Court File No. 39440

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N:

VICTOR SAMANIEGO

Appellant
(Appellant)

-and-

HER MAJESTY THE QUEEN

Respondent
(Respondent)

-and-

CRIMINAL LAWYERS' ASSOCIATION (ONTARIO)

Intervener

REPLY FACTUM OF THE RESPONDENT, HER MAJESTY THE QUEEN

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*, S.O.R. 2002 -*156)*

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PART I: OVERVIEW- THE CROWN'S POSITION

1. The power of a trial judge to manage a trial, including placing limits on cross-examination, is well settled and understood law. The power predates the oft-cited decision of Justice Rosenberg recognizing the power of a trial judge to control the court's process. It is not an expansion of trial management powers. It is not disputed by any of the parties to this case that this power exists.

2. The Crown agrees with the intervenor that clarity in the law is required but clarity currently exists. Trial judges have a long-standing power to limit cross-examination that is vexatious, abusive, repetitive, misleading or more prejudicial than probative. That is what happened in this case: the trial judge properly curtailed cross-examination. It is clear this power is necessary to ensure not only an efficient trial but a fair trial. It is clear the exercise of the power is case-specific and made by the judge best placed to understand the issues and rhythms of a trial. It is clear decisions related to cross-examination are made on the record before the trial judge and the submissions of counsel. It is clear these decisions are not made on detached reflection with the assistance of a transcript of the entire proceeding.

3. The intervenor's position will not reinforce that clarity for trial courts or litigants. Rather, the position advanced creates artificial silos of "case management powers" and "evidentiary rulings" that are neither legally nor practically viable. Limitation of cross-examination does not neatly fit within the silos or "lens" suggested by the intervenor. The power to limit cross-examination often contains not only a trial efficiency component but concerns for fairness requiring discretionary decision-making and factual findings that are entitled to deference incapable of review under the regime proposed by the intervenor. Some limitations will be based solely on evidentiary issues such as relevance. Others will be based on efficiency to encourage focus. Other limitations will be placed as a combination of efficiency, fairness and evidentiary concerns. All proper limitations promote truth-seeking and a correct result.

4. The trial management powers that the intervenor urges this Court to adopt contain within them the power to limit cross-examination, a reflection of this Court's jurisprudence urging an end to wasteful and repetitious proceedings.

PART II: THE CROWN'S POSITION ON THE QUESTIONS IN ISSUE

5. This appeal is focused on the rulings made by a trial judge during a cross-examination that was unfocused, unstructured, rambling and repetitive. It does not raise general issues about a trial judge's recognized and well delineated right to limit cross-examination. It does not raise issues about the general extent of trial management powers and a purported clash with rules of evidence.

PART III: BRIEF OF ARGUMENT

The Common Law Authority to Limit Cross-Examination: A Long-Standing Trial Management Power

6. The right to cross-examine witnesses must be "jealously protected and broadly construed". But this Court has repeatedly affirmed that this right is not without limits.[1] Counsel must respect the rules of relevancy. Trial judges can bar cross-examination that is harassing, repetitive, a misrepresentation of evidence or more prejudicial than probative in value (in the case of defence-led evidence, substantially more prejudicial than probative) even if otherwise admissible.[2] A decision to exclude relevant evidence, absence reliance on incorrect legal principles, is entitled to deference.[3] A well-recognized exception to the general admissibility of evidence in cross-examination is the trial judge's discretion to exclude it if it prejudices a co-accused.[4] A trial judge's decision how to best manage cross-examination is owed deference.[5] This

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[1] See: *R. v. Lyttle*, [2004] 1 S.C.R. 193 at para 44; *R v. Meddoui*, [1991] 3 S.C.R. 320; *R. v. Osolin*, [1993] 4 S.C.R. 595 at 161-170; *R. v. John*, 2017 ONCA 622 at para 52; *R. v. Evans*, 2019 ONCA 715 at paras 97-101: "The popular courthouse folklore 'But this is cross-examination' is simply that. It is not a lifetime pass around and through the thicket of the fundamental principles of the law of evidence"

[2] See: *R. v. Lyttle, supra* at para 4; *R. v. Kresko*, 2012 ONSC 3832 at para 22; *R. v. Mohamed*, 2019 ONSC 2767 at para 16; *R. v. Harrer*, [1995] 3 S.C.R. 562 at paras 23, 41-46

[3] See: *R. v. Arraya*, 2015 SCC 11 at para 31, *R. v. Ansari*, 2015 ONCA 575 at para 112, leave to appeal ref'd [2015] S.C.C.A. No. 487; *R. v. Clayton*, 2021 BCCA 24 at para 51

[4] See: *R. v. Crawford*, [1995] 1 S.C.R. 858; *R. v. Jama,* 2020 ONCA 106 at paras 55-59; *R. v. Suzack* (2000), 141 C.C.C. (3d) 449 (Ont. C.A.)

[5] See: *R. v. Poldolski*, 2018 BCCA 96 at para 369 leave to appeal ref'd [2018] S.C.C.A. No. 322: "Absent the kind of unwarranted interference in cross-examination that denies an accused the

power is of long standing. It did not emerge as part of the recent statutory and jurisprudential expansion of trial management powers resulting from ever longer and more complex criminal trials.[6] This trial management power incorporates both efficiency and fairness concerns for the trial process.[7] And trial fairness incorporates not only the interests of an accused individual but also the interests of the Crown as representative of the community.[8] The right to make full answer and defence does not allow an accused to admission of all relevant evidence through cross-examination nor does it allow him to distort the truth-finding function through cross-examination even if inadvertently.[9]

7. Cross-examination can be limited if a clearly articulated basis for its relevance is either not evident or properly articulated. A trial judge can properly require counsel to identify the relevance of the evidence.[10] A trial judge can also intervene in cross-examination to clarify evidence.[11] Clarification of evidence, especially if misstated in cross-examination, can only enhance the truth-

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right to make full answer and defence, this is a matter of trial management with which an appellate court should not lightly interfere."

[6] See: *R. v. Logiacco* (1984), 11 C.C.C. (3d) 374 (Ont. C.A.); *R. v. McLaughlin* (1974), 15 C.C.C. (2d) 562 (Ont. C.A.). Both decisions are accepted in *R. v. Lyttle, supra* at para 44.

[7] See: *R. v. Osolin, supra,* at para 166: "The provisions of ss.15 and 28 of the *Charter* guaranteeing equality to men and women,, although not determinative should be taken into account in determining the reasonable limitations that should be placed upon the cross-examination of a complainant [in a sexual assault case] It is only right that reasonable limitations be placed upon such cross-examination."

[8] See: *R. v. Harrer, supra,* at para 45; *R. v. Bjelland,* [2009] 2 S.C.R 651 at para 22; *R. v. S. (N.)* 2010 ONCA 670 at para 50; *R. v. Sappleton*, 2010 ONSC 5704 at para 13

[9] See: *R. v. Mills*, [1999] 3 S.C.R. 668 at paras 71-76; *R. v. Lising,* [2005] 3 S.C.R. 343 at para 3; *R. v. Ivall*, 2018 ONCA 1026 at paras 166-68: "An accused person is entitled to a fair trial, not an endless one. Trial judges are entitled to restrict a line of cross-examination that would not further the resolution of the issues in the case and might only serve to distract or to confuse the jury thereby needlessly prolonging the trial."

[10] See: *R. v. John,* 2017 ONCA 622 at para 59; *R. v. McDonald*, 2017 ONCA 568 at para 68; *R. v. Savouipour* (2006), 205 C.C.C. (3d) 533 (Ont. C.A.) at para 25; *R. v. Osman*, [1996] O.J. No. 3540 (C.A.) at para 1; *Alberta v. Hunter*, 2012 ABCA 83 at para 30.

[11] See: *R. v. Polanco*, 2018 ONCA 444 at paras 22-23; *Chippewas of Mnjikaning First Nation v. Ontario*, 2010 ONCA 47

seeking function of a trial and is a separate exercise than making an evidentiary ruling. A failure to allow relevant cross-examination is not without remedy: it can render a trial unfair and "almost always leads to a new trial".[12] This remedy ensures against wrongful convictions.

Trial Management Powers: The Ability to Limit Cross-examination

8. The need for trial judges to robustly exercise trial management powers emerged after the recognition of the right of trial judges to limit cross-examination for the purposes of efficiency, fairness or both. The modern starting point is the oft-cited decision of Justice Rosenberg in *R. v. Felderhoff*[13] who held that both superior and statutory courts have a power to manage trials, a recognition that trial judges are not, if they ever were, referees sitting passively in the face of ever lengthening criminal trials. In a non-exhaustive list, Rosenberg J.A. held that a trial judge has multiple management tools:

i. Placing reasonable limits on oral submissions;
ii. Direct submissions to be made in writing;
iii. Require an offer of proof before embarking on a lengthy *voir dire*;
iv. To defer rulings
v. To direct the manner in which a *voir dire* is conducted, especially whether to require the evidence be called *viva voce* or on the basis of transcripts;
vi. In exceptional cases, to direct the order in which evidence is called.

Pointedly, Justice Rosenberg noted it was "neither necessary nor possible to exhaustively define its contents or its limits."[14]

9. The need for more robust trial management by judges because of the increasing length of criminal trials, including curtailing improper cross-examination, has been acknowledged by this Court and other appellate courts.[15] Moldaver J., in an extra-judicial speech, described long criminal

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[12] See: *R. v. R.V.*, 2019 SCC 41 at para 86; *R. v. Shearing*, [2002] 3 S.C.R. 33 at para 151; *R. v. Osolin*, *supra,* at para 180; *R. v. Crosby*, [1995] 2 S.C.R. 912 at para 20
[13] (2003), 68 O.R. (3d) 481 (C.A.)
[14] See; *R. v. Felderhof*, *supra,* at para 57
[15] See: *R. v. Jordan*, [2016] 1 S.C.R. 631 at para 139 "Appellate courts must support these efforts by affording deference to case management choices made by courts below."; *R. v. Cody*, [2017] 1 S.C.R. 659 at paras 36-39. *R. v. Hamilton*, 2011 ONCA 399 at para 49: "At a time when we are concerned about the increasing cost and length of criminal trials as well as their drain on

trials as "a cancer on our criminal justice system".[16]

10. The intervenor urges this Court to adopt the trial management powers outlined in *R. v. Bordo*.[17] The intervenor states that absent from the list of trial management powers is any reach into the substantive rules of evidence. That may be accurate in the sense that the list does not address rules of evidence. It does not, however, address the fact that the Court explicitly accepts that "disciplined and well-focused advocacy is expected from parties, not one 'carried out with the accuracy of a blunderbuss" and time limits on evidence are a necessary part of the trial management powers to "promote a fair and efficient criminal trial". Reliance was placed on the *Lesage-Code* report[18] and its prescription for limiting cross-examination to focus counsel to ensure both an efficient and fair trial.[19] Limitation of cross-examination was explicitly acknowledged in *Bordo* as a trial management tool in that case: a three-day limit was set on defence cross-examination in its challenge to the wiretap authorization.[20] Such a limitation, by definition, curtails cross-examination on evidence that would otherwise be admissible.

PART IV: COST SUBMISSIONS

11. The Attorney General of Ontario does not seek costs and requests that costs not be awarded.

PART V: ORDER REQUESTED

12. The Attorney General of Ontario respectfully requests that the Court dismiss the appeal.

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resources and the pressures they bring to bear on the administration of justice, appropriate trial management is to be encouraged, not muted."; *R. v. Vorobiov*, 2018 ONCA 448 at para 26; *R. v. Auclair*, 2013 QCCA 671, affrmd [2014] 1 S.C.R. 83

[16] See: Hon. Justice Michael Moldaver "Long Criminal Trials: Masters of a System They are Meant to Serve" (2006) 32 C.R. (6th) 316 at p. 320

[17] 2016 QCCS 477

[18] Patrick LeSage and Michael Code: *Report of the Review of Large and Complex Criminal Case Procedures* (Toronto: Queen's Printer for Ontario, 2008)

[19] See: *R. v. Bordo*, *supra,* at paras 148-152

[20] See: *R. v. Bordo, supra,* at paras 211-212

ALL OF WHICH is respectfully submitted this 9th day of July, 2021, by

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PART VI: AUTHORITIES CITED

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