Citation: *R.* v. *L.R.R.*, 2012 YKTC 103

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Docket: 10-00327B
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12-00341
12-00441
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: His Honour Chief Judge Cozens

REGINA

v.

L.R.R.

Publication of information that could disclose the identity of the complainant has been prohibited by court order pursuant to section 486.4 of the *Criminal Code*.

Appearances:

Bonnie Macdonald — Counsel for the Crown
Robert Dick (via telephone) — Counsel for the Defence

REASONS FOR JUDGMENT ON APPLICATION TO STRIKE GUILTY PLEA

[1] COZENS C.J.T.C. (Oral): This is an application by L.R.R. (Mr. R.) to withdraw the guilty plea he entered on June 14, 2011, to a charge of sexual assault causing bodily harm. Mr. R was originally charged with having committed offences on July 29, 2010, contrary to s. 271 and 267(a). Mr. R. first appeared in court on August 2, 2010. Crown counsel elected to proceed by way of indictment. Mr. R. entered not guilty pleas on September 13, 2010, and a trial date of February 15 to 17, 2011, was set.

[2] A replacement Information charging Mr. R. with offences contrary to s. 272(1)(a), s. 272(1)(c), and s. 267(a) was sworn on November 2, 2010. No process was issued; however, and this Information was first before the Court on February 15, 2011. Crown counsel was prepared to proceed to trial on February 15, 2011, but the trial was adjourned on defence counsel's application due to a scheduling problem. On February 18, 2011, Crown counsel withdrew the original two-count Information and Mr. R. entered not guilty pleas to the replacement three-count Information. The matter was then set for trial on June 14 to 16, 2011.

[3] On June 14, counsel for Mr. R. entered a guilty plea to the charge contrary to s. 272(1)(c). No facts were read in at that time. A Pre-Sentence report was ordered and the matter was set over to August 19th for disposition. An Agreed Statement of Facts was signed on June 21, 2011 by Crown counsel and counsel for Mr. R., that described the violent act of sexual intercourse forced by Mr. R. against M.B., his former common-law partner and the mother of his child, that resulted in her receiving a number of bruises that were not trifling in nature. The Agreed Statement of Facts was filed on June 28, 2011.

[4] During the preparation of the Pre-Sentence Report Mr. R. denied having committed the sexual assault. On August 19, 2011, counsel for Mr. R., at counsel's request, was removed as counsel of record. Mr. R. advised the Court on that date that he wished to change his plea to not guilty. On January 20, 2012, Mr. R.'s application to withdraw his guilty plea was set to February 7, 2012. Mr. R. did not appear on that date and ultimately the application was heard by me on September 21 and October 2, 2012.

[5] Mr. R. filed an Affidavit and both he and his mother, E.C., testified in support of the application. The Crown relied upon the Affidavit of Mr. R.'s counsel at the time the guilty plea was entered and a DNA report in opposing the application. Judgment was reserved to today's date.

Defence Evidence - the Evidence of L. R.

[6] In his Affidavit Mr. R. states the following in paragraphs 7 to 11:

> At the time of instructing Mr. Coffin to enter a change of plea and to agree to the facts as stated in the Agreed Statement, I was under duress and was unable to think clearly about the meaning and consequences of my directions to my lawyer.
>
> I was under the impression that if I did not agree to plead guilty there would be a trial and I would lose the trial and have to go to prison for at least four years. If I were to agree to pleading guilty to the one charge then I would face a much lighter sentence which could be served at Whitehorse Correction Centre.
>
> At the time, I did not appreciate that a trial would not inevitably result in a conviction against me nor did I understand the burden of proof required for a conviction. I believe that if the complainant were to testify against me I would automatically be convicted.
>
> I felt I had no choice but to admit the facts as alleged by the Crown and filed herein, notwithstanding that those facts were not a true recitation of the events that took place at the relevant time.
>
> I did not assault the victim as alleged in the Information before the Court and the sexual intercourse that took place was consensual.

[7] Mr. R. testified that while he understood what the Agreed Statement of Facts stated, when he reviewed it with his counsel he did not agree with it. He reiterated his position that he felt like he had no choice but to plead guilty and accept the facts as

stated in the Agreed Statement of Facts. He testified that his counsel told him that the case against him was strong and that he had to plead guilty, so he did.

[8] Mr. R. stated that he had an approximately one hour long meeting with his counsel just before the June 14, 2011 trial date. During that meeting he was given the Agreed Statement of Facts to read. When asked whether he agreed with it, he stated that he did not, but he had no choice because "it's in here." He then testified that he agreed with the Agreed Statement of Facts but did not understand it. When asked in cross-examination about his conversation with counsel about changing his plea to guilty, Mr. R. stated that his counsel said to him that, "The evidence were against me and if I pleaded guilty I would get a lighter sentence. He looked in a book and he said that all the evidence said that I was guilty."

[9] Mr. R. stated that he told his counsel more than once that he did not do it, but that his counsel told him that the evidence said he did do it, referring to the police report and DNA. He testified that his counsel, "told me I had no choice and my only option was to plead guilty. That's why I pled guilty." He stated that he agreed to the Agreed Statement of Facts [as read in]:

> ... because it's all on paper, because since this thing's been put on paper I've been accused and I've been guilty [my lawyer] told me that the only option that I have is to plead guilty because all the evidence is against me and I will get a harder sentence if I don't. [He] used a lot of big words that I don't understand.

[10] When asked by Crown counsel what he did not understand at the time that he now understands, Mr. R. replied that he did not understand "a whole lot of this." He stated that he understood what the Agreed Statement of Facts said "because it's on a

piece of paper." When Crown counsel put the proposition to Mr. R. that he did in fact do what the complainant stated he did, Mr. R. replied that he did not hit her, but with the evidence he should say yes. Mr. R. agreed that he told his lawyer to enter the guilty plea on his behalf, understanding that he would be admitting the facts, knowing that they were not true and that they would be a lie. He agreed that his counsel never threatened him or made any promises to him.

Testimony of E.C.

[11] E.C. is Mr. R.'s mother. She stated that she consumed alcohol when she was pregnant with Mr. R. and that he has always struggled with cognitive issues and schooling, although he has never been diagnosed as suffered from Fetal Alcohol Spectrum Disorder. Mr. R. was placed on an individual education plan until he graduated from school after Grade 12. E.C. stated that any instructions to him have to be very specific and set out, "Like one, two, three." She said that while Mr. R. looks normal, his understanding and learning are lower. She stated that when she talks to him she makes sure she keeps to his level and always asks him whether he understands what she is saying. She stated that Mr. R. will just say yes, even though he does not understand anything.

[12] E.C. said that from the start she was not allowed to be present when Mr. R. met with his lawyer even though she wanted to be. E.C. expressed her concern about Mr. R. understanding the words lawyers use and court language, and the potential for him to be talked into doing things that he does not understand. She stated that she did go with Mr. R. to his lawyer's office after Mr. R. had come back from a meeting earlier one

day very upset. Mr. R. told her about his meeting with his lawyer and having to plead guilty. Mr. R. told her at that time that he was not guilty of what he was charged with. She stated that as a result of her discussion with Mr. R. and her concern she contacted Mr. R.'s lawyer and she and Mr. R. met with him later that same day, and she expressed her concerns to his counsel about Mr. R. pleading guilty. In cross-examination E.C. stated that this meeting was the day before Mr. R. said he wanted to change his plea to not guilty.

[13] In light of all the evidence, I am satisfied that this meeting occurred on August 18, 2011.

The Evidence of the Crown

[14] The Affidavit of Mr. R.'s prior counsel, Gordon Coffin, was admitted into evidence when present counsel for Mr. R. advised the Court that Mr. Coffin would not be required for cross-examination. Mr. Coffin has 30 years experience in the practice of law, the last 11 of which have been at the Community Law Clinic. He was appointed as counsel for Mr. R. prior to Mr. R. entering a not guilty plea in September, 2010.

[15] Mr. Coffin stated the following in paragraphs 5 to 9 of his Affidavit:

> On June 13, 2011 I received a draft Agreed Statement of Facts from specially assigned Crown counsel, Terri Nguyen. Along with the Agreed Statement of Facts was a copy of the letter proposing a resolution. Attached to this my affidavit and marked as Exhibit B is a copy of the letter of resolution.
>
> On that same date I met with L.R. We discussed his case. He appeared to follow the conversation and understand what I was saying to him.
>
> I advised Mr. R. in plain terms that I was of the view that his chances of being acquitted after trial were minimal if M.A.B.

> attended to court and testified as to what she had told police. I was of this view in part because Mr. R.'s explanation for the DNA evidence (that he and Ms. B. had last had consensual intercourse a month before the sexual assault allegation arose) is contrary to my understanding of forensic sciences.
>
> I reviewed the Agreed Statement of Facts with Mr. R. and he said he was agreeable to entering a guilty plea on the basis of the Agreed Statement of Facts. Although I did not specifically review the provisions of s. 606 of the *Criminal Code*, I did tell Mr. R. that a guilty plea was an acknowledgement of the offence.
>
> I recall Mr. R. being hesitant, but he ultimately directed me to sign the Agreed Statement of Facts. I do not think Mr. R. took a copy of the Agreed Statement of Facts home with him on that day.

[16] The DNA evidence linking the profile of the male component in the vaginal swab of M.B. to Mr. R. was provided to Mr. Coffin by Crown counsel on June 9, 2011. Mr. Coffin stated that he only became aware of Mr. R. subsequently denying having committed the sexual assault when he received and reviewed the Pre-Sentence Report on August 12, 2011. He was surprised by Mr. R.'s denial and arranged to meet with him on August 18, 2011. He met first with Mr. R., who informed him that he felt that Mr. Coffin had told him he had to plead guilty. Mr. R. returned with his mother later that day to meet with Mr. Coffin. As a result of Mr. R.'s position Mr. Coffin withdrew from his representation of Mr. R..

[17] Mr. Coffin stated that at no time did he ever tell Mr. R. that he had to plead guilty. He further stated the following in paragraph 17 of his Affidavit:

> I was aware that Mr. R. did not have an embarrassment of intellectual gifts, but I thought at the time we were communicating clearly. However, I am unable to say with certainty what Mr. R. did or did not understand.

[18] Crown counsel's position in the correspondence sent to Mr. Coffin was that, on a guilty plea to the s. 271(1)(c) charge, a jail sentence of three years would be sought. If Mr. R. was convicted after trial, Crown counsel would seek a longer sentence. Crown counsel stated the following in respect of the proposal:

> I must reserve the right to withdraw the above noted proposal at any time prior to acceptance. The offer will obviously expire at the time indicated; absent exceptional circumstances, will not be renewed.

The time indicated was noted in the letter to be by the end of business on June 13, 2011.

The Law

[19] A valid guilty plea is one that is voluntary, unequivocal and informed. The burden is on the accused to show that a plea is invalid (*R.* v. *Greenall,* 2011 BCPC 28; *R.* v. *Mah*, 2008 ONCA 555; *R.* v. *D.W.S.*, 2008 BCCA 453). The prerequisites of a guilty plea are reflected in s. 606(1.1) of the *Criminal Code*, which prohibits the Court from accepting a guilty plea unless it is satisfied that the accused is:

(a) making the plea voluntarily; and

(b) understands

  (i) that the plea is admission of the essential elements of the offence,

  (ii) the nature and consequences of the plea, and

  (iii) that the Court is not bound by any agreement made between the accused and the prosecutor.

The failure of a court to make these inquiries does not affect the validity of a guilty plea (s. 606(1.2)).

[20] Specifically, where the accused is represented by counsel, the presiding judge is justified in inferring that counsel has ensured that the client understands the nature and consequences of a guilty plea (*R.* v. *Moser* (2002), 163 C.C.C. (3d) 286, Ontario S.C. and citations within).

[21] In order for a guilty plea to be voluntary, the plea must not be the product of coercion or oppressive conduct (*Moser*). However, there are also situations where the cognitive capacity or mental state of an accused could affect voluntariness. Where these factors are raised, the Court should be satisfied that the accused is capable of understanding the court process and of making an active or conscious choice (*Mah*, para. 33). This test is met by the limited cognitive capacity standard that is used to determine an accused's fitness to stand trial, i.e. that the accused understands the process, can communicate with counsel and can make conscious decisions about options within the process (*Mah* citing *R.* v. *Whittle*, 1994 2 S.C.R. 914).

[22] The limited cognitive capacity test sets a low bar. The accused does not need to be able to make rational decisions or decisions in his own best interest. The question is whether he was deprived of his capacity to make a conscious choice about his plea (*Mah*, para. 36). For a plea to be unequivocal it has to be "clear, plain and capable of being understood in only one way" (*Greenall*). It also has to be unqualified (*R.* v. *R.T.* (1992), 10 O.R. (3d) 514 (C.A.))

[23] Finally, for a plea to be informed, the accused must know the relevant facts and the nature of the allegations, the effect of a guilty plea, and the consequences of

entering a guilty plea (*Greenall* and *Moser*). This does not mean an accused has to appreciate the exact sentence, but he should generally know the jeopardy he faces.

Application of the Law to the Facts

1. Was Mr. R.'s plea voluntary?

[24] Given the principles in the case law cited above, I cannot say that the guilty plea was obtained from Mr. R. through coercion or oppression, nor can I say with any certainty on the evidence before me that he fell below the limit on the cognitive capacity standard. This said, I have concerns about the circumstances, in particular, the timing of the receipt of the DNA report and the communication of the Crown proposal to Mr. R.'s counsel on June 13th, the day before trial, and Mr. R. having to process that information and give instructions to his counsel that same day before the offer lapsed.

[25] It is clear that Mr. R. has some cognitive limitations which come into play, both on his mother's evidence, which is uncontested, on my own assessment of his appearance in the witness box, and on the evidence of Mr. Coffin. I find, however, that these concerns are better dealt with in the analysis of whether Mr. R.'s guilty plea was an informed one.

2. Was Mr. R.'s plea unequivocal?

[26] I find that it was and that the Agreed Statement of Facts which was provided in draft form to Mr. R.'s counsel prior to the guilty plea being proffered and signed, and which was filed afterwards, removes any concerns in this regard.

3. Was Mr. R.'s guilty plea an informed one?

[27] I find that it was not. Mr. R.'s intent from early in these proceedings was to take

this matter to trial. His guilty plea was entered the day before trial and in circumstances of late DNA disclosure and significant pressure created by these circumstances to make a quick decision. At no other time does Mr. R. ever admit having committed the offence to which he pled guilty. His denial of having done so continued shortly after the guilty plea was entered, when he had to address the issue with the author of the Pre-Sentence Report, and continues to this day.

[28] The concept of “informed” must take into account the ability of Mr. R. to adequately understand and process the information provided to him. Mr. R.’s testimony and that of E.C. raise a serious doubt in my mind that he properly understood what he was doing and why he was doing it when he told his counsel he would enter a guilty plea. Based on the timeline, it appears that the Agreed Statement of Facts was discussed in response to the DNA test results received by Crown and provided to defence counsel on what was essentially the eve of trial. While the potential significance of these results to the Crown case may have been clear to Crown and defence counsel, I find that the implication was not clear to Mr. R., despite the efforts of defence counsel to discuss them with him. Similarly, while comprehensively and clearly written and understandable to Crown, defence and the Court, the content and import of the Agreed Statement of Facts was evidently not clear to Mr. R. prior to his instructing counsel to enter a guilty plea. He seems to have been under the impression that because it was on paper and because of Mr. Coffin’s book, matters were somehow decided, even if he did not agree with what had been written. There was also the pressure to tell his client right away to enter the guilty plea or he would lose the chance

to do so and receive the benefit of Crown making a submission for a lesser jail sentence of three years.

[29] While it is an obvious thing to point out, counsel dealing with accused clients or dealing with individuals, each with a unique strength and limitations, there can be no "one size fits all" approach to giving advice and taking meaningful instruction. I think it is clear from the evidence, in particular considering the limited history of Mr. R. and his cognitive difficulties testified to in court, that Mr. R. required more than a one hour meeting the day before trial to fully comprehend the impact of the DNA report upon the Crown's case against him in his defence, as well as the meaning of the Agreed Statement of Facts and the impact of signing it.

[30] Mr. R. has satisfied me that he did not adequately understand the effect and consequences of entering his guilty plea and the reasons why he was doing it. It is clear that Mr. Coffin attempted to explain this to Mr. R. at the earliest opportunity, but given Mr. R.'s cognitive limitations, I find that, in the end, Mr. R. required more time to process the information and explanation than what he received. Indeed, Mr. Coffin himself notes that he is "unable to say with certainty what Mr. R. did or did not understand" about the process and the guilty plea he entered. The late disclosure of the DNA report and potential impact upon Mr. R.'s defence likely would have provided support for a defence adjournment application in order to conduct investigation and/or make inquiries as counsel felt necessary.

[31] In the circumstances, such an application, if granted, could also have allowed for Mr. R. to probably absorb the information provided to him and ultimately properly inform

himself or be informed as to why he may wish to enter a guilty plea and what such a plea would mean as to what he was acknowledging as having done.

[32] This is an extremely serious charge, with a potential for significant consequences. I recognize that the evidence that the Crown will be relying on may well be very strong and the case Mr. R. will have to meet in order to be acquitted a difficult one. That, however, is not a reason, in these circumstances, to deny Mr. R. the opportunity to proffer a defence. I would find myself, were I to reject Mr. R.'s application, in the position of being extremely concerned about fairness and the negative impact on the administration of justice were I to then sentence him on this guilty plea.

[33] As such, I find that Mr. R.'s guilty plea to the charge of sexual assault was not an informed plea. I allow the application. The guilty plea will be withdrawn and a not guilty plea entered.

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COZENS C.J.T.C.