SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Garnier*, 2017 NSSC 239

Date: 2017 09 08
Docket: Hfx No. 454738
Registry: Halifax

Between:

Her Majesty the Queen

v.

Christopher Garnier

DECISION: *VOIR DIRE* 4
Part One - Evidentiary requirement regarding testimony of V.H.

Restriction on Publication: Section 486.5 CC
Oral decision of Justice Joshua M. Arnold of December 15, 2017,
to allow the publication ban on the identity of V.H.

Judge:	The Honourable Justice Joshua M. Arnold
Written Submissions:	Defence: August 30, 2017 Crown: September 6, 2017
Oral Decision:	September 8, 2017, in Halifax, Nova Scotia
Written Decision:	April 12, 2018
Counsel:	Carla Ball and Christine Driscoll, for the Crown Joel Pink, Q.C. and Nicola Watson, for the Defence

By the Court:

Overview

[1] The Crown alleges that Christopher Garnier murdered Catherine Campbell on September 11, 2015. This decision deals with whether *viva voce* evidence is required during a defence pre-trial application to determine if the defence can call evidence of the deceased's prior sexual conduct before the jury on the trial proper.

[2] During the preliminary inquiry held July 11 to 14, 2016, before Her Honour Judge Anne Derrick (as she was then), a hypothetical question was posed to Crown witness Dr. Matthew Bowes, the forensic pathologist who conducted the autopsy. The question was whether Ms. Campbell could have died at the hands of Mr. Garnier during erotic asphyxiation gone wrong.

[3] The defence has given notice that they wish to call evidence from V.H., a former partner of Ms. Campbell's, to discuss her prior sexual conduct in order to support the defence claim that Ms. Campbell would have suggested and/or participated in erotic asphyxiation with Mr. Garnier.

[4] The defence says that no *viva voce* evidence should be called on this *voir dire*. The Crown argues that the defence must call V.H. to support their application. For the reasons that follow I have determined that the defence must call V.H. to give *viva voce* testimony during this pretrial motion if they wish to rely on his evidence in support of their application.

Facts

[5] Prior to Catherine Campbell's body being discovered by the police, she was the subject of a publicized missing persons investigation for several days. During the course of the missing persons investigation V.H. approached the police to advise of his relationship with Ms. Campbell.

[6] The police took a statement from V.H. on September 15, 2015. In that statement V.H. described his relationship with Ms. Campbell.

[7] On June 26, 2016, V.H. met with the Crown and the police to "clarify" his evidence.

[8] In their brief of July 17, 2017, regarding the relevance of V.H.'s evidence, the Crown writes:

> 42. At most, we expect V.H. will say that in the course of their intimate encounters, he put his hand on Ms. Campbell's neck – but that this was only noteworthy because of the pressure and direct questioning that he received by a private investigator hired by the defence. V.H. put his hand on various parts of Ms. Campbell's body. To focus on his hand on the neck of Ms. Campbell does not provide a full picture of V.H. and Ms. Campbell's intimate encounters.

[9] In their brief of September 6, 2017, regarding the necessity of *viva voce* testimony from V.H., the Crown writes:

> 3. On September 6, 2017, the Crown has clarified with the defence that their position is:
>
> a. that the court should only consider the statement given by V.H. to the police on September 15, 2015; and,
>
> b. that the court should not consider the clarification evidence of what he was saying.

[10] The defence says that the evidence of V.H. will support their claim of "a unique preference on behalf of Ms. Campbell for physically rough sexual activity" and would be relevant to support the proposed testimony regarding erotic asphyxiation.

Procedure

[11] Both defence and Crown agree that neither the common law nor the *Charter* require a specific procedure be followed to determine the admissibility of evidence (*R. v. Darrach* (1998), 13 C.R. (5th) 283, 122 CCC (3d) 225 (Ont. C.A.), affirmed on other grounds [2000] 2 S.C.R. 443, 2000 SCC 46).

[12] Both parties also agree that the form of a *voir dire* to determine the admissibility of evidence is a determination to be made by the trial judge on the basis of the issue involved and the nature of the case being tried. There is no requirement that a *voir dire* must be conducted on the basis of *viva voce* evidence. (*R. v. Kematch* (2010), 252 C.C.C. (3d) 349 (Man. C.A.))

[13] The Crown concedes that as a matter of efficiency and judicial economy it is desirable to decide contested issues of admissibility on the basis of counsel's outline of the proposed evidence (*R. v. Dietrich* (1970), 1 C.C.C. (2d) 49 (Ont.

C.A.), at para. 44, leave to appeal refused (1970), 1 C.C.C. (2d) 68n (S.C.C.); *United States of America v. Anderson* (2007), 218 C.C.C. (3d) 225 (Ont. C.A.), at para. 37, leave to appeal refused (2007), 220 C.C.C. (3d) vi (S.C.C.); and *R. v. S.(D.G.)*, 2012 MBQB 19, at paras. 6-7, aff'd, 2013 MBCA 69).

Analysis

[14] The proposed evidence is of prior sexual conduct on the part of Ms. Campbell and V.H. Although the charges facing Mr. Garnier are not enumerated within s. 276 of the *Criminal Code* and the related *Criminal Code* provisions, the common law allows for numerous safeguards regarding this type of evidence in order for it to be heard at trial.

[15] Based on counsel's submissions and the materials filed by both parties, I am not at all clear as to what V.H. would actually say in front of a jury. Of course, the defence must have the tools with which to build a legitimate defence. Valuable evidence must not be arbitrarily excluded.

[16] The materials and submissions filed do not provide a clear account of V.H.'s evidence. Based on the materials provided by counsel it is difficult to discern whether there is a possibility that the evidence of V.H. could be relevant to a defence that involves an allegation of erotic asphyxiation gone wrong, or whether V.H. will merely provide irrelevant information about Ms. Campbell's prior sexual history which would invoke the twin myths that have no place in a rational and just system of law.

Conclusion

[17] In light of the sensitive nature of the proposed evidence, the guidance provided by the Supreme Court of Canada in *R. v. Seaboyer*, [1991] 2 S.C.R. 577, and the lack of clarity created by the various materials and submissions presented by counsel, the defence is required to call V.H. to give *viva voce* testimony if they want to have me consider V.H.'s evidence in determining whether to allow Mr. Garnier to eventually call evidence of prior sexual conduct at trial.

[18] Various *voir dires* regarding the admissibility of evidence in Christopher Garnier's trial were held on July 31; August 1, 2, 3, 4, 8, 9, 10, 11; September 5, 7, 8, 15; and October 4, 5, 24, 25, and 26, 2017. The five week trial started on November 20, 2017. In the meantime I was involved in other time sensitive criminal matters. Therefore, in keeping with the principles outlined in *R. v.*

Jordan, 2016 SCC 27, and *R. v. Cody*, 2017 SCC 31, I determined that it was more efficient to provide counsel with bottom-line decisions in relation to certain admissibility issues, with detailed reasons to follow.

[19] This is a companion decision to *R. v. Garnier*, 2017 NSSC 341. In that decision I banned the publication of V.H.'s name. Having determined that the defence is able to call V.H. at trial to give evidence of prior sexual conduct, there is no longer a reason to ban the publication of this decision, although the hearing proceeded *in camera*.

Arnold, J.