*R v Smith-Tsetta*, 2021 NWTSC 21 S-1-CR-2019-000036

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

**IN THE MATTER OF:**

**HER MAJESTY THE QUEEN**

**-v-**

**TYLER SMITH-TSETTA**

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**Transcript of the Decision of the Honourable Justice S.H. Smallwood, sitting in Yellowknife, in the Northwest Territories, on the 3rd day of June, 2021**

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**APPEARANCES:**

A. Paquin: Counsel for the Crown

C. Davison: Counsel for the Defence

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Charge under s. 271 of the *Criminal Code* of Canada

**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* and 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*.**

**I N D E X**

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**RULINGS, REASONS**

Reasons for decision 1

THE COURT: Tyler Smith-Tsetta is charged with sexual assault, which he is alleged to have committed in June 2018 in Yellowknife, Northwest Territories. His matter is set for a jury trial on September 13, 2021.

Mr. Smith-Tsetta has brought an application seeking the disclosure of the contact information for a potential witness, M.M. The Crown is not opposed to releasing the contact information of the witness pursuant to a court order with a number of conditions suggested.

The accused is alleged to have sexually assaulted A.S. on June 10, 2018. During the investigation M.M. was identified as a potential witness and interviewed by the police. The statement of the witness was disclosed to the defence, but contact information was not provided. For witnesses the addresses, telephone numbers and other contact information are routinely edited out of the disclosure by the Crown before being provided to the defence.

On April 7, 2021, counsel for the accused requested by email that the Crown provide “any and all contact information” for the witness, undertaking not to share or provide that information to the accused. The Crown responded on April 11, 2021, indicating that the Crown did not have a phone number for the witness and that they had inquired with the RCMP whether they had contact information for the witness.

The Crown sent a further email on April 13, 2021, saying that the Crown had received a phone number for the witness and indicating that it could not be provided to defence counsel without a court order. The Crown also indicated that she and a Crown witness coordinator spoke with the witness on the telephone.

The Crown advised that during the conversation the witness had been advised that the defence wished to talk to the witness and asked if the witness was fine with the phone number being provided to defence. The witness indicated that they did not want their contact information provided and was not comfortable with their phone number being provided to defence. Ultimately, the witness hung up on the Crown.

*Position of the parties:*

The defence’s position is that the Crown cannot refuse to disclose the contact information for a witness and the information should be provided in the ordinary course or, alternatively, upon request by counsel for the accused unless there is a specific safety or privacy concern.

The defence argues that a court order is not required for the Crown to disclose this information. Further, the defence argues that the disclosure should not be subject to the conditions that have been proposed by the Crown. The normal disclosure conditions and counsel’s undertaking, which has already been provided, not to disclose the contact information to the accused should be sufficient.

The Crown’s position is that the Crown’s obligation to provide disclosure is subject to their discretion not to disclose contact information in circumstances where there are safety or privacy concerns. The Crown argues that on a case-by-case basis the Crown may disclose this information and may require counsel to agree to conditions or may require a court order to disclose the information.

In this case the Crown says that because the witness objects to the contact information being provided, a court order is necessary. The Crown is not opposed to the application but argues that a court order is necessary with a number of conditions included.

*Analysis:*

This decision relates to the contact information of a witness who is not the complainant or alleged victim. While many of the considerations are similar, there may be additional factors to take into account where the request is for the contact information of an alleged victim. This was not the situation before me, and counsel did not argue those issues. As such, this decision relates only to the request for the contact information of the witness.

Another consideration is that the accused in this matter is represented by counsel. While disclosure is the right of the accused, often accused persons are represented by legal counsel. Lawyers, as officers of the court and bound by the Code of Professional Conduct of the Law Society of the Northwest Territories, have ethical obligations that they must comply with and regularly enter into undertakings with respect to disclosure materials.

The situation is somewhat different for an accused person, and the issue of disclosure to a self-represented accused was not argued. As the accused is represented by counsel, this decision relates to the request for contact information of the witness by counsel for the accused.

Counsel are in agreement about many of the legal principles which are applicable. The Crown has a duty to disclose all relevant information in its possession relating to the investigation of the accused. Relevant information includes not only information that Crown intends to rely on against the accused but also any information in which there is a reasonable possibility that it may assist the accused in making full answer and defence.

Unless the information is clearly irrelevant, privileged or its disclosure is otherwise governed by law, the Crown must disclose all material in its possession to the accused upon request*. R v* *Stinchcombe*, [1991] 3S.C.R*.* 326 at paragraph 17; *R v* *McNeil,* 2009 SCC 3at paragraphs 17 and 18.

The Crown retains discretion as to the manner and timing of disclosure where the circumstances may result in harm to anyone or prejudice to the public interest. The Supreme Court of Canada recognized that a residual privacy interest can exist in the contents of the Crown’s file.

Within the Crown’s file there may be highly sensitive material which may contain personal information. In a standard sexual assault file there may be complainant and witness statements, photographs, the sexual assault examination records of the complainant, other medical reports, DNA reports, criminal records, personal addresses, social media information, emails, phone numbers and more. The privacy interests in this information will vary depending on the material involved. However, it can also be assumed that the material in the Crown’s possession is relevant to the accused’s case and this material will comprise the case against the accused.

As a general rule, the accused’s interests in obtaining disclosure of all relevant material in the Crown’s possession for the purpose of making full answer and defence will outweigh any residual privacy interest held by third parties in the material. As such, the onus is on the Crown to justify the nondisclosure of any material in its possession. *McNeil*, paragraphs 18 and 20.

It is well established that there is no property in a witness. Either counsel may contact and interview a witness identified in a Crown file. The right of counsel for the accused to contact the witness is not disputed. In preparing to make full answer and defence, counsel for the accused must be able to seek information from potential witnesses. A witness may decide to talk to either counsel or no counsel. They are not required to grant an interview to any counsel.

As noted in *R v* *Quesnelle,* 2014 SCC 46and *R v* *Downey*, 2018 ABQB 915 the privacy of a witness is not an all-or-nothing concept. Since there are residual privacy interests to consider, and there may be specific privacy or security interests with respect to an individual witness in a case, the Crown should not be required to disclose to defence counsel the personal contact information of a witness as a matter of course. The Crown has an obligation to consider the privacy and security interests of a witness, and there may be times where there are issues surrounding privilege to consider as well. However, unless a witness has a specific privacy or safety concern, a witness’s general reluctance to be contacted by defence counsel is not a sufficient reason to justify withholding contact information from counsel for the accused. A general reluctance to participate in the criminal process or be contacted by defence counsel cannot outweigh the accused’s interests in making full answer and defence by obtaining the contact information of a witness in the Crown’s possession and seeking to interview that witness.

Unless the Crown through personal contact with the witness or through the police has ascertained that there is a legitimate specific privacy or safety concern, a witness’s contact information should be provided to counsel for the accused upon request. The consent of the witness is not required.

A court order will not generally be required before defence counsel is provided the contact information in a situation like this one. Lawyers are bound by ethical and professional obligations which govern their contact and interactions with witnesses and other individuals involved in a criminal matter.

Counsel in this matter has already offered to enter into an undertaking not to share or provide that information to the accused. It is open to the Crown to require defence counsel to enter into an undertaking with respect to the receipt of contact information of a witness. As mentioned, counsel regularly enter into undertakings with respect to the receipt of disclosure generally.

For this matter, I direct the Crown to provide to defence counsel the most current contact information in its possession or control regarding the telephone number of the witness M.M. This information will be provided to defence counsel for the purpose of enabling him to contact the witness to request an interview, and if the witness agrees, to further communicate with the witness as necessary.

Counsel will be subject to an undertaking not to communicate the contact information of the witness to the accused or any person other than other counsel or a member of the defence counsel’s staff working on this case.

This may not be necessary, as I expect that defence counsel would do so anyway, but I am also going to require that if counsel contacts the witness, that the witness be informed that defence counsel was provided the contact information of the witness for the purpose of contacting the witness for an interview but that the witness is not required to speak with him and that it is the witness’s choice whether to do so.

No other conditions will be imposed. Obviously, counsel are also subject to the Code of Professional Conduct which imposes other obligations, and I will not repeat them.

I have also considered the issue of Crown’s contact with the witness. Obviously, care must be taken by the Crown to ensure that a witness is not left with the impression that they should not speak to the defence and the inquiry into any specific privacy or security concerns must be undertaken responsibly. Beyond that, I decline to make further comment on the Crown’s contact with the witness.

I trust that Crown counsel and defence counsel will conduct all interviews and conduct themselves at all times in accordance with their ethical and professional obligations. It has been my experience that counsel in general in this jurisdiction do so, and the Court places its trust on this continuing to be the case in the future.

**(PROCEEDINGS ADJOURNED TO 10:00 AM, JUNE 11, 2021, YELLOWKNIFE)**

**CERTIFICATE OF TRANSCRIPT**

Neesons, the undersigned, hereby certify that the foregoing pages are a complete and accurate transcript of the proceedings transcribed from the audio recording to the best of our skill and ability. Judicial amendments have been applied to this transcript.

Dated at the City of Toronto, in the Province of Ontario, this 15th day of June, 2021.



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Kim Neeson

Principal