

CITATION: Toronto Star v The Queen, 2017 ONSC 1190
COURT FILE NO.: CR-0000011-00MO
DATE: 20170221

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:)	
)	
TORONTO STAR NEWSPAPERS LTD.)	Christopher DiMatteo, for the Applicant
)	
Applicant)	
)	
– and –)	
)	
HER MAJESTY THE QUEEN)	Holly Loubert, for the Crown
)	
Respondent)	
)	
)	HEARD: February 10, 2017

2017 ONSC 1190 (CanLII)

EM MORGAN J:

[1] On December 28, 2016, the Ontario Court of Justice issued a Production Order pursuant to s. 487.014 of the *Criminal Code* against the Toronto Star Newspapers Ltd. (“Toronto Star”), relating to an interview conducted in November 2015 by Toronto Star reporter Olivia Carville with Matthiew Deiac (the “Production Order”). Parts of that interview had been quoted and posted online in a series of newspaper articles authored by Ms. Carville dealing with human trafficking.

[2] The Production Order requires the Toronto Star to turn over to the police “[a] true copy of all recording(s) in viewable or otherwise accessible and useable form of the interview conducted by Olivia Carville of Matthiew Deiac at the East Detention Center in the City of Toronto.” The Toronto Star brings this application seeking an order in the nature of *certiorari* quashing the Production Order, or, in the alternative, an order revoking or varying it under s. 487.0193 of the *Criminal Code*.

[3] Mr. Deiac is charged with a number of counts, including human trafficking, kidnapping, assault with a weapon, and uttering death threats, all in respect of a Complainant who was

allegedly a sex worker under his control or in his coerced employ. His trial on these and other related charges is scheduled to commence on March 13, 2017.

[4] The Production Order identifies the Toronto Star as a media entity, and orders it to produce the videotape of the interview that Ms. Carville conducted with Mr. Deiacco. The application for the Production Order was supported by an affidavit of Detective Constable Jason Davis of the Toronto Police Service. In his affidavit, Officer Davis set out that in December 2015 and January 2016 the Toronto Star published a series of online articles about domestic sex trafficking in Ontario. The first two articles in the series, entitled, respectively, “Accused pimp describes ways women get lured into human sex trafficking” and “Beaten, branded, bought and sold”, relied heavily on the interview with Mr. Deiacco. The online versions of the articles contain a link to a video of a 3 minute, 43 second portion of Mr. Deiacco’s roughly hour-long interview by Ms. Carville.

[5] Before beginning the interview, Ms. Carville informed Mr. Deiacco that she was not a police officer. Although the Toronto Star does not take the position that Ms. Carville gave Mr. Deiacco a guarantee of confidentiality – that would make no sense in the context of an interview that was intended for publication in whole or in part – Ms. Carville did explain that the purpose of the interview was to learn in a general way about how the sex trade works, not to discuss the charges Mr. Deiacco was facing. The first of the articles contains an advisory that Mr. Deiacco “said he couldn’t talk about his case before the trial, but he agreed to describe how pimps play The Game” – i.e. how they engage in sex trafficking.

[6] In the published portion of the interview, Mr. Deiacco only speaks of the specific charges he is facing in terms of denying the allegations against him. He states that the police have their facts wrong, and that he did not, as alleged, repeatedly strike the complainant, throw her into a car trunk, or threaten her with a gun and say, “I’m going to shoot you. Did you think you could leave me?”

[7] As indicated, the first of the articles relies heavily on the interview with Mr. Deiacco, and quotes him intermittently. One can tell from the partial sentences and positioning of the quotes within Ms. Carville’s narrative, and from examination of the short segment of the videotaped interview made public by the Toronto Star, that there is a great deal of the interview that did not find its way into the published material.

[8] Counsel for the Crown has summarized in her factum the information conveyed by Mr. Deiacco in the quotes that appear in the article, “Accused pimp describes ways women get lured into human sex trafficking”, as follows [footnotes omitted]:

- the manipulative strategies pimps use to lure women into the sex trade (‘It begins with the boyfriend stage, he says, where pimps prey on vulnerable girls and pretend to be in love.’)

- how they target vulnerable, broken victims (‘Most of these girls, like I said, they’re broken. It’s not hard; you just gotta answer their call.’ [...] ‘You get in there, you find the crack; like some are drugs, some are just, they need to hear I love you.’)
- how many women he has trafficked (‘Over the past 13 years, Deiacco says he has had more than a dozen women working in the sex trade – at one point up to four at a time – from hotels, motels and condos in Toronto.’)
- how much he makes (‘Sometimes in a month, if you have four women, you could make \$70,000.’)
- how he currently views himself (‘[He] no longer sees himself as a pimp, but rather as a ‘manager’ of escorts.’)
- the manipulative control tactics of which he is aware (‘He has seen pimps lock girls in hotel rooms, beat them, take phone cords out of the wall and disable their Facebook and email accounts. They do this to ‘cut them off from the world so all they have is that person to rely on... so they’re dependent on them.’ The girls don’t run because ‘they have nothing, nobody.’).

[9] The article then concludes with the following quotes and text:

‘I can’t sit here and cry and be depressed because this is the life I live. I can’t sit here and blame anyone else.’

He has been told that, if convicted, he could face a possible prison sentence of ‘double digits.’

‘I don’t want to do it, but it’s the price of The Game,’ Deiacco says.
‘You play with fire, you get burnt.’

[10] Similar information is conveyed through Mr. Deiacco’s quotes in the Toronto Star article, “Beaten, branded, bought and sold”. The relevant portion of that article is as follows:

In a jailhouse interview in mid-November, the heavily tattooed Deiacco said he couldn’t talk about his case before the trial, but he agreed to describe how pimps play The Game.

It’s easy to make up to \$1,000 a day with one girl, Deiacco said. ‘Sometimes in a month, if you have four women, you could make \$70,000.’

Pimps, Deiacco said, prey on girls who are broken; girls who ‘need that daddy figure.’

It begins with the boyfriend stage: romantic dates, the illusion of love and the promise of a future, complete with a house they would own together. Then it's the grooming, the gifts and the hints about how much money she could make working in the sex trade.

Finally it comes to the 'sale,' where a pimp convinces a girl to prostitute herself and give him all her money.

Deiaco, who said his role was 'managing' at least 12 prostitutes in his time, explained a pimp might coerce a girl into entering the sex trade by selling her the dream of security, love, a big wedding and a nice house: 'See, I'm putting my 50 in, you have to do your 50. So there's another way, you can have sex with guys, but don't worry, I'm going to love you. At the end of the night you're home with me,' he says.

[11] After reviewing these published articles and reviewing the online video clip of a short portion of the interview, the police sought production of the videotape of the entire interview.

[12] Counsel for the Crown submits that it was open to the justice who issued the Production Order to conclude that there were reasonable grounds to believe that the videotape contains evidence in respect of the offences with which Mr. Deiaco is charged. This includes evidence relevant to assessing the credibility and reliability of the police statement given by Mr. Deiaco, statements establishing his involvement with human trafficking, and admissions with respect to the specific offences charged that were not deemed publishable by the Toronto Star. The Crown also submits that the full videotaped interview will provide information relevant at the sentencing stage of the proceedings against Mr. Deiaco.

[13] Counsel for the Toronto Star submits that the Production Order is a "fishing expedition", and that the materials filed by the police in support of it did not provide reasonable grounds to believe that the videotaped interview will provide evidence relevant to the charges against Mr. Deiaco. The Toronto Star further submits that the Production Order fails to strike a reasonable balance between the state's interest in investigating and prosecuting crime, and the Toronto Star's right as a media outlet to engage in its constitutionally-protected activities of gathering and disseminating the news.

[14] The Production Order was issued pursuant to s. 487.014 of the *Criminal Code*, which provides:

(1) Subject to sections 487.015 to 487.018, on *ex parte* application made by a peace officer or public officer, a justice or judge may order a person to produce a document that is a copy of a document that is in their possession or control when they receive the order, or to prepare and produce a document containing data that is in their possession or control at that time.

(2) Before making the order, the justice or judge must be satisfied by information on oath in Form 5.004 that there are reasonable grounds to believe that

(a) an offence has been or will be committed under this or any other Act of Parliament; and

(b) the document or data is in the person's possession or control and will afford evidence respecting the commission of the offence.

[15] The “reasonable grounds to believe” standard is one of “credibly based probability”, in which suspicion, conjecture and hypothesis are not sufficient: *R v Dunphy*, [2006] OJ No 850, at para 41 (SCJ). It is certainly the case that a production order cannot authorize a fishing expedition.

[16] The decision to issue an order under s. 487.014 is a discretionary one; the court “may order” production of the sought-for material when the statutory preconditions are met: *R v Vice Media Canada Inc*, 2016 ONSC 1961. The Supreme Court of Canada has emphasized that the media plays a highly significant role in Canadian democracy, and that its freedom to operate free of state interference or constraint is protected under section 2(b) of the *Charter*. Accordingly, the media's special, constitutionally protected position must be taken into account in exercising this type of discretion.

[17] So, for example, the Court has indicated that “the media are entitled to particularly careful consideration” in the context of the issuance of search warrants: *Canadian Broadcasting Corporation v Lessard*, [1991] 3 SCR 421, at para 46. As the Supreme Court has pointed out, the media's function in freely gathering and disseminating news “enable[s] members of our society to make an informed assessment of the issues which may significantly affect their lives and well-being”: *Canadian Broadcasting Corp v New Brunswick (Attorney General)*, [1991] 3 SCR 459, at para 31.

[18] That said, the constitutional protection afforded the press provides a “backdrop” against which the reasonableness standard in s. 487.014 is measured, and does not import any new or additional requirements for the issuance of search warrants or production orders: *CBC v New Brunswick*, at paras 31-32. The “reasonable grounds to believe” standard for a production order is to be evaluated on the totality of the circumstances, guided by the factors set out by Cory J in *CBC v Lessard*, at para 47:

1) It is essential that all the requirements set out in s. 487(1)(b) of the *Criminal Code* for the issuance of a search warrant be met.

2) Once the statutory conditions have been met, the justice of the peace should consider all of the circumstances in determining whether to exercise his or her discretion to issue a warrant.

3) The justice of the peace should ensure that a balance is struck between the competing interests of the state in the investigation and prosecution of crimes and the right to privacy of the media in the course of their news gathering and news dissemination. It must be borne in mind that the media play a vital role in the functioning of a democratic society. Generally speaking, the news media will not be implicated in the crime under investigation. They are truly an innocent third party. This is a particularly important factor to be considered in attempting to strike an appropriate balance, including the consideration of imposing conditions on that warrant.

4) The affidavit in support of the application must contain sufficient detail to enable the justice of the peace to properly exercise his or her discretion as to the issuance of a search warrant.

5) Although it is not a constitutional requirement, the affidavit material should ordinarily disclose whether there are alternative sources from which the information may reasonably be obtained and, if there is an alternative source, that it has been investigated and all reasonable efforts to obtain the information have been exhausted.

6) If the information sought has been disseminated by the media in whole or in part, this will be a factor which will favour the issuing of the search warrant.

7) If a justice of the peace determines that a warrant should be issued for the search of media premises, consideration should then be given to the imposition of some conditions on its implementation, so that the media organization will not be unduly impeded in the publishing or dissemination of the news.

8) If, subsequent to the issuing of a search warrant, it comes to light the authorities failed to disclose pertinent information that could well have affected the decision to issue the warrant, this may result in a finding that the warrant was invalid.

9) Similarly, if the search itself is unreasonably conducted, this may render the search invalid.

[19] The Toronto Star does not contest that there are reasonable grounds to believe an offence has been committed by Mr. Deiac, and that the videotaped interview is in its possession or control. Moreover, the standard for assessing the reasonable grounds relied upon by the police in obtaining the Production Order is a relatively low one. In *Mugesera v Canada (Minister of Citizenship)*, [2005] 2 SCR 100, at para 114, the Supreme Court of Canada held that this standard requires “more than mere suspicion, but less than the standard applicable in civil matters.” Accordingly, reasonable grounds exist where there is an objective basis for the belief, based on compelling and credible information.

[20] Furthermore, the question of whether the sought-for material “will afford evidence respecting the commission of the offence” has been characterized by the Supreme Court as a “broad statement, encompassing all materials which might shed light on the circumstances of an event which appears to constitute an offence... [including] anything relevant or rationally connected to the incident under investigation, the parties involved, and their potential culpability”: *Canadian Oxy Chemicals Ltd v Canada (Attorney General)*, [1999] 1 SCR 743 at para 15. The Court acknowledged that this standard is potentially an intrusive one, but reasoned that “the public interest requires prompt and thorough investigation of potential offences”: *Canadian Oxy*, at para 19.

[21] There are a number of ways in which it is apparent that the videotape of Mr. Deiacó’s interview will afford evidence regarding the commission of the offences charged. In the first place, the published portions of the interview suggest that the interview in its entirety gives a starkly different account of Mr. Deiacó’s involvement with the sex trade than the account he gave in his police statement. Such stark discrepancies indicate that the full interview will provide evidence going to Mr. Deiacó’s credibility.

[22] By way of illustration, Crown counsel demonstrates that in his police statement Mr. Deiacó denied being a “pimp” at all, while in the parts of the interview quoted in “Accused pimp describes ways women get lured into human sex trafficking” he portrays himself as well experienced in this line of work. Moreover, in his police statement Mr. Deiacó asserted that he has done nothing but assist a young woman leaving a homeless shelter and that his motivations were strictly altruistic, while in the Toronto Star article he states that The Game for him consists of targeting broken girls and coercing them to work for him in the sex trade for his personal financial gain.

[23] The premise of Mr. Deiacó’s interview by Ms. Carville was that he would provide the Toronto Star with detailed information about working as a pimp. This purpose, together with the insights gleaned from the published snippets of the interview, provide substantial grounds for believing that the full interview includes additional information of this type. This will then provide additional factual material to compare with Mr. Deiacó’s police statement and will aid in assessing his credibility.

[24] The charges against Mr. Deiacó indicate that he had pre-existing knowledge of how to place advertisements for sexual services on a website entitled backpage.com, that he was aware of the street prices for various sexual services, and that he was experienced in manipulative techniques such as personal, geographic, and social media isolation of the targeted young women. It is also alleged that Mr. Deiacó utilized hotel rooms suitable for prostitution, and that he had on hand lingerie for his targeted women. Given this level of specialized knowledge and resources, evidence from the interview establishing that Mr. Deiacó is a knowledgeable and experienced pimp is evidence that goes to supporting the prosecutorial theory that he is the complainant’s pimp: *Re Lubell*, [1973] OJ No 179, at para 5 (SCJ).

[25] Counsel for the Crown submits that whereas the published portions of Mr. Deiacó's Toronto Star interview contain some relevant evidence, these are in the form of decontextualized excerpts. In order to establish that these excerpts are accurate, are truly attributable to Mr. Deiacó, and, most importantly, have not been taken out of context or qualified or amended by other unpublished statements, they need to be read or heard in the context of the videotape in its entirety. The necessity of reviewing statements made by an accused person in their full context was articulated emphatically by the Court of Appeal in *R v Mallory*, 2007 ONCA 46, at para 203:

It is well accepted that if the crown tenders the statement of an accused, it cannot pick and choose those parts of the statement that it would like the jury to hear; it must take 'the good with the bad', and both the 'good' and the 'bad' are admitted for their truth, for and against the accused. Moreover, a party wishing to adduce a statement must put in as much of the statement as is necessary to permit a fair understanding of the individual utterances.

[26] Here, the specificity of the published comments suggests that there are further inculpatory admissions contained in the unpublished portions of the interview. The reference to the "life he lives" and the acknowledgment that in playing "The Game" he has been "playing with fire" and risking prison time suggests a consciousness of guilt that is the tip of the iceberg. While Mr. Deiacó started the interview with the statement that he could not speak about the charges pending before the court in his upcoming trial, it appears that once he got into the interview he found it hard to resist this topic.

[27] Unlike in *Canadian Broadcasting Corp. v Manitoba (Attorney General)* (2009) 250 CCC (3d) 61 (Man CA), on which the Toronto Star relies, there is ample evidence here of inculpatory statements by Mr. Deiacó as well as statements relevant to his credibility. A view of the short video clip and the articles published by the Toronto Star makes it apparent that the material in the public domain is only a fraction of what Mr. Deiacó said in relation to the charges he faces. The Manitoba Court of Appeal indicated, for cogent reasons, that an application for a production order of this nature requires some "evidence of the alleged inculpatory statements": *CBC v Manitoba*, at para 65. That, however, does not mean that the police must already have in hand the evidence that they seek in applying for the order.

[28] This is therefore not a case where the police applied for the Production Order based on conjecture; rather, the application was based on a reading of specific statements made in the published portions of the interview and a logical deduction that there is more of the same in the unpublished portions. The specificity of the published statements relating to the offenses charged, the partial statements about the charges attributed to Mr. Deiacó in the published part of the interview, his acknowledgement that he has been "play[ing] with fire" and will "get burnt" in his upcoming case, along with his other statements that need to be contextualized, all add up to a body of evidence that passes the *Mugasera* test of more than mere suspicion but less than the civil standard of proof.

[29] The affidavit of Officer Davis that supported the application for the Production Order made specific reference to the special position of the Toronto Star as a media organization. The officer advised the issuing court that he is cognizant that “special considerations apply when the police seek to exercise a production order on a media entity given the vital role of these institutions in a democracy.” He went on to assure the court that he understands that “complying with a search can, to some degree, disrupt a media entity and I have made efforts to ensure that any disruption to the gathering and dissemination of the news is limited as much as possible.” The officer went on to explain that the decision to proceed by way of a production order instead of search warrant or subpoena was calculated to cause minimal disruption to the Toronto Star and to Ms. Carville, its reporter.

[30] The Toronto Star is not, as its counsel suggests in argument, being used here as an instrument of the state; nor is it being made to disgorge information in the face of a guarantee of confidentiality given to its source. The source, Mr. Deiaco, gave the interview to the newspaper of his own free will and was apparently prepared to have it published. In seeking the Production Order, the police have not exploited the position of the Toronto Star and its reporter in a way that causes a legally recognizable chill on the press: *R v National Post*, [2010] 1 SCR 477, at paras 89-90.

[31] The Toronto Star’s affiant, Kevin Donovan, a seasoned and respected journalist, contends that the Production Order may have a “chilling effect” in the sense that it will discourage people from speaking to a reporter “if they know that, regardless of the assurances they received from a reporter, all of the information they provide to the reporter may be given to the police in full, unedited form, and be used to assist in their own prosecution or the prosecution of others.” It is understandable that the media may perceive the responses of potential interviewees this way, and I am certain that Mr. Donovan is stating the genuine belief of an experienced reporter. Indeed, McLachlin J (as she then was) acknowledged this point in her lone dissent in *CBC v Lessard*, at para 66, where she conceded that “the press may lose opportunities to cover various events because of fears on the part of participants that press files will be readily available to the authorities”.

[32] Nevertheless, Cory J, for a plurality of the Court in *R v New Brunswick*, at para 37, specifically indicated that that is not a “chill” of which the law relating to production orders can take account:

The media argue that the issuance of a search warrant would have the effect of ‘drying up’ their sources of information. In my view, that argument is seriously weakened once the media have placed the information in the public domain. They can then no longer say, in effect, ‘I know that a crime was committed; I have relevant information that could assist in its investigation and prosecution; but I’m not going to assist you towards that end’. Once the information has been made public, it becomes difficult to content there would be a ‘chilling effect’ on the media sources if that information were also disclosed to the police. At that point, it is unlikely that the police would want more than the videotape itself.

[33] Furthermore, and with all due respect to the Toronto Star, it is not up to them, as the target of the Production Order, to unilaterally decide what materials the police require in order to thoroughly investigate an offence. As Crown counsel points out in her written submissions, while “bits and pieces of the information the police require” are available from articles published by the Star and the less-than-4 minutes of the interview with Mr. Deiaci that it has posted online, the newspaper’s editorial decision as to how much to publish does not serve to define the scope of a police investigation. Indeed, the Toronto Star is itself not privy to all of the information that the police have collected in their investigation, and so cannot possibly be in a position to say what the police need and what they do not need: see *R v National Post*, at para 6.

[34] Review of the Production Order, like a review of a search warrant, starts with a presumption that the order is valid: *CBC v Manitoba*, at paras. 30-32; *R v Sadokov*, 2014 ONCA 72 at para 83. In *R v National Post*, at para 80, the Supreme Court of Canada set out the standard of review applicable to either type of order:

On the warrant application, the burden is on the police to show reasonable and probable grounds. Once the warrant has been issued, however, the burden shifts to the media applicant on the motion to quash to establish that there was no reasonable basis for its issuance. Moreover, the reviewing judge is generally bound, in deciding this issue, to afford a measure of deference to the determination of the issuing justice.

[35] Accordingly, the scope of judicial review is narrow. As applicant for an order of *certiorari*, the Toronto Star cannot succeed unless they show there was no reasonable basis to issue the Production Order. As reviewing judge, I am not to engage in a *de novo* analysis or substitute my own opinion for that of the authorizing justice: *R v Sadokov*, at paras 83-89.

[36] Having regard to the *Lessard* factors set out above, I am of the view that the authorizing justice “could have found the issuance of the production order against a media target to be reasonable”: *R v Vice Media*, at para 13 [emphasis added]. The test for quashing the Production Order has not been met.

[37] Finally, I note that the Toronto Star submits that, in the alternative to quashing the Production Order, it be varied pursuant to s. 487.0193(4) of the *Criminal Code*. That section authorizes a court to revoke or vary a production order if compliance with it would be unreasonable or if it would necessitate the disclosure of privileged information. There is nothing in the record to suggest that either of those circumstances apply to the Production Order in issue here.

[38] Taking all of the circumstances into account, I am of the view that the Toronto Star’s request to quash the Production Order cannot succeed. The Application is therefore dismissed.

Morgan J

Released: February 21, 2017

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REASONS FOR JUDGMENT

EM Morgan J

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