Citation: *R.* v. *Torres*, 2013 YKTC 3

Date: 20120802
Docket: 11-00618

Registry: Whitehorse

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

REGINA

v.

RODRIGO MORENO TORRES

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

Appearances:
Keith Parkkari — Counsel for the Crown
Robert Dick — Counsel for the Defence

RULING ON *VOIR DIRE* APPLICATION

[1] COZENS C.J.T.C (Oral): This matter is set for decision with respect to the Crown's application to enter into a *voir dire.*

[2] Rodrigo Torres is charged with having committed the offence of sexual assault on December 3, 2011. The trial commenced on July 30, 2012. On that day, the only witness to testify for the Crown was the complainant. The complainant stated in her testimony that Mr. Torres, a cab driver, while taking her home as a paying customer in

the early morning hours, stopped his cab in a bus turnaround near her home and without her consent had sexual intercourse with her. The complainant testified to having consumed a significant amount of alcohol the previous evening and that morning, and being highly intoxicated as a result, to the point of blacking out at times.

[3] During her testimony in direct examination, the complainant said that she had blocked out what had happened after Mr. Torres was on top of her and during the sexual assault. She stated on several occasions, in response to the questions put to her by Crown counsel, that she could not remember details such as whether there had been a conversation between herself and Mr. Torres, how long he had sexual intercourse with her, whether he touched her sexually in any other way, how the sexual assault ended, how she got home from the bus turnaround, and what happened after she had arrived home. She stated that she had blocked all of these details out of her mind. She testified that she had been sexually assaulted previously and had similarly blocked out the details of that sexual assault.

[4] During cross-examination, the complainant indicated that she had provided the RCMP with several statements about the sexual assault. It was apparent from the cross-examination that there are more details about the alleged sexual assault in these early statements, although the complainant also stated that there were certain details she was then unable to recall due to her blacking out from intoxication. Significantly, she indicated that there were details that she told the RCMP officer that investigated, but she could not now remember, due to her subsequently blocking out the events that she did not want to think about. She stated that she was not able to entirely block out the sexual assault and that it would be with her forever. She agreed with the

proposition put to her by defence counsel that shortly after the assault she remembered what happened, but that she later blocked out the details because she could not deal with it. She agreed that she was not so drunk that she did not know what was occurring at the time of the sexual assault, she has simply since blocked it out.

[5] Crown counsel had no questions or redirect for the complainant after the conclusion of her cross-examination, and both counsel indicated that the complainant was not required further. She was excused from the trial.

[6] The trial was then adjourned for the lunch break. When the trial resumed, Crown counsel indicated that he wished to enter into a *voir dire* to argue that the statements the complainant provided to the RCMP should be admitted into evidence for the truth of their contents as being her past recollection recorded. His application was subsequently expanded to include admission on the basis of the principled exception to the hearsay rule. Crown counsel noted that in the several statements the complainant provided to the RCMP, she stated much more than what she now says she can recall. Crown counsel does not assert that the complainant is a reluctant or recanting witness, but rather he says that the complainant honestly cannot remember many of the details of what happened that morning, having blocked them out.

[7] When asked why he did not attempt to refresh the complainant's memory from her statements during her direct examination, Crown counsel stated that these statements had been reviewed by the complainant on a number of earlier occasions, including on the morning of trial with the Crown witness coordinator, and again during a lengthy break in her direct testimony. It was his belief that she had not been refreshed

by her review of these statements, and, as such, he did not attempt to refresh her memory while she was testifying. Crown counsel also submits that it was only during the cross-examination of the complainant that it became really apparent the extent to which she had blocked out certain events and could not remember them. He submits that any prejudice to Mr. Torres could be rectified by allowing the complainant to be cross-examined further.

[8] Counsel for Mr. Torres opposes the Crown application to enter into a *voir dire*. He states that this application should have been made during the direct examination of the complainant and certainly prior to her being cross-examined. He states that the Crown application is untimely and prejudicial to Mr. Torres.

ANALYSIS

[9] The Crown has not yet closed its case. In *R*. v. *M.B.P.*, [1994] 1 S.C.R. 555, the Supreme Court of Canada stated in para. 20 that a Court's discretion to allow the Crown to reopen its case will be exercised less readily as the trial proceeds, and noted the following three stages in a trial:

1. before the Crown closes its case,
2. immediately after the Crown closes its case but before the defence elects whether or not to call evidence … and
3. after the defence has started to answer the case against it by disclosing whether or not it will be calling evidence.

At paras. 21 to 23, the Court states:

> In the first phase, before the Crown has closed its case, a trial judge has considerable latitude in exercising his or her discretion to allow the Crown to recall a witness so that his

> or her earlier testimony can be corrected. Any prejudice to the accused can generally be cured at this early stage by an adjournment, cross-examination of the recalled witness and other Crown witnesses and/or a review by the trial judge of the record in order to determine whether certain portions should be struck.
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> Once the Crown actually closes its case and the second phase in the proceedings is reached, the trial judge's discretion to allow reopening will narrow and the corresponding burden on the Crown to satisfy the Court that there are no unfair consequences will heighten. The test to be applied by the trial judge is generally understood to be that reopening is to be permitted to correct some oversight or inadvertent admission by the Crown in the presentation of its case, provided of course that justice requires it and there will be no prejudice to the defence.
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> Lastly, in the third phase, after the Crown has closed its case and the defence has started to answer the case against it (or, as in much of the case law, the defence has actually closed its case), a court's discretion is very restricted and is far less likely to be exercised in favour of the Crown. It will only be in the narrowest of circumstances that the Crown will be permitted to reopen its case. Traditionally, an ex improviso limitation was said to apply to this stage of the proceeding; that is, the Crown was only allowed to reopen if some matter arose which no human ingenuity could have foreseen. At this late stage, the question of what "justice" requires will be directed much more to protecting the interests of the accused than to serving the often wider societal interests represented by the Crown, the latter being a more pressing consideration at the first and, to a lesser extent, the second phase.

[10] I also note that where it only becomes obvious during cross-examination of a witness, that they either forget what they previously said or are resiling from their earlier evidence, it is allowable at that point to enter into a *voir dire* to determine whether any "prior statements [will] be admitted into evidence", *R.* v. *Glowatski*, 2001 BCCA 678, at para. 34.

[11] I do not agree, however, with Crown counsel's submission that it was only during the cross-examination of the complainant that it became apparent that she had blocked out and could not remember events. It was clear from her testimony in direct examination that she had blocked out certain events and details. Crown counsel obviously had the earlier statements of the RCMP and should have attempted to refresh her memory from them. The fact that Crown counsel believed the complainant's memory would not be refreshed does not mean that this step of the process can be skipped and followed by an application to admit the statements after she had been cross-examined and excused. If counsel wants a statement admitted into evidence for the truth of its contents on the basis of a genuinely forgetful witness, there must be an attempt to refresh the witness's memory in court, before the trier of fact and before the accused. This is a necessary step en route to a *voir dire.*

[12] I also do not accept the submission that defence counsel could have put the prior statements of the complainant to her in cross-examination. If the statements are incriminating, this could be a dubious tactical decision, to say the least. It remains the responsibility of Crown counsel to adduce the evidence the Crown wishes to rely on.

[13] I agree with defence counsel that the proper time for the Crown to have made its application was during the direct examination of the complainant. That is not the end of the matter, however. The Crown has not yet closed its case and I have considerable discretion in deciding whether to allow the Crown to recall the complainant. The allegation of sexual assault is a serious one and there is a public interest in having this matter adjudicated on its merits. There may well be considerable probative value in the statements that Crown wishes to have admitted into evidence.

[14] Apart from the public interest and the potential probative value of these statements, I must also consider whether there is a disproportionate prejudice to Mr. Torres in allowing the Crown to enter into a *voir dire* to apply to have the statements admitted into evidence for the truth of their contents. In the circumstances, I find that there is not. To the extent that there is any prejudice, I find that it can be rectified by allowing the complainant to be fully cross-examined.

[15] This said, I find that the proper way to proceed is to allow the Crown to recall the witness and attempt to refresh her memory from the statements. After this step has been taken, I will then consider whether, based upon the complainant's evidence, an application by Crown counsel to enter into a *voir dire* will be granted. If granted, it is only at the conclusion of the *voir dire* that a determination will be made as to the admissibility of any or all of these statements.

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COZENS C.J.T.C