PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. MacIntosh*, 2024 NSPC 20

Date: 20240104
Docket: 8483052
8483053
8483054
Registry: Halifax

Between:

His Majesty the King

v.

Cody MacIntosh

Restriction on Publication:
s. 486.4 Criminal Code: Ban under this section directs that any information that will identify the complainant shall not be published in any document or broadcast or transmitted in any way

DECISION: APPLICATION FOR STAY OF PROCEEDINGS PURSUANT TO SS. 7, 11(D) AND 24(1) OF THE *CHARTER*

Judge: The Honourable Judge Elizabeth Buckle

Heard: April 7, 8, May 9, 16, 17, 24, July 11, September 28, October 7, 2022, March 31, May 19, August 15, 16, 17, September 1, 26, October 3, 6, 2023

Decision: January 4, 2024

Charges: Sections 151, 271, and 163.1(2), *Criminal Code*

Counsel: Alicia Kennedy for the Crown
Peter Planetta for the Defence
Michelle James for the Defence

By the Court:

Introduction

[1] Cody MacIntosh is charged with ‘sexual assault’, touching a person who is under 16 years old for a sexual purpose (‘sexual interference’) and ‘making child pornography’, contrary to ss. 271, 151 and 163.1(2) of the *Criminal Code.* To reduce the risk of identifying the complainant, I have referred to her as ‘the complainant’ in these reasons and used first initials for people who were associated with her.

[2] Mr. MacIntosh testified. He admitted that he engaged in sexual activity with the complainant and recorded that activity on his phone. At the time, he was 24 years old, and the complainant was 15 years old. He testified that he believed the complainant was at least 18 years old and that she consented to the sexual activity. Therefore, the trial issues included mistaken belief in age, communicated consent and credibility/reliability.

[3] This decision relates to Mr. MacIntosh’s application for a stay of proceedings under s. 24(1) of the *Charter.* Mr. MacIntosh was unable to complete cross-examination of the complainant. In a mid-trial ruling, I concluded that, absent a remedy, proceeding with the trial would violate his right to a fair trial and one that complied with the fundamental principles of justice, contrary to ss. 7 and 11(d) of the *Charter*. Mr. MacIntosh sought alternative remedies, including a stay of proceedings. I excluded the complainant’s evidence and deferred decision on whether a stay of proceedings was required until all the evidence was heard.

[4] At the end of the trial, the Defence renewed its application for a stay of proceedings. I have concluded that excluding the complainant’s evidence remedied the prejudice to Mr. MacIntosh, such that he had a fair trial that accorded with the principles of fundamental justice. As a result, the trial did not violate his rights under ss. 7 and 11(d) of the *Charter* and no stay was required.

Arguments and Legal Principles

[5] In the mid-trial *Charter* application, the Defence sought alternative remedies including a stay of proceedings, a mistrial or excluding the complainant's evidence. The Crown argued that steps should be taken to ameliorate the prejudice to Mr. MacIntosh but any decision on a remedy would require me to review the entire trial record so should be deferred until the end of the trial. I concluded that I had sufficient information to properly consider all remedies other than a stay of proceedings. I also concluded that deferring my decision on whether to exclude the complainant's evidence would be unfair to the Crown and the Defence. In my view, both parties were entitled to that decision before the Crown closed its case – to allow the Crown to consider whether to call further evidence and the Defence to know the case it had to meet before electing whether to call evidence. As a result, I gave my decision to exclude the complainant's evidence prior to the Crown closing its case.

[6] I deferred decision on whether a stay was warranted until the end of the trial when I would have the benefit of the entire trial record (*R. v. Babos*, 2014 SCC 16; *R. v. La*, [1997] 2 S.C.R. 680, para. 27; and, R. *v. Varga*, [2001] O.J. No. 4262 (ONCA), footnote 3, leave to appeal to Supreme Court of Canada dismissed, [2002] S.C.C.A. No. 278).

[7] At the end of trial, the Defence argued that, despite the exclusion of evidence, the inability to complete cross-examination violated Mr. MacIntosh's right to make full answer and defence, resulting in a trial that did not accord with the principles of fundamental justice and violated his right to a fair trial as guaranteed by s. 7 and 11(d) of the *Charter*. The Defence submitted that the only remedy was a stay of proceedings.

[8] The Crown made two arguments. First, that I was precluded from considering the Defence request for a stay of proceedings because I had already granted a remedy for these breaches and I cannot grant a second remedy for the same breaches. Second, that the Defence had not shown how the trial was unfair, given the remedy already granted, and had not met the test for a stay of proceedings.

[9] A stay of proceedings is recognized as the most drastic remedy a criminal court can order (*R. v. Regan*, 2002 SCC 12, para. 53). It permanently halts the prosecution, frustrates the truth-seeking function of the trial and deprives the public of the opportunity to see justice done on the merits of the case (*Babos*, para.

30). It should be granted only in the "clearest of cases" (*R. v. O'Connor*, [1995] 4 S.C.R. 411, para. 68; and, *Babos*, para. 31).

[10] The general requirements to impose a stay were summarized by the Supreme Court in *Babos* (para. 32):

1. There must be prejudice to the accused's right to a fair trial or the integrity of the justice system that "will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome" (*Regan*, para. 54);
2. There must be no alternative remedy capable of redressing the prejudice; and,
3. Where there is still uncertainty over whether a stay is warranted, the Court is required to balance the interests in favour of granting a stay, such as denouncing misconduct and preserving the integrity of the justice system, against "the interest that society has in having a final decision on the merits" (*Regan*, para. 57).

[11] The focus here is on trial fairness. Trial fairness must be assessed from the perspective of the accused but also the broader perspective of the community. A fair trial does not require an ideal trial or the most advantageous trial to the accused and is not the same as a perfect trial (*R. v. Harrer*, [1995] 3 S.C.R. 562, para. 45; and, *R. v. Bjelland*, 2009 SCC 38, para. 22).

[12] In *Harrer*, Justice McLachlin described a fair trial as "… one which satisfies the public interest in getting at the truth, while preserving basic procedural fairness for the accused." (para. 45).

[13] There is no dispute that the right of an accused to cross-examine witnesses for the prosecution is an essential component of the right to make full answer and defence (*R. v. Potvin*, [1989] 1 S.C.R. 525; and, *R. v. Lyttle*, 2004 SCC 5, para. 2). It has been described as "… a cornerstone of the adversarial trial process", "… an important vehicle for the discovery of the truth …" and "central to our understanding of fair procedure." (*R. v.* Hart, 1999 NSCA 45, para. 19; application for leave to appeal to SCC dismissed, [2000] S.C.C.A. No. 109).

[14] The importance of the right to cross-examine was noted by the Supreme Court in *Lyttle*:

> 1 Cross-examination may often be futile and sometimes prove fatal, but it remains nonetheless a faithful friend in the pursuit of justice and an indispensable ally in the search for truth. At times, there will be no other way to expose falsehood, to rectify error, to correct distortion or to elicit vital information that would otherwise remain forever concealed.
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> . . .
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> 41 … [T]he right of an accused to cross-examine prosecution witnesses without significant and unwarranted constraint is an essential component of the right to make a full answer and defence. See *R. v. Seaboyer*, [1991] 2 S.C.R. 577, at p. 608, *per* McLachlin J. (as she then was):
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> > The right of the innocent not to be convicted is dependent on the right to present full answer and defence. This, in turn, depends on being able to call the evidence necessary to establish a defence and to challenge the evidence called by the prosecution... . In short, the denial of the right to call and challenge evidence is tantamount to the denial of the right to rely on a defence to which the law says one is entitled. [Emphasis added.]
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> . . .
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> 43 Commensurate with its importance, the right to cross-examine is now recognized as being protected by ss. 7 and 11(d) of the *Canadian Charter of Rights and Freedoms*. See *Osolin*, [1993] 4 S.C.R. 595 *supra*, at p. 665.
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> 44 The right of cross-examination must therefore be jealously protected and broadly construed. But it must not be abused. …

[15] The right to cross-examine, however, has limits and is not absolute (*Lyttle*, para. 45; and, *Hart*, paras. 19, 94-112).

[16] The Nova Scotia Court of Appeal has identified three categories of factors that should be considered when deciding whether incomplete cross-examination has caused trial unfairness: (1) the reason for the unresponsiveness of the witness; (2) the impact of the unresponsiveness; and (3) possibilities of ameliorative action (*Hart*, paras. 94-112; adopted in *R. v. Cameron* (2006), 208 C.C.C (3d) 481 (Ont. C.A.); and, *R. v. Duong*, 2007 ONCA 68).

[17] In *Hart*, the Court noted that the discretion to grant a remedy should be exercised considering these factors and "with a view to ensuring both a fair trial for the accused and with due regard for the pursuit of truth" (para. 65).

Analysis

Issue 1: Does the Prior Remedy Preclude Consideration of a Stay of Proceedings?

[18] In my mid-trial ruling, I found that the incomplete cross-examination prejudiced Mr. MacIntosh's fair trial right and I granted an alternative remedy/took ameliorative action to try to achieve a fair trial. However, with respect to the stay of proceedings, I took the approach that was recommended in the cases and advocated for by the Crown – to wait to consider the entire trial record before deciding whether a stay of proceedings was required to redress the prejudice.

[19] The Crown now argues that I cannot consider a stay of proceedings, because I have already granted a remedy.

[20] I have concluded that I am not precluded from considering a stay of proceedings for the following reasons.

[21] First, deferring the decision on whether to stay proceedings until after the evidence is heard is the recommended process (See *Babos*; *La*, para. 27; and, *Varga*, footnote 3).

[22] Second, the general principles applicable to the remedy of a stay of proceedings required me to consider whether an alternative remedy could redress the harm (*Babos*, para. 32).

[23] Finally, the cases that specifically deal with remedies for incomplete or non-existent cross-examination contemplate the Court taking ameliorative action to try to achieve a fair trial (*Hart*; *Cameron;* and, *R. v. Dalley*, 2018 NLSC 124). They also contemplate the potential for a stay of proceedings if, after those ameliorative actions are taken and in consideration of the entire trial record, the trial has been unfair.

[24] My task at the end of the trial, having heard the evidence and arguments, was to decide whether the remedy/ameliorative action I had already taken was sufficient to redress the prejudice to the Defence caused by the inability to complete cross-examination. In other words, I must consider whether the original remedy achieved the result mandated by ss. 7 and 11(d) of the *Charter* – a fair trial that accords with the principles of fundamental justice. In my view, that is mandated by the second step of the *Babos* test for a stay of proceedings. Alternatively, rather than being a second remedy for the same *Charter* violations, this is actually a new *Charter* application alleging that Mr. MacIntosh has not had a trial that complies with ss. 7 and 11(d) of the *Charter*. It is important to note that the alleged breach of the *Charter* is not the inability to cross-examine – that is just

the factual cause of the alleged breach; the breaches alleged are a violation of the right to a fair trial that accords with the principles of fundamental justice.

[25] Whether I am revisiting my deferred consideration of remedy or am now considering a new *Charter* application, in my view I am not precluded from considering it. Further, given that this process was fully discussed at the original hearing, was specifically referred to in my mid-trial decision and was, essentially, the process advocated for by the Crown, there has been no prejudice to the Crown.

[26] As an aside, I note that if a court could not do this in these circumstances, it would have to either decide whether to impose a stay before the trial was complete (not the procedure recommended in the guiding cases) or decline to grant any ameliorative remedy at an earlier stage in the trial, thereby increasing the chances that a stay would be ultimately required.

[27] As such, I concluded that I was not barred from considering whether Mr. MacIntosh's trial was unfair and warranting a stay of proceedings.

Issue 2: Is a Stay is Required?

[28] The first question in deciding whether a stay is required is to consider whether Mr. MacIntosh's right to a fair trial had been prejudiced, given the alternative remedy that I had already granted. If there has been no breach of ss. 7 or 11(d) of the *Charter,* no remedy can be granted.

[29] In deciding that, I used the *Hart* factors as modified to fit these circumstances.

The Reasons for Incomplete Cross-Examination

[30] The complainant completed her direct evidence, but part way through cross examination, she left the courthouse and was unable or unwilling to return to complete cross-examination.

[31] In *Hart*, the child was 12 years old, testifying about a sexual allegation and frequently unresponsive during both direct and cross-examination. The Court was particularly concerned about attribution of 'fault' when dealing with an unresponsive child who is testifying about sexual trauma. This recognizes that

sometimes, it is the subject-matter of the testimony that causes the unresponsiveness.

[32] Here, the complainant was 16 years old at the time of her testimony and was recalling events that had occurred when she was 15 years old. However, I had evidence from the complainant's mother and an expert that the complainant is neurodivergent. She suffers from ADHD, cognitive and learning deficits including executive dysfunction, and anxiety. The expert testified that these challenges overlap or interact with each other and produce a cumulative effect that would cause her to have difficulty testifying.

[33] The complainant was co-operative and responsive during her direct testimony, including when being asked questions that touched on the sexual activity that is the subject of the charges. She also remained cooperative and responsive for part of her cross-examination. At the point when she ceased answering questions and eventually left the courthouse, Defence counsel had not yet begun to cross examine her on the sexual activity that is the subject matter of the charge.

[34] Having heard evidence from the expert and the complainant's mother, I had no doubt that the complainant's intellectual, cognitive, and emotional challenges contributed to her emotional distress and her decision to leave court. When cross examination began, neither I nor, to my knowledge, Defence counsel was fully aware of the complainant's neurodivergence. The length and complexity of some of the questions put to her by the Defence (not Ms. James) were clearly challenging for her and contributed to her distress. However, the reliability and credibility of her recollections was also being challenged and I could not rule out that this also contributed to her emotional upset and decision to leave court. I also could not say that it was the sexual subject matter that caused her to leave, given that Defence had not yet asked any questions on that specific subject.

[35] There was some evidence of risk of psychological and physical harm to the complainant if she continued to testify. Her mother and the investigating officer testified that following the aborted cross-examinations, she threatened and engaged in self harm. The expert was not asked and did not comment on this.

[36] Steps were taken to assist the complainant. She was given the opportunity to testify from the vulnerable witness room with a support person. Before the decision was made that the cross examination could not continue, further steps

were taken. The trial was adjourned to give her the opportunity to have her statement read to her when that became necessary and to have her assessed by an expert.

[37] When the Court was advised that the complainant would not return, the Defence (again, not Ms. James) submitted that all efforts should be made to have her attend and the first step should be the issuance of a witness warrant. The Crown did not ask for one and, given the complainant's circumstances and the nature of the charges, I declined to take that step.

[38] The expert testified and proposed further measures that might assist the complainant, including using short and clear questions and taking regular breaks. I indicated my willingness to try these options including hearing the witness' testimony in short chunks with regularly scheduled breaks, to insist on short, clear questions from Defence and any other reasonable suggestions.

[39] The expert was not asked and did not testify about whether testifying would cause the complaint psychological harm or a risk of self harm.

[40] I was not persuaded on the evidence that it would be impossible for the complainant to complete her cross-examination or that it would cause her to engage in further self-harm if accommodations were made for her ADHD and cognitive challenges. I had no expert evidence about whether there were specific supports that could be put in place to reduce the risk of harm to the complainant. However, given that she did not engage in self-harming behaviour during direct-examination, I inferred that if proper accommodations were made to address her other challenges, the more severe emotional consequences could be avoided.

[41] After the evidence was heard on the *Charter* application, including the evidence of the expert, the Crown was given another opportunity to attempt to recall the complainant with the additional accommodations suggested by the expert. The Crown declined. I am not critical of that decision. The Crown is more familiar with the witness and in deciding how to prosecute a case is required to consider many factors. I accept that the Crown made a decision that was in the best interests of the complainant.

[42] The Defence submitted that the complainant's conduct was more like a refusal to be challenged rather than a true inability to participate. The Crown submitted that the complainant is not a neurotypical child who was required to

testify about traumatic events. As such, her conduct cannot be viewed as intentional obstruction of the process, but rather as a genuine inability to continue.

[43] In my view, the situation is between those extremes. This is not a case where an adult witness simply refuses to cooperate with the prosecution for their own reasons, but neither is it the same as a very young child who becomes uncooperative or unresponsive during cross-examination on evidence that is clearly potentially traumatic. Ultimately, I am sympathetic to the complainant's challenges and do not view this as intentional obstruction but cannot conclude that the complainant could not have continued her examination if recalled.

The Impact of the Incomplete Cross-Examination on the Accused

[44] The main issues in this case relate to mistaken belief in age, whether the complainant willingly participated in the activity and belief in communicated consent.

[45] In concluding that her testimony had to be excluded, I was influenced by the fact that the credibility and reliability of the complainant's testimony would be significant to many of the issues. I concluded that the opportunity to observe her reactions and responses to being challenged on things she had not yet been cross examined on could realistically have impacted my overall assessment of her credibility and the reliability of her recollections, including on the crucial 'gateway issue' of mistake of age.

[46] Having excluded her evidence, her credibility is no longer a factor in the trial.

[47] The Defence has however lost the opportunity to seek to elicit evidence from the complainant that might raise a reasonable doubt with respect to some of the issues or might confirm or corroborate Mr. MacIntosh's evidence, making his evidence on the issues more credible or reliable.

[48] The Defence submitted that it had been denied the right to put aspects of Mr. MacIntosh's defence to the complainant in circumstances where there is a possibility that it would have elicited exculpatory evidence on the question of Mr. MacIntosh's belief in age, whether the complainant was a willing participant and whether Mr. MacIntosh had an honest belief in communicated consent.

[49] I had to apply a common-sense and realistic assessment of the impact of cross-examination on those issues. I could not hold the Defence to a standard of having to show that cross-examination would have resulted in capitulation. However, it was not enough for the Defence to raise the mere hope that the complainant might have agreed to some exculpatory proposition. In my view, I had to ask whether there was a realistic prospect that cross-examination would elicit evidence that could contribute to a reasonable doubt.

[50] The complainant was cross-examined on the circumstances surrounding mistaken belief in age and, in my view, it is not realistic that she would have changed her evidence with further cross-examination. As such, on the crucial 'gateway issue' of mistaken belief in age, exclusion of her evidence left Mr. MacIntosh in the best possible position - to have that issue resolved based on his evidence and the other Crown evidence that touches on it, without the potentially contradictory evidence of the complainant.

[51] The Defence has been denied the opportunity to suggest to the complainant that she was a willing participant and that she said or did things that would support an honest belief in communicated consent. The Defence submitted that this evidence could realistically impact my assessment of these issues. More specifically, while much of the sexual activity was captured on video, there are gaps during which Mr. MacIntosh says there was communicated consent and Mr. MacIntosh has testified that there was communication between him and the complainant earlier in the day during which they agreed to meet to engage in the specific sexual acts they engaged in. Complete cross-examination would have included putting these assertions to the complainant and she may have agreed they occurred.

[52] Following a successful s. 276 application, Mr. MacIntosh testified that about six hours before the sexual activity that is the subject of the offence, he and the complainant had a conversation wherein the complainant said she wanted to engage in the activity that they later engaged in. He also testified that there were gaps in the video during which the complainant's conduct contributed to his belief that she was consenting.

[53] At best, the complainant would have agreed that she had the conversation described by Mr. MacIntosh and that prior to or during gaps in the video-recoding, she did exhibit the behaviours attributed to her by Mr. MacIntosh.

[54] Having heard all the evidence, I concluded that, given the passage of time between the conversation and the sexual activity and given what can be clearly seen and heard on the video, the previous conversation and any behaviour that was not captured on video, would have been only marginally relevant to the issues.

Possibilities of Ameliorative Action

[55] As I've already discussed, some ameliorative steps were tried, and others were proposed by the expert, but the Crown declined to recall the complainant. In addition, in the mid-trial hearing, the Crown suggested that less weight could be given to the complainant's evidence and the Defence could be permitted to file any inconsistent portions of her statement to police. Ultimately, I concluded that the ameliorative steps suggested by the Crown would not address the fair trial concerns and, continuing the trial without further remedy would violate ss. 7 and 11(d). So, I excluded the complainant's evidence.

[56] Further, as a trial judge sitting alone, I was able to assess the evidence I did hear with the knowledge that I did not have the benefit of potentially corroborating evidence from the complainant. I could take that into consideration when assessing the credibility and reliability of Mr. MacIntosh's evidence.

[57] Having completed the trial, the Defence argued that due to the impacts discussed above, it was apparent that exclusion of the complainant's statement had not been sufficient to make the trial fair and remove the prejudice created by the inability to cross-examine the complainant. As such, Mr. MacIntosh's rights under ss. 7 and 11(d) of the *Charter* were violated and this was one of the clearest of cases where charges must be stayed.

[58] I concluded that the exclusion of the complainant's evidence resulted in the Defence being in the reasonably best position he could hope to be in.

[59] As such, the remedy that has already been provided, exclusion of the complainant's evidence, together with a modified assessment of Mr. MacIntosh's evidence has resulted in a fair trial for Mr. MacIntosh and has struck the correct balance between his fair trial rights and the broader need to ensure a trial that is fair to the Crown, the complainant, and the community at large.

[60] As such, Mr. MacIntosh's trial did not violate s. 7 or s. 11(d) of the *Charter*. Alternatively, the lesser remedies redressed the prejudice to Mr. MacIntosh, so a stay of proceedings was not required.

Elizabeth Buckle, JPC.