Court File No. 1211-998-19-1683-00

ONTARIO COURT OF JUSTICE

In the Matter of an Application by JD
regarding section 486.4 of the *Criminal Code*

HER MAJESTY THE QUEEN

v.

KEVIN T. EVANS

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R E A S O N S F O R R U L I N G

REMOTELY BEFORE THE HONOURABLE JUSTICE S. N. LATIMER
on Monday, August 24, 2020, for a MILTON, Ontario proceeding.

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APPEARANCES:

N. Chiera	Counsel for the Crown
E. Chang	Counsel for Mr. Evans
S. Laperriere	Counsel for the Applicant

MONDAY, AUGUST 24, 2020

... CROWN SUBMISSIONS RECORDED BUT NOT TRANSCRIBED AT THIS TIME.

... APPLICANT SUBMISSIONS RECORDED BUT NOT TRANSCRIBED AT THIS TIME.

... DEFENCE SUBMISSIONS RECORDED BUT NOT TRANSCRIBED AT THIS TIME.

... CROWN REPLY SUBMISSIONS RECORDED BUT NOT TRANSCRIBED AT THIS TIME.

... APPLICANT REPLY SUBMISSIONS RECORDED BUT NOT TRANSCRIBED AT THIS TIME.

R E C E S S

U P O N R E S U M I N G

R E A S O N S F O R R U L I N G

LATIMER, J.: (orally)

This is an application by the third party, CBC, on behalf of the complainant, Jessica Donald, to lift a discretionary non-identification order made by a Justice of the Peace pursuant to Section 486.4 of the *Criminal Code*.

The order, at first instance, was raised by the

Justice of the Peace on her own motion. I say this not to suggest anything improper, but only to identify that this was not an order first requested by the Crown attorney's office. It proceeded, as is common in the criminal process, upon identification of the particular allegations which are enumerated in 486.4(1)(a)(i) of the *Criminal Code*.

No one on this application, properly, takes issue with the practice of the intake courts being conscious of these orders, which are commonly sought and mandatorily issued upon request.

In this particular case, the complainant no longer seeks the shelter of the statutory non-identification order. That is clear from the record before me, which all parties agree constitutes a material change. I agree with that concession.

It is equally clear that I, as a Provincial Court judge, have jurisdiction to consider this application for revocation of the previously made order. See *R. v. Adams*, [1995] 4 S.C.R. 707 at Paragraph 28, and *R. v. Cunningham*, [2010] 1 S.C.R. 331 at Paragraph 19.

I should say before I go any further that I am grateful for the thoughtfulness and industry that has gone into the submissions in this case,

particularly from Mr. Chang and Ms. Laperriere. The material filed and the focused oral submissions I heard today permit me to consider this matter and provide this judgment in such an efficient manner. Their approach to this issue is a credit to the administration of justice.

The focused issue that practically requires resolution in this case is whether Crown consent to the revocation is a necessary precondition to altering an existing 486.4 order. The respondent's position in this regard is aided by the language employed by the Supreme Court of Canada in *Adams* in 1995.

In that case, a Section 486(4) order was made during a Superior Court trial at the request of the Crown. The trial judge's ultimate reasons for judgment demonstrated significant disbelief, and perhaps disregard for the complainant, referring to her as "a prostitute" and "a liar".

At the close of his reasons, he rescinded, on his own motion, the prior non-identification order. The Crown resisted, and ultimately sought leave to appeal the rescission to the Supreme Court of Canada. Leave was granted, and the matter was heard by the Court, with Justice Sopinka writing and allowing the appeal for the Court.

In doing so, Justice Sopinka wrote as follows,

beginning at Paragraph 30:

> Where an order is required to be made by statute, the circumstances that are relevant are those whose presence makes the order mandatory. As long as these circumstances are present, there cannot be a material change of circumstances.
>
> Subsections (3) and (4) of Section 486 make the order banning publication mandatory on the application of the prosecution, the complainant or a witness under the age of 18. In this case, the circumstance that made the order mandatory was an application by the prosecutor. The Crown did not withdraw its application or consent to revocation of the order. Accordingly, the circumstances that were present and required the order to be made had not changed. The trial judge, therefore, did not have the power to revoke the order.
>
> While this conclusion is sufficient to dispose of this case, it is useful to add that, had the Crown consented to the revocation order but the complainant did not, the trial judge would equally have had no authority to revoke. The complainant was also entitled to the publication ban even if the Crown had not applied for it.

> If, however, both the Crown and the complainant consent, then the circumstances which make the publication ban mandatory are no longer present and, subject to any rights that the accused may have under s. 486(3), the trial judge can revoke the order. There may be circumstances in which the facts are such that both the Crown and the complainant conclude, after hearing the evidence or some of it, that the public interest and that of the complainant are better served if the facts are published.

These statements by the Supreme Court, in my mind, make perfect sense in the context in which they were made. In *Adams*, there was no evidence regarding the complainant's perspective on the revocation of the order. The Crown who advocated for it on her behalf during the trial was strenuously opposed to its revocation. Presumably, that position was informed by the complainant's position, as she is the one protected by the order and impacted by its revocation.

Stepping back for a moment, some overarching principles are relevant, in my mind, to framing this issue.

1. It is clear that the purpose of these provisions, both 486(4) which is in force at the time of *Adams*, and the current 486.4, are to

protect the privacy interests of complainants and promote participation in the criminal justice system by both children and vulnerable parties such as sexual assault complainants: See Adams, Paragraph 25, as well as the preamble of the legislation that created the current 486.4 provision. An Act to Amend the *Criminal Code* (Protection of Children and other Vulnerable Persons) and the *Canada Evidence Act* (S.C. 2005, c. 32). Specifically:

> WHEREAS the Parliament of Canada wishes to encourage the participation of witnesses in the criminal justice system through the use of protective measures that seek to facilitate the participation of children and other vulnerable witnesses while ensuring that the rights of accused persons are respected.

2. The modern criminal approach, while maintaining in large part the two-party accused versus state model, makes room statutorily and otherwise for a complainant's input on matters that directly impact her privacy interests.

In this regard, these provisions seek to provide protection to complainants who participate in our process, as well as agency in making considered determinations regarding decisions that impact their privacy.

The decision to seek a 486.4 non-identification order, or seek revocation of a previously made order, is an example of a complainant's permissible involvement in the criminal process. Other examples include Sections 278.2(2), 278.94(2) and (3) of the *Criminal Code*, relating to third-party records applications and prior sexual history evidentiary applications.

3. I am conscious that these provisions, by their very nature, intrude upon the Section 2(b) constitutional right to free expression. In the circumstances, my analysis should interpret these provisions, and their applicability, in a manner that is constitutionally compliant.

If the basis for an order no longer exists, continued maintenance may infringe the 2(b) right unduly.

Going back to the issue at hand, does *Adams* stand for the proposition that Crown consent is a threshold requirement to considering revocation of an existing 486.4 order? I conclude it does not.

These provisions are intended to do one thing; protect the privacy, where appropriate, of complainants and witnesses. When the Crown applies for such an order they are acting, in my view, as a conduit for the complainant's interests: See

Canadian Newspapers v. Canada, A.G. [1988] 2 S.C.R. 122, Paragraph 26.

A practical reality is that complainants and witnesses do not have the time or resources, generally speaking, to attend individual court appearances solely for the basis of advocating for their own 486.4 orders.

The system, quite reasonably, allows for the Crown, who is always present, to advocate on their behalf or, as here, for judicial officers like a Justice of the Peace to consider the issue on their own motion.

Again, in this regard, these judicial officers are acting in good faith as a conduit for the reasonable, perhaps presumptive, concern that may exist regarding the publication and identification of particulars associated with sexual assault complainants.

In this case, with respect, the Crown did very little to seek the order at first instance, and is doing very little on this application to uphold it. Their justification for not taking a position on revocation is that taking such a position is unnecessary to resolution of the issue.

While it might, perhaps, have been more helpful to the Court and to the complainant for the Crown to

have been more explicit, as it turns out, after consideration of the matter, I agree with them. Their consent is not necessary in the particular circumstances of this case.

My reading of *Adams* is that the question of material change in the context of an application to revoke a non-identification order is a fact-specific issue to be determined on a case-by-case basis.

On the facts of Mr. Evans' case, the Justice of the Peace reasonably inferred, at the time she raised the issue and made the order, that the complainant would wish the shelter of the statutory provision. On the facts before me, that conclusion is no longer justified. Ms. Donald has exercised her own agency in this regard, and has sought relief from the order.

In my view, our system makes space for such requests. This is an open-court process. 486.4 orders are necessary statutory incursions on that openness. To be clear, these orders exist generally for good reason, and are reasonable limitations on openness that are necessary to encourage participation and protection of historically vulnerable groups like sexual assault complainants in a criminal justice process.

But when faced with the express intention of a

particular complainant to not have her identity protected by a continuation of a non-identification order, it smacks of paternalism to maintain the order simply because the state's representative does not agree.

In the absence of a reasoned evidentiary basis for Crown opposition, their silence on this issue does not prohibit me from accepting the complainant's position, as advanced by CBC counsel, and revoking the current order as it relates to Ms. Donald.

In coming to this conclusion, I adopt and agree with the statements made by Justice Redman in 2018 in *JF (Re)*, 2018 ABPC 36, Paragraph 40. It is my view that the circumstances that existed presumptively in the mind of the Justice of the Peace on May 3, 2019 have changed, and that it is just that I amend the 486.4 order as it relates to Ms. Donald.

In doing so, however, I am conscious, and do not wish to be seen as ignoring the legitimate fair trial interests raised by the respondent in his material. This is a matter that appears headed for a jury trial. In the event it is determined that these concerns cannot be addressed adequately by a challenge for cause process during jury selection, it is open to the respondent to seek, with notice, his own publication ban in the Superior Court of Justice,in the manner identified by Ms. Laperriere

in her materials.

Disposition

The Section 486.4 order made on May 3, 2019 by Justice of the Peace Huston, to the extent that it relates to the complainant, Jessica Donald, is revoked. The order remains in place in relation to particular witnesses, such as - Mr. Chiera, you identified this possibility earlier in the proceeding. Can I have the initials of the particular witnesses that you were concerned of?
MR. CHIERA: Definitely, just give me one second, Your Honour. Just the initials, Your Honour?
THE COURT: Well, we're going to write - I - unless - in the context of this case, I suspect the initials will be adequate to put everyone on notice about who it's being referred to. If you think otherwise, you can just provide the names.
MR. CHIERA: I think it should be adequate. It's K.G. and L.P.
THE COURT: You will note on the information the order remains in this regard to potential witnesses, K.G. and L.P.
COURTROOM CLERK: Yes, Your Honour.

... SCHEDULING DISCUSSIONS RECORDED BUT NOT TRANSCRIBED AT THIS TIME.

M A T T E R A D J O U R N E D

FORM 2

CERTIFICATE OF TRANSCRIPT (SUBSECTION 5 (2))

Evidence Act

I, Lisa Crawford, certify that this document is a true and accurate transcript of the recording of R. v. Kevin T. Evans, in the Ontario Court of Justice, held at 491 Steeles Ave. E., Milton, taken from recording number 1211_16_20200824_091247__6_LATIMESC.dcr, which has been certified in Form 1 by N. Gresel.

August 27, 2020

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