

S-1-CR2012000104

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- vs. -

PATRICK JOHN NADLI

Transcript of the Ruling by The Honourable Justice L. A. Charbonneau, on an Application pursuant to Section 486 of the Criminal Code, at Hay River in the Northwest Territories, on November 27th A.D., 2013.

APPEARANCES:

Mr. A. Godfrey: Counsel for the Crown

Mr. T. Boyd: Counsel for the Accused

An order has been made banning publication of the identity of the Complainant/Witness pursuant to Section 486.4 of the Criminal Code of Canada

1 THE COURT: Patrick Nadli, this week,
2 faced trial on charges of break and enter and
3 commit sexual assault causing bodily harm and
4 two related counts. Before the start of the
5 trial, I heard an application by the Crown to
6 permit the complainant to testify outside the
7 courtroom pursuant to Section 486.2(2) of the
8 Criminal Code. I granted this application and
9 indicated that reasons would follow and these
10 are my reasons for granting the application.

11 By way of preliminary remarks, I will say
12 that the notice of motion that the Crown filed
13 to trigger the application was supported by an
14 affidavit sworn by a legal assistant at the
15 Crown's office which attached two letters as
16 exhibits. The first letter was from the
17 complainant's counsellor and the second was
18 from Dr. Sarah Sultan, a psychiatrist who has
19 treated the complainant. Dr. Sultan was the
20 witness who was actually called at the voir
21 dire.

22 I want to make it clear that I have not
23 relied in any way on the contents of the
24 letters that were attached as exhibits to this
25 affidavit. The rules of evidence do apply to
26 affidavits. The Rules of Court permit that a
27 deponent state information in an affidavit

1 that is based on information and belief, but
2 this cannot become a way to introduce evidence
3 and opinion evidence by filing letters with
4 the Court. The deponent of the affidavit has
5 no personal knowledge of the matters referred
6 to in the letters, nor could she have been
7 cross-examined to any degree on the assertions
8 set out in the letters. Moreover, both
9 letters are almost entirely opinions and this
10 cannot be considered without a voir dire into
11 the qualifications of the person expressing
12 the opinion to determine whether they should
13 actually be permitted to express those
14 opinions and have them treated as evidence in
15 support of an application like this one. If
16 the Crown wished the counsellor's views to be
17 considered, it would have needed to obtain an
18 affidavit sworn by that counsellor and then
19 defence could have cross-examined and test the
20 assertions made by that counsellor.

21 The evidence that was presented by the
22 Crown at the hearing itself was the viva voce
23 evidence of Dr. Sultan as I have already
24 mentioned. The Crown sought to have her
25 qualified to give opinion evidence in the
26 field of clinical psychiatry, more
27 specifically on the issue of post-traumatic

1 stress disorder, which I from this point on
2 will refer to as PTSD.

3 The defence did not dispute her
4 qualifications, nor ask her any questions
5 during the voir dire into her qualifications.
6 Based on the curriculum vitae and given the
7 defence's acknowledgment of her
8 qualifications, I qualified her as an expert
9 witness for the hearing and allowed her to
10 give opinion evidence within the parameters
11 requested by the Crown.

12 The Crown did not adduce any other
13 evidence, did not present the allegations in
14 support of the charge, nor ask the Court to
15 refer to the allegations set out in the
16 pre-trial conference reports that are part of
17 the Court's records to put this in context.
18 The Crown asked the Court to consider the
19 matter in light of the nature of the charges
20 itself, which, as I said, is an Indictment
21 charging break and enter and commit sexual
22 assault causing bodily harm, sexual assault
23 causing bodily harm, and assault causing
24 bodily harm.

25 Dr. Sultan, in her testimony, explained
26 that she is based out of the city of
27 Yellowknife and works at the hospital. She

1 met the complainant in the context of fly-in
2 clinics that are held in Hay River from time
3 to time. She explained that a psychiatrist
4 goes to Hay River for these clinics for three
5 or four days every three or four months. She
6 was the person who came to Hay River in March
7 2013, June, 2013, and September 2013, and each
8 time she met the complainant.

9 Dr. Sultan explained that during those
10 visits she would have had access to the
11 complainant's clinical file and health records
12 and would have referred to those. She did not
13 have copies of any of those documents with her
14 in court nor did it appear that she had
15 consulted them in any way before giving her
16 testimony. Dr. Sultan was not exactly sure how
17 long each session would have been with the
18 complainant but she thought between 30 and 60
19 minutes each because that is usually the
20 length of her sessions with PTSD patients.

21 Dr. Sultan explained that PTSD is a
22 condition that develops in a certain
23 percentage of the population when they are
24 exposed to a traumatic event.

25 There are three criteria to support this
26 diagnosis - avoidance of anything that reminds
27 the person of the trauma; reexperiencing

1 trauma, the traumatic event through flashback
2 or nightmares; and what she called
3 physiological reactivity which means having a
4 physical reaction to any reminders or triggers
5 which could manifest in increased heart rate
6 or sweating for example.

7 PTSD does not develop the first day after
8 the traumatic event, she said, but rather over
9 the first few weeks following that event. She
10 said that if untreated it can become
11 integrated in every aspect of a person's life.

12 Dr. Sultan diagnosed the complainant as
13 suffering from severe PTSD. She said that the
14 complainant presented all the criteria for the
15 diagnosis, that she was completely disabled
16 and manifested avoidance and physical
17 reactivity to triggers.

18 Dr. Sultan explained that the diagnosis is
19 a clinical one based on interviews with the
20 patient and information that can be obtained
21 through the patient's clinical history. She
22 was unable to say whether she posed her
23 diagnosis at the first or second visit that
24 she had with the complainant but she was very
25 sure and very firm about that diagnosis.

26 She explained that she had not discussed
27 the details of the allegation with the

1 complainant because one somewhat unique
2 feature of PTSD is that, unlike many
3 conditions, it is not diagnosed or treated by
4 focusing on the source of the condition;
5 namely, the trauma. She said it is too
6 traumatic for people to talk about what
7 happened to them so, in her words, therapists
8 and people who treat these patients have to
9 "dance around" that issue.

10 As I understood her evidence, it would
11 take many sessions for a treating therapist or
12 doctor to get into the details of the incident
13 that caused the incident.

14 Dr. Sultan did have some sense of the
15 allegations though. She was aware that the
16 complainant was reporting that a violent and
17 brutal sexual assault had occurred in her
18 home. She also said the symptoms manifested
19 by the complainant were consistent with her
20 reporting that it was that event that
21 precipitated her PTSD.

22 Dr. Sultan expressed the view that the
23 complainant was not ready to testify about
24 these events. She outlined concerns about
25 potential consequences for her if she did,
26 including a strong likelihood that even if she
27 was able to talk about the events, there was a

1 chance that she would become unwell and sick
2 if she did. She alluded to the possibility
3 that she could end up in hospital within a day
4 or two of testifying, engage in self-harm, or
5 even attempt suicide.

6 Dr. Sultan testified that the complainant
7 requires intensive treatment through an
8 inpatient program to deal with her condition.
9 Counselling, she said, is better than nothing
10 at all but a far cry from the level of
11 treatment she actually would need to treat her
12 condition given its severity.

13 Dr. Sultan talked about a few treatment
14 options, none of which are available in the
15 Northwest Territories. She said that the
16 referrals to such treatment cannot come from
17 her, it would have to come from the
18 complainant's local counsellor.

19 I understood from the whole of Dr.
20 Sultan's evidence that although she understood
21 that the complainant wanted to go ahead with
22 this matter, from a medical point of view she
23 is not as ready as she could be and that due
24 to her lack of treatment it was a bad idea for
25 her to do so. Dr. Sultan had real doubt about
26 whether she would be able to tell her story at
27 all and significant concerns about what the

1 impact would be on the complainant.

2 Then she was asked more specifically about
3 the subject matter of the application; namely,
4 the possibility of using testimonial aids such
5 as a witness screen and the possibility of the
6 complainant testifying outside the courtroom.
7 Dr. Sultan said that although the use of the
8 screen would be useful, testifying outside the
9 courtroom would by far be the best option.
10 She said a screen would eliminate visual
11 contact but it would not be as effective as
12 being in a different room. She said that for
13 someone like the complainant, even testifying
14 outside the courtroom would not be safe but it
15 would be by far the safest.

16 As I understood her testimony, physical
17 proximity with the accused should be avoided.
18 Testifying in a different room will reduce the
19 risk of being "triggered" and by this she
20 explained that she meant the risk of the
21 complainant literally falling apart, going
22 into a dissociative state where she would no
23 longer be fully conscious anymore and simply
24 react and not process at a higher level
25 anymore. This could result in answers that do
26 not make sense, inability to concentrate, and
27 even having hallucinations. She said there

1 was no way to predict what the reaction could
2 be.

3 On the whole Dr. Sultan was very skeptical
4 about whether the complainant could actually
5 tell her story and testimony but was of the
6 view that the chances of her being able to do
7 so would drop off rapidly the closer she got
8 to the triggering situation. This is why she
9 was of the view that if this was going to
10 happen at all, testifying outside the
11 courtroom was the setting that provided the
12 best chances of the complainant being able to
13 explain what happened.

14 During cross-examination, one of the
15 themes raised by defence was how solid Dr.
16 Sultan's opinions were about certain things.
17 For example, defence questioned how she could
18 have formed such a rock solid opinion about
19 the complainant's PTSD being linked to a
20 traumatic incident in the summer of 2012 or
21 even about the diagnosis itself and the
22 complainant fitting all the criteria.

23 Dr. Sultan explained that how long the
24 symptoms have manifested would be, as with
25 anything in medicine, part of what goes into
26 the diagnosis. She explained that in coming
27 to her conclusions she would have relied on

1 her interviews with the complainant and also
2 the clinical file and health records which
3 would all be in Hay River. She emphasized
4 that she is very aware that people sometimes
5 come in and claim things for ulterior motives
6 and that as she has progressed in her career,
7 she has learned to be more circumspect about
8 taking what patients tell her at face value so
9 she would look for confirmation in whatever
10 records were available.

11 With respect to PTSD in particular, she is
12 cautious to verify what the patient says, for
13 instance through the health records. One
14 example that she gave is that because symptoms
15 of this condition do not come immediately
16 after a traumatic event, if someone were to
17 say to her that they experienced a trauma and
18 immediately started experiencing nightmares,
19 she would know this person does not suffer
20 from PTSD.

21 She was cross-examined as well about the
22 fact that although she prescribed medication
23 to the complainant, she did not put any
24 pressure on the complainant to continue taking
25 it once the complainant indicated that she
26 wanted to stop taking it. Dr. Sultan's
27 explanation was that she did not think this

1 medication would really assist the complainant
2 in dealing with her symptoms and which is why
3 she did not insist that she continue to take
4 it.

5 She was cross-examined about why she did
6 not refer the complainant to the intensive
7 treatment options that she needed and Dr.
8 Sultan reiterated that she could not make
9 those referrals herself.

10 She acknowledged that the complainant has
11 a chronic alcohol abuse problem and when asked
12 why she did not do blood tests or other tests
13 to determine at what stage this condition was
14 at, she answered that her chief concern with
15 the complainant was dealing with the PTSD.

16 Dr. Sultan also acknowledged that PTSD is
17 a multifactorial condition and that people who
18 suffer from it often have other life issues
19 and difficult background circumstances. But,
20 that this does not change her diagnosis, or
21 her opinion, that the PTSD that the
22 complainant suffers from arises from the
23 events of June 2012.

24 The provision that governs this
25 application is Section 486.2(2) which reads:

26 Despite Section 650, in any
27 proceedings against an accused the
Judge or Justice may, on
application of the prosecutor or a

1 witness, order that the witness
2 testify outside the courtroom or
3 behind a screen or other device
4 that would allow the witness not
5 to see the accused if the Judge or
6 Justice is of the opinion that the
7 order is necessary to obtain a
8 full and candid account from the
9 witness of the acts complained of.

10 The wording of subsection (2) is different
11 from the wording of subsection (1) which
12 applies to witnesses who are under 18 years
13 old. When an application like this one is
14 made with respect to a person under 18,
15 paragraph (1) says that the Judge "shall" make
16 the order unless the Judge is of the opinion
17 that the order would interfere with the proper
18 administration of justice. The party opposing
19 the application, therefore, has to satisfy the
20 Court that the order would interfere with the
21 proper administration of justice.

22 Under paragraph (2), however, the Judge
23 may make the order if satisfied that it is
24 necessary to obtain a full and candid account
25 from the witness of the acts complained of, so
26 the test is different and so the onus is on
27 the party making the application.

28 Those provisions apply to applications for
29 the use of a screen as well as applications to
30 have the witness testify outside the
31 courtroom. The test is the same.

1 Both measures represent a certain level of
2 shielding the witness from the accused person.
3 The screen eliminates visual contact.
4 Testifying outside the courtroom shields the
5 witness from being in the proximity of the
6 accused. When a screen is used, it is quite
7 likely, depending on the configuration of the
8 courtroom, that the witness may catch a
9 glimpse of the accused when he or she is
10 walking up to the witness stand and clearly
11 the sense of proximity will be greater than if
12 the witness remains in a room outside the
13 courtroom. So when there are issues about
14 whether the witness will be able to provide a
15 full and candid account of events, these
16 measures offer different degrees of protection
17 or removal of the witness from the proximity
18 of the accused.

19 In this case, defence did not oppose the
20 use of a screen. In that sense there was an
21 acknowledgment that even if the complainant is
22 an adult witness, there were concerns about
23 her ability to provide a full and candid
24 account of events if she were to testify in
25 the ordinary way seated in the witness box and
26 in full view of the accused. The issue on the
27 application was whether there was a need to go

1 further and allow her to testify outside the
2 courtroom.

3 The defence presented three lines of
4 argument in opposing the application. The
5 first related to the timing of this
6 application. The defence questioned why the
7 application was made so close to the trial
8 date, when the complainant's condition has
9 been diagnosed for several months.

10 I would not give effect to that argument.
11 If the application had been made a long long
12 time in advance, the argument could have been
13 that it was premature or speculative because
14 there would be no way of knowing how the
15 complainant's condition might have evolved in
16 the intervening months. So the timing of the
17 application is not, in my view, a reason to
18 dismiss it. It could have formed the basis of
19 an adjournment application if defence was
20 taken by surprise or wanted to call its own
21 expert evidence on the motion, but it is not a
22 reason to dismiss it. The timing of the
23 application has little to do with the test
24 that must be applied on an application like
25 this one. If anything, as I have said, an
26 application made too long in advance of trial
27 could be flawed because, depending on the

1 situation, there could be a real issue as to
2 whether the evidence presented at that time
3 would enable the Court to reach a conclusion
4 about what the situation will be at trial
5 time.

6 The second line of defence argument was
7 more in the nature of an attack on Dr.
8 Sultan's diagnosis. And of course here, that
9 diagnosis was the pillar of the Crown's
10 application because it was on that basis that
11 the doctor expressed the view that the
12 complainant was more likely to be able to give
13 her account of events if she was permitted to
14 testify outside the courtroom.

15 On the issue of the diagnosis, the defence
16 noted the possibility that Dr. Sultan may have
17 a propensity to overdiagnose this condition.
18 This argument was based on Dr. Sultan's
19 evidence about the large number of people she
20 has seen in Hay River and who she believes
21 suffer from PTSD.

22 I cannot give effect to this argument
23 either. To give effect to this argument would
24 be to speculate. There is no evidence
25 suggesting that there are not, in fact, a lot
26 of people affected by this condition who
27 attend the fly-in clinic in Hay River. One

1 must remember that as the visiting
2 psychiatrist, Dr. Sultan does not meet members
3 of the population at large. She meets people
4 who are having consultations because of
5 psychiatric problems. The Court does know,
6 from the matters that come before it, that
7 there appear to be a significant number of
8 people who are exposed to trauma in this
9 community. For example, just in the last few
10 years, there have been a number of sudden
11 deaths in Hay River, some of which have
12 resulted in matters that are pending before
13 this Court. And there are also a large number
14 of people who face charges week in and week
15 out for offences where violence is alleged.
16 So there is no basis for me to conclude that
17 it is improbable that a significant proportion
18 of the people that Dr. Sultan may have seen in
19 her clinics do indeed suffer from PTSD.

20 The last concern raised by defence was the
21 link that Dr. Sultan made between the
22 condition that she diagnosed and the source of
23 that condition. The defence argued that Dr.
24 Sultan appeared to have simply accepted the
25 complainant's statement that she was seriously
26 assaulted in June 2012 and that this, in turn,
27 formed the basis for her opinion as to whether

1 the complainant should be permitted to testify
2 outside the courtroom.

3 I agree that Dr. Sultan's testimony
4 presented certain flaws and must be
5 scrutinized closely.

6 A major difficulty with her evidence is
7 that she was quite clear that she relied on
8 information reported in the clinical files and
9 health records for the complainant, along with
10 her interviews and observations, to arrive at
11 her diagnosis. Yet, she did not review these
12 documents before testifying. She did not have
13 copies of them available to refer to during
14 her testimony. As a result, she was unable to
15 give any details at all about what information
16 in those records would have informed her
17 opinion. Her evidence amounted to saying that
18 she had reviewed them at the time, they were
19 significant to her at the time and helped her
20 to reach her conclusion, but she was unable to
21 provide any details to the Court.

22 It is not surprising that she would not
23 have an independent recollection of every
24 detail of the complainant's clinical file or
25 health records or how long her visits were,
26 considering that this is one patient that she
27 saw among many others. What I do find

1 extremely surprising is that, as she was being
2 called to give opinion evidence on this topic,
3 she would not have taken the steps to review
4 the documents that were relevant to the
5 testimony she was about to give. I realize
6 that many, if not all, of these documents
7 would have been in Hay River and that this
8 witness is based in Yellowknife, but surely in
9 such cases there would be a way for her to
10 have copies of documents sent to her so she
11 could review them and be adequately prepared
12 before testifying.

13 It may well be that Dr. Sultan
14 misapprehended what she was going to be
15 testifying about or the scope of the
16 proceedings. During the cross-examination she
17 more or less said so. She expressed surprise
18 at having to defend her diagnosis. Considering
19 that her opinions that the complainant should
20 testify outside the courtroom was based on her
21 PTSD diagnosis, and considering this was a
22 contested application, it is hardly surprising
23 that she would have been asked questions
24 about the basis for that diagnosis.

25 I do not know what transpired between the
26 Crown's office and this witness before she was
27 called to testify and why she was not aware or

1 did not understand the scope of the questions
2 that she was likely to be asked about but,
3 whatever the cause, she appeared inadequately
4 prepared for her testimony and seemed to
5 become defensive when her conclusions were
6 challenged by defence counsel.

7 If the purpose of the application had been
8 to establish the source of the PTSD beyond a
9 reasonable doubt, Dr. Sultan's inability to
10 provide more details about the manner in which
11 she felt the clinical file and health records
12 confirmed her diagnosis would have been fatal.
13 Expert witnesses, and the parties who call
14 them, cannot expect the Courts to blindly
15 accept their opinions. Courts have the
16 responsibility to assess expert evidence just
17 like any other evidence and to do this, the
18 Court must be able to understand how the
19 expert reached certain conclusions.

20 But here, this is not what had to be
21 established, nor the onus to which it had to
22 be met.

23 Dr. Sultan did see the complainant three
24 times over the past nine months, including
25 fairly recently in September 2013. She did
26 diagnose her with severe PTSD, in part based
27 on her observations during these interviews.

1 She knew enough about the complainant's
2 condition to express the view that there were
3 significant risks in this matter even
4 proceeding this week.

5 Even considering that PTSD is a condition
6 that is multifactorial and making allowance
7 for the possibility that some things other
8 than the events forming the subject matter of
9 this charge may have contributed to it, the
10 fact remains that it was the psychiatrist's
11 opinion that the topic about which this
12 witness was to testify at trial was related to
13 her condition.

14 She also explained what might occur while
15 a person with PTSD talks about the traumatic
16 event. These various manifestations, such as
17 disassociating, being unable to concentrate,
18 and cognitive impairment, would all be things
19 that would interfere with the witness's
20 ability to give a full and candid account of
21 events. And on this point, the doctor's
22 evidence was not challenged in any way. Nor
23 was it challenged on the issue of how these
24 risks might be reduced. She said the more
25 removed a witness would be, the better she
26 could be expected to do. Or, put in the
27 reverse, the risk of her being triggered and

1 being unable to actually communicate her
2 evidence would increase considerably if she
3 were to be in the same room as the accused,
4 even with the use of the screen.

5 The Criminal Code provides for these
6 special mechanisms to assist witnesses in
7 giving their testimony and although they
8 depart from the usual procedure, they are
9 intended to support the truth-seeking function
10 of a trial and ensure that matters can be
11 decided on their merits with all of the
12 evidence before the trier of fact. There has
13 to be a balance between that objective and the
14 accused's right to make full answer and
15 defence.

16 But as the Supreme Court of Canada said in
17 R. v. Levogiannis [1993] S.C.J. No. 70 when it
18 examined this provision as it applies to young
19 witnesses, testimony outside the courtroom
20 with use of a closed circuit television system
21 does not preclude full cross-examination. It
22 does not prevent the trier of fact from being
23 able to observe the witness while the witness
24 testifies. And instructions to the jury about
25 the use of this type of procedure ensures that
26 no improper inferences will be drawn from it.
27 Those are all things that preserve the

1 accused's fair trial rights while ensuring
2 that the relevant evidence is placed before
3 the jury and can be weighed and assessed,
4 along with the rest of the evidence that might
5 be presented.

6 I do recognize that the considerations
7 that apply to young witnesses are different
8 from those that apply when dealing with adult
9 witnesses but the Criminal Code does not limit
10 the use of testimonial aids to child
11 witnesses. This means that Parliament
12 recognizes that there are cases where adult
13 witnesses require some accommodation in order
14 to be able to testify.

15 As I have already stated, Dr. Sultan's
16 evidence would have been more compelling had
17 she been able to explain in more detail how
18 the information in the complainant's clinical
19 file and health record assisted her in forming
20 her opinion that she suffers from PTSD and
21 that the root causes are consistent with being
22 the events forming the subject matter of her
23 testimony.

24 Despite this, Dr. Sultan's evidence was
25 sufficient to satisfy me that an order
26 permitting the complainant to testify outside
27 the courtroom was necessary to ensure that she

1 could provide a full and candid account of
2 events.

3 The Crown had also applied to have a
4 support person seated with the complainant
5 during her evidence pursuant to Section 486.1
6 of the Criminal Code. That application was
7 not opposed by defence and was also granted.
8 But because it was not opposed, I do not
9 propose to elaborate reasons for that suffice
10 it to say that the various considerations that
11 would apply under the other application would
12 have been relevant as well to the request for
13 a support person to be present.

14 That is my ruling on that application, and
15 now we will stand down again and await the
16 pleasure of the jury.

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18 RULING CONCLUDED
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Certified to be a true and
accurate transcript pursuant
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Supreme Court Rules,

Lois Hewitt,
Court Reporter