Citation: *R.* v. *E.O.,* 2016 YKTC 52 Date: 20161017
Docket: 15-00357
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Cozens

REGINA

v.

E.O.

Publication of information that could disclose the identity of the complainant or witness has been prohibited by court order pursuant to sections 486.4 and 486.5 of the *Criminal Code*

Appearances:
Kevin MacGillivray Counsel for the Crown
Jennifer Cunningham Counsel for the Defence

RULING ON APPLICATION

[1] E.O. has been charged with having committed an offence contrary to s. 153(1) of the *Criminal Code*. While the offence is alleged to have occurred in Mayo, by agreement of counsel the matter was set to proceed to trial in Whitehorse on Monday, October 17, 2016.

[2] However, the Crown has brought an application to adjourn the trial because the complainant, S.G, and her mother, C.G., did not appear at court for the trial. E.O. is related to S.G.

[3] Crown counsel seeks that witness warrants be issued for S.G. and C.G.

[4] S.G. was required to attend court pursuant to a subpoena that was served on her on October 13.

[5] C.G. did not have a subpoena served on her. There was information before me that C.G. had indicated a desire to attend at the RCMP Detachment in her community rather than having the subpoena served on her at work. She did not do so. Instead, the RCMP in S.G.'s community served the subpoena requiring C.G.'s attendance on S.G. at the same time she also was served. This is, of course, not proper service of the subpoena on C.G.

[6] The Information alleges that the offence occurred between May 1, 2014 and August 2, 2015. The complainant was 17 years of age at the time.

[7] The matter was first in court on September 24, 2015. Defence counsel re-elected to proceed before a Territorial Court judge on April 22, 2016. Today's trial date was set in court on May 20, 2016.

[8] This is the first time the matter has been set for trial.

[9] The information before me at this application is all by way of the submissions of counsel with the exception of the subpoenas that were issued and, in the case of S.G. and the accused's wife, A.O., also properly served.

[10] Crown counsel advised that there was considerable contact between the Crown's office, Victim Services, S.G. and A.G. until right before the trial date. Counsel indicates that this contact was favourable and in no way led the Crown to believe that either S.G.

or C.G. would not attend for trial, until just last week. Most of this contact was by telephone.

[11] On September 22, 2016, Crown counsel with the Crown Witness Coordinator ("CWC") and Victim Services Worker ("VSW"), had a telephone conversation with S.G. and C.G. Counsel indicated that it appeared the witnesses were certainly reluctant about testifying, but were committed to doing so, stating that they would be there at trial. C.G. asked what would happen if they did not appear for trial. Crown counsel advises that he told them warrants could be issued. He stated that at that time he had no indication that they would not cooperate.

[12] There was a discussion with respect to setting a date for a meeting between Crown counsel, the CWC and the VSW sometime on October 12-14, dependent on which of these dates Crown counsel would be available.

[13] On October 3, Crown counsel advised the RCMP to issue subpoenas for the witnesses.

[14] There was a further discussion between the CWC and S.G. on October 4, (I am unsure whether C.G. was also there at the time). It was apparent that S.G. was stressed. There was also discussion with respect to how the subpoenas were to be served on S.G. and C.G.

[15] On October 10, the RCMP served A.O. with her subpoena. She stated that she was not going to attend for trial and slammed the door on the RCMP member, who then placed the subpoena in the door.

[16] On October 11, S.G. and C.G. spoke with the CWC. C.G. expressed her reluctance about attending for trial and testifying. Again, C.G. asked what would happen if they did not attend court on the date of trial.

[17] Both C.G. and S.G. agreed to a meeting with Crown counsel, the CWC and the VSW. This meeting was to occur on October 14.

[18] On October 12, C.G. called the CWC to say that S.G. was drinking. She reaffirmed that she would pick up her subpoena at the RCMP Detachment.

[19] On October 13, C.G. called the Crown's office and stated that she and S.G. would not be attending for the trial. She cancelled the October 14 meeting.

[20] On October 14, C.G. also spoke to the travel coordinator and told her to cancel the hotel rooms in Whitehorse.

[21] The travel coordinator responded with a text that indicated that the hotel rooms were not being cancelled. On Sunday, October 16, C.G. sent a text to the travel coordinator stating that she had to support S.G. and that she was not coming into Whitehorse for the trial.

[22] There was no further contact between the Crown's office and S.G. and C.G. after October 13.

[23] Crown counsel indicates that he nonetheless remained optimistic that the complainants would show for trial today, based upon the past relationship that he and the CWC and VSW had with S.G. and C.G.

[24] While Crown counsel contemplated bringing an application for a witness warrant under s. 698(2) on Friday, October 14, he chose not to do so. I am not sure I fully understand his submission as to the apparent unavailability of a judge to hear the application on the 14th, as all three of the Territorial Court judges were present and available to hear an application on that date. I suspect that the decision not to do so may have been premised upon his hope that, given the prior spirit of cooperation demonstrated by S.G. and C.G., they would nonetheless show up at trial.

[25] Crown counsel submits that the accused has provided a statement, which is agreed to be admissible, and in which he admits to sexual contact with SG. It appears that the issue is whether there was a breach of trust such as to make the sexual contact criminal in nature. Counsel also submits that S.G. and C.G. have submitted statements. Crown counsel maintains that the statements of S.G. and C.G. are potentially admissible for use at trial even without the witnesses being present.

[26] Counsel submits that he could have started the trial today without S.G. and C.G. being in attendance, but was concerned about bifurcating the trial process.

[27] Defence counsel disagrees with the assertion that the statements of S.G. and C.G. were taken in such circumstances as to amount to what have often been referred to as “KGB” statements (***R.*** v. ***K.G.B.***, [1993[1SCR 740) and therefore admissible at trial for the truth of their contents.

[28] Defence counsel opposes the adjournment application on the basis that there have been laches on the part of the Crown and there is not a likelihood that S.G. or C.G. would attend at a future trial date.

[29] Counsel also raises a concern about the nature of the information before this Court on the adjournment application, in particular that there is little in the way of evidence supporting the applications before the Court, by way of affidavit for example. As such there is also no ability for defence counsel to cross-examine any such affiant to test the reliability of the evidence in support of the applications.

Case Law

[30] The case governing adjournment applications is that of ***Darville*** v. ***the Queen***, (1956) 116 C.C.C. 113 (S.C.C.). The test is set out in para. 13 as follows:

> (a) that the absent witnesses are material witnesses in the case;
>
> (b) that the party applying has been guilty of no laches or neglect in omitting to endeavour to procure the attendance of these witnesses;
>
> (c) that there is a reasonable expectation that the witnesses can be procured at the future time to which it is sought to put off the trial.

[31] The case of ***R.*** v. ***Pittner***, 2008 ONCJ 136, commonly cited in adjournment applications in the Yukon, refers to ***Darville*** and the case of ***R.*** v. ***Henry***, [1987] O.J. No. 947 (C.A.), in stating that the five issues for the Court to consider on adjournment applications are:

1. Materiality of the witness;

2. Neglect in securing the attendance of the witness;

3. Prospects for future attendance;

4. Seriousness of the offence; and

5. Prejudice.

Materiality of the Witness

[32] In the present case it is agreed that S.G. and C.G. are material witnesses.

Neglect in Securing the Attendance of the Witness

[33] The matter was set for trial on May 20, 2016. On October 3, 2016 the Crown asked the RCMP to serve subpoenas for the witnesses. Service was effected on A.O. on October 10 and S.G. on October 13. It was never properly effected on C.G. I say this recognizing that there was discussion about C.G. attending at the RCMP Detachment to pick up her subpoena, something she never did.

[34] I have stated previously in adjournment applications that, in my opinion, delaying the service of subpoenas for witnesses until just shortly prior to the trial date is a highly prejudicial factor on the issue of laches to a party seeking an adjournment of trial based upon the unavailability or non-attendance of a material witness.

[35] The fact that a subpoena has been served does not, in and of itself, mean that a party is not guilty of laches and therefore presumptively entitled to an adjournment and the issuance of a material witness warrant when the witness is not present for the trial.

[36] Besides the obvious risk of being unable to locate a witness, or where a witness is first learning of a trial date and has other commitments, there will be circumstances, such as in the case at bar, where the service of the subpoena appears to distress the

witness and serve as a catalyst for a witness to make a decision not to attend at the trial and then communicate this to the party who requires the attendance of the witness.

[37] Crown counsel submits that in this case, as I understood his submissions, the decision was made not to serve the subpoenas due to not wanting to upset or disturb the equilibrium of the cooperating witnesses. In my view, it would make sense to ensure the subpoenas are served well in advance of the trial date while the witnesses are cooperative. The pressure and associated discomfort of having to testify is not so looming when the trial is not, as in this case, only days after the subpoena is served. If there are any witness concerns triggered by the service of the subpoena, it would seem to make sense to have time to deal with these concerns so that either the witness is prepared to attend and testify or, if not, trial time is not squandered at the last moment along with any associated cost or inconvenience.

[38] It may be that there is a general practice not to serve subpoenas until it is apparent that the trial is going to proceed, thus saving an unnecessary expenditure of time and resources. If so, the party making such a choice must be aware of and be prepared to accept the risk of such a choice.

[39] It has been submitted to me previously, albeit not in today's application, that subpoenas are often not served until close to trial in order to serve as a reminder of the trial date and the need for the witness to attend. Again, the party making such a choice bears the risk associated with that choice. It would make sense to me to subpoena the person earlier and then follow up nearer the trial date to remind them. Generally, counsel should be having contact with witnesses in order to prepare for trial in any

event, however, I recognize that the circumstances in the Yukon do not always make it easy to have such contact with many of the witnesses we see in the courts. Certainly, even if the subpoena is served early, a court on an adjournment application will expect to see what efforts have been made to communicate with the witness in order to ensure the witness will be attending at the trial and be prepared to testify. If communication is non-existent or close to it, then the party may well have difficulty on the third part of the test.

[40] I decline to set a timeline by which a witness should be served with a subpoena, as the circumstances of each case and witness will vary. What constitutes a reasonable time will differ. However, a party seeking an adjournment will need to be able to explain why the service of the subpoena on a witness in any particular case was reasonable, and be prepared to produce sufficient reliable information in support of that argument.

[41] In the present case, I have concerns about laches due to the late service of the subpoenas and, in the case of C.G., non-service. I understand the circumstances. I also weigh these concerns against the information I have in regard to the fairly constant communication that the Crown's office has had with the complainants. This mitigates my concerns somewhat, although it does not entirely alleviate them.

Prospects for Future Attendance

[42] I have significant concerns in this case. Both S.G. and C.G. have made it very clear, as of the end of last week, that they had no intention of attending court on the trial date. In fairness, I am satisfied that they had never previously stated that they would

not attend at the trial, and in fact they had stated otherwise. The reluctance that they expressed, including through asking what would happen if they did not attend, does not amount to a clear indication that they would not be here today. It should have been, however, a red flag sufficient to raise concerns about non-attendance. In this regard, I note that there was some credence given to such a concern in the follow-through by the Crown's office to set up a meeting on October 14. This was prudent.

[43] While I have concerns about the prospects for future attendance at trial by S.G. and C.G., I must weigh these concerns against their prior cooperation with the Crown's office and, as I understand it, Victim Services. This may be only a last minute reluctance on the part of S.G. and C.G. that is remediable. As I understand the information in respect to C.G., I expect that if S.G. decides to attend at a future trial date, C.G. would likely be there in support of her daughter.

[44] So while I have concerns in this regard, they are not so great as to satisfy me that S.G. and C.G. will not attend at a future trial date. It may also be that, if the adjournment is granted and witness warrants are issued, the importance of and obligation to attend at court pursuant to a subpoena will be made abundantly clear to them and may well cause them to act differently in future in accordance with their legal obligation.

Seriousness of the Offence

[45] As stated in ***Pittner*** in para. 15:

> The more serious an allegation is, the more compelling the public interest in assuring that it is heard on its merits. By the same token, the more serious an

> allegation, the higher the expectation the court has in expecting that all branches of the Crown will ensure that the case can be heard on its merits…

[46] This is an allegation of a very serious offence. As such it is important that it be litigated; conversely, the Crown must exercise more diligence in order to ensure that the witnesses are prepared to attend at trial.

[47] I am satisfied that, in this case, the Crown made concerted efforts to establish and maintain contact with S.G. and C.G., particularly given their residence in communities outside of Whitehorse.

[48] Cases involving charges such as sexual exploitation require that considerable care and attention be given to ensure witnesses are properly subpoenaed in a reasonable time before trial. In addition there should be ongoing and meaningful contact with the witnesses with accurate records of such contact kept in the event that the witnesses do not attend at the trial date and there is an application for an adjournment and witness warrants.

[49] Certainly the subpoenas were not served within a reasonable time prior to the trial date. This, however, must be balanced against the extent to which the Crown made efforts to maintain communication, including the meeting set up for October 14.

<u>Prejudice</u>

[50] There is clearly some prejudice to the public interest if this charge is not adjudicated. It is a serious charge and should be heard on its merits.

[51] There is also, of course, a presumed prejudice to E.O. in the sense that this charge continues to hang over his head and likely carries with it associated stress and uncertainty. I have no evidence or information about any particular prejudice in this regard that goes beyond what can be presumed.

[52] There is also some prejudice in that E.O. remains bound by the conditions of his undertaking to a police officer. However, the conditions on this undertaking are minimally intrusive, being restricted to reporting to a bail supervisor, providing the supervisor with information in regard to any change in his address, employment or occupation, not having any contact or communication with S.G., and not attending at her place of residence and employment.

[53] As such, the prejudice associated with an adjournment is minimal in regard to both of these issues.

[54] There is some additional prejudice in that E.O. has driven a considerable distance to attend for the trial date. He has expended his time and certainly has some financial costs. He will likely have to do so again at a future trial date in Whitehorse.

[55] Given the knowledge the Crown had on October 13 that S.G. and C.G. had clearly indicated they were not going to attend at the trial date of October 17, it may have been prudent to take steps to have the matter brought before a judge no later than October 14 to determine whether it was likely that the trial could proceed. Had this been done, E.O. may have avoided unnecessarily spending the time and money he has to attend in Whitehorse for the trial.

[56] So while there is a prejudice to E.O. in this regard, this is a matter that could be the subject of a costs application by E.O. If such an application is brought and E.O. is successful, the prejudice would be somewhat mitigated. Even if no costs application is brought or, if brought, is unsuccessful, the prejudice is not particularly great, such as would be the case if E.O. or his witnesses were coming from outside of the Yukon and there were significant cost and/or life implications.

Conclusion

[57] When I balance the above factors, I find that, while there was certainly room for improvement in how things were handled, in particular in regard to the service of the subpoenas, the factors overall militate in favour of granting the adjournment. S.G. and C.G. are material witnesses, the laches or neglect in securing the attendance of S.G. and C.G. are present but offset by the positive efforts and regular contact that the Crown had with what appeared to be a cooperative S.G. and C.G., the prospects for their attendance at a future trial date are questionable but not clearly low, the seriousness of the charge favours taking steps to ensure that the matter proceeds to trial, and the prejudice to the accused is fairly limited and certainly not so great as to offset the prejudice to the public interest if an adjournment is not granted.

[58] As such the Crown request for an adjournment is granted. The next trial date is peremptory on the Crown.

[59] Also granted is the application for witness warrants pursuant to s. 698(2) for S.G. and C.G. The warrant for S.G. will issue the morning of October 25, 2016 where it hopefully can be executed and S.G. can be brought before me at the circuit court in her

community. The warrant for C.G. will issue the morning of October 26, 2016 where it can hopefully be executed and C.G. can be brought before me at the circuit court in her community.

Comment

[60] I wish to make one further comment. In my opinion, on adjournment applications such as these, it is important that there be a clear chronology of the contact that has occurred between, in this case, the Crown's office, Victim Services and the witnesses. In the absence of information indicating ongoing and meaningful contact, it is far less likely that an adjournment will be granted, both on the issue of laches and neglect and on the issue of a reasonable likelihood the witnesses would attend at a future trial date.

[61] Ideally, this information should be available by way of an affidavit or by *viva voce* evidence from a CWC or VSW for example. I take defence counsel's point that there should be an opportunity for cross-examination on the information in support of the application if the circumstances warrant it.

[62] I appreciate that often the need for an adjournment arises at short notice without even the advance notice from the witnesses that occurred in this case. It may not be practical to prepare an affidavit. However, it would be beneficial if there was at a minimum a clear and concise chronology of contact between the Crown's office and Victim Services available for the Court. Ideally, defence counsel should be provided this information in advance of the application in order to peruse it. It may be that defence counsel's position on the adjournment will change. At a minimum, defence counsel would be better situated to make submissions on the application.

[63] I would expect that this would not be difficult to do as I assume, as a matter of practice, notes and entries would be made in regard to any contact between the Crown and Victim Services office and the witnesses as a matter of sound practice and, as such, could easily be readily available on fairly short notice.

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COZENS T.C.J.