*R v Shatilla.*, 2016 NWTSC 72

Date:  2016 12 05

Docket:  S-1-CR-2015-000014

**IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES**

BETWEEN:

HER MAJESTY THE QUEEEN

Applicant

-and-

DENNIS SHATILLA

Respondent

**RULING ON *VOIR DIRE***

**(Application under s. 715.1, *Criminal Code,*** RSC 1985, Chap C-46**)**

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| **Publication Ban:** There is a ban on the publication, broadcast or transmission of the evidence taken, the information given or the representations made and the reasons for decision, pursuant to **s. 648(1)** of the *Criminal Code,* RSC 1985, Chap C-46 |

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| **Publication Ban**: There is a ban on the publication, broadcast or transmission of any information that could identify the complainant, pursuant to **s. 486.4** of the *Criminal Code,* RSC 1985, Chap C-46 |

1. The Crown applied under s. 715.1 of the *Criminal Code* for an order allowing the complainant’s video-taped statement to police to be used as her evidence in chief at trial.

**BACKGROUND**

1. The complainant is a young person. The offences with which Mr. Shatilla is charged are sexual assault and sexual interference, contrary to ss. 271 and 151 of the *Criminal* Code respectively. They are alleged to have occurred between January 1 and March 31, 2014. The complainant gave a video-taped statement to the police on September 25, 2014 in which she described the acts which form the basis of the charges.
2. Defence counsel concedes the statement was taken within a reasonable time following the event and does not generally contest the statement being tendered as evidence in chief. Rather, he has concerns with certain questions and answers in the statement.
3. The audio quality of the statement is not optimal. The complainant is very soft spoken and it is sometimes difficult to hear her on the video. The Crown has indicated it can amplify the sound, however. If jurors indicate they are unable to discern what is being said, a read-back can be arranged through the court reporter.
4. At the end of the *voir dire* I indicated to both counsel that I would grant the application, subject to the possibility of certain parts of the statement being edited out of the version that is ultimately tendered into evidence. I reserved decision and reasons on this. I have concluded that certain portions of the statement must be expunged from the video because they do not conform to the rules of evidence.

**QUESTIONS AND ANSWERS ABOUT PRIOR SEXUAL CONTACT**

1. A transcript of the video statement was prepared and tendered as an exhibit in the *voir dire.* Its accuracy is not disputed by defence counsel. I will be referring to that transcript in this ruling for the purpose of identifying those portions which are in issue and which may be excised.
2. The first two parts of the statement which are in dispute are transcribed at lines 158 to 162 and lines 189 to 192, as follows:

158 Cst. Taylor: Okay. Have you ever had, before this incident, did you guys ever fool around, or have sex, or anything?

160 [Complainant]: No

161 Cst. Taylor: No? Never kiss?

162 [Complainant]: No

\* \* \*

189 Cst. Taylor: Okay. So, has anyone had, have you ever had sex before?

190 [Complainant]: No

191 Cst. Taylor: This was your first time?

192 [Complainant]: Yah

1. Exclusion of these portions of the statement is not sought under s. 276 of the *Criminal Code,* which prohibits evidence of prior sexual history for the purpose of showing a complainant is more likely to have consented or is less worthy of belief (the “twin myths”). What defence counsel argues is that they each serve to bolster the complainant’s credibility and create prejudice to the accused by suggesting the complainant is *less* likely to have consented and/or is *more* worthy of belief because of a lack of previous sexual experiences. Thus, defence counsel submits they should be excluded.
2. Constable Taylor was asking the complainant questions in relation to an investigation. Information respecting prior sexual activity may well have been relevant to that process. What I must decide, however, is whether these questions and answers conform to the rules of evidence in a criminal court. I find they do not. Fundamentally, evidence must be relevant and probative to be admissible. It must assist the trier of fact in determining what happened. Neither of the passages above assist in this process in any meaningful way. The complainant’s sexual history is not relevant to the question of whether she was sexually assaulted. Further, even if there is some probative value (and I find there is none), it is outweighed by the potential for prejudice to the accused. These passages must be edited from the video statement.

**LEADING QUESTION REGARDING THE EVENTS**

1. Constable Taylor posed to the complainant the following question, and received the following answer from her, respecting the nature of the sexual contact forming the charges:

204 Cst. Taylor: Okay. So when you said you had sex, what was, what was he doing to ya? Do you know what ah, like was he, did he put it inside you, his penis?

206 [Complainant]: Yah.

1. Again, it must be remembered Constable Taylor was conducting an investigation. His job was to find out what happened. It is highly unlikely, however, that a judge in a criminal trial would permit this question to be asked or answered. It is not a question about a typically innocuous subject, such as the occupation of the witness, how long they have lived in a certain location or their street address, for which counsel are often permitted some latitude to lead on direct. Rather, it is a question which suggests an answer underpinning a key element of both sexual assault and sexual interference (ie. intentional touching of a sexual nature) and which goes to the heart of the charges. It must not be included as part of the complainant’s testimony in chief.

**ORDERS AND DIRECTIONS**

1. The Crown’s application for an order allowing the complainant’s video-taped statement to police to be used as her evidence in chief at trial is granted, subject to the following:
   1. The portions of the video statement reflected at lines 158 to 162, lines 189 to 192 and lines 204 to 206 shall be edited from the video statement and not included in the video to be used as the complainant’s evidence-in-chief at trial;
   2. The Crown shall take the steps necessary to excise the aforesaid portions from the video; and
   3. The Crown shall make arrangements to appropriately augment the sound quality of the video statement.
2. In addition to the publication ban issued previously pursuant to s. 486.4 of the *Criminal Code,* respecting the identity of the complainant, I order a ban on the publication, broadcast or transmission of any portion of this *voir dire,* including the evidence taken, the information given or the representations made and the reasons for this decision, pursuant to s. 648(1) of the *Criminal Code.*

K. M. Shaner

J.S.C.

Dated at Yellowknife, NT, this

5th day of December, 2016

Counsel for the Crown: Blair McPherson

Counsel for the Defendant Mr. Gary Wool

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| RULING ON APPLICATION  (s. 715.1, *Criminal Code,* RSC 1985, Chap C-46)  THE HONOURABLE JUSTICE K. SHANER |