

SUPREME COURT OF NOVA SCOTIA

Citation: *R. v. W.F.*, 2023 NSSC 276

Date: 20210621

Docket: *Halifax*, No. 490540

Registry: Halifax

Between:

His Majesty the King

v.

W.F.

DECISION (ADJOURNMENT REQUEST)

Restriction on Publication: s.486.4, s.486.5, s.517(1), and s.539(1)

Judge: The Honourable Justice John Bodurtha

Heard: June 21, 2021, in Halifax, Nova Scotia

Oral Decision: June 21, 2021

Written Decision: August 31, 2023

Counsel: William Mathers and Tiffany Thorne, Crown Counsel
Jonathan Hughes, Defence Counsel

By the Court (orally):

Background

[1] During the proceedings in court, W.F. has expressed a preference of being addressed by first and last name. For the purposes of this decision and, in keeping with the publication bans in place, I will use initials only and gender-neutral pronouns throughout.

[2] Defence counsel seeks an adjournment of the continuation trial dates set for July 2 and 5, 2021. They advise in their written submissions of June 14, 2021 that "... I have had no success in obtaining a tentative expert to speak to the medical issues outlined ..." and seek a further adjournment for the purpose of retaining an expert. They conclude the letter by saying, "... we are unfortunately unable to provide any timeline in which the Defence would be prepared to call such a witness."

[3] Defence counsel advised that, today, June 21, 2021, W.F. provided a letter indicating a consultation appointment with Dr. Gregory Bailly on July 12, 2021. Dr. Bailly is a urologist. Defence counsel submits that Dr. Bailly can speak to the functioning of W.F.'s body as of July 12, 2021. Defence counsel argues that after the consultation Dr. Bailly would be able to provide a firmer position on whether he could provide an opinion on W.F.'s condition and whether he can extrapolate what W.F.'s condition would have been in 2018 based on W.F.'s medical file and the upcoming ultrasound (the second document provided).

[4] The second letter indicates that W.F. has an appointment for diagnostic imaging on June 25, 2021 at 13h30 with Dr. Nadine Vaninetti. It reads under appointment type "US Scrotum/Testes" and there is a handwritten note underneath, reading "Seminal Vessilles". There is no evidence before the Court to indicate who wrote this handwritten note. Defence counsel submits that the diagnostic imaging is for an ultrasound of the scrotum, testes and seminal vesicles. These two documents form the basis for the adjournment request.

[5] The Court previously granted adjournment requests by Defence counsel to obtain medical experts. After the close of the Crown's case on February 23, 2021, Defence counsel advised they would be bringing an adjournment request to seek medical evidence. Submissions were heard and, on February 26, 2021, the

adjournment was granted to March 12, 2021 and Defence counsel was directed to provide a status update on March 5, 2021.

[6] On March 5, 2021, Defence counsel advised that Dr. Vaninetti responded to the questions raised by Defence counsel and advised the questions were not within her expertise and that a urologist would be a better option. Defence counsel advised that they were searching for a urologist and that their position was not to proceed with the trial on March 12, 2021.

[7] On March 12, 2021, Defence counsel requested a further adjournment advising that they were still looking to obtain a medical expert. They advised that they spoke with Dr. John Mahoney, a urologist at the Royal Ottawa Hospital, to explore a retainer for his opinion. Defence counsel's position was to adjourn the March 12th trial date and look for dates in July for the continuation of the trial. They advised that the costs of any report would have to be approved by Legal Aid. The matter was further adjourned to July 2 and 5, 2021 for the continuation of the trial. A status hearing was set for May 18, 2021 for an update on the retention of experts.

[8] During the status hearing on May 18, 2021, Defence counsel advised that they had been speaking with Dr. Mahoney and he advised they would be able to provide a report without physically seeing W.F. Dr. Mahoney believed he could provide a report and testify on that basis. Defence counsel was still awaiting confirmation from Legal Aid regarding whether they would cover the costs of an expert report. A further status hearing was scheduled for June 2, 2021.

[9] On June 2, 2021, there was another status update. Defence counsel relayed that Dr. Mahoney advised he would not be able to provide an opinion on the issues discussed and recommended Dr. Bailly. Dr. Bailly indicated that it would not be in his area of expertise either and he referred them to another doctor who advised that he would be unable to assist at this time. Defence counsel takes the position that this is crucial information for the Court to hear and seeks a further adjournment of the trial to obtain an expert who can speak to the issue whether W.F. could produce ejaculate.

[10] During today's hearing the Crown argued W.F.'s positions keep shifting and do not reflect the evidence. For instance, W.F. specifically stated that they took testosterone supplements in their statement to the police but today W.F. is saying they did not take such a supplement at that time. The Crown raised concerns as to whether the medical evidence could provide a full defence because ejaculate is not

just sperm. There is also a previous finding of fact by this Court that W.F. can ejaculate, *R. v. D.A.M.*, [1999] NSJ No. 468, 1999 CarswellNS 431, at paras. 29 and 77 which is contrary to the position that the Defence now takes.

[11] Lastly, the Crown argues that it would be difficult for an expert to determine what W.F.'s condition would have been at the time of the alleged offences, a period from January 2012 to January 2018. The Crown advised they would want to cross-examine any expert on the fact that, at the time of W.F.'s statement to the police they said they were taking testosterone which is contrary to their position today.

Issue

[5] Should the Court grant W.F.'s request for an adjournment of the hearing scheduled for July 2 and 5, 2021?

Analysis

[12] The decision whether to adjourn a trial is within the discretion of the trial judge, however it is not unfettered: it must be "grounded on reasons which are well founded in law": *R. v. Starcheski*, 2005 ABCA 136, para. 15; *Barrette v. R.* [1977] 2 S.C.R. 121, para. 6.

[13] For the reasons that follow, W.F.'s application for an adjournment is denied.

Medical Evidence

[14] The medical evidence W.F. intends to present will involve the testimony of a medical expert. In *Darville v. The Queen* (1956), 116 CCC 113, (SCC) the Supreme Court of Canada outlined the test for an adjournment where a witness is not available, the factors are as follows:

a) The Witness Being Material to the Case

[15] The Defence argues that this is pertinent information and necessary to have a fair adjudication of the matter. They believe that the information will be dispositive because the central issue to the adjournment request is whether W.F. was able to ejaculate. The Defence believes the information will show that W.F. had an orchiectomy in 1984, and, therefore, since he did not have testicles and if his seminal vesicles are not functioning it would make it impossible to ejaculate. I

note that this contradicts Justice Cacchione's sentencing decision in *D.A.M.* for offences between 1993 to 1998 which included an agreed statement of facts where W.F. agreed that he could ejaculate.

[16] I have concerns as to the materiality of the witness given the previous admission by W.F. in *D.A.M.* and the ability of a medical expert to definitively answer the question whether W.F. could ejaculate during the period of January 2012 to January 2018 based on an examination of W.F. in 2021. I do not think the medical evidence will be dispositive of the issues as Defence counsel indicates. I agree that the evidence will go to credibility but is not necessarily a full defence to the alleged offences.

b) The Party Requesting the Adjournment Has Not Been Guilty of Laches or Neglect in Omitting to Procure the Attendance of the Witness

[17] On February 14, 2018 W.F. was arrested on this matter. Their trial began in February 2021 and was adjourned to allow W.F. an opportunity to obtain medical evidence. W.F. has had more than three years to obtain medical evidence to assist in their defence of the charges.

[18] W.F. has not provided any information or supporting evidence to show when they first sought these referrals and appointments. The Court has little evidence to show that W.F. has been diligent in obtaining referrals and appointments to gather the medical evidence.

[19] W.F. has raised various purported medical defences to the alleged offences before. At a previous adjournment hearing on December 2, 2020, W.F. informed the Court that they had an appointment with Dr. Vanietti [*sic, Vaninetti*] on March 24, 2021, a chromosome and internal disorders specialist, and that they were also in the process of trying to find an appointment with the IWK Medical Genetics Services. There was no evidence before me explaining whether W.F. attended with respect to the appointment with Dr. Vaninetti or W.F.'s efforts in trying to obtain an appointment with the IWK Medical Genetics Services.

[20] W.F. now says they have a couple appointments in July 2021. However, there is nothing concrete before the Court as to what may or may not result from these appointments. The Court finds that W.F. is guilty of laches or neglect because there is no evidence before the court of their diligence. W.F. can not have unlimited time to prepare and obtain witnesses and medical reports.

c) There Being a Reasonable Expectation that the Witness can be Procured at the Future Time to Which it is Sought to Put Off the Trial

[21] W.F. brought no evidence of this before the Court. W.F. advised that they have an appointment with Dr. Bailly. There is no indication regarding how long it will take to procure a medical report. In essence, this is a request for an indeterminate adjournment.

Conclusion on Darville Factors

[22] In reviewing all three of the *Darville* factors, the Court finds that W.F. has known about their potential medical defence for many years, at the latest since February, 2021, but has failed to demonstrate to this Court that they have taken sufficient steps to procure any potential medical witnesses for either this trial date or a future trial date. The Court is not convinced that the proposed witness is material to the case based on the Crown's concerns, but I base my decision on the other *Darville* factors.

[23] W.F. has referred to various medical defences, to the police, his previous counsel, the Crown, and this Court over the years with none of the assertions being supported by any actual expert medical evidence. Without some concrete evidence before the Court of an anticipated expert medical opinion, the Court is unable to grant an adjournment based on the *Darville* factors. None of W.F.'s assertions has resulted in any formal medical evidence from the obtained adjournment on February 26, 2021. At that time, the Court said in its oral decision that "... the administration of justice would not be brought into disrepute over a short delay to allow the truth seeking function to run its course." Four months later there is still nothing substantive to support W.F.'s medical assertions.

Prejudice to a Party

[24] Another factor for the Court to consider is the prejudice a party may suffer as a result of an adjournment. With the passage of time, memories of witnesses fade and the Crown's case generally gets weaker. The Defence argues that a further adjournment to allow these examinations to take place would not prejudice the Crown's case as it is now closed. I note this does not take into consideration that the Crown may wish to call rebuttal witnesses, so any further delay could affect their ability to recall events. To say there is no prejudice to the Crown is incorrect. In addition, this is at least the fourth adjournment request on this file by the Defence.

[25] The Crown's case closed in February, 2021, and, at that time, the Crown did not oppose the Defence request for an adjournment of four months to allow the Defence to obtain an expert witness. To date there is still nothing concrete from the Defence, such as a letter from an expert indicating they have been retained to provide the opinion sought.

[26] Complacency towards adjournments is a thing of the past: see *Jordan, Cody* and *Thanabalasingham*. The Supreme Court of Canada recently provided guidance on adjournment requests in *Thanabalasingham*:

As we did in both *Jordan* and *Cody*, we again emphasize the special role that trial judges - who are charged with curtailing unnecessary delay and changing courtroom culture - must play in this shift (*Cody*, at para. 37, citing *Jordan*, at para. 114). For example, where the defence seeks an adjournment, a court may deny it "on the basis that it would result in unacceptably long delay, even where it would be deductible as defence delay" (*Cody*, at para. 37). In sum, practices that were formerly commonplace or merely tolerated are no longer compatible with the right guaranteed by s. 11(b) of the *Charter* - a right that inures not just to the benefit of accused persons, but to the benefit of victims and society as a whole as well: *Thanabalasingham*, 2020 SCC 18.

Conclusion

[27] W.F.'s application for an adjournment is denied because the Court finds W.F. has had ample time to prepare for trial and retain expert witnesses.

[28] These are serious allegations. A further adjournment would result in an unacceptably long delay. It is now June 14, 2021; the alleged offences occurred during the period January 2012 to January 2018, W.F. was arrested on February 14, 2018, and the Crown closed its case in February, 2021. To adjourn this matter again indefinitely for a potential medical witness is not within the interests of justice. Both the victim and society at large deserve for the matter to be heard in a timely manner.

Bodurtha, J.