

CANADA / JUDGMENT

R. v. McGenn

2018 BCSC 708

COURT

Supreme Court of British Columbia

DECIDED

1 May 2018

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2018 BCSC 708 R. v. McGenn IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: R. v. McGenn, 2018 BCSC 708 Date: 20180501 Docket: 66276 Registry: Chilliwack Regina v. Shayne Daniel Duncan McGenn and Sarah Margaret Sather Before: The Honourable Madam Justice Devlin Reasons for Judgment - Testimonial Accommodation Counsel for the Crown: L.J. Kenworthy Counsel for the Defendant Shayne McGenn: J.B. Turner Counsel for the Defendant Sarah Sather: D.M. Turko, Q.C. Place and Date of Trial/Hearing: New Westminster, B.C. March 28, 2018 Place and Date of Judgment: New Westminster, B.C. May 1, 2018

INTRODUCTION

- [1] The accused Shayne Daniel McGenn is charged with one count of second degree murder of David Delaney. Mr. McGenn's co-accused Sarah Margaret Sather is charged with one count of being an accessory after the fact to murder. The judge alone trial is scheduled to commence in June 2018.
- [2] The Crown applies for two orders regarding the witness Barbara Koeller. The Crown seeks orders pursuant to s. 486.2 and s. 486.7 of the Criminal Code, R.S.C., 1985, c. C-46 [Code] to permit the witness to testify outside of the courtroom in the presence of courthouse dog Caber and his handler Ms. Gramlich. Counsel for Mr. McGenn and Ms. Sather do not oppose the application.
- [3] On March 28, 2018 I granted the Crown's application with reasons to follow. These are those reasons.

BACKGROUND

- [4] At the time of the offence Ms. Koeller had a close relationship with Mr. McGenn. They referred to each other as mother and son. The Crown anticipates that Ms. Koeller will provide evidence of Mr. McGenn's admission to her that he caused the death of Mr. Delaney.
- [5] The material the Crown filed in support of this application establishes that Ms. Koeller is very anxious about testifying. She does not want to be in the same room as Mr. McGenn and is fearful that Mr. McGenn will seek retribution.

- [6] Mr. Koeller has had significant health issues in the past and the stress associated with the prospect of testifying at Mr. McGenn's trial has impacted her health.
- [7] Ms. Koeller testified at the preliminary inquiry with the same accommodation the Crown is seeking for trial. As recently as March 2018 Ms. Koeller advised investigators she was experiencing anxiety about testifying and does not think she can function if in the same room as Mr. McGenn. The Legal Principles
- [8] There is no dispute with respect to the legal principles which govern my consideration of the Crown's applications. Therefore, I shall simply set out the legal principles that govern my analysis.
- [9] Section 486.2(2) of the Code states: 486.2 (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) sets out the factors that a judge must consider on the application. The factors applicable to this application are as follows:
- (a) the age of the witness;
 - (b) the witness' mental or physical disabilities, if any;
 - (c) the nature of the offence;
 - (d) the nature of any relationship between the witness and the accused;
 - (e) whether the witness needs the order for their security or to protect them from intimidation or retaliation; * * *
 - (g) society's interest in encouraging the reporting of offences and the participation of victims and witnesses in the criminal justice process; and
 - (h) any other factor that the judge or justice considers relevant.
- [11] Similar factors apply to my consideration of an order pursuant to s. 486.7 of the Code.

Analysis

- [12] I will conduct my analysis with reference to the relevant factors set out above. Age of the witness
- [13] Ms. Koeller is an adult and her age is not a relevant factor on this application. The Witness mental or physical disabilities

- [14] Ms. Koeller suffers from extreme anxiety due to the prospect of appearing in the courtroom with Mr. McGenn. Ms. Koeller also has other health issues and the stress related to testifying further exacerbates her overall poor health. The nature of the offence
- [15] Mr. McGenn is charged with the very serious offence of second degree murder. Ms. Koeller will be testifying about Mr. McGenn's admissions to that offence. The nature of their relationship
- [16] Ms. Koeller was very close to Mr. McGenn and she had a mother-son type relationship with Mr. McGenn. Ms. Koeller feels a sense of betrayal in testifying at Mr. McGenn's trial and this contributes to her stress and anxiety. The need to witness security or protection
- [17] While there have been no direct threats, Ms. Koeller has expressed a genuine fear of retribution and believes she is at risk by testifying at trial. This fear contributes to Ms. Koeller's stress and anxiety. Society's interest in encouraging the reporting of offences and the participating of victims and witnesses in the criminal justice process
- [18] This is a significant factor in favour of the Crown's application. Ms. Koeller's evidence of Mr. McGenn's confession to her that he killed his roommate is central to the Crown's case against Mr. McGenn. Without the requested accommodation, it is unlikely that Ms. Koeller would be able to provide a full and candid account of what Mr. McGenn told her. The truth seeking function of the trial would be frustrated without Ms. Koeller's testimony.
- [19] Having considered all of these factors, I find there is an overwhelming basis to grant the orders requested by the Crown. I am satisfied that the accommodations sought would facilitate Ms. Koeller's ability to provide a full and candid account of her evidence.

Conclusion

- [20] The Crown's application for an Order pursuant to s. 486.2(2) to permit Ms. Koeller to testify outside of the courtroom is granted. I also grant the Crown's application for an Order pursuant to s. 486.7 to permit Ms. Koeller to be accompanied by Caber, the courthouse dog and his handler Ms. Gramlich. "Devlin J."

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