SUPREME COURT OF YUKON

Citation: *R. v. Netro*, 2018 YKSC 11

Date: 20180305
S.C. No. 17-01502
Registry: Whitehorse

BETWEEN:

HER MAJESTY THE QUEEN

AND

CURTIS FREDERICK NETRO

Publication of information that could disclose the identity of the complainant or witnesses has been prohibited by court order pursuant to section 486.4 of the *Criminal Code*. This order has lapsed.

Before: Mr. Justice L.F. Gower

Appearances:

Leo Lane — Counsel for the Crown
André Roothman — Counsel for the Defence

RULING
(Crown's s. 486.2 application)

INTRODUCTION

[1] This is an application by the Crown for an order allowing the complainant, J.B., to testify via video link from outside the courtroom, pursuant to s. 486.2(2) of the *Criminal Code.* The video link would employ closed circuit television ("CCTV") which would enable the accused in the courtroom to see the face and upper body of the complainant while testifying, but the complainant would not be able to see the accused, Curtis Netro. He is charged with committing a sexual assault upon J.B. in Teslin, Yukon on November

25, 2016. Crown counsel informs me that the nature of the alleged sexual assault involves sexual intercourse.

[2] Defence counsel opposes the application. He submits that the credibility of the complainant will be a central issue at trial and that, to properly test her credibility, she should be examined in the courtroom in the presence of the judge and Crown and defence counsel. He also submits that the evidence in support of the application from the complainant, both from her affidavit and her testimony in cross-examination on this application is “a bit on the thin side” and does not address several of the factors set out in s. 486.2(3) of the *Code*.

[3] In a more general sense, defence counsel is concerned that a relatively recent amendment to s. 486.2(2) should not be interpreted so broadly as to result in a situation where virtually every complainant alleging a sexual assault is allowed to testify using a testimonial aid that allows the witness not to see the accused. Formerly, s. 486.2(2) allowed a court to make such an order if it was of the opinion that the order “is necessary to obtain” a full and candid account from the witness. However, an amendment that came into force on July 22, 2015 changed that language, such that a court may now make such an order if it is of the opinion that the order “would facilitate the giving of” a full and candid account from the witness “or would otherwise be in the interest of the proper administration of justice”.

[4] The main issue on this application is how to interpret this amendment.

COMPLAINANT'S EVIDENCE

[5] J.B. resides in the village of Teslin, Yukon, which she estimates has a population of approximately 500. She is 27 years of age and works for the Yukon government. She has two school-aged children.

[6] J.B. has known the accused for five or six years. She said that they were friends and co-workers before the incident on November 25, 2016. His wife was a good friend of hers. They visited each other at their respective houses.

[7] J.B. deposed that she thinks about the sexual assault every day, that it has caused her a lot of stress, and that it has been hard on her health.

[8] J.B. also deposed that, when she sees the accused, it brings flashbacks and pain. It triggers a lot of emotions for her. She feels anger towards the accused and fear. Being in the same room with him makes her uncomfortable and she wants to leave right away. If she has to testify in the courtroom, she said it will make her very uncomfortable.

[9] J.B. testified by CCTV from a separate room at the preliminary inquiry in this matter in Whitehorse on May 25, 2017. She deposed that she was able to speak, and that testifying was easier without having to see the face of the accused. She said that she felt more comfortable in the other room.

[10] In August last year, J.B. attended a Tlingit celebration in Teslin. The accused and some of his relatives were present and she felt that they were staring at her and laughing at her when she walked past them with her family. She acknowledged that that she did not actually hear what they were saying, but her perception was that they were trying to intimidate her.

[11] J.B. acknowledged as well that she would be comfortable being in a separate room with counsel present during her direct examination and cross-examination, as long as the accused was in a different room.

ANALYSIS

[12] What is central to this analysis is whether the requested testimonial aid or accommodation will enhance or undermine the truth seeking function of the criminal trial process: *R. v. S.B.T.*, 2008 BCSC 711 ("*S.B.T.*"), at para. 40. As the Supreme Court stated in *R.* v. *Levogiannis*, [1993] 4 S.C.R. 475, the "goal of the court process is truth seeking and, to that end, the evidence of all those involved in judicial proceedings must be given in a way that is most favourable to eliciting the truth" (para. 13).

[13] Under our criminal justice system, an accused has no constitutional right to a face-to-face "confrontation" with the complainant making a sexual assault allegation, or indeed an allegation of any criminal offence: *R. v. J.Z.S.*, 2008 BCCA 401, at para. 41. As Kilpatrick J. said in *R. v. Hainnu*, 2011 NUCJ 14, "the "right" of face-to-face confrontation forms no part of the tenets of fundamental justice guaranteed by the *Charter*." Rather, it is the right to a fair trial and the right to make full answer and defence that are protected (para. 50).

[14] Before going further, it may be helpful to set out the provisions of s. 486.2 in their entirety:

> 486.2 (1) Despite section 650, in any proceedings against an accused, the judge or justice shall, on application of the prosecutor in respect of a witness who is under the age of 18 years or who is able to communicate evidence but may have difficulty doing so by reason of a mental or physical disability, or on application of such a witness, 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.

(2) Despite section 650, in any proceedings against an accused, the judge or justice may, on application of the prosecutor in respect of a witness, or on application of a witness, 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 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.

(2.1) An application referred to in subsection (1) or (2) may be made, during the proceedings, to the presiding judge or justice or, before the proceedings begin, to the judge or justice who will preside at the proceedings or, if that judge or justice has not been determined, to any judge or justice having jurisdiction in the judicial district where the proceedings will take place.

(3) In determining whether to make an order under subsection (2), the judge or justice shall consider

(a) the age of the witness;

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

(c) the nature of the offence;

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

(e) whether the witness needs the order for their security or to protect them from intimidation or retaliation;

(f) whether the order is needed to protect the identity of a peace officer who has acted, is acting or will be acting in an undercover capacity, or of a person who has acted, is acting or will be acting covertly under the direction of a peace officer;

> (f.1) whether the order is needed to protect the witness's identity if they have had, have or will have responsibilities relating to national security or intelligence;
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> (g) society's interest in encouraging the reporting of offences and the participation of victims and witnesses in the criminal justice process; and
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> (h) any other factor that the judge or justice considers relevant.
>
> (4) If the judge or justice is of the opinion that it is necessary for a witness to testify in order to determine whether an order under subsection (2) should be made in respect of that witness, the judge or justice shall order that the witness testify in accordance with that subsection.
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> (5) A witness shall not testify outside the court room in accordance with an order made under subsection (1) or (2) unless arrangements are made for the accused, the judge or justice and the jury to watch the testimony of the witness by means of closed-circuit television or otherwise and the accused is permitted to communicate with counsel while watching the testimony.
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> (6) No adverse inference may be drawn from the fact that an order is, or is not, made under subsection (1) or (2).

[15] An application under s. 486.2(1) is quite different from one under s. 486.2(2). The former now presumptively requires the use of a screen, CCTV or other device, upon application by the Crown, or at the request of a 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: *R. v. Etzel*, 2014 YKSC 50, at para. 10. The latter provision still gives the court discretion to make an order for the use of a

testimonial aid and requires the court to consider the applicable factors in s. 486.2(3). The onus remains with the applicant on a balance of probabilities.

[16] Incidentally, as I understood them, Crown and defence counsel are agreed in this application that where the Crown or a witness applies for a particular type of testimonial accommodation and no issue arises as to whether the type of accommodation might interfere with the proper administration of justice, then both s. 486.2(1) and s. 486.2(2) presume that the court will order the accommodation requested by the applicant, unless an "interference" issue arises: *Etzel*, cited above, at para. 18. In other words, the presiding judge must rule on the application which is before the court and does not have the discretion to consider a testimonial accommodation other than that requested by the moving party, absent evidence of interference with the proper administration of justice: *R. v. W.V.*, 2016 ONSC 874, at para. 10.

[17] In the case at bar, this means that I have no jurisdiction to substitute a screen or other testimonial accommodation for the CCTV requested by the Crown, unless I am persuaded that there is a legitimate issue regarding the administration of justice. No such argument has been made by defence counsel on this application.

[18] In *R. v. J.S.*, 2016 YKTC 59 ("*J.S.*"), Cozens J. considered the amendment to s. 486.2(2) that changed the test from from "is necessary to obtain" a full and candid account to "would facilitate the giving of" such an account. He concluded that the amendment clearly reflects Parliament's intention to lower the threshold required in order to allow a witness to testify from outside the courtroom, or behind a screen or other device that would allow the witness not to see the accused (paras. 16 and 27). Cozens J. relied on *R. v. Jimaleh,* [2016] O.J. No. 5133 (S.C.) for his conclusion.

[19] *J.S*. was referred to with approval by Gorman J. in *R. v. K.P.*, [2017] N.J. No. 69 (P.C.), at paras. 20 and 21. At para. 24, he concluded:

> 24 I view the deletion of the word "necessary" as being significant. It illustrates that the Crown no longer has to establish that there will, without a section 486.2(2) order, be a "deprivation" of the witness's ability to provide a full and candid account … Rather, all that the Crown must establish is that a section 486.2(2) order will "facilitate" the giving of a full and candid account by the witness or would otherwise be in the interest of the proper administration of justice. Either is sufficient.

[20] Gorman J. then went on to consider various dictionary definitions of "facilitate". The Concise Oxford Dictionary, (10th ed.), defines the word as "make easier or less difficult; help forward". Thus, Gorman J. concluded that there is now "a very low threshold" for making an order under s. 486.2(2), and that one should be made if allowing a witness to testify with some form of testimonial accommodation will make it easier or help that witness to give a full and frank account of the subject matter (para. 27).

[21] Gorman J. also addressed the interpretation of the words "in the interest of the proper administration of justice". Essentially, he concluded that the concern is whether the testimonial accommodation will enhance or undermine the truth seeking function of the criminal trial process: see also *S.B.T.*, cited above, at para. 39. Finally, Gorman J. quoted from *J.S*., cited above, at para. 25, where Cozens J. wrote:

> … knowledge that, in appropriate circumstances, a witness and complainant will be able to testify outside of the courtroom and does not have to see the accused can have the desired effect of encouraging the reporting of offences and the participation of victims and witnesses in the criminal

justice process.

Gorman J. found such a result is in the interest of the administration of justice and, if CCTV is used, the right of confrontation is not affected (para. 31).

[22] All this may make it increasingly common for complainants in sexual assault matters to be allowed to testify with the assistance of testimonial accommodation. While that is a concern for defence counsel in this case, it is nevertheless the apparent intention of Parliament to move in that direction, and this Court must respect that intention. Having said that, the onus remains upon the applicant for an order under s. 486.2(2). The onus is both evidentiary and persuasive and should address the various factors specifically identified by Parliament in s. 486.2(3) of the *Code*, to the extent that they are applicable.

[23] In the case at bar, I will go through those various factors:

a) **the age of the witness** - J.B. is 27 years old. She also testified on this application in a seemingly forthright and self-confident manner;

b) **the witness' mental or physical disabilities, if any** - this does not appear to be applicable;

c) **the nature of the offence** - again, I am informed that the allegation involves full sexual intercourse and some otherwise potentially embarrassing circumstances supposedly involving the accused's wife;

d) **the nature of any relationship between the witness and the accused** - they were formerly friends and co-workers;

e) **whether the witness needs the order for their security or to protect them from intimidation or retaliation** - this does not appear to be applicable;

f) **whether the order is needed to protect the identity of a peace officer who has acted, is acting or will be acting in an undercover capacity, or of a person who has acted, is acting or will be acting covertly under the direction of the peace officer** - this is not applicable;

f.1) **whether the order is needed to protect the witnesses identity if they have had, have or will have responsibilities relating to national security or intelligence** - this is not applicable;

g) **society's interest in encouraging the reporting of offences and the participation of victims and witnesses in the criminal justice system** - this is applicable, and I adopt the observations made by Cozens J. in *J.S.*; and

h) **any other factor that the judge or justice considers relevant** - while I agree with defence counsel that the evidence in support of this application was "a bit thin", at the end of the day, J.B. did give evidence that "testifying was easier without having to see" the face of the accused.[1]

CONCLUSION

[24] The Crown's application is granted.

[25] With the Crown's consent, defence counsel may choose to cross-examine the complainant in the same room she testifies from via CCTV, providing arrangements are made for the accused communicate with counsel while watching the testimony. It is not possible, as suggested by defence counsel, for the accused to be in a separate room in

[1] Affidavit filed February 13, 2018, para. 8.

order to watch the complainant in court via CCTV, as that would offend s. 650(1.1) of the *Code*.

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GOWER J.