

Citation: *R. v. Munro*, 2009 YKTC 125

Date: 20091116
Docket: 08-00794
Registry: Whitehorse

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

Regina

v.

Kaighen Alyisha Lauren Munro

Appearances:
K.C. Komosky
Ed Horembala

Counsel for Crown
Counsel for Defence

RULING ON APPLICATION

Overview

[1] Kaighen Munro has been charged with impaired driving contrary to s. 253(1)(a) of the *Criminal Code* and failing or refusing to provide a breath sample upon demand contrary to s. 254(5). The trial is set for February 9, 2010.

[2] This is an application by the Crown pursuant to s. 714.1 of the *Code* to have Cst. Blake Manchur provide his evidence by video-link.

Evidence

[3] The affidavit of Sgt. Glen Ramsay was filed as evidence on the application. Cst. Manchur is currently posted at the RCMP Oceanside Detachment in Parksville, British Columbia. In order to travel to Whitehorse to testify, Cst. Manchur will be away from Parksville for three days. The estimated cost of his travel and accommodations is \$1,600.00.

[4] Cst. Manchur was not the lead investigator on the file. His role was as the breathalyzer technician operating the Datamaster C. He made observations regarding the allegation that Ms. Munro failed or refused to provide a breath sample into the Datamaster C.

[5] There is no evidence as to the actual or estimated costs of the video-link, or as to the facility from which the video-link would take place.

[6] There is also no evidence pointing to their being any particular hardship or difficulty created by Cst. Manchur being absent from the Oceanside Detachment for three days.

Law

[7] Section 714.1 allows for evidence to be given by video-link, where appropriate in all of the circumstances, taking into account:

- (a) the location and personal circumstances of the witness;
- (b) the costs that would be incurred if the witness had to be physically present; and
- (c) the nature of the witness' anticipated evidence.

Position of the Crown

[8] The Crown is not relying on the first of the three enumerated factors for their application.

[9] Crown counsel points to the costs associated with having Cst. Manchur travel to Whitehorse to testify. Counsel urges the court to be mindful of the need to be careful with the public purse in these times of economic recession. In determining the actual costs savings of allowing Cst. Manchur to testify by video-link, I note that any costs associated with operating the video-link should be

deducted. There is no evidence, however, as to what these costs are estimated to be.

[10] Crown counsel also points to the nature of Cst. Manchur's expected testimony. His evidence is essentially limited to the observations that he made of Ms. Munro's efforts to provide a suitable sample into the breathalyzer machine.

[11] Crown counsel says that Cst. Manchur's evidence is not likely to be highly controversial. In making this submission Crown counsel notes that defense counsel has given notice of his intention to tender medical evidence as to Ms. Munro's physical inability to provide a suitable breath sample. As such, the evidence that Ms. Munro did not provide a suitable breath sample is not particularly contested.

Position of Defense

[12] Defense counsel submits that a consideration of the first enumerated factor does not support the Crown's application. He is a police officer and testifying at trial is part of the job he is paid to do and for which, it is to be assumed, he will be paid for if he travels to Whitehorse to testify. (See **R. v. Cardinal** 2006 YKTC 67 at para. 15, referring to **R. v. Fleury**, 2004 SKPC 53).

[13] Defense counsel does not dispute the estimated costs put forward by the Crown. He does, however, argue that these costs should not provide much support for the Crown's application, particularly when consideration is given to the nature of Cst. Manchur's evidence.

[14] He concedes that the credibility of Cst. Manchur may not be called into question at trial. This is a qualified concession, however, dependent upon how Cst. Manchur testifies. Cst. Manchur's credibility may, in fact, end up being challenged.

[15] Defense counsel also raised concerns about the effectiveness of the video-link technology in providing the court with a sufficient visual of Cst. Manchur should he be required to demonstrate how Ms. Munro was puffing her cheeks and sucking in air, as compared to him being present in the courtroom for any visual demonstration.

[16] Defense counsel further raises the issue of the potential prospect of Cst. Manchur being required to demonstrate how the test itself was conducted on the Datamaster C.

Analysis

[17] In *R. v. Chapple*, 2005 BCSC 383, in considering the application of s. 714.1, Parrett J. stated at paras. 50 and 51:

This provision does not replace the established procedure of calling witnesses to the witness stand in criminal cases or of allowing the accused to face his or her accuser, but rather, supplements that normal practice and allows the use of technology where it is appropriate. The order so authorized is discretionary but the court must, in the end, find that the particular circumstances are appropriate for the use of the technology. *In my view, the presumption, or starting point, must be that, unless the circumstances warrant dispensing with the usual practice, the witness should be called to the witness stand to testify.* [emphasis added]

In considering whether to dispense with the usual practice, and to take a witness' evidence by video link, the court must consider all of the circumstances of the particular case and the three enumerated factors. Cost savings, in and of themselves, cannot justify such an order without the other factors being considered.

[18] Despite the technological advancements that have been made and the considerable assistance these advancements have provided to the trial process,

it is important to remember that they are still subrogated to the presumption of witnesses being physically present in court on the witness stand to provide their evidence.

[19] The three enumerated factors set out in s. 714.1 must be looked at in consideration of all of the circumstances of each individual case.

[20] The Crown's argument boils down to the fact that as there will be additional financial cost in bringing Cst. Manchur to Whitehorse to testify at trial and his evidence is not likely to be controversial; therefore, the application should be granted. I am prepared to consider that the three days of travel involved on their face have at least a minimum of inconvenience to Cst. Manchur attached to it.

[21] Defense counsel's argument boils down to the fact that the presumption of actual attendance of the witness in the courtroom should not be displaced in this case where the location and personal circumstances of Cst. Manchur are not an impediment, the costs are not significant and the potential for Cst. Manchur's credibility to become an issue remains a real possibility.

[22] For the following reasons, I agree with Defense counsel.

[23] On the evidence before me, the first enumerated ground has little bearing on the issue.

[24] With respect to the second enumerated ground, costs are a factor for consideration and should not be unnecessarily incurred where the use of appropriate technology can avoid such costs. However, I concur with the comments of Giardini J. in **R. v. Ross** 2007 BCPC 244 at para. 21 that:

A cost saving to the state, while commendable, in and of itself does not justify the issuance of an order for a videoconference. In this case, that appears to be the primary, though not necessarily the only, stated reason for the Crown's application. Officer Smith is a correctional officer and one of the duties for such officers is that they must, from time to time, give evidence as to what occurred during the course of their employment.

[25] In considering the potential for cost savings, I note that Crown counsel indicated their intention to bring an expert witness from Vancouver in anticipation of a potential need to call rebuttal evidence. No application has been made with respect to videoconferencing of this witness for whom the costs associated may well be less than \$1,600.00. Thus, it appears that the Crown is prepared to bring one witness up from the lower part of British Columbia to testify, whose credibility is not likely to be challenged, and meanwhile is bringing this application to avoid doing so for another witness situated a little further away, whose credibility may become an issue. While there may be good reason for how the Crown is proceeding with respect to this potential witness, nonetheless this is still part of the overall circumstances and, as such, is of assistance in putting the issue of costs in context.

[26] The costs factor cannot be separated out from the third enumerated factor, this being the nature of the Cst. Manchur's' anticipated testimony. As Lilles J. noted in *Cardinal* in denying the Crown application for videoconferencing, at para. 6:

With respect to the nature of the evidence, Parrett J. held that where there are serious issues of credibility, a Court should:

...be very reluctant to deprive the trial judge of seeing the witness physically present in the courtroom during his evidence.

However, if the witness' evidence is not controversial, the nature of the evidence, "elevates the importance of the cost factor."

[27] In order to assess the impact on the Crown's application of the relatively low costs associated with having Cst. Manchur attend in Whitehorse for the trial, I need to make an assessment of the nature of the evidence of Cst. Manchur.

[28] I place little weight on the possibility that Cst. Manchur may be required to demonstrate in Court on a Datamaster C instrument what occurred when Ms. Munro was responding to the demand to provide a breath sample. The Crown indicated that it has no intention of having a Datamaster C present in the courtroom at the trial and, after discussion with counsel, it remains somewhat unclear to me how that could be a realistic possibility. At present, this appears to me to be somewhat speculative, although I am not saying it could not occur.

[29] I also recognize the concession by Defense counsel that Cst. Manchur's testimony may not necessarily be challenged to the extent that his credibility is put in issue. This is a significant difference from the **Cardinal** case where the witness, the complainant, was the key witness, and where the court determined, at para. 19, that credibility findings would likely determine the outcome of the trial.

[30] I also do not have any particular concerns about the capacity of the video-link technology to provide an acceptable image of Cst. Manchur's face and an acceptable audio recording of the sounds he may be required to make.

[31] This case is much more marginal than **Cardinal** when it comes to the issue of the nature of the witness' anticipated evidence and the impact on the right to make full answer and defense. I note that in **Cardinal**, the personal circumstances of the witness were a more significant factor militating in favour of the Crown's application, than in the present case, but this was insufficient to overcome concerns regarding the nature of the witness' evidence.

[32] However, I share the same concerns expressed by Giardini J. in **Ross** when he states at para. 19:

At this stage of the proceedings, I know nothing of the case except what I have been told by counsel for the purposes of this application. I am not in a position where I can discount defense counsel's concerns regarding credibility issues. Given the fact that there were two searches conducted by two different officers, there is a reasonable likelihood that issues of credibility may arise. In such circumstances, I am reluctant to deprive the trial judge of the ability to see the witness physically present in the courtroom while giving evidence.

[33] In the present case, based upon the submissions I heard, it is unclear whether Cst. Horbachewsky, the investigating officer, was actually a witness to the events occurring when Cst. Manchur made his observations that led to the s. 254(5) charge. Cst. Horbachewsky appears to have notes regarding this time period, but it is not apparent to either counsel or to me whether Cst. Horbachewsky's notes reflect first-hand observations. Cst. Horbachewsky's testimony at trial, if he is a witness, may well impact upon the approach taken with respect to Cst. Manchur's testimony.

[34] In the end, the application to have Cst. Manchur testify by video-link is a question of cost savings with some measure of inconvenience. The nature of his anticipated testimony may not be controversial, but it also may be, a factor that will likely not be determined with certainty until the trial is underway.

[35] In my view, after considering the overall circumstances of this case, and being mindful of the enumerated factors set out in s. 714.1 of the *Code*, I conclude that this is not an appropriate case in which to exercise my discretion to grant the order requested by the Crown. The circumstances are insufficient to displace the presumption of having Cst. Manchur physically present in the courtroom to provide his testimony.

[36] The Crown's application to have Cst. Manchur testify by video-link is denied.

COZENS T.C.J.