SUPREME COURT OF YUKON

Citation: *R. v. Etzel*, 2014 YKSC 50

Date: 20141001
S.C. No. 13-01517
Registry: Whitehorse

Between:

HER MAJESTY THE QUEEN

Applicant

And

JUSTIN LEO ETZEL

Respondent

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

Before: Mr. Justice L.F. Gower

Appearances:

Leo Lane — Counsel for the Applicant
Malcolm E.J. Campbell — Counsel for the Respondent

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is an application by the Crown under s. 486.2(1) of the *Criminal Code*, R.S.C., 1985, c. C-46, ("the *Code.*") to have the complainant, S.D., and another Crown witness, C.D., testify outside the courtroom for the purposes of trial. If allowed, the Crown intends to elicit testimony from these two witnesses by way of closed circuit television ("CCTV").

[2] The accused, Justin Leo Etzel, is charged with sexually assaulting S.D. in Ross River, Yukon, between June 1 and September 1, 2012, when S.D. was a person under

the age of 16. The original information was sworn on December 23, 2012, and the matter proceeded to a preliminary inquiry in Ross River on March 14, 2014. At that time, the Crown successfully applied for an order allowing the complainant to testify behind a screen (s. 486.2) with the assistance of a support person (s. 486.1). Neither application was opposed by defence counsel. It is worth noting that CCTV equipment was brought to Ross River for the preliminary inquiry by court staff, however Crown counsel informs me that the complainant preferred to testify behind a screen on that occasion.

[3] The accused was committed to stand trial on the offence of sexual assault contrary to s. 271 of the *Code*. The indictment was filed on March 28, 2014, and the matter was scheduled to proceed before a judge and jury in Ross River commencing September 29, 2014.

[4] Pre-trial conferences were held on May 20 and July 2, 2014. However, the issue of testimony outside of the courtroom by CCTV was not raised by the Crown until a pre-trial conference on September 19, 2014. On September 20, 2014, the senior court clerk informed counsel that, after making some inquiries, he was of the view that court services could not offer a CCTV system for witness' testimony on court circuit. He advised that the court did not have equipment capable of ensuring that oral evidence given in that fashion would be clearly captured on the record. This was confirmed in a further pre-trial conference on September 23, 2014. The clerk explained that the CCTV equipment which had been brought to Ross River for the preliminary inquiry had been used for a previous trial on another matter and that the court's recording system was unable to successfully record all of the testimony elicited through the CCTV equipment.

[5] The Crown filed and served this application on September 25, 2014, and it was heard on September 26th. I granted the application, with reasons to follow. These are my reasons.

EVIDENCE

[6] The Crown's evidence in support of the application was in the form of an affidavit from Constable Kelly Manweiller, an RCMP officer with 14 years' experience as an investigator of sexual assaults involving child complainants. She deposed that the CCTV system in the Whitehorse courthouse has been used successfully in a recent sexual assault trial involving a child complainant. She further deposed that the CCTV system is preferable to the screens which were used in two previous sexual assault trials, where the child complainants still had to walk through the courtroom to enter the witness box and testify in court. Constable Manweiller deposed that this caused the complainants to appear more nervous, upset, unsure of themselves, scared and uncomfortable than they had been when they were disclosing their alleged abuses to her in private.

LAW

[7] Section 486.2(1) of the *Criminal Code* came into force on January 2, 2006, replacing the former s. 486(2.1). The current subsection reads:

> "486.2(1) Despite section 650, in any proceedings against an accused, the judge or justice shall, on application of the prosecutor, of a witness who is under the age of eighteen years or of a witness who is able to communicate evidence but may have difficulty doing so by reason of a mental or physical disability, order that the witness testify outside the court room or behind a screen or other device that would allow the witness not to see the accused, unless the judge or justice is of the opinion that the order would interfere with the proper administration of justice."

[8] Thus, the subsection:

a) applies to witnesses under 18, or witnesses with a physical or mental disability;

b) has eliminated the requirement that an applicant establish an evidentiary basis (required under the former s. 486(2.1)) for the request for testimonial accommodation; and

c) requires the court to grant such an application, unless to do so would interfere with the proper administration of justice.

[9] The provision was considered by the British Columbia Court of Appeal in *R. v. J.Z.S.*, 2008 BCCA 401. The issues on that appeal included whether s. 486.2 of the *Criminal Code* violated ss. 7 or 11(d) of the *Charter*. The Court described s. 486.2(1) as follows, at para. 19:

> "19 The section allows for the presumptive use of a screen or closed circuit television ("CCTV") as testimonial aids for witnesses under the age of 18. It directs the court to make an order for the use of testimonial aids upon an application by the Crown or at the request of the witness. The provision eliminates the requirement that an applicant establish an evidentiary basis for need; it mandates the court to grant such an application unless to do so would interfere with the proper administration of justice."

The Court further observed, at para. 21, that the repealed s. 486(2.1) had previously:

> "...required a pre-testimonial inquiry into whether there was a need for a child or vulnerable witness to testify with the assistance of a testimonial aid. The testimonial aid had to have been necessary in order for the witness to provide a full and candid account of the alleged offence."

In dismissing the appeal, the Court held that the elimination of this pre-testimonial inquiry did not infringe the accused's right to a fair trial. And, further, that under our criminal justice system, an accused has no constitutional right to a face-to-face "confrontation" with the complainant (para. 41).

[10] Thus, s. 486.2(1) now presumptively requires the use of a screen, CCTV or other device upon application by the Crown, or at the request of the witness, unless the respondent accused can satisfy the court on a balance of probabilities that to do so would interfere with the proper administration of justice. This shifts the persuasive burden to the respondent accused to establish such an interference, and may also give rise to an evidentiary burden: see *R. v. T.D.J.F.P.*, 2010 YKYC 3, at para. 4.

[11] A dispute has arisen in the case law about whether it is the court or the applicant who determines which type of accommodation is to be presumptively ordered under s. 486.2(1). Smart J. in *R. v. S.B.T.*, 2008 BCSC 711, ("*S.B.T.*"), held that it is the applicant (para. 38). In other words, said Smart J., the trial judge does not have an independent discretion to determine which particular type of testimonial accommodation he or she prefers or believes is better (para. 43), unless the judge engages in the second aspect of the application, which is whether the requested accommodation "would interfere with the proper administration of justice" (para. 41). It is not until that stage of the analysis that the trial judge can consider an accommodation which is different from that requested by the applicant (para. 42).

[12] The Courts of Queen's Bench in Manitoba and Saskatchewan and the Ontario Court of Justice have rendered decisions which initially appear to take issue with this approach, emphasizing that within the analysis under s. 486.2(1), the court retains its

inherent jurisdiction to manage the trial and the courtroom in which it takes place: *R. v. C.T.L*, 2009 MBQB 266; *R. v. Brown*, 2010 SKQB 420; and *R. v. Wight*, 2011 ONCJ 414. However, in my respectful view, there is really little which separates these cases from the analysis by Smart J. in *S.B.T.*

[13] In *C.T.L.*, Martin J. was deciding a s. 486.2(1) application where the Crown was asking for a screen and CCTV, while defence counsel was asking that the witness simply be allowed to testify in the courtroom out of sight of the accused, without the need for a testimonial aid. It is not clear from the case report whether defence counsel was grounding their argument on the basis that the accommodation requested by the Crown would interfere with the proper administration of justice. However, the Crown had not advanced the notion that s. 486.2(1) empowered it to determine the type of testimonial aid in a given case (para. 11), as was done in *S.B.T.* Further, Martin J. relied upon a previous decision of the Manitoba Court of Queen's bench in *R. v. G.A.P.*, 2007 MBQB 127, in which the trial judge ordered that two witnesses testify behind a screen inside the courtroom, rather than outside the courtroom by means of CCTV, as requested by the Crown. However, the Crown in that case agreed that this determination was within the trial judge's jurisdiction. Again, there is no mention of whether this was within the context of deciding whether the requested accommodation would interfere with the proper administration of justice. At para. 15, of *C.T.L.*, Martin J. contrasted the approach in *G.A.P.* with that of Smart J. in *S.B.T.*, and while he preferred the former, it is interesting to note that he also concluded that the outcome of either approach may be the same in a given situation:

> "15 Regarding section 486.2(1), in *R. v. G.A.P.*, supra for example, the trial judge exercised her discretion to have the two witnesses testify behind a screen inside the courtroom, so documents could be more efficiently put to them, rather than in another courtroom by means of CCTV as requested by the crown. The crown agreed this determination was within the trial judge's jurisdiction. This approach is distinct from that in *R. v. T. (S.B.)*, 2008 BCSC 711, 232 C.C.C. (3d) 115 (B.C.S.C.), where the court held that it was the crown, not the trial judge, that determines which testimonial aid is to be presumptively ordered and that the trial judge may consider an alternative when the requested aid would interfere with the proper administration of justice. The outcome of either approach may be the same in a given situation but, with respect, I think the approach in *R. v. G.A.P.* is preferable." (my emphasis)

[14] In *Brown*, Gunn J. commented upon the apparently different approaches by Martin J. in *C.T.L.* and Smart J. in *S.B.T.* At para. 19 she concluded:

> "19 With the greatest of respect, I prefer the approach taken to this issue in Manitoba by Justice Martin. In my view the trial judge has the sole and inherent authority to manage the trial and the court room in which it takes place. The judge has the ongoing responsibility to be satisfied that the use of a testimonial aid or the use of a particular testimonial aid will not interfere with the proper administration of justice. It is also my view that the judge's decision is one which may be re-visited during the course of a trial if necessary."

[15] In *Wight*, Lalande J. purported to agree with Gunn J. in *Brown*, over Smart J. in *S.B.T.*, stating that within the framework of s. 486.2(1), "the trial judge has the jurisdiction and the responsibility to decide what form of testimonial aid, if any, should be permitted" (para. 16). In that case, the Crown had asserted its authority to determine which particular type of testimonial accommodation was to be presumptively ordered. At para. 7, Lalande J. observed:

> "7 Inherent in the Crown's argument is that it is up to the applicant to determine which accommodation is to be presumptively ordered. In other words, consideration by the court of the use of a testimonial accommodation other than that which is being sought is only warranted within the context of the court considering whether the requested accommodation would be interfering with the proper administration of justice."

However, in coming to his final conclusion, Lalande J. also stated, at para. 21:

> "... The court accepts that there is a presumption that the order sought by the Crown should be made and that the Crown no longer has to tender evidence in order to be entitled to one of the testimonial aids described in the Criminal Code. The next step is for the court to be satisfied that the order would not interfere with the proper administration of justice...." (my emphasis)

[16] In my respectful view, there is no substantial difference between this last passage and what Smart J. was stating in *S.B.T.* If there is any difference at all between these three cases and *S.B.T.*, it is only about whether the inherent jurisdiction of the trial judge is engaged throughout the s. 486.2(1) analysis, or only if and when the judge proceeds to the "next step" of deciding whether the requested accommodation would interfere with the proper administration of justice. As I understand him, Smart J. acknowledges, at para. 41, that the court retains its inherent jurisdiction in that second part of the analysis:

> "41 [40] In my view, it is when the judge or justice is determining whether the requested testimonial accommodation would interfere with the proper administration of justice that he or she may consider other testimonial accommodations. It is when engaged in this analysis that he or she may conclude that the requested accommodation would interfere but a different accommodation would not."

[17] I note that *S.B.T.* was an application for judicial review of a decision by a provincial court judge on a s. 486.2(1) application. In contrast, *C.T.L.*, *Brown* and *Wight* were all rulings within a trial. It would also appear that Smart J. had the benefit of extensive submissions from both Crown and defence counsel, including a number of decisions and articles explaining the evolution of testimonial accommodation for witnesses over the previous 20 years. He was also provided with the Parliamentary history of Bill C-2, which enacted what is now ss. 486 to 486.6 of the *Criminal Code*. Thus, it would appear that Smart J. had the benefit of more fulsome argument on the interpretation of s. 486.2(1) than perhaps was the case with the other three authorities discussed here.

[18] In any event, I prefer the reasoning in *S.B.T.* and adopt it. Accordingly, where the Crown or a witness applies for a particular type of testimonial accommodation and no issue arises as to whether that type of accommodation might interfere with the proper administration of justice, then s. 486.2(1) presumes that the court will order the accommodation requested. Alternatively, if such an 'interference' issue arises, then the court may consider a different type of accommodation, or indeed, whether any at all is required.

[19] In this regard, Smart J. also considered, at para. 40 of *S.B.T.*, the meaning of the phrase "proper administration of justice", and stated that it is of "wide import" including (non-exhaustively) many factors and considerations, such as:

- the age of the witness;
- the nature of the charge(s);
- the relationship between the witness and the accused;
- the need to have the witness view exhibits while testifying; and

- whether the requested accommodation can be properly provided in the particular courtroom or courthouse.

He then concluded by stating that what is central to the decision is whether the requested accommodation "will enhance or undermine the truth-seeking function of our criminal trial process."

DEFENCE POSITION

[20] In the case at bar, defence counsel opposes the application on four grounds. First, he argued that the application was brought at the last minute before trial. This prevented him from obtaining specific instructions from his client and from canvassing the possibility of obtaining evidence in response. He says that the Crown had the opportunity to raise the possibility of CCTV testimony at one of the earlier pre-trial conferences, and ought to have done so. On the other hand, defence counsel candidly concedes that s. 486.2(2.1) of the *Code* allows for such an application to be made before or during the proceedings, and that this presupposes that some such applications will be on very short notice.

[21] Crown counsel responded by stating that he had assumed the CCTV equipment which had been brought to Ross River for the preliminary inquiry would similarly be available for the trial, and that therefore there was no particular need to raise the issue earlier. Indeed, it was not until the pre-trial conference on September 20, 2014 that the senior court clerk informed counsel that the CCTV equipment would not be adequate for the purposes of the trial, as it would not permit proper recording of the evidence.

[22] In the circumstances, while ideally it would have been preferable for the Crown to have confirmed its intentions earlier, Crown counsel's assumption that the equipment

was available and operable was not unreasonable. Accordingly, I give little weight to the defence complaint about short notice.

[23] The second reason that defence counsel opposes the application is that, if successful, it will effectively result in a change of venue for the trial. That is because the CCTV equipment is only available in Whitehorse, where a permanent system has been recently been installed in each of the courtrooms. This will mean that the accused will not be tried in the community where the offence allegedly occurred, contrary to the policy of this Court, and indeed northern courts generally, whenever practicable. Further, because this matter is being tried by a judge and jury, the accused will be denied a jury of his peers. Defence counsel submits that the communities of Whitehorse and Ross River are significantly different, implying that a jury selected in Whitehorse would be less demographically representative than one from his home community. Finally on this point, counsel submits that holding the trial in Whitehorse will cause significant difficulties not only for the two Crown witnesses, but also for the accused and other defence witnesses he intends to call from Ross River, as all such witnesses reside in that community.

[24] I am sympathetic to the accused's position here. However, I agree with Smart J. in *S.B.T.* that the central question on the issue of requested testimonial accommodation under s. 486.2(1) is whether it will enhance or undermine the truth-seeking function of the criminal trial process. In this case, the Crown has determined that CCTV will be necessary for the two underage Crown witnesses to properly testify. Thus, the desirability of holding trials in the community of origin must occasionally give way to those circumstances where the testimonial accommodation cannot be provided in that community, unless the accused persuades the court otherwise.

[25] I note here that Kilpatrick J. was faced with a similar problem in *R. v. Hainnu*, 2011 NUCJ 14. In that case, the Crown applied to have two 15-year-old female complainants testify by videoconference link with the courtroom, based upon certain identified psychological needs. As videoconferencing was not available in the community of origin, the Crown requested a change of venue from that community to Iqaluit. Kilpatrick J. determined that the application was ostensibly being made pursuant to s. 714.1 of the *Code*. That section allows the court to permit a witness residing in Canada to give evidence by means of technology that allows the testimony "in the virtual presence of the parties and the court", if the court is of the opinion that it would be appropriate in all of the circumstances. Four of the six individuals charged with a multitude of sexual offences against the complainants opposed the application, principally on the basis that the technology would not permit effective cross-examination. Kilpatrick J. noted, at para. 61, that videoconferencing had been in common use in Nunavut for the previous four years, and had facilitated long-distance testimony in "every conceivable type of criminal allegation, including homicides." At paras. 109 and 110, he concluded:

> "109 This Court does not lightly entertain changes of venue to a different community. Every effort is made to hold trials in the community of origin. There is great value to the community in doing so. It is particularly important in Nunavut for the local community to see justice being done. However, the long-standing practice of this Court may occasionally have to yield to necessity.
>
> 110 In the circumstances of this case, the Court is satisfied that the overall benefits accruing to the administration of justice through a change of venue exceed the public benefits associated with access to justice in the community of origin. A change of venue from Community X to Iqaluit is therefore ordered with respect to all four matters."

[26] In the case at bar, I similarly conclude that the long-standing practice of this Court to attempt to hold trials in the community of origin must, in the circumstances of this case, give way to the primacy of enhancing the truth seeking function of the criminal trial process.

[27] The third argument raised by defence counsel is that, notwithstanding Constable Manweiller's affidavit, it has been his experience that CCTV testimony "takes away from the flow of the trial". For example, in a recent trial, defence counsel complained that there were times when the complainant dropped her head while being televised, in such a fashion that those in the courtroom could not see her face while she was testifying. On the other hand, counsel candidly conceded that the same problem can occur during the testimony of a witness in the witness box. In my experience, when that sort of thing happens, or when the witness fails to speak clearly and audibly, the problem can often be resolved by a direction from the court to the witness to sit up or speak up. The other example provided by defence counsel was that the complainant could not see the trial judge when he was speaking to her. While that may be less than ideal, in my view, it is more important that the trier-of-fact be able to see the witness, rather than the other way around. In summary on this point, the types of challenges that may arise in communicating with the witness via CCTV technology are not expected to be so great as to constitute an interference with the proper administration of justice. In any event, the defence can always revisit the interference issue should complicating circumstances arise during the trial.

[28] The last argument raised by defence counsel was that an order granting the Crown's application would necessitate an adjournment of the trial and will give rise to

further delay. Counsel noted for the record that he is not waiving his client's right to be tried within a reasonable time under s. 11(b) of the *Charter*. I agree that further delay is unfortunate. However, in relative terms, and without prejudging the matter, this case is not inordinately long in the tooth. In any event, this is ultimately an issue to be resolved on another day.

CONCLUSION

[29] In conclusion, I grant the Crown's application pursuant to s. 486.2(1) of the *Code* and authorize the complainant, S.D., and Crown witness, C.D., to testify outside the courtroom for the purposes of trial via CCTV. As there is no adequate CCTV system presently available for use in Ross River, the jury trial scheduled to commence on September 29, 2014 has been adjourned generally. The rescheduling of the trial will be spoken to on October 7, 2014, at 1:30 PM.

Gower J.