

PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Bevan-John*, 2024 NSPC 25

Date: 20240117

Docket: 8626168

Registry: Dartmouth

Between:

His Majesty The King

v.

Nicholas David Bevan-John

Decision on Crown Application for a Witness to Testify Via Video-Conference

Judge: The Honourable Judge Bronwyn Duffy,

Heard: January 11, 2024, in Dartmouth, Nova Scotia

Decision January 17, 2024

Charge: Section 266 of the *Criminal Code*

Counsel: Hartwell Millett, for the Public Prosecution Service of Nova
Scotia
Sheena O’Rielly, for the Defence

By the Court:

[1] This is my ruling with respect to a Crown application for an out-of-province witness to testify via videoconference at trial.

[2] The legislative authority for these applications is s. 714.1 of the *Criminal Code* (*Code*) which provides a broad discretion to a court to permit videoconference testimony if it is appropriate, having regard to all the circumstances.

[3] Section 714.1 sets out a non-exhaustive list of considerations, including the location and personal circumstances of the witness, the costs of personal appearance, the nature of the anticipated evidence, the suitability of the location from which the witness will give *viva voce* evidence, the accused's right to a fair and public hearing, and the nature and seriousness of the allegation or allegations.

[4] The Crown witness resides in Ontario.

[5] The Crown estimates that it would have to incur a cost approximating \$1,700 for this witness to travel and testify in person. This includes incidentals, meals, hotel, airfare, and local transportation.

[6] The witness would also have to miss work and to spend time away from her family.

[7] The Crown advises that this is a single witness prosecution. The witness's testimony is expected to address all the essential elements of the alleged offence. The Crown acknowledges that it will be necessary for the Court to conduct a credibility assessment of the witness's evidence.

[8] The prosecution proposes that the witness will testify at the Ontario Provincial Police (OPP) station. The Crown submits that an appearance by way of video will permit full cross-examination and allow the Court and counsel to see the witness's facial expressions. The Crown argues that allowing the witness to testify remotely will not prejudice the accused's *Charter*-enshrined right to a fair and a public hearing.

[9] In terms of the nature and seriousness of the allegation, and while noting that domestic violence is serious in any capacity, there are no injuries alleged, and the Crown characterizes the allegation as a "low level" assault.

[10] Defence counsel is opposed to the application. Ms. O'Rielly's representations include that only two people were present at the time of the alleged

assault and notes that the complainant has only resided in Ontario since shortly after the police laid the charge.

[11] The Defence relies on a case from our Court of Appeal - *R. v. S.D.L.*, 2017 NSCA No. 58 - for the following propositions:

1. applications of this nature must be supported by an evidentiary foundation; and
2. courts have discretion so long as it does not impact trial fairness.

[12] The Court in *S.D.L.* stated at para. 32 that when credibility is at issue, applications of this nature should be entertained only in exceptional circumstances. The Defence says that there is no basis to consider these circumstances exceptional.

[13] With respect to the right to a fair trial, Defence counsel argues that the fact-finding function of the Court would be undermined because the case turns entirely on credibility.

[14] Following the Defence submissions, the Crown rose in reply to suggest that more recent legislative amendments and jurisprudence have diluted the utility of *S.D.L.*. I offered counsel the opportunity to provide additional authorities and submissions in writing, and both counsel did so.

[15] In further written submissions, the prosecution notes the legislative amendments since *S.D.L.* in 2019 and 2022. These include Parliament adding provisions (d) through (g) in 714.1, thus expanding the enumerated criteria. The Crown emphasizes that Parliament did not adopt a special test for witnesses for whom credibility is a live issue.

[16] Section 714.41 was also added, giving the Court express statutory authority to stop the use of video evidence if the Court thinks it is appropriate.

[17] Furthermore, Parliament enacted Part XXII.01 which involves remote attendance by certain persons, the purpose of which is to expand and standardize the availability of videoconference and audioconference technology in the court process.

[18] Within Part XXII.01, s. 715.22 states that the purpose of the provisions of the *Code* that allow a person to appear at, participate in, or preside at a proceeding by audio or video conference, is to serve the proper administration of justice, including by ensuring fair and efficient proceedings and enhancing access to justice.

[19] The Crown provided the case of *R. v. K.Z.*, 2021 ONCJ 321, in which Justice Kenkel declined to apply *S.D.L.* having regard to several factors including the

changes in the legal landscape occasioned by the pandemic and the limited role that demeanour plays in the Court's assessment of credibility. Justice Kenkel refused to add a special or restrictive test to cases involving complainant credibility that would limit access to video conference technology where an application otherwise meets the statutory criteria. Justice Kenkel noted the risk of creating an unnecessary barrier to justice for complainants in sexual assault cases.

[20] Justice Kenkel also noted that the Court in *S.D.L.* had considered a prior, pared down version of 714.1 that set out only “minimal criteria for the order” relative to the current provisions that are now in force (*K.Z.*, para. 11). The prosecution's submission as to the relevance of the statutory amendments echoes the comments of Justice Kenkel.

[21] Justice Kenkel's analysis in *K.Z.* was followed in *R. v. Pogachar*, 2022 ONSC 6675, *R. v. J.L.K.*, 2023 BCCA 87, and *R. v. McLaughlin*, 2022 YKSC 17.

[22] As stated by Chief Justice Duncan in *McLaughlin* beginning at para. 14:

...I am of view that [*S.D.L.*'s] value particularly as it relates to assessment of credibility and reliability is limited given the subsequent amendments to the *Criminal Code* that did not include any special test or restriction for credibility and reliability assessments by video. ...

... credibility assessment is not a significant consideration for the professional witnesses in this case. If it were, I agree with the court in *KZ* at

para. 21 that the addition of an exceptional circumstances test to cases involving credibility is unnecessary, given this Court's positive experiences in using videoconferencing technology to assess witness credibility.

[23] So, the Crown asked the Court to apply the factors in the new legislative provisions rather than relying upon the *S.D.L.* test and suggested that the application should be granted.

[24] The Defence filed a brief reiterating that the Court of Appeal's decision in *S.D.L.* remains good law in this province. Ms. O'Rielly submits - correctly - that the burden of satisfying the Court is on the Crown. She suggests that the application should be denied for three reasons:

- 1) there is no evidentiary foundation for the application;
- 2) the Crown has not established that exceptional circumstances exist; and
- 3) even if exceptional circumstances are not required, the Crown has not established that it is appropriate that the complainant testify via video conference.

[25] Defence counsel provided *R. v. J.W.T.*, 2020 NSSC 300 where Justice Wright reiterated the application of the principles noted by the Court of Appeal in *S.D.L.*

[26] Defence counsel also provided *R. v. Chow*, 2021 NSPC 16, where the Court held that the application for an order allowing a witness to testify via video should be supported by an evidentiary foundation that addresses the enumerated factors.

[27] So, for the first two factors in the legislation, the location and personal circumstances of the witness and the costs that would be incurred if the witness were to appear in person, the Defence suggested that the information before the Court is not sufficiently detailed and it is not in a proper evidentiary form.

[28] As to the third factor, the nature of the witness's anticipated evidence, the Defence submitted that it will be more effective to cross-examine the complainant in person.

[29] As to the fourth factor, the suitability of the location from where the witness will give evidence, the Defence argued that we are lacking information about the integrity of the system in use at the OPP station, whether the equipment is operational, and whether the internet is reliable, among other considerations.

[30] As to the fifth factor, the accused's right to a fair and public hearing, the Defence focused on how the Court's assessment of credibility will be the keystone issue in the case which, in her submission, should balance in favour of requiring in-person testimony.

[31] With respect to the sixth and final factor, the nature and seriousness of the offence, the Defence noted that domestic violence is serious and cited the legislatively aggravating factor of s. 718.2(a)(ii).

Analysis

[32] Since the onset of the pandemic, the courts, in effect, have developed two lines of authority on this issue, in this province and in others.

[33] *S.D.L.* says when credibility is at issue, there must be exceptional circumstances. It is not a balance of convenience test in those circumstances and there must be an evidentiary foundation to support the application.

[34] The contrary view is exemplified by the B.C. Court of Appeal in *J.L.K.* which directed that the test should use a more flexible approach and that there is no bar to permitting video-link testimony even in cases that involve a credibility assessment.

[35] *J.L.K.* stated that the technology is well developed such that *viva voce* evidence can be fully tested on cross-examination and that the trier of fact can complete their fact-finding inquiry unfettered. Moreover, the Court in *J.L.K.* noted that the submissions of counsel can suffice in support of the application.

[36] The timing of the jurisprudence is notable. Justice Gogan in *R. v. Young*, 2021 NSSC 214 had this to say on the subject:

...The decision in *S.D.L.* is important and binding but was released before the COVID-19 pandemic and does not consider the implications of it. Subsequent decisions have been increasingly focused on pandemic considerations.

[37] *Young* also involved a potential credibility assessment. Justice Gogan stated that if exceptional circumstances were required, she found them to exist in that case. At para. 28, she then went on to draw upon the following analysis of Judge Gorman in *R. v. Rowe*, [2021] N.J. No. 118 (P.C.) at para 4:

...the word “appropriate” and the inclusion of “all the circumstances” in section 714.1... “must be interpreted in the context of hearing the matters during a pandemic and the difficulties and potential dangers which travelling can cause for witnesses... Thus an expansive view of the operation of section 714.1, is in the present circumstances, appropriate.”

[38] Judge Gorman in *Rowe* was ultimately of the view that modern technology can allow for trials that are both fair and safe.

[39] I also note that the Yukon Supreme Court's decision in *McLaughlin* favourably cited *Young*.

[40] The pandemic is not in full force now, though it still forms a part of the landscape for this application. Indeed, we are now in the fifth year since its onset. It is not a matter of hot dispute that it has changed the manner of operation in many professions, including this one.

[41] The ethos of the stakeholders has adapted. Audio and video conferencing have become a more standard option for appearances than they were prior to the pandemic necessitating the widespread use of technology.

[42] The use of Zoom and Teams are now commonplace, as are audio and video court appearances. The amendments to the *Code* expanding the use of audio and video court appearances reflect this.

[43] An application for a witness to testify by video in a criminal trial, however, should be subject to a careful, thoughtful, and sober assessment. Parliament has directed as much. And so, I will now review the factors in s. 714.1 within the context of our current environs and in relation to the specific context of this case.

[44] While *S.D.L.* is the most recent statement of our Court of Appeal on the issue of video testimony, it was decided under different legislation.

[45] Furthermore, *S.D.L.* was decided prior to a surge in the use of technology post-pandemic that can almost be described as a metamorphosis in method as compared to the standard operating procedures in the justice system some seven years ago in 2017.

[46] I note that factor (g) in 714.1 has no application here as it involves audio conferencing.

[47] I am satisfied with the representations of Crown counsel as an officer of the Court as they relate to the location of the witness in Ontario, the estimates of the costs involved, and the suitability of the location where the witness will testify. I find that those factors balance in favour of allowing the application.

[48] The seriousness of the offence was conceded by the Crown to be “low-level” in the context of domestic assault charges. I am of the view that this factor also works in favour of allowing the application. The more serious the allegation in a criminal trial, the more likely that factor will be to give the Court pause in permitting a deviation from the default of in-person testimony.

[49] The nature of the witness's evidence and the right to a fair and public hearing are the two factors that are the core of the issue here. This is not a peripheral

witness - she is the sole witness for the Crown in making out the essential elements of the allegation.

[50] Furthermore, I understand from both counsel that a credibility assessment will be an important aspect of my decision-making process. So, again, I need no evidentiary foundation to confirm the same. That factor balances in favour of declining the application.

[51] For this Court, the application then turns on the *Charter*-guaranteed right of the accused to a fair and public hearing.

[52] Will allowing the witness to testify by video link at a police station undermine this constitutional right? In this regard, I take the approach of our Supreme Court in *Young*.

[53] The changes in the use of technology occasioned by the pandemic, the ability to see and hear the witness, the limited role of demeanour in the credibility assessment, and the more expansive statutory criteria all satisfy me that Mr. Bevan-John can fully cross-examine the witness such that he is able to make full answer to the charge and exercise his right to a fair and public hearing with the complainant giving *viva voce* evidence by video.

[54] The application is granted, but I reserve my authority and jurisdiction to cease the use of the video link under 714.41 if I find the setup to be insufficient to ensure a fair hearing.

Bronwyn Duffy, JPC