Her Majesty the Queen v. Figliola et al.

[Indexed as: R. v. Figliola]

2011 ONCA 457

Court of Appeal for Ontario, Rosenberg, Goudge and Blair JJ.A.
June 17, 2011

Criminal law — Trial — Cross-examination — Adverse witness — Following ruling that Crown witness adverse, Crown conducting unrestricted cross-examination having effect of undermining witness' credibility and suggesting she was lying to protect guilty accused — Only ruling that witness was hostile permitting cross-examination at large not merely finding of adversity under s. 9(1) of Canada Evidence Act — Trial judge erred by failing to instruct jury that even if they found witness incredible that could not support inference that accused were incredible or guilty — Appeal from conviction allowed and new trial ordered — Canada Evidence Act, R.S.C. 1985, c. C-5, s. 9(1).

Criminal law — Trial — Severance — Crown alleging that F hired D to kill F's husband — Crown intending to call G to testify that F made statements to him about having her husband killed — Trial judge dismissing D's pre-trial application for severance but ruling that G could not testify as to name or description of man F said she had hired — After eight weeks of trial and Crown's case almost complete, trial judge reversing that ruling and permitting admission of previously excluded descriptors of man F told G she had hired and that F and man agreed killing to be carried out in manner similar to way murder took place — G's evidence inadmissible against D but highly prejudicial — Reversal of pre-trial ruling resulting in injustice — D's appeal from conviction for first degree murder allowed.

F and D were charged with first degree murder. The Crown alleged that F hired D to kill F's husband. G, a man with whom F had had an affair, claimed that F had made statements to him about arranging to have her husband killed. Before the trial, D moved to have his trial severed from that of F because G's evidence, which was admissible against F but not against D, and would significantly prejudice D. The application was dismissed, but the trial judge ruled that the portion of G's evidence relating to the man's physical description, nationality and first name would be excluded from his testimony. After eight weeks of trial, as the Crown's case was reaching its conclusion, the trial judge reversed his evidentiary ruling on the basis of a change of position by counsel for F and permitted the description of the alleged killer that she told G she had hired to be adduced by the Crown.

P, a close friend of both accused, was a Crown witness at trial. The Crown applied successfully under s. 9(1) of the *Canada Evidence Act* to have P declared an adverse witness and then conducted a wide-ranging cross-examination, shredding P's credibility and implying that she was lying to protect the accused, who were liars and guilty. Both accused were convicted of first degree murder. They appealed.

Held, the appeals should be allowed.

The adversity ruling under s. 9(1) was appropriately sought and granted on the basis that P had made a number of prior statements to the police and at the

preliminary hearing that were inconsistent with her testimony at trial, that she adopted a position in her testimony opposite to the Crown's position and that she had a motive to protect the accused. However, a declaration of adversity pursuant to s. 9(1) did not permit the Crown to cross-examine P at large. The effect of the cross-examination of P was to create a factual matrix in which the jury might well conclude that P was not only a liar, but was lying for the very purpose of covering up for the accused, and that the accused were therefore liars themselves, and guilty. Following the s. 9(1) ruling, the Crown should have been restricted to cross-examining on the prior inconsistent statements and the circumstances surrounding them. Once the cross-examination evolved as it did, the jury should have been instructed that if they found P not to be credible, they could not use that finding to conclude that the accused were not credible either, or that they were guilty.

The trial judge erred in refusing to grant D's severance application as that ruling ultimately resulted in an injustice to D arising from the highly prejudicial effect of G's evidence that the trial judge ruled admissible almost at the end of the Crown's case. G testified that F told him that she had obtained the services of a man who could "make people disappear". G testified that F told him that she had gotten someone with D's name, of the same nationality and description to carry out her husband's murder in the way it appeared to have happened. D's counsel objected to the reversal in the evidentiary ruling, arguing that, had it been known that the evidence was to be admitted, D would have cross-examined earlier Crown witnesses to attack G's credibility and the impact its admission would have on the defence case. The force of that evidence was considerably enhanced by the fact that it was given twice, first in chief, and then in reply. The balance of the evidence involving D was circumstantial. G's evidence directly implicated him in the murder and there was a palpable risk that the jury would misuse G's evidence against D, despite instructions to the contrary. The trial judge simply instructed the jury that statements attributed to F constituted evidence against her but could not be used against D even if they described what D said or did. Offered essentially without explanation or rationale, those directions would have significantly taxed the jury's common sense. The trial judge's reversal of his evidentiary ruling as the Crown's case approached its conclusion and G was about to be called contributed to the injustice resulting from the dismissal of the severance application.

R. v. Soobrian (1994), 21 O.R. (3d) 603, [1994] O.J. No. 2836, 76 O.A.C. 7, 96 C.C.C. (3d) 208, 25 W.C.B. (2d) 605 (C.A.), **apld**

Other cases referred to

R. v. Cassibo (1982), 39 O.R. (2d) 288, [1982] O.J. No. 3511, 70 C.C.C. (2d) 498, 8 W.C.B. 241 (C.A.); *R. v. Coffin*, [1956] S.C.R. 191, [1956] S.C.J. No. 1, 114 C.C.C. 1, 23 C.R. 1; *R. v. Crawford* (1995), 22 O.R. (3d) 288, [1995] 1 S.C.R. 858, [1995] S.C.J. No. 30, 179 N.R. 161, J.E. 95-708, 81 O.A.C. 359, 96 C.C.C. (3d) 481, 37 C.R. (4th) 197, 27 C.R.R. (2d) 1, 26 W.C.B. (2d) 555; *R. v. Cronshaw*, [1976] O.J. No. 2466, 33 C.C.C. (2d) 183, 1 W.C.B. 90 (Prov. Ct.); *R. v. Guimond*, [1979] 1 S.C.R. 960, [1979] S.C.J. No. 16, 94 D.L.R. (3d) 1, 26 N.R. 91, 44 C.C.C. (2d) 481, 8 C.R. (3d) 185; *R. v. Gushue (No. 4)*, [1975] O.J. No. 2211, 30 C.R.N.S. 178, 1975 CarswellOnt 25 (Co. Ct.); *R. v. Hamilton*, [2011] O.J. No. 2306, 2011 ONCA 399; *R. v. Last*, [2009] 3 S.C.R. 146, [2009] S.C.J. No. 45, 2009 SCC 45, EYB 2009-164847, J.E. 2009-1893, 247 C.C.C. (3d) 449, 394 N.R. 78, 311 D.L.R. (4th) 193, 69 C.R. (6th) 1, 255 O.A.C. 334; *R. v. Litchfield*, [1993] 4 S.C.R. 333, [1993] S.C.J. No. 127, 161 N.R. 161, J.E. 93-1895, 14 Alta. L.R. (3d) 1, 145 A.R. 321, 86 C.C.C. (3d) 97, 25 C.R. (4th) 137, 21 W.C.B. (2d) 369; *R. v. Osae*, [2010] O.J. No. 2285, 2010 ONSC 3108; *R. v. Rose*, [1997] O.J. No. 1947, 100 O.A.C. 67, 34 W.C.B. (2d)

503 (C.A.); *R. v. S. (S.W.)*, [2005] O.J. No. 4958, [2005] O.T.C. 1004, 67 W.C.B. (2d) 658 (S.C.J.); *R. v. Vivar*, [2004] O.J. No. 9, [2004] O.T.C. 5, 60 W.C.B. (2d) 53 (S.C.J.); *Wawanesa Mutual Insurance Co. v. Hanes*, [1961] O.R. 495, [1961] O.J. No. 562, 28 D.L.R. (2d) 386, [1963] 1 C.C.C. 176 (C.A.)

Statutes referred to

Canada Evidence Act, R.S.C. 1985, c. C-5, s. 9 [as am.], (1), (2) [as am.]
Criminal Code, R.S.C. 1985, c. C-46, ss. 591(3), 686(8)

APPEALS from the convictions entered by Harris J. of the Superior Court of Justice, sitting with a jury, on May 7, 2006 for first degree murder.

Michael W. Lacy, for appellant Maria Figliola.
P. Andras Schreck and *Apple Newton-Smith*, for appellant Daniele Di Trapani.
David Finley and *John Pearson*, for respondent.

[1] BY THE COURT: — The appellants, Maria Figliola and Daniele Di Trapani, appeal from their convictions for first degree murder by a court composed of C. Raymond Harris J. and a jury. The Crown alleged that Ms. Figliola hired Mr. Di Trapani to kill Frank Figliola, Ms. Figliola's husband. While the appellants raised a number of grounds of appeal, we have found it necessary to deal with two: Ms. Figliola's submission concerning the cross-examination by Crown counsel of his own witness, Teresa Pignatelli, and Mr. Di Trapani's submission that the trial judge erred in refusing to grant his application for severance. For the following reasons, the appeals are allowed and separate new trials are ordered.

The Facts

Events before August 6, 2001

[2] There was no dispute at trial that Ms. Figliola and her husband had a difficult marriage. At the time of the deceased's death, they were sleeping in separate rooms and largely leading separate lives. The deceased was also having significant financial problems, which Ms. Figliola attributed to his gambling. There was other evidence indicating that the deceased distrusted Ms. Figliola's financial dealings. In any event, at trial, Ms. Figliola admitted that she stole $462,000 over a 20-year period from her then employer, a bank. Following the deceased's death, Ms. Figliola became entitled to various payments from the deceased's employer and from life insurance policies totalling approximately $500,000.

[3] Ms. Figliola had also begun an affair in April 2001 with Geoffrey Gonsalves. That relationship lasted for almost two years after the death. Mr. Gonsalves became an important witness for the Crown as a result of statements that Ms. Figliola allegedly made to him and which the Crown argued were admissions of involvement in her husband's death.

[4] The Crown led evidence of conversations Ms. Figliola had with co-workers before the death in which she said that her marriage was over but she was not going to get a divorce because of what she felt entitled to. Two of her co-workers also claimed that she talked about having her husband killed and about hiring a hit man.

[5] Ms. Figliola and Mr. Gonsalves met regularly between April and August 2001 in various places. Mr. Gonsalves testified that, about two months before the deceased's death, Ms. Figliola told him that she had had a "physical argument" with the deceased over finances. She told Mr. Gonsalves that she knew some people to call so that she did not have to "deal with" the deceased any more. Ms. Figliola denied that any such conversation took place. Mr. Gonsalves also testified to other conversations, before the deceased's murder, in which Ms. Figliola outlined various scenarios for dealing with her husband. One of these scenarios involved someone attacking the deceased while Ms. Figliola and the deceased were out walking on a path, a scenario that closely resembled the manner in which the deceased died. According to Mr. Gonsalves, she was in discussions with someone named "Dan" and her friend Teresa Pignatelli. Ms. Figliola denied having any such discussions with Mr. Gonslaves or with Ms. Pignatelli or Mr. Di Trapani.

[6] Ms. Figliola testified that she met Mr. Di Trapani through one of his aunts, who was a co-worker at the bank where she used to work. She also began seeing him at Ms. Pignatelli's home and work. Mr. Di Trapani owned several social clubs in the Hamilton area and was also good friends with Ms. Pignatelli, as well as her husband, with whom he had a business relationship.

[7] There was also evidence that Ms. Figliola gave Mr. Di Trapani a cellphone which she had acquired through her work for Compusmart, the company she joined after leaving the bank. Ms. Figliola testified that she gave the cellphone to Ms. Pignatelli's husband to give to Mr. Di Trapani. Ms. Pignatelli had asked for the cellphone because Mr. Di Trapani was doing some construction work for them. Mr. Di Trapani and Ms. Figliola spoke often using their cellphones. In the month leading up to August 6, 2001, cellular telephone records show that Ms. Figliola

and Mr. Di Trapani spoke 143 times. This regular telephone contact ceased after the murder.

[8] While Mr. Di Trapani did not testify, statements he made to the police were introduced by the Crown. He told the police that he knew the deceased but saw Ms. Figliola more often and would see her at Ms. Pignatelli's home and place of business. When he was originally asked if the number for the cellphone Ms. Figliola had given him meant anything to him, he said it did not. Later in the questioning, when he was told it was the number for the telephone Ms. Figliola gave him, he said that he did not get it from Ms. Figliola directly, but rather from Ms. Pignatelli, and that it was for the social club. The cellphone cost $300 to $400 per month and he gave the money for the phone to Ms. Figliola.

Events of August 6, 2001

[9] Frank Figliola was found bludgeoned to death in the early morning hours of August 7, 2001 near a path close to his home in Stoney Creek. His car was found on the street near the path and various witnesses saw the car being driven to this area around 9:00 p.m. on August 6, 2001.

[10] Earlier that day, there was a large party at a park for Mr. Di Trapani's extended family. He left the party around 8:30 p.m., telling his mother that he was going to his club. One of the regular patrons at Mr. Di Trapani's club recalled seeing five or six men, including Mr. Di Trapani, standing outside the club and a fire burning in the bin behind the club. He could not say what was being burned but told the police the appellant said he was "burning shit he didn't like". It was not uncommon for there to be fires in the bin at the club.

[11] Luigi Latorre was a friend of Mr. Di Trapani's. He gave a number of statements to the police. In the early statements, he said nothing that implicated Mr. Di Trapani. During these interrogations, the police suggested that he was involved in the killing or was a witness. However, after a lengthy interrogation, Mr. Latorre told the police about his encounter with Mr. Di Trapani on August 6, 2001. He testified that on August 6, he arrived at Mr. Di Trapani's club between 9:00 p.m. and 9:30 p.m. Mr. Di Trapani arrived about a half-hour later. Later, he drove Mr. Di Trapani to the street where the path begins where the deceased's body was found. As they drove by, Mr. Di Trapani leaned over trying to see something out the driver's side window and said "just looking at something, keep driving". Mr. Di Trapani then directed him to a residential area, where Ms. Figliola lived, and told him to stop the car. Mr. Di Trapani left the car and went

to one of the houses. He returned about ten minutes later. Mr. Latorre arrived home around 12:30 a.m. or 1:00 a.m. Mr. Latorre last spoke to Mr. Di Trapani in December 2002. He claimed that Mr. Di Trapani told him he was in a "little bit of trouble" and that the police were going to question Mr. Latorre. He asked Mr. Latorre to tell the police that they were together "last year" at Tim Horton's.

[12] On August 6, 2001, Ms. Figliola and Mr. Di Trapani spoke twice, once for 17 seconds at 2:13 p.m. and once for 23 seconds at 7:25 p.m. In her testimony, Ms. Figliola could not recall what they discussed in those calls. Cellphone records show that Mr. Di Trapani was in the Stoney Creek area for most of August 6, except for a call made at 11:18 a.m. from St. Catharines.

Ms. Figliola's statements to Geoffrey Gonsalves

[13] After the deceased's murder, Mr. Gonsalves claimed that Ms. Figliola told him it "would cost $80,000 to carry something like that out". She also told him she was not paying as "Dan", the person she had hired, had run into legal problems and was "going away" for awhile. Again, Ms. Figliola denied having these conversations.

[14] A year after Mr. Figliola's death, the police obtained judicial authorization to intercept the telephone conversations of both appellants, as well as those of Mr. Gonsalves and Ms. Pignatelli. The conversations between Ms. Figliola and Mr. Gonsalves showed a deteriorating relationship due, in part, to financial problems and his jealousy due to his belief that she was having relationships with other men.

[15] The police also visited Mr. Gonsalves on September 18, 2002. They told him that they suspected that he was involved in the deceased's murder. This visit sparked several conversations between Mr. Gonsalves and Ms. Figliola in which Mr. Gonsalves repeatedly accused her of setting him up for her husband's murder. Ms. Figliola denied this and said she would clear things up with the police and said she would sign something to give to the police. In a call on September 26, 2002, she told Mr. Gonsalves that she would give the police a confession to "something I didn't do". A few days later, she met with Mr. Gonsalves and gave him something. He later called her and said that he was going to have his lawyer turn the letter over to the police. She tried to persuade him to give it back and said it was only "security" but now it was a "noose". Later that same day, a lawyer retained by Mr. Gonsalves handed over to the police a letter purportedly written by Ms. Figliola in which she says that Mr. Gonsalves

had nothing to do with her husband's death and that she took "full and all responsibility for my husband's death".

[16] Ms. Figliola testified that Mr. Gonsalves forced her to write the letter because he was upset about being questioned by the police. She wrote the letter to placate him, despite the fact that she bore no responsibility for her husband's death.

[17] Mr. Gonsalves, although claiming to be afraid of Ms. Figliola, continued his relationship with her until March 2003, when she became enraged when she found out he had dated another woman. On March 27, 2003, Mr. Gonsalves had a formal interview with the police in the presence of his lawyer. Initially, he revealed little and was chiefly interested in getting into the witness protection programme. After the police told him he was being too vague, he suspended the interview to talk to his lawyer. When the interview resumed, he divulged details to the police such as the various plans that Ms. Figliola had talked to him about before the death.

[18] As indicated, one of these plans was similar to the manner in which the deceased actually met his death. In his statement, Mr. Gonsalves seems to suggest that the police had first given him details of how the deceased was killed. The police officer in charge of the investigation denied giving Mr. Gonsalves those details. Mr. Gonsalves in his testimony initially testified that he was unable to explain how he knew about how and where the deceased was killed. Later, he admitted that he received some details either from the police or his lawyer. However, he could not remember any details of how or when he received this information. In a further interview with the police on April 29, 2003, Mr. Gonsalves said that he found out that the deceased had been killed on a path near Lake Ontario "from my lawyer and conversations with the Hamilton Police".

[19] As a result of the trial, Crown counsel's submission that Ms. Figliola's counsel had made an allegation of recent fabrication; in re-examination, Crown counsel was permitted to play the videotape of the entire April 29 police interview. In the interview, Mr. Gonsalves said that Ms. Figliola had spoken to her friend Ms. Pignatelli, who could get a guy named "Dan" to do anything. He also said that "Dan" was connected to the "Mafia" and to "bikers". In re-examination, Mr. Gonsalves also confirmed that, in the April 29 interview with police, he reported that Ms. Figliola had told him "it was done" shortly after the deceased's murder.

Police surveillance of the appellants and financial transactions

[20] Police surveillance showed the appellants met for about 45 minutes in the parking lot of a Tim Horton's on September 6, 2001. A friend of Mr. Di Trapani's, Americo Roque, testified that he was also present. Ms. Figliola testified that they were simply talking about getting the deceased's car cleaned.

[21] On September 28, 2001, police surveillance officers saw Mr. Di Trapani drop Ms. Figliola off at her bank, where she cashed a cheque for $3,500. Mr. Di Trapani picked her up a short time later. Ms. Figliola testified that $3,000 was for a car auction Mr. Di Trapani was going to take her to in order to look for a car for her daughter. The other $500 was to get the deceased's car cleaned. However, she never actually gave Mr. Di Trapani the money.

[22] On October 18, 2001, Ms. Figliola took out a bank draft for $4,300 payable to Mr. Di Trapani's mother. Ms. Figliola testified that this bank draft was a partial payment for a car Mr. Di Trapani was going to buy at an auction for her daughter. Mr. Di Trapani asked her to make the draft out to his mother because he was having problems at the bank.

[23] The police asked Mr. Di Trapani about his meetings with Ms. Figliola on September 6 and 28, 2001. He said the meeting on September 6 must have been to deliver a payment for the cellphone. He could not remember why they met on September 28. He denied that Ms. Figliola gave him $3,500 in the car that day.

[24] Bank records also showed Ms. Figliola withdrew $4,500 in cash on October 12, 2001 and a $10,000 cheque payable to a company registered in Mr. Di Trapani's name dated October 22, 2001. Payment was stopped on the cheque before it was cashed. Ms. Figliola denied writing this cheque. She explained that someone had broken into her car around this time. She immediately contacted her bank and had them stop payment on any cheques. A handwriting expert from the Centre for Forensic Sciences testified that the signature on the cheque was probably not Ms. Figliola's. The expert also testified that the endorsement of Mr. Di Trapani's mother's name on the October 18, 2001 bank draft was probably written by Mr. Di Trapani.

[25] On December 31, 2001, Ms. Figliola deposited $15,000 into an account in the names of her brother and mother. Two months earlier, on October 26, 2001, a bank draft had been issued on this account in the amount of $10,000, payable to Mr. Di Trapani's company. Ms. Figliola testified that this transaction also related to Mr. Di Trapani purchasing a car for her

daughter. In the end, he never did purchase a car. She tried to track down Mr. Di Trapani to get the money back. Ms. Pignatelli told her that Mr. Di Trapani was having money problems. In July 2002, the appellants talked and Mr. Di Trapani acknowledged that he owed her the money.

[26] The police asked Mr. Di Trapani about the $10,000 cheque from Ms. Figliola to his company. Mr. Di Trapani said that he had been in trouble and owed money to people who would break his legs if he did not repay them. He could not say why Ms. Figliola had written a cheque to his mother.

[27] The Crown also relied upon various statements made by Ms. Figliola to the police which the Crown claimed were untrue. For example, Ms. Figliola told the police that she did not have a cellphone and that she did not have a boyfriend. She testified that she lied because she was trying to keep her affair with Mr. Gonsalves secret.

[28] She also told the police that on the evening of August 6, 2001, a stranger came to her door, after the deceased had left. She agreed to see a police hypnotist at the request of the police to help her remember and describe this stranger. She didn't keep the appointments to see the hypnotist and made various excuses. For example, on one of the dates she claimed she could not come because she had painters at the house. Police surveillance showed that she went out with Ms. Pignatelli. Ms. Figliola explained that she changed her mind about seeing the police hypnotist as a result of advice from her lawyer and her physician.

[29] In an interview with Ms. Figliola, the police mentioned several names to her, including the co-appellant, Mr. Di Trapani. She said that she did not know this person. Ms. Figliola testified that she only knew Mr. Di Trapani by his nickname, "Biff".

Teresa Pignatelli's evidence

[30] Crown counsel called Ms. Pignatelli to testify. She testified that she had seen Mr. Di Trapani twice on August 6, 2001. Around 9:30 p.m., while walking to a store, she saw him in the parking lot of the social club that he operated. A few minutes later, she saw him drive by her esthetics shop with Luigi Latorre. She called him on his cellphone and spoke to him for a little over two minutes at 9:31 p.m. She spoke to him again at 10:21 p.m. for four seconds. She testified that she probably called him at this time when she was going home.

[31] Ms. Pignatelli also testified to financial transactions with Ms. Figliola in November and December 2001. She received a $1,000 cheque from Ms. Figliola on November 26, 2001, which

was partial repayment of a loan Ms. Pignatelli had given Ms. Figliola for her son's school tuition. Ms. Figliola gave her a cheque for $22,000 on December 10, 2001 to complete repayment of the loan and help Ms. Pignatelli retire a line of credit for which the bank was demanding repayment. Ms. Figliola confirmed this version of events.

[32] Ms. Pignatelli testified that she and Mr. Di Trapani were good friends in 2001. They had a falling out in 2002 as a result of a dispute between him and her husband. They reconciled in December of that year.

[33] Following a *voir dire*, the trial judge permitted Crown counsel to cross-examine Ms. Pignatelli as an adverse witness under s. 9(1) of the *Canada Evidence Act*, R.S.C. 1985, c. C-5. This turned into an extensive cross-examination and is the subject of a ground of appeal by Ms. Figliola. We will provide further details when dealing with this ground of appeal. In short, during this cross-examination Ms. Pignatelli was cross-examined on when she learned of Ms. Figliola's relationship with Mr. Gonsalves, the amount of money Ms. Figliola had given her, a supposed gap in telephone contact with Ms. Figliola in the week prior to the murder and allegedly inconsistent statements she had given about talking to Mr. Di Trapani on August 6, 2001 and the number of times she saw him that night. Crown counsel suggested to Ms. Pignatelli that she was covering for the appellants and was prepared to say anything on the witness stand.

The Grounds of Appeal

[34] Each of the appellants raises a number of grounds of appeal. While Ms. Figliola argues that the trial judge erred in admitting certain evidence and misdirected the jury in some respects, we only find it necessary to deal with the one ground of appeal — permitting Crown counsel to cross-examine Teresa Pignatelli as an adverse witness under s. 9(1) of the *Canada Evidence Act*.

[35] Mr. Di Trapani's principal ground of appeal is that the trial judge erred in refusing to sever his trial from that of his co-appellant, Ms. Figliola. In a closely related ground, he argues that the trial judge erred in permitting Mr. Gonsalves to testify about conversations he had with Ms. Figliola in which she allegedly identified "Dan" as the person she hired to kill her husband. The appellant also alleges errors in the charge to the jury. Since we are of the view that the trial judge erred in refusing to sever the appellant's trial, we do not find it necessary to deal with the other grounds of appeal.

Analysis

Cross-examination of Ms. Pignatelli as an adverse witness

[36] Section 9 of the *Canada Evidence Act* reads as follows:

> *Adverse witnesses*
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> 9(1) A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but if the witness, in the opinion of the court, proves adverse, the party may contradict him by other evidence, or, by leave of the court, may prove that the witness made at other times a statement inconsistent with his present testimony, but before the last mentioned proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, shall be mentioned to the witness, and he shall be asked whether or not he did make the statement.
>
> *Previous statements by witnesses not proved adverse*
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> (2) Where the party producing a witness alleges that the witness made at other times a statement in writing, reduced to writing, or recorded on audio tape or video tape or otherwise, inconsistent with the witness' present testimony, the court may, without proof that the witness is adverse, grant leave to that party to cross-examine the witness as to the statement and the court may consider the cross-examination in determining whether in the opinion of the court the witness is adverse.

[37] Ms. Figliola attacks the trial judge's ruling declaring the witness, Teresa Pignatelli, an adverse witness pursuant to s. 9(1), and the Crown's cross-examination following that ruling. She submits the trial judge erroneously permitted the Crown to cross-examine its own witness for the sole purpose of demonstrating the witness was a liar attempting to cover up for the two accused and thus impermissibly tarring the appellants with the same credibility brush — all contrary to this court's decision in *R. v. Soobrian* (1994), 21 O.R. (3d) 603, [1994] O.J. No. 2836 (C.A.).

[38] We do not see it in quite the same fashion, but we do agree with Mr. Lacy, counsel for Ms. Figliola, that a clear and specific mid-trial and final direction should have been given to the jurors instructing them that they could not use a finding that Ms. Pignatelli was not credible against Ms. Figliola or Mr. Di Trapani to conclude they, too, were not credible and were therefore guilty. As we shall explain, this conclusion follows from the way in which the treatment of Ms. Pignatelli's evidence evolved.

[39] *Soobrian* was a sexual assault trial with two accused, Soobrian and Beaudry. The defence was consent. At trial, the Crown called a witness, Williams, who, with another man, had been in the same apartment as the parties at the time of the offence. Williams had told the police immediately after the

incident that he had not seen any sexual activity between the complainant and the accused men. By the time of the preliminary hearing, however, he changed his story to favour the accused, testifying instead that he had witnessed consensual sexual activity between the complainant and Beaudry, but not between the complainant and Soobrian.

[40] The Crown called Williams not for the purpose of establishing some facts in proof of the Crown's case, but for the deliberate tactical purpose of discrediting him and his evidence, and thereby — as this court said — "[to] throw a shadow across the expected defence". The Crown called Williams knowing that he would give the same evidence that he gave at the preliminary hearing in support of the accused and planning to impeach that evidence through resort to the prior inconsistent statement and then, through general cross-examination, to show that the witness had lied in collaboration with his friends. The Crown was forthright in disclosing this objective and the trial judge refused to grant a declaration that the witness was adverse pursuant to s. 9(1), but nonetheless permitted cross-examination on the prior inconsistent statement pursuant to s. 9(2).

[41] On appeal, this court agreed with the decision not to declare Williams adverse under s. 9(1) or to permit cross-examination of Williams at large. Acknowledging that the Crown was technically within the ambit of s. 9(2), the court questioned whether there was any purpose left for a s. 9(2) order permitting cross-examination on the prior statement, since the Crown was not attempting to show that either the prior statement or the witness' testimony at trial was the truth. This court concluded, however, that precluding cross-examination on the prior statement would have left the jury without adequate information to assess Williams' credibility and that, since the Crown had begun its cross-examination before seeking a *voir dire*, there was little choice but to proceed as the trial judge did and to leave the matter to be dealt with in the charge to the jury.

[42] There was no specific instruction to the jury in the charge respecting the use of Williams' testimony, and the appeal was allowed on that basis. The court said, at pp. 612-13 O.R.:

> It is plain that the witness Williams did not adopt his prior statement as true and the only use the jury could properly make of his evidence that he saw the things he testified to was either to accept it, reject it or give it little weight having regard to the view they took of his initial statement to police and his explanation for having made it. But, on the facts of this case, the thing for which the jury could not use a finding of credibility against Williams, if based on his statement to the police, was to support a finding that neither [either?] or both of the appellants were not credible. Nor could

> it support the truth of the complainant's evidence that either of the appellants had sexually assaulted her. A finding against the credibility of Williams on these grounds would simply neutralize his evidence under oath. The instruction on the use of prior inconsistent statements was useful as far as it went. In the unusual circumstances of this case, it did not go far enough in not addressing the true purpose for which that evidence was tendered by the Crown. Williams' evidence did not support the evidence of the complainant, or in any other way advance the Crown's case. Williams' cross-examination tended to show that he was not a credible witness, but that in itself had no relevance to the case. The true purport of Williams' evidence, including his cross-examination by the Crown, was to show that the appellants were not credible because Williams was not. The trial judge should have made clear to the jury that there was no basis upon which they could use Williams' evidence to support that conclusion.
>
> While there was no objection to the charge, we think it was non-direction amounting to misdirection to not make clear to the jury these things specifically.

[43] This case is not dissimilar in the result.

[44] Ms. Pignatelli was a close friend of both Ms. Figliola and Mr. Di Trapani. She spoke to each on a regular basis, sometimes more than once daily by telephone. She was able to give evidence with respect to (a) the relationship between the various principals, particularly of the relationship between Ms. Figliola and Mr. Gonsalves and between Ms. Figliola and Mr. Di Trapani; (b) the fact that Ms. Figliola agreed to provide a cellphone to Mr. Di Trapani through her work at her own expense; (c) the fact that she had seen Mr. Di Trapani at around 9:00 p.m. on the night of the murder in an area not far from the scene of the murder; and (d) that she had seen him in the company of the witness Louis Latorre, thus corroborating the testimony of Mr. Latorre at least insofar as they were together in the same car on the night in question.

[45] The Crown was thus justified in calling — and, indeed, may have had little choice but to call — Ms. Pignatelli as a witness. We are not able to conclude on the basis of this record that the Crown initially, and deliberately, called her for the purpose of impeaching her testimony through prior inconsistent statements and then, having obtained a s. 9(1) order and permission to cross-examine her at large, showing that she was an inveterate liar who was covering up for, and collaborating with, the two accused — thereby tarnishing their credibility as well and enhancing the likelihood of a finding of guilt. It is that type of purpose on the part of the Crown that is forbidden by *Soobrian*.

[46] That said, however, the cross-examination of Ms. Pignatelli became problematic as it evolved.

[47] The Crown cannot be faulted for seeking an adversity ruling under s. 9(1), nor do we think there is any basis for

interfering with the trial judge's discretionary decision to grant that order in the circumstances. He concluded after a *voir dire* — correctly, in our view — that Ms. Pignatelli had made a number of prior statements to the police and at the preliminary hearing that were inconsistent with her testimony at trial; that she adopted a position in her testimony opposite to the Crown's position; and that she had a motive to protect her friends. There was ample support on the record for those findings and for the decision based on them.

[48] The Crown sought an order under s. 9(1) declaring Ms. Pignatelli an *adverse* witness. The trial judge made an order declaring Ms. Pignatelli an *adverse* witness. The Crown did not seek, nor did the trial judge grant, an order declaring her a *hostile* witness, and, contrary to Ms. Pignatelli's submission, the trial judge did not make an order granting the Crown leave to cross-examine Ms. Pignatelli at large. Perilously, though, everyone appears to have assumed that such an order had been made. The Crown proceeded to cross-examine the witness forcefully in a wide-ranging fashion — and with considerable success — with no intervention by the trial judge and no objection from defence counsel (not counsel on the appeal) or request for a limiting instruction to the jury.

[49] However, this seamless move to a cross-examination at large was misguided. In Ontario, a ruling that a witness is "adverse" pursuant to s. 9(1) of the *Canada Evidence Act* is not the equivalent of a common law declaration of "hostility" entitling the beneficiary of the ruling to cross-examine the witness at large. This court has held that adversity and hostility are not synonymous for these purposes: *Wawanesa Mutual Insurance Co. v. Hanes*, [1961] O.R. 495, [1961] O.J. No. 562 (C.A.); *R. v. Cassibo* (1982), 39 O.R. (2d) 288, [1982] O.J. No. 3511 (C.A.). See, also, *R. v. Vivar*, [2004] O.J. No. 9, [2004] O.T.C. 5 (S.C.J.), at paras. 11-12; *R. v. S. (S.W.)*, [2005] O.J. No. 4958, [2005] O.T.C. 1004 (S.C.J.); *R. v. Osae*, [2010] O.J. No. 2285, 2010 ONSC 3108; *R. v. Gushue (No. 4)*, [1975] O.J. No. 2211, 1975 CarswellOnt 25 (Co. Ct.); and *R. v. Cronshaw*, [1976] O.J. No. 2466, 33 C.C.C. (2d) 183 (Prov. Ct.).

[50] This jurisprudence confirms that an "adverse" witness is one who is opposed in interest or unfavourable in the sense of opposite in position to the party calling that witness, whereas a "hostile" witness is one who demonstrates an antagonistic attitude or hostile mind toward the party calling him or her. In *R. v. Coffin*, [1956] S.C.R. 191, [1956] S.C.J. No. 1, 114 C.C.C. 1, at p. 213 S.C.R., p. 24 C.C.C., Kellock J. described a hostile witness as one who does not give his or her evidence fairly and with a

desire to tell the truth because of a hostile *animus* towards the prosecution.

[51] The common law right of a party to cross-examine his or her own witness at large with leave of the trial judge, if in the judge's opinion the witness is "hostile", is not affected by s. 9(1) of the *Canada Evidence Act*: *Cassibo*, *per* Martin J.A., at p. 302 O.R. Section 9 makes no reference to a witness "proving *hostile*" and contains no suggestion of a right to cross-examine at large. As Porter C.J.O. pointed out in *Wawanesa*, a declaration of hostility and its consequences are something that arise "in addition [to]" a finding of adversity. At pp. 507-508 O.R., after reviewing the steps to be taken by a judge in deciding whether to make a declaration of adversity and the factors to be considered, he stated that "[t]he Judge, *if he declared the witness hostile*, might, *in addition* permit him to be cross-examined" (emphasis added). It follows that a declaration of adversity pursuant to s. 9(1) was not, itself, sufficient to trigger a right in the Crown to cross-examine Ms. Pignatelli generally as to all matters in issue.

[52] Ill-advisedly, however, that is what happened. The Crown cross-examined the witness about inconsistencies between her evidence at trial and statements she had made to the police during interviews on three occasions (October 2, 2002, January 14, 2003 and January 22, 2003) as well as between her evidence at trial and at the preliminary hearing. These inconsistencies related to such things as when she knew [that] Ms. Figliola was in a relationship with Mr. Gonsalves (at trial she acknowledged suspecting they were involved at the time of the murder, but in October she told the police she did not know); the amount of money Ms. Figliola had given her; and a number of details about the evening of August 6, 2001 (in her October statement she did not tell the police she had seen Mr. Di Trapani that night; in both January statements she said she twice saw Mr. Di Trapani and Mr. Latorre drive by her shop, where she was having an ice cream with Ms. Figliola's cousin, Bruna; at trial she said they drove by once).

[53] As Ms. Pignatelli's cross-examination by the Crown developed, however, it is apparent that these questions were simply a springboard to a much broader attack on her credibility. The "cover up" theory emerged.

[54] In this respect, the Crown cross-examined Ms. Pignatelli on an intercepted phone conversation in which she had offered to "cover" for Ms. Figliola so that she could conceal from her children the fact that she had spent the night with Mr. Gonsalves at his home, thus suggesting she was "covering" for the appellant with her testimony as well.

[55] Intercepted phone calls were also the theme around which the Crown's attack on the witness' denial that she knew that Ms. Figliola's relationship with Mr. Gonsalves was intimate before the murder was built. The Crown put to Ms. Pignatelli a large number of interceptions showing Ms. Figliola's cellphone moving from the Stoney Creek area to the Scarborough area, where Mr. Gonsalves lived, over a lengthy period of time, interspersed with calls to one of Ms. Figliola's phones at or about the same time. The following exchange puts the "cover up" suggestion directly to her (and the jury):

> Q. Now, Ms. Pignatelli I've reviewed with you those records for a purpose and that is to suggest that you are not being truthful with this jury when you're telling us that you had no idea, you didn't know that Maria Figliola was involved in an intimate relationship with Geoff Gonsalves prior to the murder of Frank Figliola?
>
> A. I'm not lying. I did not know for a fact. If I wanted to imagine I would say yes. Did she tell me from her mouth? No. Did I know she saw him? Yes, I did.
>
> Q. You had to have known just looking at those phone calls, the numerous trips she's making to Scarborough while in telephone communication with you . . .
>
> A. I don't recall . . .
>
> Q. . . . she had to have told you that?
>
> A. To tell me that she was sleeping with him?
>
> Q. Yes.
>
> A. We're not in high school.
>
> Q. She had to have told you that?
>
> A. I'm not . . .
>
> Q. You're not telling us that . . .
>
> A. I'm not . . .
>
> Q. . . . *you're trying to protect her?*
>
> A. *Protect her from what?*
>
> Q. *From responsibility for this murder.*

(Emphasis added)

[56] During the October 2, 2002 interview, Ms. Pignatelli made no mention of Mr. Di Trapani. When questioned about Mr. Di Trapani's cellphone number, Ms. Pignatelli denied that she recognized it. Phone records showed that Ms. Pignatelli had called that number on many, many occasions. At the time of this interview, Mr. Di Trapani had not been interviewed by the police and it is not clear that he was then a suspect. The Crown used

this exchange to make the point that the witness was withholding information from the police in order to deceive them, because she knew "if [she] mentioned [that the phone number was Mr. Di Trapani's] . . . the logical result would be that the police would go speak to Mr. Di Trapani". Twice, Crown counsel put directly to Ms. Pignatelli that she did not identify the owner of the phone number because she was protecting Mr. Di Trapani, adding once that she was doing so "just like [she] protected Maria Figliola".

[57] Two other aspects of the Crown's cross-examination of Ms. Pignatelli bear mentioning.

[58] First, the Crown's take on the "drive-by" testimony appears to shift. In examination-in-chief, and before the adverse witness ruling, Crown counsel elicited evidence from the witness about the fact that she had seen Mr. Di Trapani and Mr. Latorre drive by her esthetics shop at around 9:30 p.m. on the night of the murder while she and Bruna Di Iorio were sitting out in front eating ice cream. She said she called Mr. Di Trapani on his cellphone (phone records show a call at 9:31 p.m. lasted two minutes and 57 seconds). This evidence was capable of corroborating the testimony of Mr. Latorre, who said he and Mr. Di Trapani were together that night and that Mr. Di Trapani had requested him to drive him to a point near the site of the murder. Indeed, this is one of the purposes, as noted above, that Crown counsel on appeal submits entitled the Crown to call Ms. Pignatelli as a witness.

[59] Following the ruling, however, and during the robust cross-examination at large, the Crown appears to use the testimony in a different fashion — to show that it was false and designed to provide an alibi for Mr. Di Trapani. Building on a discrepancy between Ms. Pignatelli's evidence-in-chief that Mr. Latorre was driving the vehicle and earlier statements to the police that she didn't know who was driving, Crown counsel suggested that the reason why she couldn't remember was that the event never happened. Near the close of cross-examination, the subject was revisited. Ms. Pignatelli had made no mention of Mr. Di Trapani in her October 2, 2002 statement to the police. The Crown extracted an admission that she had talked to Mr. Di Trapani prior to her statements to the police on January 14 and 22, 2003, and was aware that he had been interviewed as well. The Crown then suggested that "lo and behold [she now] came up with this story that [she] saw Mr. Di Trapani with Mr. Latorre". She then gave Mr. Latorre's name to the police during the January interviews, suggested the Crown, "because he was part of a plan to provide an alibi for Danny Di Trapani on the night of the murder".

[60] Lastly, the Crown established through Ms. Pignatelli that she had visited Mr. Di Trapani while he was in jail awaiting his bail hearing following his arrest and that, in August 2004, she and her husband had accosted Mr. Latorre in a bar in Toronto. The suggestion was that they were trying to intimidate a potential Crown witness in order to protect Mr. Di Trapani.

[61] The Crown's s. 9(1) cross-examination was very effective. However, that is not the point. It is the problem. In our view, by taking the tack it did, the Crown — inadvertently or otherwise — strayed into impermissible *Soobrian* territory. Even without any initial intent to do so, the ultimate effect of the cross-examination was to create the very scenario that *Soobrian* envisages: the effect of the cross-examination was to shred the credibility of the Crown's own witness and to create a factual matrix in which the jury might well conclude that Ms. Pignatelli was not only a liar, but was a witness lying for the very purpose of covering up for the appellants' wrongful deeds and that the appellants were therefore liars themselves, and guilty too.

[62] Following the s. 9(1) ruling, the Crown should have been restricted to cross-examining on the prior inconsistent statements and the circumstances surrounding them. Once the cross-examination at large evolved, however, without any objection from defence counsel for either accused, the jury was in the same position as the jury in *Soobrian*. The jurors needed to understand clearly that if they found Ms. Pignatelli not to be credible, they could not use that finding to conclude that either or both of the appellants were not credible either. Nor could they use such a finding to so support a conclusion that either or both of the appellants were guilty. As this court stated in *Soobrian*, at p. 613 O.R.:

> It was incumbent on the trial judge to instruct the jury that, in the absence of any evidence of collusion between [Ms. Pignatelli] and the appellants, there was no basis upon which they could draw an inference adverse to the defence from the fact that [Ms. Pignatelli] was a liar, if they were to so find.

[63] In our view, a specific instruction relating to Ms. Pignatelli was required in these circumstances. We do not accept the Crown's submission that the portion of the trial judge's general instructions respecting the assessment of credibility directing the jurors to consider whether a witness "has an interest in the outcome of the case or any reason to give evidence that is more favourable to one side than to the other" were sufficient to de-escalate the risk posed by the *Soobrian* factor that developed. The specific instruction should have been given mid-trial, immediately following the Crown's cross-examination of Ms. Pignatelli, and repeated in the charge to the jury.

[64] We recognize that there were no defence objections either to the cross-examination or to the charge to the jury, and, indeed, that defence counsel declined to request any special instructions with respect to Ms. Pignatelli's testimony in spite of specific questions from the trial judge and Crown counsel as to whether they did. Like the court in *Soobrian*, however, we feel that "it was non-direction amounting to misdirection [not to] make clear to the jury these things specifically".

[65] We would therefore allow the appeal, set aside Ms. Figliola's conviction and order a new trial.

Severance of Mr. Di Trapani's trial

[66] Mr. Di Trapani argues that he must be retried because his trial should have been severed, and heard separately from that of Ms. Figliola.

[67] He bases this on the prejudice to him arising from certain evidence given at trial by Mr. Gonsalves that was inadmissible against him. Its impact was increased when its substance was repeated in re-examination when Mr. Gonsalves adopted his prior consistent statement given out of court to the police and videotaped by them. It was played for the jury. Added to this was the fact that the trial had proceeded for a number of weeks prior to this testimony on the basis that the prejudicial evidence would be excluded. Mr. Di Trapani says that, as a consequence, the failure to sever his trial resulted in an injustice requiring that his conviction be set aside and that he be retried separately.

[68] For the reasons that follow, we agree.

[69] Prior to trial, counsel for Mr. Di Trapani moved to have his trial severed from that of Ms. Figliola because of the evidence of Mr. Gonsalves with respect to the statements made by Ms. Figliola to him about arranging to have her husband killed. This evidence was admissible against Ms. Figliola but not against Mr. Di Trapani, although it would significantly prejudice him. We have set out above a summary of Mr. Gonsalves' testimony. However, to put this ground of appeal into context, we refer to the testimony Mr. Gonsalves was expected to give when the severance application was first brought. Mr. Gonsalves was expected to testify that Ms. Figliola told him prior to the murder that she could arrange to have her husband killed by contacting Teresa Pignatelli, who could then contact a person named Dan who could arrange the murder. Ms. Figliola described Dan as large, husky and Italian with ties to organized crime and bikers. Mr. Di Trapani is large, husky and Italian and his name is Dan. Mr. Gonsalves was also expected to say that Ms. Figliola talked about three scenarios for killing her husband and that Dan

could be convinced to help her. In one of these, she would take her husband for a walk on a wooded path that they had been to previously, where someone would be waiting to carry out the plan. Frank Figliola's body was found beside a wooded path where he had gone for walks before.

[70] During the submissions on the severance application, the trial judge suggested that the references to the name "Dan" and his description as heavy and Italian could be edited out of Mr. Gonsalves' testimony and that the individual could merely be described as a man. Mr. Gonsalves' testimony would thus not implicate Mr. Di Trapani.

[71] After further discussion, counsel agreed with this suggestion. Counsel for Mr. Di Trapani acknowledged that, with this change, there would not be much to his severance application and it would mean that "the wind is out of my sails".

[72] The trial judge delivered his ruling on December 20, 2005. It included this description of the problematic evidence:

> At the preliminary hearing Mr. Gonsalves testified that the accused Figliola told him that she had obtained a person who could make people disappear. Gonsalves testified that Figliola had described this person by the name of "Dan" who was "Italian" and a "husky, big and overweight man". This testimony would be admissible against Figliola, but not admissible against Daniele Di Trapani who is Italian, husky and carries the first name of "Dan".
>
> This testimony at trial would be significantly prejudicial requiring careful and clear instructions to the jury. I was disposed to refusing severance, however, the Gonsalves testimony was troublesome.

[73] The trial judge then referred to the Crown's concerns about editing Mr. Gonsalves' evidence and concluded by issuing his ruling in the following terms:

> The Crown outlined two perils with the suggestion:
>
> First, if Gonsalves testifies in the suggested manner of leaving out the description of the "man", then the defence could suggest a different name to the "man".
>
> Secondly, Ms. Figliola might deny the conversation with Gonsalves, in which case he would need to provide details of the conversation for his credibility.
>
> Counsel for both accused responded helpfully and accommodations were arranged. The result, as I apprehend the submissions, is that there would be no mention of the name "Dan" and no mention that he was Italian and overweight or husky or big, and no suggestion of a different name would be offered and no attempt to deny the conversation with Gonsalves.
>
> It was also agreed that there would be no mention of the man being from the Mafia and that "organized crime" would be used in its place.
>
> Accordingly, the application for severance is abandoned and the accommodation articulated in this ruling is undertaken by all counsel.

> Having said that, if I have misapprehended the agreement, counsel is free to make their submissions.

[74] Counsel for Ms. Figliola, who had said nothing in her submissions to suggest that she would make no attempt to deny the conversation that Mr. Gonsalves would testify to, immediately took up this invitation from the trial judge and made clear that she did not admit that the conversation occurred:

> Certainly on behalf of Mrs. Figliola, I indicated very clearly that we would not, in cross-examination, intend to elicit or challenge Mr. Gonsalves on the details of his statement which had been ruled inadmissible. But it is not an admission that my client simply was talking to him about a hit man.
>
> *So we're not admitting that that conversation occurred*, but we certainly will not go near the details in an effort to challenge his credibility based on what we know has been ruled as inadmissible.

(Emphasis added)

[75] The trial judge did not change his ruling, simply responded as follows:

> HIS HONOUR: I've made a note of that.
>
> MS. EDWARD: Thank you.
>
> HIS HONOUR: And that will be addressed. I don't think now is the time to do it.

[76] Ms. Figliola and Mr. Di Trapani were placed in the charge of the jury on January 10, 2006. The Crown began its evidence on January 11, 2006. The trial concluded on May 7, 2006, when the jury rendered a guilty verdict for both accused after three days of deliberations.

[77] By March 7, the Crown had been calling evidence for eight weeks and had reached the point at which Mr. Gonsalves was to be the next witness. Following his evidence, it was anticipated that the Crown would take only two more weeks to complete its case. At this point, most of the Crown's case had been called.

[78] The last Crown witness prior to Mr. Gonsalves was the detective who had interviewed him. In cross-examining the detective, counsel for Ms. Figliola made several suggestions to the effect that Mr. Gonsalves had access to information about the murder from sources other than Ms. Figliola.

[79] When the detective's evidence concluded on March 7, the Crown addressed the trial judge in the absence of the jury. Counsel suggested that this cross-examination was laying the foundation to suggest to Mr. Gonsalves that his conversation with Ms. Figliola never happened and that he had obtained his information about the murder from other sources. Counsel for

the Crown said that this contravened the basis of the December 20 ruling and required a revisiting of Mr. Di Trapani's abandoned severance application. Counsel argued that, in order to demonstrate that the conversation had occurred, Mr. Gonsalves ought to be permitted to testify about all the details, including Ms. Figliola naming Dan and describing him as a large, husky Italian with biker and Mafia connections.

[80] Counsel for Mr. Di Trapani responded with a brief reprise of his arguments for seeking a severance in December. He added to this his significant concern about what had transpired since then:

> And rather than have a severance pre-trial, we are now eight weeks into this trial. And as a result of that, the prejudice which flows to Mr. Di Trapani is more considerable than had it been — than the landscape for severance pre-trial, because on the basis of the all-parties agreement, I have not cross-examined ancillary witnesses regarding Mr. Gonsalves, nor have I sought to elicit interceptions which may put Mr. Gonsalves in even more unfavourable light because I have been proceeding on the basis that with the all-parties agreement and no Dan, no *indicia*, no adjectives of Dan, which would look — from which the jury would look at my client, the battle with — my contest with Mr. Gonsalves was minimal, if it even existed.

[81] Counsel for Ms. Figliola reiterated the position she had taken on December 20, namely, that she would be challenging Mr. Gonsalves about whether the conversation with Ms. Figliola took place, but would not cross-examine him about the details edited out by the December 20 ruling. The trial judge's immediate response was that this position was a challenge to Mr. Gonsalves' credibility and was inconsistent with what had been agreed to in December.

[82] While the trial judge did not formally set aside his December 20 ruling, he made clear his view that the position now taken by counsel for Ms. Figliola was inconsistent with the agreement on December 20 and that the Crown should be free to lead the evidence prejudicial to Mr. Di Trapani that his previous ruling had excluded. He then accepted the Crown's suggestion that counsel for Mr. Di Trapani be invited to immediately renew the severance application more formally.

[83] Counsel did so on March 8. He reiterated the prejudice to Mr. Di Trapani arising from Mr. Gonsalves' evidence that Ms. Figliola identified the person who arranged the murder as "Dan", who was large, husky, Italian and connected to bikers or the Mafia. He added to this the prejudice that came from not having sought to cross-examine Crown witnesses in order to put Mr. Gonsalves in a bad light, because there had been no need for it. He referred by way of example to the surveillance evidence concerning Mr. Gonsalves, the wiretap evidence (and disclosures

not put in evidence, which he had not reviewed with this in mind) and evidence of questionable banking transactions. Finally, he expressed grave concern about the change in trial tactics that recalling witnesses for cross-examination would require at a stage of the trial when he was fully engaged in preparing for the remainder of the Crown's case and assembling the defence evidence. He was alarmed at the impact this change would have on the jury and its perception of how important this evidence must seem to counsel when no explanation for the change in tactics would be offered. He reminded the trial judge that none of these concerns were his doing. He therefore proposed that Mr. Di Trapani be severed from the trial and that the trial of Ms. Figliola continue.

[84] The Crown's position was simply that the agreement of counsel in December had unravelled, that any prejudice to Mr. Di Trapani could be remedied by recalling witnesses for new or further cross-examination, and postponement of Mr. Gonsalves' evidence until that was done. The Crown argued that the evidence against Mr. Di Trapani was so intertwined with the evidence against Ms. Figiola that the interests of justice required a joint trial.

[85] The trial judge delivered his ruling dismissing the severance application on March 8, with further reasons on April 3. In his March 8 reasons, he explained his view of the need for the new severance application:

> Yesterday, counsel for Mrs. Figliola in cross-examination of a Crown witness took a position inconsistent with the December agreement, which according to Mr. Di Trapani, changed the evidentiary landscape he had relied upon in his defence. This motion was therefore brought on promptly this morning[.]

[86] He addressed the recalling of witnesses as follows:

> I see no injustice to the applicant here and I am confident that any prejudice that has come the applicant's way can be remedied. The Crown will re-call any witnesses required for new or further cross-examination by the applicant and my instructions to the jury will be clear and strong and perhaps repetitive as the trial proceeds in order to ensure that no improper use of the evidence is made.

[87] In his further reasons on April 3, he addressed the change of trial tactics required of Mr. Di Trapani with this assertion:

> The change of trial tactics should not negatively influence the jury as re-questioning witnesses regarding Mr. Gonsalves prior to his testimony would not appear overly unusual.
>
> In the result, the application for severance is not allowed.

[88] Following the ruling of March 8, counsel for Mr. Di Trapani declined to seek to recall witnesses because, as he had argued, it would be impractical and the change in tactics towards Mr. Gonsalves necessitated would leave the jury wondering why and would draw their attention to Mr. Di Trapani's concern over Mr. Gonsalves' evidence.

[89] The Crown then proceeded to call Mr. Gonsalves. In his evidence-in-chief, Mr. Gonsalves testified that Ms. Figliola told him that her friend Teresa could get her someone to get rid of her husband. Ms. Figliola identified the person as "Dan", a huskier, bigger, Italian guy, who was involved in organized crime or knew people who were, and who could have something like this done.

[90] Mr. Gonsalves testified that Ms. Figliola described three scenarios to him, one of which was that she would take her husband for a walk on a wooded pathway they knew, where someone would be waiting to carry out the plan. When she then reported the death of her husband to Mr. Gonsalves, he understood her to say that one of the plans she had described had been carried out. She later told Mr. Gonsalves that she was not going to pay Dan the $80,000 it cost because he had run into some trouble.

[91] Prior to re-examining Mr. Gonsalves, the Crown asserted that in cross-examination, counsel for Ms. Figliola had set up the argument that the evidence of what Ms. Figliola told him was recently fabricated. As a consequence, in the re-examination of Mr. Gonsalves, the Crown played the videotape of his out-of-court interview with the police on April 29, 2003. In it, Mr. Gonsalves appeared emotional and afraid for his own safety, and gave essentially the same details as he had in his evidence-in-chief, namely, that the husky Italian with Mafia and biker connections named Dan arranged the whole thing.

[92] At the conclusion of Mr. Gonsalves' evidence-in-chief, at the end of Mr. Gonsalves' reply evidence and in his final charge, the trial judge gave the jury a direction on the use they could make of this part of Mr. Gonsalves' evidence. Its essence was as follows:

> [T]here is a special rule on how to use statements made by an accused outside the courtroom. And you have heard some statements attributed to Mrs. Figliola today.
>
> . . . . .
>
> You must not consider anything Ms. [Mrs.] Figliola said to Mr. Gonsalves in reaching your verdict on Mr. Di Trapani, even if it describes what Mr. Di Trapani said or did. Mrs. Figliola's testimony is not evidence against Mr. Di Trapani in any way, shape or form. You can only consider it as it applies to Mrs. Figliola because it comes from her.

[93] When faced with a severance application, s. 591(3) of the *Criminal Code*, R.S.C. 1985, c. C-46 requires that the trial judge assess whether severance would be in the interests of justice. A trial judge's decision on severance is an exercise of discretion and is entitled to deference: see *R. v. Hamilton*, [2011] O.J. No. 2306, 2011 ONCA 399. In *R. v. Last*, [2009] 3 S.C.R. 146, [2009] S.C.J. No. 45, at para. 14, the Supreme Court of Canada quoted from *R. v. Litchfield*, [1993] 4 S.C.R. 333, [1993] S.C.J. No. 127 to describe the basis for interfering with that discretion:

> As noted by this Court in *R. v. Litchfield*, [1993] 4 S.C.R. 333 [at pp. 353-54 S.C.R.], the absence of specific guidelines for granting severance requires that deference be afforded to a trial judge's ruling to the extent that he or she acts judicially and the ruling does not result in an injustice:
>
> > The criteria for when a count should be divided or a severance granted are contained in ss. 590(3) and 591(3) of the *Code*. These criteria are very broad: the court must be satisfied that the ends or interests of justice require the order in question. Therefore, in the absence of stricter guidelines, making an order for the division or severance of counts requires the exercise of a great deal of discretion on the part of the issuing judge. The decisions of provincial appellate courts have held, and I agree, that *an appellate court should not interfere with the issuing judge's exercise of discretion unless it is shown that the issuing judge acted unjudicially or that the ruling resulted in an injustice*.

(Emphasis in original)

[94] The question in this case is not whether the trial judge reached his decision unjudicially. Clearly, there are strong policy reasons for accused persons charged with offences arising out of the same series of events to be tried together, although their force is perhaps somewhat muted, where, as here, neither alleges the other is the guilty party and where there is no real risk of inconsistent verdicts from separate trials: see *R. v. Crawford* (1995), 22 O.R. (3d) 288, [1995] 1 S.C.R. 858, [1995] S.C.J. No. 30.

[95] In the case at bar, the trial judge focused particularly on the fact that the evidence against Mr. Di Trapani was "inextricably intertwined with the evidence against Figliola". This, in his view, made a joint trial desirable, presumably because of the benefit to trial efficiency and truth seeking.

[96] The question is whether the ruling resulted in an injustice. As the Supreme Court of Canada made clear in *R. v. Last*, that is an inquiry that usually entails scrutiny of the unfolding of the trial and of the verdict. In *R. v. Rose*, [1997] O.J. No. 1947, 100 O.A.C. 67 (C.A.), Charron J.A. put the appellate task this way, at para. 17:

> In determining this issue, it is necessary to consider the entire trial, including the potential prejudicial effect of the evidence, the closing addresses of counsel, the judge's instructions to the jury and any inference that may be drawn from the ultimate verdicts returned by the jury.

[97] The potential prejudicial effect on Mr. Di Trapani from Mr. Gonsalves' evidence of what Ms. Figliola told him is obvious. She described a big, overweight Italian named Dan who could carry out a plan to kill her husband while he was walking on a wooded pathway known to him. She later told Mr. Gonsalves that the plan had been carried out but that she had not paid Dan the $80,000 because he had gotten into trouble. Mr. Di Trapani's name is Dan. He is big, overweight and Italian. He had gotten into trouble over debts to people who threatened to break his legs if he did not repay them. The body of Frank Figliola was found beside a wooded pathway that was known to him. In essence, Ms. Figliola told Mr. Gonsalves that she had gotten someone with Mr. Di Trapani's name and description to carry out her husband's murder in the way it appears to have happened.

[98] The force of this evidence was considerably enhanced by the fact that it was given not once but twice, first by Mr. Gonsalves in chief, and then in reply, in a very emotional videotape of his out-of-court interview with the police.

[99] The balance of the evidence involving Mr. Di Trapani was circumstantial. As outlined above, there was evidence of contact between him and Ms. Figliola, both before and after the murder, including frequent telephone calls in the period leading up to it. There was evidence that Mr. Di Trapani received money from Ms. Figliola and evidence that he burned some unknown object behind his club on the night of the murder. Mr. Di Trapani pointed to innocent explanations for each of these. There was also evidence from Mr. Latorre that, on the night of the murder, Mr. Di Trapani asked him to drive to the vicinity of the murder and then to Ms. Figliola's home and many months later asked him for a false alibi for "last year". Finally, there was evidence of alleged falsehoods in Mr. Di Trapani's statements to the police. However, Mr. Di Trapani made no inculpatory statements nor was there any physical evidence connecting him to the murder scene.

[100] By contrast, Mr. Gonsalves' evidence directly implicated him in the murder. It was the most damning evidence against him. As hearsay, it was, of course, inadmissible against him, although not against Ms. Figliola.

[101] Prejudice in this context refers to the risk that the jury, having been asked to accept this evidence in trying Ms. Figliola,

would improperly use it in considering Mr. Di Trapani's guilt. In our view, that risk was palpable in the circumstances of this case.

[102] In his closing address, the Crown reminded the jury of the evidence that served to confirm that Ms. Figliola told Mr. Gonsalves the details of her husband's murder. While acknowledging that the trial judge would tell them that they could not use what Ms. Figliola told Mr. Gonsalves against Mr. Di Trapani, the Crown urged the jury to use it directly against Ms. Figliola, thus setting up for them the risk described above.

[103] At the end of Mr. Gonsalves' evidence-in-chief and re-examination, and again in his charge, the trial judge delivered an instruction to the jury. He simply directed them to abide by the special rule that statements attributed to Ms. Figliola constituted evidence against her but could not be used against Mr. Di Trapani even if they described what Mr. Di Trapani said or did. Offered as they were, essentially without explanation or rationale, these directions would have significantly taxed the jury's common sense. Moreover, as the Supreme Court said in *Last*, at para. 46, a proper jury instruction can only limit the risk of inappropriate use of evidence. In other words, it cannot remove potential prejudice to the accused as a relevant factor in the analysis.

[104] In *R. v. Guimond*, [1979] 1 S.C.R. 960, [1979] S.C.J. No. 16, the Supreme Court of Canada was faced with a similar circumstance: an out-of-court statement admissible against one accused and inadmissible against his co-accused, although highly prejudicial to that co-accused. In upholding the decision that the two should have been tried separately, the majority used language, at p. 978 S.C.R., that, as adapted to the circumstances here, aptly captures our conclusion: however often the jury was told that Ms. Figliola's statements to Mr. Gonsalves did not constitute evidence against Mr. Di Trapani, it cannot be said with assurance that one or more of the jurors did not convict Mr. Di Trapani on the basis of that evidence.

[105] A separate consideration in determining whether the March 8, 2006 order denying severance resulted in an injustice is the way it came about. The pre-trial ruling of December 20, 2005 excluded from Mr. Gonsalves' testimony the evidence that Ms. Figliola identified Mr. Di Trapani as the man who carried out the murder of her husband. That was the rule under which the first eight weeks of the Crown's case was defended by Mr. Di Trapani.

[106] Then, on March 8, as the Crown's case approached its conclusion and Mr. Gonsalves was about to be called, the trial judge reversed that rule and made clear that this evidence could be elicited by the Crown, not once as it turned out, but twice. This reversal was not due in any way to Mr. Di Trapani. The trial judge justified the change because he said counsel for Ms. Figliola had changed her position from December 20. Although we think that is far from clear, for present purposes, the question is whether the reversal of this ruling, coming when it did, contributed to the injustice resulting from the dismissal of the severance application.

[107] In our view, the answer is clearly yes. Counsel for Mr. Di Trapani, knowing what he was facing and what he was not facing, had laid no foundation with prior witnesses for the undermining of Mr. Gonsalves' credibility, because, as he put it, that was not his fight in light of the ruling of December 20. There was no need for him to worry about the potential prejudice to Mr. Di Trapani arising from the improper use of that evidence. On March 7, when this arose for the first time and the December 20 ruling was effectively reversed, counsel was focusing on the remaining Crown witnesses and preparing his defence evidence. To require counsel to turn at that stage to a detailed review of eight weeks of evidence to determine how an attack on Mr. Gonsalves' credibility could be mounted, and with the recall of what witnesses, would have simply been impractical. We do not agree with the trial judge that the recall of Crown witnesses for new or further re-examination by counsel for Mr. Di Trapani was a practical remedy that could have properly addressed the prejudice caused by the timing of the reversal of the ruling.

[108] Moreover, the tactical change it would have forced on counsel carried its own problems for Mr. Di Trapani. Suddenly mounting a challenge to Mr. Gonsalves' credibility would run the risk of the jury concluding that his evidence must somehow be harmful to Mr. Di Trapani, particularly given that no explanation for the change in tactics could be given. We do not agree with the trial judge's view that the change in trial tactics would carry no risk of negatively influencing the jury.

[109] Nor would the recall of witnesses undo the perception of unfairness to an accused arising from a change, after eight weeks of evidence, in one of the significant rules of his trial set at the start by the trial judge. This is particularly so since the accused had played no part in causing the change.

[110] The reversal on March 8 of the December 20 ruling made admissible Mr. Gonsalves' evidence that caused particular

potential prejudice for Mr. Di Trapani. The timing provided important context for the renewed severance application. To deny that application at that stage left Mr. Di Trapani with a proposed solution to the prejudice caused by the timing of the reversal that in our view was impractical, required a change in trial tactics that could realistically have negatively influenced the jury and created a perception of unfairness to him.

[111] When the consequences for Mr. Di Trapani of the order of March 8 denying severance are assessed, we must then consider both the consequences of the ruling itself and the consequences of the circumstances in which it was made. Taking these together, we have no hesitation in concluding that, in the circumstances, the ruling resulted in an injustice.

[112] Having reached that conclusion, it would be impossible for us to conclude that there was no miscarriage of justice. Hence, there is no room for the application of the *proviso*.

[113] We would therefore allow the appeal and set aside Mr. Di Trapani's conviction and order a new trial.

Disposition

[114] Accordingly, the appeals are allowed, the convictions set aside and new trials ordered. Pursuant to s. 686(8) of the *Criminal Code*, we order that there be separate trials.

Appeals allowed.

Cassidy's Transfer & Storage Limited v. 1443736 Ontario Inc., operating as Canada One Sourcing, et al.

[Indexed as: Cassidy's Transfer & Storage Ltd. v. 1443736 Ontario Inc.]

2011 ONSC 2871

Superior Court of Justice, Ray J. May 12, 2011

Carriage of goods — Bills of lading — Government of Canada entering into contract with Company A for supply and delivery of socks for Canadian Forces — Company A retaining carrier to deliver army socks to Canadian Forces bases — Canada continuing to pay Company A after learning that Company A was not paying carrier's freight charges — Carrier suing Canada for amount outstanding — Action allowed — Presumption in s. 2 of Bills of Lading Act that consignee is responsible for freight charges applying — Terms of contract between Canada and Company A not incorporated by reference in bill of lading — Carrier not waiving protection of Act — Bills of Lading Act, R.S.C. 1985, c. B-5, s. 2.