SUPREME COURT OF YUKON

Citation: *R. v. P.J.S.*, 2013 YKSC 127

Date: 20131220
S.C. No. 12-01511
Registry: Whitehorse

Between:

HER MAJESTY THE QUEEN

And

P.J.S.

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

Before: Mr. Justice L.F. Gower

Appearances:

David McWhinnie — Counsel for the Crown
André W.L. Roothman — Counsel for Accused

RULING
(Application for Witness to Testify Out of Court)

[1] This is an application by the Crown under s. 486.2 (2) of the *Criminal Code* (the "*Code*") to allow the complainant, G.S., to testify outside the courtroom by way of a video link. The accused is charged with having sexually assaulted G.S. when he was a child, roughly between the ages of three and six years old. Crown counsel informs me that the allegations involve two principal incidents: one of anal intercourse and the other of oral sex. The accused is also allegedly the uncle of G.S. G.S. is now in his mid-thirties and

the accused is 48 years old. The accused opposes the application on the basis that the Crown has not established that it will be necessary for G.S. to testify by video link in order to obtain a full and candid account of his allegations.

[2] Section 486.2(2) of the *Code* provides:

> "Despite section 650, in any proceedings against an accused, the judge or justice may, on application of the prosecutor or a witness, order that the witness testify outside the court room or behind a screen or other device that would allow the witness not to see the accused if the judge or justice is of the opinion that the order is necessary to obtain a full and candid account from the witness of the acts complained of."

[3] Section 486.2(3) states that, in making the above determination, the judge shall take into account the factors referred to in subsection 486.1(3), which are:

- the age of the witness;
- whether the witness has a mental or physical disability;
- the nature of the offence;
- the nature of any relationship between the witness and the accused; and
- any other circumstance that the judge considers relevant

[4] G.S. testified in open court in the normal fashion at the preliminary inquiry in this matter. Crown counsel informs me that G.S. has also indicated that he will obey any subpoena requiring him to testify at the trial. However, the Crown's evidence of the anticipated difficulty with G.S.'s testimony comes from the Crown Witness Coordinator, Lois Sembsmoen, who deposed as follows in her affidavit sworn June 11, 2013:

> "I am aware that the witness is concerned about being in the same room with [P.S.] and members of [P.S.]'s family. His concern relates to strong feelings of anger toward the

> Accused as a result of the allegations before the court. I am aware that [G.S.] has sought counselling for that anger but is not yet able to control that emotion in a healthy way;"

[5] Defence counsel relied on the case of *R.* v. *Pal*, 2007 BCSC 1493, a decision of Mr. Justice Joyce of the Supreme Court of British Columbia. In that case, the accused were charged with kidnapping, unlawful confinement, assault causing bodily harm and sexual assault of the complainant. The Crown alleged that during the unlawful confinement, one of the accused, Tahvili, cut or twisted the complainant's penis and threatened to insert an object into his anus. The Crown applied under s. 486.2(2) of the *Code* to permit the complainant to testify behind a screen. The Crown filed the complainant's affidavit in which he deposed to being terrified for himself and his family about testifying in open court. In particular, he was afraid of being identified by the two accused persons, as well as others who participated in the crimes, but who remained at large. Specifically, he feared that the accused or others would track him down to harm him or his family.

[6] Joyce J. relied upon a decision from the Ontario Court of Appeal in *R.* v. *M.(P.)* (1990) 1 O.R. (3d) 341 (C.A.), which dealt with s. 486(2.1), which was the provision preceding the current s. 486.2(2). Despite some differences in the wording of the two provisions, the phrasing "if the judge or justice is of the opinion that the [exclusion of the witness, now "order"] is necessary to obtain a full and candid account [from the witness]" is virtually identical. At his para. 7, Joyce J. quoted Morden A.C.J.O., who stated that the trial judge should be accorded "substantial latitude" in deciding whether or not to form the requisite opinion, but emphasized that the opinion must be based on the evidence:

> "… His or her decision on this particular issue is not, in my view, strictly speaking, one of discretion, but, rather, one of

> judgment. The trial judge is not, however, empowered to form the requisite opinion unless there is an evidential base relating to the standard of necessity referred to in this subsection which is capable of supporting the opinion." (my emphasis)

[7] At paras. 5 and 6 of *Pal*, Joyce J. similarly focused on the need for the evidence to meet the standard of necessity under s. 486.2(2), as well as the fundamental right of the accused to be present in court and face his accusers under s. 650 of the *Code*:

> "[5] The right of an accused person to be present in court throughout the trial and to observe his accusers and those who testify against him is a fundamentally important right that is recognized by s. 650 of the *Criminal Code*. In my view it must not be lightly interfered with.
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> [6] In my opinion there must be an evidentiary basis to establish the standard of necessity set out in the subsection."

[8] At paras. 8 and 9, Joyce J. concluded that, while it was understandable that the complainant in the case before him was fearful, he had not said that he would be unable to give a full and candid account. Therefore, the standard of necessity under s. 486.2(2) had not been met and Crown's application was dismissed.

[9] I note that the Supreme Court recently confirmed in *R.* v. *N.S.*, 2012 SCC 72, that while face-to-face confrontation in open court is the norm in common law criminal courts, it is not an independent constitutional right (para. 22).

[10] The Crown here relies upon *R.* v. *Salehi*, 2011 ONCJ 39. That case involved two sisters who complained that they were the victims of sexual offences committed by the accused, their great uncle, when the girls were each around 10 years old. At the time of trial, they were 20 and 23 years old. The Crown applied under s. 486.2(2) to have them

testify out of court by way of a video link. The evidence in support of the application came from the investigating police officer who interviewed each of the complainants about a week before the trial. The officer testified that the first complainant was "extremely upset" at the prospect of attending and giving her evidence in front of the accused. She had told the officer that if she were forced to attend the courtroom to testify, she was "not sure what she would say, if anything". She then yelled at the officer and left the room in a very upset state. The second complainant similarly told the officer that she was "not sure" she could testify in court in the presence of the accused. The officer also spoke of the "obvious distress" of both complainants during the interviews.

[11] Bourque J.went through the factors in s. 486.1(3) and noted in particular that the offences involved the "sexual integrity" of the witnesses, which could be expected to be "central to their self-esteem … intensely personal [and] very disturbing". Bourque J. also suggested that the stated "feelings of fragility" of the complainants was likely related to the fact that the offences allegedly took place while they were children and were committed by a family member. At para. 19, Bourque J. stated:

> "By testifying in another room with a video link the witness would certainly feel less intrusion on privacy, and thus more likely to relate her obligations under oath."

[12] While Bourque J. was also initially concerned about the evidence that both witnesses were uncertain of their ability to testify in open court, he ultimately gave that factor the least weight because it turned so much on the subjective feelings of the witnesses. At para. 21, he stated:

> "A statement by a potential witness that she will not testify about her allegations if forced to do so in open court causes me great concern. If I was led to believe that this was not a

> sincere (even if misguided) belief then I would discount it and give it no weight. But where I cannot discount it, it goes to the central issue and that is "getting a full and candid account". Clearly the witness Complainant #1 is more adamant in this regard than Complainant #2. Even so, I think I must consider the real possibility for both witnesses that they would be unable to testify. In the final analysis however, I give this factor the least weight because it is so very much a statement of the subjective feelings of the witness." (my emphasis)

Bourque J. ultimately allowed the Crown's application.

[13] In the case at bar, the Crown also relied upon *R.* v. *Dessouza*, 2012 ONSC 145. Although that case also involved an application to have the complainant in a sexual assault case testified by video link, the application was brought under a different section of the *Code*, i.e. s. 714.1. That provision differs from s. 486.2(2) in that it incorporates a test of 'appropriateness' rather than 'necessity'. Section 714.1 states:

> "714.1 A court may order that a witness in Canada give evidence by means of technology that permits the witness to testify elsewhere in Canada in the virtual presence of the parties and the court, if the court is of the opinion that it would be appropriate in all the circumstances, including
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> (a) the location and personal circumstances of the witness;
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> (b) the costs that would be incurred if the witness had to be physically present; and
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> (c) the nature of the witness' anticipated evidence." (my emphasis)

[14] In *Dessouza*, the police officer in charge of the case testified in support of the Crown's application. The complainant was 18 years old at the time of the alleged sexual assault, which involved the use of a knife and a death threat. At the time of the application, the complainant was 33 years old, married with three children, employed and residing in a different city than the one where the trial was being held. She had told the

officer that she would not personally attend the trial despite being subpoenaed to do so, even if she had to be arrested.

[15] Ricchetti J. considered the complainant's location and personal circumstances and the nature of her anticipated evidence. With respect to the latter, Ricchetti J. noted that the complainant was the only eyewitness and her testimony was critical to both the Crown and the defence.

[16] In discussing the right of the accused to make full answer and defence, Ricchetti J. commented, at para. 24:

> "There can be no doubt that it is best when the evidence is given in court. The uncertainties which arise during a trial affecting witnesses: such as a witness' exclusion during objections; the efficient use of exhibits, such as the ability to ensure the witness has the exhibit and is looking at the right portion of the exhibit; and the ability of the trier of fact to observe the witness, are best achieved with live testimony by a witness. However, this right to have a witness give evidence in person before the accused at trial is not absolute. See:
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> * S. 709 Commissioned evidence;
> * S. 714.1 Video link evidence;
> * S. 715 Previously given evidence;
> * S. 486.2(1) under 18 years old or mental or physical disability; and
> * S. 486.2(2) any witness outside the courtroom or behind a screen or other device." (my emphasis)

[17] Having said that, Ricchetti J. also readily acknowledged, at para. 26, that:

> "… it would only be in the rarest of cases that a court would grant in order under s. 714.1 of the Criminal Code to permit a complainant testified by way of video link."

Indeed, Ricchetti J. stated that, if the location and personal circumstances of the complainant and the nature of her evidence were the only factors to be considered, he would have dismissed the Crown's application (para. 27). Rather, under the rubric of considering "all the circumstances" on the application, Ricchetti J. concluded that the case was "rare and exceptional", because of the history of the proceedings, and granted the application.

[18] In *Dessouza*, the offence was alleged to have occurred in 1996 and the preliminary inquiry was scheduled for 1997. However, the accused failed to appear and left Canada for a period of time. He was arrested upon his return in 2001. He then failed to attend a preliminary inquiry scheduled for 2003 and absconded a second time from Canada. He was arrested again upon his return in 2008 and the preliminary inquiry was held 2009, some 13 years after the alleged offence. That lengthy delay was made worse by the accused subsequently and repeatedly hiring and firing lawyers and seeking consequential adjournments. The trial was ultimately scheduled to be heard in January 2012. At paras. 29 and 35, Ricchetti J. emphasized the impact of this horrendous delay upon the complainant:

> "[29] As can be seen from the above, Mr. Dessouza caused approximately 9 years of delay in this matter as a result of his leaving the country and failing to attend court in 1997 and 2003. Ms. M.G. was prepared to testify at the preliminary hearings and did attend and testified at the preliminary hearing in October 2009 - some 13 years after the alleged sexual assault and death threat occurred. Ms. M.G. has been forced to continue to deal with this, no doubt difficult and traumatic event and the repeated stress of potentially having to publicly discuss the events and be cross examined on what happened. She has not been able to get on with her life or put this behind her.
>
> …

> [35] The position of Ms. M.G. [that she would not attend the trial in person] is not entirely surprising. The charges are almost 16 years old. She has moved on with her life. She has a new life. She has been forced to continue to live with this matter the entire time. She has been diligent about attending the preliminary hearings. She has been diligent and was prepared to attend all the prior trial dates."

[19] In the result, Ricchetti J. concluded that the "truth finding aspect of [the] trial", i.e. an adjudication on the merits, would be frustrated by the accused's delay, unless the complainant was allowed to testify by video link (para. 37). Nevertheless, I would distinguish *Dessouza* as a rare and exceptional case.

[20] With respect, I also do not find *Salahi* very helpful on this application. While the judge in that case focused a good deal of his attention on the "intensely personal" nature of the sexual offences and seemed to link the apprehensions of the complainants about testifying to that issue, he somewhat inconsistently, in my view, then gave the "least weight" to the complainants' "subjective" reasons for not wanting to testify in person, but nevertheless granted the application. Perhaps the most that can be taken from that case is that, where a witness says that he or she will not testify, that is a consideration, but it is not determinative of the issue of necessity.

[21] In the case at bar, there is no evidence that the complainant will not testify. Nor is there any evidence to support an opinion that video link testimony "is necessary to obtain a full and candid account" of the allegations from G.S. The evidence that G.S. has "strong feelings of anger" towards the accused as a result of the allegations, indeed anger that he is "not yet able to control" in a healthy way does not support a reasonable inference that he will be unable to testify. Indeed, I would venture to guess that complainants and sexual assault cases are often angry towards their perceived

aggressors. While G.S.'s anger is understandable, like the fear of the complainant in *Pal*, it does not meet the standard of necessity under s. 486.2(2) of the *Code*. Certainly, there is no evidence from the complainant himself that he would be unable to give a full and candid account unless he is permitted to testify by video link.

[22] In my view, if the Crown seeks to interfere with the generally followed practice of allowing an accused to confront his or her accuser face-to-face in an open courtroom, then it must provide an evidentiary basis for doing so. As no such basis was provided in this case, the Crown's application must fail.

[23] However, should circumstances change as this matter progresses towards trial, or after the trial commences, there is no statutory bar preventing the Crown from renewing the application.

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Gower J.