Citation: *R.* v. *Cardinal*, 2006 YKTC 67 Date: 20060529
Docket: T.C. 05-00567
Registry: Whitehorse

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

REGINA

v.
JEREMY CARDINAL

Appearances:
Michael Cozens Counsel for Crown
Fia Jampolsky Counsel for Defence

REASONS FOR JUDGMENT

[1] LILLES T.C.J. (Oral): This is the matter of Jeremy Cardinal, and an application by the Crown for an order that a witness in this case, the complainant, Ms. Elanik, give evidence by means of video link at the trial of the accused, Mr. Cardinal, on a charge of assault. In order to grant the application, s. 714.1 of the *Criminal Code* requires the court to be 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.

[2] I am satisfied from counsel's submissions that (a) and (c) above are relevant to the application before the Court.

[3] The witness is the complainant in the assault charge before the Court. She currently resides in Inuvik, Northwest Territories. She states that she is afraid of Mr. Cardinal; that he breached his undertaking by contacting her by telephone and threatening her if she returned to Whitehorse. She also says that he came to Inuvik to her apartment building on one occasion, also in breach of his undertaking. As a result, Mr. Cardinal has been charged with a number of charges, in addition to the original charge contrary to s. 266 of the *Code*.

[4] Mr. Cardinal has pled not guilty to the assault charge. He also denies the new allegations by the complainant. He suggests that these allegations were made up by the complainant in order to secure custody of their child, who is currently living with an aunt of the accused in Red River, Northwest Territories. He suggests that the complainant may have an ulterior motive in fabricating these charges against him.

Case Law

[5] The B.C. Supreme Court recently considered the application of s. 714.1 of the *Criminal Code* in *R*. v. *Chapple*, 2005 BCSC 383. Parrett J. held at paragraph 50:

> 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 circumstances warrant dispensing with the usual practice, the witness should be called to the witness stand to testify.

> 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.

[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."

[7] The Court must also take into account cases where infirmity, illness or a medical condition makes a witness' attendance risky or impossible.

[8] Parrett J. stressed that a determination pursuant to s. 714.1 is not merely a balance of convenience test, at paragraph 55. Courts in this jurisdiction have stressed the importance of witness health and safety in considering whether to make an order pursuant to s. 714.1.

[9] In *R*. v. *T.P.S.,* 2003 YKSC 52, Veale J. considered the interpretation of s. 714.1 for the purposes of a sentencing hearing. The accused had behaved violently in the courtroom to the extent that he had been ordered to appear with shackles and manacles. He noted, at paragraph 17, that the power of the Court in a s. 714.1 application "is not limited to the enumerated factors set out, but rather can take into account 'that it would be appropriate in all of the circumstances'."

[10] Veale J. held at paragraph 18:

> With reference to s. 714.1(a), T.J.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.

[11] Faulkner J. also addressed the issue of witness frailty in *R*. v. *McLean*, 2002 YKTC 64. In deciding whether to allow video conferencing, he considered the location, the personal circumstances of witness, the costs that would be incurred if the witness had to be physically present, and the nature of the witness' anticipated evidence. The witness was prepared to testify, but was reluctant to return to Mayo to do so as she feared that she may relapse into substance abuse. A letter from her doctor confirmed that her current recovery process was "fragile and precarious" and recommended against her returning to Mayo. Although transporting the witness to the trial would be expensive, the cost of transporting the Court back to Whitehorse for the video conference testimony, followed by a return to Mayo for the remainder of the trial, negated any savings.

[12] Faulkner J. found that the main considerations in this case were whether or not the accused would be impaired in his ability to meet the case against him, and the frailty of the witness. Faulkner J. rejected counsel's argument that the accused's right to face his accuser and his ability to cross-examine would be impaired to any significant extent. He held at paragraph 18:

> …it would be difficult for me to override the concerns expressed by the witness and her physician without substantial evidence that there would be prejudice to the accused.

The order was granted in that case.

[13] In *R.* v. *Gibson*, 2003 BCSC 524, the B.C. Supreme Court allowed a witness who lived in Saskatchewan and had serious medical difficulties, confirmed by her physician, to testify by video conference. This case demonstrates both that the quality of the video conference technology will be a significant factor in determining whether the witness will be in the "virtual presence" of the courtroom and the importance of accommodating a witness with health concerns.

[14] In G*ibson*, Davies J. had the benefit of two video link appearances by consent. One of the video links was not helpful due to lack of immediacy and because of the size of the screens, which affected his ability to observe the witness. The second link, however, was acceptable in that he could clearly see and observe the witness, including her facial expression and body language. After requesting that the Crown organize a test of the video conference technology to be used, the judge was satisfied that the use of video technology would not preclude a fair trial. He held at paragraph 7:

> …when possible, the Court should attempt to ensure that witnesses are not unduly inconvenienced by the trial process. Even more importantly the Court should attempt to ensure that a witness's health will not be subjected to undue risk.

Davies J. also stated that if he determined during examination that trial fairness was being compromised, he would correct the situation, even discontinuing the procedure if necessary.

[15] Inconvenience to a witness likely requires more than simply the inconvenience caused by having to travel. In *R.* v. *Fleury*, 2004 SKPC 53, Bobowski Provincial Court Judge rejected an application by the Crown to have the key witness, who was an RCMP officer, testify by video conference. The Crown cited the cost of travel, hotels and meals

as well as the officer's wages. The Court found that it would be in the course of the officer's duty to give evidence and that it would not be any great inconvenience to the witness to have to travel to give his evidence. The judge rejected the argument that the officer's wages were a consideration since these would be paid no matter where the office was on duty.

[16] The Court was also dissatisfied with the proposed technical arrangements. There was no video hook-up present in the courtroom, so the hearing would have to be heard in a different facility. No evidence was presented as the size and structure of the room, nor were security concerns addressed.

[17] Finally, the Saskatchewan Court of Queen's Bench identified a non-exhaustive set of factors that may be considered in deciding whether to allow a witness to testify by video conference in *R.* v. *Young* (2000), 150 C.C.C. (3d) 317. It may provide a useful guide in approaching s. 714.1 applications. Wright J. was clear in setting forth this list that the factors are not in order of importance and all factors will not be applicable in every case :

1. whether a video appearance by the witness will impede or impact negatively on the ability of defence counsel to cross-examine the witness;
2. the nature of the evidence to be introduced from the witness and whether it is non-controversial and not likely to attract any significant objection from defence counsel, for example, various police and technical witness who testify to routine matters;
3. the integrity of the examination site and the assurance that the witness will be as free from outside influences or interruptions as that person would be in a public courtroom;
4. the distance the witness must travel to testify in person and the logistics of arranging for his or her personal appearance;

5. the convenience of the witness and to what degree having to attend in person at a distant location may interfere with important aspects to the witness's life, such as his or her employment, personal life and the like;
6. the ability of the witness to attend who lives in a country or area that makes it difficult to arrange for travel or travel in a reliable fashion;
7. the cost to the state of having the witness attend in person; and
8. whether the witness is effectively beyond the control of the Court in the trial jurisdiction, since whatever powers a judge may have over such a person, they are certainly not extraterritorial.

Conclusion

[18] Some cases suggest that attendance by video conference limits the ability of defence counsel to cross-examine the witness. Counsel have not explained to me how the use of this technology is limiting. The technology available today, on its face, appears to be quite adequate to allow full cross-examination by defence counsel. Admittedly, some defendants, as a trial tactic, wait to see if the key witness shows up for trial, a strategy that video conferencing may eliminate.

[19] With today's technology, I am not satisfied that the defendant would not be prejudiced in his cross-examination of the complainant if video conferencing is used. The witness, Ms. Elanik, is the key witness in the assault trial or the assault charge against Mr. Cardinal. No one else was present when the alleged assault occurred except for their infant son. Findings of credibility by the trial judge will likely determine the outcome of the trial. The ability of the trial judge to observe the complainant in person as well as the accused, if he testifies, will be important, if not critical, to assist in making findings of credibility.

[20] There was information before the Court that Ms. Elanik was working and was afraid of losing her job if she had to travel to Whitehorse to give evidence. Her financial resources are limited and if she loses her job, she may also lose her apartment. I understood, however, that this employment was scheduled to end at the end of May and that a later trial date would not create the same problem. The Court would expect the Crown to be sensitive to the needs of the complainant when setting a new trial date in order to minimize the inconvenience to her. The distance between Inuvik and Whitehorse is not great and the two towns are serviced by commercial air service, although the flights do not occur every day.

[21] Notwithstanding Ms. Elanik's fear of Mr. Cardinal, I am confident that her living arrangements while in Whitehorse attending the trial can be kept a secret from the accused. I note that Mr. Cardinal is now bound by a detailed recognizance, with his employer acting as a surety.

[22] Ms. Elanik has not disclosed any health problems that would make travel to Whitehorse for the trial difficult or dangerous for her.

[23] In consideration of all these factors, but particularly the importance of the trial judge seeing the complainant physically in the courtroom in order make findings of credibility, I am not granting the Crown's application to have the complainant testify by video conference. A trial date should be set in Whitehorse, if one has not already been set, and the complainant will be required to attend in person. Has a trial date been set in fact?

[24] MR. COZENS: No, I would suggest the matter go to this Friday at 1:00 p.m. to fix a new date for the trial. A date had been held only in the event that a video conferencing link was --

[25] MS. JAMPOLSKY: That's fine, Your Honour. I understand that the other charges were brought to today's date. If they could all go to Friday to fix dates for trial.

[26] THE COURT: I do not know that pleas have been entered. Have pleas been entered to the new charges?

[27] THE CLERK: Your Honour, there has been no plea entered on the new charges.

[28] MS. JAMPOLSKY: If we could reserve those pleas until Friday, we will be prepared on Friday. I can speak to my friend in the interim.

[29] THE COURT: All these matters will go to Friday at one o'clock.

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LILLES T.C.J.