IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *R. v. Sagmoen,*
2019 BCSC 1720

Date: 20190917
Docket: 52333-2; 52333-3
Registry: Vernon

Regina

v.

Curtis Wayne Sagmoen

Ban on Publication: Pursuant to 486.5(1) & 517(1) C.C.C.
A publication ban has been imposed under section 486.4 restricting the publication, broadcasting or transmission in any way of evidence that could identify a complainant or witness, referred to in this judgment by the name Witness A and use of initials BB, CC, DD, EE, FF, GG, HH, II and JJ. This publication ban applies indefinitely unless otherwise ordered

Before: The Honourable Madam Justice Beames

Oral Reasons for Judgment

Counsel for the Crown:	S. McCallum
Counsel for the Accused:	L.J. Helps
Counsel for CBC/Global News:	M. Vesely R. Gerbrandt
Appearing on behalf of Info News:	B. Bulmer (Company Representative)
Place and Date of Trial/Hearing:	Vernon, B.C. September 16, 2019
Place and Date of Judgment:	Vernon, B.C. September 17, 2019

[1] **THE COURT:** The accused, Curtis Sagmoen, is before the court on a four-count indictment, alleging that on August 27 and 28, 2017, he masked his face with intention to commit an indictable offence, intentionally discharged a firearm, being reckless as to the life or safety of another person, used a firearm while threatening the complainant or during flight after threatening the complainant, and uttered threats. The trial commenced last Monday, by judge alone, with a voir dire as to the voluntariness of statements made by the accused to the police on September 5 and 6, 2017, after his arrest. Before the trial commenced, Crown sought an order banning the publication of the identity, or any information that might tend to identify Witness A, who is the complainant in this matter. The application was made on notice to the media, and not opposed by the media or by defence. I granted that publication ban and it remains in place indefinitely. The defence then sought a ban on the publication of any of the evidence or submissions on this voir dire, and any subsequent voir dires, which are expected to be heard later this year and which relate to alleged breaches of the s. 8 and s. 9 *Charter* rights of the accused. Notice had not been given to the media of that application and members of the media sought to respond to that application. In particular, CBC advised that in-house counsel was being consulted and that outside counsel may be retained to make submissions. I imposed a temporary ban until such time as I had heard submissions and ruled. The statement voir dire, as I indicated, commenced last Monday, September 9 and concluded on September 12. I hope to give oral reasons on September 23 on the statement voir dire. During the statement voir dire, two members of the media applied for access to exhibits. Those applications were put over to be heard with the application for the publication ban.

[2] Yesterday I heard the defence application for a ban on the evidence and submissions on the statement voir dire. The application for the publication ban with respect to the other voir dires was essentially adjourned and will be spoken to later if required. I also heard yesterday the submissions with regard to release of exhibits to the media.

[3] Dealing first with the publication ban, the legal principles are not in issue. I have the inherent jurisdiction to impose a publication ban. The principles to be applied in determining whether to exercise my jurisdiction to impose a ban are based on the *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, and *R. v. Mentuck*, 2001 SCC 76, decisions and were neatly summarized in the very recent case of *R. v. Minassian*, 2019 ONSC 4455, at para. 26 as follows:

> [26] . . . (1) Court proceedings, including any materials filed in such proceedings, are presumptively "open" to the public.
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> (2) The party seeking to impose any limit on the public's access to court proceedings bears the burden of establishing that the test for limiting access has been met. [*Nova Scotia (Attorney General) v. MacIntyre*, [1982] 1 S.C.R. 175, at p. 189]
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> (3) Full public access can only be barred where the judge, in the exercise of her discretion, "concludes that disclosure would subvert the ends of justice or unduly impair its proper administration." [*Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41 at para. 4]
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> (4) A non-publication or sealing order can only be made when two conditions are satisfied:
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> (i) such an order is necessary to prevent a serious risk to the administration of justice because reasonable alternative measures will not prevent the risk; and
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> (ii) the salutary effects of the order 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 the accused to a fair and public trial, and the efficacy of the administration of justice. [*Ibid* at para. 26]
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> (5) The "risk" in the first prong of the test must be "real, substantial, and well-grounded in the evidence." It is a "serious danger sought to be avoided, not a substantial benefit or advantage to the administration of justice sought to be obtained." [*Ibid* at para. 27; *Mentuck*, *supra* note 2 at para. 34]
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> (6) The balancing of interests involved in the second part of the test only arises if the first part of the test has been met. [*Mentuck*, *supra* note 2 at para. 48]

[4] Defence counsel submits that there is a risk of trial fairness given the possibility of witness tainting, specifically the complainant witness, if details and descriptions of the accused from the statement voir dire are published and if details of the property where the accused lived are published. Defence counsel also seeks

a publication ban in order to preserve trial fairness with regard to another criminal case pending against the accused, and two ongoing investigations being conducted by the RCMP involving the accused, which may lead to further charges, and future trials, including one ongoing investigation of murder.

[5] Defence counsel also seeks the publication ban in order to protect the privacy interests of her client, with regard to information he discussed with the interviewing police officer which may be embarrassing or detrimental to his reputation but which are not central to this case. She raised the spectre of the accused being at risk in jail if a ban is not granted. It is also the defence submission that the publication ban sought is necessary in order to prevent harm, or further harm, to the parents of the accused.

[6] The evidence before me on this application is limited to the evidence I heard in the voir dire, an affidavit filed last week detailing the extensive media coverage of this case up to the commencement of the voir dire, and an affidavit filed yesterday affirmed to by Corporal Kilborn of the RCMP South East District Major Crime Unit. In addition, I have some indication from submissions by Crown counsel with regard to the statement or statements made by the complainant concerning her description of the person who she says threatened her and some words that person spoke.

[7] In general, a mere assertion that witness testimony could or would be tainted by the reading or hearing of media reports cannot justify the granting of a publication ban (*Toronto Star Newspaper, Ltd. v. Ontario*, 2005 SCC 41 at paras. 38-9; *R. v. Minassian*, 2019 ONSC 4455 at paras. 44-5).

[8] In this case, there is simply no evidence before me of a real risk of witness tainting if the media simply reports on the evidence heard and submissions made on the statement voir dire in this case. To paraphrase from *R. v. Cloughley*, [1996] N.W.T.R. 238, as quoted in *Minassian* at para. 46, Crown witnesses should be told to avoid reading or hearing anything published about the case and if a Crown witness gains knowledge from a media report, that can be dealt with by counsel for Crown and defence, as counsel said at trial.

[9] With respect to Mr. Sagmoen's other charges, which he has elected to have tried by judge alone, I am unable to see how publication of any of the evidence on the statement voir dire in this case could present a serious risk to the proper running of that judge-alone trial. With regard to ongoing investigations, no charges have been laid. Any risk, in my view, is speculative. If in fact charges are laid in the future against Mr. Sagmoen, and eventually tried, the trial will be significantly in the future. If such a trial proceeded as a judge and jury trial, the passage of time and all of the tools available to ensure impartial juries, including changes of venue, challenges for cause, and firm instructions to jurors, will ameliorate any serious risk to trial fairness.

[10] With regard to privacy interests of the accused, or protection of the accused or his family, I have no evidence of any serious risks. There has already been significant media coverage with respect to this matter and the investigation conducted at Mr. Sagmoen's parents' property, and no evidence has been put before me to justify granting a publication ban on that basis.

[11] However, there is evidence, in the affidavit of Corporal Kilborn, of risk of serious harm to other witnesses and subjects on other investigations, and a risk to ongoing investigations, if the names, or pseudonyms, for those people, who are named in the warned statements given by the accused, were to be published at this time. Crown, defence, and counsel for the media parties agree that those names should be the subject of a publication ban.

[12] With that exception, I am not satisfied a publication ban on the statement voir dire is necessary to prevent a serious risk to the proper administration of justice. Consequently, the application for the ban on publication of the evidence and the submissions on the statement voir dire, and on this application, including my reasons, is dismissed, except that there will be a ban on the publication of the names BB, CC, DD, EE, FF, GG, HH, and II.

[13] I turn now to the media request for exhibits. The same analytical approach developed in *Dagenais* and *Mentuck* applies to weighing the factors at stake, in the context of the specific case before the court when an application is made for release

of court exhibits (*Canadian Broadcasting Corp. v. The Queen*, 2011 SCC 3 at para. 16).

[14] Given my ruling with regard to the publication ban application, I am prepared to grant the media access to many of the exhibits filed on the statement voir dire. However, in this case, the main issue at trial will be identification. There is a very real risk, in my view, of allowing release of the video and audiotapes which record the voice of the accused and photographs of articles of clothing seized from his residence and marked as Exhibit AA on the voir dire, due to the risk of witness tainting if those visual and audio exhibits are published.

[15] Counsel for the media parties advises that audio and video recordings can be distorted and pixelated so as to ensure that Mr. Sagmoen's voice is not recognizable and his image is not identifiable.

[16] Balancing the interests at stake in this case, I will order that the media is entitled to obtain copies of all of the exhibits on the voir dire, except Exhibit O, which is covered by the ban imposed last week concerning the identity of Witness A, and Exhibit AA, which is the package of photographs of articles of clothing.

[17] With respect to the audio and video recordings, their release to the media is on the condition that the audio recordings and video recordings may only be broadcast and/or published if the voice of Mr. Sagmoen is distorted so as to be unrecognizable. I do not find it necessary, given the photographs already in the public domain and the nature of the expected identification evidence to be led at trial, to impose any condition with respect to pixilation of Mr. Sagmoen's image.

[18] The ban with regard to publication of the names identified by Corporal Kilborn referred to by me a moment ago, of course, also bans publication of any parts of the transcripts or recordings of Mr. Sagmoen's statements where those names appear, unless the transcripts or recordings are first redacted to remove those names.

[19] That concludes my decision on the application for publication ban and on the media applications for access to exhibits.

[20] Are there any matters arising.

[21] MS. McCALLUM: My Lady, it is Simone McCallum for Crown counsel speaking.

[22] THE COURT: I recognize your voice, Ms. McCallum, go ahead.

[23] MS. McCALLUM: Thank you. The one question I have arising is in Crown counsel's submission, the pseudonym attaching to -- believed to attach to Witness A was mentioned. It is not referenced in Corporal Kilborn's affidavit. Has the court given any consideration to extending the ban on publication to that name?

[24] THE COURT: I think that the ban on publication with respect to the Witness A and any information that might tend to identify her covers her already, including publication of her pseudonym, and so consequently I did not think it necessary to add that name but, out of an abundance of caution, I am prepared to provide that clarification if you think it appropriate.

[25] MS. McCALLUM: I think it might be helpful, My Lady. I can see the possibility that there might be a disconnect between the court's reasons on this matter and perhaps members of the media not recognizing that that name is connected to Witness A.

[26] THE COURT: All right, then added to the list of names I provided earlier will be the name JJ.

[27] MS. McCALLUM: Thank you.

[28] THE COURT: Anything else arising?

[SUBMISSIONS FROM 10:18:44 TO 10:25:07 A.M.]

[29] THE COURT: All right, I have heard enough. I am going to impose a ban with respect to the issue of the identification, - I am not quite sure how to phrase this - any evidence concerning what the complainant may have said concerning the

specifics of the appearance of the accused or the assailant, perhaps is a better expression, and any submissions or reference in my reasons to the complainant having heard the assailant speak, for the reasons that identification, as I have already indicated, remains the main, if not the only, but certainly a main issue at the trial of this matter, and because of the concern of requiring defence to, in effect, disclose defence strategies, and to ensure that the issue of witness tainting is not raised by media reporting.

[30] So that portion of the submissions made yesterday concerning what the complainant is said to have said about identification of the assailant or the assailant's voice is not to be published or broadcast, nor is that small excerpt with respect to my reasons. That is to say, reference to what the complainant has said or is alleged to have said about appearance and voice identification.

“Beames J.”