Citation: *R. v. K.S.*, 2015 YKTC 6

Date: 20150227
Docket: 14-03538
Registry: Whitehorse

YOUTH JUSTICE COURT OF YUKON
Before: His Honour Judge Cozens

REGINA

v.

K.S.

Publication of identifying information is prohibited by sections 110(1) and 111(1) of the *Youth Criminal Justice Act.*

Appearances:
Leo Lane — Counsel for the Crown
Malcolm E. J. Campbell — Counsel for the Defence

RULING ON APPLICATION

[1] K.S. has been charged with having committed offences contrary to ss. 272(2)(b) (x2), 271 (x2), 151 (x2), and 264.1(1)(a) (x2). These offences are alleged to have been committed against K.S.' younger sisters, now 12 and 10 years old. The offences against the older sister are alleged to have been committed between January 2010 and October 2014, and against the younger sister between January 2011 and October 2014. K.S.' 18th birthday is February 22, 2015.

[2] Crown Counsel has filed two applications, seeking:

1. Pursuant to s. 486.2, an order that the complainants testify via closed-circuit television ("CCTV") from outside the courtroom; and
2. An order fixing the location of the trial in Whitehorse.

[3] There has not been a trial date set for this matter.

[4] Defence counsel is not necessarily opposed to an order being granted under s. 486.2, as long as the trial takes place in the community of Haines Junction. Counsel is opposed, however, to having the trial occur in Whitehorse and would oppose the order for the complainants to testify via CCTV if the impact of such an order would be to result in the trial then, of necessity, being moved to Whitehorse.

[5] [redacted]

[6] In the Notice of Application, Crown counsel submits that the trial should be moved to Whitehorse because:

a. Haines Junction does not have a suitable CCTV system;

b. A trial in Haines Junction would create undue hardship for the complainants, as it would publicize the intensely personal and embarrassing allegations. Knowledge of this exposure would jeopardize the complainant's emotional safety and prevent them from giving a full and candid account of their evidence;

c. The offences are not alleged to have occurred in Haines Junction, but rather on private rural land some 30 km away.

[7] T.S. provided an affidavit and testified in this application. He is the father of the accused and the complainants.

[8] He provided evidence that his wife's family has lived in the Haines Junction area for over 30 years. His children were born and raised in the area. His daughters have told him that they are worried and scared about people, and in particular their friends, finding out about the details of the alleged offences that they will be testifying to.

[9] He states that, as Haines Junction is a small community where his family is well known, if there is a trial there, everyone will find out about the abuse.

[10] He believes that having to testify in a public trial in Haines Junction would be unfair, hurtful and a terrible thing for his daughters to face. People would be able to come into court and would learn about the abuse.

[11] The father states that the complainants had difficulty telling the RCMP officer what had happened to them, even with their mother present. He states that they have difficulty talking about what happened to him and his wife as well.

[12] The complainants have lived their entire lives in [redacted]. They previously attended school in Haines Junction for one or two years. They have been home-schooled for the past two years.

[13] The complainants have friends in Haines Junction. They go into Haines Junction to participate in youth and community activities on a regular basis. They also come to Whitehorse to participate in youth and community activities.

[14] The father believes that if the complainants know that people from Haines Junction are listening to them in court it will hinder their testimony.

[15] In cross-examination he stated that he did not know where court was held in Haines Junction. He stated that he did not see public notices in Haines Junction about where court was being held.

[16] Cst. Manweiller swore an affidavit. She is an investigator with the Specialized Response Unit of the Yukon RCMP. She states that she has been interviewing child witnesses for 14 years with the RCMP, the majority of which were sexual assault complainants. She stated that in her experience dealing with child complainants in sexual assault cases there "were noticeable changes in the complainant's demeanour when testifying in court. They seemed more nervous, upset, unsure of themselves, scared and uncomfortable than they had when they were disclosing their alleged abuse to me in private". Cst. Manweiller stated that, in one particular case in October, 2014, she observed a complainant whom she had interviewed testify via CCTV. She noted that this complainant's demeanour while testifying was similar to when Cst. Manweiller had dealt with her previously. She "…seemed very relaxed and comfortable during her testimony".

[17] Also provided as evidence was the affidavit of Krysta Kelly, a legal assistant with the office of the Public Prosecution Service of Canada ("PPSC"). In her affidavit she provided evidence in regard to the current CCTV capabilities and its interaction with the court's digital audio recording system ("DARS"). This information was stated to have been relayed to her by Sheri Blaker, Director of Court Services.

[18] Ms. Blaker testified during the Application as to what the current CCTV options were and the interaction with DARS.

[19] I will not deal with Ms. Kelly and Ms. Blaker's evidence at this point in the judgment, other than to say that there are concerns about whether it is at all possible to receive testimony via CCTV in Haines Junction.

Analysis

[20] Section 486.2(1) states that a judge, on application by the prosecutor or the witness, shall order that a witness under the age of 18 testify outside of the courtroom or behind a screen or other device that would allow the witness not see the accused, unless the judge is of the opinion that making the order would interfere with the proper administration of justice.

[21] This order is presumptive in this case, as the complainants are 12 and 10 years old. Therefore the persuasive burden shifts to K.S. to satisfy the Court on a balance of probabilities that to make such an order would interfere with the proper administration of justice (***R.*** v. ***Etzel***, 2014 YKSC 50, at para. 10; ***R.*** v. ***T.D.J.F.P.***, 2010 YKYC 3 at para. 4).

[22] However, the Crown has also applied to have the trial moved to Whitehorse. In my opinion, in this case it is preferable to first consider whether the trial should be held in Whitehorse or Haines Junction prior to making a determination as to whether the complainants should testify by CCTV. I can do so as the Crown has brought both applications before me. This differs from the ***Etzel*** case, cited above, in which only an application under s. 486.2 was before the Court. The granting of that application resulted in a further hearing before Veale J. (***R.*** v. ***Etzel***, 2014 YKSC 64), on a subsequent application to change the venue of the trial.

[23] I am thus not in the same position Gower J. was where he faced a submission from defence counsel that to grant the CCTV application would in effect be granting a change of venue application, something that was not before the Court (see paras. 23 to 25). Gower J. stated in para. 24 that, while sympathetic to the accused's position:

> …the desirability of holding trials in the community of origin must occasionally give way to those circumstances where the testimonial accommodation cannot be provided in that community, unless the accused persuades the court otherwise.

[24] If I make an order for testimony to be adduced via CCTV and then determine that CCTV cannot be facilitated in Haines Junction, the first order will necessarily cause me to make an order that the trial be held in Whitehorse. Of course, if I make an order for a screen or other similar device, rather than CCTV, that can be accommodated in Haines Junction.

[25] In this case the Crown has applied for an order for CCTV, and not for a screen or other similar device. As Gower J. stated in ***Etzel*** at para. 18:

> …Accordingly, where the Crown or a witness applies for a particular type of testimonial accommodation and no issue arises as to whether that type of accommodation might interfere with the proper administration of justice, then s. 486.2(1) presumes that the court will order the accommodation requested. Alternatively, if such an 'interference' issue arises, then the court may consider a different type of accommodation, or indeed, whether any at all is required.

[26] My rationale for deciding that I should consider the change of venue application prior to determining whether the complainants should testify via CCTV is based upon the requirement in s. 486.2 to ensure that allowing the complainants to testify via CCTV

will “not interfere with the administration of justice”. This is a required consideration whether the order is presumptive, as it is in this case, or not.

[27] There may be occasions where the importance of holding a trial in the community, or community district, where an offence occurred raises a countervailing interest comparable in weight to the interest of having a complainant or witness testify via CCTV. In such cases, it may be that the reasons in support of allowing the witness to testify via CCTV, such as obtaining a full and frank disclosure of events, may need to be subrogated to other interests that are necessary to ensure trial fairness, for example the possible unavailability of an important witness or witnesses if the trial is moved.

[28] There may be occasions where the impact of a change of venue can be a consideration in an application for evidence to be adduced via CCTV, in deciding whether allowing the application would or would not interfere with the proper administration of justice. That would be particularly true where there is only an application under s. 486.2 before the Court.

[29] In this case, given that the Crown has brought both applications before me for hearing at the same time, and based upon the evidence adduced, I am able to deal with the applications separately. As a matter of practice, in cases where there is a reasonable possibility that granting a s. 486.2 application would have the effect of requiring a trial to be moved out of the community it would normally be conducted in, it would be preferable to have both applications before the court at the same time, as was done in this case.

Venue

[30] Section 599 of the *Code* states that:

> (1) A court which an accused is or may be indicted, at any term or sittings thereof, or a judge who may hold or sit in that court, may at any time before or after an indictment is found, upon the application of the prosecutor or the accused, order the trial to be held in a territorial division in the same province other than that which the offence would otherwise be tried if
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> (a) it appears expedient to the ends of justice, or
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> (b) a competent authority has directed that a jury is not to be summoned at the time appointed in a territorial division where the trial would otherwise by law be held.

[31] "Territorial division" is defined in s. 2 of the *Code* as including "…any province, county, union of counties, township, city, town, parish, or other judicial division or place to which the context applies".

[32] As stated in ***R.*** v. ***Johnson,*** 2014 YKSC 28:

> 22 Holding jury trials in small communities is the general rule in the Yukon. The guiding principles were set out in ***R.*** v. ***Daunt***, 2005 YKSC 33, at para. 7:
>
> 1. a criminal trial should be held in the place in which the crime is alleged to have occurred;
>
> 2. the applicant must establish, on a balance of probabilities that a fair and impartial trial cannot be held in [the presumptive community];
>
> 3. the discretion to change the location must be exercised judicially, that is on a principled basis;
>
> 4. the applicant must be able to demonstrate that the partiality or prejudice established cannot be overcome by safeguards in jury selection which include peremptory challenges, challenges for cause and trial judge instructions to the jury.

[33] Veale J. noted several factors referred to in para. 8 of ***Daunt***:

1. the size of the community;

2. prejudicial pre-trial publicity;

3. widespread animosity that people may have towards the accused or the victim;

4. widespread sympathy for the accused or the victim;

5. fear or revulsion in the community;

6. the nature of the crime; and

7. the nature of the issues.

[34] Veale J. made reference to the decision of Lilles J. in ***R.*** v. ***S.C.B.,*** 2001 YKTC 506, in which a sexual assault trial was moved from Carmacks to Whitehorse due to concerns about the emotional safety of the complainant were the trial to take place in Carmacks.

[35] In paras. 25 - 27 Veale J. stated:

> 25 …The Court feared that the complainant's emotional safety was at risk, which would have affected her ability to testify and precluded a fair trial.
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> 26 Lilles J. followed the principles in *R. v. Lafferty* (cited above) [1977, 35 C.C.C. (2d) 183 (N.W.T.S.C.)] and *R.* v. *Muckpa*, [1994] N.W.T.J. No. 68 (S.C.) in moving the trial. He confirmed the importance of holding a trial in the community where the incident occurred in creating a sense of trust and ownership in the community as well as facilitating the appearance of the witnesses involved. At para. 9., he stated that the onus on the applicant to move a judge-alone trial was less than for a jury trial but still a substantial one. He summarized the principle at para. 10:

> For these reasons, as a matter of principle and long standing practice, the Territorial Court travels to all communities on a regular schedule and trials in the Yukon normally take place in the community where the offence is alleged to have occurred. There have been relatively few exceptions in the past. These exceptions result from balancing various factors in relation to the fairness of the trial, convenience, cost, as well as community interests and the exercise of discretion by the court to ensure that justice will be done. Every application must have a factual basis and each case has to be judged on its own facts.

27. Lilles J. added that the fairness of a trial must be judged not only from the viewpoint of the accused but also from the broader perspective of the complainant and the community. He noted that a trial is not fair if a witness cannot testify because of concerns for his or her safety.

[36] Similarily, in ***Etzel***, Gower J. stated in para. 26 that:

> In the case at bar, I similarly conclude [referring to the decision in *R.* v. *Hainnu*, 2011 NUCJ 14] that the long-standing practice of this Court to attempt to hold trials in the community of origin must, in the circumstances of this case, give way to the primacy of enhancing the truth-seeking function of the criminal trial process.

Application to this Case

[37] These offences are alleged to have taken place in a location some distance outside of the community of Haines Junction. As Haines Junction is the closest community in which court is regularly held, in accordance with the long-standing practice in the Yukon, in the normal course the trial of this matter would be held in Haines Junction.

[38] The charges in this case are very serious and are of a sexual nature involving an accused young person and his younger sisters. The complainants are most closely

connected with the community of Haines Junction and the family is known in the community.

[39] Court proceedings in Haines Junction are open to the public. I have been the judge primarily responsible for circuit court in the community for a number of years. I am aware that the regular docket courts in the community generally appear to be attended by individuals who are either involved in a matter before the Court or who are connected to someone who is, other than, of course, probation officers, victim services workers, Aboriginal court workers and other similarly employed individuals connected to the justice system. I cannot say with any certainty, however, that this is always the case.

[40] I can appreciate that the trial of this matter could occur on a special sitting of the court, which would deal only with this matter. As such there would not be other matters before the court and thus no other individuals compelled to be there or attending with individuals who may be compelled to be there. That would not preclude any member of the public from attending should they somehow find out that court was in session, absent the extraordinary step of holding the trial *in camera*.

[41] As Lilles J. noted, trial fairness speaks to more than simply fairness for the accused. The public interest in courts ensuring that trials are conducted fairly includes trial fairness for the accused, but also for complainants, witnesses and the community.

[42] I am satisfied on the evidence before me that the complainants' concerns about having their friends, as well as other people, find out what they say happened are legitimate. Outside of closing the courtroom in Haines Junction to the public, and

holding the trial *in camera*, which is not an application before me and is an order that would be exceptional in any event, there is opportunity for someone to attend and for what is said in the courtroom to be spread in the community. Certainly this could also occur if the trial is held in Whitehorse, however, the likelihood of that occurring is less, simply because of the distance between Whitehorse and Haines Junction. While court in Whitehorse would also be open to the public, it is not likely that members of the Haines Junction community would simply wander into court to see what is going on.

[43] Regardless, the real issue here is what the complainants fear may occur with respect to the details of their allegations becoming public in the community of Haines Junction, not what in fact may actually transpire in the end. If they are fearful, there is a reasonable likelihood that they will not provide a full and frank accounting of events. They may also suffer emotional harm.

[44] I accept that the complainants' fears are legitimate. I also find that the complainants' fears could compromise their ability to testify in a manner that best provides for a full and frank accounting of events. I also find, in particular noting their ages, the length of time over which the offences are alleged to have occurred, and the nature of the relationship with K.S., that they could suffer emotional harm. I find that this would compromise trial fairness.

[45] In addition, I note that the connection of these alleged crimes to the community of Haines Junction is tenuous; it simply happens to be the closest community, not the community in which the offences are alleged to have occurred.

[46] I also find that there is no evidence of prejudice to K.S. in having the trial moved from Haines Junction to Whitehorse. In saying this, I want to make it clear that there is no burden on K.S. to show why the trial should be held in Haines Junction. The burden rests with the Crown to show why the trial should be moved. I am satisfied that the Crown has met this burden and order that the trial be held in Whitehorse in order to ensure trial fairness.

[47] In so finding, I am not basing my decision on any consideration of whether there is the capacity to have evidence provided via CCTV in the community of Haines Junction. The evidence I heard in this regard was not conclusive and left open the possibility that it could be facilitated. Even were I to have evidence before me that CCTV could be facilitated in Haines Junction, I would still have made the order to move the trial to Whitehorse in order to ensure trial fairness.

CCTV

[48] With respect to the application that the complainants testify via CCTV, as noted earlier, this is a presumptive order and I do not see any basis for an argument that to make this order would interfere with the proper administration of justice.

[49] I will add that, in considering the affidavit of Cst. Manweiller, I do not have difficulty with what she states with regard to child witness demeanour when testifying by CCTV as compared to being in court. I expect, however, that to some extent this could also be said about many adult witnesses. I am sure that testifying in open court can be stressful and uncomfortable for many witnesses and could impact their demeanour accordingly.

[50] In this case, given the presumption, and no evidence to displace it, I order that the complainants testify by CCTV.

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COZENS T.C.J.