Citation: *R.* v. *Sweet,* 2011 YKTC 75

Date: 20111125
Docket: 11-00126
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: Her Honour Judge Ruddy

REGINA

v.

IAN TRAVIS SWEET

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
André Roothman — Counsel for the Defence

RULING

[1] This is my ruling with respect to an application made by Crown for admission of the videotaped statement of the complainant, C.S., pursuant to s. 540(7) of the *Criminal Code* and an application by defence counsel to cross-examine C.S. pursuant to s. 540(9) of the *Criminal Code*. Crown and defence effectively agree that the videotaped statement taken from C.S. is sufficiently credible or trustworthy to be admitted under s. 540(7) of the *Code.* I would therefore grant the Crown's application. Accordingly, the focus of this ruling will be on the defence application pursuant to s. 540(9).

Introduction

[2] Mr. Sweet is charged with sexually assaulting C.S., who is sixteen years old now and was also sixteen years old at the time of the alleged offence on May 19, 2011. Mr. Sweet is unknown to C.S., and the allegation is that the sexual assault, which consisted of under-the-clothes touching of C.S.'s breasts and genitals, occurred after he had picked her and her boyfriend up in his truck and drove them around Whitehorse. The police encountered C.S. shortly after the alleged assaults, and she went to the detachment with Constable Joshua Penton to give a videotaped statement.

[3] Defence applies pursuant to s. 540(9) to cross-examine C.S. on her statement. Section 540(9) reads:

> (9) The justice shall, on application of a party, require any person whom the justice considers appropriate to appear for examination or cross-examination with respect to information intended to be tendered as evidence under subsection (7).

Thus, if I am satisfied that it is 'appropriate' that C.S. appear for cross-examination, I shall order her attendance.

Analysis

[4] Section 540(9) is a relatively new addition to the *Code*, and there has been considerable latitude in its application.

[5] The most authoritative interpretation of the section comes from the Quebec Court of Appeal in *R. v. P.M.,* 2007 QCCA 414, leave to appeal to SCC refused, 45667 (October 25, 2007), and it is on this case that defence counsel primarily relies. The

facts in *P.M.* bear some similarity to this case. P.M. had been charged with sexual offences against two girls aged 14 and 10, each of whom had given a taped statement to the police that was admitted into evidence at the preliminary inquiry. Defence applied to cross-examine the two complainants, and the preliminary inquiry judge found that cross-examination was appropriate in the circumstances. The Court found that the use of the word 'appropriate' (or 'pertinent' in the French version) in s. 540(9) conferred a broad discretion on the preliminary hearing judge to allow or disallow cross-examination. In making the determination about whether a witness is required to appear for cross-examination, the preliminary hearing judge should balance the accused's legitimate interest in preparing a defence, which includes bringing out weaknesses or insufficiencies in the Crown case, against the particular situation of the witness and the circumstances of the case (para. 86)[1].

[6] For its part, the Crown takes the position that the defence's sole purpose in seeking to cross-examine C.S. is to challenge her credibility and that this is an inappropriate use of the preliminary inquiry, since, as a preliminary inquiry judge, I cannot make findings of credibility and only need to determine whether there is sufficient evidence to commit the accused to stand trial. In support of its position, the Crown has filed a number of cases dealing with the proper scope and function of a preliminary inquiry.

[1] I would also note that some confusion about language arises, in that the non-official translation consistently translates the French 'pertinent' as 'relevant', despite the different meaning the Court found it had in the context of s. 540(9) – see para. 63.

[7] There does appear to be significant debate in the caselaw about the effect of the 2004 amendments to s. 540 and the role of the preliminary inquiry in the criminal process: see *R. v. McFadden and Rao*, 2010 BCPC 189. I acknowledge that post-*Stinchcombe*, the preliminary inquiry no longer plays the important role in discovery that it once did, however the extent to which a preliminary inquiry properly serves an 'exploratory role' or 'discovery function' remains a contentious question. Suffice it to say, this role, although ancillary, has not been eliminated.

[8] However, as the judge presiding over this preliminary inquiry, my immediate concern is the determination of whether it is appropriate to order C.S., who has provided a statement that meets the threshold test of being credible and trustworthy per s. 540(7), to appear for cross-examination. In order to do this, I must consider all the available information about the situation of the witness and the case against the accused, including the statement itself: *R. v. Vaughn*, 2009 BCPC 142. There is no test to mechanically apply or any rote solution; I must exercise my discretion in a way that addresses the particular circumstances of this case.

[9] I find that it is appropriate, in these circumstances, to order that C.S. appear for cross-examination by defence counsel, for the following reasons.

[10] The statement given by C.S. to Cst. Penton is relatively short and somewhat confused as a narrative. She is the critical witness in the case against the accused. While I do not suggest that she was fabricating anything, her statement was made without any emphasis on, or even acknowledgement of, the importance of telling the

truth. As well, although identification is not in issue for the purposes of this preliminary inquiry, I note 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. The combined effect of these issues, in my view, is such that the case to be met is not entirely clear. In the circumstances, given these limitations in the statement being admitted as evidence, I find that the accused's right to make full answer and defence in the criminal process is engaged. Any discovery function served by cross-examining C.S. is ancillary to this consideration. I am satisfied that challenging the credibility of C.S. is not the sole purpose underlying the defence application.

[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.

[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.

[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.

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RUDDY T.C.J.