*R v Hornibrook*, 2022 NWTSC 1

Date: 2022 01 06

Docket: S-1-CR-2021-000080

 IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

DAVID HORNIBROOK

RULING ON THE APPLICATION FOR THE REVOCATION OF A PUBLICATION BAN PURSUANT TO S. 486.4 OF THE *CRIMINAL CODE*

1. David Hornibrook is charged with four counts of sexual assault and one count of assault, all involving the same complainant, K.G. The charges stem from a series of incidents alleged to have occurred between October 2018 and October 2020 in Yellowknife, Northwest Territories.
2. On November 10, 2021, in Territorial Court, the Crown sought and obtained a publication ban pursuant to s. 486.4 of the *Criminal Code*. The publication ban is one that prohibits the publication, broadcast or transmission of information that could identify the victim of a sexual offence and is mandatory when requested by the Crown or the victim.
3. It is not disputed that the Crown’s application for a publication ban was made in error and that the complainant did not wish to have the publication ban in place. The Crown now applies to revoke the publication ban. The accused is opposed to the application arguing that the Crown has not established a material change in circumstances and to revoke the publication ban could impact on trial fairness.
4. For the reasons that follow, I conclude that the publication ban should be revoked.
5. Section 486.4 of the *Criminal Code* provides for orders restricting publication of information that could identify victims in the case of sexual offences. The relevant portion states:

486.4(1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

1. any of the following offences:
2. an offence under section 151, 152, 153, 153.1, 155, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or
3. any offence under this Act, as it read from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day; or
4. two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (*a*).
5. In proceedings in respect of the offences referred to in paragraph (1)(*a*) or (*b*), the presiding judge or justice shall
6. at the first reasonable opportunity, inform any witness under the age of eighteen years and the victim of the right to make an application for the order; and
7. on application made by the victim, the prosecutor or any such witness, make the order.
8. The Supreme Court of Canada considered these sections (as they then were, sections 486(3) and (4)) in *R v Adams,* [1995] 4 S.C.R. 707, in the context of a court’s ability to set aside a publication ban. In that case, at the conclusion of the trial and after acquitting the accused, the trial judge rescinded the publication ban on the identity of a complainant in a sexual assault case. In doing so, the trial judge acted on his own motion and without the consent of the Crown or the complainant.
9. The Supreme Court of Canada noted that the s. 486.4 publication ban was intended to encourage victims to come forward and report sexual offences which would ultimately contribute to the suppression of crime and improve the administration of justice. The mandatory nature of the publication ban is necessary to ensure certainty for the complainant and to achieve parliament’s objective. *Adams,* paras 25-27.
10. In considering whether a court had authority to re-consider or revoke the publication ban, the Court stated, at paras 28-30:

[I]t may be desirable and in keeping with the purpose and objects of the section to permit reconsideration and revocation of the order if the circumstances which justified its making have ceased to exist….

With respect to orders made during trial relating to the conduct of the trial, the approach is less formalistic and more flexible. These orders generally do not result in a formal order being drawn up and the circumstances under which they may be varied or set aside will depend on the importance of the order and the nature of the rule of law pursuant to which the order is made… [A]n order made under the authority of statute will attract more stringent conditions before it can be varied or revoked. This will apply with greater force when the initial making of the order is mandatory.

As a general rule, any order relating to the conduct of a trial can be varied or revoked if the circumstances that were present at the time the order was made have materially changed. In order to be material, the change must related to a matter that justified the making of the order in the first place.

1. The circumstances which are relevant in a case involving a mandatory publication ban are those which make the order mandatory; for a publication ban pursuant to s. 486.4, it is the request by the Crown or the complainant of the sexual offence which triggers the mandatory publication ban.
2. If the Crown and the complainant consent to the revocation of the order, then the circumstances which make the publication ban mandatory are no longer present. In addition to the consent of the Crown and the complainant, a factor to consider before granting an application to revoke are any rights that the accused may have. *Adams,* para 32.
3. In this case, the accused was charged on an Information sworn on April 29, 2021. Prior to his first appearance on June 8, 2021, the Crown discussed with the complainant a publication ban pursuant to section 486.4(2). The complainant advised the Crown that she did not want a publication ban. Taking into account the position of the complainant and the circumstances of the case, the Crown decided it would not apply for a section 486.4(2) publication ban.
4. Following the first appearance, the matter was adjourned to June 29, 2021, August 31, 2021 and then November 10, 2021. On November 10. 2021, the presiding Judge asked the Crown whether it was applying for a publication ban. The Crown responded affirmatively and the order was made. The Crown acknowledges this was an oversight and was done in error.
5. After the court appearance on November 10, 2021, the Crown met with the complainant and informed her of what had occurred in court that day, including that a publication ban had been made. The complainant confirmed that her views had not changed and she did not want to have a publication ban in place for this matter.
6. Following the meeting, the Crown filed an Indictment and then on November 26, 2021 filed an application seeking to revoke the publication ban.
7. The first question to consider is whether there has been a material change in circumstances. The basis for the application is that the Crown mistakenly sought and obtained the publication ban contrary to the known and expressed wishes of the complainant and now seeks to rectify the error. The accused argues that a mistake does not constitute a material change in circumstances.
8. A complainant changing their mind about wanting a publication ban can constitute a material change in circumstances as suggested by the Supreme Court of Canada in *Adams*. This approach has been adopted in other cases, in situations where the Crown consented to the application and where the Crown took no position or did not explicitly consent to the application: see *Re JF,* 2018 ABPC 36; *R v Evans*, 2020 ONCJ 428.
9. If a complainant changing their mind about wanting a publication ban can constitute a material change in circumstances, it is hard to conceive that a legitimate mistake made by the Crown in obtaining a publication ban would not also constitute a material change in circumstances. Had the Crown not mistakenly sought and obtained the publication ban, it would not have been ordered. The only other person who could have applied for the publication ban was the complainant and it is undisputed that she did not want the publication ban.
10. The mistaken request of the Crown for the mandatory publication ban was material to it being imposed. To hold that a mistake in this situation is not a material change in circumstances would be unduly restrictive and ignore the views of the complainant regarding a publication ban which applies to her identity alone. A mistake by the Crown in obtaining a publication ban pursuant to s. 486.4(2) constitutes a material change in circumstances.
11. The rights of the accused also have to be considered. The accused argues that his fair trial rights could be impacted. The accused has elected trial by Judge and Jury although his trial has not yet been scheduled.
12. The accused argues that publication of the name of the complainant would affect his fair trial rights. The ability of the complainant to identify herself as a victim of sexual assault on social media and/or publish information regarding the facts that will be before the court could taint the jury pool. The accused says that the only rational conclusion is that the complainant wishes the publication ban to be revoked so that she can publish her name in the media or social media.
13. Pre-trial publicity and the potential tainting of the jury pool are legitimate fair trial concerns, particularly in a small jurisdiction like the Northwest Territories and with the availability of information on the internet through the media and social media. While these are concerns to bear in mind, there is no evidence that the accused’s fair trial interests will be impacted by the revocation of the publication ban.
14. The suggestion that the complainant wishes the publication ban to be revoked so that she can publish her name in the media or social media is speculative and not supported by evidence. The Information in this matter was sworn on April 29, 2021 and the s. 486.4(2) publication ban was imposed on November 10, 2021. During that time period, there was nothing to prevent the complainant from identifying herself as a complainant in a sexual offence or from detailing the allegations before the court; however, there is no evidence that the complainant did so.
15. The nature of the publication ban is also relevant. It is a publication ban designed to protect the identity of the complainant; it is not a ban on publishing details of the allegations. If the accused is concerned that details of the allegations may be published in the media or social media, then he can apply for a publication ban.
16. If the identity of the complainant is published in the media or social media in the future, that may have more of an impact on the accused’s fair trial rights. At this point, there is nothing to suggest that any concerns raised by the accused cannot be addressed through the challenge for cause process, by an application for a change of venue or through the trial judge’s instructions to the jury.
17. For these reasons, the Crown’s application is granted and the publication ban ordered pursuant to s. 486.4(2) prohibiting the publication in any document or broadcast or transmission in any way of information that could identify the victim is revoked.

 S.H. Smallwood

 J.S.C.

Dated at Yellowknife, NT, this

6th day of January, 2022

Counsel for the Crown : Angie Paquin / Matthew Scott

Counsel for the Accused : Christopher Murphy

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