the surface from what I have heard to data, a complicated case. In addition to the authorities that I have referred I am assisted again by the work by Justice Donald S. Ferguson, Ontario Courtroom Procedure, 2009, pages 252 to 257. So, do have pen and paper for Mr. Steele. I will give him. So, Mr. Steele you can write down anything you want. Ensure that when you hand it to your lawyer that you hand it facedown so no one can see it but him, and you are to give it back at the end of each court session. You are not to take it back into the cells.

83 THE ACCUSED: Your Honour, can I speak?

84 THE COURT: I would prefer that you speak through your Counsel. That is the reason that you retained him. While we are--while Counsel is consulting Mr. Steele, Mr. Costa, what is happening in Mr. Paiva's matter?

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