CITATION: *R. v. Douse*, 2022 ONSC 3163
COURT FILE NO.: CR-21-50000137
DATE: 20220526

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
HER MAJESTY THE QUEEN	)	*P. Zambonini and M. Townsend*, for the Crown
– and –	)	*R. Handlarski and T. Lau*, for Mr. Douse
	)	*D. Derstine and J. Cowley*, for Mr. Smith
ANDRAE DOUSE and MICHAEL SMITH	)	
	)	**HEARD:** April 19, 2022

RULING
(Request to Sit at Counsel Table)

SCHRECK J.:

[1] Andrae Douse and Michael Smith wish to sit at counsel table during their trial on a charge of first degree murder. They submit that there should be a presumption that accused persons sit at counsel table during their trials as permitting them to do so promotes the presumption of innocence and facilitates counsel's communication with their clients. While they accept that security concerns can justify requiring an accused to sit in the prisoner's dock, they point out that they have made numerous court appearances without incident, including during a seven-day preliminary inquiry. Counsel rely on numerous authorities from this court in support of their position.

[2] The Crown submits that Mr. Douse and Mr. Smith should sit in the prisoner's dock. Crown counsel submits that there should be a presumption that accused persons remain in the dock as this is an accused's traditional place in the courtroom. The Crown also submits that the jury will get a better view of the defendants if they remain in the dock, which will be necessary for the jury to assess the identification evidence in this case. Based on Mr. Smith's prior convictions for failing

to obey court orders and some misconduct by both Mr. Douse and Mr. Smith while in custody, the Crown submits that there are also security concerns which justify requiring them to remain in the dock. The Crown also relies on numerous authorities from this court in support of their position.

[3] At the conclusion of hearing submissions on the issue, I advised counsel that Mr. Douse and Mr. Smith would be permitted to sit at counsel table and that I would provide reasons for my decision at a later date. Those reasons follow. Because this issue has been the source of disagreement among members of this court, I am providing detailed reasons in an attempt to develop a principled and workable approach to this issue, which arises frequently in trials on serious charges.

I. FACTS

A. The Allegations

[4] On May 1, 2019, a Honda Accord arrived at a housing complex in Toronto. Three men emerged from the car and were seen on various security video cameras walking towards a townhouse that was the home of Blaine Grindley. The men were off-camera for less than a minute and were then seen running back the way they came. At around that time, a neighbour heard the sound of gunshots. When police and paramedics arrived, they found Mr. Grindley's body in the townhouse. He had died of a single gunshot wound to the chest.

[5] The Crown alleges that the three men who got out of the Honda were Mr. Smith, Dayne Sitladeen and a man who not yet been identified.[1] Mr. Douse is alleged to have purchased gloves and face coverings for the three men shortly before the shooting.

[6] The central issue at trial from Mr. Smith's perspective will be whether the Crown has proven that he was one of the three men who got out of the Honda Accord. The Crown intends to rely on evidence linking Mr. Smith to the Honda Accord as well as to Mr. Sitladeen and Mr. Douse, including cell phone tower evidence and security video showing the parties in each other's company on other occasions. The central issue for Mr. Douse will be whether the Crown can prove that when he purchased the gloves and face coverings, he was aware of any plan the three men had to shoot Mr. Grindley or commit some other unlawful act.

B. Antecedents and Behaviour in Custody

[7] Both Mr. Smith and Mr. Douse have been in custody since their arrests in May 2019. Mr. Smith has a criminal record with several convictions for failing to comply with court orders. Mr. Douse does not have a record. Both defendants have been sanctioned for misconduct while in custody, mostly for possessing contraband in the form of marijuana and related paraphernalia and one instance in which Mr. Douse was involved in a fight.

III. ANALYSIS

[1] Mr. Sitladeen was initially charged with Mr. Douse and Mr. Smith but has since been severed.

A. History of the Prisoner's Dock

[8] The historical origins of the prisoner's dock are unclear. The word originates from the Dutch or Flemish word "*dok*," meaning a pen for animals: L. Rosen, "The Dock – Should it be Abolished" (1966), 29: 3 *Modern L.R.* 289, at p. 289; M.A. Johnston, "Dock Block: The Case for Eliminating the Prisoner's Dock" (2020), 68 *C.L.Q.* 480. It has been suggested that it originally existed in England because accused persons could not enter the part of the courtroom "within the bar" reserved for court officials: L.E. Doersken, "Out of the Dock and Into the Bar: An Examination of the History and Use of the Prisoner's Dock" (1990), 32 *C.L.Q.* 478, at p. 481.

[9] Eventually, counsel, jurors and witnesses were permitted to enter the bar as they were participants in the trial, but accused persons were not participants as they were not permitted to testify until the 19th century: Doerksen, at p. 481. As a result, accused persons had to stand outside the bar, or "at the bar," hence the term "prisoner at the bar." There are, however, early cases where accused were permitted to enter the bar if they had difficulty hearing the evidence or for other reasons. Mary Queen of Scots was permitted to sit within the bar during her trial in 1586, but Charles I was not permitted to do so at his trial in 1649: Doerksen, at pp. 483-486.

[10] In *R. v. St. George* (1840), 173 E.R. 921 (Q.B.), it was held that "[in] the case of felony the party must be tried at the bar. In misdemeanour it is otherwise." Eventually, the prisoner's dock was used in cases of felonies, but not misdemeanours. This practice was adopted in Canada, although the distinction between felonies and misdemeanours was eventually statutorily abolished: Doerksen, at pp. 486-488.

B. The Prisoner's Dock in Other Jurisdictions

(i) United States

[11] The prisoner's dock has rarely been used in the United States since the 19th century and there are decisions going back to the first half of the 20th century holding that its use violated the constitutional right to counsel because it impeded communication between defendants and their lawyers: D. Tait, "Glass Cages in the Dock?: Presenting the Defendant to the Jury" (2011), 86 *Chicago-Kent Law Review* 467, at p.473; Rosen, at p. 293. The dock continued to be used in Massachusetts until the early 1980s, when it was held that its use absent security concerns was a violation of the Fourteenth Amendment due process guarantee. In *Young v. Callahan*, 200 F.2d 32 (1st Cir., 1983), at p. 35, the Court concluded that the use of the dock, "like appearance in prison attire, is a 'constant reminder of the accused's condition' which 'may affect a juror's judgment', eroding the presumption of innocence which the accused is due."

(ii) England

[12] The prisoner's dock continues to be used in England, although its use was criticized in reports prepared by the law reform organization Justice and the Howard League for Penal Reform: *In the Dock: Reassessing the use of the dock in criminal trials* (Justice, 2015): "What if the dock was abolished in criminal courts?" (Howard League for Penal Reform, 2020).

(iii) Other Countries

[13] The dock continues to be used in France, Germany and most parts of Australia but is not used in Holland, Denmark or the Australian Capital Territory: Tait, at p. 468.

C. Presumptions About the Accused's Location

(i) The Issue

[14] The parties agree that it has long been held that the location of an accused during a trial is within the discretion of the trial judge: *R. v. Levogiannis*, [1993] 4 S.C.R. 475, at para. 34; *R. v. Lalande* (1999), 138 C.C.C. (3d) 441 (Ont. C.A.), at para. 19. They disagree on where an accused's proper place is presumed to be and who bears the onus of establishing that the presumption should be displaced. As noted, each side relies on a series of decisions from this court as there is no appellate authority on that issue.

[15] In 1998, in the *Report of the Commission on Proceedings Involving Guy Paul Morin* (Toronto: Queen's Printer for Ontario, 1998), the Honourable Fred Kaufman made the following recommendation (Vol. 2, p. 1167):

> Absent the existence of a proven security risk, person charged with a criminal offence should be entitled, at their option, to be seated with their counsel, rather than in the prisoner's dock.

Courts in Ontario have not been consistent in applying this recommendation and, as noted, there are two distinct lines of authority in Ontario on this issue, one of which rejects the recommendation and the other of which adopts it.

(ii) Cases Supporting a Presumption That the Accused Remains in the Dock

[16] The former line of authorities is exemplified by *R. v. Gervais* (2001), 49 C.R. (5th) 177 (Ont. S.C.J.), on which the Crown relies. In that case, A. Campbell J. stated (at paras. 8-17):

> Although the *Criminal Code* is silent on this issue, the following principles emerge:
>
> 1.The customary position of the accused in the courtroom is in the dock
>
> 2.The trial judge has discretion as to the position of the accused in the courtroom in individual cases
>
> 3.The presence of the accused in the dock does not violate his or her *Charter* rights.
>
> Exceptions may arise where the presence of the accused in the dock manifestly precludes him from making full answer and defence.

. . . .

> Everyone in the courtroom including the judge, the accused, the counsel, the jury and the court officials, have a different role in the proceedings and a clearly designated place in the courtroom.
>
> Some of the historic reasons for the dock had to do with the need to distinguish the accused from the others present in court and provide him or her with a clearly assigned place in the same way as the jurors, the judge, the witness, the clerk, and others involved in the trial. . . . .
>
> . . . .
>
> The modern functional reasons for the dock have to do with the focus of the trial. If the accused remain in the dock they remain at centre stage. The focus of the trial remains on them. The trier of fact is able to observe their responses to the evidence as it unfolds. The jury and indeed the judge and counsel are on balance less likely to be distracted by communications between accused and counsel.
>
> . . . .
>
> If counsel feel that the position of the accused in the courtroom might prejudice the jury, counsel can ask the judge for an appropriate direction. Some judges as a matter of course direct the jury that everyone in the courtroom has their traditional and individual place, including the judge and the jurors and the accused, that the accused like the judge and the jurors sits in the place traditionally reserved for him, and they cannot take that against the accused who are presumed innocent.

[17] *Gervais* has been followed in many decisions of this court, including several that are relatively recent: *R. v. Isaac*, 2020 ONSC 7243; *R. v. McKenzie*, 2018 ONSC 2817; *R. v. Barrett*, 2017 ONSC 3867; *R. v. Cook*, 2017 ONSC 697; 8 M.V.R. (7th) 289.

(ii) Cases Supporting a Presumption That the Accused Sit at Counsel Table

[18] The opposing view is that there ought to be a presumption that accused persons sit at counsel table unless there are security concerns that justify requiring them to remain in the dock. This was the approach taken by Laforme J. (as he then was) in *R. v. Kinkead*, [1999] O.J. No. 1742 (S.C.J.), Trafford J. in *R. v. Smith*, [2007] O.J. No. 2579 (S.C.J.), and Nordheimer J. (as he then was) in *R. v. M.T.*, [2009] O.J. No. 2424 (S.C.J.). In the latter case, Nordheimer J. stated (at paras. 3-5):

> In addition to the existing authorities, another consideration that is of some considerable importance to this issue is that in his report to

> the Ontario Government on the wrongful conviction of Guy Paul Morin, the Honourable Fred Kaufman, Q.C., a former judge of the Quebec Court of Appeal, recommended that accused persons should be entitled to sit with their counsel absent a proven security risk. In his report, Justice Kaufman made the salient point that:
>
> The environment in which accused persons are tried must reflect that he or she really is innocent until proven guilty beyond a reasonable doubt.
>
> Underlying this observation is the concern that the presence of the accused person in the prisoner's box, isolated from all of the other participants in the trial process, may serve as a constant and implicit suggestion of guilt. Indeed, it would appear to be this very concern that has led the United States to essentially abandon the use of prisoners' boxes in criminal trials. As was noted by the United States First Circuit Court of Appeals in *Walker v. Butterworth*, 599 F. 2d 1074 (1979):
>
> > The practice of isolating the accused in a four foot high box very well may affect a juror's objectivity. Confinement in a prisoner dock focuses attention on the accused and may create the impression that he is somehow different or dangerous. By treating the accused in this distinctive manner, a juror may be influenced throughout the trial. The impression created may well erode the presumption of innocence that every person is to enjoy.
>
> In accordance with those observations, I am of the view that, as a general proposition, absent any specific security concerns an accused person ought to be able to sit at counsel table.

[19] The approach in *Kinkead, Smith* and *M.T.* has also been followed in a number of recent decisions, including *R. v. I.M.*, 2019 ONSC 767; *R. v. Osborne*, 2019 ONSC 219; and *R. v. Young*, 2018 ONSC 1564.

(iv) Is There a Presumption?

[20] The Crown submits that the approach in *Gervais* should be followed because it is favoured by recent jurisprudence and sitting in the dock does not offend the presumption of innocence or prejudice the accused, and, if it does, the prejudice can be overcome with appropriate jury instructions. Counsel for Mr. Smith and Mr. Douse submit that the opposing approach should be adopted as it more consistent with the presumption of innocence.

[21] In my view, neither position is correct. I draw this conclusion from what was said in *R. v. A.C.*, 2018 ONCA 333, 360 C.C.C. (3d) 540, at para. 37:

> Like a trial judge's decision on a severance application, a trial judge's ruling in relation to where an accused sits during his trial is discretionary, and this court should begin from a place of deference: *R. v. Lalande* (1999), 138 C.C.C. (3d) 441 (Ont. C.A.). While the default placement of an accused on trial is in the prisoner's box, *there is no presumption in this regard*. In every case, the accused's placement must permit him to make full answer and defence, but the issue is to be assessed on a case-by-case basis, having regard to the interests of a fair trial and courtroom security in the particular circumstances of the case: *Lalande*. [Emphasis added].

[22] Two principles emerge from this decision. First, it is clear from this that there is no presumption that an accused should remain in the dock unless he can demonstrate that his right to make full answer and defence will be impaired, nor is there a presumption that he will sit at counsel table unless security concerns dictate otherwise. Each case has to be assessed individually.

[23] Second, the considerations in determining where an accused will sit are the interests of a fair trial and courtroom security concerns. Before I turn to a consideration of those factors, I wish to comment on some factors which, in my respectful view, ought not to be considered.

D. Factors Not to Be Considered in Determining Where the Accused Should Sit

(i) Tradition

[24] One factor which appears to be an important consideration in *Gervais* is tradition. This factor is not mentioned in *A.C.* This is for good reason. In my view, the suggestion that the accused should sit in the prisoner's dock because that is where the accused has customarily sat is based on the logical fallacy described as *argumentem ad antiquitatem,* otherwise referred to as an appeal to tradition. The fact that a practice is rooted in tradition or custom is not, by itself, reason to continue it absent some other justification. I agree with Nordheimer J. in *M.T.* that "[c]ustom is a poor rationale for perpetuating a state of affairs that may carry with it problematic, if unintentional consequences" (at para. 6). Similarly, in *R. v. Davis*, 2011 ONSC 5567, 249 C.R.R. (2d) 39, at para. 25, van Rensburg J. (as she then was) stated :

> I agree that courtroom architecture, that is how the courtroom is designed with a specific place for the prisoner, and the traditions of our courts that would place the accused in the box, are not valid reasons for requiring the accused to sit in the prisoner's box. These are not "interests" to be protected and in fact these considerations are routinely disregarded with out-of-custody and many in-custody accused.

The common law cannot develop and the justice system cannot respond to changes in society if courts insist on following custom for its own sake.

(ii) Ability to See the Accused's Reactions to the Evidence

[25] Another consideration, also mentioned in *Gervais*, is the suggestion that accused persons should sit in the dock so that the trier of fact can "observe their responses to the evidence as it unfolds." In my view, this is not a appropriate consideration. In this regard, I again agree with Nordheimer J. in *M.T.*, at para. 7:

> I also part company with the decision in *Gervais* on the rationale that having the accused person in the prisoners' box maintains the focus on that person and permits the trier of fact to "observe their responses to the evidence as it unfolds". It would be impermissible to suggest to a trier of fact that his, her or their view of the evidence, and the weight to be given to it, could be based on, or influenced by, their perception of the accused person's reaction to that evidence. I would also note, from a practical point of view, that whether the accused person is in the dock or seated at counsel table does not impede the trier's view of that person.

[26] As in all cases, I intend to instruct the jurors that their verdict must be based only on the evidence and that the evidence consists only of what the witnesses say, the exhibits and any admissions. The defendant's reactions to the evidence do not fall into any of these categories. Furthermore, as was noted in *R. v. M.(T.)*, 2014 ONCA 854, 318 C.C.C. (3d) 421, at para. 64, there is a significant risk that an accused's reaction (or lack thereof) to evidence in the courtroom will be misinterpreted. I adopt what was said by my colleague, Edwards J. in *R. v. Young*, 2018 ONSC 1564, at paras. 10-11:

> If an accused shows body language or facial expressions in response to how evidence unfolds in the courtroom, it would be an entirely wrong inference for a jury to draw from that body language or facial expression any inference of guilt or innocence. After all, jurors are constantly reminded in the closing instructions that they receive from trial judges across this province, that they should not make any decision solely on the basis of the demeanour of a witness. To suggest that the demeanour of an accused in the prisoner's dock -- even before he or she elects to give evidence, would be entirely wrong. In my view, it is a completely irrelevant consideration that jurors should be able to see an accused at all times so that they can formulate any kind of conclusion from how an accused presents in the prisoner's dock. This would equally hold true wherever an accused is located, whether he or she is in the prisoner's dock or sitting at counsel table.

> One of the first things jurors are told after they have been empaneled as a jury is the importance of some fundamental principles of our criminal justice system, beginning with the presumption of innocence and the burden always being on the Crown to prove its case beyond a reasonable doubt. Jurors are told an accused does not have to testify or call any evidence in his defence. If these instructions are to mean something, I fail to understand how having an accused sit in a prisoner's dock so a jury can watch his or her reactions as the evidence unfolds can be tolerated. Surely, this is inconsistent with our admonition to the jury that an accused does not have to testify. If an accused does not have to testify, how then should it be appropriate for a jury to take into account anything that happens in a courtroom that is not evidence called in the normal process? What an accused does in the prisoner's dock is completely irrelevant to the issue of guilt or innocence. Guilt or innocence is decided by the evidence, not on an accused's demeanour whether he is in the prisoner's dock or at the counsel table.

Boswell J. made the point somewhat more succinctly in *Osborne*, at para. 20: "The sightline issue is not one that I find persuasive. Mr. Osborne is on trial, not on display. His reactions, if any, to evidence as it comes in, are of no evidentiary moment."

E. Fair Trial Interests

(i) Prejudice

(a) Stigma and a "Suggestion of Guilt"

[27] While the fair trial interests engaged in applications of this nature will vary from case to case, some are likely to arise in most cases. The one most often mentioned is the concern that remaining in the prisoner's dock will occasion some prejudice to the accused. The extent of this concern appears to be the subject of divided authority. Many judges of this court accept that there is a danger that having the accused in the dock "may serve as a constant and implicit suggestion of guilt," that "there is a stigma attached to the prisoner's dock that may adversely affect a juror's objectivity," that placing the accused in the dock has the effect of objectifying and depersonalizing him or her, and that it suggests "a need to separate the accused from others in the courtroom": *M.T.*, at para. 28; *Smith*, at para. 24; *Young*, at para. 12; *Davis*, at para. 27; *R. v. Ramanathan*, [2009] O.J. No. 6233 (S.C.J.), at paras. 9-12; *R. v. S.S.*, [1997] O.J. No. 250 (Gen. Div.), at paras. 17-20.

[28] In the United States, it is an established principle that the use of the prisoner's dock is inherently prejudicial. Its use is viewed as analogous to forcing an accused to wear prisoner's attire, a practice that was held to be unconstitutional in *Estelle v. Williams*, 425 U.S. 501, 96 S.Ct. 1691 (1976). Thus, in *Walker v. Butterworth*, 599 F.2d 1074 (1st Cir., 1979), at p. 1080, the court stated:

> The practice of isolating the accused in a four foot high box very well may affect a juror's objectivity. Confinement in a prisoner dock focuses attention on the accused and may create the impression that he is somehow different or dangerous. By treating the accused in this distinctive manner, a juror may be influenced throughout the trial. The impression created may well erode the presumption of innocence that every person is to enjoy. Of course, "[t]he actual impact of a particular practice on the judgment of jurors cannot always be fully determined. But this Court has left no doubt that the probability of deleterious effects on fundamental rights calls for close judicial scrutiny." *Id*. at 504, 96 S.Ct. at 1693.
>
> We see no state policy sufficiently compelling or essential to justify risking a dilution in the accused's presumption of innocence.

See also Tait, at pp. 472-474.

[29] On the other hand, many judges of this court are of the view that the use of the dock is not prejudicial or, if it is, that any prejudice is easily cured by appropriate judicial instructions: *Isaac*, at para. 9; *McKenzie*, at para. 11; *R. v. Ranhotra*, 2018 ONSC 2407, at para. 22; *R. v. Wills*, [2006] O.J. No. 3662 (S.C.J.), at para. 33; *R. v. Heyden*, [1998] O.J. No. 6253 (Gen. Div.), at para. 7.

[30] Having considered all of these authorities, I am of the view that there is a substantial risk that the use of the prisoner's dock may have a prejudicial effect. I draw this conclusion for three reasons.

(b) Divided Judicial Opinion

[31] First, as noted above, many well-respected and experienced judges of this court are of the view that the use of the dock creates a stigma and is suggestive of guilt. The risk is well-recognized in the United States, where the dock is rarely used. While the dock remains in use in England, as noted earlier, its use has been the subject of criticism, including from the former Lord Chief Justice, because of the risk of prejudice: "Senior judge calls for abolition of security cases from courtrooms," *The Guardian*, July 3, 2015.

[32] I recognize, of course, that many equally well-respected and experienced judges of this court take the opposite view. However, if at least some judges view the prisoner's dock as being suggestive of guilt, then it is reasonable to infer that at least some jurors will take the same view. I accept that this type of prejudice can likely be cured, or at least ameliorated, by a judicial instruction. However, as noted by Nordheimer J. in *M.T.*, at para. 9, "as a general rule it is a better to avoid prejudice to an accused person rather than attempt to redress it after it has occurred." See also *Ramanathan*, at para. 12; *S.S.*, at para. 22.

(c) The Dock as a Form of Restraint

[33] Second, it is well-established that the use of restraints in the courtroom are inherently prejudicial: *R. v. McNeill* (1996), 29 O.R. (3d) 641 (C.A.), at paras. 4-7; *R. v. Lee,* 2017 ONSC 6989, at paras. 13-15; *Wills,* at para. 45. As was concluded in *R. v. Power* (1992), 101 Nfld. & P.E.I.R. 265 (Nfld. C.A.), at para. 19, the dock, which amounts to confining the accused in a wooden box, is a "form of restraint," albeit a less restrictive one than handcuffs or shackles: *Smith,* at para. 19; *Kinkead,* at para. 6.

(d) Social Science Evidence

[34] Third, there is some social science data which suggests that the use of the dock has a prejudicial effect. A study conducted in Australia using mock jurors found that placement of the accused in a dock increases the likelihood that a juror will return a guilty verdict, independent of any other aspect of the trial or evidence: M. Rossner, D. Tait, B. McKimmie, R. Sarre, "The Dock on Trial: Courtroom Design and the Presumption of Innocence" (2017), 44 *Journal of Law and Society* 317.[2]

[35] I recognize that there are limitations involved in studies using mock jurors, who know that there is nothing at stake during the trial: *R. v. J.A.*, 2017 ONSC 2043, at paras. 11-12. However, I would make two observations.

[36] First, because of s. 649 of the *Criminal Code*, which prohibits jurors from discussing their deliberations, it will be impossible to conduct a study using real jurors, at least in Canada: *I.M.,* at para. 8; *R. v. Pan; R. v. Sawyer*, 2001 SCC 42, [2001] 2 S.C.R. 344, at paras. 100, 107.

[37] Second, while the social science evidence demonstrating that the dock is prejudicial is limited, there is, to my knowledge, no social science evidence showing that the dock is not prejudicial: *Ramanthan,* at para. 15. I respectfully disagree with the conclusion in *R. v. Barrett,* 2017 ONSC 3867, at para. 16, that "there is nothing beyond conjecture or speculation to support the proposition that stigma attaches to a defendant who is seated in the dock, leading to potential prejudice." There is evidence, albeit with limitations, that it does and no evidence that it does not.

(e) Conclusion

[38] In my view, where fair trial rights are involved, it is better to err on the side of caution. As a result, in considering whether an accused should sit at counsel table, it is appropriate to consider that having the accused sit in the dock carries with it a risk of prejudice.

(ii) Communication With Counsel

[39] In most courtrooms in this jurisdiction, the prisoner's dock is behind counsel table. As a result, counsel will ordinarily have his or her back to the accused while the trial is ongoing. An

[2] I advised counsel of the existence of this study during the argument of the application. An offer of an opportunity to review it before concluding submissions was declined.

accused who wishes to consult his or her counsel must therefore first get the attention of a court officer or some other member of the court staff, who must then relay to counsel that his or her client wishes to speak to him or her. Counsel must then request an indulgence from the judge and walk over to the dock to have a *sotto voce* conversation with the accused.

[40] There can be no doubt that allowing an accused to sit at counsel table greatly facilitates his or ability to communicate with counsel, as was noted by Nordheimer J. in *M.T.,* at para. 12:

> It is of utmost importance that any accused person be in a position to instruct his or her counsel and to provide assistance to them as the trial unfolds. After all, no one has more at stake in this process than does the accused person. Having her seated at the counsel table facilitates that goal with a minimum of disruption. While one can debate the matter, my experience is that the disruption caused by communications between counsel and the accused person is much more evident when the accused person is in the prisoners' box. It not only involves the much more noticeable back and forth movement of counsel between counsel table and the dock, but it is usually initiated either by some vocal expression or physical movement by the accused person that immediately distracts from the evidence. While I do not otherwise mean to draw any comparisons between the two, it is this same basic premise that leads me and other judges to routinely accede to the Crown's request that the investigating police officer sit at counsel table rather than be required to sit in the body of the court.

See also *Wills,* at para. 38; *Smith,* at para. 26; *Davis,* at para. 24; *I.M.,* at para. 9; *R. v. Harty,* 2019 ONSC 396, at para. 5; *R. v. Tavares,* 2015 ONSC 2792, at paras. 13-14; Rosen, at p. 296.

[41] In addition to allowing better communication, allowing an accused to sit next to counsel likely also has other benefits. In *R. v. Rover,* 2018 ONCA 745, 143 O.R. (3d) 135, at para. 45, in the context of discussing the right to speak to counsel upon arrest, Doherty J.A. stated:

> The right to counsel is a lifeline for detained persons. Through that lifeline, detained persons obtain, not only legal advice and guidance about the procedures to which they will be subjected, but also the sense that they are not entirely at the mercy of the police while detained. The psychological value of access to counsel without delay should not be underestimated.

In my view, similar considerations apply in the trial context. An accused on trial facing the Crown with its considerable resources (often represented in the courtroom by the officer-in-charge sitting at counsel table despite not being counsel) has no one on her side except her lawyer. In these circumstances, the psychological value of being permitted to sit next to the person on whom one is completely dependent should not be underestimated.

[42] For these reasons, it is my view that allowing an accused to sit at counsel table will almost always significantly enhance the fairness of the trial process.

F. Courtroom Security

(i) Relevant Considerations

[43] As indicated in *A.C.*, the accused's fair trial interests must be balanced against concerns about courtroom security. Concerns about courtroom security are frequently cited as a basis upon which to deny requests to sit at counsel: *McKenzie*, at para. 21; *Ranhotra*, at para. 21; *R. v. Bush*, 2017 ONSC 6171, at paras. 12-13. In considering issues of courtroom security, it must be recalled that *A.C.* requires that the issue be "assessed on a case-by-case basis" and "[i]n and of itself, the seriousness of the offence says nothing about security concerns or the interests of a fair trial": *A.C.*, at paras. 37-38.

[44] In my view, an important factor will be the accused's conduct while in custody. By the time a jury trial begins, most accused persons will have made numerous court appearances and many will have sat through a preliminary inquiry. How they conducted themselves during those appearances will usually be cogent evidence as to how they can be expected to conduct themselves during the trial.

[45] The nature of the allegations may also be relevant. However, the mere fact that the accused is charged with an offence of violence would not, in my view, be sufficient by itself to justify requiring an accused to remain in the dock. To determine the issue based on the offence charged creates a presumption, treats the seriousness of the offence as a determinative factor and is inconsistent with the case-by-case approach required by *A.C.* Rather, the allegations have to be considered in context. For example, an accused who allegedly committed a violent act against a specific person for a specific motive is not necessarily more likely to act out in the courtroom for this reason. On the other hand, an accused with a history of spontaneous violence in a variety of circumstances is undoubtedly a cause for concern.

[46] In my view, the correct approach with respect to issues of courtroom security is that described by Dambrot J. in in *R. v. Vivar*, [2003] O.J. No. 5054 (S.C.J.), at para. 21:

> In fulfilling this proposed responsibility, the Court is not obliged to conjure up a specific scenario in which the accused might place the security of the proceedings in jeopardy. It is enough if the totality of the circumstances raises a *real possibility* that the accused might do something that places the security of the proceedings at risk. [Emphasis added].

(ii) Properly Assessing the Security Advantages of the Prisoner's Dock

[47] While having an accused in the dock undoubtedly enhances courtroom security, in my view courts should be cautious about overestimating the extent to which it does so. In most courtrooms in this building, the dock consists of a four-foot wooden wall that would provide little impediment to a person who is intent on acting out. Absent the use of restraints, in most cases the real guarantee

of courtroom security is the presence of the court officers, who are trained in how to respond and who are present regardless of the where the accused sits. As noted earlier, courts in the United States do not use prisoner's docks, and it is doubtful that their courtrooms are less secure than ours as a result.

[48] However, in rare cases, an accused's prior conduct may require extraordinary security measures, such as shackling. In such cases, it is imperative that the jury not be made aware of the security measures, and this can often be accomplished by placing the accused in the prisoner's dock, where his feet cannot be seen: *R. v. McArthur,* [1996] O.J. No. 2974 (Gen. Div.), at para. 26; *R. v. Vickerson,* [2006] O.J. No. 351 (S.C.J.), at para. 38. Nordheimer J. recognized the utility of the dock for this purpose in *M.T.,* at para. 9:

> I understand that there are a small percentage of accused persons who do actually pose a security risk, whether of violence or of flight, that require extraordinary security measures. The structure of prisoners' boxes allows those extra security measures to be put into place while at the same time minimizing the risk that such measures will come to the attention of the jury. Nevertheless, the vast majority of accused persons do not pose those concerns and they should not have to contend with the risks associated with such a placement simply because of the need to deal with a small group of troublesome accused.

(iii) Delivery of the Verdict

[49] I recognize that different considerations may apply when a verdict is announced. This point in the trial is no doubt the most stressful for an accused and the point where the danger of an emotional reaction by the accused (or, as is sometimes the case, by people in the body of the court) is most pronounced. For this reason, it is customary in this courthouse for there to be extra security personnel in the courtroom when a verdict is to be delivered. Depending on the nature of the case, it may be appropriate for an accused who sat at counsel table during the trial to sit in the dock when the verdict is delivered.

G. Juror Identification

[50] There is one other factor, which is not mentioned in *A.C.*, which may be relevant. For the reasons outlined earlier, I am not persuaded that ensuring that the jury gets an unobstructed view of the accused in order to gauge his or her reaction to the evidence is an appropriate consideration. In some cases, however, it may be important for the jurors to be able to see the accused because they will be asked to compare his appearance to the appearance of a person in a video or photograph in accordance with *R. v. Nikolovski,* [1996] 3 S.C.R. 1197. In such cases, making sure that the jury has a clear view of the accused will be a relevant consideration in determining where he or she sits: *Harty,* at paras. 10-11. The extent to which this will be a factor will depend on the layout of the particular courtroom.

H. Summary of Relevant Principles

[51] The following principles emerge from this review of the jurisprudence:

- Where an accused sits in the courtroom is within the discretion of the presiding judge.
- There is no presumption that an accused should sit in the dock or at counsel table. Rather, the issue must be determined on a case-by-case basis having regard to (1) the accused's fair trial interests and (2) courtroom security.
- The fair trial interests include (1) the possibility that sitting in the dock will occasion prejudice to the accused; and (2) the accused's ability to effectively communicate with counsel during the trial.
- Courtroom security concerns will usually involve a consideration of the accused's past conduct during court appearances and in custody as well as the nature of the allegations. The issue is whether the totality of the circumstances raises a *real possibility* that the accused will do something that places courtroom security at risk.
- In cases where the accused's appearance has evidentiary value, the jury's ability to have a clear view of him or her is a relevant consideration.
- Tradition, custom, the seriousness of the charge and the jury's ability to gauge the accused's reaction to the evidence are not relevant considerations.

[52] While there is no presumption as to where an accused will sit, in my view fair trial interests will almost always favour allowing an accused to sit at counsel table. As a result, an application of these factors will usually not result in the use of the prisoner's dock unless there are specific security concerns.

[53] While these reasons are intended to attempt to create a principled approach to an issue on which there appears to be little judicial consensus, it is doubtful that they will end this debate. There are decisions from this court about whether accused persons should sit in the dock or at counsel table going back over 20 years and different members of this court take dramatically different approaches, with the result being that where an accused sits during his or her trial depends largely on which judge is assigned to the trial. This gives rise to a degree of arbitrariness that is unlikely to enhance the reputation of the administration of justice. In these circumstances, the following words written nine years ago by my colleague, Corbett J., in *R. v. Liard,* 2013 ONSC 5457, at paras. 188-189, bear repeating:

> . . . I would suggest, with respect, that our trial court has pretty much exhausted this debate without resolving it. Appellate guidance would reduce, substantially, the number of times this issue is raised at trial, and would provide trial courts with a clear starting position, something that now turns on the personal preferences of trial judges.

> For obvious reasons, this issue is not likely to emerge as a compelling ground of appeal. If, as a result, appellate guidance is not forthcoming, perhaps this is a matter that could be addressed expressly in the criminal rules.

IV. APPLICATION

A. Fair Trial Interests

[54] For the reasons outlined earlier, I accept that having Mr. Douse and Mr. Smith sit in the dock risks stigmatizing them and creating a conscious or unconscious perception that they are dangerous. In this regard, I note that Mr. Douse and Mr. Smith are both young Black men, and concerns about stereotypes that young black men are prone to violence justified a challenge for cause in this case as well as specific jury instructions about bias.

[55] Counsel for Mr. Douse and Mr. Smith advised me that their ability to communicate with their clients throughout the trial would be enhanced if they were seated at counsel table and they are in the best position to make this assessment. In any event, as observed earlier, it is obvious that communication between counsel and client is easier and less disruptive if they are seated at counsel table.

B. Courtroom Security

[56] Crown counsel candidly acknowledged during submissions that the Crown's position is not primarily based on concerns about courtroom security. Mr. Douse and Mr. Smith have made numerous court appearances, including during a preliminary inquiry that lasted several days, and did not behave inappropriately at any time. While they are charged with a very serious offence, the allegation that they committed a targeted and planned murder does not, in my view, give rise to concerns that they will spontaneously misbehave in the courtroom.

C. Identification

[57] I am advised that the Crown will ask the jury to compare Mr. Smith's appearance to the appearance of a person in a video taken prior to the shooting at another location in an attempt to establish a connection between Mr. Smith and others with a view to establishing that Mr. Smith was one of the individuals who entered the deceased's home and killed him. Mr. Douse has acknowledged through his counsel that he was the person who purchased gloves and neck gaiters and his identity is not in issue.

[58] The ability of the jury to get a clear view of Mr. Smith is the Crown's primary concern in opposing the application to sit at counsel table. While the jury's view of Mr. Smith would be clearer if he sat in the dock, I am of the view that the jurors will be able to see him clearly enough if he sits at counsel table.

IV. DISPOSITION

[59] Mr. Douse and Mr. Smith will be permitted to sit at counsel table during the trial.

Justice P.A. Schreck

Released: May 26, 2022