SUPREME COURT OF YUKON

Citation: *R. v. J.J.P.*, 2017 YKSC 66

Date: 20171116
S.C. No. 16-01514
Registry: Whitehorse

BETWEEN

REGINA

APPLICANT

AND

J.J.P.

RESPONDENT

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

Before Mr. Justice R.S. Veale

Appearances:
Noel Sinclair and
Sue Bogle — Counsel for the Crown
Vincent Larochelle — Counsel for J.J.P.

REASONS FOR JUDGMENT
(Section 486 Exclusion of Public Order)

INTRODUCTION

[1] The accused pled guilty to nine counts of sexual interference with persons under the age of sixteen years, eight counts of production of child pornography and two counts of voyeurism.

[2] The Crown applies for an order under s. 486(1) of the *Criminal Code* to exclude the public from viewing a proposed exhibit of various child pornography photographs and video-recordings, which includes images of the child victims. This is not an

application to exclude the public from the sentencing hearing. It is an application to have me review the exhibit *in camera* in my chambers, and to then seal it and prohibit public access entirely.

[3] The privacy of the victims is presently protected by a court order under s. 486.4 prohibiting the publication, broadcast or transmission of any information that could identify them.

[4] The Crown gave oral notice of its application in open court on October 5, 2017, and served it on local media including the Canadian Broadcasting Corporation. No one from the media appeared to oppose the application or otherwise provided submissions. I am advised that counsel for J.J.P. has reviewed the exhibit and does not take a position on this application.

The Evidence Already Before the Court

[5] Eleven girls under the age of 16 have been victimized by the accused. Nine were sexually assaulted and photographed while two became the subjects of pornographic photos and videos by means of a hidden camera.

[6] The accused admits to sexually fondling nine of the victims. He admits to digital anal penetration of six of the girls, penile anal penetration of three and attempted penile penetration of one. He applied a vibrator to the genital areas of three girls.

[7] The accused as well admits to taking hundreds of photographs and numerous video recordings of his victims.

[8] The Crown's two original Indictments, each containing 49 counts and identifying the victims by initials only, have been sealed within the court file. After negotiation with counsel for the accused, the Crown filed a Replacement Indictment of 19 counts. The

accused pled guilty to these 19 counts and the Replacement Indictment has been sealed.

[9] An Agreed Statement of Facts identifying the victims by their initials was filed and has been sealed.

[10] An Agreed Statement of Facts with the names of victims redacted entirely has been filed and is not sealed. A Replacement Indictment of 19 counts identifying them only as Victim 1, Victim 2, etc, has been filed and is not sealed.

[11] The exhibit being considered here includes extensive, graphic, and profoundly disturbing photographs and video-recordings of the victims, in accordance with the Agreed Statement of Facts. All of the images and recordings fit within the definition of child pornography set out in s. 163.1 of the *Criminal Code*.

THE LAW

[12] At the outset, I should state that I agree with the Crown that it is important that these photos and videos be viewed as part of the sentencing proceedings.

[13] Two relatively recent appellate cases to consider the viewing of child pornography in a sentencing context are *R. v. Hunt*, 2002 ABCA 155 ("*Hunt*") and *R. v. P.M.*, 2012 ONCA 162 ("*P.M.*").

[14] In *Hunt,* a guilty plea proceeded on the basis of an Agreed Statement of Facts based on 549 graphic photographs of child pornography. The Crown attempted to introduce the photographs at the time of sentencing and defence counsel objected as the Agreed Statement of Facts did not refer to the photographs. The sentencing judge declined to view the photographs, finding that the offences were well described in the Agreed Statement of Facts and it would be of no benefit to see the photographs.

[15] In finding that the sentencing judge should have reviewed the photographs, the Alberta Court of Appeal stated at para. 16:

> Ordinarily, a sentencing judge would be expected to review photographs that depict the crime. By definition, such photographs are relevant. In this case, the photographs do not depict the crime - they are the crime. That is, the actus reus of this offence is making, printing, publishing, or possessing photographic representations of someone under eighteen years engaged in explicit sexual activity. Thus, they are relevant. Being relevant, they should have been reviewed by the sentencing judge unless some other exclusionary rule applied. Counsel for the Respondent did not suggest the prejudicial effect outweighed the probative value. We doubt such an argument could be made when dealing with the actus reus of the crime. …

[16] *P.M.* also considered a sentencing judge's refusal to view a disc of child pornography, which in that case included, among other images, five photos and three videos depicting the offender's forced anal and vaginal intercourse with his daughter. There, the expectation seemed to be that the disc would be played in open court, and the victim expressed her view that she did not want the disc viewed. In a sense picking up where *Hunt* left off, Rosenberg J.A. for the majority, found that sentencing judges do have the ability to exclude relevant evidence at sentencing on the basis that the prejudicial effect outweighs the probative value. He also, however, agreed with the determination in *Hunt* that, ordinarily, the sentencing judge should view the kind of evidence proffered in this case if asked to do so (para. 31), as well as the view expressed by Molloy J. in *R. v. Kwok,* [2007] O.J. No. 457 (S.C.) that "[w]hile the description in words of such disturbing images is shocking, nobody can fully appreciate the sickening horror of such pornography without actually looking at it" (para. 33).

[17] Despite the sentencing judge's concern about playing the disc in open court, Rosenberg J.A. noted that he could have taken steps to limit the exposure of the public and the victim to the images contained.

[18] In the result, the majority of the Court of Appeal refused to interfere with the sentencing judge's decision to decline to view the disc.

[19] In her dissenting opinion, however, Epstein J.A. found that he had erred. More specifically, with respect to the views of the victim, she commented that there are practical ways to provide a trial judge an opportunity to view images like the ones at issue while minimizing the impact on the victim, and pointed to *R. v. Bernardo,* [1995] O.J. No. 1472 (Gen. Div.) ("*Bernardo*"), *R. v. Lehman,* 2007 ONCJ 18, *R. v. M.G.*, 2009 ONCJ 561 and *R. v. J.V.H.*, 2010 BCPC 253. In both *Lehman* and *M.G.*, it appears that the sentencing judge reviewed child pornography images outside of the courtroom, while in *Bernardo* and *J.V.H.* the court adopted a process whereby video evidence was played in court but visible and/or audible only to the judge and the parties.

[20] The Crown here has requested that I view the images and videos in my chambers and has brought this application under s. 486 of the *Criminal Code.* Sections 486(1) and (2) state:

> **Exclusion of public**
>
> 486 (1) Any proceedings against an accused shall be held in open court, but the presiding judge or justice may, on application of the prosecutor or a witness or on his or her own motion, order the exclusion of all or any members of the public from the court room for all or part of the proceedings, or order that the witness testify behind a screen or other device that would allow the witness not to be seen by members of the public, if the judge or justice is of the opinion that such an order is in the interest of public morals, the maintenance of order or the proper administration of justice

> or is necessary to prevent injury to international relations or national defence or national security.
>
> …
>
> **Factors to be considered**
>
> (2) In determining whether the order is in the interest of the proper administration of justice, the judge or justice shall consider
>
> (a) society's interest in encouraging the reporting of offences and the participation of victims and witnesses in the criminal justice process;
>
> (b) the safeguarding of the interests of witnesses under the age of 18 years in all proceedings;
>
> (c) the ability of the witness to give a full and candid account of the acts complained of if the order were not made;
>
> (d) whether the witness needs the order for their security or to protect them from intimidation or retaliation;
>
> (e) the protection of justice system participants who are involved in the proceedings;
>
> (f) whether effective alternatives to the making of the proposed order are available in the circumstances;
>
> (g) the salutary and deleterious effects of the proposed order; and
>
> (h) any other factor that the judge or justice considers relevant. (my emphasis)

[21] Superior courts have both statutory jurisdiction pursuant to s. 486 of the *Criminal Code* and the inherent jurisdiction "to ensure the observance of the due process of the law, to prevent improper vexation or oppression, to do justice between the parties and secure a fair trial between them". See *Endean v. British Columbia*, 2016 SCC 42

("*Endean*"), at paras 23 and 24, quoting I.H. Jacob, "The Inherent Jurisdiction of the Court", (1970), 23 Curr. Legal Probs. 23. As well, all courts, superior and provincial/territorial, have an inherent or implied jurisdiction to control their own process (see e.g. *Cunningham v. Lilles*, 2010 SCC 10).

[22] While there is no limit upon the power of the court in the exercise of its inherent jurisdiction, it must be exercised sparingly to regulate court proceedings in a way that secures the convenience, expeditiousness and efficiency in the administration of justice. See *Endean*, at para. 60.

[23] The application in this case is not precisely to exclude members of the public from the courtroom as contemplated by s. 486, but rather to have some of the Crown's evidence viewed outside of the courtroom entirely. Accordingly, in my view, it requires an exercise of the inherent jurisdiction described in *Endean*, which should be informed by the framework of s. 486.

[24] *R. v. Bernardo*, is one example of the exercise of inherent jurisdiction in a similar context. In *Bernardo,* LeSage A.C.J.O.C. ordered that video-recordings depicting the brutal and degrading sexual assaults of four teenaged girls be played at the accused's trial in such a way that the video would only be visible to jurors, the judge, the parties, and court reporters, while the audio would be heard throughout the courtroom. There, as here, verbal or text descriptions of the images captured were available to the public.

[25] LeSage A.C.J.O.C. confirmed that "open justice" was the foundation of our legal system but it was not an absolute concept. He recognized the important role played by the media in reporting on criminal trials but stated that there must be a proper balance between the right to know and publish and the protection to be afforded to victims and

their families. See *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3. S.C.R. 835, and *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326.

[26] LeSage A.C.J.O.C. determined, at paras. 121-123, that the harm, there the harm to the surviving family members of the three girls who subsequently died at Bernardo's hands, would far exceed any benefit from the public exposure of the graphic sexual assaults. He stated that the public pictorial display had virtually no redeeming societal value and would seriously affect the families and friends of the victims, as well as a large number of citizens. The limitations imposed would not affect the accused's right to a fair and public hearing.

[27] Since the Crown was seeking something less than a s. 486(1) publication ban, it was necessary to involve the court's inherent jurisdiction. Section 486(1), then read as follows:

> Any proceedings against an accused shall be held in open court, but where the presiding judge, provincial court judge or justice, as the case may be, is of the opinion that it is in the interest of public morals, the maintenance of order or the proper administration of justice to exclude all or any members of the public from the court room for all or part of the proceedings, he may so order.

[28] LeSage A.C.J.O.C. was satisfied that he was permitted to exercise his inherent jurisdiction to the extent that it was required to "see that justice is done." He decided that s. 486(1) of the *Code* did not restrict his authority to grant what was in effect a lesser remedy (at para. 13).

[29] I note that *Bernardo* differs from the case at bar in that the video-recordings there were being played as part of the Crown's case at trial, and witnesses were going to be questioned about the contents in the course of their testimony.

[30] In *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)* (*Re R. v. Carson)*, [1996] 3 S.C.R. 480 ("*CBC v. New Brunswick*"), the Supreme Court of Canada ruled that s. 486(1) constitutes a justifiable limit on the freedom of expression guaranteed by s. 2(b) of the *Charter of Rights and Freedom* and is thereby saved by s. 1 of the *Charter*. In that case, a prominent Moncton resident pled guilty to two charges of sexual assault and two charges of sexual interference. On a motion of the Crown, consented to by defence counsel, the trial judge excluded the public and the media with the exception of the accused, the victims, their immediate families and a victim services coordinator, from those parts of the sentencing proceedings dealing with the specific acts committed by the accused. The ultimate issue was whether the trial judge exceeded his jurisdiction. The Court decided that the judge did not have all the facts before him to provide a sufficient factual foundation for the exercise of his discretion under s. 486(1). The mere fact that it was a sexual assault case was not sufficient to establish undue hardship for the complainants requiring the exclusion of the public.

[31] The burden of displacing the general rule of openness of the court lies upon the party making the application. See *CBC v. New Brunswick*, at paras. 71 and 75; and *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3. S.C.R. 835. There must be a sufficient evidentiary basis from agreed facts or found in a *voir dire* if there is a dispute. There must be a sufficient evidentiary basis generally to allow the judge to determine;

1. Whether the order is necessary in light of reasonable and effective alternatives;
2. Whether the order has been limited as much as possible; and

3. Whether the positive and negative characteristics are proportionate.

[32] I add that there is also a category for the exclusion of the public in the interest of public morals. See *R. v. Colalillo*, 2006 QCCS 7903, at para. 12, where the judge to had to determine what evidence might reasonably be expected to offend, or to have an adverse or corrupting effect on public morals by publicity of obscenities, perversions or the like. That is not specifically submitted to be the case in this application.

ANALYSIS

[33] In the case at bar, as in *P.M.*, the photography and video recordings contained within the exhibit depict the acts forming the basis of both the sexual interference and production of child pornography offences.

[34] As stated in both *P.M.* and *Hunt*, a sentencing judge is expected to review this type of evidence when it is presented. I am satisfied, however, that in these circumstances, it is appropriate that I do so in chambers rather than in open court. I also conclude that the exhibit should be sealed within the court file.

[35] I reach this conclusion both on the basis of the reasoning in *Bernardo* as well as with consideration of the factors now enumerated within s. 486 of the *Criminal Code.* In my view, a public display of this exhibit in court would seriously and adversely affect the victims, as well as their families and friends, and the open courts principle is satisfied by the public availability of the Agreed Statement of Facts, which sets out the details of the offences in a manner sufficient to allow the public to grasp the shocking and abhorrent nature of them.

[36] As well, allowing the exhibit to be viewed by the media or the public could, in my view:

1. disclose the identity of the victims;
2. cause significant psychological harm to the victims;
3. discourage the reporting of sexual offences;
4. publicize child pornography; and
5. disadvantage women and girls who are subjected to significant trauma by sexual violence and pornography.

CONCLUSION

[37] I conclude that the order sealing the exhibit and limiting its viewing to the sentencing judge addresses the factors to be considered in s. 486(2)(a), (b), (d) and (e).

[38] There is really no other way of protecting the privacy and security of the victims and, overall, the negative consequences of media and public access overwhelmingly outweigh this limited restriction on court openness.

[39] In my view, the order is necessary and the availability of the redacted Agreed Statement of Facts satisfies the public's right to know about the offences committed by the accused and these proceedings.

[40] I therefore make the following order:

1. that the copies of the Replacement Indictment dated October 5, 2017, one including the full names of the eleven victims and one including only the victims' initials, be sealed and secured in the Court records in a manner which will ensure the confidentiality of the victims' identities, subject to any further order of the Court;

2. that the Crown tenders an audio-visual exhibit of various child pornography photographs and video recordings featuring images of the victims indicated in the Replacement Indictment filed in this proceedings;
3. that the Court examine the said audio-visual exhibit *in camera*, privately within the presiding Justice's chambers;
4. that following the Justice's examination of the audio-visual exhibit, the exhibit shall be sealed to prevent access and viewing by anyone other than the presiding Justice, subject to any further order of the Court;
5. that the audio-visual exhibit shall be secured in the Court records in a manner which will ensure the confidentiality of the exhibit, subject to any further order of the Court; and
6. that when the said exhibit is no longer required for the due administration of justice, the Crown may apply for its return to the RCMP for destruction. The Crown shall give notice of its application to local media and any victims who may have commenced civil proceedings in the Supreme Court of Yukon.

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VEALE J.