Citation: *R. v. Hadvick*, 2021 YKTC 22

Date: 20210609
Docket: 18-00832
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Chisholm

REGINA

v.

JARRED ALEXANDER MARCUS HADVICK

Publication of evidence taken at the preliminary inquiry is prohibited by court order pursuant to s. 539(1) of the *Criminal Code.*

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

Appearances:
Noel Sinclair — Counsel for the Crown
Meghan Forhan — Counsel for the Defence

RULING ON APPLICATION

[1] CHISHOLM T.C.J. (Oral): Mr. Hadvick faces three charges contrary to ss. 151, 271 and 348(1)(a) of the *Criminal Code*.

[2] He elected to be tried by a judge and jury on November 18, 2020.

[3] At the outset of the preliminary inquiry, the Crown has applied to amend the sexual interference offence.

[4] The charge presently reads:

> Between the 30th day of October, 2018 and the 31st day of October, 2018 at Faro in the Yukon Territory, did for a sexual purpose touch [redacted] person under the age of sixteen years directly with a part of his body, to wit his lips contrary to Section 151 of the Criminal Code.

[5] The Crown applies to remove the words: "to wit, his lips". On May 13, 2021, the Crown gave the defence notice of its intention to make this application. The defence does not consent to this proposed amendment.

[6] The Crown contends that a reading of s. 601(3)(c) allows for this amendment to be made.

> 601(3) Subject to this section, a court shall, at any stage of the proceedings, amend the indictment or a count therein as may be necessary where it appears
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> …
>
> (c) that the indictment or a count thereof is in any way defective in form.

[7] The Crown says that the evidence is expected to show that the accused allowed the complainant to perform oral sex on him. The Crown's theory is therefore that the sexual interference count consists of a more serious sexual crime than kissing. The Crown submits that it is appropriate for the Crown to apply for the amendment, at this time, in order that the accused clearly understands the case he has to meet.

[8] The defence maintains that the application for the amendment should not be made at the stage. The defence indicates that there is no defect in form of the count in question, a prerequisite for the section the Crown is relying on.

[9] The defence says that the amendment could be applied for after the evidence is heard and that the application is not properly made under s. 601(3)(c).

Discussion

[10] The Crown relies on the decision in *R. v. Careen*, 2013 BCCA 535, and argues that it speaks to the importance of the accused knowing the case they have to meet, and highlights the unfairness of making amendments after the close of the Crown's case, and after the accused makes decisions as to call or not call evidence based on his understanding of the Crown's evidence. However, in that case, the amendment to the charging document was made after closing submissions when the judge raised the issue of the wording of a charge. After argument, the judge concluded that the amendment caused no prejudice to the accused, as he was not in any way misled by it.

[11] The Court of Appeal agreed, indicating at para. 13 that the amendment did no more than change the wording of the count to what the accused always understood the allegation against him to be.

[12] The decision in *R. v. McConnell*, [2005] 75 O.R. (3d) 388 (C.A.), is apposite to the question before me. In that case, the trial Crown had sought to amend the Information in a drinking and driving matter because the description of the vehicle driven by the accused was inaccurate. Defence counsel did not consent to the proposed amendment. After the Court refused to make the amendment and the accused pleaded not guilty, the Crown offered no evidence.

[13] On appeal, as here, the Crown argued that the proposed amendment fell within s. 601(3) as a defect in form. Mr. Justice Rosenberg, on behalf of the Court of Appeal, considered this section and stated:

> 14 In my view, however one were to define a defect in form or substance, this information was not defective. It alleged offences known to law and complied with the sufficiency requirements of s. 581. On its face, there was nothing wrong with the information. In my view it was not defective in either form or substance. The only problem was that the prosecution expected that its evidence would not support the charges as alleged. In my view, that is not a defect. In considering the meaning of defect it is appropriate to look at the other parts of s. 601 and in particular subsection (2). That subsection deals exactly with the prosecution's problem in this case. It permits the court to amend a count in an information "where there is a variance between the evidence" and a count in the information.
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> 15 Alternatively, the problem in this case may be captured by s. 601(3)(b)(i), which I repeat for ease of reference:
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> > (b) that the indictment or a count thereof
> >
> > > (i) fails to state or states defectively anything that is requisite to constitute the offence,
> > >
> > > ...
> >
> > and the matters to be alleged in the proposed amendment are disclosed by the evidence taken on the preliminary inquiry or on the trial;
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> 16 The problem for the prosecution in this case is that to rely on this part of subsection (3), the matters to be alleged in the amendment must have been disclosed in the evidence. At the opening of the trial, when Crown counsel sought the amendment, there was no evidence. In my view, the submissions of counsel as to what is contained in the disclosure is not evidence.

[14] And at paras. 20 and 21, the Court further stated:

> 20 In my view, the interpretation that is most consistent with the wording of the Criminal Code is that there is no power to amend to conform to the evidence until the evidence has been heard. In addition to R. v. Callocchia, see for example, R. v. King (1956), 116 C.C.C. 284 (Ont.

> C.A.). Admittedly, the cases are also almost universally to the effect that if the trial judge errs and permits a premature amendment, if the accused was not prejudiced the appeal will be dismissed, presumably by application of the proviso in s. 686(1)(b)(iii) or (iv) of the Criminal Code. Thus, in addition to R. v. Deal, see R. v. Fiore (1962), 132 C.C.C. 213, (Ont. C.A.) and R. v. S.(C.A.) (1997), 114 C.C.C. (3d) 356 (B.C.C.A.) at 360 and 364. But the fact that no prejudice was occasioned by the error cannot create a power of amendment outside the Criminal Code regime.
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> 21 … Crown counsel should have called his evidence. Once the evidence showed that the respondent was not driving the vehicle alleged in the information, the Crown could have applied to amend the information at that stage in accordance with s. 601(2). Since there would have been no prejudice to the respondent, the trial judge would have been required to make the amendment.

[15] See also *R. v. Harris*, 2014 BCSC 1058.

[16] I find the *McConnell* decision to be directly on point and persuasive. I am of the view that I have no power to make the amendment sought at this stage of the proceedings, as there is no defect in the form of the Information. Accordingly, I dismiss the Crown's application. The Crown may choose to pursue the proposed amendment pursuant to s. 606(2) or s. 606(3)(b)(iii), once the Crown's evidence has been led.

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CHISHOLM T.C.J.