

SUPREME COURT OF YUKON

Citation: *R. v. J.J.P.*, 2018 YKSC 7

Date: 20180213
S.C. No.: 17-01513
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16-01514A
16-01514B
16-01513
17-00700
Registry: Whitehorse

BETWEEN:

HER MAJESTY THE QUEEN

AND

J.J.P.

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

Before Mr. Justice R.S. Veale

Appearances:

Noel Sinclair
Susan E. Bogle
Vincent Larochelle

Counsel for the Crown

Counsel for the Defence

REASONS FOR JUDGMENT

[1] VEALE J. (Oral): My decision in this matter should firstly set out what the issue is. We are now in a sentencing hearing for J.J.P. He has pled guilty to a number of outstanding offences that are sexual in nature (child pornography). The Crown is applying for a dangerous offender or a long-term offender designation.

[2] Pursuant to that, the Court has ordered that Dr. Lohrasbe, an eminent psychiatrist in this jurisdiction, give his opinion with respect to assessments of risk for violence, treatability, and risk management of sexual offenders. He is going to testify momentarily on a lengthy report that he has provided to the Court.

[3] Ms. P., the wife of J.J.P., is listening to the case at this very moment. The Crown has applied to have an exclusion of witnesses. I have ordered the general exclusion of witnesses but excepting this particular application. The Crown is seeking the exclusion of Dr. Lohrasbe's evidence from Ms. P.

[4] The Canadian Encyclopedic Digest sets out the general rule rather succinctly at para. 216:

Before evidence is taken at a hearing, a party may ask the judge to order the exclusion of prospective witnesses from the courtroom. The danger if this is not done is that witnesses who hear other witnesses for the same party give evidence may tailor their own testimony to conform to that already given, or at the very least, be better prepared for cross-examination. ...

[5] It is a discretionary matter.

[6] The Crown also points out that the report of Dr. Lohrasbe, which will be redacted and filed this morning, is a report that will be available to Ms. P. and to counsel for J.J.P. to review and consider, with respect to the evidence that she may or may not give in this sentencing hearing.

[7] I am of the view, nonetheless, that it is appropriate in this circumstance to not have Ms. P. hear the evidence of Dr. Lohrasbe so that we are assured that there will be no conscious or unconscious tailoring of her evidence. I think that is a very important aspect to this sentencing hearing. However, she will be able to read the report and certainly discuss it with counsel for J.J.P. under the ethical rules that apply. It would be

more appropriate for her not to hear the examination and cross-examination of Dr. Lohrasbe. I am making this order.

[8] I trust that someone will be able to go into the room where Ms. P. is to advise her that she is not permitted to stay for this evidence of Dr. Lohrasbe.

[9] MR. LAROCHELLE: As I've told the Court, she might decide to just not testify and listen to the evidence.

[10] THE COURT: Crown, what is your view on that?

[11] MR. SINCLAIR: I am content with that and I suppose that if Mr. Larochelle is undertaking not to call Mrs. P., in the event that she does choose to sit in, then that's fine.

[12] What has happened in some of the cases is that an order is made and, yet for one reason or another, a witness remains present in the courtroom and then is called to testify. That raises its own problems, which seem most usually to be resolved by attaching a different weight to the evidence of the witness, but I don't even want to get there.

[13] If that choice is made and Mrs. P. decides to watch remotely or appear in the courtroom, then I would only be comfortable with that if it is on the undertaking which I have described.

[14] THE COURT: The undertaking of Mr. Larochelle?

[15] MR. SINCLAIR: Yes.

[16] MR. LAROCHELLE: Well, what I can undertake to do is to talk to Ms. P. and explain to her that if she does that, she can't testify. If she later comes to me and says,

"I really want to testify", I'm going to put it to the Court and then it's going to be for the Court to decide what to do with that.

[17] But at this point, what we could do is we could deal with the other order and I can go explain the situation to Ms. P. and I will make sure that she's not a prospective witness, as far as I am concerned. But, I mean, if she —

[18] THE COURT: You would give your undertaking if she decides she wants to listen to the evidence?

[19] MR. LAROCHELLE: Well, I can't give an undertaking not to call someone.

[20] THE COURT: You can't; why not?

[21] MR. LAROCHELLE: I can say I have no intention at this moment of calling her and I don't — I'm not trying to manoeuvre around and —

[22] THE COURT: No, no. I've made an order —

[23] MR. LAROCHELLE: Yes, absolutely.

[24] THE COURT: — that she's excluded.

[25] MR. LAROCHELLE: Absolutely. And I will go explain that order to her and I'll make sure that the terms of the order are respected. That's my undertaking.

[26] THE COURT: Now I am not sure what you mean, Mr. Larochelle. If you mean that there is still some room for you to call her if she stays and listens to the evidence that would be in breach of the order.

[27] MR. LAROCHELLE: That would be her being in breach of the order.

[28] THE COURT: Correct.

[29] MR. LAROCHELLE: The order is not aimed at me, Your Honour. I'm defence counsel for J.J.P. and I will do what I need to do to bring his case as best and as ferociously as I can.

[30] I am going to explain that order to Ms. P., and then I am going to continue conducting my defence. If she tells me, "No, don't call me", then I'll tell her then, "Yeah, you can probably listen to the proceedings." But I can't fetter my own discretion, as defence counsel, on the basis of an order affecting someone else.

[31] If she tells me, "No, I don't want to testify" and she's lying to me, she can be found in contempt of court. I will explain all of that to her. That's the best I can do, Your Honour.

[32] MR. SINCLAIR: Ultimately, it's Mr. Laroche's decision as to who he calls or who he doesn't call. It's not up to Mrs. P. to decide now to do one thing and later to decide to do something else.

[33] In spite of my friend's able, sort of, footwork around this, I think that it is ultimately within his power to make that undertaking and I can't understand why he seems to be unwilling to acknowledge that.

[34] THE COURT: What I will do, at this point, is adjourn for 10 minutes to give you an opportunity to speak to Ms. P., but you can indicate that if she listens to the evidence of Dr. Lohrasbe, then she is not going to be a witness in the proceeding.

[35] MR. LAROCHELLE: What I can explain to her is if she listens to the evidence of Dr. Lohrasbe and is a witness in these proceedings, she will be in contempt of court. I think that's what falls from the order, Your Honour.

[36] THE COURT: I do not want to get into splitting hairs. I have ordered the exclusion of witnesses. If a witness sits and hears the evidence in the face of an exclusion order, they cannot be called as a witness.

[37] MR. LAROCHELLE: Actually, they can, Your Honour. The problem is then they will be in contempt of court. There's case law dealing with that issue, as my friend has highlighted.

[38] MR. SINCLAIR: Well, again, you would — if that does happen, your discretion continues, with respect to whether or not to hear that witness, and it will be the Crown's application in that unlikelihood that that witness should not be heard, based on the clarity of our understanding at the front end of this matter.

[39] THE COURT: Fair enough. I think it is very clear what is before the Court.

[40] Please speak to Ms. P.

VEALE J.