Citation: *R. v. J.S.,* 2016 YKTC 59

Date: 20161115
Docket: 15-03597
Registry: Whitehorse

YOUTH JUSTICE COURT OF YUKON
Before His Honour Judge Cozens

REGINA

v.

J.S.

Publication of information identifying the young person charged under the *Youth Criminal Justice Act* is prohibited by section 110(1) of that *Act*.

Publication of information that could identify the complainant or a witness is prohibited by section 111(1) of the *Youth Criminal Justice Act*. Check with the court registry for details.

Appearances:
Leo Lane — Counsel for the Crown
Amy Steele — Counsel for the Defence

RULING ON APPLICATION

[1] J.S. has been charged with having committed the offences of sexual assault and unlawful confinement.

[2] J.S. is 16 years old.

[3] At the outset of the trial, Crown counsel brought an application under s. 486.1(2) that the complainant, G.I., be allowed to provide her testimony via closed-circuit

television ("CCTV") from a location outside of the courtroom. Counsel for J.S. is opposed to the application.

[4] G.I. testified on the application via CCTV, pursuant to s. 486.2(4).

[5] G.I. is 19 years of age. G.I. stated that she moved to Whitehorse from Pond Inlet, Nunavut approximately one year ago. She testified that she had never met J.S. prior to the night/morning of the alleged sexual assault. Since that night she has seen J.S. a couple of times when she was out walking. She testified that seeing him made her feel scared. She stated that she and J.S. have not talked to each other since the date of the alleged offence.

[6] G.I. stated that she was given a tour of the courtroom in the last two weeks. She sat in the witness box and saw where J.S. would be sitting while she testified.

[7] G.I. stated that testifying from the witness box would be scary for her, and she would also feel scared testifying in the courtroom with others present. She stated that she would be scared because she is so tiny. She testified that thinking about testifying in the courtroom made her feel nauseous.

[8] While G.I. did say that she thinks she could talk about what happened if she was testifying while in the courtroom, she also stated that there would probably be some parts she would not be able to talk about. In cross-examination, G.I. stated that she could or would be able to talk "a little bit" about what happened.

[9] G.I. acknowledged that J.S. has never threatened her since the time of the alleged offence. She also said that she was unsure whether the ability to have breaks would help her testify.

[10] She stated that she has never had to speak in front of a group before and that the experience would be scary.

[11] Defence counsel's opposition relies upon the traditional notion that the accused has the right to confront his or her accuser and that the presumption, or the normal manner of proceeding, is to have witnesses testify in person in the courtroom and not from outside of it.

[12] Counsel filed the case of ***R.*** v. ***Hamer***, 2016 BCSC 1040. In this case the application was to permit the alleged victim to testify behind a screen. The Court, in para 4, referred to s. 486.2(2) as reading:

> 486.2(2) Despite section 650, in any proceedings against an accused, the judge or justice may, on application of the prosecutor or 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 is necessary to obtain a full and candid account from the witness of the acts complained of.

[13] In rejecting the Crown's application, the Court stated in para. 15:

> While I recognize that each application must turn on its own facts, I am not satisfied that the necessary evidential basis for the order has been made out in this case. As Justice Joyce said in *Pal,* [2007 BCSC 1493], at para. 3:
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> > In the present case I do not doubt that the complainant is fearful. That is understandable. However, the standard of necessity under s. 486.2(2) is not whether the witness

> reasonably has a fear or whether the order is necessary to protect the witness, which is the test under subsection (4)(a) The issue is whether the order is "necessary to obtain a full and candid account from the witness of the acts complained of".

[14] In the present case, were I to be considering the evidence before me in light of the legislation as referred to in ***Hamer***, I would not have acceded to the Crown's application. The evidence does not satisfy me that it is necessary that G.I. testify by CCTV or behind a screen or other device in order to obtain a full and candid account.

[15] However, the legislation has changed from that referred to in ***Hamer***. Section 486.2(2) now allows for an order that permits 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 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. [emphasis added] [1]

[16] There is a considerable shift in the legal landscape by the use of the phrasing that includes "facilitate" rather than the previous phrasing that required the accommodation to be "necessary". The amended s. 486.2(2) clearly reflects Parliament's intention to lower the threshold required in order to allow a witness to

[1] I note that the application in ***Hamer*** was heard on February 22 and 23, 2016 with oral judgment given on the 23rd. As s. 486.2 was replaced by S.C. 2015, c. 13 s. 15 which came into force on July 22, 2015, it is unclear to me as to why Power J. would have been referring to the repealed legislation, as the current legislation, being procedural in nature, would have applied for the purposes of the application, regardless of when the offence was alleged to have occurred, a date not actually referred to in the decision.

testify from outside the courtroom or behind a screen or other device that would allow the witness not to see the accused.

[17] This was the conclusion reached by the trial judge in ***R.*** v. ***Jimaleh***, [2016] O.J. NO. 5133 (S.C.)

> 7 Section 486.2(2) previously required that the order be "necessary to obtain a full and candid account from the witness of the acts complained of." The amended section has lowered the threshold somewhat to that of "would facilitate the giving of a full and candid account..." which indicates an intention to make testifying by closed circuit or behind a screen a more commonplace occurrence.

[18] Section 486.2(3) requires that, in deciding whether to make an order under s. 486.2(2), I am to consider:

> (a) the age of the witness;
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> (b) the witness' mental or physical disabilities, if any;
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> (c) the nature of the offence;
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> (d) the nature of the relationship between the witness and the accused;
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> (e) whether the witness needs the order for their security or to protect them from intimidation or retaliation;
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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.

[19] G.I. is young, being 19 years of age.

[20] While Crown counsel mentioned some concerns about G.I. suffering some cognitive limitations due to a prior head injury, there was no evidence to support that submission and I did not observe anything in and/or from the testimony of G.I. that would support a conclusion that she suffers from a mental or physical disability. This said, it was clear that she is soft-spoken, tends towards the shy side and provided fairly simple answers to questions put to her (although I do not intend to portray this simplicity as being indicative of any form of disability or limitation).

[21] While I heard nothing in regard to the circumstances of the charges J.S. faces, I note that the Crown has elected to proceed by indictment. This, I presume, is an indication that the allegations are of a serious sexual assault and unlawful confinement as there are no issues regarding the date of the alleged offences and the swearing of the Information that would have required the Crown to have proceeded by indictment. I would, as a matter of experience and common sense, think that allegations of a serious sexual assault would require a complainant to testify as to details that may be somewhat private and intrusive in nature.

[22] G.I and J.S. were unknown to each other before and have had no contact since the date of the alleged offences. There is nothing in the nature of their relationship that would cause me to have a concern that there would be something in the relationship itself that would make G.I. seeing J.S. particularly problematic. This is in contrast, for example, to circumstances where was a prior abusive relationship in which the complainant was a victim of assaultive behaviour.

[23] There is no evidence or submission before me to suggest that G.I. is at any risk of intimidation or retaliation by J.S.

[24] With respect to (g), I find this to be more of a generalized consideration than one specific to the circumstances of any particular case. Much has been written about the difficulties that complainants in sexual assault cases face that impacts their willingness to both report crimes and to testify at trial. In this regard, any testimonial aids that have the impact of encouraging both the reporting of crimes, and the testifying by witnesses about the commission of these crimes, in particular those of sexual or domestic assault, are of considerable value to the Canadian justice system. Of course, this has to be balanced against the *Charter* rights of an accused, including individuals charged with sexual and domestic assault, to make full answer and defence and have a fair trial.

[25] Obviously, once a matter is at the trial stage, the alleged crime has already been reported. However, it is also important that witnesses, in particular alleged victims, then testify in an honest and truthful manner about the acts complained of. The knowledge that, in appropriate circumstances, a witness and complainant will be able to testify outside of the courtroom and thus 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.

[26] Thus there is both a potential impact upon the actual witness or victim in any particular case, as well as a potential impact upon others who may be considering whether to report the commission of an offence, from knowing that the witness or victim does not have to physically confront the accused in court. These protections can

provide a general encouragement to witnesses and victims to report crimes and to follow through and testify as to these crimes having occurred.

[27] This is all, of course, as long as there is a sufficient evidentiary basis for the s. 486.2(2) application to be granted. Unlike s. 486.2(1), the presumption that victims or witnesses will testify in the courtroom has not been displaced. However, s. 486.2(2) as it currently reads, has clearly reduced the threshold for the granting of such applications.

[28] Notwithstanding my comments about the general application of (f), in the present case, consideration must be given as to how the decision in the application will impact upon G.I.'s participation in the trial of this matter. Certainly, there is both a willingness and capability aspect to this consideration. While G.I. may be willing to testify, her capacity to fully testify as to all the relevant details of the acts complained of may nonetheless be impacted. Her testimony on this application supports such a finding.

[29] Finally, a significant and relevant factor in this case is that the CCTV technology as is utilized in the courthouse in Whitehorse is of exceptionally good quality. As a general observation, the quality of the video and audio available allows for the out-of-court testimony of witnesses to be presented in a manner that does not deprive the accused and his or her counsel of the ability to observe the demeanour of the witness and how the witness answers questions. It also does not interfere with ability of the trial judge to make the same observations. Frankly, in my opinion, I find that the use of CCTV for witness testimony in the Whitehorse courts can at times in fact improve the ability of counsel and the court to observe a witness.

[30] When I consider all the above factors insofar as these apply to G.I., while I am not satisfied that the use of CCTV to allow for G.I. to provide her testimony is necessary, I do find that it would facilitate her ability to provide a full and candid account. I also am satisfied that allowing G.I. to testify in this manner does not in any meaningful way impact upon the right of J.S. to make full answer and defence to the charges he faces.

[31] Therefore I grant the application and direct that G.I. provide her testimony in the trial of this matter by CCTV outside the courtroom.

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COZENS T.C.J.