SUPREME COURT OF YUKON

Citation: *R.* v. *Cole*, 2013 YKSC 13

Date: 20130219
Docket: S.C. No. 12-00020A
12-00905A
Registry: Whitehorse

BETWEEN:

HER MAJESTY THE QUEEN

AND:

DANIEL PETER COLE

Publication of evidence that could disclose the identity of the complainant has been prohibited by court order pursuant to section 486.4 of the *Criminal Code*.

Before: Mr. Justice L.F. Gower

Appearances:
Noel Sinclair — Counsel for the Crown
Michael Sparks (via teleconference) — Counsel for the Accused

REASONS FOR JUDGMENT
DELIVERED FROM THE BENCH

[1] GOWER J. (Oral): This is an application by the accused, Daniel Peter Cole, under s. 520 of the *Criminal Code,* to vary a condition of his recognizance, dated January 18, 2013. In particular, he seeks to remove the no contact condition with respect to L.T., who is the mother of the five-year-old complainant. Ms. T. says that she has been in a relationship with the accused since the end of September 2012. The application is opposed by the Crown.

[2] I have to say that, much the same way as the Territorial Court Judge stated at the original bail hearing, this issue is right on the line with me. I have a couple of concerns right off the bat. One is the issue of probable indirect contact between the accused and L.T. having occurred since the recognizance was put in place, through his father. The evidence of the accused to that effect on this application strongly suggests that there has been such indirect contact. The evidence of L.T. in that regard was more dismissive, but it seems to me unlikely and improbable that the accused would be able to state in his affidavit that, to his knowledge, L.T. wishes to have full-contact with him, if somehow that was not conveyed to him through his father. The same goes for the attendance of L.T. at this hearing.

[3] The other thing that concerns me in this application is the apparent instability of L.T. As indicated in the Bail Supervision Report, which was before the judge below, on December 19, 2012, Ms. T. contacted the Victim Services worker and indicated that she in no way wanted contact with Mr. Cole; did not want him to be released from jail; and was fearful for her own safety because of his anger issues. Then on January 4, 2013, the Victim Services worker was advised that the mother of the alleged victim now wanted contact with Mr. Cole and no longer believed him to be a threat. Ms. T. explains her inconsistency in that regard as due to the fact that she was on certain medications in mid-December of 2012, which caused her to react in behaviourally strange ways.

[4] On the other hand, it does strike me that I have to keep in mind the presumption of innocence here; I have to keep in mind the principle that the Court should impose the least intrusive conditions on the parties that is consistent with the protection of the public and the proper administration of justice. I am thinking here about interfering with

what is apparently a close, intimate relationship between the accused and Ms. T., both of whom are consenting adults, without some cogent and compelling reason to do so.

[5] Now, the Crown tells me that their concern, primarily, is that although Ms. T. is not exactly what one would call a material witness, which was the word used in the hearing below, because she has no eyewitness evidence, no direct evidence, she is nevertheless important because she will set the context of times, dates, places, relationships, and opportunities that the accused had to have contact with the complainant. So, while she is an important witness, I would not describe her as material.

[6] The other concern from the Crown is that there is a genuine risk here of indirect influence from the accused to the complainant through Ms. T., and I am alive to that concern. On the other hand, the contact that Ms. T. will have with her child from this point forward, I am told, will be limited to supervised visits only. Arrangements have been put in place, or will soon be put in place, effectively giving custody of the complainant to Ms. T.'s mother. There are plans for Ms. T. to have weekly visits with the child, but on a supervised basis only. So, if the concern is that the mother in some way is going to speak of the accused in a way that might influence the child's testimony, then it seems to me that it is the duty of Family and Children's Services to be alive to that concern as well, and prevent that from happening. There has already been a reference to an incident during a previous visit between the mother and the child, where the mother was showing the child some photographs on her smartphone and, she says by accident, a photograph of the accused came up which prompted a comment by the child about "missing Dan." However, the mother's response to that was dismissive, to change the subject, and to move on. There was no conversation engaged at that point.

[7] Now, from the evidence of the mother, it also sounded as though, at that very point in time, the supervisor may have been outside of the office, but within earshot. I would urge Family and Children's Services to perhaps take a more hands on approach with the idea of supervision given the context of this case and the significant concerns regarding any conversation taking place between the mother and the child about the accused.

[8] If that concern can be addressed, and I assume it can be, and as that is the main concern, i.e. that the child would be influenced by the mother during visits, then it seems to me that the accused has made his case for a variation on a balance of probabilities. So, I will make that order and delete L.T. from what is currently Condition 6 on the recognizance. But, I will add, and this is with the consent of both counsel, to the last sentence in condition 7:

> 7. … not to attend at or near the schools of C.D., S.D., or B.T.

[9] Counsel, have I omitted anything?

[10] MR. SPARKS: My Lord, just with condition number 7, would you delete L.T.'s name from that also?

[11] THE COURT: Yes, thank you for that. I will make that order.

[12] I should add that another consideration that I had was that there is indeed, apparently, a lot of goodwill expressed by Ms. T. about what she described as her boyfriend, the accused. It does not seem to me that that goodwill is going to change if I

prevent them from having contact on a going forward basis. So, that was a consideration that I also had in mind.

[13] The other thing that I wanted to say directly to the accused is that indirect contact means exactly that. You are to have no contact directly or indirectly with any of the persons that are named in this recognizance as will be amended from today. That means you cannot pass messages along directly through your father or anyone else, and I want you to respect that, because if there is any suggestion of further indirect contact, then you can expect to be breached, put into jail, and held in custody. You understand that?

[14] THE ACCUSED: I understand, sir.

[15] THE COURT: Okay.

[16] MR. SINCLAIR: My Lord, I would also invite the Court to remind Mr. Cole that there is a residency requirement in this order and a curfew requirement, and he had given evidence about wanting to spend weekends with his girlfriend, and I think that that is off limits based on the existing order. That he needs --

[17] THE COURT: Would not prevent her from going to the Walnut --

[18] MR. SINCLAIR: It would not prevent that, no.

[19] THE COURT: -- Drive residence --

[20] MR. SINCLAIR: That’s correct.

[21] THE COURT: -- and that was what Ms. T. stated in her evidence. Mr. Cole, do you understand?

[22] THE ACCUSED: Yeah, to do it at my 83 Walnut Crescent house, not there, because I have a curfew at 6:00, yes, I understand that.

[23] THE COURT: Okay.

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GOWER J.