IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *Her Majesty the Queen* v. *Sharp,* 2003 YKSC 52

Date: 20030917
Docket: S.C. No. 01-00541A
01-00668C
Registry: Whitehorse

Between:

HER MAJESTY THE QUEEN

Applicant

And:

THOMAS PAUL SHARP

Respondent

Publication of information that could disclose the identity of the complainant or witness has been prohibited pursuant to s. 486(4.1) of the *Criminal Code*

Appearances:
Edward J. Horembala, Q.C. — Special Agent for the Attorney General of Canada
Gordon Coffin — Counsel for the Respondent

Before: Mr. Justice Veale

REASONS FOR JUDGMENT
(Video Link and Security Provisions)

Introduction

[1] Thomas Paul Sharp was convicted of forcible seizure, sexual assault with a knife and kidnapping in November 2002.

[2] The Crown has applied for an order that Thomas Paul Sharp be found to be a dangerous offender or alternatively, a long-term offender, in addition to any sentence that might be imposed in respect of his convictions. The sentencing hearing has been

set for two weeks, from September 8-19, 2003, and one week commencing October 6, 2003.

[3] The Crown has made two applications. Firstly, it applies for an order to receive the evidence of T.H., a complainant, by video link, as well as Cst. Mark Flynn and Cst. Dominic Parent. Defence counsel consents to the latter two witnesses, and I order that they be heard by video link. The Crown also seeks to have Thomas Paul Sharp placed in a prisoner's dock, manacled, shackled and guarded by two RCMP officers.

[4] On August 27, 2003, I ordered that T.H. could be examined as a witness by video link pursuant to s. 714.1 of the *Criminal Code*. I further ordered that Mr. Sharp should be restrained by shackles and manacles behind a prisoner's dock while in court. I also ordered that he be guarded by two RCMP officers in court.

Issues

[5] There are two issues:

1. Are there circumstances under s. 714.1 of the *Criminal Code* to order the evidence of T.H. to be heard and seen by video link?
2. Are there grounds to invoke the inherent jurisdiction of the court to order the security measures requested for Thomas Paul Sharp?

The Facts

[6] These applications arise primarily from the conduct of Thomas Paul Sharp during his trial on the forcible seizure charge which commenced October 28, 2002. Mr. Sharp has been in custody since November 7, 2001.

[7] I should mention that Mr. Sharp became agitated during the submissions of the Crown on these applications on August 27, 2003. He requested through counsel that he wished to leave the courtroom, and I granted his wish pursuant to s. 758(2)(b). He did not return to court on these applications, which lasted less than a full day.

[8] I will start with the observations and findings of fact in the Memorandum of Judgment of Hudson J., who presided over the trial, dated November 7, 2002. I quote from paragraphs 2-12 as follows:

> [2] When I entered the courtroom on the 28th and the case was called, present were counsel, Mr. Coffin for the defence and Mr. Horembala, Crown counsel. Mr. Horembala rose to make some preliminary remarks and the Court suggested that perhaps the accused should be arraigned first. The charge was read to the accused and he was asked if he understood it. The accused replied, mumbling at the time, that he did not understand it. I asked the defence counsel if the charges had been explained to the accused and when that was done, did he appear to understand it. Defence counsel replied in the affirmative. Charges were again read to the accused one after the other and when asked for a plea, he said words to the effect that he was not going to answer that and I, therefore, entered, on his behalf, a plea of not guilty to each charge.
>
> [3] Before anything further could be done, the accused started shouting, swearing at persons in the gallery and kicking at the prisoners' dock. As he had stood to do this, I directed him to be seated. Security guards, members of the R.C.M.P., approached him as he was attempting to leave the dock by opening the door.
>
> [4] While the accused was making threats towards the gallery, shouting and failing to respond to the court's direction to be seated, attempts were made to restrain him. During the course of these attempts, the accused took his two hands and appeared to strike one of the guards. I say, "appeared" because the guard's back was to me. There was, however, a sound.
>
> [5] The accused was removed from the courtroom and after discussion with counsel in my chambers, I made an order under s. 650 that he be removed from the courtroom. Sometime thereafter, before the trial had recommenced, with counsel present, I directed defence counsel to go to the accused to inquire whether he was prepared to alter his conduct so as to allow the proceedings to continue without disturbance. Defence counsel

returned and indicated that his instructions were that the accused would not make such a promise, and further, that he no longer wished to have Mr. Coffin representing him in his absence and indeed wanted no lawyer to be representing him. He stated his client did not want to be in the courtroom.

[6] On considering that development, I determined to try and get those instructions to counsel in writing. Upon court recommencing, defence counsel informed the Court that the accused refused to put his instructions in writing, reiterated that he intended to discharge counsel, whereupon his counsel indicated to the court that the relationship of solicitor and client had broken down and he wished to withdraw.

[7] I then ordered that the accused be brought to the courtroom to attempt to persuade him to promise to behave and to employ counsel. The accused indicated that he did not want to be in the courtroom while the trial proceeded and that he wanted to be taken to his cell. He further indicated that he did not want Mr. Coffin or any other government lawyer, or any lawyer, representing him while the matter proceeded.

[8] When I started again to ask him if he would be prepared to sit quietly, he asked to be taken to his cell. The request was granted, and after again kicking the dock, he left.

[9] The trial proceeded. The Crown counsel asked that the accused be brought to the courtroom for the purpose of being identified by a witness, the complainant.

[10] He was brought to court, the witness indicated him as the man about whom she was testifying.

[11] I took the opportunity to again ask the accused if he was prepared to promise to not disturb the proceedings. Before I could finish, he again rose yelling. The officers again approached to restrain him. He refused to comply with the directions of the Court to be seated. As the officers attempted to restrain him, he picked up a chair, raised it over his head, at which time I adjourned court, but not until after I observed the accused head butt one of the officers violently. Three officers struggled to bring him under control. He was subdued and taken out of the courtroom but not without the sounds of violence being heard as he was taken away.

[12] I was totally concerned with the safety of the public, counsel, staff, and witnesses, should the accused be entitled to remain in the courtroom. I determined the degree of risk was very high and renewed my order under s. 650(2) that he be removed and that he be kept away. I was of the

> opinion that to proceed with the accused in the same room with staff and guard, even with shackles and manacles, was to risk the safety of the persons in the room.

[9] I repeat the observation of Hudson J. on removing Mr. Sharp from the courtroom on October 29, 2002. He was of the opinion that to proceed with Mr. Sharp in the same room with staff and guard, even with shackles and manacles, was to risk the safety of persons in the courtroom.

[10] Sgt. Frank Campbell of the Whitehorse RCMP observed the actions of Mr. Sharp when T.H. was testifying as to Sharp's identity. He and three other RCMP members eventually brought Mr. Sharp under control and physically carried him from the courtroom to the courthouse cell block.

[11] The transcript excerpt from the proceedings on October 29, 2002 contains this verbal exchange with the court at page 5, line 19 to page 6, line 12, following T.H.'s identification of Mr. Sharp:

> T.J.H., examined by MR. HOREMBALA, continuing:
>
> Q T., yesterday you gave evidence about being attacked when you got off the bus on Thompson Road near Wilson?
>
> A Yes.
>
> Q I'm going to ask you to look around the courtroom and, if you can, if you see your assailant, could you point to that individual.
>
> A It's that man right there?
>
> THE COURT: The witness indicates the accused, for the record. All right.
>
> THE ACCUSED: (Indiscernible) plea, man. God damn well, man. It's like you never seen me before, right?
>
> THE COURT: That's all. Thank you. I take it – sir, I take it sir,
> THE ACCUSED: Exactly.

THE COURT: -- you're not prepared to promise not to disturb these proceedings? All right. I'll adjourn court.

(Proceedings adjourned)

[12] The verbal outburst from Mr. Sharp on being identified by T.H. viewed from the transcript may not appear to be threatening. However, the impact upon Hudson J. was clear from his Memorandum of Judgment in that he considered all persons in the courtroom to be at risk.

[13] The impact upon T.H. was both traumatic and devastating. To fully understand this impact, I will rely upon the victim impact statement of T.H. dated July 9, 2003 to indicate her state of mind as a result of the forcible seizure and then from her courtroom experience.

[14] Under the heading "Emotional Injuries," she states:

> The winter of 2001, immediately after my attack, I was very uncomfortable staying up in Whitehorse to complete my University field practice with Department of Justice Canada. I ended up having to leave one week early due to stress. I could not sleep, eat and lost 15 pounds in the month of November because of stress. I ended up turning down my application to the . . . Honors Program, because of the stress level I was enduring at the time, (will discuss in Financial Loss).
>
> . . .
>
> I suffered greater anxiety before the trial. I had a breakdown a month before the trial, which ended in my friend . . ., having to come up with me for support. At the time of my breakdown I had not slept in four days, had barely eaten, and was hysterical. I ended up phoning my friend . . . in the middle of the night and unloading all of my feelings on her. This resulted in my seeing another counsellor for three months. I also went to my family doctor who prescribed some sleeping pills to me to get me through the next month. I was very apprehensive in taking these pills, but had no choice because I was physically and emotionally exhausted.

> In October I went up to Whitehorse to testify in the trial of Mr. Sharp. The event was disgusting and horrific for me as the victim and resulted in me being victimized a second time by Mr. Sharp. His performance in the courtroom the day I testified was inexcusable. Mr. Sharp verbally attacked me throughout his time in the courtroom and at one point was able to pick up a chair and attempt to throw it at me. I was shocked that he was able to get this far in the courtroom. That he was allowed to make rude comments to me while I was testifying, to scream out I was a liar while I was on the stand and was not removed. I was very shocked and horrified that my safety was not taken into consideration and that Mr. Sharp was able to grab a chair and get it over his head before anyone had him under control. This event revictimized me to the point where I felt worse after the trial than I did before and continued my counseling when I returned.
>
> Now it is almost two years after my attack, and here I am writing my victim impact statement and getting ready to go up for a third time. I have to go back to the day of November 5th and relive it in front of the courtroom. I have to be in the same room as the man who in my belief could have taken my life that day. I have go (sic) through this process again and again. I am very tired of having to face Mr. Sharp and tell the court what happened to me. I want this to be over and I want to get on with my life. If this is not emotional injury I don't know what is!

[15] It is clear that the in-court actions of Mr. Sharp have had a very powerful and traumatic impact on T.H.

ISSUE 1: ARE THERE CIRCUMSTANCES UNDER s. 714.1 OF THE *CRIMINAL CODE* TO ORDER THE EVIDENCE OF T.H. TO BE HEARD AND SEEN BY VIDEO LINK?

[16] Section 714.1 sets out the power of the court to order a witness to testify by video link:

> 714.1 A court may order that a witness in Canada give evidence by means of technology that permits the witness to testify elsewhere in Canada in the virtual presence of the parties and the court, if the court is of the opinion that it would be appropriate in all the circumstances, including:
>
> (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.

[17] The power of the court is not limited to the enumerated factors set out, but rather can take into account "that it would be appropriate in all the circumstances."

[18] With reference to s. 714.1(a), T.H. resides outside the Yukon, and I find that her "personal circumstances" as a victim, her emotional trauma and what she saw and heard in the courtroom strongly support her appearance by video in the sentencing hearing. It is difficult to imagine more serious circumstances.

[19] The costs to be incurred if T.H. had to be physically present are not overwhelming.

[20] However, the defence submitted that it would be prejudiced under s. 714.1(c) by not being able to observe T.H. in the courtroom while cross-examining her. In my view, this submission would have greater weight if the proposed evidence was part of the trial determining whether Mr. Sharp was guilty or not. It must be taken into account that Mr. Sharp is now a convicted offender as opposed to an accused under s. 11(d) of the *Charter*, who is presumed innocent until proven guilty. While courts must always be cognizant of the offender's right to full answer and defence in a sentencing hearing, it must not ignore the complainant's s. 7 *Charter* right to security of the person (*R.* v. *Mills*, [1999] 3 S.C.R. 665).

[21] I have concluded that the in-court physical and verbal eruption of Mr. Sharp had a profound effect upon T.H. Under these circumstances, it would be callous in the extreme to force T.H. to testify in the physical presence of Mr. Sharp. In my view, emotional traumatization may have as great, if not greater, long-term psychological impact than a physical attack.

[22] I have concluded that T.H. should testify in this sentencing hearing by video link.

ISSUE 2: ARE THERE GROUNDS TO INVOKE THE INHERENT JURISDICTION OF THE COURT TO ORDER THE SECURITY MEASURES REQUESTED FOR THOMAS PAUL SHARP?

[23] A court of superior jurisdiction has the inherent jurisdiction to control its own process, both to protect the decorum of the courtroom and the security of persons in the courtroom (*B.C.G.E.U.* v. *British Columbia (Attorney General)*, [1988] 2 S.C.R. 214.

[24] While this court has the express statutory power in s. 758(2)(a) of the *Criminal Code* to cause an offender to be removed and to be kept out of court, it appears to be limited to situations where he “misconducts himself by interrupting the proceedings.”

[25] The present application by the Crown, although anticipatory, is a reasonable attempt to provide security to persons in the courtroom while maintaining Mr. Sharp’s right to full answer and defence.

[26] Defence counsel submitted that the very fact of Mr. Sharp being shackled and manacled could have a negative influence on me in adjudicating the matter. I have assured him that this is not the case.

[27] However, in the sense that the personal security measures may have an impact on the substantive issues of whether Mr. Sharp is a dangerous or long-term offender, I can only say that I will be guided by s. 753 and s. 753.1 of the *Criminal Code*.

[28] Accordingly, I ordered the shackling, manacling and the use of the prisoner’s dock with two RCMP guards for Mr. Sharp.

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VEALE J.