

SUPREME COURT OF YUKON

Citation: *R v Farah*,
2021 YKSC 38

Date: 20210723
S.C. No. 19-01509
Registry: Whitehorse

BETWEEN

HER MAJESTY THE QUEEN

APPLICANT

AND

ABDIRAHMAN FARAH

RESPONDENT

Publication of information that could identify the complainant or witness is prohibited pursuant to s. 486.4 of the *Criminal Code*.

Before Justice K. Wenckebach

Counsel for the respondent

Amy Porteous and
Lauren Whyte

Self-represented

Abdirahman Farah

REASONS FOR DECISION

INTRODUCTION

[1] This is an application made by the Crown to permit the complainant to testify by CCTV, pursuant to s. 486.2(2) of the *Criminal Code* (the “Code”). The accused, Mr. Abdirahman Farah, is charged with sexual assault and touching for a sexual purpose a person under the age of 16, contrary to ss. 271 and 151 of the *Code*.

ISSUES

[2] The issues here are:

A. What weight should be given to the affidavit of Corporal Manweiller?; and

B. Would testifying by CCTV facilitate the complainant's testimony?

[3] I give no weight to paras. 7, 9 and parts of para. 8 of Cpl. Manweiller's affidavit.

[4] Despite this, I have sufficient information to conclude that it is in the interests of justice that the complainant be permitted to testify by CCTV.

ANALYSIS

A. What weight should be given to the affidavit of Corporal Manweiller?

[5] The Crown filed an affidavit sworn by Cpl. Kelly Manweiller of the RCMP, the lead investigator in the criminal charges, in support of its application.

[6] Corporal Manweiller provides evidence with regard to the complainant's age now and at the time of the alleged offence, and the nature of the offence. She also explains that she spoke with the complainant on May 24, 2021. The complainant told Cpl. Manweiller that she would be "extremely uncomfortable" if she were required to testify while in the same room as Mr. Farah, and that she would "freeze up" and not be able to answer the lawyer's questions (para. 7). She also stated that she finds Mr. Farah's personality "scary" and his mood "unpredictable". Cpl. Manweiller states that the complainant told her "she does not think she would be safe if she were in the same room as him." Cpl. Manweiller says that she believes the complainant was telling the truth in describing her concerns about testifying the courtroom (para. 9).

[7] In response to the Crown's application, Mr. Farah filed *R v Adeagbo*, 2017 NLTD(G) 156 ("*Adeagbo*"). That case addressed issues about the admission of hearsay evidence and the nature of the evidence required in a s. 486.2(2) application.

[8] In *Adeagbo*, the Crown supported its application by filing the transcript from the preliminary hearing and an affidavit from the victim services coordinator. The victim

services coordinator affirmed that the complainant had become emotionally overwhelmed during the preliminary inquiry. The court ruled that this was impermissible opinion evidence. After striking parts of the affidavit, the court determined that there was not enough evidence to conclude that the complainant should be permitted to testify by CCTV.

[9] Mr. Farah, who is self-represented, did not address the contents of Cpl. Manweiller's affidavit in his submissions. However, he did cross-examine her in addition to filing *Adeagbo*. Mr. Farah is challenging Cpl. Manweiller's evidence, although it is not clear whether Mr. Farah believes that the affidavit, in whole or in part, should be struck or if the evidence should not be given weight. I will proceed with a determination as to whether the evidence should be given any weight.

[10] The decision in *Adeagbo* was considered by the Newfoundland and Labrador Court of Appeal in *R v Hoyles*, 2018 NLCA 46 ("*Hoyles*"). In my opinion the Court of Appeal rejected the trial judge's analysis in *Adeagbo*. The court stated:

[11] I would first observe that evidence is not always required to support an application under sections 486.1(2) or 486.2(2). For instance, the nature of the offence, a factor for consideration in both sections, is a matter of record. Other factors, like the age of the witness, whether the witness has mental or physical disabilities, the nature of the relationship between the witness and the accused, may also be matters of record or patently obvious from observation. While a judge's exercise of discretion must be properly exercised, and must have some proper basis, it can be properly exercised on the basis of the record before him or her and submissions made ...

[10] The Court went on to emphasize that even if not always necessary, evidence is often useful.

[11] In *Hoyles* an affidavit was provided by a victim services worker, who testified, amongst other things, about her opinion regarding the complainant's emotional state. The court determined that the whole affidavit, including the hearsay and opinion evidence, was admissible. The court noted that the worker had known the complainant for several years, and had provided support to the complainant when the complainant testified during the preliminary inquiry. The court concluded at para. 15: "...her evidence was informed by her observations and experience working directly with Ms. F. over a period of years respecting the very matters before the court. On a principled application of the hearsay rule, reliability concerns about the worker's statement were next to nil. ..."

[11] Here, the evidence with regards to the complainant's age and the nature of the alleged offence is uncontroversial. The other evidence, however, is more problematic.

[12] Cpl. Manweiller's evidence combines hearsay evidence about what the complainant said with Cpl. Manweiller's opinion that the complainant was telling the truth. Based on the affidavit, I know only that Cpl. Manweiller spoke to the complainant once to discuss how the complainant felt about testifying with Mr. Farah in the room. I do not know anything about their prior history that would allow me to determine that Cpl. Manweiller was able to assess the complainant's emotional state.

[13] Corporal Manweiller's statement that she believes the complainant to be telling the truth presents an additional concern. If Cpl. Manweiller is basing her opinion, even in part, on her assessment of the complainant's credibility and reliability during their conversation, rather than on what she knows of the complainant's emotional state, then she is taking on the role of the trier of fact, which is not for her to do.

[14] I therefore place no weight on paras. 7, 9, or on the phrase “she does not think she would be safe if she were in the same room as him” of Cpl. Manweiller’s affidavit.

[15] There is, however, one part of Cpl. Manweiller’s evidence regarding the complainant’s worries about testifying that I can take into account. Cpl. Manweiller says, at para. 8 of her affidavit, that the complainant finds Mr. Farah’s personality to be “scary” and his mood to be “unpredictable.” I have observed Mr. Farah in court and he does get excitable and very forceful when making his points, particularly when he is worried about the fairness of the process, or when he has something important to say. While he also responds to the Court’s feedback and direction, I accept that the complainant would find Mr. Farah intimidating.

B. Would testifying by CCTV facilitate the complainant’s testimony?

[16] Section 486.2(3) provides a list of factors the court is to take into account in deciding whether to permit a witness to testify by CCTV. The factors applicable in the case at bar are: the complainant’s age; the nature of the offence; the nature of the relationship between the witness and the accused; and society’s interest in encouraging the reporting of offences and in encouraging the participation of victims and witnesses in the criminal justice process.

[17] Mr. Farah also says that I should take into account that the complainant has sufficient supports in place. As he is not going to personally cross-examine her, moreover, she should have no reason to fear testifying with him present.

[18] The complainant is a young adult. By the time of trial, she will still be 18 years old. This favours permitting the complainant to testify by CCTV. The nature of the offence also favours permitting the complainant to testify by CCTV. At the time of the

alleged offence the complainant was 14 years old. Her anticipated evidence is that Mr. Farah had penetrative sex with her against her will. I accept that this would make it difficult for the complainant to testify in the presence of Mr. Farah.

[19] Mr. Farah and the complainant did not know each other well before the alleged assault, and Mr. Farah was not in a position of trust. However, from my observations in court I can see that Mr. Farah is an adult, and there is likely a significant age difference between Mr. Farah and the complainant. This, too, would have an impact on the complainant's ability to testify. I recognize that society has an interest in encouraging the reporting of offences and in encouraging complainants and witnesses to participate in the criminal justice process. In this case, however, the nature of the offence, the complainant's age, the age difference between Mr. Farah and the complainant, and Mr. Farah's demeanour are more significant factors in my decision.

[20] I take Mr. Farah's point that the complainant will not be cross-examined by him, thus potentially diminishing the stress of the situation. In my opinion, however, it is a neutral factor that the complainant will be cross-examined by counsel.

[21] I therefore grant the Crown's application and direct that the complainant provide her testimony in the trial of this matter by CCTV outside the courtroom.

[22] Crown counsel raised the question of whether Mr. Farah would object to the complainant also having a support person while she testified, pursuant to s. 486.1(2). After some discussion Mr. Farah agreed to this, however Crown counsel did not seek this form part of my order. Although Mr. Farah has agreed at this juncture that the complainant can testify with a support person present, Mr. Farah is self-represented and the discussion in court was not lengthy. The Crown may therefore wish to raise this in a

more formal way in advance of the trial, to prevent potential disruption at trial on this issue.

WENCKEBACH J.