COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Cumor, 2019 ONCA 747
DATE: 20190924
DOCKET: C63071

Hoy A.C.J.O., Doherty and Zarnett JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Hasan Cumor

Appellant

Jeffery Couse, for the appellant

Tracy Kozlowski, for the respondent

Heard: March 26, 2019

On appeal from the convictions entered on December 3, 2015 by Justice Michael Code of the Superior Court of Justice, sitting with a jury.

Zarnett J.A.:

I. INTRODUCTION

[1] The appellant was convicted, by a court composed of a judge and jury, of six offences: conspiracy to traffic firearms; conspiracy to traffic cocaine; possession of a firearm for the purpose of transfer; possession of an unlicensed firearm; possession of a firearm with its serial number removed; and possession

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of property obtained by crime. The convictions for conspiracy to traffic firearms and possession of a firearm for the purpose of transfer pertained to a Beretta handgun. The convictions for possession of an unlicensed firearm and possession of a firearm with its serial number removed related to a Ruger 40 semi-automatic handgun. The conviction for possession of property obtained by crime related to $10,000 in cash.

[2] The appellant appeals his convictions. His grounds of appeal can be grouped into three categories: a) the procedure chosen for trying challenges for cause to select the jury; b) the refusal to sever the charges related to the Beretta handgun and cocaine from the charges related to the Ruger handgun and the cash; and c) the charge to the jury.

[3] For the reasons which follow I would allow the appeal, set aside the convictions, and direct a new trial based on the jury selection procedure ground of appeal. I would not give effect to the other grounds of appeal.

II. FACTUAL BACKGROUND

[4] In early 2011, during an investigation into a cocaine trafficking ring in Toronto, police intercepted certain telephone communications. On them Rukiyo Omar was heard discussing, with Samson Arkivo, the sale of a Beretta handgun and cocaine to Arkivo. A third person was also heard in seven of the intercepted calls in late January 2011.

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[5] It was conceded at the appellant's trial that the intercepted communications demonstrated two conspiracies between Arkivo and Omar: one in which Omar agreed to sell a Beretta firearm to Arkivo, who intended to split the cost with another buyer; and a second in which Omar agreed to sell cocaine to Arkivo.

[6] It was also conceded at trial that the third person heard on the intercepted calls was engaged in the conspiracy to sell the Beretta handgun; on the intercepted calls the third person spoke to Arkivo to arrange for the completion of the Beretta sale. The Crown's theory was that the intercepts also established that when Arkivo's co-buyer fell through, the third person was involved in the agreement to sell cocaine to Arkivo.

[7] The Crown alleged that the third person on the calls was the appellant. At trial, the Crown led evidence of surveillance of the appellant and Omar conducted in February 2011, which showed, among other things, the appellant's use of the telephone on which the intercepted calls took place as well as his relationship with Omar. The Crown maintained that the evidence confirmed the appellant's identity as the third person on the calls.

[8] On February 8, 2011, police executed a search warrant at a residence associated with the appellant and Omar. The Ruger handgun was located, concealed between a mattress and box spring in a third floor bedroom, and

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$10,000 in cash was also found concealed in towels on a set of shelves in a third floor bedroom. Papers found at the time of the search supported a connection between the accused and the third floor bedroom.

[9] The major issue on the two Beretta charges and one cocaine charge was identity, namely, whether the appellant was the third person on the intercepted calls. The major issue on the charges concerning the Ruger and cash found at the residence searched on February 8, 2011, was whether the appellant had knowledge and control of those items.

III. PROCEDURAL HISTORY

[10] Originally, Arkivo, Omar, and the appellant were jointly named on an indictment alleging seven counts. The appellant was charged with the six counts on which he was eventually convicted. Omar was charged with those six counts and one additional count of possession of property obtained by crime. Arviko was charged with three counts: conspiracy to traffic firearms; conspiracy to traffic cocaine; and possession of a firearm for the purpose of transfer.

[11] The parties appeared before Molloy J. commencing on October 14, 2014 for pre-trial motions. During the course of the motions Molloy J. was told that if a jury were selected there would be a *Parks* challenge.[1] She then asked counsel

[1] In a *Parks* challenge, potential jurors may be asked whether in deciding if the prosecution has proven the charge against the accused their ability to judge the evidence in the case would be affected by the fact that the person charged is a member of a visible racial minority: *R. v. Parks* (1993), 65 O.A.C. 122,

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which category of triers, rotating or static, would be used to hear and decide challenges for cause of prospective jurors. Counsel for one of the accused wanted the option of rotating triers with "the [challenge for cause] question only asked to each prospective juror as they enter[ed] the room before the triers." When asked by Molloy J. to explain, counsel stated that she was more concerned that prospective jurors not hear the challenge for cause question until they came into the courtroom than she was about whether the triers were rotating or static. When asked for her preference as between rotating and static triers, counsel answered that she preferred rotating triers with prospective jurors excluded from the courtroom, describing that as her "ideal", but stated that she could "live with" static triers. Counsel for the appellant described his preference as identical to that of the co-accused.

[12] On November 28, 2014, Molloy J. released a decision which severed the charges against Omar from those against the appellant and Arviko, directing that Omar be tried separately: *R. v. Arviko, Cumor and Omar*, 2014 ONSC 6627, at para. 37. On the same date, Molloy J. issued a ruling in the continuing case against the appellant and Arkivo, that the evidence related to the charge of conspiracy to traffic in a firearm, the Beretta, could not be used on the other counts: *R. v. Arviko, Cumor and Omar*, 2014 ONSC 6625, at para.13.

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15 O.R. (3d) 324, leave to appeal refused, [1993] S.C.C.A. No. 481, at p. 359; see also: *R. v. Spence*, 2005 SCC 71, [2005] 3 S.C.R. 458, at para. 1; *R. v. Douse* (2009), 246 C.C.C. (3d) 227, 193 C.R.R. (2d) 264 (Sup. Ct.), at paras. 3 and 68-74.

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[13] In January 2015, the case against the appellant and Arkivo came on for trial before Brown J. The appellant and Arkivo moved to sever three charges based on the intercepts (conspiracy to traffic firearms, conspiracy to traffic cocaine, and possession of a firearm for the purpose of transfer) from the three search related charges (possession of an unlicensed firearm, possession of a firearm with its serial number removed, and possession of property obtained by crime). In other words, they sought to sever the Beretta related charges and the cocaine related charge from the charges that related to the Ruger and the cash. The request was denied: *R. v. Arviko*, 2015 ONSC 6768, at para. 42.

[14] Counsel for the appellant noted before Brown J. that the parties had agreed as to the challenge for cause procedure: rotating triers with the exclusion of unsworn jurors from the courtroom. No formal application was heard. Brown J. proceeded on the basis of the parties' consent to the procedure. A jury was selected using that procedure, but due to the illness of Arkivo's counsel, a mistrial was declared before evidence was called.

[15] In November 2015, the trial recommenced before the trial judge.

[16] By the time the matter came before the trial judge, he had already decided, in *R. v. Jaser*, 2014 ONSC 7528, rev'd 2019 ONCA 672, that the court was without jurisdiction to order exclusion of unsworn jurors to preserve juror impartiality while using rotating triers to try challenges for cause. In his view,

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Parliament had removed that jurisdiction in 2008, when it enacted ss. 640(2.1) and (2.2) of the *Criminal Code*, R.S.C. 1985, c. C-46. These sections provided that the court may, upon the application of the accused, if necessary to preserve the impartiality of jurors, exclude sworn and unsworn jurors during challenges for cause. If such an order were made the court was required to appoint static triers to try the challenges.

[17] Counsel for the appellant advised the trial judge that he had applied for rotating triers with the exclusion of unsworn jurors, and that Brown J. had allowed that procedure, although Brown J. had not issued a written ruling. Counsel stated that he was aware of the trial judge's practice of only allowing static triers if there was to be an exclusion of jurors, but submitted that as Brown J. had already permitted the procedure of rotating triers with unsworn jurors excluded in this case, it should be followed as a matter of judicial comity and fairness.

[18] The trial judge noted that his own ruling in *Jaser* had predated the ruling of Brown J. Counsel for the appellant responded that he believed that the trial judge still had the jurisdiction to order the jury selection procedure sought. He expressed a preference for rotating triers over static triers due to the risk that would arise from being "stuck" with two triers if one or both triers did not understand their instructions or apply them correctly. In counsel's words it would create "a bit of a mess". He argued that although the use of rotating triers did not absolutely eliminate the risk arising from misunderstood or misapplied

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instructions, it minimized the risk. The trial judge described a process of vetting the static triers to ensure those selected understood their duty. Counsel for the appellant conceded that that would ameliorate his concern in part, but returned to the point that in his view Brown J. had already made a ruling for rotating triers with unsworn jurors excluded, and that the trial judge maintained the jurisdiction to proceed as requested because the *Criminal Code* amendments had not ousted the discretion to do so. Counsel acknowledged that he would not be making those submissions except for Brown J.'s prior ruling "because Your Honour's already decided it", but that he might still have brought an application to preserve the issue.

[19] The trial judge, following his decision in *Jaser*, ruled that he did not have jurisdiction to allow the requested procedure and was not bound by Brown J.'s ruling to allow it. Counsel then brought an application under s. 640(2.1) of the *Criminal Code* for the exclusion of both sworn and unsworn jurors, which the trial judge granted, directing that static triers be used pursuant to s. 640(2.2). He noted that the appellant's position on rotating triers with unsworn jurors excluded was "preserved".

[20] The jury was selected using the procedure directed by the trial judge. At the conclusion of the Crown's case, Arkivo changed his plea to guilty.

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[21] The appellant's position at trial was that the Crown did not prove that he was the third person on the intercepted calls and that therefore he was a party to the conspiracies charged, and that the Crown did not prove he had knowledge and control of the Ruger and the cash. The appellant did not testify.

[22] The jury convicted the appellant on all six counts.

IV. ANALYSIS

A. The Jury Selection Issue

(i) The Issue

[23] It is common ground between the parties that the trial judge's ruling, that he lacked the jurisdiction to order the exclusion of unsworn jurors while using rotating jurors, was in error. Subsequent to his ruling this court, in *R. v. Grant*, 2016 ONCA 639, 342 C.C.C. (3d) 514, at paras. 37, 39 and 41, held that the jurisdiction and discretion to make such an order continued to exist after the 2008 amendments to the *Criminal Code* enacting ss. 640(2.1) and (2.2) providing for the exclusion of both sworn and unsworn jurors and the appointment of static triers. In *R. v. Husbands*, 2017 ONCA 607, 353 C.C.C. (3d) 317, leave to appeal refused, [2017] S.C.C.A. No. 364, at paras. 35-36, this court stated that such discretion had not been ousted or circumscribed by the enactment of ss. 640(2.1) and (2.2). Indeed, the trial judge's prior decision in *Jaser*, which he relied upon to

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make the jury selection ruling in this case, has very recently been overruled by this court: *R. v. Esseghaier*, 2019 ONCA 672.

[24] What is in issue on this appeal is the effect of the trial judge's error.

(ii) The Competing Positions

[25] The appellant argues that the trial judge's error deprived him of his option for challenges for cause to be determined by rotating triers with unsworn jurors excluded from the courtroom while the challenges were heard. He argues that this entitles him to a new trial.

[26] The Crown responds that the appellant merely expressed a preference for the rotating trier procedure, asked the trial judge to implement it only as a matter of judicial comity because Brown J. had permitted it, conceded before the trial judge that the procedure would not have been sought but for Brown J.'s ruling, and ultimately brought an application under s. 640(2.1) for static triers when the appellant was faced with "two competing options". Moreover, the Crown contends that the process undertaken by the trial judge to vet static triers responded directly to the concern about them raised by counsel, and therefore removed any hint of prejudice arising from the jury selection procedure chosen. The Crown argues that any error can be cured by the curative proviso in s. 686(1)(b)(iv) of the *Criminal Code*.

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(iii) The Provisions of the *Criminal Code*

[27] At the time of trial section 640 of the *Criminal Code* provided, in relevant part, as follows:

> **(2)** If the ground of a challenge is one that is not mentioned in subsection (1) and no order has been made under subsection (2.1), the two jurors who were last sworn — or, if no jurors have been sworn, two persons present who are appointed by the court for the purpose — shall be sworn to determine whether the ground of challenge is true.
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> **(2.1)** If the challenge is for cause and if the ground of the challenge is one that is not mentioned in subsection (1), on the application of the accused, the court may order the exclusion of all jurors — sworn and unsworn — from the court room until it is determined whether the ground of challenge is true, if the court is of the opinion that such an order is necessary to preserve the impartiality of the jurors.
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> **(2.2)** If an order is made under subsection (2.1), two unsworn jurors, who are then exempt from the order, or two persons present who are appointed by the court for that purpose, shall be sworn to determine whether the ground of challenge is true. Those persons so appointed shall exercise their duties until 12 jurors — or 13 or 14 jurors, as the case may be, if the judge makes an order under subsection 631(2.2) — and any alternate jurors are sworn.

[28] Section 686(1)(b)(iv) of the *Criminal Code* provides, in relevant part, as follows:

> **686(1)** On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal

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> …
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> **(b)** may dismiss the appeal where
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> …
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> **(iv)** notwithstanding any procedural irregularity at trial, the trial court had jurisdiction over the class of offence of which the appellant was convicted and the court of appeal is of the opinion that the appellant suffered no prejudice thereby
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> …

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(iv) The Principles

(1) The Accused's Options as to the Category of Triers and Juror Exclusion

[29] There are three related concepts concerning the trial of challenges for cause which are important in this case: the category of triers, the persons who could be excluded from the courtroom while challenges for cause were heard, and the nature of the accused's options concerning these matters.

[30] At the relevant time, there were two categories of persons who could hear and determine (that is, try) challenges for cause: rotating triers and static triers.[2] Rotating triers were two individuals who were sworn members of the jury (unless none had yet been sworn), and they changed (rotated) as each new juror was sworn. Static triers were two individuals who tried challenges for cause but who

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[2] In amendments to s. 640 of the *Criminal Code* which come into force on September 19, 2019, the presiding judge will try challenges for cause: see *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*, S.C. 2019, s. 272.

were not and did not themselves become members of the jury: *Criminal Code*, ss. 640(2), (2.1) and (2.2): *Husbands*, at para. 37.[3]

[31] Whether triers were rotating or static was at the option of the accused. Rotating triers were the default right of an accused; the accused did not have to do anything to be entitled to rotating triers: *Criminal Code*, s. 640(2).

[32] On the other hand, unlike rotating triers, static triers would only be used if the accused made an application or its functional equivalent under s. 640(2.1) of the *Criminal Code* for the exclusion of all sworn and unsworn jurors during the hearing and determination of challenges for cause, and the application was granted. Only the accused could invoke the precondition to static triers, because only the accused, not the Crown, could apply under s. 640(2.1): *Husbands*, at paras. 37-38. Nor did the court have the power, without an application by the accused or its functional equivalent, to order static triers: *Husbands*, at paras 37-38.

[33] Turning to the question of which jurors could be excluded from the courtroom during the hearing of challenges for cause, static triers and full exclusion went hand in hand. The precondition to static triers being used was that an order under s. 640(2.1) had been made for the exclusion of all jurors,

[3] Ordinarily when static triers are used, the same two individuals try all the challenges for cause. The trial judge has a discretion to replace static triers with other static triers. But they never become members of the jury: *R. v. Province*, 2019 ONCA 638, at paras. 88-94.

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sworn and unsworn, from the courtroom. However, rotating triers could not be used if all jurors, sworn and unsworn, were excluded, since the rotating triers who were present to hear and determine the challenges were sworn jurors. Rotating triers and full exclusion were mutually exclusive.

[34] Rotating triers could be used if there was no exclusion ordered. And as noted above, the court had a discretion, when rotating triers were used, on the request of the accused, to exclude unsworn jurors[4] from the courtroom to prevent the tainting of unsworn jurors that could result from their hearing the questions put to, and answers given by, other unsworn jurors before they themselves were questioned: *Grant*, at para. 21; *R. v. Riley*, 2017 ONCA 650, 137 O.R. (3d) 1, leave to appeal refused, [2018] S.C.C.A. No. 216, at paras. 62 and 80. This discretion contemplated less extensive exclusion than was involved with static triers, which was preconditioned on the exclusion of all sworn and unsworn jurors.

[35] Thus, under the law as it has been settled by this court, there were three options an accused could invoke for proceeding with a challenge for cause:

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[4] In *R. v. Murray*, 2017 ONCA 393, 347 C.C.C. (3d) 529, at para. 54, the court wrote: “Although the point did not arise in *Grant*, some courts have held that this discretion to exclude unsworn prospective jurors when the truth of the challenge for cause is tried by rotating triers extends to sworn jurors who are not acting as triers: *Swite*, at para. 28; *R. v. English* (1993), 84 C.C.C. (3d) 511 (Nfld. C.A.), at pp. 533-534, leave to S.C.C. refused. 87 C.C.C. (3d) vi (S.C.C.).”

a. rotating triers, as provided in s. 640(2) of the *Criminal Code*, with no one excluded from the courtroom during the hearing and determination of the challenges;

b. rotating triers, as provided in s. 640(2) of the *Criminal Code*, with unsworn jurors excluded from the courtroom if the accused requested and the court under its common law discretion so ordered ;[5] and

c. sworn and unsworn jurors excluded from the courtroom if the accused made an application for that exclusion under s. 640(2.1) and the court determined to grant it in which case static triers were to be used pursuant to s. 640(2.2) of the *Criminal Code*: *Murray*, at para. 60; *Esseghaier*, at para. 28.

[36] While the court had a discretion *whether* to order exclusion when the accused sought to invoke an option that involved it, it was the accused who had the right to choose *which* option to seek to invoke: *Esseghaier*, at paras. 15, 25 and 28.

[37] In order to exercise the choice of option, an accused could consider the benefits and disadvantages of rotating triers and static triers, and the extent of exclusion that came with rotating and static triers. In *Grant*, the court noted two

[5] See footnote 4.

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advantages to rotating triers that could be important to an accused: the participation of members of a jury in its own selection, and the fact that rotation minimized the risk arising from one trier who was unable or unwilling to understand and fulfil his or her duty in assessing the validity of challenges: para. 21. On the other hand, the static trier procedure involved the full exclusion of sworn and unsworn jurors, and thus could prevent the tainting of all jurors through listening to the challenge for cause questions and answers, including possible tainting of already sworn jurors who could not be excluded if rotating triers were used: *Grant*, at para. 21. However, it was the accused who had to balance the benefits and disadvantages of each option, as it was the accused who chose which jury selection option to pursue: *Esseghaier*, at para. 31.

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(2) The Consequences of an Error in the Challenge for Cause Procedure

[38] A mistaken view held by a trial judge as to the options that were available to the accused about the mode of jury selection may or may not have a consequence.

[39] Where the trial court's mistake led to a situation where a jury was selected by a challenge for cause procedure "disavowed by an accused, thus depriving him or her of the option to invoke the method of selecting the composition of triers", the verdict cannot stand, and the curative proviso in s. 686(1)(b)(iv) of the

Criminal Code does not apply: *Husbands*, at paras. 40-41; *R. v. Noureddine*, 2015 ONCA 770, 128 O.R. (3d) 23, at paras. 52-53, 57, 61 and 68.

[40] Conversely, even where the trial court held a mistaken view, the *Noureddine* and *Husbands* principle will not apply where, looking at what the accused had asked for in substance rather than as a matter of form, the accused got what the accused wanted in terms of the jury selection procedure: *Grant*, at paras. 50-52; *Riley*, at paras. 80 and 85; *Murray*, at paras. 63-66. Such an analysis looks at the specifics of the request both in terms of triers and exclusion, as well as the advantages and disadvantages identified by the accused about the jury selection method as they shed light on what the accused in substance sought.

[41] The curative proviso may apply where the accused expressed a willingness for or agreed to static triers, but a formal application was not made: *Noureddine*, at para. 57; *Riley*, at para. 66.

(v) Application of the Principles

[42] A determination of whether the jury was selected by a challenge for cause procedure that wrongly deprived the accused of his then existing option to select the composition of triers, or whether the accused got what he wanted in terms of a jury selection procedure notwithstanding any error, turns on the facts of each case. I turn to the salient facts here.

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[43] Before Molloy J., counsel for the appellant supported the preference of his co-accused's counsel for rotating triers with unsworn jurors excluded. At the time, however, the primary concern counsel for the co-accused expressed was that jurors be excluded. There was no specific articulation of why rotating triers were preferred. Counsel for the co-accused went so far as to say she could "live with" static triers, a statement which appellant's counsel at the time did not contest. If no more had been said, it could be concluded that full exclusion and static triers gave the accused what they wanted. But here there was more.

[44] Before Brown J., the parties agreed to a challenge for cause procedure of rotating triers with unsworn jurors excluded. That agreement is difficult to square with exclusion of all jurors and static triers being what the appellant wanted. The agreement to rotating triers with unsworn jurors excluded is only consistent with that option being what the appellant wanted, and a disavowal of other options.

[45] That position did not change when the matter came before the trial judge. The appellant argued before the trial judge for rotating triers with unsworn jurors excluded. He did so on the basis of judicial comity and fairness (Brown J. having allowed that procedure), but also on the ground that the jurisdiction to make such an order existed (an argument which was ultimately determined by this court's subsequent jurisprudence to be correct). He also gave reasons for preferring rotating triers to static triers, namely to minimize the risk of a static trier who did

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not understand his or her duty. All of this is consistent with the appellant wanting this option.

[46] Although counsel noted before the trial judge that he would not have so argued if Brown J. had not already allowed this procedure, given the trial judge's already expressed view in *Jaser*, I do not interpret counsel's statement to be the equivalent of being content with static triers or a withdrawal of the appellant's selected option. Indeed, counsel's indication that even if Brown J. had not allowed the procedure he would have brought an application to the trial judge for rotating triers with unsworn jurors excluded, to "preserve" his position, indicates that it remained the option the appellant wanted and that there was no withdrawal of the right to object if the appellant was deprived of the option. The trial judge properly noted, in ruling that the option was not available, that the appellant's position regarding rotating triers with unsworn jurors was "preserved", reinforcing this point.

[47] In these circumstances, I cannot agree with the Crown that the appellant got what he wanted because "when faced with two competing options, counsel for the appellant brought the [s. 640(2.1)] application" [Emphasis deleted]. The remaining two options were rotating triers with no one excluded and static triers with full exclusion. A choice of one over the other in these circumstances does not equate to the appellant getting what the appellant wanted. These options had both been effectively disavowed when the appellant sought rotating triers with

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unsworn jurors excluded. The trial judge's error deprived the appellant of the option he chose and restricted the appellant to picking between two options he had not selected. There was a third option, the one that he did select. That was what the appellant wanted, and what he did not get.

[48] Nor does the fact that the trial judge carefully vetted the static triers make that procedure the equivalent of what the appellant wanted. Counsel for the appellant had justified his preference for rotating triers on the basis of minimizing the risk that a static trier who did not understand or apply their instructions would create a "bit of a mess". Although the trial judge explained to appellant's counsel that he would follow a careful vetting procedure, and counsel acknowledged that this would ameliorate his concern in part, counsel for the appellant persisted in expressing a preference for rotating triers. The question of which procedure provided the best balance of benefits and disadvantages for a particular accused was under the *Criminal Code* provisions in force at the time, a decision of the accused. They made the ultimate choice of which procedure to request one for the accused to make. The importance of viewing that choice of option as one for the accused, as opposed to viewing the options as equivalent, no matter which option the accused had chosen, was underscored in *R. v. Swite*, 2011 BCCA 54, 268 C.C.C. (3d) 184, where the court said, at paras. 58-59:

> I also disagree with Crown counsel's submission that prejudice cannot be presumed in these circumstances on the basis that Parliament has made it clear, through

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> the provision for static triers, that either static or rotating triers are capable of properly trying the truth of challenges for cause so as to ensure, to the extent possible, an impartial jury.
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> In response to this submission, I return to my earlier point that Parliament has not dictated the method by which the triers of a challenge are to be selected, but has effectively left that choice with the accused. It must be kept in mind that it is the accused whose liberty is at stake at trial and whose right to an impartial jury is at issue. In effect, Parliament has determined that it is the accused (subject to the making of an order under s. 640(2.2)) who has the right to determine by what method those who determine his fate will be chosen. The accused has the vested interest in the outcome which, in the case of Mr. Swite, was a verdict of guilty of first degree murder and the imposition of the statutorily mandated sentence of life imprisonment with a minimum period of parole ineligibility of 25 years. He is entitled to a trial before a properly constituted court. In this case, however, the court was constituted using a process whereby jurors were effectively screened by static triers in circumstances where rotating jurors were mandated. …

[49] Moreover, this case does not have the features present in *Grant*, *Riley* and *Murray*, cases where this court was able to conclude that the accused got what the accused wanted in terms of the jury selection procedure, notwithstanding any erroneous view the trial court had held as to the options available to the accused.[6] Unlike *Grant*, this is not a case where the trial judge recognized a discretion to exclude unsworn jurors while using rotating triers but was given no reason to exercise it, such that the trial judge did not err in requiring the accused

[6] See the discussion of these cases in *Esseghaier*, at paras. 79-87.

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to select between the remaining options: at paras. 49-52. It is not a case like *Riley*, where the sole concern the accused raised was juror exclusion, but he made no mention of rotating triers and applied under s. 640(2.1): at paras. 80 and 85. It is not a case like *Murray*, where counsel for the accused never rejected the use of static triers and made the functional equivalent of an application under s. 640(2.1): at paras. 56, 57, 63 and 65. In each of those cases the court was able to conclude that in substance the accused got what the accused wanted. A similar conclusion cannot be reached here.

[50] This case is also different from *R. v. Evans*, 2019 ONCA 715, where this court found that the full exclusion of jurors and the appointment of static triers gave the accused what they wanted in terms of the jury selection procedure. In *Evans*, the accused did not seek any ruling that unsworn jurors be excluded while rotating triers were used, the accused expressly abandoned such a request, the court did not make any ruling denying that option to the accused, and the accused expressly invoked and applied under s. 640(2.1) for juror exclusion which led to the appointment of static triers, not as a result of an erroneous ruling but because the accused wanted exclusion rather than a specific type of trier: at paras. 52-59. In contrast, here, the appellant specifically sought rotating triers with unsworn jurors excluded, did not abandon that request, and there was a ruling as to the non-availability of that option, but with the

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appellant's rights arising from having requested that option preserved before any application under s. 640(2.1) was made by the appellant.

[51] This court's jurisprudence makes it clear that there is very little scope for the operation of the curative proviso where an error has been made that affects the accused's rights regarding the procedure for selecting the jury. In *Noureddine,* two reasons for this were given. First, the result of an error that deprived the accused of a jury selection method to which he was entitled is an improperly constituted jury, and that is beyond the scope of the errors that can be cured by in curative proviso: at paras. 52-53, 57, 61 and 68; see also: *Riley*, at para. 73. Second, the curative proviso can only be applied where the Crown shows absence of prejudice to the accused. Prejudice extends beyond actual prejudice (which is impossible to gauge in this kind of situation) to prejudice to the due administration of justice, which occurs where a jury selection method the accused was entitled to under the *Criminal Code* was invoked by the accused, but denied in favour of one disavowed by the accused: *Noureddine*, at paras. 62-64, 68; see also: *Swite*, at paras. 58-59.

[52] Where might the curative proviso apply? In *Noureddine*, the court gave as an example a situation where the accused agreed to the use of static triers but made no formal application for their use: at para. 57. This situation is not present here. Counsel for the appellant did apply for static triers, but only when an option of jury selection procedure available to the appellant was erroneously ruled to be

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unavailable, and only after preserving his right arising from his initial choice of jury selection procedure. The application ultimately made under s. 640(2) here cannot be equated to willingness or agreement to use static triers without a formal application in the sense meant in *Noureddine*.

[53] Accordingly, the principle applied in *Noureddine* and *Husbands* is applicable here. The result it mandates is that the appeal be allowed and the verdicts of guilty be set aside on this ground.

B. Refusal to Sever

[54] At the commencement of the trial before Brown J., the appellant and Arkivo asked for severance of the counts related to the Ruger handgun and the property obtained by crime, from the counts related to the Beretta handgun and the conspiracy to traffic cocaine. Only the counts related to the Beretta and the conspiracy to traffic cocaine involved Arkivo.

[55] In support of the requested severance, the appellant and Arkivo relied on Molloy J.'s ruling on the use of cross-count evidence. Molloy J. had held that evidence on the count of conspiracy to traffic in a firearm, which pertained to the Beretta, had no relevance to any other count of the indictment, had to be kept in a "water-tight compartment", and would be highly prejudicial to the defence on the other counts. The appellant argues that it was an error not to sever the counts in these circumstances, as no limiting instruction was capable of curing

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the risk of prejudice to the appellant that would arise from trying the charges together. I disagree.

[56] A trial judge's severance ruling is entitled to deference and will only be interfered with on appeal if the judge acted unreasonably or if the ruling resulted in an injustice: *R. v. A.C.*, 2018 ONCA 333, 360 C.C.C. (3d) 540, at para. 21; *R. v. Figliola*, 2011 ONCA 457, 105 O.R. (3d) 641, at para. 96.

[57] Counts will be severed where it is in the interests of justice to do so: *Criminal Code*, s. 591(3)(a). The interests of justice encompass the accused's right to be tried on the evidence admissible against him or her as well as society's interest in seeing that justice is done in a reasonably efficient and cost-effective manner. A number of factors are to be considered and weighed cumulatively to determine whether the interests of justice require severance: *R. v. Last*, 2009 SCC 45, [2009] 3 S.C.R. 146, at paras. 17-18, 44 and 47.

[58] Brown J. considered the relevant factors and weighed them appropriately. He accepted Molloy J.'s finding that the conspiracy to traffic in the Beretta would be prejudicial to the defence on the other counts. However, as did Molloy J., he also considered that a limiting instruction telling the jury that they could not apply evidence on the Beretta counts to the other counts would protect against that prejudice.

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[59] In fact, the trial judge gave a limiting instruction.[7] The jury is presumed to have acted in accordance with the instructions they received: *R. v. Puddicombe*, 2013 ONCA 506, 299 C.C.C. (3d) 543, at para. 93, leave to appeal refused, [2013] S.C.C.A. No. 496; *R. v. Hamilton*, 2011 ONCA 399, 271 C.C.C. (3d) 208, at para. 214.

[60] Brown J. also considered the legal and factual nexus between counts, including that: the two conspiracy counts were based on the same intercepted communications; the conspiracy to traffic in cocaine evidence was relevant to the Ruger-related counts and the property obtained by crime count, because (as Molloy J. had observed) the evidence obtained from the search of the residence included evidence that could tie the appellant to the conspiracy; and the charges all arose from the same investigation, meaning that in order to present a cohesive narrative, much of the same evidence would be required even if there were separate trials. Brown J. also noted that granting the application would create a multiplicity of proceedings consisting of lengthy trials.

[61] Brown J. considered the effect, on the appellant's ability to testify, of hearing the conspiracy-related charges together with the Ruger and property obtained by crime charges. He accepted that it was objectively reasonable that the appellant could choose to testify on the latter charges but not wish to testify

[7] The appellant complains about the extent of the limiting instruction – a point discussed in paragraphs 67-68 below.

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on the conspiracy-related charges so as not to give the jury an opportunity to identify his voice. He properly considered a stated intention to testify as one factor to be balanced.

[62] However, upon a balancing of all considerations, Brown J. concluded that the legal and factual nexus and the benefit to the administration of justice in avoiding a multiplicity of proceedings, outweighed any factors in favour of severance, and he refused to grant it. In my view, that decision did not involve any error that would warrant appellate intervention.

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C. The Jury Instruction Grounds

[63] The appellant raises several concerns with respect to the jury instructions.

[64] The appellant submits that the trial judge's charge was too lengthy. A jury charge that is unnecessarily confusing constitutes an error in law: *R. v. Hebert*, [1996] 2 S.C.R. 272, at para. 8. Here the charge took two days to deliver and was 171 pages in length.

[65] The short answer to this submission is that the charge was not confusing, let alone unnecessarily so. The test for a charge is "whether the jury was properly, not perfectly, instructed": *R. v. Calnen*, 2019 SCC 6, 374 C.C.C. (3d) 259, at para. 9. Length and detail are not independent grounds on which to criticize a jury charge; the question is whether the trial judge met his "duty to inform the jury of the relevant evidence, and to assist the jury in linking that

evidence to the issues that it must consider in reaching a verdict.”: *R. v. Rodgerson*, 2015 SCC 38, [2015] 2 S.C.R. 760, at para. 30.

[66] Here the trial judge conducted a pre-charge conference. He implemented some suggestions of counsel, and in respect of other suggestions he was entitled to depart from them. For example, the trial judge insisted, notwithstanding a suggestion of defence counsel, on reviewing for the jury evidence relevant to whether there were conspiracies as alleged even though the defence conceded there were. As the trial judge appropriately pointed out, it was up to the jury to decide if there was a conspiracy whether or not the appellant conceded it.

[67] The circumstances of the case justified a lengthy charge. There were six separate offences charged, including two conspiracies. There was wiretap, surveillance, and expert evidence. In delivering the charge efforts were made to keep it understandable and digestible, by using methods such as taking breaks during the oral delivery of the charge, and using headings and subheadings in the written version of the charge.

[68] I agree with the Crown that the charge was “comprehensive” and “comprehensible”.

[69] The appellant also argues that the trial judge erred in failing to instruct the jury that they should not consider the determination they would make about whether the appellant was involved in the conspiracy to traffic firearms when they

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considered whether the appellant was in possession of the cash as property obtained by crime. The appellant argues that Molloy J. had ruled that evidence irrelevant, yet the trial judge instructed the jury they could consider that evidence as relevant.

[70] This issue was addressed at the pre-charge conference. When Molloy J.'s ruling about the ability to use evidence of the conspiracies as relevant to the property obtained by crime charge was raised, counsel for the appellant stated that Molloy J. had been wrong to say it could not be used in respect of this charge. The trial judge was not obliged to follow a pre-trial ruling which the parties agreed was wrong in law: *R. v. R.V.*, 2018 ONCA 547, 141 O.R. (3d) 696, at paras. 97-104, rev'd on other grounds, 2019 SCC 41.

[71] The appellant further argues that the trial judge did not instruct the jury that it needed to be satisfied beyond a reasonable doubt on each element of the offence of conspiracy. He says the trial judge left the jury with the impression that identity only had to be proven on a balance of probabilities.

[72] I disagree. The trial judge expressly told the jury that "[a]ll of the "elements" of a particular offence must be proved beyond a reasonable doubt before there can be a conviction for that offence." He explicitly stated that the identity of members of the conspiracy was one of the elements of the offence of conspiracy and that it had to be "proved beyond a reasonable doubt before you can convict

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an accused of this offence." He properly instructed the jury that they must find beyond a reasonable doubt that the appellant was the voice of the third person on the intercepted communications.

[73] The appellant argues that the jury could have taken the trial judge to mean that identity had to be proven on a balance of probabilities from his instruction to use that standard on the question of whether the appellant was probably a member of the conspiracy so as to make co-conspirators' statements admissible against him. However, the trial judge was clear that it was only for this purpose that the lower standard of proof applied. He was equally clear that on the question of identity as an element of the conspiracy offences, proof beyond a reasonable doubt was required.

[74] Finally, the appellant submits that the trial judge unfairly undermined counsel prior to the jury commencing deliberation. The trial judge had, at the request of appellant's counsel, re-called the jury to explain the meaning of the word "exculpatory". The appellant argues that in providing the explanation the trial judge told the jury he thought they were too smart not to know what exculpatory meant, suggesting that appellant's counsel thought otherwise.

[75] In my view, the entire passage, read in context, does not have the undermining effect the appellant contends for, nor could one isolated remark have been anything other than harmless in a lengthy trial conducted in all

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respects with appropriate decorum. I would not give effect to this ground of appeal.

V. CONCLUSION

[76] Because of my decision on the jury selection issue, I would allow the appeal, set aside the convictions, and direct a new trial.

Released: “AH” September 24, 2019

“B. Zarnett J.A.”
“I agree. Alexandra Hoy A.C.J.O.”
“I agree. Doherty J.A.”

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