

CANADA / JUDGMENT

R. v. Sutherland

2020 BCSC 2318

COURT

Supreme Court of British Columbia

DECIDED

27 November 2020

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2020 BCSC 2318 R. v. Sutherland

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Sutherland,

2020 BCSC 2318

Date: 20201127

Docket: 27689-2, 27689-3

Registry: Quesnel

Rex

v.

Aaron Craig Sutherland

Before: The Honourable Madam Justice Church

Oral Ruling

on Crown Application under s. 714.1 C.C.C.

Counsel for the Crown appearing by teleconference:

B.D.M. Israel

Counsel for the Accused appearing by teleconference:

R. Larmer

Place and Date of Hearing:

Quesnel, B.C.

November 26, 2020

Place and Date of Judgment:

Quesnel, B.C.

November 27, 2020

- [1] THE COURT (by teleconference): Aaron Craig Sutherland is charged on Indictment 27689-2 with assault with a weapon and assault causing bodily harm of Cody Sutherland. These offences are alleged to have occurred on August 12, 2019, at Quesnel, B.C.
- [2] Mr. Sutherland's trial on these charges is scheduled to take place in Quesnel for three days during the December 7, 2020, assize.
- [3] The Crown case will consist of testimony from only two witnesses, one police witness and a civilian witness, Michelle Knights, who the Crown says was an eyewitness to the alleged offences. Ms. Knights resides in the Okanagan.
- [4] The Crown applies for an order pursuant to s. 714.1 of the Criminal Code that Ms. Knights be permitted to testify at trial via videoconference because of the current public health emergency and public health directive to avoid non-essential travel, and because Ms. Knights suffers from anxiety that makes travel by air or land very difficult for her.
- [5] The Crown also submits that Ms. Knights suffers from additional medical conditions, including a cardiac condition and asthma, and is especially concerned about travelling to Quesnel because her medical conditions put her at higher risk were she to contract COVID-19.
- [6] The Crown proposes that Ms. Knights testify via videoconference from the courthouse nearest to her location in the Okanagan.
- [7] If this court is not prepared to grant such an order, the Crown seeks an adjournment of the trial date.
- [8] Mr. Sutherland is opposed to an order that Ms. Knights testify via videoconference. He submits that there is an insufficient evidentiary basis to make such an order in this case. He also submits that the case against him rests almost entirely on the testimony of Ms. Knights and there are significant credibility issues with respect to her testimony. Counsel for Mr. Sutherland submitted that the defence theory of the case is that Ms. Knights is lying. He questions the veracity of her claims to have underlying health conditions that impact her attendance at trial, given that none of those concerns were raised when the matter was previously scheduled for trial on September 21, 2020, and he submits that the evidence of such health conditions is insufficient.

- [9] Defence counsel submits that there should be compelling exceptional circumstances to warrant such an order being made and submitted that the current provincial state of emergency and public health directives do not, by themselves, constitute sufficiently compelling reason to justify from a departure from established trial procedures and in-person testimony.
- [10] Defence counsel also pointed to some logistical difficulties related to the accused's right to make full answer and defence, in that he anticipates putting certain documents to Ms. Knights in cross-examination which will, if she is permitted to testify via videoconference, require that the documents be produced and sent to the location where she is testifying in advance of her testimony.
- [11] He also submitted that it will be more difficult for the court to observe her responses by videoconference if she does not testify in person.
- [12] Section 714.1 of the Criminal Code allows the court to order that a witness give evidence by audio conference 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 witness;
 - (b) the costs that would be incurred if the witness were to appear [personally];
 - ...
 - (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 audioconference.
- [13] As I have noted, Ms. Knights resides in the Okanagan and during the winter months, at least, the drive to Quesnel would probably take somewhere in the realm of six to seven hours. There was no evidence before me as to the costs that would be incurred if Ms. Knights was to appear personally at the trial.
- [14] It is anticipated that Ms. Knights will give eyewitness testimony about the alleged offences and she is the only Crown witness in this regard. Her evidence is material and highly relevant.
- [15] The Crown proposes that her testimony be given from the courthouse nearest to where she resides, and thus would utilize the court's own videoconference facility. I have no concerns about the suitability of that location.

- [16] While I appreciate the point of defence counsel that credibility of Ms. Knights will be front and centre in this trial, it is certainly arguable that credibility can still be assessed using available videoconference technology. The court's own videoconferencing platform is used throughout the Province on a daily basis, and is of sufficient quality to ensure that witnesses are clearly seen and heard.
- [17] The mere fact that a witness appears by videoconference is not, of itself, an impairment to full cross-examination or to the court observing the physical demeanour of the witness as he or she testifies.
- [18] The offences with which Mr. Sutherland is charged are serious, but they are not the most serious criminal offences found in the Criminal Code. Having said that, I note that Mr. Sutherland is detained on these files, as well as other matters, and so it may be that his liberty is at stake if he is convicted.
- [19] I also note that defence counsel's ability to effectively confront Ms. Knights with documentary evidence may well be impacted if she is permitted to testify via videoconference.
- [20] With respect to the personal circumstances of Ms. Knights, the Crown urges me to take judicial notice of various factors with respect to the COVID-19 pandemic and submits that those more general factors, together with evidence about Ms. Knights' specific circumstances, should tip the balance in favour of an order permitting her to testify via videoconference.
- [21] Mr. Justice Varpio in the case of *R. v. Cunningham*, 2020 ONSC 2724 at para. 18 found that the court could take judicial notice of the following factors with respect to COVID-19:
1. COVID-19 is spread by person-to-person contact either directly or via indirect transmission;
 2. Individuals may be able to spread the virus while they are either pre-symptomatic or are asymptomatic;
 3. The virus can be lethal;
 4. The rates of mortality appear to be pronounced among the aged as well as among those who have certain underlying conditions such as respiratory ailments. The mortality rate among those who do not fall within these categories is not nearly as high; and
 5. Social distancing has been utilized to lessen the rate of infection in the population and, as such, the failure to adhere to social distancing will generally increase the rate of infection.
- [22] I agree that this court can take judicial notice of these factors. I have also considered the evidence attached to the affidavit of Abby Giesbrecht filed by the Crown in support of this application in which she described publicly-available information about the recent surge of COVID-19 cases in British Columbia and the public health directive to avoid all non-essential travel to other regions inside and outside the province.

- [23] While I accept that the purpose of the public health directive was to significantly reduce interactions and travel to try to reduce the spread of COVID-19 within the community, I also note that the day-to-day activities of courts all around the province are an essential service and are thus exempt from that directive.
- [24] I agree with the submission of defence counsel that there is an insufficient evidentiary basis for this application, but not for the same reasons. I have specific concerns about the evidence relied on by the Crown regarding Ms. Knights' specific circumstances and her underlying health conditions.
- [25] The Crown relies on the affidavit of Ms. Giesbrecht who deposes, in paras. 33, 34, and 35, that:
33. I have been told and believe that Michelle Knights resides in the Okanagan and has advised that she has an anxiety condition which makes travel by land or air very difficult. I attach a copy of a doctor's note (redacted for privacy reasons) which Ms. Knights has provided to our office as Exhibit "L".
34. I have been told and believe that Ms. Knights suffers from additional medical conditions, however her medical file has not been fully transferred from Quesnel so Exhibit "K" does not address them. These conditions include a cardiac condition and asthma.
35. I have been told and believe that Ms. Knights is especially concerned about travelling to Quesnel because her medical conditions put her at a higher risk, were she to contract COVID-19.
- [26] Nowhere in her affidavit does Ms. Giesbrecht say who told her this information. I cannot tell from that evidence whether it is hearsay, that is information conveyed to Ms. Giesbrecht by Ms. Knights herself, or possibly double or even triple hearsay, information conveyed to Ms. Giesbrecht by some other person on behalf of Ms. Knights. Because of the way that affidavit is framed, I have no way of assessing either the admissibility of this evidence or even its reliability. This is simply not a proper evidentiary basis to establish that Ms. Knights has underlying health conditions that place her at a high risk in the event that she contracts COVID-19.
- [27] The application should have been supported with direct evidence in the form of an affidavit of Ms. Knights herself as to her underlying health conditions.
- [28] Both Crown and defence counsel referred me to a number of cases that have considered the application of s. 714.1 during the pandemic. I found the case of this court, *R. v. Zamora*, 2020 BCSC 1259, of most assistance in my determination of this application. Although that application involved a police witness, the officer who was based in Halifax provided clear affidavit evidence and was cross-examined about his medical condition. The court took judicial notice of the fact that interprovincial travel, while not impossible, was discouraged in order to prevent people from contracting COVID-19. The judge accepted the affidavit evidence of the constable himself that he had obtained medical advice about his particular

situation and that advice was not to travel outside of Nova Scotia, and that factor, when weighed with the other factors in s. 714.1, persuaded her to exercise her discretion and allow the Crown application.

- [29] That is clearly not the case here. There is insufficient evidence for me to find that Ms. Knights has underlying conditions that put her at greater risk if she were to contract COVID-19 or that she has obtained medical advice about her situation that discourages travel outside of her region.
- [30] In the absence of proper evidence, this factor does not weigh in favour of granting the Crown application for Ms. Knights to testify via videoconference.
- [31] In my view, the evidence falls short of what would be needed to weigh all of the factors set out in s. 714.1, and I am therefore not prepared to exercise my discretion and grant the Crown application for Ms. Knights to testify at trial via videoconference.
- [32] The Crown's alternative application is to adjourn the currently scheduled trial date. Mr. Sutherland is opposed to the adjournment of the trial and says that he is in custody on this file and has the right to be tried in a reasonable time. This matter was previously scheduled for trial dates on the September 21, 2020, assize, but was bumped due to lack of court time. There was another matter proceeding on that date that had priority in the Quesnel courthouse.
- [33] I note that Ms. Giesbrecht does depose that Ms. Knights provided her with a doctor's note, which is attached as an exhibit and describes Ms. Knights suffers from anxiety that "makes travel by land or air very difficult." This bold statement is not particularly helpful and it does not say that travel is impossible due to her anxiety condition, but I infer from the doctor's note and the Crown's submissions that winter driving conditions may exacerbate Ms. Knights' anxiety, given Crown counsel's statement that Ms. Knights could attend court with the assistance of a victim services worker who could drive her to Quesnel if the trial was scheduled after the winter months in either the spring or the early summer.
- [34] Counsel for Mr. Sutherland made a compelling case that Ms. Knights should attend the trial in person. I accept that there is at least some evidence that travel, particularly winter travel, is very difficult for her due to her anxiety condition. I do not doubt that driving the 550 or so kilometres from the Okanagan to Quesnel in December could exacerbate Ms. Knights' anxiety, given the unpredictable and potentially hazardous road conditions. I note that the date of the alleged offences is August 12, 2019, and that a trial date in the spring of 2021 would still be within the Jordan deadline.
- [35] The Crown also advised me that Mr. Sutherland is in custody, not only on this matter, but also on other matters. I also note that the trial date that was previously scheduled in September 2020 was adjourned as a result of lack of court time.

- [36] In all of the circumstances, I am prepared to grant the Crown application for an adjournment of the trial to allow for it to be rescheduled at a time when Ms. Knights can travel to Quesnel in person with the assistance of a victim services worker.
- [37] Accordingly, the trial dates that are scheduled on the December 7th assize are hereby cancelled. I will adjourn this matter over to a new date for counsel to fix a trial date in early 2021.

"The Honourable Madam Justice Church"

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