SUPREME COURT OF YUKON

Citation: *R. v. P.J.S.*, 2014 YKSC 10

Date: 20140211
S.C. No. 12-01511
Registry: Whitehorse

Between:

HER MAJESTY THE QUEEN

And

P.J.S.

Publication of information that could disclose the identity of the complainant or witnesses has been prohibited by court order pursuant to s. 486.4 of the *Criminal Code*.

Before: Mr. Justice L.F. Gower

Appearances:

Terri Nguyen — Counsel for the Crown
André W.L. Roothman — Counsel for the Accused

RULING
(Application under s. 276.1 of the *Criminal Code*)

[1] The accused is charged with having committed a sexual assault on his nephew, G.S., when G.S. was between five and seven years old, approximately. G.S. is now 35 years old and the accused is 48 years old. G.S. alleges two incidents of sexual assault: (1) that the accused had anal intercourse with him; and (2) the accused forced G.S.to perform fellatio upon him. The incidents are alleged to have occurred in Whitehorse.

[2] This is a pre-trial application by the accused to determine whether certain evidence is admissible under s. 276(2) of the *Criminal Code* (the "*Code*"). The accused wants to cross-examine G.S. about certain disclosures he made about other persons who sexually assaulted him when he was a child. Technically, this would be evidence that the complainant "has engaged in sexual activity" with another person and would not be admissible under s. 276(1) of the *Code* to support an inference that, by reason of the sexual nature of that activity, G.S.:

> "(a) is more likely to have consented to the sexual activity that forms the subject-matter of the charge; or
> (b) is less worthy of belief."

These are referred to as the "twin myths": *R.* v. *Darrach*, 2000 SCC 46, at para.32.

[3] However, pursuant to s. 276(2) of the *Code*, the accused may adduce evidence that "the complainant has engaged in sexual activity other than the sexual activity that forms the subject-matter of the charge", if this Court determines that the evidence:

> "(a) is of specific instances of sexual activity;
> (b) is relevant to an issue at trial; and
> (c) has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice."

In making this determination, I am to have regard to the factors set out in s. 276(3), including the right of the accused to make a full answer and defence.

[4] Defence counsel has indicated that he wishes to cross-examine G.S. about disclosures relating to three particular individuals: another of the complainant's uncles, D.S.; the complainant's aunt, A.S.; and one of the complainant's former school principals, J.V. Defence counsel has also clarified that his questioning about these disclosures

would not be for the purpose of challenging the truth of the allegations. Indeed, counsel went so far as to say that the accused is willing to accept that those incidents happened. What counsel wants to pursue in this regard is when disclosures were made, to whom, and the details of the disclosures. Defence counsel anticipates that this line of questioning will establish that G.S. has been inconsistent in making these disclosures and that this inconsistency will undermine the reliability of G.S.'s specific allegations against the accused. Counsel submits that the reliability of the complainant's testimony will be particularly important at trial, given that the alleged incidents took place almost 30 years ago, when G.S. was still a relatively young child.

[5] In a previous ruling in this matter, cited at 2013 YKSC 125 (unpublished), I ordered the production of certain records in the custody of a counsellor of G.S. [Redacted] I will refer to them cumulatively as "the counselling records".

[6] The other sources of the disclosures pointed to by defence counsel are two witness statements given by G.S. to the RCMP, and G.S.'s testimony at the preliminary inquiry.

[7] As I understood her, Crown counsel does not oppose cross-examination on the disclosures relating to the uncle, D.S., as these are inextricably linked with the allegation of forced fellatio against the accused. Indeed, it appears that G.S. alleges that both the accused and D.S. were involved in that incident, and that the allegations against both individuals are within one transaction.

[8] Crown counsel also concedes that the reliability of G.S.'s testimony will be a live issue at trial.

[9] Initially, Crown counsel opposed any cross-examination on the disclosure relating to G.S.'s aunt, A.S., on the grounds that the evidence relating to A.S. is a "collateral matter". However, when we discussed further the general rule against calling evidence on collateral matters, as referred to in *R.* v. *A.R.B.*, (1998), 41 O.R. (3d) 361 (C.A.), at para. 13, counsel seemed to resile from this opposition.

[10] In *A.R.B.*, the Ontario Court of Appeal referred to the rule as follows:

> "13 Furthermore, the general rule is that one cannot impugn a witness's credibility by contradicting the witness on matters which are collateral even in a case where the "core" issue is credibility. As stated in *Phipson*, supra, at para 12-33:
>
> > A party may not, in general, impeach the credit of his opponent's witness by calling witnesses to contradict him as to matters of credit or other collateral matters, and his answers thereon will be conclusive. This rule is not absolute. The test whether a matter is collateral or not is this: "if the answer of a witness is a matter which you would be allowed on your own to prove in evidence - if it had such a connection with the issues, that you would be allowed to give it in evidence - then it is a matter on which you may contradict him."

[11] As I understand it, G.S. first disclosed his allegations against A.S. in his second statement to the RCMP, dated September 21, 2012. In the excerpt of that statement in evidence on this application, it appears that G.S. is saying that A.S. sexually assaulted him, and otherwise abused him physically and mentally, at about the same time and in about the same place that G.S. alleges he was sexually assaulted by the accused.

[12] As I noted above, defence counsel will not challenge the truthfulness of G.S.'s allegations against A.S. Rather, he only wishes to explore when they were made, to whom, and the details of the allegations. Defence counsel has further confirmed that he

does not intend to call any evidence to rebut what G.S. may say about the allegations. Therefore, I fail to see how this evidence can be considered "collateral". On the contrary, I am satisfied that the accused should be able to raise the issue of inconsistency regarding these allegations, as that properly relates to the reliability of G.S.'s testimony overall. In summary, I am satisfied that this line of questioning meets the threefold test under s. 276(2) of the *Code* and is properly part of the accused's right to make a full answer and defence.

[13] The third line of questioning at issue relates to the allegations made by G.S. against J.V. in the counselling records. [Redacted]

[14] Defence counsel wants to ask G.S. why he did not disclose this sexual assault to the police in either of his two statements. In particular, counsel points to the statement of September 21, 2012, in which G.S. apparently addressed his complaints against the accused, and further made his first complaint against A.S. At page 9 of the statement, the following exchange occurred:

> "Q: You mentioned two times with ah [the accused] ah two incidents um that were around in the same time frame um concerning [the accused] <u>are there any other incidents that we should ah memories we should explore?</u>
> A: There is but I, I have… I want to try to deal with it one at a time.
> Q: Okay.
> A: The only two that really stick out is [the accused] and [A.S.], ones that really hurt me…." (my emphasis)

[15] As I understood her, Crown counsel submitted that it would be unfair to cross-examine G.S. on why he did not disclose the J.V. incident to the police because: (a) that incident occurred at a different time and place than the allegations against the accused; and (b) the police were not asking G.S. to discuss all the sexual assaults against him

over his entire life; rather, the questioning was focused on the times and places involving the accused.

[16] I disagree. On its face, the question I emphasized above is very general. Now, it may well be that G.S. can explain why he did not mention the J.V. incident on that occasion. In that event, defence counsel would likely be stuck with an answer which is not particularly helpful to the defence. [Redacted] I am satisfied that the accused has met his onus of establishing, on a balance of probabilities, that this evidence also goes to the reliability of G.S.'s testimony overall, and that it meets the test in s. 276(2) of the *Code*. I am also mindful here of the remarks by McLachlan J., as she then was in *R.* v. *Seaboyer*, [1991] 2 S.C.R. 577, at pp. 620 - 621:

> "… Given the primacy in our system of justice of the principle that the innocent should not be convicted, the right to present one's case should not be curtailed absent an assurance that the curtailment is clearly justified by even stronger contrary considerations."

[17] In conclusion, the accused is permitted to cross-examine G.S. about all three of the disclosures, i.e. those relating to D.S., A.S. and J.V.

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Gower J.