SUPREME COURT OF YUKON

Citation: *R. v. Sweet*, 2012 YKSC 37

Date: 20120601
S.C. No. 11-AP015
Registry: Whitehorse

Between:

HER MAJESTY THE QUEEN

And

IAN TRAVIS SWEET

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

Before: Madam Justice R. Nation

Appearances:

Keith D. Parkkari — Counsel for the Crown
André W.L. Roothman — Counsel for the accused

REASONS FOR JUDGMENT

INTRODUCTION

[1] The application before me is in the nature of *certiorari*. The Crown asks that this Court quash part of a decision of Ruddy T.C.J. made on November 25, 2011, which ordered that the complainant was to appear and be cross-examined at a preliminary inquiry.

ISSUES

[2] The issues are as follows:

1. What are the parameters of the consideration of a judge when deciding whether cross-examination should be allowed under s. 540(9) of the *Criminal Code*?
2. Did the judge exceed her jurisdiction by considering the contents of the statement as it related to identity, an issue admitted by the defence?
3. Should the judge after allowing cross-examination, have then limited the extent of that cross-examination?

BACKGROUND FACTS

[3] The accused is charged with sexual assault. At a pre-hearing conference before Ruddy T.C.J. to assist with the issues on which evidence would be given at the preliminary inquiry, the Crown agreed to provide a transcript of the statements given to the police, and it was agreed those could be filed at the preliminary inquiry as allowed under s. 540(7) of the *Criminal Code* (the "*Code*"). The accused agreed to admit jurisdiction and identity for the purposes of the preliminary inquiry. Counsel for the accused requested that witnesses be provided for cross-examination at the preliminary inquiry. That last issue was to be addressed prior to the preliminary inquiry date.

[4] After the pre-hearing conference, the Crown filed a notice of application pursuant to s. 540(7) of the *Code*, asking that the transcribed statement of the complainant be admitted into evidence at the preliminary inquiry.

[5] Also after the pre-hearing conference, counsel for the accused filed a notice of application pursuant to s. 540(9) of the *Code*, seeking to cross-examine the complainant at the preliminary inquiry.

[6] The applications were both argued on November 10, 2011 and Ruddy T.C.J. issued her ruling on November 25, 2011. She allowed the Crown's application to admit the videotaped statement of the complainant into evidence pursuant to s. 540(7) of the *Code*. This was based on Crown and defence counsel "effectively agreeing" that the videotaped evidence would meet the necessary level required to find it sufficiently credible and trustworthy to be admitted into evidence at the preliminary inquiry under s. 540(7).

[7] Ruddy T.C.J. also allowed the accused's application under s. 540(9) of the *Code* and directed that the complainant was to appear at the preliminary inquiry to be cross-examined. She considered the law relating to preliminary inquiries, the available information about the situation of the witness, the case against the accused and the statement itself. She exercised her discretion to order the complainant to appear, as she found the statement to be short, somewhat confused as to narrative and she noted that the complainant is a critical witness in the case against the accused. She considered that the statement was not sworn, and there was no emphasis to, or acknowledgment by, the complainant of the importance of telling the truth at the time the statement was given. She also noted that although identity was not in issue for the purposes of the preliminary inquiry, the complainant was unable to describe the accused in any detail at all.

[8] Ruddy T.C.J. expressed that the combined effect of these issues in her view, was that the case to be met by the accused was not entirely clear, and thus the accused's right to make a full answer and defence was engaged. She was satisfied that a challenge to the credibility of the complainant was not the sole purpose behind the defence application.

[9] Ruddy T.C.J. then went on to balance those considerations, against the situation of the witness. She found the complainant, who was sixteen years old at the time, was a young person but not a child. She recognized that the complainant may be vulnerable, and giving evidence about an alleged sexual offence would be difficult for her. She also took into account that accommodations can be made in the courtroom to ameliorate that, including the use of support persons or screens.

[10] The judge considered the effect of such an order on the administration of justice, and held it would not delay or unduly complicate the proceedings. She noted that the complainant was presumably within the jurisdiction and as the allegations were not complex, her cross-examination did not need to be protracted. Ruddy T.C.J. was weighing the implicated right of the accused to know the case against him against the effects of making an order for the appearance of this witness.

THE CRIMINAL CODE PROVISIONS

[11] In relation to a preliminary inquiry, ss. 540(7) and (9) of the *Code* state:

> 540(7) A justice acting under this Part may receive as evidence any information that would not otherwise be admissible but that the justice considers credible or trustworthy in the circumstances of the case, including a statement that is made by a witness in writing or otherwise recorded.
>
> …

> 540(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).

[12] These two sections of the *Code*, in setting out procedure and rules for the holding of a preliminary inquiry, give the justice hearing the inquiry certain powers. Firstly, the *Code* states a justice may receive as evidence a statement of a witness (which would otherwise be hearsay), but specifically in relation to that power under s. 540(7), it directs a justice shall require any person that the justice considers appropriate to appear for examination or cross-examination with respect to any such statement.

THE POSITIONS OF THE PARTIES

[13] I will set out the position of Crown and defence, as the outline of their position and argument assists to understand the background of the issues, and the concerns to be addressed.

[14] Both Crown and defence counsel indicated that issues arise around whether cross-examination should be allowed at a preliminary inquiry on a statement by a complainant in a sexual assault charge. Also, the interplay between ss. 540 (7) and (9) raises some challenges. Most of these arise from the competing interests of minimizing the intrusive effect of cross-examination of a complainant in an alleged sexual assault versus the rights of the accused.

The Argument of the Crown

[15] The Crown argues that a judge at a preliminary inquiry does not have inherent jurisdiction, her powers are prescribed by the *Code*. The procedures set out in s. 540 were added in 2004, when preliminary inquiries became optional, and there was an

intention to streamline and focus preliminary inquiries. The Crown cites the proposition that parliament intended to minimize the extent to which complainants, and particularly those in sexual assault cases, are subject to examination and cross-examination. Crown counsel points to the fact that a preliminary inquiry is not mandatory, and Crown and defence must identify the issues to be explored and the witnesses they wish to examine. Crown argues that s. 540 (7) was added to the *Code* to allow the judge to admit a witness statement in certain conditions, this being more expedient than requiring the witness (who may also be the complainant) to attend and is consistent with parliament's intentions.

[16] Crown counsel concedes that a judge's assessment of whether a statement is sufficiently credible and trustworthy to be received as evidence at the preliminary inquiry includes an assessment of the circumstance in which the statement was given, in order to ascertain that there are sufficient assurances that the witness is being honest and forthright. But the Crown argues that, in this case, the admission of the statement was agreed to under s. 540(7), so there is no need for the judge to assess the content of that statement. Crown points out it is trite law that the judge at a preliminary inquiry does not weigh or evaluate evidence when determining if an accused should be committed to stand trial.

[17] The Crown recognizes that it remains an open question as to the extent a judge can assess and weigh the evidence when determining if a witness should be required to appear for the purposes of cross-examination under s. 540(9). Crown counsel argues that Ruddy T.C.J.'s consideration of the situation of the witness and the effect on the administration of justice were proper considerations in this case. However, it argues that

her assessment of the evidence in the statement concluded that there were issues with the identification of the accused and based on that, she determined that the accused's right to full answer and defence was engaged. The Crown argues that identification had been agreed not to be in issue at the preliminary inquiry, so the judge exceeded her jurisdiction when she looked at that issue and decided that the case to be met on identification was not clear. Crown further argues that to require a witness to appear for cross-examination because the accused's right to full answer and defence is engaged renders the court's process of identifying and focusing on issues a nullity. The consideration of the judge of the identification evidence ignored the agreements reached in relation to what was at issue in the preliminary inquiry and the focus to have a hearing at the preliminary inquiry only on the issues in dispute.

[18] Crown counsel argues that the assessment of the statement in this case went beyond a determination of the sufficiency of evidence, and became an assessment of the credibility of the witness. As that is not within the purview of a preliminary inquiry judge, she was exceeding her jurisdiction. The Crown argues that as credibility is not a decision to be made at the preliminary inquiry, a request to cross-examine the complainant based on a wish to test or evaluate her credibility is an improper reason for an order to cross-examine under s. 540(9) to be allowed.

[19] Alternatively, Crown counsel argues that if the judge had the jurisdiction to assess the completeness and clarity of the evidence contained in the complainant's statement, then when ruling that the complainant could be cross-examined, it was incumbent on Ruddy T.C.J. to direct that the cross-examination not include matters agreed by the parties would not be at issue in the preliminary inquiry, here identification.

The Argument of the Defence

[20] The defence argues that cross-examination is important in the overall administration of justice, and it is a right in making a full answer and defence. Defence argues that s. 540(9) specifically addresses the right of cross-examination if a statement is admitted under s. 540(7), leaving it to the judge to decide if it is appropriate. Thus the *Code*, in setting out the rules of a preliminary inquiry after the 2004 amendments, specifically allows a justice to require the witness who has given a written statement to attend for examination or cross-examination.

[21] The defence argues that *R. v. P.M.*, 2007 QCCA 414, for which leave to appeal to the Supreme Court of Canada was refused, is the leading case on this issue in Canada. Defence points out that in that case, as is the case here, the accused conceded that statements were sufficiently credible and trustworthy to allow them to be admissible under s. 540(7), but argued he should be allowed to cross-examine those complainants pursuant to s. 540(9). The Quebec Court of Appeal, after a lengthy consideration of the 2004 amendments to the *Code* and the reasons therefore, held there were no exceptional circumstances to preclude the cross-examination, which the judge had ordered to be by way of closed-circuit television. The case recognizes a discretion held by the judge at the preliminary inquiry to order cross-examination of any person the justice considers appropriate. The defence argues that the case stands for the proposition that any cross-examination is not limited to the purpose of determining if the evidence is credible and trustworthy enough to be admitted pursuant to s. 540(7).

[22] The defence points out that in the case here, there was an absence of any caution about the importance of telling the truth. Defence argues if that is the case, and

it is not a sworn statement, the defence should be allowed to cross-examine, as the commitment to tell the truth is the basis of the criminal justice system, and the lack of a caution or oath necessitates granting a cross-examination at the preliminary inquiry, if such a statement is allowed to be filed under s. 540(7).

[23] The defence argues that the intention of parliament was not to eliminate the secondary discovery function of the preliminary inquiry nor to convert the inquiry to a paper discovery.

[24] The defence relies on paras. 86 and 87 of the case of *R. v. P.M.*, cited above, where it was stated that in allowing or disallowing cross-examination requested by the accused, the justice will consider on one hand the accused's legitimate interest in preparing his defence and bringing out at the preliminary inquiry the insufficiency or weakness in the Crown's evidence, and on the other hand, that the cross-examination requested by the accused is relevant with regard to the particular situation of the person whose appearance is requested and to all the circumstances of the case. It points out that the justice has the responsibility to protect the vulnerable witness against an abusive cross-examination, should that actually occur in the courtroom, so the vulnerability of the complainant in a sexual assault case can be accommodated in that way, rather than by refusing an application for cross-examination.

[25] The defence points to a number of cases: *R. v. Inglis*, 2006 ONCJ 154, *R. v. M.P.L.*, 2008 BCPC 213 and *R. v. C.A.C.*, 2011 BCPC 170, which point out that cross-examination is still part of trial fairness, even at the preliminary inquiry stage. The cases illustrate that a balance must be struck between the objectives of a s. 540(7) application

and trial fairness, and that cross-examination was not meant to be eliminated by ss. 540(7) and (9), but rather a more focused preliminary inquiry was to occur.

[26] The defence points out that the assessment of Ruddy T.C.J. did not decide to allow cross-examination based only on the identity of the offender. She read the statement, commented on the vagueness and brief nature of the statement, including the vagueness on the identification of the accused. She was alert to the complete absence of a sworn statement or any warning of the need to tell the truth. She used all of this to come to her decision to allow the application for cross-examination.

[27] The defence argues that there is no need for a court to direct limits to the cross-examination in providing a ruling under s. 540(9) in this case, any limit on cross-examination should be exercised at the preliminary inquiry. Defence says that should the respondent's counsel ask questions relating to the identification at the preliminary inquiry, that the judge at that time could disallow those questions, as it is not in issue at this preliminary inquiry.

DISCUSSION OF THE ISSUES

1. What are the parameters of the consideration of a judge when deciding whether cross-examination should be allowed under s. 540(9) of the *Code*?

[28] The background of the amendments to the *Code* in 2004 was a desire to streamline the preliminary inquiry process. Also, in terms of sexual assault charges, there was a desire to minimize the extent to which complainants were exposed to cross-examination.

[29] Whatever the background debate, the eventual amendments must be read as a whole. Parliament, in passing s. 540, allowed for statements to be admitted in a preliminary inquiry. However, by s. 540(9), in relation to any of those statements

admitted under s. 540(7), it expressly gave the judge presiding at the preliminary inquiry the ability to require any person considered appropriate to appear for examination or cross-examination with respect to the information intended to be tendered as evidence. There is no delineation between a witness and a witness who may also be the complainant.

[30] I do not agree with the Crown's restrictive interpretation of the operation of s. 540(9), that once there is an agreement or order to allow the admission of the statement under s. 540 (7), that the statement cannot be examined by the judge or that any examination is only to relate to its admission under sub-section 7. Just because defence counsel acknowledges a statement will meet the requirements of s. 540(7), there may still be a need for the judge to assess the content of the statement. It is important for her to consider the statement, its circumstances and content in an application as to whether cross-examination will be allowed under s. 540(9).

[31] The section reads that a judge presiding at a preliminary inquiry shall require a person who is the maker of a statement entered under s. 540(7) to appear, if the judge considers it "appropriate".

[32] The reasoning in *R. v. P.M.*, cited above, is detailed and I find it persuasive and comprehensive in relation to issues under ss. 540(7) and (9). It gives a detailed background to the legislative amendments, and emphasizes that cross-examination is not an exceptional procedure. The ancillary role of exploring the Crown's disclosure (generally through cross-examination of witnesses) was not intended to be eliminated by parliament. Section 540(9) is a direction given to a judge to order an examination or cross-examination where in the circumstances of the case that judge finds it

appropriate. This is a discretionary decision to be made by the judge, based on what is appropriate in the circumstances. The onus is not on the accused to establish that cross-examination is necessary, nor is the judge required to provide restriction around that cross-examination in allowing it to proceed. As cross-examination under s. 540(9) is not an exceptional procedure, it must be considered in relation to the relevance of the evidence, and the evaluation of the appropriateness of allowing cross-examination in the context of the circumstances of the case. Cross-examination under this section is not limited to the purpose of determining whether the evidence is credible and trustworthy enough to be admitted pursuant to s. 540(7).

[33] A judge in this situation must clearly be involved in balancing the interests between the potentially vulnerable witness and the rights of the accused. However, it must be remembered that the vulnerability of a young witness can be ameliorated in several ways: a screen, closed circuit TV, etc. Streamlining of cases is a worthy objective, but the over aching principle has to be that an accused knows the case he has to meet.

[34] Both counsel in oral argument expressed frustration to determine exactly what are the considerations to be taken into account by the judge making a determination as to the “appropriateness” of examination or cross-examination. It is difficult to establish a list: as the decision is on a case-by-case basis. The judge will have to see the statement, to appreciate its content and the circumstances of how it came to exist.

[35] Whether the statement is sworn, whether there was any caution or discussion of the importance to tell the truth will be significant issues, as the idea of truth goes to the basis of the criminal justice system. If the statement is not sworn, or no caution is given

about telling the truth, the more likely a cross-examination of a witness will be allowed. How important the witness is to the Crown's case will be a factor, as if the witness is key, the nature of the statement will be an important consideration in the determination of whether it is appropriate to allow cross-examination. The less detailed or comprehensive a statement, the more likely it will be appropriate to allow cross-examination. The over arching consideration is that the accused must know the case he has to meet.

[36] Highly contentious in argument, was the ability of defence to request to cross-examine on a statement for the sole purpose of exploring credibility. This is contentious as at the preliminary inquiry, a judge does not make any credibility assessment. The question for that judge is the sufficiency of evidence to allow the case to proceed to trial. However, it is naive to suggest that credibility is not of interest to counsel at the preliminary inquiry: Crown may in fact call witnesses at a preliminary inquiry to get an assessment of their willingness to appear or their ability to testify; while defence is generally interested to test the veracity of a statement and to create a record of evidence given under oath, which may be later used at trial if the evidence of a witness changes.

[37] The Crown in this case argued that cross-examination based on credibility or veracity of the statement should not be allowed. This is very much along the lines of the Crown argument in *R. v. P.M.*, cited above, which was rejected by the Quebec Court of Appeal. The exploratory role of a preliminary inquiry, although ancillary, is not diminished, watered down or abrogated by the amendments under discussion. If appropriate in the circumstances of the case, cross-examination must be allowed.

[38] Although Crown and defence may wish more direction for judges making these decisions, little more can be said. The discussion in *R. v. P.M.*, cited above, dealt with many of the same issues which the Crown raises, and although the Crown may wish to suggest the amendments were to limit cross-examination, or were designed to disallow any cross-examination that may go into areas of credibility of a complainant in a sexual assault case, that is not what the amendments say.

[39] Here the judge was faced with an admission that the statement would meet the necessary requirements of s. 540(7) to be admissible, but counsel for the accused wished to cross-examine the complainant. The judge looked at the statement, and considered the available information about the situation of the witness, the case against the accused and the statement. She found the statement was made with no caution about the necessity to tell the truth, that it was short and somewhat confused. She recognized that this was a critical witness for the Crown. Although she was aware that identification was not at issue at the preliminary inquiry, she noted the inability of the complainant to describe the accused with any clarity. She found the combined effect of these issues was that the case to be met was not clear. Because of these features of the statement that counsel was agreeing she should admit as evidence under s. 540(7), she found that the accused's right to make full answer and defence was engaged and challenging the credibility of the complainant was not the sole purpose underlying the defence application. She found the vulnerabilities of the young person could be balanced, and the effect of this order on the administration of justice would not be adverse. These were all allowable and appropriate considerations.

2. Did the judge exceed her jurisdiction by considering the contents of the statement as it related to identity, an issue admitted by the defence?

[40] I do not find this is an appropriate case for *certiorari*. There has been no loss of jurisdiction here, no issue arises that would affect the jurisdiction of the territorial court judge.

[41] The judge is given a discretion, she did not exercise it solely on a consideration of the complainant's statement around identification, which she was fully aware was not engaged in the preliminary inquiry. In the process of looking at the statement, and evaluating it for completeness, she noted a number of things about it, including that it was short and somewhat confused. She was entitled to consider the whole statement, including any comment it made on items not at issue at the preliminary inquiry, to see how comprehensive it was, and to the extent that cross-examination would be "appropriate".

[42] Although I recognize that the judge in her reasons commented on the complainant's inability to say much about the description of the accused, she prefaced this with a recognition that this was not a live issue in the preliminary inquiry. The comment was made in the context of her evaluation of the statement as short, and somewhat confused, i.e. unable to describe the accused in detail. The judge said the combined effect of the issues she enumerated meant the case to be met was not entirely clear, and given the limitations in the statement being admitted, she was willing to allow a cross-examination, recognizing the accused's right to make a full answer and defence. She was cognizant of the reasons for the amendments, and she performed an analysis of the situation of the witness, the statement and the effect her order may have on the administration of justice.

3. Should the judge after allowing cross-examination, have then limited the extent of that cross-examination?

[43] Crown counsel argued that here, where a judge has allowed cross-examination, she should have set some parameters. For example, that the complainant could not be cross-examined on the identity of the accused, as this was not to be at issue in the preliminary inquiry.

[44] There is no question that a judge making an order under s. 540(9) has the ability to put limits on the cross-examination. Whether this is done largely depends on the nature of the case. However, this is certainly not necessary in most cases, and is a discretionary call by the judge hearing a s. 540 application.

[45] For example, a statement on five separate counts, that only gives details of two counts, may cry out for specifics, or the knowledge of the complainant on the other three. In that case, a judge could confine the cross-examination to those three counts, if appropriate. It would have been open for the judge here, to have directed that there be no cross-examination on identify.

[46] However, restriction given in the void of context or based on a hypothetical situation can sometimes be less than helpful. Restrictions on questioning, which are made daily by judges in court, are generally made on the actual questions being posed in the courtroom, in the context of the evidence as it evolves. For instance, a cross-examination of a complainant may elicit drug or alcohol use which was not asked about or volunteered in the statement. Disclosure of the use of substances that may affect the memory or the ability of the complainant to recall, may widen the areas on which a judge would then allow cross-examination, after hearing this evidence in the courtroom.

[47] Thus, although Crown may ask for a delineation of or limitation on cross-examination, it may often not be appropriate. In many circumstances, such a request and the debate about it, may in fact, result in more time and speculation, than if the cross-examination proceeded, and any abusive or irrelevant cross-examination could be addressed at that time.

[48] The fact that Ruddy T.C.J. made no restrictions on cross-examination, and did not expressly ban questions on identity is not a reason to allow *certiorari*, or a review of her discretion on this matter.

CONCLUSION

[49] The application of the Crown is dismissed, and the ruling of Ruddy T.C.J. stands.

Nation J.