PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. Giffin*, 2015 NSPC 24

Date: 2015-06-03
Docket: 2752664; 2752665; 2752666
2757122; 2757123; 2757124; 2757125; 2757126
Registry: Halifax

Between:

Her Majesty the Queen

v.

Clinton Waldo Giffin

DECISION ON MOTION FOR SCREEN AND SUPPORT PERSON

Editorial Notice:	Identifying information has been removed from this electronic version of the judgment.
Judge:	The Honourable Judge Marc C. Chisholm
Heard:	April 28, 2015
Decision:	June 3, 2015
Charge	Sections 151; 271 x2; 153(1); 271(1) x2; 153(a) *Criminal Code*
Counsel:	Chris Nicholson, for the Crown Stan MacDonald, for the Defendant

By the Court:

Introduction

[1] The accused is charged with a number of sexual offences.

[2] The accused elected to be tried in the Supreme Court by a Judge alone.

[3] The accused requested a Preliminary Inquiry.

[4] At the commencement of the preliminary inquiry, Crown counsel made two applications.

[5] First, pursuant to s. 486.2(2) for the complainant, who is 19, to testify behind a screen; and

[6] Second, pursuant to s. 486.1(2) for the complainant to have a support person sitting close to her while she testified.

[7] These applications are opposed by the Defence.

[8] An order under s. 486.1(1) or 486.2(2) is discretionary. The wording of the test is the same for each provision. An order may be made:

> "…if the judge or justice is of the opinion that the order is necessary to obtain a full and candid account from the witness of the acts complained of."

[9] In relation to each application,

> "The judge or justice shall take into account the age of a witness, whether the witness has a mental or physical disability, the nature of the offence, the nature of any relationship between the witness and the accused, and any other circumstances that the judge or justice considers relevant. (s. 486.1(1) and s. 486.2(3))

[10] In my respectful view, where, as in this case, the witness, in relation to whom the application(s) are made, gives evidence on the application, the Court's assessment of the witness during their testimony is a relevant consideration.

[11] The burden rests on the Crown to satisfy the Court that the order(s) sought are necessary to obtain a full and candid account from the witness of the acts complained of.

[12] By agreement of counsel, the two applications were heard together on a voir dire.

[13] The Court heard testimony from two witnesses, first, the complainant's mother, D. L., and second, the complainant, J. L.. The complainant testified behind a screen with a support person, her aunt, B.S., seated by her side, pursuant to s. 486.2(6)

[14] I will review the evidence and relate it to the considerations in s. 486.1(3).

Considerations

The age of the witness:

[15] The witness, J. L., is 19 years of age. She will turn 20 on June […], 2015. That is her chronological age. She is not, in my opinion, of the same maturity as most women of her age.

Whether the witness has a mental or physical disability:

[16] Ms. J. L. does not have any physical disability.

[17] There was no medical evidence of Ms. J. L. having been diagnosed with a mental disability. There was evidence of her experiencing learning and cognitive difficulties. The term mental disability is not defined in s. 486.1 or s. 486.2. The *Criminal Code* of Canada makes reference to mental disorders (s. 672.1) and mental conditions (s. 672.1). As the *Code* has used a different term in s. 486.1 and 486.2, I conclude that it must have a different meaning then mental disorder or mental condition. I will return to the question of what constitutes a "mental disability" after reviewing the relevant evidence.

[18] I accept the testimony of Ms. D. L., mother to J. L., that, since elementary school, teachers advised her that J. was experiencing difficulty understanding the lessons being taught. Consequently, starting in elementary school, J. L. received an individualized education program. This continued throughout her junior and senior school years. The content of her education was not further explained.

[19] In 2013, J. attended the Nova Scotia Community College, […] and attempted to complete a […]. She failed to complete the program because she was unable to understand the written, English grammar aspect of the course, including sentence structure.

[20] Although J. L. correctly answered a couple of time related questions during her testimony, I accept the evidence of D. L. that J. often has difficulty with dates and times.

[21] Further, I accept the evidence of D. L. that her daughter J. has difficulty understanding the concept and use of money. J. L. was unable to answer a question as to how she would pay for a $15 item.

[22] J. L. has never had or used a credit card. She has never had a driver's license. J. has recently begun working part-time at […]. She gives the money she earns to her mother to keep safe.

[23] D. L. described J. as having low cognitive ability. She said her assessment was based on her being with J. since she was a young child.

[24] D. L. appeared to be a person of average intelligence and her evidence was credible.

[25] The standard Oxford English Dictionary definition of disability includes "impairment of normal functioning". On its face, this appears very broad in scope. What is normal? In my view, "normal" mental functioning includes a broad range of intelligence, ability to understand, and cognitive functioning. Therefore, only where the judge or justice is of the opinion that the witness' mental functioning is outside the normal range ought the Court conclude that the witness has a mental disability.

[26] I am of the opinion that J. L.'s mental functioning is outside the normal range and that she has a mental disability. Even if I concluded otherwise, I would find that her mental functioning was a relevant factor to be considered on these applications.

Nature of the Offence(s)

[27] The accused is charged with several sexual offences. The witness, J. L. is the alleged victim.

Relationship between the Accused and the Witness

[28] D. L. testified that she had known the accused, Mr. Giffin and his wife and family for many years.

[29] […].

[30] Since she was 7 years old, J. has known the accused through […] activities and his being at her home on numerous occasions.

[31] D. L. said that Mr. Giffin sometimes just dropped by their house. […].

[32] She testified that, "my girls look up to Mr. Giffin and his wife. […]".

Other Relevant Circumstances

J.'s level of maturity

[33] In the Court's view, J. L. has led a very sheltered life, to date and appeared less mature and less self-confident than most persons of her age.

[34] In Court, her demeanor was that of a very frightened child. Her hands were shaking. She did not look around. Once, she furtively glanced towards me. She

gave relatively short, quick answers. Most persons are nervous when appearing in Court, but J. L.'s nervousness was much greater than that of the average witness.

[35] This was her demeanor when testifying with a screen and with a support person close by her side.

[36] She testified that if the screen was removed, she would not really be comfortable at all. She testified that if the screen and support person were absent, she wouldn't want to testify. I accept her evidence.

J.'s conduct when shown the courtroom

[37] D. L. testified that the day before the preliminary inquiry, she and her daughter J. and a support worker came to the courtroom. It was explained to J. where people would be seated and their respective roles. D. L. testified that when J. was told where she would be seated and asked questions "she broke down" … "she became very upset" … "she was very scared" … "she wanted to leave".

[38] D. L. testified that when J. was to give a statement to the police, she asked for her mother to be present. This request was refused. J. gave her statement without a support person being present.

[39] J. L.'s statement to the police was done, one-on-one, in a private setting, a clearly distinguishable process from that of giving evidence in a large public courtroom.

Analysis

[40] Sections 486.1(2) and s. 486.2(2) provide for discretionary orders to be made when a Judge or Justice is "of the opinion that it is necessary to obtain a full and candid account from the witness of the acts complained of".

[41] Defence counsel argued that because the accused has a right to face his accuser(s), any limitation of that right ought be made only when the evidence satisfies the Court on a balance of probabilities.

[42] In relation to the accused's right to face his accuser(s). In R. v. Hinkley, 2011 ABQB 567, the Honourable Justice E.A. Marshall, in dealing with an application by the Crown to have a witness testify via video link, pursuant to s. 714.1 stated, at para [14]:

> "There is little dispute that any "right of confrontation" recognized by Canadian law is one of metaphor rather than a physical requirement for face-to-face interaction. There is no dispute the administration of justice remains affected by any lost opportunity for an accused to physically face a complainant or other witness: R. v. Levogiannes (1990), 1 O.R. (3d) 351 at p. 482; *R. v. J.Z.S.* {2008) BCCA 4001 at p. 32-36"

[43] In R. v. J.Z.S., (2008) BCJ No 1915, in finding that s. 486.1(1) did not violate the *Charter*, the court held that an accused did not have a constitutional right to a face-to-face confrontation with the complainant. The court confirmed than an accused has a right to a fair trial. Any limitation of that right must be *Charter* compliant (Canadian Broadcasting Corp. v. New Brunswick (Attorney General) (1996), 3 S.C.R. 480).

[44] Defence counsel urged the Court to find that to be *Charter* compliant an order under s. 486.1(2) or 486.2(2) required proof on a balance of probabilities.

[45] Defence counsel referred the Court to s. 515(10) where the word "necessary" is used in the context of justification(s) for pre-trial detention. In that context, the burden on the Crown, absent reverse onus situations, is on a balance of probabilities (*R.* v. Julian (1972), 20 CRNS 227 (NSSC)).

[46] In other sections of the *Criminal Code*, the word "satisfied" is used to describe the standard of persuasion needed to grant an order (see for eg. s. 487.05 and 487.051).

[47] In other provisions, such as s. 14(3) of the *Controlled Drugs and Substances Act* a judge must be "satisfied there are reasonable grounds to believe…"

[48] The different language used in the federal criminal statutes raises the question whether a different standard of proof is required, in relation to each application. I find that is not a question I need answer.

[49] While I am inclined to agree with the Defence position that the burden in s. 486.1(2) and 486.2(2) is on a balance of probabilities, I find it unnecessary to decide that point in order to address the present applications as the evidence has satisfied me on the balance of probabilities.

Conclusion

[50] Having considered the factors in s. 486.1(3) of the *Criminal Code*, I am satisfied that the use of a screen and a support person in this case is more than a matter of comfort for the witness. It is my opinion that without the use of a screen and support person, J. L. would be too nervous to provide a full and candid account of the acts complained of. I am of the opinion that it is necessary to grant both orders to obtain a full and candid account of the acts complained of from J. L..

[51] Motions granted.