SUPREME COURT OF YUKON

Citation: *R. v. Schafer*, 2018 YKSC 52

Date: 20181207
S.C. No. 18-AP007
Registry: Whitehorse

Between:

HER MAJESTY THE QUEEN

Respondent

And

CHRISTOPHER RUSSELL SCHAFER

Appellant

Before Madam Justice G.M. Miller

Appearances:

Noel Sinclair	Counsel for the Respondent
Vincent Larochelle and Gregory Johannson	Counsel for the Appellant

REASONS FOR JUDGMENT

INTRODUCTION

[1] The Appellant, Christopher Schafer, appeals from the imposition on him, by Ruddy J. of the Territorial Court of Yukon, of a s. 810.2 recognizance. Mr. Schafer challenges the legal basis for the evidentiary standard applied at his hearing. He raises two grounds of appeal:

a. First, that the territorial court judge erred by admitting hearsay evidence at the hearing; and
b. Second, that the territorial court judge erred by admitted opinion evidence at the hearing.

[2] The Respondent takes the position that the correct evidentiary standard was applied and the s. 810.2 application properly granted.

[3] In submissions, for the first time, counsel for the Appellant raised the issue of the Crown's failure to disclose the source documents relied on by the Crown's witness on the Application. At the hearing, the disclosure issue was raised by the hearing judge and counsel for the Appellant specifically indicated there was no disclosure issue. Absent the competence of hearing counsel being a ground of appeal, which suggestion is not made here, this issue is not properly the subject of this appeal. The fact that appeal counsel might have conducted the hearing differently does not provide a proper basis for appeal.

The Hearing

[4] The s. 810.2 hearing took place April 13, 2018. Ruddy J. provided her decision and imposed a two-year s. 810.2 recognizance on Mr. Schafer on May 10, 2018. The conditions imposed with the s. 810.2 order included a residency requirement, a curfew, and a condition that the Appellant abstain from consuming alcohol or drugs. Neither the duration of the order or its conditions are the subject of this appeal. Ruddy J. provided written reasons for judgment on May 23, 2018.

[5] The hearing proceeded with affidavit and *viva voce* evidence from Cpl. Kirk Gale of the RCMP and testimony given by Christopher Schafer and Marion Schafer.

[6] In his affidavit Cpl. Gale relied on various documents including: Mr. Schafer's criminal record, which was admitted; and a number of documents provided by Corrections Canada, including risk and psychological assessments conducted by Corrections Canada personnel. Relying on these documents, Cpl. Gale testified that he feared, on reasonable grounds, that Christopher Schafer would commit a serious

personal injury offence as defined in s. 752 of the *Criminal Code*. The source documents themselves were not produced to the Court.

[7] Ruddy J. addressed the evidentiary issues in her Reasons for Judgment as follows:

> [39] My primary concern in assessing whether or not Crown has met the burden in this case relates to the sufficiency of the evidence that was presented to me. In particular, the Crown's case rests on Cpl. Gale's summary of materials he received from Corrections Canada, effectively making it double hearsay. The failure to provide the Court with the source material raised concerns for me about whether the evidence can be said to be sufficient to satisfy me that the test has been met.
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> [40] After much consideration, I have decided that the evidence in this case is sufficient to satisfy me that there are reasonable grounds to fear that Mr. Schafer will commit a serious personal injury offence, though reaching this conclusion would certainly have been easier had the source material upon which Cpl. Gale's affidavit is based been provided to the Court.
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> [41] However, I have concluded that the test has nonetheless been met for the following reasons.
>
> [42] Firstly, it is clear that hearsay evidence can be considered in peace bond hearings. In *R. v. Budreo* (2000), 46 O.R. (3d) 481(C.A), Laskin J. noted:
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> > 53 (QL) Moreover, although an informant's fear triggers an application under s. 810.1, under subsection (3) a recognizance order can only be made if the presiding judge is satisfied by "evidence" that the fear is reasonably based. Section 810.1 (3) therefore requires the judge to come to his or her own conclusion about the likelihood that the defendant will commit one of the offences listed in subsection (1). Although the "evidence" the judge relies on might include hearsay, a recognizance could only be ordered on evidence that is credible and trustworthy.

> [43] This is confirmed in *R. v. Flett*, 2013 SKQB 155, in which, following a review of the relevant case law since *Budreo*, the Court notes:
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> > 24 These decisions at all court levels up to and including the Supreme Court of Canada confirm that s. 810 hearings are not criminal trials. The usual rules of evidence applicable in criminal trials do not apply. Hearsay evidence is admissible. The question before the judge is to determine whether or not sufficient weight can be given to the hearsay evidence to establish the reasonable and probable grounds required for the individual to swear the information to justify the fear of harm to others by the Respondent.
>
> [44] I am also mindful of the fact that peace bond applications are preventative rather than punitive in nature such that it has been clearly accepted that the stringent evidentiary rules of a criminal trial do not apply. (see *Haydock v. Baker*; *R. v. Flett*)
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> [45] Secondly, in assessing whether the hearsay evidence provided by the Crown is credible and trustworthy, I note that, beyond highlighting the dated nature of much of the evidence, the validity of the information provided through Cpl. Gale was not, by and large, called into question by the Respondent.
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> [46] And finally, the fact that so many of the risk factors identified in the admittedly dated risk and psychological assessments are clearly still evident in Mr. Schafer's own evidence bolsters the credibility and trustworthiness of the hearsay information provided.

Appellant's Argument

[8] The Appellant submits that the hearing judge incorrectly accepted the evidence given by Cpl. Gale. The Appellant submits that the purpose of strict procedural safeguards in criminal law, including evidentiary standards, is a product of the jeopardy of the proceedings. The Appellant submits that courts regularly afford the benefit of these standards to criminal offences that carry no prospect of incarceration, and should as well in s. 810.2 applications.

Hearsay Evidence

[9] The Appellant submits that the cases relied on by the hearing judge, *Flett*, *Budreo*, and *Haydock v. Baker*, 2001 YKTC 502 are all either problematic or off-point.

[10] The Appellant submits that the Supreme Court of Canada decision relied upon in *Flett* is *R. v. Zeolkowski*, [1989] 1 S.C.R. 1378, which dealt with s. 98 firearms prohibitions and that that case turned on the phrase "all relevant evidence" in s. 98(6). The Appellant submits that the court found that this specific phrase signalled a lower evidentiary standard (at paras. 18-19) whereas the Court explicitly distinguished s. 98 proceedings from s. 810 (then s. 745) proceedings, as those sections contain different evidentiary standards (at para. 15).

[11] The Appellant submits that *Budreo* was an analysis of the constitutionality of s. 810.1; it did not purport to deal with evidence law. The portion cited by Ruddy J.- that hearsay "might" be admissible at a s. 810 hearing - is at best *obiter dicta*. The Appellant further submits that likewise, *Haydock* does not address evidentiary standards.

[12] The Appellant submits that both *Flett* and the present case erred by conflating the issue of standard of proof with admissibility of evidence.

[13] The Appellant concedes that there is case law which suggests the standard of proof to be met by the applicant in a s. 810.2 hearing is that of a balance of probabilities. However, the Appellant submits that on a plain reading, even if the language in s. 810.2 suggests a balance of probabilities standard (rather than proof beyond a reasonable doubt) - a point the Appellant does not concede - the term "evidence adduced" in s. 810.2 does not signify a lower evidentiary standard. Nor does a purposive interpretation of s. 810.2.

[14] The Appellant submits that absent clear language otherwise, the normal rules of evidence apply and that this reasoning is consistent with Supreme Court of Canada decisions, including *R. v. McIvor*, 2008 SCC 11. In that case the Supreme Court of Canada noted, at para. 19, in relation to evidence at a Community Supervision Order breach hearing, that:

> [I]t is helpful to consider what evidentiary rules would apply if Parliament had simply been silent on these matters. [....] However, the *Criminal Code* is silent with respect to applicable evidentiary rules. This is not unusual. In the absence of any applicable statutory provision, hearings are simply conducted in accordance with the common law rules of evidence applicable in all criminal courts. In order to prove an alleged breach of probation, the Crown must adduce admissible evidence and prove the allegation beyond a reasonable doubt. Evidence adduced by the Crown must comply with common law evidentiary rules, including the hearsay exclusionary rule. As in other proceedings, evidence is usually presented in the form of viva voce testimony, and the accused has the right to cross-examine the witnesses.

[15] The Appellant submits that the purpose of a peace bond is more than merely to prevent harm; it is to balance two competing interests: the protection of the public, and individual liberty. Appellate courts have consistently affirmed the principle that by design peace bond hearings presuppose baseline procedural safeguards. For example, in *Budreo* the Ontario Court of Appeal noted that s. 810 hearings must meet the "procedural fairness requirements of a summary conviction trial" (paras. 47-48).

[16] The Appellant further submits that in *R. v. Parks*, [1992] 2 S.C.R. 871, Sopinka J. (in concurring reasons) emphasised the importance of individual liberty in relation to common law peace bonds. He noted, at paragraph 32, that the power to impose a peace bond "cannot be exercised on the basis of mere speculation, but requires a proven factual foundation which raises a probable ground to suspect of future

misbehaviour." Sopinka J., at paras. 34-36, went on to question whether a peace bond would survive *Charter* scrutiny were the potential harm which the order contemplated is abstract. At that time Parliament had not yet enacted s. 810.2. It is the position of the Appellant that the potential harm which a s. 810.2 order contemplates is abstract.

[17] The Appellant submits that the statutory context of s. 810.2 also suggests a higher evidentiary standard as s. 810.2 is one of only two peace bond sections that requires the consent of the Attorney General to proceed and this distinguishes it from the more commonplace s. 810 peace bond, in which the typically legally untrained private citizen must persuade a court of their case. It is the Appellant's position that the state has the capacity and resources to abide by a higher evidentiary standard than the private citizen.

[18] The Appellant further submits that *Charter* s. 7 and s. 11(d) can further assist in resolving ambiguities in the interpretation of s. 810.2. In submissions counsel for the Appellant was explicit in stating that they do not challenge the constitutional validity of s. 810.2 but take the position that the *Charter* can assist in determining the appropriate evidentiary standard to be applied. Section 7 states "[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice". Section 11(d) states "[a]ny person charged with an offence has the right to be presumed innocent until proven guilty according to law in a fair and public hearing by and independent and impartial tribunal".

[19] The Appellant submits that a s. 810.2 hearing is a quasi-criminal proceeding which aims to promote public order within a public sphere of activity, and therefore falls under the scope of s. 11(d) (*R. v. Wigglesworth*, [1987] 2 S.C.R. 541, at para. 32). The

Appellant submits that a fair hearing includes full disclosure of the information on which the Crown is relying, and the right to (at a minimum) prevailing evidentiary standards in criminal matters.

[20] The Appellant further submits that a peace bond restricts liberty and therefore engages s. 7. The principles of fundamental justice under s. 7 guarantee procedural fairness to a degree that is consonant with the impact of the proceedings on the rights of the applicant. In *R. v. Wells*, 2012 ABQB 77, at para. 32 the Court applied the factors set out in *Baker v. Canada (Minister of Citizenship & Immigration),* 1999 SCC 699, to peace bonds and determined that they required "a very high degree of procedural fairness".

Opinion Evidence

[21] The Appellant further submits that it was an error for the territorial court judge to give any weight to the risk assessment made by Cpl. Gale in his affidavit and in his testimony. It is the Appellant’s position that a risk assessment is quintessentially expert opinion evidence and absent certain exceptions, expert or opinion evidence is inadmissible.

Respondent’s Argument

[22] It is the Respondent’s position that in a s. 810.2 application there are two elements which must be proven. The first component requires proof that, subjectively, the informant personally fears that the respondent will commit a serious personal injury offence as defined in s. 752 of the *Criminal Code*. Secondly, the hearing judge must examine the evidence adduced in the hearing and determine on an objective basis whether the informant's fear is reasonably based (*Haydock v. Baker*, 2001 YKTC 502 at para. 20; *Canada (Attorney General) v. Driver*, 2016 MBPC 3 at para. 22).

[23] The Respondent submits that the subjective test in the first component of proof does not focus on what the respondent did. Rather, it focuses only upon whether the informant fears the respondent will commit a serious personal injury offence. The Respondent submits there is no language in s. 810.2 calling for anything more than proof of a fear that the respondent will commit a serious personal injury offence.

[24] It is the Respondent's position that it is clear and undisputed that Cpl. Gale does indeed fear that the Appellant will commit a serious personal injury offence, as deposed to at para. 2 of Cpl. Gale's affidavit and through his sworn testimony at the hearing of the application.

Hearsay Evidence

[25] It is the Respondent's position that hearsay evidence may be relied upon in a s. 810.2 application, provided it is credible and trustworthy. As noted by the Ontario Court of Appeal in *Budreo* in the analogous context of s. 810.1 applications:

> ... although an informant's fear triggers an application ... a recognizance order can only be made if the presiding judge is satisfied by "evidence" that the fear is reasonably based. Section 810.1 (3) therefore requires the judge to come to his or her own conclusion about the likelihood that the defendant will commit one of the offences listed in subsection (1). Although the "evidence" the judge relies on might include hearsay, a recognizance could only be ordered on evidence that is credible and trustworthy.

[26] The Respondent relies on *Flett* at paras. 18-19 in support of its position that case law from various Canadian jurisdictions and levels of court is well settled upon the principle that hearsay is admissible evidence in s. 810.2 hearings.

[27] The Respondent further takes the position that, in *R. v. Smith*, [1992] 2 S.C.R. 915, at para. 2, the Supreme Court of Canada cited with approval the following statement from *Subramaniam v. Public Prosecutor*:

> Evidence of a statement made to a witness by a person who is not himself called as a witness ... is not hearsay and is admissible ... when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made. The fact that the statement was made, quite apart from its truth, is frequently relevant in considering the mental state and conduct thereafter of the witness...

[28] In this case no objection was taken to Cpl. Gale's evidence at trial and the Appellant's counsel in the application did not seek to impugn the reasonableness, credibility or trustworthiness of the underlying Correctional Service Canada records relied upon by Cpl. Gale in forming his fear.

[29] It is the Respondent's position that the Correctional Service Canada records were properly determined by the territorial court judge, with some reservations, to be sufficiently credible and trustworthy to be relied upon by Cpl. Gale as the foundation for his stated fear.

Opinion Evidence

[30] It is the Respondent's position that Cpl. Gale's purported fear is not an expert opinion, rather it is his subjective perception, which arises from his consideration of the risk assessments and other Correctional Service Canada records which he examined.

[31] It is the Respondent's position that Cpl. Gale was the applicant and his fear that the Appellant would commit a serious personal injury offence as defined in s. 752 of the *Criminal Code* was the basis for the application itself. The court in a s. 810.2 application must objectively assess the basis for that fear.

ANALYSIS

[32] It is notable that leave to appeal the decision in *Budreo* to the Supreme Court of Canada was dismissed ([2000], S.C.C.A. No. 542) and that *Flett* was an appeal decision.

[33] I do not find that statement made in *Budreo* that “the "evidence" the judge relies on might include hearsay” is *obiter dicta*. The word “might” simply connotes that hearsay is one type of evidence that may be relied on by the hearing judge.

[34] Further, while the review of case law from across the country set out at para. 19 of *Flett* includes cases addressing the standard of proof (a balance of probabilities) for a s. 810.2 application, the cases reviewed also encompass cases specifically addressing the evidentiary standard at such hearings. Paragraph 24 of that decision clearly indicates that it is the evidentiary standard that is considered and decided. Those cases addressing the standard of proof are simply assessed in respect of the fact that “[t]hese decisions at all court levels up to and including the Supreme Court of Canada confirm that s. 810 hearings are not criminal trials.”

[35] The Appellant did not challenge the admissibility of the hearsay evidence relied upon by Cpl. Gale during the hearing of the application, nor did the Appellant call into question the reliability of the records relied upon by Cpl. Gale.

[36] I agree with both the premise and the conclusion reached in *Flett*, specifically at para. 24, that in s. 810.2 hearings:

> The usual rules of evidence applicable in criminal trials do not apply. Hearsay evidence is admissible. The question before the judge is to determine whether or not sufficient weight can be given to the hearsay evidence to establish the reasonable and probable grounds required for the individual to swear the information to justify the fear of harm to others by the Respondent.

[37] I find that the hearing judge in this case did not err in relying on the hearsay evidence provided by Cpl. Gale, or in her finding that in all of the circumstances it was credible and trustworthy.

[38] In respect of the opinion proffered by Cpl. Gale in his affidavit and in his testimony, that he feared that Christopher Schafer would commit a serious personal injury offence, I agree with the Crown's submission that the opinion offered is not an expert opinion subject to the relative rules of admissibility.

[39] Cpl. Gale's fear that the Appellant would commit a serious personal injury offence as defined in s. 752 of the *Criminal Code* was the basis for the application itself. The role of the court in a s. 810.2 application is to objectively assess the basis for that fear.

[40] I find that the hearing judge in this case did not improperly rely upon the opinion given by Cpl. Gale in his affidavit and in his testimony, but properly assessed whether there existed, on an objective basis, reasonable grounds for that fear.

[41] I find no basis on which to overturn the decision of Ruddy J. made May 10, 2018 imposing a two-year s. 810.2 order on the Appellant, Christopher Schafer.

[42] The appeal is dismissed.

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MILLER J.