

IN THE YOUTH JUSTICE COURT OF NOVA SCOTIA

R. v. T.(B.) 2012 NSPC 60

Date: June 29, 2012

Docket: 2388561 -
2388565

Registry: Halifax

BETWEEN:

Her Majesty The Queen v. T.(B.)

and

Christopher Picco and Jerrico Upshaw, Applicants

and

The Halifax Herald Limited, Intervenor

ORAL DECISION ON APPLICATION FOR PUBLICATION BAN

JUDGE: The Honourable Anne S. Derrick

HEARD: June 29, 2012

ORAL DECISION: June 29, 2012

CHARGES: sections 235, 344, 355(b), 342(1)(c), and 88(1), of the
Criminal Code

COUNSEL: Ronald Lacey and Kimberly McOnie, for the Crown
Peter Planetta, for Christopher Picco
Brian Church, for Jerrico Upshaw
Luke Craggs, for T.(B.) (not appearing)
Nancy G. Rubin, for the Intervenor

The Court: I do not have anything prepared, so I doubt very much that I am going to be erudite. As I said, there has been an application for a publication ban made, formally, by Mr. Planetta on Christopher Picco's behalf and joined in now by Mr. Church, representing Jerrico Upshaw. They are the two adults who are charged in the homicide that T. (B.), the young person, is charged in.

T. (B.) is on trial before me in the Youth Court. Mr. Picco, I believe, consented to his committal to trial and is, I presume, awaiting the setting of trial dates in the Supreme Court. I do not know what his election was, whether it was Judge alone or Judge and Jury --

Defence Planetta: Judge and Jury, Your Honour.

The Court: -- because he is charged as an accessory and Mr. Upshaw, I believe is scheduled to have his Preliminary Inquiry commence next week before Judge Campbell in Provincial Court so there has been no committal to trial of Mr. Upshaw at this point.

T. (B.)'s trial is underway. The application by Mr. Picco for a publication ban has been joined in by the Crown as well. And the issue that has been raised by the Chronicle Herald, who has responded to the media notice, is that, indeed, I do not

have the jurisdiction to order a publication ban, notwithstanding what, if any, merits such an application might have, that I, as the Judge hearing the T. (B.) trial, do not have the jurisdiction to order a publication ban on that evidence on behalf of Mr. Picco and Mr. Upshaw. Ms. Rubin, who is in attendance here this morning on behalf of the Herald provided me, and I do appreciate it, with a brief which was circulated to everyone, and cases, and notably, for the purpose of the jurisdiction issue, pointed me to paragraph 16 of the *Degenais* decision from the Supreme Court of Canada where Chief Justice Lamar said that, “The application should be made to the trial judge, if one has been appointed, or to a judge in the court at the level the case will be heard.” He says more than that in paragraph 16, but that is the essence of it.

Now, the Crown here this morning and Mr. Planetta and Mr. Church, all say that, that trial judge is me, that I am the trial judge that is hearing the evidence that these adult accused persons and the Crown want to have banned from publication and therefore, that is what gives me jurisdiction to decide should there be a ban on the publication of that evidence or should there not be. Although that is, in fact, how I understood the issue when I first raised this at the start of T. (B.)’s trial, earlier this week, I have since, on reflection, concluded that is not correct. And I do, in fact, view the issue differently than I had. I had been thinking that because the evidence

that was the subject matter or the target of the publication ban was evidence that was unfolding in the context of a trial that I was hearing, that therefore brought the issue of the publication ban squarely before me and under my jurisdiction. I have thought more carefully about what actually is being addressed in the context of a publication of this nature. And I am of the view that what, in fact, is being addressed are the fair trial rights of the adult accused persons to be balanced with the rights of the media under section 2(b) of the Charter and that the merits of the publication ban application have to be engaged around those rights and that the evidence is in effect a kind of passive aspect of the determination that has to be made with respect to that balancing. So the fair trial rights of Mr. Picco at this point – it is simplest on these facts to focus on Mr. Picco, because he has consented to a committal to trial and therefore is already within the jurisdiction of the Supreme Court, and Mr. Upshaw, of course, if he is committed, will end up in the Supreme Court – Mr. Picco's fair trial rights, what they constitute, how they are to be safe-guarded, whether the T.(B.) evidence will implicate those fair trial rights or compromise them, those are issues that have to be determined, in my view, by the Supreme Court that is going to be dealing with Mr. Picco's trial. And the same would go for Mr. Upshaw, if that is how things evolve for him. The question of the rights of the media and how those rights and the fair trial rights are to be balanced against each other according to the jurisprudence from the Supreme Court

of Canada, that has to be determined in the Supreme Court. I do not have jurisdiction over any determination with respect to the nature or scope or extent to which safeguards are required in relation to the fair trial rights of these adult accused. I do, in my view, have jurisdiction, obviously, over the fair trial rights of T. (B.). As I indicated, T. (B.) is not seeking a ban on publication. If he were, I would consider myself – or if he does – I would consider myself to have jurisdiction in respect of his fair trial rights and my obligation to then do the balancing with respect to the rights of the media.

So I have concluded, having considered the issue carefully, and having heard from counsel and reviewed the cases, that indeed, I do not have jurisdiction, and that Mr. Planetta and Mr. Church and potentially supported by the Crown, are obviously at liberty to make their application to the Supreme Court. My determination does not impose any prejudice on them with respect to that. It is simply a determination that I do not have jurisdiction with respect to this application as it relates to their clients. Were there to be a determination from the Supreme Court that fair trial rights' protection, with respect to Mr. Picco and theoretically Mr. Upshaw, required some modification of publication with respect to evidence from the T.(B.) trial, then that would be a directive that would be coming from the Supreme Court to the media and anyone else who might be publishing evidence from the trial –

that is to whom the order would be directed – it would have no bearing on my conduct of the T. (B.) trial. Any restrictions on publication, were there to be any, would be the responsibility of the publishers to comply with. So, I have concluded that I do not have jurisdiction to entertain this application and that the proper place for it to be dealt with is in the Supreme Court. I do thank you for your submissions and appreciate your comments today. Thank you.