IN THE YOUTH JUSTICE COURT OF NOVA SCOTIA
Citation: R. v. M.G. , 2008 NSPC 54

Date: September 16, 2008
Docket: 1680788
Registry: HALIFAX

Her Majesty the Queen

v.

M.G.

Restriction on publication: **S. 110(1) YCJA - Subject to this section, no person shall publish the name of a young person, or any other information related to a young person, if it would identify the young person as a young person dealt with under this Act**

Judge: The Honourable Judge Pamela S. Williams

Heard: April 10, 2007; May 3, 2007; June 7, 2007; August 9, 2007; September 25, 2007; November 1, 2007; November 8, 2007; December 12, 2007; January 23, 2008 ; February 18, 2008; May 14, 2008 ; September 16 ,2008
in Halifax Youth Justice Court

Oral Decision : September 16, 2008

Counsel: Gary Holt, for the Crown
Chandra Gosine, for the Defence

By the Court:

Background:

[1] During MG's sentencing hearing in May 2007 the Crown sought a primary DNA order for the offence of assault with a weapon. The hearing was adjourned several times to allow counsel to file and respond to various written material. Some of the material had to be obtained from independent sources (The National DNA Data Bank, the RCMP and federal and provincial government agencies) and therefore, required rather lengthy adjournments. Some 16 months later the Youth Court is asked to make a ruling.

Law:

[2] Section 487.051(1)(a) of the *Criminal Code* states that the court is required to authorize the taking of DNA samples from an accused found guilty of a primary designated offence, unless it is satisfied under s. 487.051(2) that the accused has established that the impact of the order on his privacy and security interests "would be grossly disproportionate to the public interest in the protection of society and the proper administration of justice".

[3] The legislative provisions make no distinction as between adult and young persons.

[4] In ***R. v. RC [2005] SCJ 62***, the Supreme Court held (5-4) that while no specific provision of the *Youth Criminal Justice Act (YCJA)* modifies section 487.051, Parliament clearly intended that the principles of the *YCJA* would be respected whenever young persons are brought within the criminal justice system.

[5] The Supreme Court provides instruction to trial judges in determining whether, in a particular case, an order should be granted in relation to a young person. In ***R. v. RC*** the crown sought a DNA order in relation to a youth, being sentenced for a primary designated offence, assault with a weapon. The trial judge declined to make a DNA order. The Nova Scotia Court of Appeal overturned the decision and the Supreme Court of Canada restored the original ruling of the trial judge. In

deciding that the trial judge had not erred in declining to make an order the court provided a set of guiding principles to be considered by trial judges when determining whether to grant a DNA order.

[6] Those principles are as follows:

1. The inquiry is highly contextual and necessarily individualized;

2. Some relevant factors that may be considered are:

    a. Considerations as set out for secondary designated offences which assist the trial judge in exercising discretion as to whether to grant the order or not, namely:

        I. The age of the youth;

        ii. Criminal record, if any;

        iii. Nature of the offence;

        iv. Circumstances surrounding the commission of the offence;

        v. Circumstances of the youth;

        vi. Risk of recidivism.

    b. Other relevant factors such as the underlying principles and objectives of the *YCJA* including recognition that youth are to be entitled to enhanced procedural protections ensuring that they are treated fairly and that their rights to privacy are protected: *YCJA* s. 3(1)(b)(iii)

3. The court is to consider the effects such an order may have on a youth:
    a. Making an order of this nature is not a minimal infringement. It is an infringement of his/her right to informational privacy.

    b. Making an order may affect the physical, emotional and psychological health of youth depending on his/her:
        I. Age;
        ii. Level of development;
        iii. Understanding of the offence.

    c. This is a serious intervention and inherently invasive.

[7] Recently, in ***R. v. DB [2008] SCC 25,*** the Supreme Court of Canada had occasion to reflect and comment further on the importance of a the privacy rights of youth. Though dealing with the issue of the potential effect of the loss of the right to the privacy provisions when a youth is sentenced as an adult, Chief Justice McLachlin's comments are noteworthy and worth repeating. At paragraphs 84 to 86 she endorses the comments of scholars, international instruments and the Ontario Court of Appeal in so far as they relate to the importance of protecting the privacy interests of youth:

> [84] In s. 3(1)(b)(iii) of the *YCJA*, as previously noted, the young person's "enhanced procedural protection ... <u>including their right to privacy</u>:, is stipulated to be a principle to be emphasized in the application of the Act. Scholars agree that "[p]ublication increases a youth's self-perception as an offender, disrupts the family's abilities to provide support, and negatively affects interaction with peers, teachers, and the surrounding community" (Nicholas Bala, *Young Offenders Law* (1997), at p. 215)....
>
> [85] International instruments have also recognized the negative impact of such media attention on young people. The United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("Beijing Rules") (adopted by General Assembly Resolution A/RES/4033 on November 29, 1985) provide in rule 8 ("Protection of privacy") that "[t]he juvenile's right to privacy shall be respected at all stages in order to avoid harm being caused to her or him by undue publicity or by the process of labelling" and declare that "[i]n principle, no information

> that may lead to the identification of a juvenile offender shall be published".

> [86] The Ontario Court of Appeal, echoing the Quebec Court of Appeal, recognized the impact of 'stigmatizing and labelling" the young person, which can "damage" the offender's developing self-image and his sense of self-worth: para. 76.

[8] These passages are equally instructive in this case where I am asked to consider the privacy interests of this young person which may be affected by the imposition of a DNA order. The above passages serve as a cogent reminder as to the vulnerability of the adolescent psyche.

Factual Considerations:

[9] The youth before me is 15 years old and has no record of convictions. On May 2, 2006 at 7:30 pm MG and another, SM, an older youth well-known to the courts, passed a group of 4 younger children. SM chased the 4 youths and then put a pellet gun to the back of one youth and to the temple of a second youth. I am told that the younger boys knew the gun was a pellet gun. SM took property belonging to one youth and the youth struck SM in the nose. MG picked up a stick and struck the younger boy. The three other younger boys ran to get adults.

[10] MG, 14 years old at the time, was not attending school. The pre-sentence report described MG as being impulsive. In recent years he had been getting into conflict both at home and at school. He is reported to have a 'lack of concern' for the offence and has demonstrated no remorse.

[11] The factual background of this matter varies somewhat from the situation of the 13 year old who stabbed his mother in the foot with a pen after she yelled at him to get out of bed and threw dirty laundry on him: ***R. v. RC,*** **supra** . It also varies substantially from the 14 year old boy convicted of assault with a weapon for

having struck his sister with the telephone during an argument: ***R. v. SM [2004] AJ 534.*** The court, in each of those cases, declined to make a DNA order. This case involved a 'group oriented assault' in the community whereas the others were family related matters having occurred in the home.

Analysis:

[12] The *YCJA* requires that the privacy interests of youth be protected; however, other competing interests must be weighed by the court before determining whether to impose a DNA order.

[13] Although the public interest is presumed to outweigh privacy interests in the case of primary designated offences (for adults and youth alike), the presumption is rebuttable. The court is not required to make a DNA order if it is satisfied that the young person has established that the impact of such an order on his/her privacy and security interests would be grossly disproportionate to the public interest in the protection of society and the proper administration of justice, to be achieved through the early detection, arrest and conviction of offenders: s. 487.051(2).

[14] MG filed an affidavit sworn to June 6th, 2007, wherein he stated that he does not want his DNA taken and given to people and institutions in Nova Scotia and 'all across the country' as he does not want to share his private life with all those people. He further states that he will not feel comfortable and that his chances of 'going about [his] life without the baggage of a DNA order will be greatly affected. He fears that the taking of a sample will result in unfavourable consequences such as not feeling safe at home, at school or in the community knowing that his DNA was given to people all across the country: at paragraphs 4 through 7.

[15] The court accepts that this 15 year old may actually have these concerns, but the question is whether the impact of such an order would be 'grossly disproportionate' to the public interest in granting such an order.

[16] I return to the guiding principles set out in ***R. v. RC,*** **supra**:

[17] **Inquiry is highly contextual and necessarily individualized**

MG was in the company of an older and more experienced youth who had been in trouble many times before. The older youth had the pellet gun and threatened the younger children. There is no indication that MG played any role in this or that he knew that SM had a pellet gun or was going to use it in this fashion. It was only after one of the younger boys struck SM that MG, impulsively picked up a stick and struck to boy so as to protect SM. There is no indication that this was planned.

[18] **Relevant factors to consider**

a. Age of the youth - MG was 14 years old at the time of the offence.
b. Criminal record - MG did not have a criminal record.
c. Nature of the offence - MG struck a younger boy once with a stick in the back.
d. Circumstances surrounding the offence - MG struck the boy after the boy had struck MG's friend in the face for having pointed a pellet gun at him.
e. Circumstances of the youth - he was younger, less mature and reacted instinctively.
f. Risk of recidivism - I am not aware of any further involvement by MG in the criminal justice system since this incident which occurred over 2 years ago.

[19] **Balancing the governing factors under s. 487.051(2) with the underlying principles and objectives of the *YCJA***

Youth are entitled to enhanced procedural protections to ensure they are treated fairly and that their rights to privacy are protected. As indicated above, interference with a youth's privacy rights can have significant and potentially serious detrimental

effects on youth. This potential effect must be weighted against the public's interest in receiving a youth's DNA. MG, in his affidavit, sets out his concerns. These concerns, I take it, are real, at least to him.

[20] **Potential effect on the youth's right to informational privacy and whether such an order will affect the physical, emotional and psychological health of the youth having regard to his age, his level of development and his understanding of the offence.**

There is no evidence before me that the granting of a DNA order will affect MG's physical health. However, the contents of his affidavit filed with the court suggest that the granting of an order will affect his emotional and psychological health. Given his young age and his relative immaturity it is understandable that he may feel this way. Granting a DNA order is a serious intervention and inherently invasive as noted by the Supreme Court of Canada.

[21] I have also been asked to consider the potential effect the existence of both an order and a DNA sample could have on this young person's right to informational privacy given, what appears to be, undisputed and documented proof that the procedural guarantees established by the legislation are not always adhered to (samples not being destroyed or records either not being destroyed or archived as required: sections 9.1 and 10.1 of the *DNA Identification Act* and section 128 of the *YCJA*.)

[22] When legislated procedural protections relating to the privacy and security of some youth are not being respected as they ought to be, this creates doubt in the efficacy of the system to protect the privacy and security rights of all. This is a potential concern. This consideration, in my view, cannot be ignored particularly in light of the very clear statement by the Supreme Court of Canada that courts are to consider the potential effect the granting of an order will have on the youth's right to informational privacy and the impact it will have on the youth. The question remains, has MG established that the impact of an order on his particular privacy and security interests would be grossly disproportionate to the public interest in protecting society from MG and ensuring that the proper administration of justice is to be achieved through the early detection, arrest and conviction of offenders.

Conclusion:

[23] After having considered the provisions of section 487.051 together with the *YCJA* and the principles set out in ***R. v RC*, supra,** I am of the view that MG has, in this instance, rebutted the presumption. I am satisfied that the impact of a DNA order on his privacy and security interests would be grossly disproportionate to the interests of society. Accordingly, a primary DNA order will not be made.

Order Accordingly

Pamela S. Williams
Judge of Youth Justice Court