Citation: *R.* v. *Mantla,* 2012 YKTC 52

Date: 20120608
Docket: 11-00506
11-00710A
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: His Honour Judge Luther

REGINA

v.

LAWRENCE MANTLA

Appearances:
Kevin MacGillivray — Counsel for the Crown
Melissa Atkinson — Counsel for the Defence

RULING ON APPLICATION

[1] The accused has been charged under s. 271 and s. 246(a) of the *Criminal Code* in relation to T.H. The alleged offences stem from events occurring on October 25, 2011.

[2] Subsequently, the accused was charged with three offences from November 4, 2011 to January 6, 2012, s. 264(2)(a), 264(2)(b) and s. 145(3) of the *Code*.

[3] The Crown elected to proceed by indictment and the accused elected judge and jury.

[4] I presided over two pre-hearing conferences. The Crown seeks an order that the video recorded statements of T.H. from October 25, 2011, December 12, 2011, January

13, 2012, and the audio recorded statement of November 9, 2011, plus the transcripts of these recordings be received, pursuant to s. 540(7) of the *Code,* into evidence at the preliminary inquiry.

[5] Defence counsel was not opposed to Crown's application and made an application to have T.H. called on the preliminary inquiry for cross-examination.

[6] During the first pre-hearing conference, both counsel agreed that I could watch and listen to the recordings and follow along with the transcripts. Defence already had these disclosed.

[7] The case was first called in Court on May 25, 2012. I had finished observing the recordings in their entirety on May 22, 2012.

[8] Both counsel filed Books of Authorities supporting their positions on the s. 540(9) application. In Court, counsel further argued their positions. I denied the defence application and indicated that written reasons would be filed shortly.

[9] The complainant T.H. is 33 years of age and has been in a troubled relationship with the accused for 10 years. He was prosecuted and jailed for spousal abuse involving T.H. as recently as 2008 in Alberta.

[10] The quality of the recordings and transcripts was good, with some inaudibles, none of which appeared to me to be of any significance.

[11] In the first interview T.H. was sad, somewhat quiet and reflective. Her emotional state was appropriate, given what she alleged had just occurred. She was not under

the influence of alcohol and responded well to questions. The interviewer did not lead her too much.

[12] The next interview showed a woman who was relatively calm and was a bit more talkative. She showed insight into her situation and was not overly harsh nor judgmental towards the accused.

[13] In the last video statement, she expressed her frustration with the Crown's submissions in Court. This was understandable given the Crown's not having been briefed in a timely manner by the police on a key point.

[14] Also in the last video statement, T.H. admitted to some paranoia in relation to her concerns about the accused following her and observing her while he was on bail.

[15] Overall her recollections were lucid and clearly contained sufficient details for counsel to prepare her cross-examination at trial.

[16] The interviews were not long and drawn out. She was readily able to describe relevant events with little leading. In chronological sequence, the four interviews were 11 minutes, 11 minutes, 24 minutes and 38 minutes in length.

[17] There are three decisions from this jurisdiction I will refer to.

[18] In *R. v. Morgan*, 2006 YKTC 79, Chief Judge Faulkner, as he then was, did not require the complainant for the preliminary inquiry and I quote from paragraphs 21, 22, 23 and 28 of that decision:

> **21** The trouble with this submission is that credibility is not actually in issue at a preliminary hearing. Providing the evidence meets the test in

> *United States of America v. Sheppard*, [1977] 2 S.C.R. 1067, the justice is required to commit. What defence counsel really mean when they speak of testing credibility at the preliminary hearing is that they want a chance to have a free run at the complainant. At its most benign, the intent will be to develop a record of the complainant's story at the preliminary hearing that, with luck, the complainant will contradict at trial. At the other end of the spectrum, the purpose is to intimidate the witness, making her less willing or less able to undergo the ordeal a second time at trial.
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> **22** I hasten to add that I ascribe no improper motive to defence counsel in this case. Nevertheless, given that no particularly relevant or pressing purpose for ordering this child to appear has been put forward, I have decided to exercise my discretion against ordering her to appear at this proceeding.
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> **23** I am well aware of the accused's right to make full answer and defence at the preliminary inquiry as well as at trial, but I have not been provided with any insight as to how this right will be impaired in any substantial sense given that the accused has disclosure of the videotape, the transcript, the contents of the child's complaint to her mother, the reports of the attending medical staff and the results of all other police investigations in the matter. Nothing suggests that these provide anything other than a complete recitation of the allegations against Mr. Morgan or of the evidence available in support of them.
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> …
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> **28** The argument seems to be made in many of these cases that, if Parliament had intended to work such a sea change on the preliminary inquiry, it would have used more robust language, (or, as was suggested in one case, the proposed legislation would have provoked more debate in the Houses of Parliament). However, the fact is that ss. 540(7), 540(8) and 540(9) are entirely clear and unambiguous. They permit the court to receive exactly the kind of evidence proposed in this case and they authorize the presiding justice to decide whether or not to direct any person to appear for cross examination with respect to that evidence.

[19] Chief Judge Cozens in *R. v. Townsend,* 2011 YKTC 63 allowed the defence application to have the 31 year old female complainant be made to appear at the preliminary inquiry.

[20] The interviewing constable considered her to be of “somewhat lower intelligence and capacity.” Cst. Whiles “took an audio and video-recorded statement from her. Unfortunately the video portion was recorded over and is no longer available.”

[21] The complainant had been drinking and had passed out in the residence and in a nearby tent. She felt she had been sexually assaulted twice but wasn’t able to say by whom.

[22] The Chief Judge decided that in these particular circumstances the witness should be cross-examined at the preliminary inquiry.

> [30] This does not mean, however, that there is an automatic or even presumed right to cross-examine a witness at the preliminary inquiry stage of a proceeding. Obviously, criminal trials that proceed without a preliminary inquiry are presumed to be fair in the sense that an accused can still adequately prepare and make full answer and defence. Therefore the inability to cross-examine a witness or complainant at the preliminary inquiry stage does not necessarily attenuate an accused’s ability to make full answer and defence. The desire to test the credibility of a witness, by itself, does not provide sufficient reason to allow cross-examination at the preliminary inquiry.
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> [31] Where, however, the accused has legitimate reasons for wanting to cross-examine a witness, for example, in order to allow them to assess the quality of the evidence and understand the case to be met, cross-examination of the witness should be ordered. That an assessment of the credibility of the witness by defence counsel may also be an ancillary benefit of cross-examination does not prevent an order under s. 540(9) from being made. As stated in ***P.M.*** at para. 84:
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> > Let us recall, moreover, that the usual rules applicable to preliminary inquiries allow the accused to cross-examine the witnesses presented by the prosecution (s. 540(1) Cr.C.) and to examine the witnesses the accused calls himself or herself (s. 541 Cr.C.) Parliament thus explicitly allows the accused to test the credibility of witnesses during the preliminary inquiry. So, that exercise cannot be characterized as irrelevant or inappropriate in the framework of subsection 540(9) Cr.C.

> [32] In the present case, I find that these legitimate reasons exist. I find that the statement of G.S. is somewhat unclear with respect to the nature and sequence of the events that transpired. This is not a case where a witness has no memory of events, but rather a fragmented memory. Some of G.S.' recall was assisted by information provided to her by Cst. Whiles. Cross-examination of G.S. may clarify critical details with respect to the circumstances surrounding the allegation of sexual assault and, in doing so, assist Mr. Townsend in making full answer and defence to the charge against him.
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> [33] I recognize that there is a balancing of interests at play here that includes both the right to make full answer and defence and the societal interest in ensuring that justice is pursued and truth brought out. In this case, I find that the appropriate balancing of these interests requires that the defence application to cross-examine under s. 540(9) be granted.

[23] Ruddy, T.C.J. also dealt with this issue in *R. v. Sweet,* 2011 YKTC 75. She ordered the witness appear for cross-examination.

[24] The main concerns in the case were that the police officer did not emphasize the importance of telling the truth and that C.S. was unable to describe the accused in virtually any detail at all, beyond remembering he was big, maybe in his mid-to-late thirties and noting she was 'pretty sure' that he was white.

[25] Judge Ruddy concluded as follow:

> [11] I must balance this finding against the situation of the witness. On this side of the equation, while a young person, C.S. is not a child. I acknowledge that she is vulnerable and I appreciate that giving evidence in two proceedings about an alleged sexual offence will be difficult for her. However, the *Criminal Code* provides for testimonial accommodations that can make the experience less distressing. In these circumstances, and subject to the submissions of counsel, C.S. can make use of a support person and/or testify from outside the courtroom or behind a screen.
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> [12] A final consideration that is relevant to my determination of whether it is appropriate to order C.S. to appear is the effect of such an order on the administration of justice, and particularly any effect this order might have on the timeliness and efficiency of these proceedings. I find that this order will not delay the proceedings nor will it unduly complicate or prolong them.

> C.S. is presumably within the jurisdiction and, as the allegations are not particularly complex, her cross-examination does not need to be protracted.
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> [13] In conclusion, after weighing the implicated right of the accused to fully know the case against him, the effects of making an appearance order on this witness and any adverse effects this order could have on the course of the criminal process, I am satisfied that it is appropriate and fair in the circumstances to order C.S. to appear for cross-examination.

[26] What is clear from the above three cases and many others from the rest of the country including *R. v. McFadden and Rao,* B.C.P.C. 10 August 2010, *R. Inglis,* 2006 ONCJ 154, *R. v. S.P.I.,* 2005 NUCJ 3, *R. v. J.P.L.,* 2006 ABPC 113, *R. v. P.M.,* 2007 QCCA 414, is that each application under s. 540(9) will be determined judicially based on its own merits.

[27] For this application I am satisfied that it is not required to have the witness produced at the preliminary inquiry to be cross-examined for the following reasons:

1. T.H., while not sworn or affirmed, nor warned by the investigator, was well aware that she was giving a statement to the police which would result in charges being laid. T.H. was assaulted by this same accused before. The accused was charged, resulting in his having gone to jail in Alberta three and a half years before. Thus, she was well aware of the significance of giving statements to the police.

2. T.H. gave a lucid account of what took place. She was not coached nor unduly led. She was not confused.

3. T.H. was sober.

4. T.H. was clear on the identity of the person she accused. She was in a ten-year common-law relationship with him.

5. T.H. was, under the circumstances, reasonably balanced and not overly vindictive nor emotional.

6. There were no significant problems with the quality of the video and audio recording and the resultant transcripts. While there were several “inaudibles”, none appeared to be of any consequence.

7. There are a number of specific details T.H. gave which would have been observed by others, which would form a solid basis for cross-examination and for which T.H. could be held accountable through potential charges under s. 131 or s. 140 of the *Criminal Code.*

8. The offences alleged were recent.

[28] I am not suggesting by any means that all of the above factors be necessary for such a ruling denying the defence application under s. 540(9), but this would be one of the clearest cases for doing so.

[29] In *R. v. McFadden and Rao, supra,* Bagnall, P.C.J. stated at para. 26:

> As long ago as 1995, the Supreme Court of Canada expressed clearly the view that a preliminary inquiry ought not to be seen as a screening advise, rather than a means of discovery of the Crown’s case for the accused. In *R. v. O’Connor,* [1995] 4 S.C.R. 411…

[30] In *R. v. O’Conner* at para.171 it was stated:

> Nevertheless, the "discovery" aspect of the preliminary inquiry remains, at most, an incidental aspect of what is in essence an inquiry into whether the Crown's evidence is sufficient to warrant the committal of the accused to trial. We must also recognize that the law of disclosure in Canada changed significantly as a result of this court's decision in Stinchcombe. Stinchcombe recognized that a rigorous duty exists on the Crown to disclose to the defence all information in its possession, both inculpatory and exculpatory, which is not clearly irrelevant or privileged. While the Crown retains a discretion as to what is "clearly irrelevant", this discretion is reviewable by the trial judge at the instance of the defence…

[31] In R. v. Bjelland, [2009] S.C.J. No. 38, the Supreme Court of Canada at para. 3 ruled that:

> …the trial judge committed a reviewable error by failing to consider whether the prejudice to the appellant could be remedied without excluding the evidence and the resulting distortion of the truth-seeking function of the criminal trial process…

[32] Furthermore, the S.C.C. stated at paras. 32 and 36:

> The appellant also says that his right to a fair trial was prejudiced because he was denied the right to cross-examine Friedman and Holland at a preliminary hearing. Cross-examining a witness at a preliminary hearing, however, is not a component of the right to make full answer and defence. What is protected under s. 7 is the right to make full answer and defence at trial, not the right to cross-examine a witness at a preliminary hearing.
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> …
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> Although the primary purpose of the preliminary inquiry is to enable a provincial court judge to determine whether an accused should be committed for trial, as noted by Martin J.A. in *Arviv,* at p. 560, "the preliminary hearing does serve the ancillary purpose of providing a discovery of the Crown's case". However, if Crown disclosures are otherwise complete, then the accused's s. 7 right has not been infringed by his not being able to cross-examine a witness at a preliminary hearing. The discovery purpose of the preliminary inquiry has been met through other means, such as providing the accused with witness statements.

[33] I wholeheartedly concur with Bagnall, P.C.J. at para. 35 in *McFadden and Rao:*

> From all of these cases, and in particular, those that are binding on me, the following might be distilled. A preliminary hearing is meant to be an "expeditious charge-screening mechanism," as indicated by the Chief Justice in *Regina v. Hynes.* Discovery may result at a preliminary hearing, but it is not a discrete purpose of a preliminary hearing. The accused my benefit from the opportunity to discover the Crown case at a preliminary hearing, but such discovery will be that which is incidental or ancillary to the primary purpose of the hearing. The words "incidental" and "ancillary" connote something quite different than a purpose independent and separate from the primary purpose of a preliminary inquiry.

[34] That each application under s. 540(9) is to be determined based on its own set of facts is obvious and has been so stated by many jurists including Faulkner, C.J.T.C. in *Morgan supra* at paras. 27 and 28:

> … In short, the decision is one to be made one case (and one statement) at a time. There is nothing automatic about it.
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> The argument seems to be made in many of these cases that, if Parliament had intended to work such a sea change on the preliminary inquiry, it would have used more robust language, (or, as was suggested in one case, the proposed legislation would have provoked more debate in the Houses of Parliament). However, the fact is that ss. 540(7), 540(8) and 540(9) are entirely clear and unambiguous. They permit the court to receive exactly the kind of evidence proposed in this case and they authorize the presiding justice to decide whether or not to direct any person to appear for cross examination with respect to that evidence.

[35] The fact that Parliament chose to reduce and not eliminate preliminary inquiries does not mean that judges should err on the side of undue caution and require a witness to be examined or cross examined at a preliminary inquiry unless there is good reason to do so. The preliminary inquiry should no longer ever be viewed as a dress rehearsal for the main event.

[36] T.H. presented well and thoroughly on the recorded statements which totally assuages any inclination I might have to have her called at the preliminary inquiry.

[37] The defence application under s. 540(9) is denied.

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LUTHER T.C.J.