Citation: *R. v. Rowe*, 2019 YKTC 45

Date: 20191029
Docket: 18-00469
Registry: Whitehorse

**IN THE TERRITORIAL COURT OF YUKON**
Before His Honour Judge Cozens

REGINA

v.

GEORGE DAVID ROWE

**Publication of information that could identify the complainant or a witness is prohibited pursuant to section 486 of the *Criminal Code*.**

Appearances:
Kevin MacGillivray — Counsel for the Crown
Vincent Larochelle — Counsel for the Defence

## RULING ON APPLICATION

[1] George Rowe has been charged with having committed offences contrary to ss. 151 and 271 of the *Criminal Code*.

[2] The trial commenced on May 30, 2019.

[3] By consent, the 10-year-old alleged victim, O.E., testified via CCTV from outside the courtroom with a support person present.

[4] Crown Counsel also applied to have O.E.'s mother, E.N., testify via CCTV from outside the courtroom with a support person present.

[5] Counsel for Mr. Rowe was not opposed to E.N. having a support person present when she testified.

[6] Counsel was opposed, however, to E.N. being allowed to testify from outside of the courtroom. Counsel submitted that there was an insufficient evidentiary foundation for the Crown's application.

[7] I decided that I would grant the Crown's application, and provided a brief explanation as to why. I indicated that a written Ruling on Application would follow. This is that Ruling.

**Legislation**

[8] Section 486.2(2) reads as follows:

> (2) Despite section 650, in any proceedings against an accused, the judge or justice may, on application of the prosecutor in respect of a witness, or on application of a witness, order that the witness testify outside the court room or behind a screen or other device that would allow the witness not to see the accused if the judge or justice is of the opinion that the order would facilitate the giving of a full and candid account by the witness of the acts complained of or otherwise would be in the interest of the proper administration of justice.

[9] Section 486.2(3) set out the factors a judge shall consider when deciding a s. 486.2(2) application. The relevant portions of these sections, for the purpose of the application before me, are as follows:

> (3) In determining whether to make an order under subsection (2), the judge or justice shall consider
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> (a) the age of the witness;
>
> (b) the witness' mental or physical disabilities, if any;

> (c) the nature of the offence;
>
> (d) the nature of any relationship between the witness and the accused;
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> …
>
> (g) society's interest in encouraging the reporting of offences and the participation of victims and witnesses in the criminal justice process; and
>
> (h) any other factor that the judge or justice considers relevant.

**Contents of the Application**

[10] The Notice of Application set out the following as the grounds in support of the Application:

> 1. The Witness is a 36 year old Gwichin woman.
> 2. The Witness is the mother and primary caregiver of the 10 year old complainant, O.E. (the "Complainant"), in this matter.
> 3. The allegations involve the Respondent building a relationship with the Witness and her family.
> 4. The allegations involve the Respondent taking the Complainant while she was in the care of the Witness and violating the Complainant sexually.
> 5. The video technology used in the Yukon Courts is of superior quality that does not impair the delivery of the evidence to those persons present in the courtroom.
> 6. The Witness has a fear of public speaking.
> 7. The Witness feels uncomfortable when speaking publicly and it is more difficult for her to answer questions because she becomes nervous and forgetful.
> 8. The Witness has seen the Respondent in the community and when she does it has cause [sic] her to cry and leave the area.

9. Canadian society has an interest in encouraging the reporting of allegations of sexual assault and the participation of individuals like the Witness in the adjudication of such allegations.

10. Canadian society has an interest in ensuring all Canadians have access to justice and this accommodation is in keeping with Canada reconciling with the indigenous people of Canada.

11. This accommodation will allow for a full and candid account of the testimony of the Witness and is otherwise in the interest of the proper administration of justice.

**Evidence**

[11] The evidence in support of the Application were the affidavits of E.N., and of Social Worker, Vyda Zaliauskas.

[12] E.N. stated in her affidavit at paras. 3-7 as follows:

3. I have a lot of anxiety about testifying in the courtroom with Mr. Rowe being present. When I have anxiety I get scared, I breathe faster and I can also get angry.

4. I do not want to see Mr. Rowe, whenever I have seen him in the community tears come to my eyes and it's hard for me to talk. I have seen him at the Salvation Army while having lunch, I had to leave right away.

5. I am a very shy person and I speak very softly. Speaking loudly gives me a headache. If I was in the courtroom I would be concentrating on how I am speaking and if people could hear me. My focus would be on keeping my voice loud rather than listening to the questions and answering them as best as I can.

6. I was asked by the Crown Prosecutor Kevin MacGillivray, "how do you feel about speaking publicly" I told him "I don't speak publicly because it doesn't feel good for me.

7. I would feel scared testifying in the court with other people looking at me. I would be scared because I am really shy and soft spoken. I do not think I could focus on the question and give a full answer.

[13] Ms. Zaliauskas was assigned as a social worker to work with E.N. and her family as of January 2017. She stated in her affidavit that she had offered support services to E.N. by way of counselling, case-planning and bi-weekly appointments.

[14] Ms. Zaliauskas stated the following in her affidavit at paras. 7-9:

> 7. E.N. struggles with cultural differences due to her heritage and would find it difficult to make eye contact when being asked questions and to speak loudly in a court room [sic] setting if there are strangers in the room.
>
> 8. E.N. has confided in me that she is very emotional over the alleged offence that her child is a victim of and I would be concerned that she may start crying or have trouble giving a full and candid statement in the court room [sic].
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> 9. E.N. would benefit in my opinion to testify outside the court room [sic] by way of closed-circuit television and to have a support person present during her testimony.

**Analysis**

[15] In ***R.*** v. ***J.S.***, 2016 YKTC 59, I stated the following with respect to the legislative change in the wording within s. 486.2(2) from “necessary” to “facilitate”:

> [16] There is a considerable shift in the legal landscape by the use of the phrasing that includes “facilitate” rather than the previous phrasing that required the accommodation to be “necessary”. The amended s. 486.2(2) clearly reflects Parliament’s intention to lower the threshold required in order to allow a witness to testify from outside the courtroom or behind a screen or other device that would allow the witness not to see the accused.
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> [17] This was the conclusion reached by the trial judge in ***R.*** v. ***Jimaleh***, [2016] O.J. NO. 5133 (S.C.)
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> > 7 Section 486.2(2) previously required that the order be "necessary to obtain a full and candid account from the witness of the acts complained of." The amended section has lowered the threshold somewhat to that of "would

> facilitate the giving of a full and candid account..." which indicates an intention to make testifying by closed circuit or behind a screen a more commonplace occurrence.

[16] Counsel for Mr. Rowe submitted that the affidavit of Ms. Zaliauskas should be accorded little weight, as it was opinion evidence and Ms. Zaliauskas was not qualified as an expert to provide expert opinion evidence.

[17] Counsel further submits that the fact E.N. may be scared or anxious is not a sufficient basis for the application to be granted. Being scared or anxious is not an uncommon feeling for witnesses who are required to testify in court.

[18] Counsel relies on ***R.*** v. ***B.C.H.*** (1990), 58 C.C.C. (3d) 16 (M.B.C.A.). In this case, Twaddle J.A. noted that on the s. 486(2.1) application a police officer, social worker and the complainant's mother provided evidence. He stated as follows:

> The statutory requirement is that, before permitting the witness to testify outside the court room, the judge must be of the opinion that the exclusion of the witness is necessary in order to obtain a full and candid account of her allegations. He is entitled to hold a voir dire to ascertain the facts on which his opinion will be formed, but I do not think the Crown is entitled to ask witnesses, at least those not qualified as experts, to express their opinions on the issue.

[19] In ***R.*** v. ***K.P.***, [2017] N.J. No. 69, (P.C.), Gorman J. was dealing with a s. 486.2(2) application. In dispute was the admissibility and value of the evidence of the complainant's mother on the application. In para. 10, Gorman J. states:

> Mr. Ash objected to this evidence, describing it as an opinion on the "ultimate issue" I must decide. However, when we subsequently examine the statutory provisions in issue we will see that the decision I must render in this application is of a broader nature. In addition, I view this evidence as exactly the type of evidence a judge considering a section 486.1 or a section 486.2 *Criminal Code* application should receive. Mrs. A is in an

> excellent position to offer such an opinion. This does not relieve me of my responsibility to apply the statutory provisions to these applications, but the evidence is relevant whether coming from a counsellor, a social worker or a parent.

[20] In ***R.*** v. ***O'Neill,*** [1995] 29 W.C.B. (2d) 351 (O.N.C.J.), the Court was considering the necessity of expert opinion evidence on a s. 486(2.1) application. In para. 19 the Court states:

> I do not agree with defence counsel that in determining this issue, only a opinion from an expert is sufficient to provide the necessary evidentiary foundation. Both the Court of Appeal in Paul, and the Supreme Court of Canada in Levogiannis supra, did not mandate this requirement and in fact in Paul the court went out of its way to distance itself from any rigid evidentiary requirement. Therefore to the extent that the Manitoba Court of Appeal in R. v. H.(B.C.) (1990), 58 C.C.C. (3d)16, follows another route, I respectfully decline to follow that case. …

[21] Further, in ***R.*** v. ***Turnbull***, 2017 ONCJ 309, a s. 486.2(2) application, the Court stated in paras. 22 and 23 as follows:

> 22 My colleague Justice Renaud, in the case of *R. v. Lanthier*, [1997] O.J. No.4238, addresses the question of evidence to show mental disability on an application under the analogous legislation to this section at the time. In that case, the complainant on a sexual assault allegation was over 18 years of age, but had what was termed by the investigating officer as "obvious intellectual deficits" which amounted to "a mental disability, which could impair or hinder her ability to communicate evidence, in such a situation, if a screen is not in place ...". His view was that the non-expert evidence was sufficient to demonstrate on a balance of probabilities, that the order be granted. His view of the choice of Parliament to use the phrase "mental or physical" disability, at paragraph 62, signaled Parliament's intent to "not wish to impose a requirement that a court receive expert opinion. Indeed, different considerations would apply had Parliament employed the expression "mental disorder"...". His Honour, well known on our Bench as a meticulous legal researcher, surveys numerous contexts in which the phrase "mental disability" is used, and concludes specifically, that "mental disability describes a condition which is apparent to a lay person" and therefore, no expert assistance is required.

> 23 Respondents commend the decision in the Manitoba Court of Appeal in *R. v. B.C.H,* [1990] M.J. No. 363, as persuasive authority for the proposition that expert evidence is required in order for the Court to determine whether any necessity exists that a witness might testify outside the courtroom, in order to obtain a full and candid account of the allegations. In that case, the Appellant was unrepresented at trial and on the motion. The procedure proposed involved the testimony of an eight year old girl. Unlike the sophisticated equipment in place in the present case to facilitate the Appellant's cross-examination, an awkward procedure was used, whereby a "friend" of the accused, not legally trained, cross-examined the child complainant, who was in a CCTV room. The court queried other aspects of the proceeding, as the equipment enabled the child to hear the accused asking questions, notwithstanding the role of the "friend"; and there were other procedural and substantive shortcomings in the trial, many stemming from the lack of understanding and instruction of the Appellant as to the nature of a trial proceeding. Thus, the court's concern about opinion evidence from others than experts on the issue relating to testimony from outside the courtroom must be understood in its context. And the larger context, for me, includes the decisions of the Ontario Court of Appeal and the Alberta Court of Appeal, which I refer to above.

[22] The Ontario Court of Appeal case referenced was ***R.*** v. ***P.M.***, [1990] 1 O.R. (3d) 341 (C.A.), and the Alberta case was ***R.*** v. ***Smith*** (1993), 141 A.R. No. 241 (C.A.). In para. 19 and 20 of ***Turnbull***, the Court stated:

> 19 Respondents point out that I have no evidence, even a letter, from a mental health professional, to support the Application in relation to the impact of CB's mental health issues insofar as they affect her testimonial ability. I note that while the authorities review several forms of evidence, which may form the foundation of the Order sought here, our Court of Appeal gave broad leeway to the court hearing the matter, in the case of *R. v. P.M.*, [1990] O.J. No. 2313, (C.A.) at p.5:
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> > Section 486(2.1) enabled the trial judge to make the order sought if he were "of the opinion that the exclusion (i.e., the use of the screen) is necessary to obtain a full and candid account of the acts complained of from the complainant". It is clear, of course, that what counts is the trial judge's opinion and not that of a reviewing court and, I think, substantial latitude should be accorded to the trial judge in deciding whether or not to form the requisite opinion. He or she is the one who has had the advantage of hearing the evidence and

> seeing the witnesses give it. His or her decision on this particular issue is not, in my view, strictly speaking, one of discretion, but, rather, one of judgment. The trial judge is not, however, empowered to form the requisite opinion unless there is an evidential base relating to the standard of necessity referred to in the subsection which is capable of supporting the opinion.

20 The succinct statement of the Alberta Court of Appeal in the case of *R. v. Smith* (1993), 141 A.R. 241 provides helpful guidance, in a case where the application record was not unlike the record here. On a preliminary hearing, applications under the predecessor section were made with "the unsworn statement of the prosecutor", who provided her observations of the anxieties of each child to the courtroom setting and the reactions of each to strangers entering the courtroom. The observations were based as well on "earlier" discussions with the child complainant. Justice McClung speaks for the Court of Appeal:

> "...the unsworn statements of counsel, where accepted by the judge, may serve under s. 486 C.C. as a sufficient foundation for the judge to make the order that is in dispute. Equally they may not. The judge may demand evidence in traditional form. What is sufficient will be resolved by "...the opinion of the Court" (s.486.1 and 2.1) as to what the needs of the case are."

[23] I agree with the reasoning of the Courts in ***K.P.***, ***O'Neill*** and ***Turnbull*** and decline to follow the reasoning in ***B.C.H.*** Expert opinion evidence is not required in a s. 486.2(2) or equivalent application. It is up to the judge hearing the application to determine whether any particular evidence, regardless of the form it is proffered in, is of assistance in determining whether the requisite standard has been met in order to allow the application to be granted.

**Application to this case**

*Age*

[24] E.N. is 38 years of age. I do not find her age to militate one way or the other in this Application.

*Mental or Physical Disabilities*

[25] Ms. Zaliauskas, based upon her interactions with E.N., has begun the process of arranging for E.N. to be assessed to determine whether, and to what extent, she may be suffering from the effects of Fetal Alcohol Spectrum Disorder ("FASD"). Noted by Ms. Zaliauskas are E.N.'s "weakened executive functioning abilities, inability to plan ahead, the need for constant reminders, and to escort her to and from appointments to ensure she attends."

[26] She also notes the need when dealing with E.N. to use "concrete language and to set out plans in advance whereas if this is not done it causes her to be overwhelmed, confused and may cause forgetfulness".

[27] While an FASD diagnosis is not on its own necessarily a sufficient reason to grant a s. 486.2(2) application, it is a factor to be considered. While E.N. has not been formally diagnosed as suffering from FASD or another mental disability, there is some foundation for a concern that she exhibits symptomology consistent with a possible FASD diagnosis. The observations of Ms. Zaliauskas that are consistent with the possibility of such a diagnosis for E.N. need to be considered.

[28] Ms. Zaliauskas, who has worked closely with E.N., is of the opinion that this may affect E.N.'s ability to testify.

[29] E.N. states that she is concerned that if she has to testify while she is able to see Mr. Rowe, and while in front of other people in the courtroom, this will affect her ability to focus on the questions that she will be asked and to answer these questions.

[30] In my opinion, this aspect militates in favour of granting the Application.

*Nature of the Offence/Relationship of E.N. to the Accused*

[31] The allegation is that of a sexual assault against E.N.'s 10-year-old daughter. It is reasonable to assume that this will be difficult for E.N. Again, on its own, this is not a sufficient basis to essentially "rubber stamp" the Application.

[32] However, I also note that the grounds for the Application include that E.N. had developed a sufficiently trusting relationship with Mr. Rowe to allow him to take O.E. with him unsupervised. E.N., who was responsible for the care of O.E., will be testifying about an allegation that her daughter was sexually assaulted by the individual she trusted enough to let her daughter be alone with.

[33] Taken together, and in consideration with the possible cognitive limitations that appear to be present, I am satisfied that these factors militate in favour of granting the Application.

*Society's Interest in the Reporting of Offences and in the Participation of Witnesses*

[34] There can be no question that in the area of sexual offences, numerous legislative amendments have been made over the past number of years to encourage the reporting of such offences and to further encourage the participation of complainants and witnesses in the criminal law process. The legislative replacement of the word "necessary" with "facilitate" in ss. 486.1 and 486.2 is demonstrative of this.

[35] Any steps that can be taken in the criminal justice process that encourage the reporting of sexual offences and the participation of complainants and witnesses in the process should be implemented, so long as these are in accord with the proper administration of justice. This includes the need to ensure that the rights of an accused to make full answer and defence and to be treated fairly in the criminal law process are not compromised.

[36] In my opinion, and again in light of the other considerations, this factor militates in favour of granting the Application.

*Other Factors*

[37] The CCTV capabilities in the Whitehorse courthouse are excellent. The testimony of witnesses through CCTV here is very clear, both with respect to the video and audio, and does not suffer from any apparent technological deficiencies. It is very close to having the witness in the courtroom, without the witness actually being physically present.

[38] Underscoring some of the personal circumstances of E.N. is the evidence that she has recently been suffering from emotional trauma in relation to Residential Schools. I do not have specifics of E.N.'s relationship to Residential Schools. However, taking into account the considerable and unquestioned acceptance within jurisprudence of the devastating impacts of the Residential School system on Indigenous Peoples in Canada, I find these factors, again, when considered with the above factors, to militate in favour of granting the Application.

[39] As such, I grant the Crown's Application to allow E.N. to testify by CCTV from outside the courtroom, as I find that it will facilitate E.N.'s ability to provide a full and candid account of events and is otherwise in accord with the interests of justice.

[40] With respect to the application to have a support person present, as counsel for Mr. Rowe has provided his consent, I order that E.N. be allowed to have a support person present when she testifies.

[41] The Application of the Crown is therefore granted.

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COZENS T.C.J.