

R. v. Avadluk, 2013 NWTSC 63  
Date: 2013 09 11  
Docket: S-1-CR-2012-000093

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN  
Applicant

- and -

NOEL AVADLUK

Respondent

Ruling on a s. 486.3(2) Application.

Heard at Yellowknife, NT, on September 3, 2013.

Reasons filed: September 11, 2013

Restriction on Publication: By Court Order, there is a ban on publishing information that may identify the person/persons described in this judgment as the complainant/witness, pursuant to section 486.4 of the Criminal Code, R.S.C. 1985, c.C-46.

Restriction on Publication: There is an order prohibiting the broadcast or the publication in a newspaper of the evidence taken at the preliminary inquiry pursuant to section 539(1) of the Criminal Code, R.S.C. 1985, c.C-46.

REASONS FOR JUDGMENT OF THE  
HONOURABLE JUSTICE S.H. SMALLWOOD

Counsel for the Applicant: Wendy Miller  
Respondent: Self Represented

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## REASONS FOR JUDGMENT

### INTRODUCTION

[1] The accused is charged on a two-count indictment as follows:

Count One: On or about the 14th day of April in the year 2012 at or near the City of Yellowknife in the Northwest Territories, did commit a sexual assault on R.P., contrary to section 271 of the Criminal Code.

Count Two: On or about the 14th day of April in the year 2012 at or near the City of Yellowknife in the Northwest Territories, with intent to enable himself to commit the indictable offence of sexual assault, did attempt to suffocate R.P. by putting his hands over her mouth, contrary to section 246(a) of the Criminal Code.

[2] The matter is set for a jury trial which is scheduled to commence on September 16, 2013. The accused is self-represented. On September 3, 2013, the Crown made an application, pursuant to section 486.3(2) of the Criminal Code, to

[3] have counsel appointed to cross-examine R.P. so that the accused would not personally cross-examine her. The accused opposed the Crown's application. After hearing the submissions of the Crown and accused, I ordered that counsel be appointed to cross-examine R.P. I said that reasons would follow.

### BACKGROUND

[4] The accused was charged with these offences on April 16, 2012. On the same day, a warrant for his arrest was issued. The warrant was executed on April 18, 2012 and the accused appeared before a Justice of the Peace on that date. His matter was adjourned to April 20, 2012 for a show cause hearing.

[5] On April 20, 2012, the accused appeared with counsel, Mr. Homberg, and consented to his remand reserving his right to a show cause. He elected a trial by judge and jury and requested a preliminary inquiry. His matter was adjourned to April 24, 2012. On April 24, 2012, the accused appeared with the same counsel and the preliminary inquiry was scheduled for August 9, 2012.

[6] The preliminary inquiry proceeded as scheduled on August 9, 2012 and the accused was represented by Mr. Homberg. After the preliminary inquiry, the accused was committed to stand trial. Following the preliminary inquiry, a show cause was held and the accused was detained on the charges.

[7] The matters were then transferred to this Court. The matter was first spoken to at Criminal List Scheduling on November 23, 2012. At that time, Mr. Homberg advised the Court that he had been fired by the accused.

[8] The accused made a number of subsequent appearances where the issue of counsel was discussed. Initially, it appeared that another lawyer was going to represent the accused but the accused later advised the Court that he would be representing himself. There followed several more appearances where the issue of whether the accused was going to seek counsel or represent himself was discussed. The accused, on several occasions, expressed the desire to represent himself but also spoke of retaining a lawyer from Edmonton.

[9] On June 17, 2013, Mr. Petitpas appeared with the accused and advised that he would be acting as counsel for the accused. Shortly after this, the matters were set for Trial on September 16, 2013.

[10] Mr. Petitpas brought an application to be removed from the record on August 15, 2013. After hearing from Mr. Petitpas and the accused, I granted the application. The accused again indicated his desire to represent himself at the trial. Upon questioning the accused, it appeared that his assertion that he wished to represent himself stemmed from his dissatisfaction with his previous two counsel and that he did want another lawyer to represent him. The matter was adjourned for the accused to contact legal aid regarding the appointment of another lawyer.

[11] On August 15, 2013, the Crown indicated that if the accused was going to represent himself, the Crown would be making an application to appoint counsel to cross-examine R.P. The matter was adjourned to August 26, 2013 to allow the accused the opportunity to retain counsel.

[12] On August 26, 2013, the accused advised the Court that he would be representing himself and that Legal Aid had refused to provide him with another lawyer. The Crown's application to appoint counsel to cross-examine R.P. was adjourned to September 3, 2013 so that the application could proceed before myself, the trial judge.

## EVIDENCE ON THE S. 486.3(2) APPLICATION

[13] The Crown filed an Affidavit of Brooke Harker on the application. In addition, the Crown relied upon the transcript of the Preliminary Inquiry and a transcript of the Pre-Trial Conference held on March 12, 2013. The accused presented no evidence on the application.

[14] Mr. Harker is employed by the Public Prosecution Service of Canada as a Crown Witness Coordinator. He had contact with R.P. at the preliminary inquiry. In his Affidavit, he stated that:

5. R.P. indicated that she was reluctant to testify at the preliminary inquiry. She exhibited signs of stress in relation to the incident. She displayed common trigger reactions such as anxiety, panic attacks, irritability and anger.

6. It was difficult to convince Ms. P. that she was safe to testify without reprisal or judgment, to the point that she almost refused.

[15] In the transcript of the Preliminary Inquiry, the Crown pointed to an excerpt which occurred during examination in chief and the questions and answers are as follows:

Q And when you say he “raped” you, how did that happen?

A He pulled my pants, my pyjamas pants down. I was trying to keep him from penetrating but he still did.

Q And what did he penetrate you with?

A His penis.

Q And was that into your vagina?

A Yeah.

Q You can take some tissues if you need to, Ms. P. After you were in the bathroom, what happened after?

[16] The Crown submits that this demonstrates that R.P. experienced difficulty in testifying and was crying during her testimony. The Crown also points to an excerpt during cross-examination which it says demonstrates that R.P. was agitated:

Q Okay, Ms. P., isn't it true that you were jealous of Mr. Avadluk?

A What the hell for? I'm not jealous of that ugly asshole. Creep.

[17] The Crown also points to statements made by the accused during the Pre-Trial Conference held in open court. Both statements contain the accused's assertion that he had a prior relationship with R.P.  
THE APPLICABLE LAW

[18] Section 486.3(2) of the Criminal Code provides that a judge may appoint counsel to conduct the cross-examination of a witness where the court is of the opinion that in order to obtain a full and candid account from the witness that the accused should not personally cross-examine the witness.

[19] In making this determination, the court is required to take into account the factors in s. 486.1(3). They are: the age of the 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 circumstance that the judge considers relevant.

[20] In order to grant an application under s. 486.3(2), an evidentiary basis is required. There is no specific form of evidence required and it is not mandatory to hear from the witness on the application. Neither is the witness required to try to testify and fail before the order can be made. *R. v. Predie*, [2009] O.J. No. 2723.

[21] The evidence that is required must be “reliable, trustworthy evidence from sources with intimate knowledge of the individual witness.” *R. v. Tehrankari*, [2008] O.J. No. 5652, at para. 19.

[22] The Court has wide discretion in considering applications of this nature and the “circumstances need not be ones that would create inordinate or exceptional stress.” *Predie*, supra at para. 14.

[23] The Court must be satisfied on a balance of probabilities that a full and candid account could not be achieved if the witness were to be cross-examined by the accused. *Tehrankari*, supra at para. 19.

## ANALYSIS

### Age of the Complainant

[24] R.P. is 55 years old now. She is an adult who is approximately 20 years older than the accused. This is not a situation where her age gives rise to any specific concern about her vulnerability as a witness. Whether the Witness has a Mental or Physical Disability

[25] There is no indication that R.P. has any mental or physical disability which would impact upon her ability to testify as a witness and be cross-examined by the accused.

### Nature of the Offence

[26] The offences are ones that involve allegations of violence committed by the accused against R.P. The accused is charged with sexual assault and with attempting to suffocate R.P. in order to enable

himself to commit the sexual assault, contrary to sections 271 and 246(a) of the Criminal Code. These offences are serious offences, the maximum punishment being 10 years for the sexual assault and life imprisonment for the latter.

[27] The Crown or a witness may make an application under section 486.3(2) when the accused is charged with any offence. In this jurisdiction, applications of this nature are frequently made in cases involving violence and sexual violence, offences which have a very personal impact upon the witness.

[28] It is difficult to conceive of a situation where the Court would not grant the application in a case of an alleged sexual assault. Each situation, of course, is unique and must be considered on the basis of the applicable factors. The nature of the offence of sexual assault, however, is such that permitting the accused to cross-examine a witness, particularly the complainant, will most often raise serious concerns about the ability of the witness to provide a full and candid account if personally cross-examined by the accused.

[29] The serious impact of major sexual assaults was discussed by the Alberta Court of Appeal in *R. v. Arcand*, 2010 ABCA 363 at paras. 176-177:

... When an offender commits a major sexual assault, including rape, against a person, this act of violence causes harm. It is harm to both the victim and society. A major sexual assault constitutes a serious violation of a person's body and an equally serious violation of their sexual autonomy and freedom of choice. These breaches of one's physical integrity and privacy are indisputable and undeniable. That harm, and it is substantial, is inferred from the very nature of the assault. Add to this the serious breach of a person's human dignity and the gravity of a major sexual assault perpetrated on a victim becomes readily apparent.

In addition to this very grave harm, there is also intrinsic to major sexual assaults the likelihood of other very real psychological or emotional harm. That includes fear, humiliation, degradation, sleeplessness, a sense of defilement, shame and embarrassment, inability to trust, inability to form personal or intimate relationships in adulthood with other socialization problems and the risk of self-harm or even suicide. While these effects fall into the psychological or emotional harm category, they may be equally or even more serious than the physical ones but much less obvious, indeed even unascertainable at sentencing.

[30] The allegations described by R.P. at the preliminary inquiry depict a violent sexual assault involving forced vaginal intercourse and the accused suffocating R.P. to the point of unconsciousness. I am satisfied that the allegations as depicted by R.P. at the preliminary inquiry would constitute a major sexual assault.

[31] The Affidavit of Brooke Harker establishes that the events have had an effect on R.P. Her reluctance to testify at the preliminary inquiry and Mr. Harker's observations of R.P. exhibiting signs of stress such as panic attacks, anxiety, anger and irritability demonstrate the impact the allegations and the proceedings have had upon her.

[32] The Crown points to the preliminary inquiry where Crown counsel offered R.P. a tissue as an example of R.P. crying and her emotional state while testifying. It is not clear from the transcript that R.P. was crying and there may be other explanations for why the Crown offered R.P. a tissue. However, given the point that R.P. had reached in her evidence (discussing the forced sexual intercourse) when the offer of a tissue was made, the most logical explanation is that she was upset. I have no difficulty accepting that, as referred to in *Arcand*, a sexual assault can result in psychological or emotional harm to a complainant, and that testifying about a sexual assault can be, and often is, a difficult and trying experience for a complainant.

Nature of any Relationship between the Witness and the Accused

[33] The nature of the relationship between R.P. and the accused is not clear. R.P. testified at the preliminary inquiry that she knew the accused "on and off probably eight years" and that they were friends. She was not questioned further about the nature of their relationship.

[34] The accused, at the Pre-Trial Conference and at other appearances, has asserted that he had a prior relationship with R.P. and that there were witnesses who could confirm their prior relationship. It is not clear why the accused feels it is necessary to establish that he had a prior relationship with R.P. It may be that he feels this contradicts something she has said previously, either in a statement or in her sworn testimony at the preliminary inquiry. He may also want to pursue a line of inquiry which is prohibited pursuant to section 276 of the Criminal Code. There may be another reason for the accused's emphasis on this point; these are issues that have yet to be explored.

[35] In any event, R.P. and the accused were not strangers or casual acquaintances. R.P. felt comfortable enough with the accused that she, on her evidence, spent the evening consuming alcohol with

him and another person. I conclude that R.P. and the accused knew each other prior to the alleged sexual assault and were, at least, friends. That R.P. and the accused had a past relationship of some sort suggests to me that R.P. may be the type of vulnerable witness that this type of order is designed to address.

#### Any Other Relevant Circumstance

[36] The focus of the application is on the witness and the section is not intended to ensure that the accused gets help conducting the most effective cross-examination. However, the ability of the accused to conduct a "focused, rational and relevant cross-examination" is another factor that I feel is relevant. Predie, supra at para. 25.

[37] In this case, I have observed the accused on several occasions and reviewed the available transcripts of his previous appearances. The accused has often been pre-occupied with certain specific issues, such as his previous counsel, their conduct and how the preliminary inquiry was conducted. In addition, he has repeatedly alleged that R.P. is lying and wants her to tell the truth. His insistence on cross-examining R.P. personally is based on his desire to get her to tell the truth and that his previous counsel did not ask the questions that he wanted. I am not certain what those questions are but the accused's focus on his prior relationship with R.P., his statements about her mental health status, and his allegation that R.P. has continually lied under oath provide some insight into the manner in which he might be expected to conduct his cross-examination.

[38] The accused's single-minded focus on certain issues leaves me with a real concern that he will be unable to conduct an effective and focused cross-examination of R.P., who is the main Crown witness. To permit the accused to personally cross-examine R.P. is to risk not being able to obtain a full and candid account of her evidence.

#### CONCLUSION

[39] Based on the evidence before me and considering the nature of the offences, the nature of the allegations before the court, the emotional vulnerabilities demonstrated by R.P., the nature of the relationship between the accused and R.P., and the concern about the accused's ability to conduct an effective and focused cross-examination, I am satisfied that in order to obtain a full and candid account of the evidence of R.P., that the accused should not personally cross-examine her at trial. Counsel will be appointed, pursuant to section 486.3(2) of the Criminal Code, for that purpose.

S.H. Smallwood  
J.S.C.

Dated at Yellowknife, NT, this  
11th day of September 2013

Counsel for the Applicant: Wendy Miller  
Respondent is self-represented

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