SUPREME COURT OF PRINCE EDWARD ISLAND

Citation: R. v. Clow 2017 PESC 9

Date: 20170622
Docket: S1 GC 1222
Registry: Charlottetown

Between:

Her Majesty the Queen

Informant

And:

Joel Lawrence Clow

Accused

In the matter of the Application of Her Majesty the Queen to Restrict Publication of Exhibits

Before: The Honourable Justice Nancy L. Key
Decision on the Restriction of the Publication of the Video Statement of the Accused

Appearances:
Cyndria Wedge, Q.C. and Jeffrey MacDonald, Solicitors for the Crown

David Coles, Q.C. solicitor for the Canadian Broadcasting Corporation and The Guardian

Joel Pink, Q.C. and Nathan Sutherland, Solicitors for the Accused

Place and date of hearing	Charlottetown, Prince Edward Island May 15, 2017 - May 26, 2017
Judgment rendered orally	Charlottetown, Prince Edward Island May 25, 2017
Place and date of written judgment	Charlottetown, Prince Edward Island June 22, 2017

Publication Ban – Criminal Proceedings – Application by the Crown to restrict publication of the video recording of the statement of the accused – Applicant not meeting two part Dagenais/Menuck test – no public component to the interests to be protected – no serious risk to the proper administration of justice – Application denied

CASES CONSIDERED: ***Dagenais v. Canadian Broadcasting Corp.***, 1994 CanLII 39 (SCC); ***R. v. Mentuck***, [2001] 3 S.C.R. 442, 2001 SCC 76; ***R. v. Bourque***, 2014 NBQB 263; ***M.E.H. v. Williams***, 2012 ONCA 35; ***R v. Dingwell***, 2012 PESC 14

Key J.:

[1] This decision was rendered orally during the trial on the issue of whether or not to allow an application to restrict publication of the video recording of the statement of the accused, Joel Clow.

[2] The original application also sought to ban the publication of the autopsy photographs and the crime scene photographs of the deceased victim. While preparing my oral remarks I was advised by the Crown that the parties had reached an agreement on the issue of the photographs. The media agreed not to publish the photographs in Book 1 of Exhibit C-5 from pages 51 – 64 inclusive nor the photographs at Tab 1 of Book 3 of 3, Exhibit C-7 (autopsy photographs).

[3] There is no disagreement on the common law test to determine whether or not to allow a publication ban.

[4] The test is from the cases of ***Dagenais v. Canadian Broadcasting Corp.***, 1994 CanLII 39 (SCC) and ***R. v. Mentuck,*** [2001] 3 S.C.R. 442, 2001 SCC 76, both Supreme Court of Canada cases. What is known as the Dagenais/Mentuck test states that a publication ban should only be ordered when:

1) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonable alternative measures will not prevent the risk; and

2) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interest of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice. (para. 32 of ***Mentuck***).

[5] I have commented earlier on in this trial, on the struggle between the right to free speech and the rights of the accused.

[6] There must be a convincing evidentiary basis for issuing a publication ban. The Crown, in this instance must show, on a balance of probabilities, that there is a serious risk which poses a serious threat to the proper administration of justice. The burden is on the Crown in this application.

[7] In other words, "it is a serious danger sought to be avoided that is required, not a substantial benefit or advantage to the administration of justice sought to be obtained". (***Dagenais)***

[8] The Crown has, through the affidavit of its two witnesses, put forward two arguments with respect to the publication of the video recording.

[9] First, the references made about Traci Lynch's son, who I will refer to as O.L. for the purposes of this published decision. A number of the witnesses have referred in their testimony to O.L. and did so prior to the video being seen in the courtroom. By my count, in the video O.L.'s name was mentioned four times and the reference to a son, twice. These are references to a personal interest that of O.L. and his family. These are not public interests which must be protected.

[10] Do the references to the victim's son provide a sufficient reason for the Court to withhold the video from the public domain? Those in the Courtroom have now seen the video. Should the rest of the public be denied that access? Based on the case law and submissions, I think not.

[11] The second concern is that if O.L. sees the video recording he will hear Joel Clow make negative comments about his mother's drug use. I have reviewed the evidence of the past eight days and by my count, 11 witnesses have referred to, sometimes in great detail, Traci Lynch's drug use. No request for a ban was made regarding that evidence. The evidence of her drug use is now out there in the public domain.

[12] The video of Joel Clow writhing on the grass outside his home while waiting for the EMS to arrive is now part of the public domain. That video could be quite traumatic for a child. But it is now public and there was no request for a ban on its publication.

[13] As Mr. Coles stated, ***Mentuck*** is still the law and after a review of all of the case law presented, it becomes very clear that:

1) There must be a convincing evidentiary basis before the trial judge to satisfy the need for a publication ban;

2) There may be a broad social interest in the protection of minor children. However, as one of the affidavits states, O.L. has access to an IPad, television, and various other forms of media. O.L.'s interests may conflict with the public interest and the public interest, here, in this case, trumps O.L.'s interests.

3) The Crown may have, but chose not to, provide evidence of the direct harm to O.L. In ***R. v. Bourque***, 2014 NBQB 263 Chief Justice Smith of the New Brunswick Queen's Bench quotes ***Mentuck***:

> "...the order granted to protect the complainants was improperly granted. The evidence of potential undue hardship to the complainants, which primarily rested on the Crown's submission that the evidence to be brought was of a 'delicate' nature, did not displace the presumption in favour of an open court." (page 4)

4) In reference to a public interest, the ***Bourque*** decision also refers to ***M.E.H. v. Williams,*** 2012 ONCA 35. The Court said "the interest jeopardized must, however, have a public component. Purely personal interests cannot justify non publication or sealing orders." (paragraph 25)

[14] Again, in referring to the ***Dagenais*** decision the risk referred to in the two part test must be a real and substantial risk. That is, it must be a risk, "the reality of which is well-grounded in the evidence. "

[15] At paragraph 39 of ***Mentuck***, the Court states:

> ...the judge must have a convincing evidentiary basis for issuing a ban.

[16] The affidavits provided by one of O.L.'s caregivers and one of Traci Lynch's sisters indicate interests which are personal in nature.

[17] The affiants state, at paragraph 5:

> O.L. [SIC] is aware that Joel has something to do with his mother's death, but we have not told him any details of her death.

[18] Paragraph 6 of the affidavit states:

> O.L. [SIC] is comfortable with technology; he has his own IPad and frequently uses the internet and Youtube to find videos. We are extremely worried that O.L.[SIC] will be able to search Youtube and listen and watch the man who is accused of murdering his mother recounting the last moments she was alive.

[19] That too causes me great concern on a personal level. However, those are personal interests. There is no public component to those interests as required by the law.

[20] Paragraph 32 of the ***M.E.H. v. Williams*** decision states:

> 32 As there is no balancing of competing interests at the first stage, it is wrong at that stage to consider the extent to which the societal interests underlying and furthered by freedom of expression and the open court principle are engaged in that particular case. Even if those values are only marginally engaged (the respondent's submission in this case), restriction on media access to and publication in respect of court proceedings cannot be justified unless it is necessary to prevent a serious risk to a public interest. A court faced with a case like this one where decency suggests some kind of protection for the respondent [page330] must avoid the temptation to begin by asking: where is the harm in allowing the respondent to proceed with some degree of anonymity and without her personal information being available to the media? **Rather, the court must ask: has the respondent shown that without the protective orders she seeks there is a serious risk to the proper administration of justice?** (emphasis mine)

[21] The Court does not believe that without the publication ban there is a serious risk to the proper administration of justice.

[22] In ***R v. Dingwell,*** 2012 PESC 14 concerns were raised by the trial judge, Justice Mitchell as he then was about the release of the video statements of the accused Mr. Dingwell. In the ***Dingwell*** decision, the Crown and defence consented to the release of the video statement. I too share Justice Mitchell's concern. However, as Justice Mitchell stated at paragraph 26:

> 26...Is this in the best interests of justice? In the final analysis, the Crown does not appear to have the concerns that I have and I therefore have **no evidence or even argument upon which to deny the media requests** for the statements. The media shall have copies of the statements. (emphasis mine)

[23] The comments are obiter. This Court can, however, without disagreeing with Justice Mitchell's decision, also state that there is no clear evidentiary basis before it to deny the publication ban.

[24] I agree with counsel's comments that Mr. Clow made the statement voluntarily knowing that it was being recorded. I do not have any evidence before me that would suggest that in the future an accused may not make statements because of a fear of being on the local news at 6 p.m.

CONCLUSION

[25] Thus, the application of the Crown, with the support of counsel for the accused, must fail. The video recording of the statement of Joel Clow shall be released to the media.

Dated: June 22, 2017

Nancy L Key
J.