

SUPREME COURT OF NOVA SCOTIA

Citation: R. v. J.W.T., 2020 NSSC 300

Date: 20200904

Docket: CRH. No. 476290

Registry: Halifax

Between:

Her Majesty the Queen

v.

J.W.T.

<p>Decision on Crown Application under s.714.1 Restriction on Publication: ss. 486.4, 486.5 and 539(1)</p>
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Judge: The Honourable Justice Robert W. Wright

Heard: September 4, 2020 in Halifax, Nova Scotia

Oral Decision: September 4, 2020

Written Decision: **October 26, 2020**

Counsel: Christine Driscoll, QC and Sarah Kirby for the Crown
Brad Sarson for the Defence

Wright, J. (orally)

[1] The accused is charged with the sexual assault and sexual touching of the complainant, a person under the age of 16, at or near Hubble, Nova Scotia and Sooke, British Columbia, between January 1, 2008 and November 1, 2013. The trial is scheduled to take place before me commencing October 5th.

[2] This pre-trial application is now brought by the Crown under s.714.1 of the Criminal Code for an order allowing the complainant and her mother, who now reside in British Columbia, to testify by way of video conferencing to avoid having to travel to Halifax during the Covid pandemic. I begin with a recitation of s.714.1:

714.1 A court may order that a witness in Canada give evidence by audioconference or videoconference, if the court is of the opinion that it would be appropriate having regard to all the circumstances, including

- a) the location and personal circumstances of the witnesses;
- b) the costs that would be incurred if the witness were to appear personally;
- c) the nature of the witness' anticipated evidence;
- d) the suitability of the location from where the witness will give evidence;
- e) the accused's right to a fair and public hearing;
- f) the nature and seriousness of the offence; and
- g) any potential prejudice to the parties caused by the fact that the witness would not be seen by them, if the court were to order the evidence to be given by audio conference.

[3] In short, s.714.1 confers a discretion upon the court to allow testimony by video conferencing when the court deems it appropriate in all the circumstances. Video conferencing of testimony is not presumed for witnesses living in Canada as it is for witnesses living outside Canada. It is for the court to weigh the various factors at play, in light of the prevailing caselaw.

[4] I will first outline the positions of the parties, beginning with the Crown. The Crown has not filed any affidavit evidence in support of this application but argues that the ongoing Covid pandemic is an exceptional circumstance that justifies the exercise of the court's discretion to allow the complainant and her mother to testify by video link from their home province of British Columbia.

[5] Ms. Driscoll points to the length of travel required involving three airports, a self-isolation requirement here in Nova Scotia except when attending court, and the risk of Covid transmission, notwithstanding safety protocols now implemented in public places. She argues that this situation is the very definition of an exceptional circumstance within the ambit of s.714.1 and the relevant caselaw that meets the test for the order sought to be made.

[6] Defence counsel Mr. Sarson, on the other hand, acknowledges that public travel presents some increased risk but that this risk has been mitigated by safety protocols implemented by airlines, the Provincial Health Authority, and indeed within this courthouse. He argues that this mitigated risk is outweighed by the necessity of his client to be able to make full answer and defence and to enhance trial fairness in this a case where credibility of the Crown witnesses is critical to its outcome. To that end, he considers it important that he be able to cross-examine these witnesses in person.

[7] Defence counsel is also concerned over the four hour time zone differential between Nova Scotia and British Columbia. This means that the complainant and her mother, if testifying by video link, will only be available in the afternoons, which will spread the testimony of the complainant over at least two days. That may mean interruption of her testimony by testimony of other witnesses in the mornings. He is also concerned that those interruptions present an opportunity for the complainant to talk about her evidence with others overnight, notwithstanding any cautions against that which the court would give. He has also voiced the concern over the potential for technical difficulties which may interrupt, if not cause an adjournment, of the trial.

[8] All-in-all, Mr. Sarson submits that the exceptional circumstance test, which I will come to later in this decision, has not been met by the Crown in this a case to be decided by the court on credibility findings.

[9] I begin the analysis of this application with a review of **R. v. S.D.L.** [2017] NSJ No. 247 which is the leading case in Nova Scotia pertaining to s.714.1 applications. For convenience, I will paraphrase the background of this case from its headnote. It involved a situation where the accused's son alleged that when he was 7 years old, he was sexually assaulted by the accused. He and his mother testified via video link. Aside from a police officer who provided context for laying the charges, the Crown's entire case rested on the video evidence of the complainant and his mother. The reason for seeking to allow the video link testimony was due to the challenge of having the witnesses travel from Alberta. As the defence theory was a complete denial, credibility was the only issue at trial. The trial judge convicted the accused of two counts of sexual touching ... which was challenged by the accused on several grounds, including that the trial judge

erred in allowing the complainant and his mother to testify against the accused via video link as opposed to face to face in the courtroom.

[10] In the reasons for judgment authored by Chief Justice MacDonald, the opening premise (at para 19) was that constitutionally, while the accused has a right to be present for his trial and to make full and defence, it is not necessary that witnesses testify in the accused's presence. He went on to say (at para 21) that an accused's right to face his or her accuser in the courtroom remains a fundamental aspect of most criminal trials.

[11] In the course of reviewing the case law and its trends, the Chief Justice further said (at para 24) that it is understandable that the use of video is inversely proportional to the importance of the proposed testimony. In other words, the closer the proffered testimony approaches the heart of the case, the less likely it will be tendered by video.

[12] The Chief Justice also noted (at para 27) that courts have also highlighted the need for a solid evidentiary foundation upon which to exercise their discretion, and particularly so when credibility is at issue where compelling evidence would be demanded.

[13] This review of the caselaw culminated in the enunciation of eight guiding principles set out in para. 32. I incorporate all of these guiding principles by reference in this decision but will revisit the first four of them later in this decision where they are the most germane to the outcome of this application.

[14] In applying those principles in **S.D.L.** the first premise noted by the court (at para 34) was expressed as follows:

Aside from a police officer who provided context for laying the charges, the Crown's entire case rested on the video evidence of the complainant and his mother. In other words, the authorization essentially covered the Crown's entire case. Furthermore, the defence theory was a complete denial, thereby rendering credibility the only issue at trial.

[15] There were added complications in that case, notably the significant technical problems experienced in the video conferencing of the evidence of the complainant and his mother, particularly during cross-examination.

[16] After reviewing the various factors at play, the court allowed the appeal, set aside the convictions and ordered a new trial. For expedience, I will here paraphrase a summary of the court's conclusions again from the case headnote. It recites that the decision to allow the complainant and his mother to testify via video link denied the accused his right to make full answer and defence, which in turn lead to a miscarriage of justice. Credibility was a central issue and while the subject matter was sensitive, the reason for seeking the authorization for video link testimony was not because of the personal impact on the witnesses, but rather the difficulties associated with travel from Alberta. Furthermore, there was no evidentiary basis for the Crown's request. There were also many technical problems which interrupted the flow of meaningful cross-examination.

[17] Although far from being identical, the present case has a number of similarities to **S.D.L.**, foremost among which is that the Crown's case essentially rests on the video evidence of the complainant and her mother. The only other witnesses who the Crown intends to call is the investigating police officer and a relative of the accused.

[18] Where identification and consent are not in issue, it appears that the defence theory will be a complete denial, thereby rendering credibility as the central issue

at trial. It is readily apparent that the assessment of credibility will be critical to the outcome at trial.

[19] The most germane factors set out in s.714.1 must be considered in light of that premise, as must be the consideration of the guiding principles enunciated in **S.D.L.**

[20] I now turn to a consideration of the s.714.1 factors in sequence, albeit in a slightly different order from the way they are listed. I begin with a combination of subparagraphs(a) and (d) which refer to the location and personal circumstances of the witnesses and the suitability of the location from where the witnesses will give evidence. Here, both the complainant (who is now 20 years of age) and her mother reside in British Columbia. Otherwise, their personal circumstances are not known to the court in the absence of any supporting affidavit evidence. Indeed, no evidence has been provided of exceptional circumstances that personally impact these witnesses; only the assertion that in travelling to Nova Scotia, they would be subject to the risks of Covid transmission associated with flying. There is no suggestion that either one is medically vulnerable to that risk by an underlying medical condition.

[21] As to the location in British Columbia where the evidence as proposed would be given by video link, no specifics have been provided other than an indication that the Crown would seek the venue of a local courthouse.

[22] The reference in subparagraph (b) to costs that would be incurred if the witnesses were to appear personally does not come into play in this case where there is no evidence of what those costs would be or by whom they would be borne.

[23] Subparagraph (f) requires the court to also consider the nature and the seriousness of the offence. Here, it goes without saying that the accused is facing very serious charges of sexual assault and sexual touching of a person under the age of 16, in respect of whom he stood in a position of trust and authority. The accused's liberty is obviously at stake if he were to be convicted.

[24] Last but not least, subparagraphs (c) and (e) require a consideration of the nature of the witness' anticipated evidence and the accused's right to a fair and public hearing. These are the most critical factors engaged in the present case. The court is assisted in their application by the first four of the guiding principles articulated in **S.D.L.** which read as follows:

1. As long as it does not negatively impact trial fairness or the open courts principle, testimony by way of video link should be permitted. As the case law suggests, in appropriate circumstances, it can enhance access to justice.
2. That said, when credibility is an issue, the court should authorize testimony via 714.1 only in the face of exceptional circumstances that personally impact the proposed witness. Mere inconvenience should not suffice.
3. When the credibility of the complainant is at stake, the requisite exceptional circumstances described in #2 must be even more compelling.
4. The more significant or complex the proposed video link evidence, the more guarded the court should be.

[25] Trial judges generally refrain from reading the transcript of the Preliminary Inquiry, but it can be expected from the charges in the indictment that the complainant will testify to having been sexually assaulted and touched by the

accused over a period spanning some five years, beginning when she was about 8 years old. Presumably, her mother will speak to some corroborating circumstances.

[26] Defence counsel has indicated that the accused will testify at trial in his defence, which presumably will be a denial of the occurrence of the alleged offences where neither identification or consent arise in this case.

[27] As we all know, there is no more vital component of the truth finding function of the court than cross-examination of witnesses. A thorough cross-examination is unquestionably essential to trial fairness and the right of an accused to make full answer and defence.

[28] To that end, an in person cross-examination of a complainant is preferable to one conducted by video link. Video conferencing has its place but in a case like this, the onus is on the Crown to demonstrate that there are exceptional circumstances of a compelling degree that personally impact the proposed witnesses so as to justify the exercise of the court's discretion to allow their request to testify by video. The only exceptional circumstance advanced by the Crown, through oral and written submissions, is the risk of Covid transmission from flying across the country.

[29] I understand the reluctance of some people to fly in an airplane during this pandemic, but the airlines have heralded a number of extensive safety protocols they have implemented to keep travellers safe. Once in Nova Scotia, witnesses will fall under the requirements of the *Health Protection Act* which specify that individuals engaged in a legal proceeding here may enter the province for participation in the legal proceeding if the individual both self-isolates for the period of time they are in Nova Scotia other than when they are in court, and otherwise comply with the requirements of physical distancing. Beyond that, there are several stringent safety protocols that have been implemented for all Nova Scotia courthouses.

[30] While I appreciate the reluctance and inconvenience of these two Crown witnesses to have to travel to Halifax for this trial, I conclude that that is not a sufficiently compelling exceptional circumstance to authorize their testimony by video link. It is outweighed by the higher objective of fulfilling the truth finding function of the court to enhance trial fairness. I might add that I consider it to be beneficial not only to the defence, but to the presiding judge as well, to observe and absorb in person testimony when key findings of credibility must be made in deciding a case. This point was also observed by the court in **R. v. Petit** 2013 ONSC 2901, a case cited by our Court of Appeal in S.D.L. at para. 31.

[31] In the result, the application by the Crown under s.714.1 of the Code is dismissed, which will necessitate the in person testimony of the complainant and her mother at the upcoming trial.

J.