SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Towsey*, 2023 NSSC 3

Date: 20230105
Docket: CRH 504491
Registry: Halifax

Between:

His Majesty the Queen

v.

Daniel Jude Towsey

Restriction on Publication: ss. 486.4 and 486.5

Judge:	The Honourable Justice D. Timothy Gabriel
Heard:	October 18, 2022, in Halifax, Nova Scotia
Counsel:	Maura Landry, for the Provincial Crown Maria Mikhailitchenko, for the Defence

By the Court:

[1] Daniel Jude Towsey is charged on a four-count indictment as follows:

> THAT on or between the 31st day of December, 1995, and the 2nd day of January, 2005, at or near Halifax, Nova Scotia did unlawfully committed a sexual assault on J.M., contrary to Section 271 of the *Criminal Code*.
>
> AND FURTHER that he at the same time and place aforesaid, did for a sexual purpose touch J.M., a person under the age of sixteen years directly with a part of his body, contrary to Section 151 of the *Criminal Code.*
>
> AND FURTHER that he at the same time and place aforesaid, for a sexual purpose, invite, counsels or incites J.M., a person under the age of sixteen years, to touch directly a part of his body, contrary to Section 152 of the *Criminal Code*.
>
> AND FURTHER that he at the same time and place aforesaid, did unlawfully assault J.M., contrary to Section 266 of the *Criminal Code.*

[2] The accused initially elected to be tried by judge and jury, however, has since re-elected, with the Crown's consent, to be tried by judge alone. His trial is scheduled to be heard April 3 - 6, 2023. In the meantime, he brings a motion seeking permission to attend his trial by videoconference. The court heard this motion on October 18 and 19, 2022, and the decision was reserved. In the very unusual and unfortunate circumstances of this case, his motion is granted. My reasons follow.

[3] At the outset, it is necessary to comment upon the manner in which the accused has framed his motion. The written materials refer to it as one brought pursuant to s. 714.1 of the *Criminal Code*. The section reads as follows:

> 714.1. A court may order that a witness in Canada give evidence by audioconference or videoconference, if the court is of the opinion that it would be appropriate having regard to all the circumstances, including
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> (a) the location and personal circumstances of the witness;
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> (b) the costs that would be incurred if the witness were to appear personally;
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> (c) the nature of the witness' anticipated evidence;
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> (d) the suitability of the location from where the witness will give evidence;
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> (e) the accused's right to a fair and public hearing;
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> (f) the nature and seriousness of the offence; and
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> (g) any potential prejudice to the parties caused by the fact that the witness would not be seen by them, if the court were to order the evidence to be given by audioconference.

[4] Virtually all of the authorities cited by the applicant in the two briefs that were filed on his behalf, first by his former lawyer, and the second by current counsel, were decided pursuant to that section. With respect, this section applies to "witnesses". This is not a label that necessarily is applicable to the accused, who, in any event, cannot be compelled to testify if he chooses not to.

[5] As the Crown pointed out in its brief, and as counsel for the accused tacitly conceded during the hearing itself, s. 650 is the appropriate frame of reference, in these circumstances. The section reads as follows:

> 650. (1) Subject to subsections (1.1) to (2) and section 650.01, an accused, other than an organization, shall be present in court during the whole of his or her trial.
>
> *Video links*
>
> (1.1) If the court so orders, and if the prosecutor and the accused so agree, the accused may appear by counsel or by closed-circuit television or videoconference, for any part of the trial other than a part in which the evidence of a witness is taken.
>
> *Video links*
>
> (1.2) If the court so orders, an accused who is confined in prison may appear by closed-circuit television or videoconference, for any part of the trial other than a part in which the evidence of a witness is taken, as long as the accused is given the opportunity to communicate privately with counsel if they are represented by counsel.

[6] What does this all mean? There are different ways of looking at it. Section 650(1) requires that the accused be "present during the whole of his or her trial". This is said to be subject to subsections 1.1 to 2. The former subsection empowers the court to grant an order, if the prosecution and accused agree, permitting the accused to appear by closed-circuit television or video conference for any part of the trial "... other than a part in which the evidence of a witness is taken." The latter subsection appears to confer a broader discretion upon the court to permit the accused to be out of court during his trial.

[7] Given the sizable and ever-expanding improvements in technology since these provisions were enacted, some might argue that an accused who attends a hearing, has access to all of the exhibits, whose counsel is physically present at the hearing, and who is provided with the technology enabling him to consult with counsel, and for counsel to obtain instructions from him, is essentially "present" within the meaning intended by s. 650(1). Under this argument, a practical interpretation of that section, one which is consistent with current technological capacities, should not

conflate the words "present in court" with being "physically present in court" during the proceeding.

[8] With that having been said, and as we have seen, s.650(1.2) does appear to provide the Court, in cases where the accused's proposed method of appearance is to be by way of "closed-circuit television or video conference", with a discretion (if the parties agree) to permit it, provided that the evidence of a witness is not being taken. The fact that Parliament made special provision for the use of this particular type of technology appears to somewhat blunt the force of the argument set forth in the previous paragraph. By necessary implication, it would appear that when the accused participates in the preceding via “closed-circuit television or vide conference”, he is not to be taken to be "... present in court" within the meaning of s.650(1). He is therefore considered to be "out of court".

[9] This brings us to s.650(2). This discretion, at first glance, appears rather broad. It reads:

> 650(2). The court may
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> > (a) cause the accused to be removed and to be kept out of court, where he misconducts himself by interrupting the proceedings so that to continue the proceedings in his presence would not be feasible;
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> > (b) permit the accused to be out of court during the whole or any part of his trial on such conditions as the court considers proper; or
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> > (c) cause the accused to be removed and to be kept out of court during the trial of an issue as to whether the accused is unfit to stand trial, where it is satisfied that failure to do so might have an adverse effect on the mental condition of the accused.
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> [Emphasis added]

[10] I also note that s. 715.23 provides:

> 715.23 (1) Except as otherwise provided in this Act, the court may order an accused to appear by audioconference or videoconference, if the court is of the opinion that it would be appropriate having regard to all the circumstances, including
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> > (a) the location and personal circumstances of the accused;
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> > (b) the costs that would be incurred if the accused were to appear personally;
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> > (c) the suitability of the location from where the accused will appear;
> >
> > (d) the accused’s right to a fair and public hearing; and
> >
> > (e) the nature and seriousness of the offence.

> (2) If the court does not make an order under subsection (1) it shall include in the record a statement of the reasons for not doing so.
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> (3) The court may, at any time, cease the use of the technological means referred to in subsection (1) and take any measure that the court considers appropriate in the circumstances to have the accused appear at the proceeding.

[11] Section 650(2)(b) specifically contains the word "trial", while s. 715.23 seems to deal with "appearances". The word "trial" is not used. In any event, a prominent consideration is "the accused's right to a fair and public hearing" (s. 715.23(1)(d)). Subsections (a)-(c), and (e) are non-exhaustive criteria which may inform the Judge in the exercise of her discretion as to whether the accused's right to due process and fairness would be compromised. These factors, and others, are also pertinent to a s. 650(2)(b) analysis as well.

[12] The overarching consideration, in a s. 650(2)(b) application, is that the accused receive a procedurally fair trial. Ordinarily, this will require the accused to be physically present. The discretion conferred upon the Court in that section is one which will therefore be sparingly exercised.

[13] Mr. Towsey has filed an affidavit in support of his application. In paraphrase, the affidavit (and the medical reports that are exhibited to it) made note of the fact that he is currently homeless, and resides in a van by the side of the road in Hope, British Columbia.

[14] He had been involved in a motor vehicle accident in November 2009. It occurred while he was riding a bicycle and was struck by a car. The vehicle actually ran over the right side of his torso, including his chest, abdomen, and pelvis.

[15] Among the many injuries that Mr. Towsey sustained, as a result of this collision, were multiple rib fractures, compression fractures, hematomas, a commuted fracture of the right proximal humerus, an avulsion fracture of the right elbow, injuries to his neck, left shoulder and upper right extremity, injuries to his back and right leg, as well as an intra-abdominal bleed. He underwent an urgent laparotomy.

[16] Despite the surgical interventions, rehabilitation assistance, occupational therapy, and other care that he received in the aftermath of the accident, it was considered likely that Mr. Towsey would retain some permanent disability. Indeed, a letter from his physiotherapist dated October 26, 2010 (*affidavit, Exhibit "E"*) refers to the fact that Mr. Towsey is "... currently ambulatory with rolling walker

which he uses for balance and to minimize the jarring that goes up his legs and into his back. He can walk slowly without his walker on smooth, padded, flat surfaces ... but has minimal tolerance for walking on uneven services (i.e. sidewalks, shoulder road, hills, etc.)"

[17] On April 18, 2019, a social worker from the Chilliwack Mental Health Center (*affidavit, Exhibit "F")* stated in a note:

> Please be advised that Daniel [Towsey] has multiple physical disabilities that severely restrict his mobility and functioning, including problems with balance. He is a high risk of falling, especially when he is not walking a level ground or if he accidentally pushed. It is therefore risky for him to be too close to crowds of people. He is also unable to manage more than a couple of stairs without being at risk of falling. He relies on a mobility aid at all times. Daniel also has limited use of his arms. He requires help with carrying items. Please note he is unable to carry and balance a food tray.

[18] Mr. Towsey has also provided evidence (*affidavit, Exhibit "G"*) that as of July 5, 2021, he qualifies for the Fuel Tax Refund Program for persons with disabilities in the Province of British Columbia. He further deposes that he relies upon that disability benefit for his food, gas, his van, and all the necessities of life. He does not feel that his current medical condition allows him to physically travel, beyond very short trips in and around Hope, British Columbia. He further says that a trip from that town to Halifax would be beyond his capabilities, as it would require plane changes and possible layovers that would be beyond what he could physically endure. Finally, were he to travel to Halifax, he expressed the concern that he would be "homeless and without any financial means or support".

[19] The accused elaborated upon this evidence when he testified at this hearing (remotely). He said that he is unable to get an update on his medical condition, since no British Columbia physician (at least the ones with whom he has spoken) are willing to review his voluminous medical file and charts and write a report. He was of the further understanding that the Province of British Columbia is unwilling to fund such an exercise. He said that he is currently living out of his vehicle on a country logging road, has done so for about eight years.

[20] Moreover, he added that the fingers on his left hand were cut off in an accident with a wood saw. He cannot use that hand to hold onto anything to steady his balance as a consequence.

[21] Crown counsel stated that she took no issue with the physical shortcomings to which Mr. Towsey testified. The Crown agrees that the Court is empowered under section 650 (2) to grant the order that the accused has requested, however, stresses that it is the Court which must be satisfied, in the context of all prevalent circumstances, that the accused will receive a procedurally fair trial, before it can consider granting same. Hence, this application is not one to which the Crown and defence can simply agree. Rather, it is the Court's obligation to ensure that the accused sustains no prejudice, notwithstanding his expressed preference to attend remotely by video conference.

[22] Although some similar considerations were dealt with in *R v. Elgar*, 2021 ABCA 327, that decision does not inform or assist in the circumstances of the case at bar. In *Elgar*, the accused had been facing charges of uttering threats, criminal harassment and extortion, but was initially found not criminally responsible on account of a mental disorder. He had been detained on full warrant at an Alberta hospital, and was subject to various conditions.

[23] His detention was expected to be reviewed on December 2, 2020, but before that could happen, Mr. Elgar absconded without authorization, and in fact had been missing for over two months by the time the Alberta Parole Review Board convened to review his detention. It did so by videoconference because of the Covid-19 pandemic restrictions which were then current. There is no indication that the Board considered adjourning the hearing or appointing *amicus curiae* to represent Mr. Elgar during it. It simply considered the recommendations of the treatment team and, in the absence of the appellant, extended the full warrant, although it did modify some of the conditions to which he was subject.

[24] Mr. Elgar was apprehended on February 15, 2021 and stated that he did not find out about the decision of the Board until March 19, 2021. He launched his appeal at that time.

[25] The Court, in the course of allowing the appeal, noted that section 672.5 (13) of the *Criminal Code* empowered the court or the Chair of the Review Board, as the case may be, to appear by close circuit television or video conference for any part of the hearing. However, it noted that the section expressly required the accused's agreement to do so before that section could be invoked. Since the only manner in which the proceeding could take place by videoconference was in the manner set forth in that section, and since the accused had absconded, obviously he had not agreed to conduct the proceeding in this manner, nor, in fact, did he get to attend it at all.

[26] This is obviously not a hearing "in respect of the disposition of an accused", pursuant to ss. 672.84(1) or (3). So, the provisions of s. 672.5(13) are inapplicable.

[27] In *R. v. Colegrove*, 2022 NSSC 9, Justice Brothers dealt with an application under s. 650(2)(b), albeit within the context of an accused wishing to attend a Charter application via video. He was, at the time, an inmate at the Springhill Institution, and proposed to appear from a secure room by way of a videoconferencing system regularly used for court appearances at the Supreme Court. He had provided an informed waiver of his right to be physically present, during the height of Covid-19 pandemic. Mr. Colegrove was unvaccinated at the time. The application was unopposed.

[28] In the course of her analysis, Justice Brothers noted:

> 20. In *Re: Court File No. 19/578*, 2020 ONSC 3870, Lemon, J. was faced with a request from both the Crown and defence to run a trial over the Zoom platform, which would involve the accused being physically absent from the courtroom during the taking of evidence. The accused would observe through the remote video conferencing software.
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> …
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> 22. After reviewing the competing decisions in *R. v. Candelaria*, 2020 ONCJ 194 and *R. v. Daley*, 2020 ONCJ 201, Lemon, J. wrote:
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> > 22. Support for the parties' submission is found in *R. v. Daley*, 2020 ONCJ 201, at para 7. There, Monahan J. distinguished *Candalaria* by finding that an accused who is represented by counsel can expressly waive his right to be physically present during a guilty plea and sentence.
> >
> > 23. Moreover, Monahan J. interpreted s. 650 differently than Downes J. Whereas Downes J. found that the explicit inclusion of s. 650(1.1) and (1.2) in s. 606(5) precluded relying on s. 650(2), Monahan J. found the opposite. He wrote (at para. 13):
> >
> > > Subsections 650(1.1) and (1.2) permit the accused in certain circumstances to appear by video except where evidence is being given by a witness. However, subsection 650(2)(b) is even broader and permits the court to allow the accused to be completely out of the courtroom with no connection by video or audio even when evidence is being taken from a witness.
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> 23. The court went on to make the following statement, with which I agree:
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> > I do not see *Candalaria* of any significance to my interpretation here. That case dealt with an unrepresented accused who wished to plead guilty by

> phone. Regardless of Downes J.'s analysis, this is an entirely different situation here. Similarly, in *Daley*, the issue was with respect to a guilty plea by phone but with counsel. I need not determine who is correct for my purposes.

24. I also adopt the reasoning of the court as expressed in the following excerpt:

> 32. Edited to its relevant wording, s. 650 allows that an accused shall be present in court during the whole of his or her trial. However, the court may permit the accused to be out of court during the whole or any part of his trial on such conditions as the court considers proper.
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> 33. Where the accused, his experienced counsel and the Crown all agree on the proper conditions of the videoconferencing for the purposes of the particular trial, a judge should be slow to hold up the trial. Here, however, I have an ample record to find that the factors enumerated in ss. 715.22-715.24 allow for such a trial.
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> 34. The charge is to be tried by judge alone. There are few witnesses, few documents and few issues. All parties are committed to the Zoom process and sufficiently experienced to make it work effectively. Despite the nature of the charge, it appears that the complainant agrees with the process.

[29] She further added:

> 27. Here, allowing Mr. Colegrove to appear by video ensures that he is not subjected to close confinement for extended periods of time. We know that if he were to be physically present in the courtroom for these *voir dires*, he would be subjected to a lengthy period of close confinement with only one hour out of his cell. The courts have been clear about such confinement, it takes a terrible toil on those subjected to it. I refer to *Brazeau v. Canada (Attorney General)*, 2020 ONCA 184, *Corporation of the Canadian Civil Liberties Association v. Her Majesty the Queen*, 2019 ONCA 243; and *British Columbia Civil Liberties Association v. Canada (Attorney General,)* 2019 BCCA 228).
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> 28. This is a request by Mr. Colegrove on humane grounds. This should not be lost in the considerations. Further, the province is still in a state of emergency. As an unvaccinated individual in a correctional facility, Mr. Colegrove is vulnerable. This is also a factor to consider.
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> 29. We have used video links in all our case management conferences and in applications where no evidence was called. These have gone smoothly, and Mr. Colegrove has not had any problem hearing or seeing those in the courtroom. He

> has also had every opportunity to speak to and consult his very experienced lawyers.
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> 30. The accused is directed to alert the court immediately if he cannot see or hear the evidence or if he wishes to consult with his counsel.

[30] In addition to the authorities previously cited, I have also considered cases such as R. v. Fecteau (1989), 49 CCC (3d) 534 (OHC), R. v. Drubinsky (2008), 235 CCC (3d) 350 (Ontario Superior Court of Justice) and R. v. Zarubin (2001), 157 CCC (3d) 115 (Sask CA).

[31] I have concluded that I am in agreement with the parties with respect to the effect of s. 650(2)(b). To the extent that the invocation of the section requires a waiver by the accused, he has provided one, in writing, which evidences a full awareness of his right to be physically present, in court, and his desire to give up that right without any pressure having been exerted upon him to do so. His counsel will be present physically, and will be permitted opportunity to speak with her client privately when necessary.

Conclusion

[32] I will grant the accused's application, subject to conditions set forth below. In doing so, I have concluded that, to deny the accused's request, in these comparatively rare circumstances, would effectively deny him access to justice. Mr. Towsey shall be permitted to attend his trial virtually, through video conference. That trial, which is scheduled to be heard April 3 – 6, 2023, shall commence at 1:30 p.m. (Atlantic Standard Time) which is 9:30 a.m. (Pacific Time) each day. Counsel have assured the Court that this will still provide sufficient time to complete the hearing.

[33] This is subject to the following provisos:

1. This Court shall be provided with written confirmation from the Supreme Court in Chilliwack, British Columbia, as to the availability of satisfactory facilities at the courthouse from April 3 – 6, 2023, from 9:30 a.m. until 1:30 p.m. each day; as well as confirmation of the following:
2. Mr. Towsey will have available to him physical copies of all exhibits which will be addressed by either side during the trial, and the video

screen available must include a split screen so that he may at all times see an exhibit to which another witness is referencing;

3. A Sheriff, or other suitable personnel, must be available to go into the room with Mr. Towsey to ensure that he has taken no other materials into the room besides those to which he is entitled;

4. The Sheriff, or other suitable personnel, will remain with Mr. Towsey in the room as a monitor and to facilitate any contact with his lawyer if consultation with the other is desired by either of them. Such personnel shall only leave the room when Mr. Towsey is communicating with his lawyer, and will also help him with access to the restroom or any other facilities that are needed;

5. Such written confirmation shall be provided to this Court on or by February 6, 2023;

6. If, at any time during the course of this proceeding, Mr. Towsey should determine that he no longer wishes the trial to continue without his physical presence, or if he is having difficulty seeing or hearing at any time, he is to advise the Court immediately, and arrangements will be made to enable him to either personally attend the trial or to remedy the difficulty that he is experiencing (as the case may be);

7. Counsel will contact the Court to arrange a pre-trial conference to occur before January 30, 2023, to discuss whether any other ancillary directions are necessary.

Gabriel, J.