R. v. Andre-Stewart, 2017 NWTSC 64

S-1-CR2016000075

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- vs. -

JAKE ANDRE-STEWART

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Transcript of the Rulings by the Honourable Justice L. A. Charbonneau at Inuvik, in the Northwest Territories, on August 23rd, 2017:

1. To exclude the public from the courtroom; and,

2. Access to exhibits entered on a voir dire.

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APPEARANCES:

Mr. B. Green: Counsel for the Crown

Mr. C. Davison: Counsel for the Accused

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Charge under s. 271 Criminal Code

No information shall be published in any document or broadcast or transmitted in any way which could identify the victim or a witness in these proceedings pursuant to s. 486.4 of the Criminal Code of Canada

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THE COURT: I am going to now deal with the application that was heard earlier in this trial with respect to the exclusion of the public for the evidence of the complainant.

This application was brought in the context of a trial on charges of sexual assault and sexual interference. The offences are alleged to have occurred during the summer of 2015 in Tsiigehtchic.

The complainant was 11 years old at the time of the alleged events, and 13 at the time of the trial. She and the accused are first cousins.

Earlier this week, at the start of the trial, a voir dire was held to determine whether the videotaped statement given by R. A. to a police officer in Whitehorse could be used as part of her evidence, pursuant to section 715.1 of the Criminal Code.

She was called as a witness on that voir dire because one of the statutory conditions for admissibility of this type of evidence is that the witness has adopted the contents of the recording.

The Crown sought an order excluding the public for her evidence pursuant to section

486 of the Criminal Code, as well as orders for the use of a screen and the presence of a support person with her during her testimony. These requests were made both for the voir dire and for the trial itself.

The defence did not oppose the requests for the screen and the support person but objected to the request that the public be excluded.

In support of the application, the Crown relied on the representations of Crown counsel. No evidence was adduced in support of the application.

Crown counsel indicated that R. was nervous about testifying with the accused's parents present in the courtroom given the nature of the allegations and the close family connections between all involved. Crown counsel underscored the age of the witness, the nature of the allegations, the family connections between the witness and the accused and his parents. I should say that the only members of the public who were present at the time and throughout the trial were the accused's parents.

There was also reference during the submissions to the testimony of another

witness who had been called already in the trial. That witness, now 16 years of age, is also related to the accused and to R. That witness was asked about her family connections in Tsiigehtchic and said that she is related to virtually everyone in that community.

An order excluding the public for her evidence was sought and was not strongly opposed by defence.

In the case of that witness, the basis for the request was that she felt some pressures from R.'s family, felt torn between the two sides of her family in this case, and was reluctant to testify about this matter. I did exclude the public for the testimony of that witness.

The legal framework that governs applications to exclude the public is set out at section 486 of the Criminal Code. As I have noted in other cases, that provision was amended a few years ago and this has altered the legal framework somewhat. I discussed this in some detail in a few cases, including R. v. K. M. 2017 NWTSC 27. I discussed the fundamental principles that are engaged in applications like this and the effect of the 2015 amendments. Without repeating what I

said in R. v. K. M. here, I adopt my analysis, in that case, for the purposes of this application.

In opposing the exclusion of the public for R.'s evidence, the defence underscored the importance of the open-court principle but also noted because of the nature of the application and the testimony, R. would not in this case have to recount all the details of the alleged events. As part of the voir dire, she would, for the most part, be watching and listening to the videotaped interview. She may be asked a few additional questions but would not have to describe the events in great detail.

This, counsel argued, would reduce the burden on her and thereby reduce the concerns about the necessity to exclude the public to obtain a full and candid account of events.

The Crown countered that even if the witness did not actually have to describe the events, having to sit and watch a video of herself describing those events to a police officer in the presence of the public, and of the accused's parents, would be difficult and could compromise her ability to answer whatever questions might be put to her

afterwards.

As I said already, there was no evidence adduced on the application. Although the representations of counsel can serve as a basis for granting applications like this one, when we get into things like comparing levels of trauma or difficulties that might arise in different situations, the effect of watching a statement in the presence of the public and the impact of that on the person's ability to testify afterwards, we are venturing into an area that may require evidence as opposed to simply the representations of counsel.

So in considering the application, I approached that aspect of the submissions with great caution. And I didn't feel I could attach much weight to either counsel's representations about how the use of the video would or would not mitigate the impact on the witness of having the public present for her testimony.

But aside from that evidentiary concern and from the point of view of policy considerations that are engaged in these types of applications, the effect of the position of the defence, if it prevailed, would be that where section 715.1 is used in a trial, it

would be more difficult for the Crown to succeed on an application to exclude the public. A child witness that is benefitting from the section 715.1 accommodation would be more likely to be deprived of another potential accommodation (the one contemplated by section 486). And I agree with the Crown's submission that this would be somewhat of an incongruous result.

Section 715.1 was enacted to facilitate the presentation of evidence of child witnesses, in recognition of the failure of the justice system to address the special needs of child witnesses, particularly in sexual assault cases. This is explained in some detail in the Supreme Court of Canada decision of R. v. L. (D. O.), [1993] 4 S.C.R. 419 where the constitutional validity of section 715.1 was upheld.

Clearly, concern for young witnesses was also one of the things that was addressed in the 2015 amendments to section 486, as was encouraging the reporting of offences and the participation of witnesses in the criminal justice process. It would be an odd result to have the 715.1 procedure become an argument against offering a young witness the

accommodation contemplated by section 486.

In deciding that the application to exclude the public for R.'s testimony should be granted, I considered her age, the nature of the allegations, the family relationship between R. and the accused, the size and close-knit nature of the community of Tsiigehtchic (which I would take judicial notice of, even if I did not have the evidence of the other witness about her being related to everyone in the community).

Although the public was also excluded for the evidence of one other witness in this trial, the public could be present for the rest of the proceedings, other testimony, the submissions of counsel, and eventually my ruling.

The allegations and the evidence are a matter of the record and will not be kept secret. There has been no application by the Crown to ban publication of the evidence aside from information that would be specific enough to identify R. So the order sought, in my view, is as limited as necessary to achieve its intended purpose.

The Crown also applied to exclude the public during R.'s testimony during the trial

itself. Previously I was referring to the voir dire. My reasons for granting the application for the voir dire apply equally to the trial proper. More so, in fact, because the scope of cross-examination and of examination in-chief in the trial itself would exceed what it was in the voir dire. And that's why I granted that application as well.

The last issue to be dealt with is access to the videotaped statement that was marked as an exhibit on the voir dire.

That issue arose as a result of the question I asked during submissions on the application to exclude the witnesses. My understanding of the law is that the open-court principle applies to testimony in court. It also applies to access to exhibits.

Exhibits that are presented during a trial are not ordinarily sealed. The Court has jurisdiction to seal them on application. But the same kind of balancing between transparency of court proceedings and other important principles has to be considered before access to exhibits is prevented.

On a successful 715.1 application, as was the case here, the video-recorded statement becomes a substitute for what would otherwise

be the bulk, or at least part of, the witness's testimony in-chief. It is not marked as a trial exhibit but it is marked as an exhibit on the voir dire.

As far as the publicity of proceedings in the open-court principle, I am not aware of any legal principle that draws a distinction between voir dire exhibits and trial exhibits when there is no sealing order. My understanding of the rule is that those are accessible to the public barring a court order stating otherwise. Here, there was no such application. I see no legal basis to prevent access to exhibits in this case. There may well be logistical issues that come up, particularly when we are on circuit, but as far as the principle is concerned I do not think access can be prevented.

Those are my reasons for the ruling I delivered earlier in this trial.

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Certified to be a true and accurate transcript pursuant to Rules 723 and 724 of the Supreme Court Rules,

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Lois Hewitt,
Court Reporter