

** Preliminary Version **

Case Name:
R. v. Last

Gregory Ernest Last, Appellant;
v.
Her Majesty The Queen, Respondent.

[2009] S.C.J. No. 45

[2009] A.C.S. no 45

2009 SCC 45

EYB 2009-164847

J.E. 2009-1893

247 C.C.C. (3d) 449

File No.: 32809.

Supreme Court of Canada

Heard: March 27, 2009;
Judgment: October 15, 2009.

**Present: McLachlin C.J. and LeBel, Deschamps, Fish, Abella,
Charron and Cromwell JJ.**

(49 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

*Criminal law -- Procedure -- Information or indictment -- Joinder or **severance of counts** -- Jury -- Trial judge's duties -- Charge or directions -- Inferences of guilt -- Appeal by **accused** from conviction related to two incidents involving sexual assaults on two victims allowed -- The significant risk of prejudice to **accused** clearly outweighed any benefits to the administration of justice in trying the **counts** together -- Failing to conduct a proper balancing of the relevant factors, the trial judge acted unjudicially in making an unreasonable decision -- Intervention was therefore warranted -- The convictions were set aside and the matter was remitted to the*

Superior Court for the **counts** related to each victim to be tried separately.

*Criminal law -- Appeals -- Grounds -- Question of law -- Powers of appellate court -- New trial - Appeal by **accused** from conviction related to two incidents involving sexual assaults on two victims allowed -- The significant risk of prejudice to **accused** clearly outweighed any benefits to the administration of justice in trying the **counts** together -- Failing to conduct a proper balancing of the relevant factors, the trial judge acted unjudicially in making an unreasonable decision -- Intervention was therefore warranted -- The convictions were set aside and the matter was remitted to the Superior Court for the **counts** related to each victim to be tried separately.*

Appeal by **accused** from a conviction related to two incidents involving sexual assaults on two victims. The **accused** allegedly invited the first victim into his home, pulled out a gun and held it to her forehead, choked her and repeatedly sexually assaulted her orally, vaginally, and anally. The **accused** testified to consensual sex with the first victim and denied owning a gun. The **accused** allegedly assaulted the second victim approximately one month later. The **accused** and the second victim met through a mutual friend who left them alone in the victim's apartment. According to the second victim, the **accused** struck her across the forehead with a mug, grabbed her throat and choked her until she was unconscious. When the second victim eventually awoke, she realized she was naked and covered in blood. She suffered extensive injuries and identified the **accused** as her assaulter. Defence counsel argued that the second victim's memory was unreliable due to the trauma she had suffered and that the likely perpetrator was her ex-boyfriend. A pre-trial **severance** application was denied by the trial judge. The trial judge found that there was a nexus in time and place between incidents giving rise to the charges and was not persuaded that the question of prejudice would have been a significant factor at trial. The **accused** was convicted and sentenced to 22.5 years' imprisonment. On appeal to the Court of Appeal for Ontario, the **accused** raised numerous grounds of appeal, including that the trial judge erred in denying **severance** and that he failed to properly instruct the jury not to use prohibited propensity reasoning. A majority of the Court of Appeal dismissed the appeal.

HELD: Appeal allowed. The convictions were set aside and the matter was remitted to the Superior Court for the **counts** related to each victim to be tried separately. Section 591 of the Criminal Code governed the joinder of **counts** in an indictment and, except for murder, placed no restrictions on the number of **counts** that could have been tried together on a single indictment. Under section 591(3)(a), however, a court could have ordered that the **accused** be tried separately on one or more of the **counts** where it was satisfied that the interests of justice so required. There were two separate grounds for intervention: an unjudicial **severance** ruling or a ruling that resulted in an injustice. While the determination of whether the judge acted unjudicially called for an inquiry into the circumstances prevailing at the time it was made, the review of whether the ruling resulted in an injustice usually entailed scrutiny that included the unfolding of the trial and of the verdicts. When deciding whether to sever **counts**, courts balanced the risk of prejudice to the **accused** and the public interest in a single trial, using the following factors: the general prejudice to the **accused**; the legal and factual nexus between the **counts**; the complexity of the evidence; whether the **accused** intended to testify on one **count** but not another; the possibility of inconsistent verdicts; the desire to avoid a multiplicity of proceedings; the use of similar fact evidence at trial; the length of the trial having regard to the evidence to be called; the potential prejudice to the **accused** with respect to the right to be tried within a reasonable time; and the existence of antagonistic defences as between co-**accused** persons. Although the **accused** was likely to testify on both incidents, the risk of prejudice to the **accused** in having a joint trial was nevertheless significant because of the

dangers of credibility cross-pollination and prohibited propensity reasoning. A joint trial in the circumstances of this case did not serve any truth-seeking interest and brought few if any benefits to the administration of justice. Courts should have only resorted to a proper limiting instruction to the jury to overcome any potential prejudice to the **accused** when there were sufficient countervailing factors providing a rationale for a joint trial. The significant risk of prejudice to the **accused** clearly outweighed any benefits to the administration of justice in trying the **counts** together. Failing to conduct a proper balancing of the relevant factors, the trial judge acted unjudicially in making an unreasonable decision and intervention was therefore warranted.

Statutes, Regulations and Rules Cited:

Criminal Code, R.S.C. 1985, c. C-46, s. 591, s. 591(1), s. 591(2), s. 591(3), s. 591(3)(a), s. 591(3)(b), s. 591(4)(a), s. 591(4)(b)

Subsequent History:

NOTE: This document is subject to editorial revision before its reproduction in final form in the Canada Supreme Court Reports.

Court Catchwords:

*Criminal law -- Trial -- Joinder and **severance** -- **Accused** charged with several **counts** arising from two sexual assaults committed at different times against different complainants -- Whether trial judge erred in dismissing application for **severance**.*

Court Summary:

The **accused** was charged in one indictment with **counts** related to two sexual assaults and breaches of undertakings. Both assaults occurred in the same city, approximately one month apart. S.M. testified that, after attending a night club with the **accused**, she went to his home in order to call a taxi. She testified that once inside the **accused's** home, he held her at gunpoint, choked her and repeatedly sexually assaulted her. M.A. testified that the **accused** accompanied a mutual friend to her apartment. After the friend left, the **accused** struck her across the forehead with a mug and choked her into unconsciousness. She was sexually assaulted with an object while unconscious. The **accused** applied to sever the **counts** in order to be tried separately in respect to each sexual assault. The trial judge denied the application. He found that there was a nexus in time and place but observed that he was "not persuaded that, at trial, the question of prejudice will be a significant factor at all" since "a modern jury should be able to handle the instructions given by [him] to avoid any meaningful possibility of prejudice". He did not put much weight on a statement by defence counsel that the **accused** might wish to testify on **counts** related to one incident but not the other. He held that the case was not complex, and that the possibility of inconsistent verdicts did "not loom large". This led him to conclude that the interests of justice did not require **severance** in this case. At trial, the **accused** was convicted on all charges and a majority of the Court of Appeal upheld the convictions.

Held: The appeal should be allowed. The convictions should be set aside. The matter should be remitted to the Superior Court and the **counts** related to each complainant should be tried separately.

Section 591 of the *Criminal Code*, which governs the joinder of **counts** in an indictment, except for murder, places no restrictions on the number of **counts** that can be tried together on a single indictment. However, s. 591(3)(a) permits a court to order that the **accused** be tried separately on one or more of the **counts** where it is satisfied that the interests of justice so require. There are two grounds for intervention: unjudicial **severance** ruling or a ruling that result in an injustice. An inquiry into whether a judge acted unjudicially examines the circumstances prevailing at the time the **severance** ruling was made, while a review of whether the ruling resulted in an injustice will usually scrutinize the unfolding of the trial and of the verdicts. When deciding whether to sever **counts**, courts balance the risk of prejudice to the **accused** and the public's interest in a single trial. Factors that may be weighed when deciding whether or not to sever include prejudice to the **accused**, the legal and factual nexus between the **counts**, the complexity of the evidence, whether the **accused** intends to testify on one **count** but not another, the possibility of inconsistent verdicts, the desire to avoid a multiplicity of proceedings, the use of similar fact evidence at trial, the length of the trial having regard to the evidence to be called, the potential prejudice to the **accused** with respect to the right to be tried within a reasonable time and the existence of antagonistic defences as between co-**accused** persons. [paras. 13-15] [paras. 17-18]

In this case, the trial judge failed to conduct a proper balancing of the relevant factors and made an unreasonable decision in denying the application for **severance**. All the factors must be considered and weighed cumulatively and most of them militated in favour of separate trials. Although the **accused** was likely to testify in respect to both assaults, the risk of prejudice to the **accused** in having a joint trial was significant because of the dangers of credibility cross-pollination and prohibited propensity reasoning. Furthermore, there were no compelling countervailing reasons for having a joint trial. This case did not pose a risk of inconsistent verdicts, nor any substantial overlap in witness testimony or other evidence. The nexus of time and place between the **counts** did not explain why it was necessary, desirable or convenient to try the cases together. A joint trial did not serve any truth-seeking interest and brought few if any benefits to the administration of justice. Considering the unlikelihood of a successful similar fact application, the gains in judicial economy usually achieved from avoiding multiple proceedings were absent in this case. Although a limiting instruction to the jury in an appropriate case can limit the risk of prejudice to the **accused**, courts should resort to limiting instructions only where sufficient countervailing factors provide a rationale for a joint trial. The significant risk of prejudice to the **accused** clearly outweighed any benefits to the administration of justice in trying the **counts** together. [para. 41] [paras. 44-45] [para. 47]

This is not a case where the curative proviso should be applied. The Crown has not discharged its burden that despite the error of law, no substantial wrong or miscarriage of justice occurred. [para. 49]

Cases Cited

Referred to: *R. v. Litchfield*, [1993] 4 S.C.R. 333; *R. v. Kestenberg* (1959), 126 C.C.C. 387, leave to appeal refused [1960] S.C.R. x; *R. v. Grondkowski* (1946), 31 Cr. App. R. 116; *R. v. Rose* (1997), 100 O.A.C. 67; *R. v. E. (L.)* (1994), 94 C.C.C. (3d) 228; *R. v. Cross* (1996), 112 C.C.C. (3d) 410; *R. v. Cuthbert* (1996), 106 C.C.C. (3d) 28, aff'd [1997] 1 S.C.R. 8 (*sub nom.* *R. v. C. (D.A.)*); *R. v. Arp*, [1998] 3 S.C.R. 339; *R. v. Handy*, 2002 SCC 56, [2002] 2 S.C.R. 908; *R. v. Jaw*, 2009 SCC 42.

Statutes and Regulations Cited

Criminal Code, R.S.C. 1985, c. C-46, s. 591.

Authors Cited

Watt, David. *Watt's Manual of Criminal Evidence*. Thomson Carswell: Toronto, 2009.

History and Disposition:

APPEAL from a judgment of the Ontario Court of Appeal (Feldman, Lang and Juriansz JJ.A.), 2008 ONCA 593, 91 O.R. (3d) 561, 236 C.C.C. (3d) 231, [2008] O.J. No. 3208 (QL), 2008 CarswellOnt 4833, upholding the **accused's** convictions. Appeal allowed.

Counsel:

Clayton C. Ruby and Gerald J. Chan, for the appellant.

Lisa Joyal, for the respondent.

The judgment of the Court was delivered by

DESCHAMPS J.:--

1. Introduction

1 The Crown enjoys a large discretion in deciding to include more than one **count** in an indictment (s. 591(1) of the *Criminal Code*, R.S.C. 1985, c. C-46). On an application to sever a multi-**count** indictment, the overarching criteria are the interests of justice. This appeal raises the issue of whether a trial judge erred in dismissing an application to sever. In my view, he did.

1.1 Overview

2 The appellant, Gregory Ernest Last, was charged in one indictment with **counts** related to two incidents involving sexual assaults on two victims and with two **counts** of breach of undertaking. Prior to trial, he applied for an order that the **counts** related to each sexual assault be severed and that a separate trial be held with respect to each incident. The trial judge, Killeen J., denied the **severance** application and proceeded to try all **counts** together. Mr. Last was convicted on all charges. A dangerous offender application was dismissed and he was sentenced to 22.5 years' imprisonment. Mr. Last appealed both his convictions and his sentence to the Ontario Court of Appeal but his appeal was dismissed, Juriansz J.A. dissenting (2008 ONCA 593, 91 O.R. (3d) 561).

3 Mr. Last appeals his conviction as of right to this Court on the issue of whether the trial judge erred in dismissing his application for **severance**. Mr. Last was also granted leave to appeal on the issue of whether the trial judge erred in failing to instruct the jury against propensity reasoning.

4 For the reasons that follow, I would allow the appeal on the ground that the trial judge

erred in failing to conduct an appropriate balancing exercise of all factors relevant to the **severance** order. I would set aside the convictions and remit the matter to the Superior Court for the **counts** related to each victim to be tried separately.

1.2 Factual Background

5 The first incident occurred in the early hours of September 27, 2003 and involved the alleged sexual assault of S.M. Mr. Last had accepted S.M.'s invitation to join her at a night club on the night of her 19th birthday. At the end of the night, a friend of S.M. offered them a ride home from the night club. When they arrived at Mr. Last's home, S.M. informed Mr. Last that she would not be accompanying him. Mr. Last refused to get out of the car unless S.M. got out with him. Not wanting to inconvenience her friend, whose parents had imposed a curfew, S.M. decided to get out of the car and call a taxi from Mr. Last's home. S.M. testified that once she was inside his home, Mr. Last pulled out a gun and held it to her forehead. According to S.M., Mr. Last then proceeded to choke her and repeatedly sexually assault her orally, vaginally and anally. S.M. eventually escaped once Mr. Last fell asleep.

6 The next morning S.M. related the events to her sister, who noticed red marks on S.M.'s neck. When S.M. went to the hospital two days later she had no visible injuries. A witness for the Crown testified that she had seen Mr. Last with a gun on three occasions. Mr. Last testified to consensual sex with S.M. and denied owning a gun.

7 The second incident occurred approximately one month later and involved the alleged sexual assault of a 32-year-old woman, M.A. After midnight on the night of October 29, 2003, Mr. Last accompanied one of M.A.'s friends to M.A.'s apartment. This was the first time M.A. had met Mr. Last. After introductions and a brief conversation over a cup of tea, the friend got up to leave to go to a bar. Mr. Last refused to accompany her because he did not have enough money or proper identification to go to a bar. After a brief discussion, it was agreed that Mr. Last would stay behind with M.A. and wait for the friend's return. At one point, once the friend had left, Mr. Last went to the kitchen to get more tea and came back with his mug and sat down. According to M.A., Mr. Last then stood up and struck her across the forehead with a tea mug. M.A. testified that he grabbed her throat with both hands and started choking her until she was unconscious. When M.A. eventually awoke, she had a seizure. Once she recovered from the seizure she realized she was naked and covered in blood. M.A. managed to wrap a towel around herself and exit her apartment, which had been locked from the outside. M.A. sought help from the superintendents of her apartment building, who immediately called the police. M.A. identified Mr. Last as her assaulter.

8 M.A. suffered extensive injuries that included vaginal and anal assault with an object. She bore numerous bruises, including one of 12 cm x 10 cm on the eye, and abrasions, including tears to the hymenal tissues and anus. M.A.'s blood was found on numerous sites in her apartment, including the floor, wall and couch in her living room.

9 Mr. Last testified that he left shortly after his friend because M.A. was expecting a visit from a male acquaintance. Mr. Last's defence counsel noted that cell phone records indicated that Mr. Last had at most a 20-minute window of opportunity to commit the assault. Defence counsel argued that M.A.'s memory was unreliable due to the trauma she had suffered and that the likely perpetrator was her ex-boyfriend.

1.3 Decisions of the Courts Below

10 A pre-trial **severance** application was denied by the trial judge, Killeen J. He found that there was a nexus in time and place because "[t]he incidents giving rise to the charges only occurred roughly one month apart" in the same city. He then observed that he was "not persuaded that, at trial, the question of prejudice will be a significant factor at all" since "a modern jury should be able to handle the instructions given by [him] to avoid any meaningful possibility of prejudice" (A.R., at p. 79). He did not put much weight on the statement by defence counsel that the **accused** might wish to testify on **counts** related to one incident but not the other because he found "that point was taken so vaguely as not to constitute a significant factor". He also noted that the case was not complex, and that the possibility of inconsistent verdicts did "not loom large". This led him to conclude that the interests of justice did not require **severance** in this case.

11 On appeal to the Court of Appeal for Ontario, Mr. Last raised numerous grounds of appeal, including that the trial judge erred in denying **severance** and that he failed to properly instruct the jury not to use prohibited propensity reasoning. A majority of the Court of Appeal dismissed the appeal. Juriansz J.A. dissented on the ground that the trial judge erred in assessing the weight of the relevant factors and their cumulative effect on the interests of justice.

2. Issues

12 This appeal raises the issue of whether the trial judge acted unjudicially in dismissing the **severance** application. The appellant also contends that the trial judge's decision resulted in an injustice and that he erred in failing to warn the jury against propensity reasoning. The Crown maintains that there is no error in the decision not to sever and that if any error was committed, the curative proviso should be applied. Given my conclusion that the trial judge acted unjudicially in his weighing of the relevant factors in the **severance** application, it will not be necessary to discuss the appellant's other grounds. Moreover, this it is not, in my view, a case where the curative proviso can be applied.

3. Analysis

3.1 *The **Severance** Application*

13 Section 591 of the *Criminal Code* governs the joinder of **counts** in an indictment:

591. (1) [Joinder of **counts**] Subject to section 589, any number of **counts** for any number of offences may be joined in the same indictment, but the **counts** shall be distinguished in the manner shown in Form 4.

(2) [Each **count** separate] Where there is more than one **count** in an indictment, each **count** may be treated as a separate indictment.

(3) [**Severance** of **accused** and **counts**] The court may, where it is satisfied that the interests of justice so require, order

(a) that the **accused** or defendant be tried separately on one or more of the **counts**; and

(b) where there is more than one **accused** or defendant, that one or

more of them be tried separately on one or more of the **counts**.

(4) [Order for **severance**] An order under subsection (3) may be made before or during the trial but, if the order is made during the trial, the jury shall be discharged from giving a verdict on the **counts**

(a) on which the trial does not proceed; or

(b) in respect of the **accused** or defendant who has been granted a separate trial.

14 It is noteworthy that, save for murder, s. 591(1) of the *Code* places no restrictions on the number of **counts** that can be tried together on a single indictment. Under s. 591(3)(a), however, a court may order that the **accused** be tried separately on one or more of the **counts** "where it is satisfied that the interests of justice so require". As noted by this Court in *R. v. Litchfield*, [1993] 4 S.C.R. 333, 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 (at pp. 353-54):

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 added.]

15 The Court in *Litchfield* integrated the long accepted two separate grounds for intervention: an unjudicial **severance** ruling or a ruling that resulted in an injustice (see, for example, *R. v. Kestenberg* (1959), 126 C.C.C. 387 (Ont. C.A.), leave to appeal refused, [1960] S.C.R. x; and *R. v. Grondkowski* (1946), 31 Cr. App. R. 116 (C.C.A.), at pp. 119-20). These two grounds involve different inquiries. While the determination of whether the judge acted unjudicially calls for an inquiry into the circumstances prevailing at the time it was made, the review of whether the ruling resulted in an injustice will usually entail scrutiny that includes the unfolding of the trial and of the verdicts (*R. v. Rose* (1997), 100 O.A.C. 67, at para. 17).

16 The ultimate question faced by a trial judge in deciding whether to grant a **severance** application is whether **severance** is required in the interests of justice, as per s. 591(3) of the *Code*. The interests of justice encompass the **accused's** right to be tried on the evidence admissible against him, as well as society's interest in seeing that justice is done in a reasonably efficient and cost-effective manner. The obvious risk when **counts** are tried together is that the evidence admissible on one **count** will influence the verdict on an unrelated **count**.

17 Courts have given shape to the broad criteria established in s. 591(3) and have identified factors that can be weighed when deciding whether to sever or not. The weighing exercise ensures that a reasonable balance is struck between the risk of prejudice to the **accused** and the public interest in a single trial. It is important to recall that the interests of justice often call

for a joint trial. *Litchfield*, where the Crown was prevented from arguing the case properly because of an unjudicial **severance** order, is but one such example. **Severance** can impair not only efficiency but the truth-seeking function of the trial.

18 The factors identified by the courts are not exhaustive. They simply help capture how the interests of justice may be served in a particular case, avoiding an injustice. Factors courts rightly use include: the general prejudice to the **accused**; the legal and factual nexus between the **counts**; the complexity of the evidence; whether the **accused** intends to testify on one **count** but not another; the possibility of inconsistent verdicts; the desire to avoid a multiplicity of proceedings; the use of similar fact evidence at trial; the length of the trial having regard to the evidence to be called; the potential prejudice to the **accused** with respect to the right to be tried within a reasonable time; and the existence of antagonistic defences as between co-**accused** persons: *R. v. E. (L.)* (1994), 94 C.C.C. (3d) 228 (Ont. C.A.), at p. 238; *R. v. Cross* (1996), 112 C.C.C. (3d) 410 (Que. C.A.), at p. 419; *R. v. Cuthbert* (1996), 106 C.C.C. (3d) 28 (B.C.C.A.), at para. 9, aff'd [1997] 1 S.C.R. 8 (*sub nom. R. v. C. (D.A.)*).

19 Mr. Last focusses his submission on the first *Litchfield* ground for intervention. He contends that the trial judge acted unjudicially in dismissing the **severance** application and that the ruling resulted in an injustice. More particularly, he contends that the trial judge erred in principle by dismissing his intention to testify on one set of **counts** and not the other as vague, failing to reasonably weigh the absence of benefits to the administration of justice of having the **counts** tried together, and concluding that the prejudice he suffered was insignificant. He submits that the reasonable weighing of the relevant factors can only lead to a conclusion that the **counts** ought to be severed.

20 The Crown submits that the trial judge acted judicially in deciding that the interests of justice did not require **severance** in Mr. Last's case. The Crown submits that there was a diminished risk of prejudice to Mr. Last arising from a single trial of the multiple **counts** and, moreover, that it was open to the trial judge not to sever the **counts** since any prejudice could be minimized through an appropriate jury instruction limiting the use of evidence.

21 Since the trial judge enjoys a broad discretion in deciding whether to sever or not, a reviewing court should only intervene on the ground of unjudicial ruling if the judge erred on a question of law or made an unreasonable decision. I will review first the **accused's** submission that the dismissal of his intention to testify resulted in an unjudicial ruling and then turn to the prejudicial effect of trying all **counts** together, and the minimal benefits of a joint trial to the administration of justice. I will end the analysis by reviewing the weighing exercise conducted by the trial judge.

3.2 The **Accused's** Intention to Testify

22 During submissions at the **severance** hearing, defence counsel indicated to the trial judge that "There is a larger probability or greater probability . . . that the **accused** would testify with respect to [the S.M.] charge than on the other charge which is dependent more heavily on other evidence" (A.R., at p. 51). The trial judge nevertheless found that the "point was taken so vaguely as not to constitute a significant factor in this case" (A.R., at p. 80).

23 Before this Court the parties raise the issue of the appropriate weight to give, on a **severance** motion, to the **accused's** intention to testify. Mr. Last submits that **severance** should be "strongly favoured" where the following two requirements are met: (1) the **accused** expresses an intention to testify on one **count** but not the other; and (2) the **accused** provides

an explanation for that intention that is objectively justifiable. In his view, *Charter* values support this twofold approach. Mr. Last submits that he satisfied both requirements in this case and that the trial judge erred in principle by not giving this factor any weight.

24 The Crown submits that in order for an **accused's** intention to testify to be given significant weight on a **severance** application, the following requirements must be met: the **accused** should assert a clear and positive intention to testify on some **counts** and not others; and the **accused** should provide a sufficient explanation as to why she or he intends to testify on some **counts** and not others. With respect to the first requirement, the Crown submits that it should be open to a trial judge to give little or no weight to a simple assertion on the part of an **accused** of an intention to testify on some **counts** and not others. The Crown rejects a test that would make the assertion of an intention to testify a determining factor. With respect to the second requirement, the Crown notes that the burden lies with the **accused** to convince the trial judge on the balance of probabilities that the interests of justice require **severance**. Accordingly, the **accused** ought to be required to demonstrate why his or her testimonial intention should be given significant weight on the motion.

25 In assessing the **accused's** testimonial intention on a **severance** application the underlying concern is for the **accused's** ability to control his defence, and, more specifically, his right to decide whether or not to testify with respect to each of the **counts** unimpaired by inappropriate constraints.

26 Both the Crown and the defence submit that the **accused's** intention should be objectively justifiable. This requirement is, indeed, a threshold. The **accused's** expression should have both a subjective and an objective component. However, while a formulaic expression of a subjective intention is not sufficient in and of itself to discharge the **accused's** burden to have the **counts** severed, the trial judge should not substitute his or her own view for that of the **accused** and determine that the **accused** should testify or not. Rather, the trial judge must simply satisfy him- or herself that the circumstances objectively establish a rationale for testifying on some **counts** but not others. The burden on the **accused** is to provide the trial judge with sufficient information to convey that, objectively, there is substance to his testimonial intention. The information could consist of the type of potential defences open to the **accused** or the nature of his testimony: *Cross*, at p. 421. However, the **accused** is not bound by his stated intention; he remains free to control his defence, as the case unfolds, in a manner he deems appropriate.

27 While an **accused's** provisional intention with respect to testifying is certainly a consideration which should be given significant weight, it is but one factor to be balanced with all the others. An **accused's** stated and objectively justifiable intention to testify on some but not all **counts** is not necessarily determinative of a **severance** application. It can be counterbalanced by other circumstances that the judge finds may prevent the **accused** from testifying, or be outweighed by factors that demonstrate that the interests of justice require a joint trial.

28 During the **severance** hearing counsel for the defence explained to the trial judge, albeit briefly, that Mr. Last was more likely to testify in respect of the S.M. **counts** since the issue was whether the sexual intercourse was consensual or not, and was therefore highly dependent on S.M.'s word against Mr. Last's. Defence counsel at trial did not further elaborate on Mr. Last's position, other than to say that the M.A. **counts** were "dependent more heavily on other evidence". However, the suggestion before the Court of Appeal and this Court was that Mr. Last was less likely to testify with respect to the M.A. **counts** since they involved an

issue of identification.

29 While defence counsel could reasonably argue that the M.A. **counts** called for a distinct theory of the case from the S.M. **counts**, it is to be noted that the likelihood Mr. Last may feel strategically compelled to testify with respect to the M.A. **counts** as well as the S.M. **counts** could not be discounted. The Crown's evidence implicating Mr. Last on the M.A. **counts** was not insignificant given Mr. Last's admission that he was in her apartment just prior to the assault and M.A.'s identification of Mr. Last as her assailant. It was thus fairly probable he would have to testify in order to put forward his theory of the case -- that it was someone else who entered M.A.'s apartment and committed the assault. Such a testimonial outcome was discernable at the time of the **severance** application.

30 I conclude that although Mr. Last's intention to testify on one set of **counts** and not the other was objectively justifiable, it did not constitute, in this case, a significant factor in view of the likelihood that his decision whether or not to testify would be the same in relation to both sets of **counts**.

3.3 Nexus Between the Two Incidents

31 Another factor to be considered on a **severance** application is whether there is any legal or factual nexus between the **counts**. The trial judge found there was a nexus in time and place between the two sets of charges because the two assaults giving rise to the charges occurred in the city of London, approximately one month apart. The dissent in the Court of Appeal, however, found the nexus between the two **counts** to be "exceedingly weak":

Factually, the two cases involve different complainants. They occurred in different locations. They occurred approximately one month apart.

Legally, both sets of **counts** relate to sexual assault, but they raise different legal issues. In the S.M. case, the legal issue was consent, and in the M.A. case the issue was identification.

None of the evidence on one set of cases was relevant or admissible on the other. At trial, the Crown agreed that none of the evidence qualified as similar fact evidence. [paras. 127-29]

32 I agree with the dissenting judge that the factual and legal nexus between the two sets of **counts** is extremely thin. The fact that the two incidents occurred in London approximately one month apart is of very limited significance in this case. This was the city where Mr. Last resided and worked. The attacks on the women were not closely connected in any meaningful way. While the charges were similar, the theory of the defence was completely different: consent was at issue in one and identification in the other. The theory of the Crown that the two incidents were part of the same transaction was not supported by the facts. Rather, the attacks were separate incidents. The trier of fact would not need to know about one in order to understand the other. The circumstances surrounding the charges were not sufficiently similar in character to have supported a similar fact evidence application. Accordingly, there was no truth-seeking interest in trying the **counts** together.

33 In many cases a ruling allowing similar fact evidence will favour a joint trial since the evidence on all incidents would have to be introduced in any event. However, in view of the different burden in a similar fact evidence application, the issue has to be considered carefully

in the context of a **severance** motion. As said in *R. v. Arp*, [1998] 3 S.C.R. 339, at para. 52:

However, where the similar acts are alleged as part of a multi-**count** indictment, the consideration of the admissibility of similar fact evidence will have to be taken into account in deciding whether the **counts** should be severed. Nevertheless, the trial judge should be careful not to confuse admissibility with **severance**. A motion to sever under s. 591(3)(a) of the *Code* must be brought by the **accused**, who bears the burden of establishing on a balance of probabilities that the interests of justice require an order for **severance**. Yet the burden of demonstrating that similar fact evidence should be admitted must be borne by the Crown. These respective burdens may involve the consideration of similar factors, but as Lord Scarman noted in *R. v. Scarrott* (1977), 65 Cr. App. R. 125 (C.A.), at p. 135, "[i]t does not follow that because a multi-**count** indictment has been allowed to proceed that therefore the evidence given will be evidence on all the **counts** contained in the indictment". Thus, to paraphrase the Manitoba Court of Appeal in *R. v. Khan* (1996), 49 C.R. (4th) 160, at p. 167, notwithstanding the trial judge's refusal to sever the **counts** in a multi-**count** indictment, it remains open to him or her, as the evidence progresses at trial, to determine as a matter of law that evidence on one **count** is not admissible as similar fact evidence on the other **counts**. The assessment of similar fact evidence and the determination of its probative value and admissibility places on onerous burden on the trial judge. It is a task that must be undertaken with great care.

34 In the case at bar, an issue facing the trial judge at the time of the **severance** hearing was the fact that the Crown indicated that it wanted to wait until the conclusion of its evidence before making a similar fact evidence application. There is no procedural rule requiring the Crown to bring the similar fact evidence application at the time of the **severance** application: see D. Watt, *Watt's Manual of Criminal Evidence* (2009), at s. 34.02. Given that the assessment of the similar fact evidence application can be a difficult task, in many cases such an assessment may be best done once all of the Crown's evidence has been tendered. However, in this case, the acts complained of did not come close to having the requisite "high degree of similarity" that would have rendered "the likelihood of coincidence objectively improbable": *Arp*, at para. 43; see also *R. v. Handy*, 2002 SCC 56, [2002] 2 S.C.R. 908. Therefore it was clear at the **severance** motion that a similar fact application was not likely to succeed. Indeed, in his reasons, the trial judge did not rely on the possibility of a similar fact evidence application for denying **severance**.

35 In summary, the nexus in this case was so tenuous as to hardly bear any weight in favour of a joint trial.

3.4 Risk of Prejudice to the **Accused**

36 Mr. Last identifies two sources of prejudice in trying the **counts** together, and submits that the trial judge's failure to accord significant weight to this factor constituted an error in principle. First, joinder created the potential for cross-pollination on credibility assessments. The existence of two complainants who had no relation to each other alleging two separate incidents of sexual assault created a risk that the credibility of each complainant would be bolstered. Similarly, if the jury found Mr. Last not credible while testifying with respect to one set of **counts**, the jury might presume that he was also not credible with respect to the other. Second, the joinder created a risk that the jury would engage in prohibited propensity

reasoning. If the jury were to find that the Crown had satisfied the burden of proof for one set of offences, the jury might infer that Mr. Last was the kind of person who would commit these types of crimes and thereby convict him of the second set of offences.

37 The Crown submits that there was a relatively diminished risk of prejudice to Mr. Last that the trier of fact would engage in impermissible credibility bolstering or propensity reasoning. The Crown notes that the nature of both the proceedings and the evidence was relatively simple and straightforward. Since the cases did not involve similar fact evidence, the jury would not be instructed to pool the evidence on one set of **counts** with the evidence from the other set, and could therefore easily maintain the evidence in each case strictly separate.

38 Moreover, the Crown submits that the two sets of complaints were of relatively similar severity, and thus there was little danger that one set of **counts** would trigger a substantially greater degree of revulsion in the jury than the other.

39 The Crown's position minimizes the differences between the two incidents. There is no question that there is inherent violence in any sexual assault. However, to say that the two events were similar is to mischaracterize them.

40 The significant risk of propensity reasoning to the **accused** cannot be understated. The severity of the injuries in M.A.'s case and the telling pictorial representation of those injuries, together with the testimonies of the experts, made the evidence in this case much more visual than in S.M.'s case. On the other hand, the alleged threat with a gun and repeated sexual assault on the night of S.M.'s 19th birthday with the ensuing inherent psychological and emotional distress, if joined with the **counts** in M.A.'s case, seriously invited the possibility that the jury would engage in impermissible credibility bolstering and prohibited propensity reasoning. As pointed out by defence counsel, the jury would inevitably wonder why two complainants who did not know each other would independently accuse Mr. Last of sexual assault. Furthermore, if the jury was convinced beyond a reasonable doubt that Mr. Last had committed sexual assault on one victim, the jury would be inclined to reason that Mr. Last had the propensity for committing this type of offence and convict on the other. Indeed, the trial judge implicitly recognized the potential prejudice to the **accused**, but felt that he could cure any resulting prejudice with a limiting instruction (A.R., at p. 79). I will later comment further on the limiting instruction.

3.5 Minimal Benefit to the Administration of Justice

41 Another factor to consider is the benefit enuring to the administration of justice from holding a joint trial. As mentioned earlier, this is not a case where the evidence of one assault would have to be introduced at the trial of the other. The assaults did not bear the markers of similar fact evidence. Consequently, considering the unlikelihood of a successful similar fact application, the gains in judicial economy usually achieved from avoiding multiple proceedings were absent in this case.

42 Moreover, there was no overlap in evidence or key witnesses, such as complainants or expert witnesses. Indeed, only some of the investigating officers would likely have testified on both sets of **counts** and even then their evidence would not have overlapped. The benefits to the administration of justice in trying the **counts** together were thus minimal.

3.6 Balancing the Factors and Assessing the Interests of Justice

43 In his weighing of the interests of justice, the trial judge referred to a few factors: nexus, general prejudice to the **accused**, the possibility that the **accused** would testify on one set of **counts** but not the other, and multiplicity of proceedings. As mentioned earlier, he found the nexus weighed in favour of a joint trial when this factor should have been given very little weight. In addition he took the view that a limiting instruction would "avoid any meaningful possibility of prejudice" without assessing the benefits to the administration of justice. Finally, he observed that "[t]he purpose of joining **counts**, of course, is to avoid multiplicity, and it would be a rare thing for that criterion alone to tell in favour of **severance**". This last statement, in my view, does not come close to the analysis of the benefits to the administration of justice mandated on a **severance** application.

44 It was incumbent upon the trial judge to consider and weigh cumulatively all the relevant factors to determine whether the interests of justice require **severance**. In this case, although Mr. Last was likely to testify on both incidents, the risk of prejudice to Mr. Last in having a joint trial was nevertheless significant because of the dangers of credibility cross-pollination and prohibited propensity reasoning. In other circumstances, after balancing all relevant factors, the interests of justice may have nevertheless required a joint trial. However, in this case, there was an absence of compelling countervailing reasons for having a joint trial. This case did not pose a risk of inconsistent verdicts, nor did it involve substantial overlap in witness testimony or other evidence. As stated by the dissenting judge, "the nature of the nexus between the **counts** in this case did not provide a reason why it was necessary, desirable or convenient to try the cases together" (para. 130). Indeed, a joint trial in the circumstances of this case did not serve any truth-seeking interest, and brought few if any benefits to the administration of justice.

45 While the Crown argued that it was open to the trial judge to decide that a proper jury instruction can overcome any potential prejudice to Mr. Last, I agree with the dissenting judge below that this should be done only where there are sufficient countervailing factors providing a rationale for a joint trial (at para. 155):

Here, the countervailing factors in favour of trying these two sets of charges together were negligible and the reasons to sever were compelling. As a result, this was not a case to attempt to address the risk of prejudice by a jury instruction.

46 Indeed, if a proper jury instruction were all that was needed to deal with potential prejudice to the **accused**, then prejudice would in a sense cease to be a relevant factor in the analysis. While a limiting instruction can *limit* the risk of inappropriate cross-pollination or propensity reasoning, courts should not resort to a limiting instruction unless there is a valid reason to do so. As with the **accused's** intention to testify, the limiting instruction is but one factor in the balancing exercise.

47 As previously stated, all the factors must be considered and weighed cumulatively. Here, most of the factors militated in favour of separate trials. Consequently, the significant risk of prejudice to the **accused** clearly outweighed any benefits to the administration of justice in trying the **counts** together. Failing to conduct a proper balancing of the relevant factors, the trial judge made an unreasonable decision. I therefore conclude that the trial judge acted unjudicially and that intervention is warranted.

48 The Crown invites the Court to apply the curative proviso. The applicable rules were recently reviewed in *R. v. Jaw*, 2009 SCC 42, and there is no need to repeat them here.

Suffice it to say that the burden on the Crown is to prove that despite the error of law, no substantial wrong or miscarriage of justice occurred -- either because the error was so harmless that it could not have affected the verdict, or because the evidence adduced was so overwhelming that a conviction would have been inevitable. The Crown has not discharged its burden in this case. The evidence largely consists in testimonies that need to be appreciated by the triers of the facts and the evidence, viewed as a whole, does not allow the Court to conclude that no substantial wrong or miscarriage of justice occurred. Consequently, this case is not one where the curative proviso should be applied.

4. Conclusion

49 Since I have found that the trial judge acted unjudicially in denying **severance**, I would allow the appeal, set aside the convictions, and remit the matter to the Superior Court for the S.M. and the M.A. **counts** to be retried separately.

Appeal allowed.

Solicitors:

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Solicitor for the respondent: Attorney General of Ontario, Toronto.

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