Citation: *R. v. Quash*, 2021 YKTC 62

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T.C. Docket: 21-00219
21-00219A
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Chief Judge Cozens

REGINA

v.

CHRISTOPHER JACKIE QUASH

Appearances:
Kevin Gillespie — Counsel for the Crown
Gregory Johannson — Counsel for the Defence

RULING ON APPLICATION

[1] COZENS C.J.T.C. (Oral): Mr. Quash is before the Court on a pre-trial application by the Crown under s. 486.2 of the *Criminal Code* (the "*Code*"), that the evidence of the complainant — in this case, Patricia McGundy — be allowed to be presented at the trial by way of CCTV. The trial is to take place this afternoon. The allegations are of an assault against Ms. McGundy, a breach of a no contact and not attend a residence condition, and an abstain breach.

[2] Ms. McGundy testified on the application by CCTV. She is a 36-year-old member of the Kwanlin Dün First Nation. She was in a relationship — although I do not know the length of it — with Mr. Quash and the allegations are of an assault simpliciter

that took place on June 18, 2021, and a breach of the no-contact and do not attend at the residence conditions on July 19, 2021.

[3] Ms. McGundy's testimony is that she felt that if she saw Mr. Quash again it would make her feel scared. She testified in court she would feel nervous or sick to her stomach. She did say, when asked how to compare CCTV and testifying in court, that it would not help her tell her story; yet she also said that it would be better by video because it would make it easier for her to say everything that happened. She was somewhat upset and, at one point, crying briefly during her testimony. She did agree that, while it would be scary for her testifying, it might probably be for anybody testifying. She does not have a fear of any retaliation or anything from Mr. Quash and admitted he is not that kind of person.

[4] That is essentially the evidence that is before the Court.

[5] Counsel for the Crown says that that meets the test set out in s. 486.2. Counsel for Mr. Quash is opposed to the application.

[6] Section 486.2(2) allows that:

> ... on application of the prosecutor that the witness testify outside the court room ... if the judge or justice is of the opinion that the order would facilitate the giving of a full and candid account by the witness of the acts complained of or would otherwise be in the interest of the proper administration of justice.

[7] The criteria set out in s. 486.2(3):

> (a) the age of the witness;

[8] There is nothing in the age of Ms. McGundy that supports the application as it would perhaps if it was maybe a younger or much older person.

(b) the witness' mental or physical disabilities, if any;

[9] There are none that appear to be present.

(c) the nature of the offence;

(d) the nature of any relationship between the witness and the accused;

[10] As to (c) and (d), this is an allegation of domestic violence, which has the breach of trust aspect to it. Certainly, while not as well stated as it is with respect to sexual assault, and perhaps better dealt with under (g), there is a concern with respect to domestic violence in the community and the reporting of these offences.

[11] (e) does not apply. There is no fear of intimidation or retaliation.

[12] (f) does not apply.

[13] (f.1) does not apply.

[14] As I said earlier, (g) does apply. Domestic violence is not perhaps as well reported and, with respect to encouraging the reporting of offences of sexual assault and participation in the trials of those matters, it is still true that domestic violence is prevalent in society, and the nature of the relationship between the parties makes it somewhat of a difficult offence to report and prosecute. So this factor does apply.

[15] Finally "any other factor" that is considered relevant. I do take into account the fact that Ms. McGundy is Indigenous, and that the Court has recognized that there is a vulnerability to the Indigenous population that cannot be overlooked. Certainly the *Code* deals with this in the concept of sentencing, and it is something that I am aware of.

[16] The case of ***R.*** v. ***C.D.***, 2021 ONSC 6995, was a sexual assault case. The Court made some statements with respect to how s. 486.2 is to be interpreted, recognizing, of course, that the change to "facilitate" from "necessary" is a major change to the threshold in applying s. 486.2. In considering whether it is necessary or whether it would facilitate, the courts have stated that there is a big change that has lowered the threshold. It is clearly much more prevalent that these applications are granted.

[17] At para. 4, the Court says:

> 4 The general rule is that witnesses in common law criminal courts are required to testify in open court. ...

[18] Then it notes, however, the provisions of ss. 486.1 to 486.7, and the Court considers them at some length.

[19] At para. 7. the Court states that:

> 7 ... the applicable test is whether giving such evidence out of court, or behind a screen would "*facilitate* the giving of a full and candid account by the witness of the acts complained of" or would "otherwise be in the interest of the proper administration of justice." ...

[20] The previous version contained a stricter test and that was "where necessary" came in, but the amendment in July 2015 with the coming into force of the *Canadian*

Victims Bill of Rights, S.C. 2015, c. 13, s. 2, supports the conclusion that Parliament intended to lower the threshold required to allow witnesses to testify from outside the courtroom or behind a screen.

[21] The ultimate goal of these provisions is to enhance the truth seeking function of the criminal trial process. This must also be balanced against the rights of the accused. However, an accused has no constitutional right to confront the complainant face to face. Section 486.2(2) still affords an accused the ability to conduct a cross-examination. The jury is still able to observe the witness — this was a jury trial, I note — while he or she testifies, which is an important part of assessing that witness's credibility. The same obviously applies to a judge.

[22] It should be noted that the test is directed to whether a full and candid account is facilitated by testifying through CCTV or behind a screen. Merely showing that the witness will be more comfortable in giving evidence does not meet the test. Even uncomfortable, nervous, and emotional witnesses are capable of providing a full and candid account of their evidence. Thus, there must be a real concern that if the witness were to be required to testify in the courtroom, he or she would be unable to furnish a full and candid account. After all, the accused is still presumed innocent and has a fundamental right to a fair trial.

[23] In disposing of this case, the Court said:

> 58 It bears repeating that the word chosen by Parliament is "facilitate". "Facilitate" means to make easier or less difficult. In the context of s. 486.2(2), the Court must determine whether permitting a witness to testify via CCTV will make it easier for this Complainant to make full and frank account of the sexual assault that she alleges occurred to her.

[24] The Court said:

> 59 I do believe that it is not *necessary* for the Complainant to testify via CCTV. If the application were to be denied, I accept that the Complainant would likely be able to testify in a meaningful fashion from within the courtroom.
>
> 60 However, on balance, I am persuaded that permitting the Complainant to testify via CCTV will facilitate the giving of a full and candid account. I take "full" to mean that she will be more likely to include greater detail, and "candid" to mean that she will be forthcoming and straightforward in her evidence.

[25] ***R.*** v. ***Boden***, 2021 BCSC 79, referred to, also cites my decision in ***R.*** v. ***J.S.***, 2016 YKTC 59, where I spoke about the change to "facilitate" from "necessary". In ***J.S.*** ***R.*** v. ***Jimaleh***, [2016] OJ No 5133 (QL), was referred to.

[26] At para. 23, the Court notes that:

> …
>
> > [68] The lower threshold was discussed in *R v Turnbull*, 2017 ONCJ 309. There, the court concluded, referring to Gorman Prov Ct J's analysis in *R v KP*, [2017] NJ No 69 (NLProvCt)] "... that facilitate means, plainly, to make easy or easier ... other jurists have commented that is a "very low threshold" for the issuing of the order; and that the Superior Court in Ontario (*R v Jimaleh*, [2016] OJ No 5133 (SupCt) viewed the lowering of the threshold an indication of "intention to make testifying by closed circuit or behind a screen a more commonplace occurrence"" (at para 34).
>
> …

[27] The Court, in that case, says:

> 24 I agree that it was Parliament's intention to lower the threshold for the issuance of a witness accommodation order under s. 486.2 (2) of the *Code* if and when the court considers that accommodation to be in the interests of the proper administration of justice.

— which is the other portion of the test.

[28] In this case, having observed Ms. McGundy, I am of the opinion that, while she may be able to give an account of her story and testify in the courtroom, the very low threshold of making it easier to testify in the context of her stating that she feels that she would be able to do so, in light of everything I heard from her, and taking into account her Indigenous status and the nature of the relationship, I feel that this lower threshold has been met, that it would make it easier for her to give a full and candid account.

[29] I appreciate that I do not have a lot of evidence before me, but having observed Ms. McGundy and her emotional state and the hesitancy with which she spoke here, while I would not have made this ruling were the word "necessary", I believe the evidence supports that it would be “easier”. I think to give a different meaning to the word "facilitate" would be wrong in this case, and so I will direct that she gives her testimony from outside the courtroom via CCTV.

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COZENS C.J.T.C.