

Publication of information that could disclose the identity of the complainant or witness has been prohibited by Court Order pursuant to s. 486(3) of the Criminal Code.

R. v. Harper, 2002 YKSC 11

Date: 20020226
Docket No.: 00-00593D
Registry: Whitehorse

IN THE SUPREME COURT OF THE YUKON TERRITORY

BETWEEN:

HER MAJESTY THE QUEEN

AND:

THOMAS MOSES HARPER

NARISSA SOMJI

For the Crown

FIA JAMPOLSKY and GORDON COFFIN

For the Defence

**MEMORANDUM OF RULING
DELIVERED FROM THE BENCH**
(On the capacity of the complainant to testify)

[1] VEALE J. (Oral): The Crown has challenged the capacity of the complainant to testify in this case. I have previously ruled that she was not going to be traumatically affected by giving evidence and thus I proceeded to do an inquiry into her capacity under s. 16 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5, at Macaulay Lodge residence.

[2] The Supreme Court of Canada, in *R. v. Marquard*, [1993] 4 S.C.R. 223,

establishes that testimonial competence involves an inquiry into the witness's capacity to observe, the capacity to recollect, and the capacity to communicate. It is not an inquiry into credibility, but rather capacity to perceive, recollect and communicate. The threshold is low and I must be satisfied that the witness has a basic ability to perceive, remember and communicate.

[3] Expert evidence from Dr. Anzarut, her neurologist, indicates that the complainant suffers from multiple sclerosis. The diagnosis was made in 1994 when the complainant was blind and paralyzed. Yesterday, she appeared before me in a wheelchair. She was attentive and cooperative in answering questions. However, Dr. Anzarut testified that the complainant is child-like in her behaviour and her memory has been affected by the disease, and that was certainly apparent from my observations in doing the s. 16 inquiry yesterday.

[4] However, the complainant was able to remember the names of her parents, her children, where she lived. She remembered the name of her local doctor, Dr. Sally Macdonald. She knew the year was 2002, but she did not know the day or the month. She couldn't say what she did on the weekend, but when prompted she recalled that she had had her hair done. She remembered going to the police station in the past.

[5] While it is clear that she has some memory deficits, I am satisfied that she has the capacity to give evidence. The issue of accuracy and credibility is not at issue for this inquiry under s. 16 of the *Canada Evidence Act*.

[6] I am not satisfied that she has the ability to understand an oath, but I am satisfied that she can promise to tell the truth. I should also add that I am satisfied by

my observations of the complainant and the expert opinion of Dr. Anzarut that although she will be stressed and perhaps confused and agitated in giving evidence, it will not cause her any permanent harm.

[7] I am therefore ordering that the complainant has the capacity to testify.

VEALE J.