Date: 2013 04 12
File: Y2-YO-2011-000126

IN THE YOUTH JUSTICE COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

D.D.

REASONS FOR DECISION
of the
HONOURABLE JUDGE GARTH MALAKOE

Heard at:	Fort Liard, Northwest Territories November 26, 2012 Yellowknife, Northwest Territories February 27, 2013
Date of Decision:	April 12, 2013
Counsel for the Crown:	Jennifer S. Bond
Counsel for the Accused:	Charles Davison

[Section 271 of the *Criminal Code*]

[*Application for Mistrial*]

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A. ISSUE AND BACKGROUND

A.1 Issue

[1] The Court must decide whether or not to declare a mistrial after finding this young person guilty but before sentence has been imposed. The application for a mistrial by the accused is based on recently discovered evidence that the father of the complainant had been charged, but not convicted, of assaulting the complainant in the past. Both the father and the complainant testified at the trial of the accused.

A.2 Background

[2] On November 26, 2012, after a trial held in Fort Liard, Northwest Territories, D.D. was found guilty of a sexual assault on D.B. contrary to section 271 of the *Criminal Code*. The sexual assault took place on September 21, 2011. Two civilian witnesses testified for the Crown: the complainant, D.B. and her father, F.B. D.D. testified on his own behalf.

[3] A pre-sentence report was ordered and sentencing was adjourned to January 21, 2013. Prior to the date scheduled for sentencing, counsel for D.D. filed a Notice of Motion seeking the declaration of a mistrial based on evidence that had come to the attention of counsel since the finding of guilt. The sentencing did not proceed on January 21, 2013. The application for a mistrial was heard on February 27, 2013 in Yellowknife, NT.

[4] The evidence that forms the basis for the mistrial application, which I will refer to as the "new evidence", is that in the past, F.B. had been charged with five

offences involving assaults against his daughter, D.B. Four were common assaults under section 266 *Criminal Code* dated June 2, 2008; October 18, 2009; July 12, 2011 and February 27, 2012. One charge was assault causing bodily harm under section 267(a) *Criminal Code* on February 27, 2012. The Crown directed a stay on the June 2, 2008 assault. The Crown withdrew three of the charges and F.B. was acquitted, after a trial, of the February 27, 2012 assault. That trial took place on September 19, 2012.

[5] With respect to the application for a mistrial, counsel filed an Agreed Statement of Facts on January 16, 2013. It is clear that at the time of the trial of D.D. on November 26, 2012, neither Crown nor defence counsel were aware that F.B. had been charged in the past with assaulting his daughter.

[6] After hearing the evidence at the trial on November 26, 2012, I rejected D.D.'s evidence that when F.B. discovered D.D. and D.B., she was giving him oral sex. I accepted the evidence of F.B. that he came upon D.D. and D.B. in an empty house; that D.D. was on top of D.B. having sexual intercourse with her; that her eyes were closed and she was not moving; and that after F.B. pulled D.D. off his daughter, it took some time for F.B. to rouse her.

[7] At trial, my decision turned on an assessment of the credibility of the three witnesses: D.D., D.B. and F.B.

B. BASIS FOR MISTRIAL APPLICATION

[8] The accused is seeking a declaration of a mistrial. The accused is not seeking to re-open its case. Neither Crown nor defence argued that a re-opening of the trial was appropriate.

[9] The basis for the accused's application appears to be that if defence counsel had been aware of the charges against F.B., he would have cross-examined both F.B. and D.B. about the circumstances surrounding these charges and their disposition. As a result of this cross-examination, the Court may have questioned the credibility of either or both of them. For example, it might have been established that D.B. was afraid of her father and this could affect her testimony. Or that D.B. had made false allegations to the police in the past. I have picked only two of the most obvious potential scenarios.

[10] I am satisfied with the position of counsel that a re-opening of the trial is not a potential outcome of this application for the following reason. Had this application for mistrial included an application for re-opening the trial and were I to grant an application to re-open the trial, it would mean that a further cross-examination of D.B. and F.B. would have to occur. The probative nature of the

"new evidence" at its strongest goes to the credibility of the two key witnesses. It has no direct relevance to the events of September 21, 2011.

[11] In order to acquit D.D. I would have to come to conclusions with respect to the credibility of D.B. and F.B. which are different than those already expressed in my reasons for judgment after the trial on November 26, 2012. Should the new evidence be insufficient to change these conclusions and were I to maintain a finding of guilt, there could very well be a perception that I "had already made up my mind." Or as Mr. Justice Trotter said, in *R. v. Drysdale*, [2011] O.J. No. 4232 at paragraph 29, "he [meaning the accused], along with reasonably informed members of the public, would always wonder whether my 'new' conclusions and reasons were infected by my prior adverse finding of credibility."

[12] The application for a mistrial is based on two alternate legal routes. Firstly, at common law, there is an inherent jurisdiction of the Court to control its process until sentence is imposed [see, for example, *R. v. Bajwa*, 2004 BCSC 1127 at paragraph 1]. Secondly, a failure to disclose by the Crown can result in a breach of an accused's right to make full answer and defence which is part of the principle of fundamental justice embraced by section 7 of the *Charter* [see for example, *R. v. McQuaid*, [1998] 13 C.R. (5^{th}) 217 (S.C.C.) at paragraph 22].

[13] These two approaches will be dealt with separately. The first will be the alleged failure by the Crown to disclose the charges against F.B. to the defence.

C. FAILURE TO DISCLOSE

[14] The Crown has an obligation to disclose all relevant material in its possession so long as that material is not privileged. This obligation and the meaning of "relevant" were defined by the Supreme Court of Canada in *R. v. Stinchcombe*, [1991] 3 S.C.R. 326 (S.C.C.). Material is relevant if it could reasonably be used by the defence in meeting the case for the Crown.

[15] In *Stinchcombe*, Mr. Justice Sopinka stated, at paragraph 29:

> With respect to what should be disclosed, the general principle to which I have referred is that all relevant information must be disclosed subject to the reviewable discretion of the Crown. The material must include not only that which the Crown intends to introduce into evidence but also that which it does not. No distinction should be made between inculpatory and exculpatory evidence.

[16] Although it is accepted that the individual Crown prosecutor responsible for prosecuting this case was unaware of the charges against F.B., the "Crown" as an institution was in possession of this information. As was explained in *R. v. T.(L.A.)*, [1993] CanLII 3382 (Ont. C.A.), the Crown has a duty to obtain from the

police, and the police have a corresponding duty to provide for the Crown, all relevant information and material concerning the case. Was there a duty on the Crown's part, in the absence of a request for this information, to provide the "new evidence" to the accused's lawyer?

[17] In answering the question, it is necessary to look at the nature of the new evidence. Clearly, there is no direct connection between this new evidence and the events of September 21, 2011, the date of the alleged sexual assault by D.D. The evidence is not about criminal convictions or even outstanding charges against F.B. As will be shown later, the use of outstanding charges when cross-examining a witness is very restricted. The Crown could not be expected to anticipate that charges against a witness which had been disposed of by way of a stay of proceeding, a withdrawal or an acquittal would be "relevant". Normally, this new evidence would not be relevant and would have no potential use by either Crown or defence. In this unusual case, the potential relevance is only because these charges against F.B. involved D.B.

[18] There is some judicial authority which states that absent a specific request by defence, there is no duty to disclose criminal records of witnesses [*R. v. Oddleifson*, [2007] B.C.J. No. 2940 (B.C. P.C.)]. The relevance of the "new evidence" in this case is much more tenuous than a criminal record. I am satisfied that absent a specific request by defence, there is no duty to disclose criminal charges against a witness which are finished and did not result in a finding of guilty. The "new evidence" did not meet the *Stinchcombe* threshold.

[19] For this reason, I find that there was no breach of the accused's right to make full answer and defence and it is not necessary to embark upon an analysis of remedies under section 24(1) of the *Charter*.

D. INHERENT JURISDICTION TO DECLARE A MISTRIAL

[20] As stated earlier, the Court has inherent jurisdiction to control its process until sentence. A discussion of the case law which examines the jurisdiction to re-open and to declare a mistrial is contained in the British Columbia Supreme Court case of *R. v. Bajwa*, 2004 BCSC 1127 at paragraph 18. The Court in *R. v. Brossart*, [2011] S.J. No. 670 (Sask. Q.B.) at paragraph 13 stated, "Simply put, a judge, sitting alone, is not *functus officio* until a sentence has been imposed or an acquittal has been rendered."

[21] In *R. v. Burke*, [2002] 2 S.C.R. 857, the Supreme Court of Canada said, at paragraph 74 that "[t]he common theme running through this case law is the test of whether there is a 'real danger' of prejudice to the accused or danger of a miscarriage of justice."

[22] The Ontario Court of Appeal in *R. v. Lessard (1976)*, 30 C.C.C. (2d) 70 (Ont. C.A.) stated that the power of a trial judge to vacate a finding of guilt prior to imposing sentence, " . . . should only be exercised in exceptional circumstances and where its exercise is clearly called for." In *R. v. Arabia (2008)*, 235 C.C.C. (3d) 354 (Ont. C.A.), the Court stated at page 367:

> While there may be some uncertainty about the precise standard a judge is to apply in determining whether to declare a mistrial before verdict or judgment, it is well-settled that the authority to declare a mistrial should only be exercised in the clearest of cases. *R. v. R.(A.J.)* (1994), 94 C.C.C. (3d) 168 (Ont. C.A.) at 174; *R. v. Paterson* (1998), 122 C.C.C. (3d) 254 (B.C.C.A.) at paras. 93-98. There seems no reason in principle to apply any less rigorous standard to applications for the same remedy made after verdict or judgment.

[23] Counsel in their submissions adopted the approach taken in *R. v. Bajwa*, *supra*, at paragraph 19, in *R. v. Drysdale*, [2011] O.J. No. 423 (On. SCJ) at paragraph 13, and in *R. v. Ouellet*, 2010 BCCA 588 at paragraph 12, that the four factor test from *R. v. Palmer*, [1980] 1 S.C.R. 759 at page 775, should be used to determine whether a verdict of guilt can be vacated and a mistrial declared. The test from *Palmer* was enunciated by the Supreme Court of Canada to guide in determining whether or not to admit fresh evidence at appeal. It appears to be accepted that this test can also guide the trial judge in determining whether fresh evidence is sufficient to cause a re-opening of a trial or a mistrial.

[24] The four factor test from *Palmer* is:

(a) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: see *McMartin v. The Queen*, [1964] S.C.R. 484;

(b) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial;

(c) The evidence must be credible in the sense that it is reasonably capable of belief; and

(d) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

[25] In my view, there are no contentious issues with respect to the first and third factors. Given the nature of this new evidence as discussed above, it would not be expected that it would be discovered by defence counsel, in the normal course of

preparing for trial. Given that the new evidence is being provided by the Crown, I accept that the statement of the charges against F.B. and their disposition as presented in Appendix "B" to the Agreed Statement of Facts filed on January 16, 2013 is credible.

[26] Is the new evidence relevant and does it relate to an issue that is at least potentially decisive? This was a trial whose outcome was determined by an assessment of the credibility of the witnesses. Although there was some physical evidence by way of an Agreed Statement of Facts concerning DNA testing, this evidence did not assist on the critical issue of whether or not the complainant was consenting to or had the ability to consent to sexual activity. In my view, the issue of credibility is potentially decisive. If I did not accept the evidence of F.B. or if there were issues with respect to the Crown's evidence as a whole because of concerns with F.B.'s or D.B.'s credibility, then the outcome could very well have been different.

[27] During their submissions, Crown counsel took the position that the second branch of the *Palmer* test would have no meaning if credibility is always considered to be decisive or potentially decisive. If fresh evidence relates to credibility and credibility is always potentially decisive, then any fresh evidence related to credibility would always be admitted under the second branch of the *Palmer* test. I disagree. In my view, the second branch does incorporate some "weighing" of how the new evidence relates to credibility. Further, credibility has been recognized as a decisive or potentially decisive issue for the purposes of the *Palmer* test in *R. v. Downing*, [2012] A.J. No. 491 (Alta. Q.B.) at paragraph 72 and in *R. v. L.R.L.*, [1997] B.C.J. No. 522 at paragraph 64. Finally, the second branch of the *Palmer* test has to be weighed in connection with the other three branches, in particular, the fourth branch.

[28] Although the credibility of F.B. and D.B. are "potentially decisive" issues, the question has to be whether or not the new evidence could be used in a way that would reasonably be expected to affect a judge's finding with respect to their credibility and hence the result. This question requires an analysis of how the new evidence would be used at trial and what could potentially be achieved.

[29] Counsel for the accused submits that had he been in possession of the new evidence at the time of the trial, he would have cross-examined both F.B. and D.B. on the circumstances surrounding the charges and the disposition of the charges. Under normal circumstances, counsel are restricted in how unproven charges can be used to cross-examine a witness who is not the accused in a trial. The fact that someone is or was charged cannot be used to degrade his character or impair his credibility; however, an ordinary witness may be cross-examined with respect to

misconduct on unrelated matters which has not resulted in a conviction [*R. v. Gonzague*, [1983] O.J. No 53 (Ont. C.A.) at paragraph 19]. In addition, an ordinary witness can be cross-examined with respect to outstanding charges which might be a possible motivation to seek favour with the prosecution [*R. v. Titus*, [1983] 1 S.C.R. 259].

[30] Although I recognize that the ebb and flow of cross-examination and the resultant outcomes cannot be predicted with certainty, it is possible to anticipate what might be the general outcomes from the cross-examination of F.B. and D.B. that are the most advantageous to the Defence:

(a) F.B. will admit to hitting his daughter in the past;

(b) D.B. will admit to being afraid of her father; that if she does something to displease him, he will hurt her;

(c) D.B. will admit to making stories up about her father hitting her and giving false information to the RCMP.

[31] These outcomes, in the context of the testimony that I have already heard, could not reasonably be expected to have affected the result. I make this assessment based on evidence that has already been heard. Both D.B. and F.B. said that her pants and underwear were on the floor. F.B. said she was naked from the waist down. D.B. said she was completely naked. D.D.'s version of what happened, as I stated earlier, would have her completely clothed.

[32] D.D. testified that D.B. was staggering and that her talking did not make sense. This level of intoxication is consistent with D.B.'s own description of her being passed out.

[33] Were there to be evidence that showed D.B. was telling the Court what her father wanted her to say, it makes no sense that they would both be fabricating a totally different scenario than the one described by the accused. Further, if F.B.'s reaction to his daughter's misbehaviour in the past was to assault her, it makes no sense that in this case, he would fabricate a story which changed a consensual sexual act to one which had his unconscious daughter being assaulted.

[34] To summarize, I accept the defence position that had the new evidence been known to him, there would have been some potential to cross-examine both D.B. and F.B. with respect to this new evidence. I am not satisfied that if this cross-examination were to occur, the resultant effects on the credibility of one or both of them would reasonably be expected to affect the outcome of the trial.

E. CONCLUSION

[35] The application by the accused for a mistrial is denied. In the absence of a request by counsel for another date, the sentencing of D.D. will be scheduled for the June 6, 2013 sitting of the Territorial Court in Fort Liard.

Garth Malakoe
Y.J.C.J.

Dated at Yellowknife, Northwest Territories, this 12th day of April, 2013.

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