IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. A.A.B., 2006 NSPC 16

Date: 20060419
Docket: 1474879, 1474893
Registry: Halifax

Between:

R.

v.

A.A.B. (re Canadian Broadcasting Corporation and Halifax Herald Ltd.)

Judge:	The Honourable Judge James H. Burrill
Heard:	April 12 &19, 2006, in Halifax, Nova Scotia
Written decision:	May 31, 2006
Charge:	**220(b) CC** 249.1(4)(b) CC
Counsel:	Gary Holt, Q. C. and Eric Taylor for the Crown Warren Zimmer, for the Defence Nancy G. Rubin, for the Chronicle Herald Ltd. David G. Coles, Q.C. , for the C.B.C.

By the Court:

Introduction

[1] On January , 2006 A.B. was sentenced on several offences including criminal negligence causing death, to a term of 54 months. A.B. is a young person within the meaning of the Youth Criminal Justice Act, (Y.C.J.A.), but received an adult sentence for his crimes. At the sentencing hearing this court focussed on the need to impose a sentence that would hold the young person accountable through the imposition of a sentence that would promote A.B.'s rehabilitation and reintegration into society.

At the conclusion of the sentencing hearing the defence made an application to extend the ban for access to records pursuant to S. 117 of the Y.C.J.A. A representative of the media asked to be heard and after notice to the media, counsel for the Halifax Herald Ltd. and the Canadian Broadcasting Corporation appeared and have made submissions.

Though the application was initially made in respect of "records" in general the application was refined. The defence now seeks an order restricting access to psychological reports, pre-sentence reports and Institutional Progress Reports that

were marked as Exhibits Nos. 3, 4, 5, 8, 10 and 11 at the sentencing hearing. An interim access ban was granted in respect of those exhibits until such time as the matter could be heard.

Background

[2] At the sentencing hearing which began on December 13, 2005 this court ruled in recognition of the open court principle that access to exhibits would be granted to the public and the media during the course of the proceedings. Specifically I said,

> "...in my view, an exhibit filed at these proceedings does not fall within the definition of record, as such is defined by the Youth Criminal Justice Act. Record, is defined very broadly indeed by that Act, but in my view, cannot be intended to include essentially, what is evidence called at the trial.....at least during the course of the trial. Our courts are open courts and generally speaking, the public should have the right to access the courts, to hear the evidence read and it would be ludicrous to conclude that having read a document in court a member of the public could not then have access to it, to review it in order to check for accuracy."

[3] Although, the court was at the time, dealing with a specific request that they be allowed access to an Agreed Statement of Facts, I court went on to make the following ruling:

> "Therefore during.....the documents and exhibits may very well become records at the conclusion of the case and I will not rule on that point, but during the course of these proceedings I will permit access to any exhibits that are filed, by members of the media or public so that they can review the evidence that has been called at the proceedings."

The Issue

[4] Now that court proceedings are at an end the defence seeks to ensure that no further access is granted to the media or the public. The defence argues that to permit further access would have a deleterious effect on the rehabilitation of the young person.

[5] The media argues that the open court principle which is inextricably linked to the fundamental freedom of expression enshrined in S 2(b) of the Charter. The charter right, combined with S.117 of the Y.C.J.A., they argue should operate so that access should be permitted.

The Law

[6] A number of provisions are relevant to the court's consideration of the issues in this case. Section 2(b) of the Charter must be the starting point of any analysis and reads:

> s.2 Everyone has the following fundamental freedoms:.....(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

[7] This fundamental freedom is inextricably linked with the principle that our courts should function openly. In the case of Edmonton Journal v. Alberta (Attorney General), [1989] 2 S.C.R. 1326 (S.C.C.) at page 1339 Cory J. said:

> "It can be seen that freedom of expression is of fundamental importance to a democratic society. It is also essential to a democracy and crucial to the rule of law that the courts are seen to function openly. The press must be free to comment upon Court proceedings to ensure that the courts are, in fact, seen by all to operate openly in the penetrating light of public scrutiny."

[8] In commenting on the protection that the freedom of expression confers on the public to receive such information at page 1340 Cory J. goes on to say;

> "They as "listeners" or readers have a right to receive this information. Only then can they make an assessment of the institution. Discussion of court cases and constructive criticism of court proceedings is dependent upon receipt by the public of information as to what transpired in court. Practically speaking, this information can only be obtained from the newspapers or other media. It is equally important for the press to be able to report upon and for the court to receive information pertaining to court documents."

[9] Cory J. pointed out that the right to access court records was not absolute and at page 1339 said,

> "Undoubtedly every court has a supervisory and protecting power over its own records. Access can be denied when the ends of justice would be subverted by disclosure or the judicial documents might be used for an improper purpose. The presumption, however, is in favour of public access and the burden of contrary proof lies upon the person who would deny the exercise of the right."

Such an approach is consistent with the approach of the Supreme Court of Canada in the later cases of Dagenais v. Canadian Broadcasting Corp. ,[1997] 3 S.C.R. 835; R v. Mentuck ,[2001] 3 S.C.R. 442; and Sierra Club of Canada v. Canada (Minister of Finance) ,[2002] 2 S.C.R. 522.

[10] In respect of criminal cases involving Young Persons there is a recognition by the courts that there is a valid exception to the broad application of the openness principle. While youth courts are courts that are open to the public there the provisions dealing with non-disclosure of identifying information and the

provisions restricting access to records. In R v Southam Inc. (1984), 16 C.C.C. (3d) 262 (Ont. C.A.) Section 38(1) of the Young Offenders Act ,which was similarly worded to s. 110 of the Y.C.J.A., was held not to be an unconstitutional infringement of the guarantee to freedom of expression contained in s. 2(b) of the Charter.

[11] The limits contained in the Young Offenders Act and those now contained in the Y.C.J.A. are limits prescribed by law and constitute reasonable limits within the meaning of S. 1 of the Charter. There are valid reasons to generally protect the identity of young persons from being published and allowing general access to the record of there cases. It is generally accepted that protecting such information will generally assist in the rehabilitation and reintegration of the Young Person back into the community.

The sections of the Y.C.J.A. dealing with non-disclosure of identity information and restrictions on access to records do not apply when the young person has received an adult sentence (S. 110(2)(a) and S. 117). With respect to records the Y.C.J.A. specifically provides in S. 117 that “the record shall be dealt with as a record of an adult.” That is the situation in this case. Those provisions of the

Y.C.J.A. no longer afford protection to the A.B. since he received an adult sentence.

[12] In support of its application the defence cites the case of R v. M.C.R., [2004] N.S.J. No. 28 (N.S.S.C.) where Gruchy J. extended the ban on publication of all medical, psychological, predisposition and presentence reports except those parts or portions of the reports specifically quoted in the sentencing decision. In that case M.C.R. had been transferred to an adult court and sentenced for attempted murder. Justice Gruchy was concerned that "the publication of the details of this boy's psychological background and makeup and the details of his prognosis would become self-fulfilling prophecies". He was concerned that publication would harm the possible rehabilitation of M.C.R. and thereby pose a risk to the administration of justice.

Analysis

[13] In the present case A.B. has received an adult sentence. Section 117 dictates that the records of the case be dealt with as a record of an adult. While this court does have the authority to control access to exhibits filed in the course of the

proceedings there is a presumption that access should be granted to the media or members of the public (Edmonton Journal v. Alberta supra.). Access should only be denied, as Cory J. said "when the ends of justice would be subverted by disclosure or the judicial documents might be used for an improper purpose." I am not persuaded that the defence has met this burden of proof in this case.

[14] I am not persuaded, after having carefully reviewed the contents of all of the exhibits in question, that there is any information contained therein that would harm A.B.'s rehabilitative prospects. Much of the information contained in the reports has already been placed in the public domain during the sentencing hearing. I am mindful that, as mentioned in the Supreme Court of Canada in R v F.N. (Re) ,[2000] S.C.J. No. 34, publicity can contribute to a youth's self-perception as an offender and diminish prospects for rehabilitation. I am satisfied, however, that allowing access to the exhibits in this case would have no significant effect on A.B.'s prospects of rehabilitation. The case is well known to the public, his identity has been extensively reported and his background was made publicly available through his mothers testimony at a public inquiry (a transcript of which was filed with the court by counsel on the hearing of this application). Any harm

that could come from now publishing information contained in the exhibits would, in my view, be minimal at most.

[15] I have considered the cases of Vickery v. Nova Scotia Supreme Court (Prothonotary,[1991] 1 S.C.R. 671 (S.C.C.) and Halifax Herald Ltd. v. Nova Scotia (Attorney General) ,[1992] N.S.J. No. 301 (N.S.S.C.T.D.) I find that they are distinguishable. In each of those cases the accused were found not guilty. In Vickery the court found a need to protect the innocent and was clearly concerned that an improper use would be made of the exhibit while in Halifax Herald Ltd. the court was concerned about proprietary rights to the exhibits.

[16] In the present case A.B. was convicted and sentenced. The exhibits were all documents prepared for the court so that it could discharge its' duty. There is no evidence that access is sought for any improper purpose or that access would subvert the ends of justice. Any proprietary interest in the exhibits rests with the court itself. The media and public should be granted access to these exhibits so that they could have the ability to engage in a discussion of the courts decision on sentencing. To withhold the exhibits from scrutiny as soon as sentence was passed in my view would only cause uncertainty and concern with regard to the court's

process. It would lead to less respect for the rule of law and the proper working of the courts. Parliament in considering whether there was a societal need to protect the identities and records of Young Persons charged with crimes chose not to extend such protection to those who receive an adult sentence. As such parliament's decision is entitled to due consideration by this court.

[17] With regard to exhibits 8 and 10 the defence argues that those exhibits or portions of them were prepared in contemplation of other proceedings. They argue that pursuant to s. 34(12) and 40(4) of the Y.C.J.A. they are records of the case in respect of which they were requested and not the case at bar. It is argued that in respect of those exhibits the protections afforded under s. 110 and ss. 118 to 129 of the Y.C.J.A. apply. In that regard I accept the arguments of the defence. Those exhibits are a record not of this case but of another. All of the exhibits which are the subject of this application are, however, inextricably linked and a meaningful review of one can not occur without reference to the others. As a result, in relation to exhibits 8 and 10, I grant an order pursuant to s. 119(1)(s) that will permit an accredited member of the media access to those exhibits because on the unique facts of this case I find that it is desirable in the interest of the proper administration of justice that media be permitted access.

[18] It is no answer to say that the media were already granted access during the course of the proceedings and that there should be no further access. In R v. R.D.S. (Re Halifax Herald Ltd.) ,[1995] N.S.J. No. 207 (N.S.S.C.) Palmeter ACJ. considered a request by the media for access to a tape of a youth proceeding an in granting access he noted the importance of the open court principle and the fact that the media can not be in all courtrooms at all times. While courts must supervise access to records such access should not be automatically curtailed at the conclusion of the proceeding. Access may be available during the trial and while such access will satisfy the open court principle to a degree access to exhibits and records after the completion of the trial must be granted or denied only on the basis of the previously discussed test set out by the Supreme Court of Canada in the Edmonton Journal case.

[19] I would also note that my subsequent review of the R.D.S. (Re Halifax Herald Case) convinces me that I was wrong when I initially ruled during the course of the sentencing hearing that the exhibits filed at the hearing did not constitute "records" as defined by the Y.C.J.A. They were "records" and access to exhibits

during the course of the proceeding should have been dealt with after consideration of s.119(1)(s) of the Y.C.J.A.

[20] The interim ban on access is lifted and access is permitted as indicated herein.

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The Honourable Judge James H. Burrill
Judge of the Youth Justice Court