Citation: *R. v. Morgan*, 2006 YKTC 79

Date: 20060823
Docket: 05-00588A
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: His Honour Chief Judge Faulkner

R e g i n a

v.

Clinton Lance Morgan

Publication of information that could disclose the identity of the complainant or witness has been prohibited by court order pursuant to section 486(3) of the *Criminal Code*.

Appearances:
Noel Sinclair — Counsel for Crown
Jennie Cunningham — Counsel for Defence

REASONS FOR DECISION

[1] Clinton Lance Morgan is charged with offences contrary to ss. 151(a), 152 and 271 of the *Criminal Code*. All three relate to allegations that he sexually assaulted M.F., a six-year-old neighbour, after he had invited the girl into his residence to obtain some videos. The girl immediately complained to her mother and the police were called. The child was taken to the Whitehorse Hospital for examination and, shortly thereafter, was interviewed by Constable Thur of the Whitehorse R.C.M.P. and a social worker. This 35-minute interview was videotaped. Subsequently a transcript of the interview was prepared.

[2] Mr. Morgan elected trial by judge and jury and requested that a preliminary hearing be held. As required by s. 536.3 of the *Code* and the Court's

Practice Directives, counsel acting on Mr. Morgan's behalf (who was not Ms. Cunningham) filed a "Form A Statement Identifying Issues and Witnesses". That form asks the accused to focus the preliminary hearing in the following words:

> The requesting party requires evidence to be given only on the following issues:

[3] This query is answered by counsel as follows:

> Identity and jurisdiction is {sic} not an issue for the purposes of the preliminary hearing.

[4] The form also asks the accused to specify which of the potential witness he wishes to hear from at the preliminary hearing. Counsel listed four witnesses, including M.F.

[5] Subsequently, pursuant to s. 536.4, the Crown applied for a pre-hearing conference (sometimes called a "focus hearing"). In that application, the Crown indicated its intention to apply under s. 540(7) of the *Code* to introduce the evidence of the complainant M.F. (now aged seven) by way of Cst. Thur producing the videotape and transcript of his interview of her. The Crown further gave notice that it would oppose any application by the accused pursuant to s. 540(9) of the *Code* to require that M.F. be produced at the preliminary hearing for the purpose of cross-examination.

[6] I determined that the preliminary hearing should commence and that Cst. Thur be called. The videotape and transcript were produced and the video was played. Following this, and after hearing submissions from the parties, I ruled that the videotape and transcript could be admitted and that it was not necessary to produce M.F. for the purpose of cross-examination. I promised to provide written reasons in due course. These are my reasons for those decisions.

[7] I begin by noting that the recent changes to the *Criminal Code* were clearly intended to modernize what has been described as an archaic ritual – a

ritual whose previous function of providing defence discovery of the Crown's case had been rendered largely obsolete by the *Stinchcombe* requirements for full Crown disclosure (*R. v. Stinchcombe,* [1991] 3 S.C.R. 326).

[8] In passing the amendments, Parliament clearly intended not only to streamline the process, but to protect vulnerable witnesses. In aid of both objectives, the *Code* now provides in s. 540(7) that:

> 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.

[9] This section clearly contemplates an application of the kind made by the Crown in this case since it specifically provides for the admission into evidence of "a statement that is made by a witness that is in writing or otherwise recorded". Section 540(8) requires reasonable notice of an intention to introduce a statement or other information. The Crown provided timely notice in this case. Section 540(9) then provides:

> 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).

[10] The first question to be answered is whether M.F.'s statement to Cst. Thur is sufficiently credible or trustworthy in the circumstances of the case to warrant its admission into evidence.

[11] In making this determination, I am of the view that the test to be employed is not the same as would be the case were the court asked to admit the statement at trial under the necessity and reliability test of *R. v. K.G.B.,* [1993] 1

S.C.R. 740, *R. v. Khan,* [1990] 2 S.C.R. 531, and *R. v. Starr*, 2000 SCC 40. I agree with the view expressed in *R. v. Trac*, 2004 ONCJ 370, and *R. v. Francis,* 2005 ONCJ 150, that the test here is the same as that which is applied with respect to evidence tendered at a judicial interim release hearing. Section 518 of the *Code*, which governs the conduct of judicial interim release proceedings, sets out exactly the same test in s. 518(e):

> [T]he justice may receive and base his decision on evidence considered credible or trustworthy by him in the circumstances of each case.

[12] It should be emphasized that the Crown here did not simply propose to proffer the statement without any *viva voce* evidence as was the case in *R. v. Trac* and *R. v. S.P.I.,* 2005 NUCJ 3. It is obvious that simply filing the statement is insufficient since it provides no means for the presiding justice to determine whether or not the evidence is credible or trustworthy in the circumstances of the case. The preliminary inquiry, as some have feared, cannot simply be turned into an exercise in filing paperwork.

[13] In Mr. Morgan's case, Cst. Thur was called to testify. He indicated that he had received training in the procedures to be used in interviewing child complainants in sexual assault cases. Prior to the interview, Cst. Thur had spoken to the child's mother and been told the substance of the child's complaint as she had received it from her daughter immediately after the incident in question. Cst. Thur's interview was within hours of the incident.

[14] No attempt was made to administer an oath or affirmation to the child, but it would have been idle to do so given the girl's age. Arguably, it would have been prudent to say something to the child to impress upon her the importance and necessity to tell the truth.

[15] In general, the child was allowed to tell her story unimpeded and it proved to be consistent with the earlier disclosure to her mother. The tone of voice and manner of questioning employed by both Cst. Thur and the social worker were generally, and appropriately, neutral. That is to say, the interviewers were neither overbearing nor overly solicitous. There were some suggestive or leading questions employed at various times; however, it is important to note that the child did not simply agree with the questioners. Rather, she was quite robust in disagreeing with suggestions from the interviewers when she wanted to. For example, Cst. Thur asked the child if Mr. Morgan had pulled her pants back up. M.F. immediately replied that no, *she* had pulled her pants back up.

[16] In viewing the videotape it did not appear to me that the child was particularly distressed or under pressure, albeit she did swing her legs back and forth more or less constantly throughout.

[17] Considering the manner in which the interview was conducted, the manner in which the complainant responded, and the background circumstances leading up to the interview, I am satisfied that the statement is sufficiently credible or trustworthy to warrant its admission into evidence at the preliminary inquiry.

[18] That brings us to the second issue – whether or not I should require that the complainant be produced at the preliminary for the purpose of cross-examination.

[19] Section 540(9) might be seen as requiring the justice to order any person to appear for cross-examination merely upon the application of a party since the section uses the word “shall”. However, the section goes on to say that the justice shall make the order when the justice considers it appropriate. Moreover, the section does not speak of the maker of the statement necessarily being produced, but merely of a witness with evidence to give “with respect to the

information intended to be tendered as evidence under subsection (7)". Thus, for example, it might suffice to order the officer who took the statement to testify.

[20] I need here to refer back to the "Form A" filed by counsel for the accused. It refers to a desire to have M.F. produced as a witness but provides no information as to the issues to be canvassed at the inquiry, save and except to indicate that jurisdiction and identity are not amongst them. There is, therefore, no indication as to the purpose to be served by calling the complainant, or indeed, any of the other witnesses listed. At the hearing, Ms. Cunningham indicated that the issue was credibility.

[21] The trouble with this submission is that credibility is not actually in issue at a preliminary hearing. Providing the evidence meets the test in *United States of America v. Sheppard*, [1977] 2 S.C.R. 1067, the justice is required to commit. What defence counsel really mean when they speak of testing credibility at the preliminary hearing is that they want a chance to have a free run at the complainant. At its most benign, the intent will be to develop a record of the complainant's story at the preliminary hearing that, with luck, the complainant will contradict at trial. At the other end of the spectrum, the purpose is to intimidate the witness, making her less willing or less able to undergo the ordeal a second time at trial.

[22] I hasten to add that I ascribe no improper motive to defence counsel in this case. Nevertheless, given that no particularly relevant or pressing purpose for ordering this child to appear has been put forward, I have decided to exercise my discretion against ordering her to appear at this proceeding.

[23] I am well aware of the accused's right to make full answer and defence at the preliminary inquiry as well as at trial, but I have not been provided with any insight as to how this right will be impaired in any substantial sense given that the accused has disclosure of the videotape, the transcript, the contents of the child's

complaint to her mother, the reports of the attending medical staff and the results of all other police investigations in the matter. Nothing suggests that these provide anything other than a complete recitation of the allegations against Mr. Morgan or of the evidence available in support of them.

[24] In the very similar case of *R. v J.P.L*., 2006 ABPC 113, the accused was charged with an offence contrary to s. 151 of the *Code*. The defence indicated it wanted the young complainant called at the preliminary inquiry for the purpose of testing her credibility. Lamoureux J. held that, since credibility was not in issue at the preliminary hearing, the defence was not entitled to have her called for cross-examination. The test for committal could be satisfied by having the officer who took the complainant's statement testify and produce the statement provided that there were proper guarantees of the statement's trustworthiness.

[25] There have, of course been other cases wherein the application to allow cross-examination of the complainant succeeded or, it might be said, the Crown's effort to avoid calling the complainant failed. However, each case appears to turn on its own facts. For example, in *R. v. Inglis*, 2006 ONCJ 154, Vaillancourt J. declined to allow a videotaped statement by the complainant in a sexual assault case to be introduced in evidence at the accused's preliminary hearing and ordered that the complainant be produced to testify. However, in that case the videotape was of poor quality and contained many inaudible comments. There were also other reasons to doubt the credibility or trustworthiness of the statement. In these circumstances it is hardly surprising that Vaillancourt J. made the orders he did.

[26] In other cases, the Crown has been permitted to introduce the complainant's statement, but was also required to produce the complainant for cross-examination. One example closest to the present circumstances is *R. v. S.P.I., supra.* Johnson J. ordered that the six young complainants in that case be produced for cross-examination. He appears to have done so because he felt

that, if the Crown was entitled to rely on s. 540(7) in lieu of calling witnesses, there would be no point in having a preliminary inquiry as its outcome would be a foregone conclusion. However, with respect, this *in terrorem* argument goes too far.

[27] Firstly, I have already held that the Crown cannot use s. 540(7) as a complete substitute for calling witnesses. The statement must be shown, through *viva voce* evidence, to be sufficiently credible and trustworthy to warrant its admission. Nor does it follow that because a statement in this case is admitted and cross-examination is refused, that such would be the result in every case. If the statement were of lesser quality than the one here, or the witness was not a child, the court could very well refuse to admit the statement, or if it did admit it, still order that the witness be produced for cross examination. In short, the decision is one to be made one case (and one statement) at a time. There is nothing automatic about it.

[28] The argument seems to be made in many of these cases that, if Parliament had intended to work such a sea change on the preliminary inquiry, it would have used more robust language, (or, as was suggested in one case, the proposed legislation would have provoked more debate in the Houses of Parliament). However, the fact is that ss. 540(7), 540(8) and 540(9) are entirely clear and unambiguous. They permit the court to receive exactly the kind of evidence proposed in this case and they authorize the presiding justice to decide whether or not to direct any person to appear for cross examination with respect to that evidence.

Faulkner C.J.T.C.