

2010 ONSC 7078  
Ontario Superior Court of Justice

R. v. Powney

2010 CarswellOnt 10762, 2010 ONSC 7078

**R. v. Allan Wayne Powney**

R.M. Thompson J.

Heard: September 20 - November 8, 2010

Judgment: December 20, 2010

Docket: CR-08-128

Counsel: Michael J. Murdoch, for Crown

**David Midanik**, for Defendant

Subject: Criminal

**Related Abridgment Classifications**

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

**Headnote**

**Criminal law --- Trial procedure — Selection of jury — Empanelling jury — Challenge for cause — Questioning jurors**

**Table of Authorities**

**Cases considered by R.M. Thompson J.:**

*R. v. Klymchuk* (2000), 2000 CarswellOnt 5331 (Ont. S.C.J.) — followed

*R. v. Sherratt* (1991), 1991 CarswellMan 282, 3 C.R. (4th) 129, 73 Man. R. (2d) 161, [1991] 1 S.C.R. 509, 63 C.C.C. (3d) 193, 122 N.R. 241, 1991 CarswellMan 7 (S.C.C.) — followed

**R.M. Thompson J.:**

1 Allan Wayne Powney is charged with first degree murder. It is alleged that he shot and killed Dr. Henry Janssen on January 22, 2008.

2 Allan Wayne Powney and his wife, Elaine, were neighbours of Dr. Henry Janssen and his wife, all of whom resided in Jackson's Cove.

3 It is alleged that Mr. Powney and Mrs. Janssen had an extra-marital affair lasting several years. It is further alleged that Mrs. Janssen ended this affair several months prior to Dr. Janssen's death and that Mr. Powney did not take the termination of the relationship well, lapsing into depression.

4 Allan Wayne Powney has pleaded not guilty and has chosen a trial by judge and jury.

5 Allan Wayne Powney denies that he murdered Dr. Henry Janssen and wishes to advance the theory that Mrs. Lynn Janssen, either personally or through an unknown third party, murdered her husband.

6 The defence wishes to challenge each prospective juror for cause based on pre-trial publicity. The Crown opposes such a challenge. However, both the defence and Crown have agreed that if a challenge for cause is permitted, the questions to the prospective jurors would be:

"On January 22, 2008 Doctor Henry Janssen was shot and killed on Scenic Caves Road, near Lion's Head, Ontario. Allan Wayne Powney is charged with the first degree murder of Henry Janssen.

Have you read, seen or heard anything about this case through the media, including newspaper, radio, television or the internet or in some other manner?"

If the response is negative there would be no further questioning. If the response is in the affirmative, the following question would be asked:

"If you have read, seen or heard anything about this case, would you be able to judge this case without bias or partiality, based solely on the evidence presented at the trial?"

7 In support of its Application, the defence has filed copies of newspaper articles, internet postings of newspaper articles, and an internet posting by an entity known as Counterpoint Editors.

8 The newspaper articles filed are:

a) The Sun Times, Friday, January 25, 2008: article titled "Police say doctor was murdered", by Paul Jankowski, front page and page A2 of newspaper;

b) The Sun Times, Saturday, January 26, 2008: Family Notices: Deaths: Janssen, Dr. Henry Peter, page B4 of newspaper;

c) The Sun Times, Saturday, January 26, 2008: article titled "Neighbour charged in doctor's murder", by Scott Dunn, front page and page A2 of newspaper;

d) The Globe and Mail, Saturday, January 26, 2008: article titled "Neighbour charged in killing of rural Ontario doctor", by Jessica Leeder, page A8 of newspaper;

e) The Sun Times, Monday, January 28, 2008: article titled "Slain man, accused friends", by Patrick Maloney, front page and page A7 of newspaper;

f) The Sun Times, Wednesday, January 30, 2008: article titled "Suspect in doctor's murder to appear for bail hearing", by Scott Dunn, front page of newspaper;

g) The Sun Times, Thursday, January 31, 2008: article titled "Suspect sounded 'shooked up'", by Scott Dunn, front page and page A2 of newspaper;

h) The Sun Times, Friday, February 1, 2008: article titled "Doctor's death leaves peninsula residents reeling", page A5 of newspaper;

i) The Sun Times, Monday, March 3, 2008: article titled "Slain doctor remembered", by Scott Dunn, front page and page A3 of newspaper;

j) The Sun Times, Friday, March 22, 2008: article titled "More charges for man accused of killing doctor", by Scott Dunn, front page of newspaper;

k) The Sun Times, Friday, April 4, 2008: article titled "Murder Suspect Powney arrives for court", front page of newspaper; and

l) The Sun Times, Tuesday, May 6, 2008: article titled "Powney out on bail", by Scott Dunn, front page and page A3 of newspaper.

9 The defence filings also included articles printed from the internet on October 25, 2010. Those articles are:

a) The Sun Times, Archives, article titled "More charges for man accused of killing doctor", by Scott Dunn, posted 2 years ago;

b) Warton Echo, Archives, article titled "Toronto lawyer to defend Wayne Powney", posted 2 years ago;

c) The Sun Times, Archives, article titled "Man charged in Dr. Janssen's death", by Scott Dunn, updated 2 years ago;

d) The Niagara Falls REVIEW, Archives, article titled "Powney case postponed by forensics", by Scott Dunn, updated 2 years ago;

e) The Sun Times, Archives, article titled "Powney to stand trial on murder charge", by Scott Dunn, Sun Times staff, posted 1 year ago; and

f) The Sun Times, News, article titled "Powney pre-trial hearings start soon", posted 1 month ago.

10 The defence also filed an internet article posted on the Owen Sound Sun Times website on July 25, 2008. That article was a reproduction of a newsprint article entitled "Delays cause adjournment in Powney case — Test results still in the works at Centre of Forensic Sciences".

11 The defence filed an article (9 pages) posted on the internet by Counterpoint Editors, an entity created by a publisher in Toronto. This article can still be viewed on the internet by simply typing in the accused's name on a Google search. The article is entitled "Murder on the Bruce Peninsula revisited ... again", and is dated June 4, 2009 and up-dated on November 4, 2009.

12 Most of the newsprint articles appearing in the Owen Sound Sun Times, a local newspaper distributed throughout Grey and Bruce Counties, go beyond a straightforward reporting of normal court appearances by Mr. Powney. Most of the newsprint articles were published in a three or four month period following the murder, although there have been several articles sprinkled over the 2 1/2 years since the arrest of Mr. Powney. A review of the headlines and following articles leaves one with the distinct impression that protecting Mr. Powney's right to a fair trial was not a major priority for the publisher. The headlines and accompanying articles appear more designed to enticing potential readers to purchase the newspaper. A prime example is the article published on January 31, 2008, under a front page headline "Suspect sounded 'shooked up'". The article quotes acquaintances of Mr. Powney and Dr. Janssen together with quotes attributed to an O.P.P. constable who is reported to have told the reporter the day before (1 week after Mr. Powney was arrested) that the "police finished investigating the Jackson's Cove neighbourhood where the Powney and Janssen families live on Sunday night" [which would be January 27, 2008, 4 days after Mr. Powney's arrest — my comment]. The officer is quoted as saying "It's all in preparation for court now. You know, checking backgrounds ... the whys of everything".

13 Subsequent to being charged with the murder of Dr. Henry Janssen, Mr. Powney was charged with several gun-related offences arising from observations made at the Powney residence by police officers executing a search warrant issued in the murder investigation. On March 22, 2008, the Owen Sound Sun Times published an article on the front page of the newspaper under the headline: "More charges for man accused of killing doctor." The article stated that "Wayne Powney now faces gun charges in addition to first-degree murder in the death of Lion's Head family doctor Henry Janssen."

14 The article went on to state:

"A court document shows the charges of improper storage relate to a Savage Springfield 12-gauge pump-action shotgun with a three-inch chamber and a box of Canadian Tire brand Supreme 2 <sup>3</sup>/<sub>4</sub> inch shotgun shells.

Powney allegedly possessed without a licence a Winchester lever-action rifle. The unregistered firearms allegedly include a .22-cal. bolt-action single-shot rifle, a Winchester lever-action rifle, a Stevens .22-cal. semi-automatic long rifle, a Coeoy hinge-action single-shot 12-gauge full choke shotgun, a Winchester lever-action big-bore rifle and a Savage Springfield 12-gauge pump-action shotgun with a three-inch chamber.

15 This detailed description of the guns was immediately followed by the following:

Janssen, a friend and neighbour of Powney's at Jackson's Cove, was found dead in his truck on Scenic Caves Road just after 9 p.m. Jan. 22 in a quiet, isolated rural area. Janssen, 57, was killed by a gunshot wound.

Police charged Powney with first-degree murder two days later.

16 The Crown is not alleging that any of the guns referred to has any connection to the murder charge. Absent any probative value the jury trying the murder charge will probably not hear any reference to the additional and independent charges.

17 On April 4, 2008, the local newspaper, The Sun Times, published a colour photograph of the accused handcuffed to another prisoner and escorted by two peace officers on the front page under the headline "Murder suspect Powney arrives for court". The occasion of Mr. Powney's attendance in court was for a remand. The article again referred to the murder charge and the unrelated gun charges.

18 On May 6, 2008, the Owen Sound Sun Times published an article on its front page under the headline "Powney out on bail; Judge places strict conditions on release of Bruce Peninsula man charged in doctor's murder".

19 The article commenced with the following paragraphs: [underlining is my emphasis]

"Murder suspect Allan Wayne Powney literally sprinted to freedom Monday — to a waiting car from a side door at the courthouse — after a Superior Court justice released him on strict terms into the care of six family members who posted \$300,000 bail.

Powney, 63, of Jackson's Cove, was whisked away from the courthouse, where he and family members waited for a couple of hours as a reporter waited outside by the front door.

Powney was first driven by family to Owen Sound Jail, where one member held up a coat to try to block a Sun Times photographer's view of him. Powney, wearing a short white beard and moustache like hockey commentator Don Cherry's, remarked "Can I hit him?" referring to the photographer".

20 The article then continued a few paragraphs later:

Powney at first showed little emotion in reaction to Wein's decision but then smiled broadly.

Martin walked over to Janssen's two sisters to offer his condolences for the loss of their brother when one, who was in court for the first time, broke down.

'Oh my God,' she wailed, with her face buried in her hands as she sat back down on the courtroom bench. The exclamation drew all eyes in the courtroom, including those of Powney and his entourage.

A couple of minutes later the sisters left the courthouse. The Janssens and a woman who accompanied them all declined comment, although Jean Janssen was heard saying she thought the judge's decision was 'disgusting'.

'This is too much for us today', she said outside the courtroom.

In a telephone interview later, Jean Janssen also said anyone charged with first-degree murder should not get bail. 'I am very upset with the fact that this man got out on bail. At the same time, I am very aware of what the judge said ... we have to let the wheels turn and see what happens'.

21 The article then went on to list each of the terms of the release of Mr. Powney on bail:

Conditions of Powney's release can be reported.

Powney was ordered to live under house arrest with his cousins, Tom and Joan Kennedy in Heathcote, near Thornbury. He is not to be left alone, may not use a phone or access the Internet or any messaging devices and be anywhere outside the home without one of those posting his bail present. He may visit his other sureties if approved in advance.

Two other couples are also responsible to ensure he follows the rules and have agreed to let him stay with them. Powney's sister, Carole Hill and her husband Kenneth Rolland Hill of London, and Powney's daughter, Jacqueline June Irwin and her husband John, of Orangeville. The latter's guns must be removed from their home before Powney may visit.

Powney was ordered not to go within five kilometres of the University of Western Ontario in London, where Rebecca Janssen, the doctor's daughter, is studying medicine, or anywhere else she is likely to be in London. He must have no contact with the doctor's widow, Lynn, or her son David either.

Powney must not enter Bruce County and most of Grey County, as delineated by a line the judge drew on a map just west of Woodford, south to Priceville and west to Kincardine. He may only come to Owen Sound for court or to go to his lawyer's office.

Wein ordered Powney to abide by the routine and discipline of the family members who agreed to be responsible for him. He must continue with treatment for depression and physical illnesses and must take medicine prescribed for him.

He was also banned from having any contact with 14 other people, although Powney's wife, Elaine, is not among them. Powney must not possess firearms, ammunition or weapons of any kind.

He must not drive a vehicle or vessel or possess their keys and he must keep the peace and be of good behaviour.

He is to report to Blue Mountains OPP monthly starting June 2. He must notify Det. Insp. Mel Joa of any changes to the prearranged schedule of his whereabouts.

Powney already surrendered his passport and he must surrender his birth certificate and driver's licence within two weeks.

He was ordered not to obtain a ticket for passage outside the province. However, he is permitted to visit his mother in Montreal with one of the family members responsible for him with Joa's approval.

22 On July 28, 2008, the Sun Times reporting on adjournment in Ontario Court published an article stating that the Crown requested an adjournment as it was awaiting a report from the Centre of Forensic Sciences. The article went on to state that: "Court heard last month that the test results will determine the length of the preliminary hearing." The article again reported the fact that "Powney also faces numerous firearms charges" — a fact as I have earlier related the jury will unlikely hear at the murder trial. The "numerous gun charges" are unrelated to the murder trial.

23 On September 23, 2008, the Sun Times (Owen Sound) published an article headlined on the front page as "Powney case put off". The article stated that the test results from the Centre of Forensic Sciences were not yet available. Unfortunately the article went on to state:

Martin also said a judge's ruling is needed on the admissibility of 'certain documents' to determine if they're subject to solicitor-client privilege. That ruling need not be made before the preliminary hearing, he said.

Knowing that Mr. Martin is a seasoned and fair Crown Attorney and noting that the article does not use parentheses around the words attributed to Mr. Martin, I suspect that these words were not directed to the reporter specifically but rather overheard by the reporter when the matter was spoken to in court.

24 These words relating to "certain documents" being subject to "solicitor-client privilege" were unfortunately printed. In another ruling, I have edited 16 pages of notes seized from Mr. Powney's jail cell. I would suspect that the Crown will not be referring to the remaining notes after the extensive blocking out of materials protected by the privilege. With this article, the potential jury pool will have been advised that there are some facts which will be withheld from their consideration.

25 Allan Wayne Powney will be propounding the possibility that Lynn Janssen was the person responsible for the murder of her husband in an attempt to raise a reasonable doubt in the mind of the jury.

26 The Globe and Mail, a newspaper distributed in Grey/Bruce, on January 26, 2008, published an article which stated that "the sight of her husband's red Chevy pickup truck parked alone on Scenic Caves Road Tuesday night *would have been* worrisome for Lynn Janssen [my emphasis] ... What she found inside the truck *no doubt sickened her.*" [my emphasis]. The author was not content to report facts but obviously felt it necessary to spice up the article with her own speculation.

27 Posted on the internet (where it still remains) is an article published by an entity known as Counterpoints. The article is entitled "Murder on the Bruce Peninsula revisited ... again." The original article was dated June 4, 2009 and up-dated November 4, 2009.

28 The article is 9 pages in length and consists of a re-hash of prior articles published by a number of newspapers together with titillating comments and innuendo. eg: page 3 — "There's got to be something going on that we don't know about"; page 5 — "What was going on between the Janssens and the Powneys?" page 7 — "May 6 UPDATE — There has now been a major development in the fate of Dr. Janssen's alleged murderer, Wayne Powney. Following are some relevant excerpts from a report by Scott Dunn in the Owen Sound Sun Times:" What follows is the publication of the Sun Times article of May 6, 2008 which commenced with: "Murder suspect Allan Wayne Powney literally sprinted to freedom Monday — " and included Mr. Powney's reputed comment "Can I hit him?" referenced to a newspaper photographer.

29 The Counterpoints article went on to say: "Some members of the Janssen family present when Justice Wein's decision was announced were not pleased by the granting of bail to Wayne Powney."

30 The Counterpoints article referenced the Sun Times publication "Toronto trial lawyer David Midanik will soon be defending Wayne Powney." The Counterpoints article went on to state:

Elaine Powney, the suspect's wife, attended the bail hearing and met with Boddy privately in the courthouse after her husband's appearance was over. She declined to speak with a reporter ... Midanik has handled high-profile cases, including the defence of a man in the 1994 Just Desserts cafe shooting in Toronto ...

Locally, he defended Travis Gaeler in the 2004 Owen Sound manslaughter case in which Gaeler was sentenced to 7 1/2 years in prison for strangling his wife. The next year Midanik helped get drug charges dropped against two men caught with \$400,000 worth of marijuana in a case which saw the judge criticize police for an unlawful search.

31 At the conclusion of the Counterpoints internet posting is the following:

"Along with the web references embedded in the text above, the report here is based on the following regional and national press reports:

Jessica Leeder, "**Neighbour charged in killing of rural Ontario doctor,**" The Globe and Mail, January 25, 2008.

"**Police say Bruce Peninsula doctor was murdered** ... Post-mortem confirms gunshot wound as cause of death," The Sault Star, January 25, 2008.

Patrick Maloney, "**Friend charged in doc's slaying** ... The accused, Wayne Powney, had openly wept with Henry Janssen's grieving relatives," London Free Press, January 26 2008.

Jim Algie, "**Community in shock** ... 'Everybody liked him'," Owen Sound Sun Times, January 26, 2008.

Tracey Richardson, "**Family reaches out**," Owen Sound Sun Times, January 26, 2008.

Scott Dunn, "**Neighbour charged in doctor's murder** ... Allan Wayne Powney has been charged with first-degree murder," Owen Sound Sun Times, January 26, 2008.

Scott Dunn, "**Suspect in doctor's murder to appear for bail hearing** ... Lawyer expects case to be remanded for 10 days," Owen Sound Sun Times, January 30, 2008.

Scott Dunn, "**Suspect sounded 'shooked up'** ... Friend recounts conversation with Wayne Powney day after murder," Owen Sound Sun Times, January 31, 2008.

32 The local newspaper continues to report the progress of the matter of *R. v. Powney*. Earlier in September it reported that pre-trial hearings had commenced. Recently it reported that "Powney hearing continues." Frustrated by a court order banning publication of matters heard or discussed during pre-trial hearings, the newspaper has resorted to reporting the apparel worn by Mr. Powney to court:

Allan Wayne Powney sat at the counsel table in the Superior Court of Justice Thursday at a hearing about preliminary legal motions in his murder case. A jury is to be picked Jan. 10 and his murder trial is scheduled to commence the next day, almost three years since Powney's friend and neighbour, Dr. Henry Janssen, was found shot dead in his truck on Jan. 22, 2008 in Northern Bruce Peninsula.

Powney, then 63, was charged two days later with murder in Janssen's death.

Visiting Crown Attorney Mike Murdoch said Thursday in an interview that the trial should take about six weeks.

Justice Robert Thompson is presiding over the case. Details of the hearing, which began in mid-September, can't be published until the trial is over.

Powney was seated at the counsel table wearing a celery coloured jacket, black dress shirt and beige tie. His lawyer, David Midanik, sat with him to the judge's right with members of Powney's family seated behind them.

To the judge's left sat the Crown. Behind him sat Henry Janssen's family, including his sister Jean, who has attended every day of the hearing, her brother Herman and his wife.

Powney is also charged with six counts of possessing unregistered firearms and two counts of improper storage of a non-restricted firearm and ammunition.

He's been out on bail since May, 2008. A preliminary inquiry in 2009 found enough evidence to send him to trial.

33 I note that the Owen Sound Sun Times has repeatedly and consistently reported Mr. Powney's outstanding gun-related charges each time they publish anything concerning the murder charge. They do so knowing (or should comprehend) that the gun-related charges have no connection and are unrelated to the murder charge.

34 The leading case concerning pre-trial publicity and whether a challenge for cause is warranted is *R. v. Sherratt*, a decision of the Supreme Court (1991), 63 C.C.C. (3d) 193 (S.C.C.).

35 The Supreme Court of Canada's decision was succinctly summarized by Wein J. in her decision in *R. v. Klymchuk*, [2000] O.J. No. 5494 (Ont. S.C.J.) at paragraph 9:

9 It is not disputed that the decision of the Supreme Court of Canada in *R. v. Sherratt*, [1991] 1 S.C.R. 509, 63 C.C.C. (3d) 193, remains the governing authority for the exercise of the decision to be made under s. 638(1)(b) of the criminal trial. The threshold question is whether the publicity could potentially have the effect of destroying the presumed indifference of any prospective juror as between the Crown and the accused. The extent of the coverage, age and content of the pretrial publicity are all relevant considerations. Media coverage which misrepresents facts or refers to prejudicial facts which would not be adduced into evidence at trial or which gives an opinion as to the accused's guilt or innocence is potentially more prejudicial than coverage not displaying these features.

36 The *Sheratt* decision was rendered in early 1991 prior to the explosion of published information on the internet. As pointed out by Justice Wein, the availability of previously published newspaper articles on the internet must be considered when considering the factor of the passage of time. In this case, virtually every article published in numerous newspapers is available for anyone to read by accessing the internet and typing in the name "Powney" in any of the search engines.

37 Jury notices have been sent out to 400 prospective jurors. The notice requires them to report, on January 10, 2011, not to the courthouse, but to the Harry Lumley Bayshore Arena Complex (the courthouse cannot accommodate 400 prospective jurors). The local newspaper, the Owen Sound Sun Times, has published an article setting out the commencement date of jury selection in the murder case in which Mr. Powney is the accused (Jan 10, 2011).

38 While my instructions to the jury chosen will be to not access the internet or any external source of information, that warning (or instruction) will not have been delivered to the prospective jurors prior to their arrival at the Bayshore for jury selection. It may well be that my instructions to not access the internet will be somewhat akin to closing the barn door after the horse has escaped.

39 The coverage by the local newspaper was extensive during the 4 months following Dr. Janssen's murder. The coverage has continued over the past almost 3 years as the case proceeded through the court. Whatever coverage the local paper has produced has been under banner headlines and in the majority of publications on the front page of the newspaper.

40 Some of the content of the publications gives me concern:

- i. The statement that the accused — literally sprinted to freedom after his bail hearing;
- ii. The quote of the accused by the reporter that he asked: "Can I hit him?" referring to a newspaper photographer.
- iii. The reporting that the report from the Centre of Forensic Sciences would determine the length of the preliminary hearing (thereby giving that report more significance than should be attributed to it).
- iv. The suggestion that "certain documents" required a judge's ruling on their admissibility to determine whether they were subject to solicitor-client privilege.
- v. The setting out in a newspaper article every term of Mr. Powney's release on bail (something I have never seen before) including that he can visit his daughter and her husband but that their guns must be removed from their home before such a visit (both are probable witnesses at trial) and that he continue treatment for depression.
- vi. That he is represented by a Toronto trial lawyer who "has handled high profile cases" including the Just Desserts cafe shooting in Toronto and locally represented an individual who was sentenced to 7 <sup>1</sup>/<sub>2</sub> years for strangling his wife and helped get drug charges dropped against two men caught with \$400,000 worth of marihuana.
- vii. That the local newspaper continuously reports Mr. Powney's outstanding gun-related charges every time they report something related to the murder charge. The two sets of charges are not related in any manner whatsoever.
- viii. The reporting of one of the Janssen family's emotional reaction to Mr. Powney being granted bail together with Mr. Powney's emotional response to the decision.(he "smiled broadly" — she "wailed")



41 In my opinion, the manner in which the press covered the events surrounding the murder of Dr. Janssen, the arrest of Mr. Powney and his journey through the court process is not simply one of factual reporting but one interspersed with a degree of sensationalism designed to sell newspapers. The continuous interlocking of unrelated charges is, in my opinion, irresponsible. The internet article "Murder on the Bruce ..." is replete with innuendo and titillating conjecture inviting the reader to engage in speculation.

42 The test is whether the publicity afforded this charge of murder and its perpetrator could potentially have the effect of destroying the presumed indifference of any potential juror as between the Crown and the accused. When considered as a whole, it is my conclusion that the pre-trial publicity in this matter does have the potential to adversely affect the presumed impartiality of prospective jurors.

43 The proposed question(s) could not be considered to be a "fishing expedition" by the defence. They are straightforward and could not be construed as an attempt to "shape" the jury.

44 In conclusion, I will accede to the request for a challenge for cause on the understanding that the question(s) proposed will be the question(s) put to the prospective juror. Counsel should note that I have changed the word "and" in the last line of the second question and replaced it with the word "based". If counsel are not satisfied with this change, I may be spoken to in that regard.