

Publication of information that could disclose the identity of the complainant or witness has been prohibited by Court Order pursuant to s. 486(3) of the Criminal Code.

R. v. Harper, 2002 YKSC 10

Date: 20020225
Docket No.: 00-00593D
Registry: Whitehorse

IN THE SUPREME COURT OF THE YUKON TERRITORY

BETWEEN:

HER MAJESTY THE QUEEN

AND:

THOMAS MOSES HARPER

NARISSA SOMJI

For the Crown

FIA JAMPOLSKY and GORDON COFFIN

For the Defence

**MEMORANDUM OF RULING
DELIVERED FROM THE BENCH**
(On whether the complainant will be required to testify)

[1] VEALE J. (Oral): The Crown takes the position that the complainant in this sexual assault trial will be traumatized by testifying. The complainant has been diagnosed as having multiple sclerosis, a debilitating condition, both emotionally and physically.

[2] In order that this trial can proceed, though, I will give my decision orally at this

time. However, I reserve the right to give further written reasons.

[3] Dr. Anzarut, a neurologist specializing in multiple sclerosis treatment, testified that the complainant had a severe attack and was diagnosed with multiple sclerosis in 1994. She was essentially blind, living on feeding tubes and in a fetal position at that time. She has recovered considerably, to the point where she is now wheelchair-ridden, but she is able to talk and hear. She is unable to stand or walk, however. He describes her as having chronic multiple sclerosis with progressive deterioration.

[4] Dr. Anzarut says that testifying will have an emotional impact such as tremors and stress, but it will be short term and have no long-term physical or emotional effect. He describes her as like a six-year-old, but denies that there will be any risk of physical harm in her giving evidence

[5] Dr. Macdonald, her family physician, has a great deal of experience with multiple sclerosis and this complainant, as her patient, since 1982. She explained that the birth of her second child preceded the 1994 attack, which left her paralyzed. Dr. Macdonald states that the complainant functions best when in a routine and familiar environment. When out of this environment, she becomes agitated and the stress could exacerbate her condition. Dr. Macdonald testified that the potential for harm is reduced if the examination took place at Macaulay Lodge, which is where she presently resides. She described the risk of harm as a potential risk.

[6] A videotape of the complainant being interviewed at the police station, with a social worker present, was played. This was after the alleged incident. The complainant did not appear to be overly agitated or stressed, although that is simply

my observation from a videotape.

[7] Although I have some misgivings, I am going to order that the complainant can testify to determine whether she has the capacity to give evidence under s. 16 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5. I reserve the right to terminate the examination at any time, as this Court has no wish to cause injury to any witness.

[8] It appears she is capable of testifying in a controlled environment and I would like to hear from counsel with respect to those terms. I do not know the facilities that are available at Macaulay Lodge. There should be a screen used because the right of the accused to be present has to be protected as well. She should have a worker present, seated beside her, and that worker should not assist her in any way in answering questions, but simply be there to make her feel comfortable. Presumably, it would be Ms. Senkpiel or whatever other worker is appropriate.

[9] It would seem to me that if she were present and set up in a room with a screen and comfortable in that situation, then I could enter, followed by counsel. I doubt very much that there is going to be any particular room for the public, although I will hear from counsel about whether the press should be present. Also, just out of concerns for the people at Macaulay, there should be an R.C.M.P. officer accompanying your client, Mr. Harper, to that scene, which I understand is the scene where the alleged incident took place; is that correct?

[10] MR. COFFIN: Yes.

[11] THE COURT: Is there anything else or any comments counsel wish to make on what I have said so far?

[12] MS. SOMJI: Does your examination provide for the possibility of counsel asking questions directly, or would you like us to submit questions that we think might or should be considered?

[13] THE COURT: I am open to submissions on that. I think my preference would be to have one person doing the questioning, being myself, but counsel of course can make suggestions. But counsel may have an issue to raise with that and may want to do their cross-examination directly.

[14] MR. COFFIN: Well, I think – unless Your Lordship demands an answer now – we have some time to consider that aspect before we get there. I think we agree that it would be preferable to come from one person, as opposed to –

[15] THE COURT: In terms of her comfort level?

[16] MR. COFFIN: Yes, certainly.

[17] THE COURT: I mean, if you think that I missed something in terms of the s. 16 inquiry that is required, then obviously I would be open to posing more questions, but none of the questions will be in a cross-examination mode of any nature. They will just be eliciting her responses to the issues of capacity and ability to tell the truth.

[18] MS. SOMJI: In addition, Your Honour, as I indicated, we have made tentative provision for the Court to attend at Macaulay Lodge at 4:00 p.m. this afternoon. I would ask that we consider our attendance -- if we could enter as a

Court party into the premises together, in order to respect the residents within that lodge. So rather than people filtering in on an arbitrary basis, if we could all meet and enter and be escorted in and escorted out. In addition --

[19] THE COURT: In that respect, just to deal with that issue first, I think, then, we should assemble outside Macaulay Lodge at quarter to four, and proceed together and if someone is not there by that time then they will not have entry.

[20] MS. SOMJI: Again, also, Your Honour, back to the issue of questioning, it would be the Crown's position that the Court should consider the test set out in *R. v. Marquard*, [1993] 4 S.C.R. 223, you know, whether the witness is able to communicate the evidence. That necessitates an inquiry to their ability to perceive, recollect and communicate, and so the Crown would have a suggested and fairly extensive list of questions in that regard, which may be more than is usually done, for example, when we have child witnesses and simply ask whether they --

[21] THE COURT: Do you have a list of questions?

[22] MS. SOMJI: I'm putting one -- I do, Your Honour, and I will put it together. I have started to put it together in due course, but if that is agreeable I will provide this shortly to the Court.

[23] THE COURT: I have no difficulty with that and you should provide it to your friends as well, so that they can comment if they have concerns about any particular question.

[24] MS. SOMJI: And just so I'm clear, then, the nature of the

inquiry would be both with respect to the ability of the complainant to understand the oath and affirmation as well as the ability to communicate the evidence; is that correct?

[25] THE COURT: That is correct.

[26] MS. SOMJI: Your Honour, if we are attending Macaulay Lodge, I would also at this time would wish the Court to consider, since we are going to be there in any event, an application under s. 652 to actually view the scene of the alleged incident and, in that respect, following your inquiry with Ms. D. I would ask that if the Court could view the scene. In particular, the place where the alleged --

[27] THE COURT: Is there any particular reason for that?

[28] MS. SOMJI: Generally, the evidence in court is sufficient, but as we are attending there it may help for the Court to actually view the scene and see the particular locations, distances, between rooms, the size of the room, et cetera, the location of certain bells, access, how the doors are accessed, how the elevator's accessed, how, et cetera, et cetera. And, in my view, seeing it is always of assistance, as opposed to simply hearing of it.

[29] MS. JAMPOLSKY: No, My Lord, I'm not sure that it's necessary. The *Code* certainly allows for viewing to take place at any time, but I would submit that without hearing evidence it's impossible at this stage to make a determination of whether it is necessary or it would be superfluous to view the facilities, and without, again, having heard any evidence before the Court except with respect to capacity, I would respectfully submit that it would be premature to do it at this stage. Certainly,

My Lord, if I may, there's all indication that we are already going to be causing a disruption by going to the facility, and I would submit that by having the court party go through the entire facility, including the second floor and the rooms where patients and clients live, is going to be, at this stage, an unnecessary disruption, not only to Ms. D. but the other residents and the staff of Macaulay Lodge.

[30] MS. SOMJI: In that regard, Your Honour, I certainly would not have made the request without having first spoken to the administrators of Macaulay Lodge, and they have indicated they would be comfortable with a limited viewing if the court party stayed together, and has certainly not indicated to me that that would be problematic.

[31] THE COURT: Well, I am going to exercise my discretion at this point not to do the view. If it appears there is reason to do so, there will be no difficulty in doing it at a future date if the Crown wishes to -- or the defence wishes to renew that application.

[32] Anything further, counsel? If not, we will adjourn, then, to meet at 3:45 at Macaulay Lodge.

VEALE J.