In the Provincial Court of Alberta

Citation: R v MGM, 2018 ABPC 256

Date: 20181031
Docket: 180701047Y1
Registry: Calgary

Between:

Her Majesty the Queen

Crown

- and -

MGM, born 2000, and a Young Person within the meaning of the *Youth Criminal Justice Act*, SC 2002, c 1, as amended at the time the alleged offence was committed

Young Person

Restriction on Publication

Identification Ban – See the *Youth Criminal Justice Act*, sections 110(1) and 111(1).

No one may publish any information that may identify a person as having been dealt with under the *Youth Criminal Justice Act*.

No one may publish any information that may identify a child or young person as being a victim or witness in connection with an offence alleged to have been committed by a young person.

NOTE: This judgment is intended to comply with the identification ban.

Identification Ban – See the *Criminal Code*, section 486.4.

By Court Order, information that may identify MW must not be published, broadcast, or transmitted in any way.

NOTE: This judgment is intended to comply with the identification ban.

Judicial Interim Release – See the *Criminal Code*, section 517.

By Court Order, this decision and the evidence taken, information given or representations made may not be published, broadcast, or transmitted in any way.

NOTE: This decision is available from the court file. It may be published after the accused is discharged after a preliminary inquiry or, if the accused is committed to stand trial, after the end of the trial.

Reasons for Decision of the Honourable Judge Steven E. Lipton

INTRODUCTION

[1] The accused young person, MGM, (hereinafter, the "Young Person" or "MGM") stands charged that on or about the 20th day of June, 2017, at or near Calgary, did unlawfully commit a sexual assault upon MW, (hereinafter, the "Complainant") contrary to section 271 of the *Criminal Code of Canada*, RSC 1981, c C-46, as amended, (hereinafter, the "*Criminal Code*").

[2] On November 15th, 2017, the Young Person was given a global sentence of eight months secure custody followed by four months of community supervision for one count of sexual assault contrary to section 271 of the *Criminal Code*, and for two counts of breach of recognizance pursuant to section 145(3) of the *Criminal Code*. The victim with respect to this matter was not the Complainant. MGM's release-from-custody date for these offences would have been on July 15th, 2018, and his warrant expiry date for these offences would have been on November 14th, 2018.

[3] While MGM was still serving the custodial portion of this sentence, the Calgary Police Service, (hereinafter, the "CPS") began an investigation concerning allegations of a second sexual assault allegedly committed by MGM against the Complainant. Ultimately, the CPS laid the current charge, and a warrant was sought and issued for the arrest of MGM in June of 2018.

[4] As a result of the current charge, the Young Person was not released from custody on July 15th, 2018, with respect to his prior sentence.

[5] On June 18th, 2018, D'Souza J issued an order pursuant to section 486.4 of the *Criminal Code* prohibiting the publication, broadcast or transmission of any information that may identify the Complainant.

[6] When the Young Person appeared before me on July 25th, 2018, his counsel advised that she would be seeking two orders from the court prior to MGM's judicial interim release hearing.

[7] The first order sought was for a publication ban on the Young Person's judicial interim release hearing pursuant to section 517 of the *Criminal Code*.

[8] The second order sought was for the exclusion of the public and non-accredited media from the Young Person's judicial interim release hearing:

(a) pursuant to section 486(1) of the *Criminal Code*, and pursuant to section 132 of the *Youth Criminal Justice Act*, SC 2002, c 1, as amended, (hereinafter, the "*YCJA*");

(b) alternatively, if the Young Person's applications pursuant to sections 132 of the *YCJA* and 486(1) of the *Criminal Code* are denied, then pursuant to breaches of MGM's sections 7, 11(d) and 11(e) rights set forth in the *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c 11 (hereinafter, the "*Charter*"), with the appropriate relief being the exclusion of the public and non-accredited media pursuant to section 24(1) of the *Charter*.

[9] I requested that the applications and supporting documentation be sent to me no later than August 17th, 2018.

[10] MGM remained in custody when he appeared before me on August 30th, 2018, for his judicial interim release hearing.

[11] Crown counsel did not take any position at the judicial interim release hearing with respect to the Young Person's applications pursuant to section 132 of the *YCJA*, section 486(1) of the *Criminal Code*, and the *Charter*.

[12] In MGM's affidavit and *Charter* Notice in support of his applications, the Young Person asserted that his request to exclude all but accredited members of the media from his judicial interim release hearing was premised on the basis that his right to a fair trial would be denied due to intimidation of witnesses, tainting of their evidence, and release of personal information about him. In particular, the Young Person alleged the following:

(a) His mother told him that individuals in court on his November 15th, 2017, sentencing date shouted things at his sister;

(b) His mother told him that she had received hate mail about him, but the source of the hate mail is unknown. She advised him that this mail apparently consisted of court documents which related to MGM's sexual assault conviction for which he received the aforementioned global custodial sentence, as well as contained insults directed at MGM and his family;

(c) It is unknown whether the hate mail has been in breach of the court-ordered publication ban;

(d) He was advised by his mother that she received an envelope which contained a letter referring to a Facebook site which he believed refers to him. The letter stated that the community was being kept informed about "the animal" which MGM believed was a reference to him. MGM was told by his lawyer that she is concerned this information may be a breach of the publication ban and ought to be investigated;

(e) He was advised by his mother their family was denied membership in the community association by an individual who was in communication with the Complainant on-line;

(f) He was advised by his counsel that she observed the Sheriff, who escorted the Young Person to and from the basement holding cells, sitting by the Complainant's parents in court prior to his matter being called. MGM believed personal information about him was being shared publicly;

(g) From disclosure documentation, MGM noted that the father of the Complainant had been trying to get what he believed was private information about him from the CPS. The disclosure indicated that the request of the Complainant's father was denied by the CPS;

(h) From disclosure documentation, MGM noted that the Complainant's father told the parents of a witness that he has friends with the CPS who are keeping him advised of this matter causing this witness' mother to have concerns;

(i) MGM believed that the Complainant's father told the parents of a witness that the father was in court and yelled out that the Young Person was "a rapist";

(j) MGM, his mother, and the Young Person's counsel would not be able to be as forthcoming in the Young Person's own defence at the judicial interim release hearing because any information that came out would be shared with the public, especially by the Complainant's parents who would be in attendance; and,

(k) Any volunteer mentors supporting him could be subject to backlash if personal information about him was disclosed to the public.

[13] I granted the publication ban pursuant to section 517 of the *Criminal Code*. Counsel for the Young Person did not ask me to broaden the scope of section 517 to address MGM's concerns.

[14] I denied, however, the Young Person's applications for orders to exclude the public and non-accredited media from his judicial interim release hearing.

[15] Both counsel and the Young Person were advised that written reasons would follow.

[16] Following my decision and after consultation with his counsel, the Young Person decided to proceed with his judicial interim release hearing notwithstanding that his applications for exclusion of the public and non-accredited media were denied.

[17] MGM was denied his release from custody pursuant to section 29 of the *YCJA*, but was ultimately released to a responsible person pursuant to section 31 of the *YCJA***.**

[18] These are my reasons for denying the Young Person's applications for orders to exclude the public and non-accredited media.

ANALYSIS AND THE LAW

[19] Both sections 132 of the *YCJA* and 486(1) of the *Criminal Code* are statutory exceptions to what is often referred to as the "open court principle".

[20] The standard by which applications to exclude the public from court are determined is referred to as the *Dagenais/Mentuck* test. This test was first formulated in *Dagenais v Canadian Broadcasting Corp.*, [1994] 3 SCR 835, and later modified in *R v Mentuck*, [2001] 3 SCR 442.

[21] Although section 486(1) of the *Criminal Code* is not excluded for consideration by reason of the application of section 132 of the *YCJA*, it is my opinion that the appropriate statutory section pursuant to which an exclusionary order could have been sought in this instance is section 132 of the *YCJA* and not section 486(1) of the *Criminal Code*. There are two reasons for such a conclusion.

[22] Firstly, MGM was a "young person" within the meaning of the *YCJA* at the time of the alleged offence.

[23] Secondly, while I note that similar principles apply under both section 486(1) of the *Criminal Code* and section 132 of the *YCJA*, section 3(1)(b)(iii) of the *YCJA* emphasizes that a young person's right to privacy must be protected. Section 132 of the *YCJA* would therefore appear to offer MGM more protection than that afforded by section 486(1) of the *Criminal Code*. Such a conclusion was reached by Gill J in *R v AYD*, 2011 ABQB 590. At paragraph 23, he stated:

> " ... Accordingly, the *Dagenais/Mentuck* test must be considered in the unique context of youth criminal justice, taking into account the protections afforded to young persons."

[24] MGM's applications appeared to be pursuant to both sections 132(1)(a)(i) and 132(1)(b) of the *YCJA*.

[25] I was not provided with, nor was I able to find, any decisions dealing with public access bans being considered within the context of a youth proceeding due to concerns by a young person that witness evidence might be tainted by the presence of supporters of a complainant.

[26] The decision most relevant to the facts of this case with respect to restricting access by the public is *R v R(J)*, 2010 ABQB 38 ("*R(J)*").

[27] In *R(J)*, Brooker J stated at paragraphs 11 and 12:

> "I begin by noting that, in my opinion, section 132 of the *Youth Criminal Justice Act* does grant the judge statutory authority to grant an exclusion order in the form sought here. Such order is clearly discretionary ... There does not appear to be any specific guidance as to how one is to exercise that discretion. I think, therefore, by analogy, one should have regard to the principles set out by the Supreme Court of Canada in *Dagenais* and tweaked in the subsequent *Mentuck* case.
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> The *Dagenais/Mentuck* cases indicate that a ban can be ordered only where the judge is satisfied that 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 that the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of an accused to a fair and public trial, and the efficacy of the administration of justice."

[28] In *Canadian Broadcasting Corporation v. New Brunswick (Attorney General)*, [1996] 3 SCR 480 ("*CBC*"), the Supreme Court set out the factors to be considered by a judge in the exercise of this discretion pursuant to section 486(1) of the *Criminal Code*. Of significant importance is that the Supreme Court stated that the same factors are also useful when a *Charter* application has been made. At paragraph 69, the Supreme Court stated:

> "The same directives are equally useful in assisting the trial judge in exercising his or her discretion within the boundaries of the *Charter* when exercising the judicial discretion to order exclusion of the public under s. 486(1). Stated in the context of such an order, the trial judge should, therefore, be guided by the following:
>
> (a) the judge must consider the available options and consider whether there are any other reasonable and effective alternatives available;

(b) the judge must consider whether the order is limited as much as possible; and

(c) the judge must weigh the importance of the objectives of the particular order and its probable effects against the importance of openness and the particular expression that will be limited in order to ensure that the positive and negative effects of the order are proportionate."

[29] At paragraph 71 of *CBC*, the Supreme Court stated:

"The burden of displacing the general rule of openness lies on the party making the application."

[30] At paragraph 72 of *CBC*, the Supreme Court stated:

"There must be a sufficient evidentiary basis from which the trial judge may assess the application and upon which he or she may exercise his or her discretion judicially."

[31] In *R(J)*, the exclusionary orders being sought were done on the basis of preventing a contamination of the jury pool, thus impacting the accused's right to a fair trial. Brooker J declined to order the exclusion of the media or public despite the prevalence of press releases, news items, internet sites, and blogs which had the accused's name and picture. Brooker J stated that an assertion of serious risk to the administration of justice due to the lack of reasonable mitigative alternatives must be "well-grounded in the evidence". Speculation about what might occur was insufficient.

[32] At paragraph 17 of *R(J)*, Brooker J concluded that the criminal justice system requires openness and transparency in order to create an atmosphere of "understanding, trust and respect". He held that the deleterious effects of a ban far outweighed any salutary benefits.

[33] In *R v Gieschen*, 2014 ABPC 273, Dunnigan J dismissed an application for a publication ban. He held that there must be a real and substantial risk of significant harm to an accused. Dunnigan J also stated that mere speculation is insufficient to grant the ban, as is embarrassment, inconvenience and upset.

[34] In *MEH v Russell Williams*, 2012 ONCA 35, the Ontario Court of Appeal also concluded that embarrassment and personal distress are insufficient grounds to deny openness to court proceedings.

[35] As can be gleaned from the aforementioned decisions, the effect of the *Dagenais/Mentuck* test is that an applicant must prove both necessity and proportionality. Speculative information or speculative evidence will not suffice. Reasonable alternative measures to a ban must be shown to likely be ineffective. Furthermore, the salutary effects of the requested ban must outweigh the deleterious effects on the rights and interests of the parties and public, as stated by Brooker J in *R(J)*.

[36] The Young Person's statutory applications were denied on the basis that he did not put forward sufficient evidence to demonstrate that a ban was necessary. In my opinion, MGM's concerns were mostly speculative in nature, despite limited evidence of the existence of a Facebook site and an anonymous letter received in the mail.

[37] MGM's speculative concerns included:

(a) the sharing of information on-line about him;

(b) the ability of MGM's mother to fully disclose personal information about her family at a bail hearing;

(c) witnesses' evidence relating to the current charge possibly being tainted;

(d) a possible breach of publication bans concerning his prior global sentence because some court documents were received in the mail by MGM's mother;

(e) a courtroom Sheriff sitting beside the Complainant's parents;

(f) the Complainant's father contacting the CPS notwithstanding the fact that his requests for information were denied;

(g) the Complainant having friends inside the CPS; and,

(h) MGM's mentors potentially being subjected to backlash.

[38] Furthermore, some of the Young Person's concerns would not be alleviated by a ban, including those related to the Complainant father's anger and interest in this case, as well as the animosity of the neighborhood residents towards him and his family.

[39] MGM's concerns did not rise to the level where I could have concluded, as per section 132 of the *YCJA*, that the information presented would "be seriously injurious or seriously prejudicial to" MGM. MGM's concerns did not rise to the level where I could have concluded that it would be in the "proper administration of justice to exclude any or all members of the public".

[40] Given my conclusions on MGM's affidavit evidence and submissions, I did not find it necessary for me to consider whether there were other available alternatives to a ban which were reasonable and effective. I would also note that MGM did not put forward any evidence or submissions to show that reasonable alternatives to a ban would likely be ineffective. The Young Person requested the section 517 *Criminal Code* ban without modification.

[41] The sharing of information, provided it is not published in violation of any statutory or court-ordered ban, is an important component of the justice system.

[42] With respect to the Young Person's application pursuant to the *Charter*, it was premised on the assumption that his applications under sections 132 of the *YCJA* and 486(1) of the *Criminal Code* were denied.

[43] MGM submitted that the court's ability to have all the information it needed before deciding on his release would be tainted and/or limited if a ban wasn't ordered, thus denying his right to a fair trial and denying his right not to be denied reasonable bail without just cause. As such, MGM submitted that his sections 7, 11(d) and 11(e) *Charter* rights would be breached.

[44] The *Dagenais/Mentuck* test incorporates the right to a fair trial as protected by section 7 of the *Charter* and, on the facts of this case, balances this right against the section 2(b) *Charter* right of freedom of expression. The purpose of this test is to remind the court, in this case, that neither of these *Charter* rights is to take priority over the other. Rather, the right to a fair trial is

to be weighed against the freedom of expression and the public's interest in being informed about court proceedings involving MGM.

[45] As with the applications pursuant to the *YCJA* and *Criminal Code*, the burden of displacing the open court principle pursuant to an alleged *Charter* breach was on the Young Person.

[46] MGM's submission that a violation of his section 7 *Charter* rights alone would justify a ban was incorrect. A section 7 *Charter* violation would need to be established at the first stage of the *Dagenais/Mentuck* test. In this case, it would require the Young Person to establish that a ban was necessary in order to prevent a serious risk to the proper administration of justice because reasonable alternative measures would not prevent the risk. As aforementioned, allegations which are speculative in nature will not meet the first branch of the *Dagenais/Mentuck* test.

[47] Even if the Young Person had established a section 7 *Charter* violation, the section 2(b) *Charter* rights would still need to be taken into consideration. I again point out that the Young Person requested the section 517 *Criminal Code* ban without modification.

[48] In my opinion, neither section 11(d) nor section 11(e) of the *Charter* was applicable to this case. I am not clear as to why MGM was of the view that either of these rights would be violated if the relief sought was not granted.

Heard on the 25th day of July, and on the 30th day of August, 2018.
Dated at the City of Calgary, Alberta this 31st day of October, 2018.

Steven E. Lipton
A Judge of the Provincial Court of Alberta

Appearances:

S. Wilson, Esq.
for the Crown

A. Serink, Ms.
for the Young Person