

NOVA SCOTIA COURT OF APPEAL

Citation: *R. v. Ellis*, 2020 NSCA 45

Date: 20200603

Docket: CAC 491916

Registry: Halifax

Between:

Her Majesty the Queen

Appellant

v.

Jordan Michael Ellis

Respondent

Restriction on Publication: s. 486.4 of the *Criminal Code*

Judge: Bourgeois J.A.

Motion Heard: May 20, 2020, in Halifax, Nova Scotia in Chambers

Held: Directions provided

Counsel: Erica Koresawa, for the appellant/respondent on motion
Zebedee P. Brown, for the respondent/applicant on motion

Order restricting publication — sexual offences

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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

(i) 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

(ii) 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

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).

Decision:

Background

[1] Jordan Michael Ellis was charged with sexual assault contrary to s. 271 of the *Criminal Code*. That charge was eventually stayed, the hearing judge having found Mr. Ellis was not brought to trial within a reasonable time as required by s. 11(b) of the *Canadian Charter of Rights and Freedoms*.

[2] The Crown has brought an appeal and the hearing is scheduled for this September. On May 20, 2020, I heard a Motion for Directions brought by Mr. Ellis in relation to the contents of the trial transcript. After hearing submissions from both parties, I provided direction and promised written reasons to follow. These are my reasons.

Position of Mr. Ellis

[3] Mr. Ellis says the hearing transcript filed by the Crown is incomplete as it does not include a transcription of his recorded police statement played at trial. The statement was apparently in electronic format and was a video of his statement. In the form of a DVD, the statement was entered into evidence, marked as Exhibit 1, and played during the hearing on the courtroom equipment.

[4] Mr. Ellis' counsel, Mr. Brown, advises that due to the size of the courtroom and perhaps the equipment, it was extremely difficult to hear the audio portion of the police statement. This is supported by the hearing transcript, which contains a notation by the certified court transcriptionist stating the playing of Exhibit 1 was inaudible. Further, the comments of the judge and counsel when listening to Exhibit 1 demonstrate they were having difficulty hearing in the courtroom. In his submissions to me, Mr. Brown advises his copy of the DVD was very faint and difficult to hear when played on his own computer.

[5] Mr. Ellis says the transcript provided by the Crown for the appeal is deficient as it does not contain the audio contents of Exhibit 1 played at the hearing. He asks that I direct the Crown to have a certified transcript prepared of the audio portion of the police statement and filed as part of the Appeal Book.

Position of the Crown

[6] The Crown acknowledges it is unfortunate that the audio quality of Exhibit 1, combined with the size of the courtroom, did not permit it to be picked up and recorded by the courtroom equipment. However, it holds the view that there is no obligation to provide a transcribed version of the statement, underscoring that it was an electronic exhibit, not *viva voce* evidence.

Directions

[7] In response to my questions, the parties confirmed the police statement was never transcribed for the purposes of the hearing. It was entered as an exhibit in electronic form only. The hearing judge did not have the benefit of a transcribed version of the exhibit. If a transcribed version of Mr. Ellis' statement were provided for the purposes of the appeal, it would constitute a document that had not been available to the judge or parties in the court below.

[8] I will not direct, as requested, that the Crown have a transcript of the audio portion of Exhibit 1 prepared for the purposes of the Appeal Book. In reaching that decision, I note:

- a) Given the poor quality of the recording, it is not at all certain a complete and accurate written transcript is something that is achievable;
- b) The panel, if it determines it is relevant to the issues on appeal, has the ability to listen and watch the exhibit in exactly the same format as was available to the hearing judge;
- c) *Civil Procedure Rule 91.15(2)(b)(iv)* contemplates electronic exhibits being included by way of copies. Nothing about that provision requires a party to provide a transcription of that exhibit if one was not produced as part of the proceeding below. Of course, it always remains open to a chambers judge on motion or the panel to make or grant such a request in appropriate circumstances.

[9] A copy of Exhibit 1 properly belongs in the Appeal Book along with all other exhibits entered into evidence at the hearing. The Crown is directed to ensure that it complies with Rule 91.15 in terms of the contents of the Appeal Book. In this instance, that would include Mr. Ellis' police statement as it was introduced, in the form of a DVD.

Bourgeois J.A.