SUPREME COURT OF YUKON

Citation: *R. v. Farah,* 2021 YKSC 23

Date: 20210406
S.C. No.: 19-01509
Registry: Whitehorse

BETWEEN:

HER MAJESTY THE QUEEN

AND

ABDIRAHMAN FARAH

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

Publication of evidence taken at preliminary inquiry is prohibited by court order pursuant to s. 539 of the *Criminal Code.*

Before Justice K. Wenckebach

Appearances:

Lauren Whyte	Counsel for the Director of Public Prosecutions
Abdirahman Farah	Appearing on his own behalf
Casey St. Germain	Counsel appointed pursuant to s. 486.3 of the *Criminal Code*, appearing by telephone

REASONS FOR JUDGMENT

Introduction

[1] WENCKEBACH J. (Oral): The accused, Mr. Abdirahman Farah, is charged with one count of sexual assault, contrary to s. 271, and one count of touching for a sexual purpose a person under the age of 16, contrary to s. 151 of the *Criminal Code*.

[2] Counsel Casey St. Germain was appointed pursuant to s. 486.3 of the *Criminal Code* to cross-examine the complainant. She has brought an application to withdraw as counsel on the basis that there is a serious loss of confidence between her and Mr. Farah as defined under Rule 3.7–2 of the Code of Conduct, Law Society of Yukon.

[3] The issue at bar is whether Ms. St. Germain is in a solicitor-and-client relationship with the accused and is able to withdraw because she has concluded that there has been a serious loss of confidence between her and Mr. Farah.

Facts

[4] Mr. Farah was charged on July 4, 2018. He retained a lawyer in August 2018 but the lawyer got off the record very soon thereafter. Mr. Farah retained a second lawyer, who withdrew in December 2018. Because Mr. Farah no longer had a lawyer, the Crown applied for an order under s. 486.3 of the *Criminal Code* that counsel be appointed to cross-examine the complainant, which was granted on December 4, 2018.

[5] A lawyer was appointed for that purpose on January 18, 2019. The dates for the preliminary inquiry were also set.

[6] On March 25, 2019, the date upon which the preliminary inquiry was set to proceed, counsel appointed to cross-examine the complainant withdrew.

[7] The preliminary inquiry was adjourned to October 10, 2019. A new lawyer was appointed to cross-examine the complainant in April 2019 and an order that an *amicus curiae* be appointed was also made in April 2019.

[8] In argument before me, the Crown, who has been Crown on this matter for most if not the whole of these proceedings, explained to me that the *amicus* was “waiting in

the wings" to take over as counsel to cross-examine the complainant if the lawyer appointed to cross-examine the complainant withdrew at the preliminary inquiry.

[9] On the day of the preliminary inquiry, October 10, 2019, the lawyer appointed to cross-examine the complainant withdrew as counsel. The *amicus* stepped in to cross-examine the complainant and the preliminary inquiry was able to proceed. After completion of the preliminary inquiry, Mr. Farah's charges were transferred to Supreme Court.

[10] As Mr. Farah continued to be self-represented, Crown sought that new counsel be appointed under s. 486.3. The order was granted and Ms. St. Germain was appointed on November 4, 2019. Trial dates were set for May 12, 2020, but were adjourned due to COVID-19.

[11] In late 2020, Ms. St. Germain determined that she would make an application under s. 276 and/or s. 278 of the *Criminal Code*. Ultimately, she filed notice of Constitutional challenge to parts of s. 278. The hearing dates were set for March 29 and 30, 2021.

[12] The week of March 22, 2021, Ms. St. Germain sought an urgent pre-trial conference. Mr. Farah did not appear at the pre-trial conference. It should be noted that, through no one's fault, Mr. Farah did not learn of the pre-trial conference until after it was held. Ms. St. Germain expressed concern that Mr. Farah would not attend the hearing of the application on March 29, 2021.

[13] Mr. Farah did attend on March 29. Also on March 29, Ms. St. Germain applied to withdraw as counsel. As such, rather than proceed with the Constitutional hearing, counsel provided submissions on Ms. St. Germain's application to withdraw.

Issues

[14] This application has two issues:

(1) does a case management judge, who will not preside over the proceedings, have the authority to remove counsel appointed under s. 486.3; and

(2) can counsel appointed under s. 486.3 withdraw on the basis of a serious loss of confidence as contemplated in Rule 3.7–2 of the Code of Conduct?

Analysis

[15] Firstly, does a case management judge, who will not preside over the proceedings, have the authority to remove counsel appointed under s. 486.3?

[16] Section 486.3 provides for procedures for the appointment of counsel to cross-examine witnesses, including the complainant, where the accused is self-represented and other conditions are also met.

[17] Section 486.3(4.1), which sets out who can hear the application, states:

> An application referred to in any of subsections (1) to (3) may be made during the proceedings to the presiding judge or justice or, before the proceedings begin, to the judge or justice who will preside at the proceedings or, if that judge or justice has not been determined, to any judge or justice having jurisdiction in the judicial district where the proceedings will take place.

[18] In Mr. Farah's matter, another justice of the Supreme Court of Yukon, Justice Campbell, will preside at the proceedings.

[19] At the outset of the hearing, I raised the question as to whether I had jurisdiction to hear the application. Both Ms. St. Germain and the Crown took the position that I did have the authority to hear the application. I ultimately agreed and proceeded with the hearing.

[20] Briefly, my reasons are as follows.

[21] I based my decision on the reasoning in the case of *R. v. Aden*, 2021 ONSC 1238. *Aden* dealt with the provisions at s. 278.3 of the *Criminal Code*, which forms part of the provisions that govern the production of third-party records to an accused, and which has similar wording to s. 486.3(4.1).

[22] Under s. 278.3, an application must be made "to the judge before whom the accused is to be, or is being, tried." In *Aden*, the accused argued that the application must be made before the trial judge. The judge in that case determined that s. 551.3, which provides that a case management judge exercises the powers of a trial judge, was applicable. He concluded:

> [8] In my respectful view, when s. 278.3 is read with s. 551.3, Parliament's intent is that a case management judge is empowered to hear applications under s. 278.2. Parliament did not limit the scope of a case management judge's authority. ...

[23] Section 486.3(4.1) does not use the word "trial" but rather "proceedings". I conclude that the difference is not distinguishable. The intent of the legislation is to allow for case management judges to hear applications for the appointment and withdrawal of counsel for the purposes of cross-examination. As case management judge, I therefore have the authority to hear the application.

[24] Secondly, can counsel appointed under s. 486.3 withdraw on the basis of a serious loss of confidence as contemplated in Rule 3.7–2 of the Code of Conduct?

[25] During her oral submissions, Ms. St. Germain initially suggested that an *amicus curiae* could be appointed to cross-examine a witness at times in lieu of appointments pursuant to s. 486.3.

[26] Crown disagreed and made submissions on this.

[27] When I asked Ms. St. Germain for her response to Crown's arguments, she stated that she did not have a response. Her position was that whether an *amicus* could be appointed went beyond the question before the Court. She maintained that she was in a solicitor-and-client relationship and had the ability to withdraw for ethical reasons.

[28] Given Ms. St. Germain's response, I will not deal with the question of whether *amicus* can be appointed instead of appointing counsel pursuant to s. 486.3.

[29] Turning to the application to withdraw, Ms. St. Germain submitted that as counsel appointed to cross-examine the complainant, she is in a solicitor-and-client relationship with Mr. Farah. Consequently, the principles of *R. v. Cunningham*, [2010] 1 S.C.R. 331, apply. Pursuant to *Cunningham*, at para. 49, “[i]f withdrawal is sought for an ethical reason, then the court must grant withdrawal”.

[30] Ms. St. Germain here argued that, as she was seeking to withdraw on ethical grounds, I must grant her application.

[31] Crown, on the other hand, argued that Ms. St. Germain is not in a solicitor-and-client relationship with Mr. Farah. As a result, *Cunningham* does not apply. Crown submitted that, in this case, Mr. Farah's inability to work with counsel has resulted in lawyer after lawyer being appointed but then withdrawing. This matter has therefore been stymied by Mr. Farah's inability to work with counsel. Ms. St. Germain should not, under these circumstances, be permitted to withdraw.

[32] The case law is divided on whether a solicitor-and-client relationship exists between counsel appointed under s. 486.3 of the *Criminal Code* and an accused.

[33] In *R. v. Faulkner*, 2013 ONSC 2373, the Court determined that there was a solicitor-and-client relationship. Similarly, in *R. v. Wapass*, 2014 SKCA 76, the Court

stated: “Counsel appointed under s. 486.3(2) clearly acts as the accused's counsel, not as *amicus curiae* ...” (at para. 25).

[34] On the other hand, the courts in *R. v. Thornton*, 2014 ONSC 6688, at para. 52, and *R. v. Bakhash*, 2017 ONSC 3835, at para. 38, decided that counsel appointed under s. 486.3 and the accused do not have a solicitor-and-client relationship.

[35] I respectfully disagree with the conclusions in *Faulkner* and *Wapass*. In *Faulkner*, both counsel agreed that there was a solicitor-and-client relationship. The judge did not, therefore, have the benefit of full argument when making his decision. In *Wapass*, similarly, the question was not central to the decision before the Court.

[36] In my opinion, some of the essential elements required for a solicitor-and-client relationship are missing from the relationship between counsel appointed under s. 486.3 and an accused. As stated by Justice Gray in *Thornton*: “[t]he essence of a solicitor and client relationship is one of confidence and consent” and requires “a mutually consensual relationship” (at para. 53).

[37] In contrast, under s. 486.3, there is no requirement that the accused consent to the appointment of counsel. The Court may, indeed, make an order for counsel in the face of the accused's objections. Moreover, the provision's purpose is to protect vulnerable witnesses from being cross-examined by an unrepresented or self-represented accused. Counsel is thus not appointed for the benefit of the accused but for the benefit of the witness (see *R. v. C.G.M.*, 2015 ABCA 375, at para. 16).

[38] I therefore conclude that the relationship is not that of a solicitor-and-client relationship. This does not dispose of the matter, however. Although counsel appointed for the purposes of cross-examination and the accused do not have a full

solicitor-and-client relationship, the relationship does contain elements of a solicitor-and-client relationship. Thus, it remains to be considered whether a lawyer appointed for the purposes of cross-examination can withdraw on the same grounds as a lawyer in a solicitor-and-client relationship with a client.

[39] This analysis involves, first, determining what the relationship is between counsel and the accused. It also involves examining the principles underlying Rule 3.7–2 of the Code of Conduct of Yukon. Thirdly, I will determine whether the principles in Rule 3.7–2 apply equally to relationships between counsel appointed for the purposes of cross-examination and the accused. Finally, I will provide some guidance on how counsel appointed under s. 486.3 can fulfill their obligations.

The relationship between the accused and counsel

[40] Case law has identified that some elements of a solicitor-and-client relationship apply also to the relationship between an accused and a lawyer appointed for the purposes of cross-examination. There is a requirement of confidentiality (see *Thornton*, at para. 53). Counsel must also advance the accused's interests. Furthermore, counsel is required to consult with the accused and take instructions from them (see *Thornton*, at para. 54). The lawyer is therefore required to communicate and work with the accused.

[41] The same cannot be said of the accused, however. As counsel is appointed for the benefit of the witness, and as the appointment can be made over the objections of the accused, I conclude that there is no obligation on the accused to communicate and work with counsel. In fact, because an accused may be asked to work with legal

counsel that the accused neither sought nor wanted, the relationship can be marked by conflict and disagreement.

[42] The case law helps to illustrate the kind of issues that may arise between the accused and counsel appointed to cross-examine a witness. In *R. v. Jerace*, 2021 BCCA 94, at para. 55, and at *Bakhash*, at para. 15, the accused wanted counsel to examine a witness on the issues that, in counsel's opinion, were improper or not required. In *Thornton*, the accused wanted counsel to pursue a line of questioning which counsel did not believe would prove fruitful (at para. 60). In *Faulkner*, the accused wanted to dictate every question that appointed counsel would ask the witness (see paras. 46-47).

[43] So, while the lawyer must try to communicate and get instructions from the accused, the accused does not need to trust or want to work with the lawyer. The relationship between the accused and counsel is not reciprocal and can be conflictual.

Rule 3.7–2 of the *Code of Conduct*

[44] In contrast to the relationship between appointed counsel and the accused, trust is an essential component of the solicitor-and-client relationship. As a result, where trust is lacking, the lawyer may have cause to withdraw as counsel.

[45] Rule 3.7–2 of the Code of Conduct addresses the requirement of trust and when a lawyer may consider withdrawing in circumstances where trust is lacking.

[46] Under Rule 3.7-2, a lawyer may withdraw where there has been a serious loss of confidence between the lawyer and the client.

[47] The commentary states:

> [1] A lawyer may have a justifiable cause for withdrawal in circumstances indicating a loss of confidence, for

> example, if a lawyer is deceived by his client, the client refuses to accept and act upon the lawyer's advice on a significant point, a client is persistently unreasonable or uncooperative in a material respect, or the lawyer is facing difficulty in obtaining adequate instructions from the client. ...

[48] A client who refuses to act on advice or is persistently uncooperative may not trust their lawyer's judgment; likewise, a client who is not giving instructions to their lawyer may not trust them. Without this essential element, the solicitor-and-client relationship founders and the lawyer can withdraw as counsel (see *Russell & Dumoulin v. Farrell*, [1997] B.C.J. No. 753 (B.C.S.C), at paras. 14 and 16).

Application of Rule 3.7–2 to counsel appointed pursuant to s. 486.3

[49] In my opinion, Rule 3.7–2 does not completely apply to the relationship of accused and counsel appointed under s. 486.3 of the *Criminal Code*. As trust is the foundation for the solicitor-and-client relationship, it follows that the relationship cannot continue where trust has broken down. However, in the relationship between an accused and counsel appointed for the purposes of cross-examination, trust is not essential; the relationship can exist without it. As such, lack of trust cannot serve as the basis to terminate the relationship.

[50] Moreover, using these actions as reasons for withdrawing as counsel for the purposes of cross-examination could lead to a revolving door of appointments and withdrawals of counsel which could, in turn, bring the court proceedings to a grinding halt. The process cannot be stymied because the conditions for appointing counsel under ss. 486.3(1), (2), or (3) are met but the accused cannot or will not work with any counsel.

[51] The Crown submits that that is indeed what has occurred in the case at bar. Mr. Farah said during oral submissions that he has tried to work with counsel and that

he has not wilfully impeded the progress of the proceedings. It is not necessary for me to decide whether Mr. Farah has been acting wilfully or not. It is sufficient to note that Ms. St. Germain is the fourth lawyer to have been appointed for the purposes of cross-examination, if one includes the lawyer appointed as *amicus*. The preliminary inquiry was only able to proceed because the Court and counsel had the foresight to have an *amicus* appointed and ready to conduct cross-examination if the counsel appointed to cross-examine the complainant withdrew. I am not impugning the counsel who have attempted to take on the task under s. 486.3. However, the progression of these proceedings has been frustrated by the appointment and subsequent withdrawal of multiple counsel.

[52] I therefore conclude that Rule 3.7–2 does not apply in its entirety to counsel appointed to act for the purposes of cross-examination. Specifically, situations such as refusing to accept and act upon a lawyer's advice on significant points, persistent unreasonableness or uncooperativeness in material respects, or difficulty in obtaining adequate instructions from the client should not, in and of themselves, form the grounds for withdrawal as counsel. On the other hand, there still will be circumstances in which a lawyer can, and maybe at times must, withdraw.

[53] For instance, where an accused alleges that the lawyer acted negligently or contrary to their professional duties, where an accused deceives the lawyer or the lawyer considers that they may violate their duty to the court if they continue in their appointment, then the lawyer must assess all the circumstances and, where appropriate, withdraw.

Assisting the Accused

[54] A lawyer appointed for the purposes of cross-examination may face significant challenges in their role. Where the accused is resistant to the lawyer's advice or disagrees with the lawyer's assessment of a legal issue, the lawyer may seek direction from a court (*Jerace*, at para. 102).

[55] If the accused simply refuses to engage with counsel, then counsel should use the materials they have to prepare for cross-examination as best they can.

[56] The lawyer should as well ensure that they continue to communicate with the accused even if the accused does not respond. The lawyer should be careful to explain how they intend to proceed, including what they understand the issues to be, their theory of the defence, and areas upon which they intend to cross-examine the witness. Unless the accused raises an issue with the proposed course of action, counsel can presume that the accused takes no issue with the way counsel intends to proceed with the case.

[57] Lawyers also have developed skills for working with reluctant or skeptical clients and can put them to use even in trying circumstances.

Conclusion

[58] I therefore deny Ms. St. Germain's application to withdraw, as she is not in a solicitor-and-client relationship with Mr. Farah. However, I leave it in Ms. St. Germain's hands to consider this decision and determine whether she can continue to act or if she must, because of ethical reasons, withdraw.

[59] During oral submissions, after some discussion, Mr. Farah said that he would like to continue to work with Ms. St. Germain. Ms. St. Germain may consider this as part of

her assessment as to whether there are grounds for withdrawing. If she does renew her application to withdraw, she should do so very soon so this matter can move forward.

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WENCKEBACH J.