

CANADA / JUDGMENT

R. v. George

2020 BCSC 212

COURT

Supreme Court of British Columbia

DECIDED

22 January 2020

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2020 BCSC 212 R. v. George

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. George,

2020 BCSC 212

Date: 20200122

Docket: 41589-2; 41589-4

Registry: Campbell River

Regina

v.

Isaiah Tarcisius Tayden George

Restriction on Publication: Pursuant to 486.4(2.1) C.C.C.

Before: The Honourable Mr. Justice MacKenzie

Oral Ruling on s. 486.2(2) Application

Counsel for the Crown:

B.A. Goddard

Counsel for the Accused:

L. Stansfield

Place and Date of Trial/Hearing:

Campbell River, B.C.

January 13-17 and 20-22, 2020

Place and Date of Judgment:

Campbell River, B.C.

January 22, 2020

- [1] THE COURT: Mr. George is charged on this indictment with sexually assaulting the complainant on September 1, 2018, here in Campbell River. Mr. George has pled not guilty and elected to be tried by a court composed of a judge without a jury. The trial has commenced and I have ruled on two voir dres and have heard from several witnesses in the trial proper. The complainant is scheduled to be the next witness.
- [2] As a result, the Crown now applies, pursuant to s. 486.2(2) of the Criminal Code, for an order allowing the complainant to testify via video link from outside the courtroom. Based on past experience, this is a procedure that would utilize closed-circuit television, which would enable Mr. George and counsel in the courtroom to see the face and shoulders or upper body of the complainant while she testifies, but the complainant would be unable to see Mr. George.
- [3] I am also advised there is going to be a split screen where the complainant would be able to see Crown counsel in direct examination and defence counsel in cross, as well as myself as the trial judge.
- [4] Both Mr. George and the complainant are young indigenous persons who had been acquaintances prior to the alleged incident. One of Mr. George's closer friends is Luke Hawkins, who had also been the complainant's boyfriend for several months before they broke up a couple of weeks prior to September 1, 2018. Mr. Hawkins has already testified as to his observations involving the complainant and Mr. George on the night in question.
- [5] The allegation made by the complainant, based on what I have heard in this matter, both on the voir dres and in pre-trial applications, involves sexual intercourse after both Mr. George and the complainant and several of their friends were celebrating the complainant's 19th birthday.
- [6] The complainant is now 20 years of age. Mr. George is approximately the same age.
- [7] Defence counsel opposes the specific application made by the Crown that would permit the complainant to testify outside the courtroom, but is agreeable to the complainant being able to testify behind a screen in order to not have to see or look at Mr. George while she is testifying.
- [8] In support of the application, the Crown has filed an affidavit from the complainant who attests to an unfortunate childhood, including the fact that she says her parents are residential school survivors. She also acknowledges having significant difficulty with alcohol consumption and a general mistrust of the police and other authority figures. However, the

primary concern expressed by the complainant in her affidavit is her concern of having to face her alleged assailant and her emotional state, given the impact she submits the alleged incident has had on her. She deposes it will be "much easier" for her to focus and provide a more fulsome recollection of the incident if she is able to testify from a room outside of the courtroom. She further deposes that she is fearful of Mr. George to a certain degree and concerned about how he might react when she testifies.

[9] The relevant Criminal Code provision provides as follows:

(2) Despite section 650, in any proceedings against an accused, the judge or justice may, on application of the prosecutor in respect of a witness, or on application of a witness, order that the witness testify outside the court room or behind a screen or other device that would allow the witness not to see the accused if the judge or justice is of the opinion that the order would facilitate the giving of a full and candid account by the witness of the acts complained of or would otherwise be in the interest of the proper administration of justice.

[10] Subsection (3) of s. 486.2 goes on to list several factors the court must consider in determining whether to make an order under s. 486.2(2). I will deal with what I view to be the relevant factors in subsection (3) in a moment.

[11] In addition, subsection (5) states:

(5) A witness shall not testify outside the court room in accordance with an order made under subsection (1) or (2) unless arrangements are made for the accused, the judge or justice and the jury to watch the testimony of the witness by means of closed-circuit television or otherwise and the accused is permitted to communicate with counsel while watching the testimony.

[12] Finally, although subsection (6) is primarily relevant in jury trials, it does state:

(6) No adverse inference may be drawn from the fact that an order is, or is not, made under subsection (1) or (2).

[13] I pause here to note that I accept that I can only order the particular accommodation requested by the Crown, that is that the complainant testify outside the courtroom, and not substitute on my own volition an order that the complainant testify behind a screen, unless the requested accommodation might interfere with the proper administration of justice.

[14] As Justice Gower of the Yukon Supreme Court stated at paragraph 16 of *R. v. Netro*, 2018 YKSC 11:

[16] ... In other words, the presiding judge must rule on the application which is before the court and does not have the discretion to consider a testimonial accommodation other than that requested by the moving party, absent evidence of interference with the proper administration of justice: *R. v. W.V.*, 2016 ONSC 874, at para. 10.

- [15] In my view, there is no need to canvass this alternative accommodation until I rule on the Crown's specific application for out-of-court testimonial accommodation.
- [16] In a s. 486.2(2) application, the Crown must establish, on a balance of probabilities, that the requested order "would facilitate the giving of a full and candid account by the witness of the acts complained of or would otherwise be in the interest of the proper administration of justice." The Crown has to establish one of these two requirements exists.
- [17] In this analysis, the Crown understandably emphasizes that Parliament has made a significant amendment to s. 486.2(2) by deleting the word "necessary" and replacing it with the word "facilitate".
- [18] Justice Gower discussed the significance of this amendment in *Netro* at paragraph 18 and stated:
- [18] In *R. v. J.S. Cozens J.* considered the amendment to s. 486.2(2) that changed the test ... from "is necessary to obtain" a full and candid account to "would facilitate the giving of" such an account. He concluded that the amendment clearly reflects Parliament's intention to lower the threshold required in order to allow a witness to testify from outside the courtroom, or behind a screen or other device that would allow the witness not to see the accused *Cozens J.* relied on *R. v. Jimaleh* for his conclusion.
- [19] The court in *Netro* also considered the comments of Judge Gorman in *R. v. K.B.*, Newfoundland Provincial Court, where the court there noted that no longer, given the fact that "necessary" has been removed, must the Crown establish that particular standard of proof. He notes the inclusion of the word "facilitate" makes it a lower threshold when it comes to making an order under s. 486.2(2).
- [20] In *Netro*, Judge Gower did recognize the concern of defence counsel in that case and probably defence counsel in every such case, that is, that this amendment "may make it increasingly common for complainants in sexual assault matters to be allowed to testify with the assistance of testimonial accommodation."
- [21] However, he also noted that the inclusion of the ability to grant an order under this section, where the court determines it would be in the interests of the proper administration of justice, means there is no doubt that the amendments to these sections broadened the range of situations where a judge or justice is empowered to order a support person, a screen, or out-of-court testimony.
- [22] Similarly, Justice Backhouse said in *Jimaleh*:

The lowering of the threshold in the case of an adult witness "indicates an intention to make testifying by closed circuit or behind a screen a more commonplace occurrence."

[23] However, notwithstanding the amendment to this section, this type of application is not a fait accompli simply by the Crown making the application. The Crown or a witness is still required to provide some evidence in support of the application. Generally speaking, when dealing with a witness over the age of 18, in my view, this would mean affidavit or viva voce evidence from the witness, with or without additional material.

[24] Moreover, I also recognize, as the defence has quite properly emphasized in this case, if Parliament wanted to create a rebuttal presumption that such an order would be granted for witnesses over the age of 18, it could easily have included the same language in subsection (2) as it did in subsection (1). By not doing so, the onus lies on the Crown to satisfy the court such an order would facilitate the giving of a full and candid account of the act complained of, even though the threshold is now lower, given the use of the word "facilitate".

[25] In *R. v. Hagrais*, an Ontario decision, the court there concluded that:

Even under the original wording of the provision ...

-- this is at paragraph 12 --

... the Applicant is not required to demonstrate that "exceptional and inordinate stress" will be caused to a witness if they are not allowed to testify outside of the courtroom.

[26] The court goes on to state that the evidence is not required to take any particular form and states:

The evidence on the application must simply provide a reliable basis for the determination that the proposed testimonial aid would facilitate the giving of a full and candid account of the acts complained of or is otherwise in the interest of the proper administration of justice

quoting from the leading Supreme Court of Canada case from some 25 years ago of *Levogiannis*.

[27] I am also of the view that it is important to recognize that what was the traditional objection to such testimonial accommodation, that is, that it would preclude an accused person from full answer and defence and the ability to directly confront one's accuser, is no longer a sufficient reason to deny such an application. As Justice Gower found in *Netro* at paragraph 13:

[13] Under our criminal justice system, an accused has no constitutional right to a face-to-face "confrontation" with the complainant making a sexual assault allegation, or indeed an allegation of any criminal offence: *R. v. J.Z.S.*, 2008 BCCA 401. As Kilpatrick J. said in *R. v. Hainnu* "the "right" of face-to-face confrontation forms no part of the tenets of fundamental justice guaranteed by the Charter." Rather, it is the right to a fair trial and the right to make full answer and defence that are protected

[28] Justice Boswell in *R. v. Evans* noted:

It has been conclusively determined that the use of testimonial aids, such as a screen or video-linked testimony may well promote society's interest in getting at the truth. At the same time it does not undermine the principles of fundamental justice, nor impinge on the accused's Charter-protected right to a fair trial

Again quoting J.Z.S., in our Court of Appeal.

- [29] In my view, granting the requested order would not inhibit Mr. George's right to full answer and defence, nor undermine the presumption of innocence.
- [30] As I stated, the leading case with respect to the truth-seeking process is Levogiannis, and what is central on these types of applications is whether the requested testimonial aid or accommodation will enhance or undermine the truth-seeking function of the criminal trial process. In this regard, s. 486.2 of the Criminal Code is indeed reflective of Parliament's efforts to remove barriers to the truth-seeking process in the criminal justice system.
- [31] I now turn to the relevant factors that are outlined in subsection (3) that are of significance to the present application. First off, the age of the witness; as I mentioned, she is 20, only one and a quarter years over the mandatory age which would permit an order pursuant to subsection (1). The nature of the offence is of course significant. As I mentioned, it is an allegation involving full sexual intercourse. There was a relationship between the witness and Mr. George, as I mentioned, they were acquaintances and one of Mr. George's closer friends was a boyfriend to the complainant.
- [32] The complainant has deposed in her affidavit that she is concerned about some potential intimidation or retaliation, but I agree with defence counsel that this is not the primary consideration in this particular case. At the same time, I agree with Crown counsel that factor (g), society's interest in encouraging the reporting of offences and the participation of victims and witnesses in the criminal justice system, is of significance, given the nature of the allegations.
- [33] In the end, the complainant's principal concerns are having to testify in the presence of Mr. George about the allegation of sexual assault. On this point, as Justice Voith in the Supreme Court of B.C. observed in *Dosanjh*, while s. 486.2 is not limited to specific offences, nor does it expressly require that a witness's difficulty in giving evidence be tied or related to the presence of the accused, virtually all of the cases that he canvassed in *Dosanjh* in relation to a 486.2(2) application were cases of sexual offences or domestic violence.
- [34] He then states at paragraph 19:
- [19] I emphasize this only because in such cases, for reasons that are readily understood, victims or complainants often struggle to give their evidence in the presence of an accused. It is to be noted that s. 486.2(2) allows a court to order that a witness "testify outside the court room or behind a screen or other device that would allow the witness not to see the accused".

He concludes in the next paragraph:

- [20] The importance of having complainants or witnesses be prepared to come to court and to have them give their evidence openly is a dominant and pervasive theme in these cases and is a central reason that orders for testimonial accommodation are often made.
- [35] Being guided by these principles and the relevant factors outlined in subsection (3), especially the nature of the allegation, coupled with society's interest in encouraging the reporting of sexual assaults, balancing the competing interests at play in this type of application, and the totality of the circumstances, I am persuaded the Crown has met the burden of establishing it would be appropriate to grant the specific order it seeks.
- [36] As such, the complainant will be permitted to testify in a room outside the courtroom. Arrangements will be made between counsel to have any exhibits or prior statements put to the complainant as is necessary and as agreed to between counsel and the court.

"The Honourable Mr. Justice B.D. MacKenzie"

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/20/02/2020BCSC0212.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/r-v-george-2020-bcsc-212>

Prepared on 28 October 2026 · Esheria