Court of Queen's Bench of Alberta

Citation: R v EA, 2020 ABQB 536

Date: 20200915
Docket: 170268676Q1
Registry: Calgary

Between:

Her Majesty the Queen

Respondent

- and -

E.A.

Applicant

Restriction on Publication

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

By Court Order, information that may identify the Complainant must not be published, broadcast, or transmitted in any way.

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

Reasons for Decision
of the
Honourable Madam Justice R.E. Nation

Introduction

[1] The Applicant was acquitted of a sexual assault charge in March of 2018. He is applying for an exception to a publication ban that exists under section 486.4 of the *Criminal Code*, RSC 1985, c C-46. Under this exception, he intends to submit an unredacted transcript of the sexual assault trial to the Canada Border Services Agency [the "CBSA"] in support of a claim that his wife at the time [the "Complainant"] committed an immigration fraud.

[2] This Application is for an "administration of justice" exception under section 486.4(4) of the *Criminal Code*. The question is whether an exception to a publication ban may be granted to release unredacted trial transcripts to the Applicant on the basis of the administration of justice exemption.

Background Facts

[3] The Applicant and the Complainant met over the internet. After meeting in person in Morocco, they married and the Applicant sponsored the Complainant to come to Canada. The Applicant alleges that the Complainant told him she wanted to move to Canada to live with him as his wife. The Complainant arrived in Canada in January of 2017. In March of 2017, the Complainant went to the Calgary Police Service with allegations of neglect and sexual assault. After an investigation, charges were laid against the Applicant.

[4] Applicant's counsel stated that his understanding of the immigration situation in 2017 was that when an individual sponsored their spouse, the individual and the spouse had to stay married and live together for three years as a condition of the spouse's immigration visa; however, exceptions were made in cases of neglect or sexual assault.

[5] The Applicant deposes that he contacted Immigration and Citizenship Canada in April of 2017, requesting the cancellation of his sponsorship of the Complainant and alleging that he was a victim of immigration fraud. He was told that the Complainant had obtained a permanent resident card so his sponsorship was no longer relevant, and was advised to wait until the outcome of his sexual assault trial before making a complaint of immigration misrepresentation to the CBSA.

[6] The Applicant retained an immigration lawyer to make the complaint, and deposes that he met with the lawyer and an unnamed former CBSA officer about how best to prepare an immigration complaint to the CBSA [the "Meeting"]. The complaint, as articulated by the Applicant's counsel, is that the Complainant falsely represented that she would come to Canada to live with the Applicant and be his wife; however, after arriving and obtaining her permanent resident card, she made false allegations of abuse and neglect so that she could stay in Canada but not live with the Applicant as his wife and not be subject to his sponsorship.

[7] The Applicant deposes that during the Meeting, the former CBSA officer recommended that a trial transcript be provided with his complaint as "[t]he former officer made it clear that based on his experience, without the trial transcript, [his] complaint would have very little chance of success."

[8] The Crown has no contact information for the Complainant at this time. The Crown takes no position on this application, other than to stress the strong policy reason to protect the identity of complainants in sexual assault matters, and to express concern that the CBSA was not served and is not involved in this Application.

The Law

[9] Section 486.4 of the *Criminal Code* states:

> (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of
>
> > (a) any of the following offences:
> >
> > > (i) an offence under section 151, 152, 153, 153.1, 155, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or
> >
> > > (ii) any offence under this Act, as it read from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day; or
> >
> > (b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).
>
> (2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall
>
> > (a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the victim of the right to make an application for the order; and
> >
> > (b) on application made by the victim, the prosecutor or any such witness, make the order.
>
> …
>
> (4) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice when it is not the purpose of the disclosure to make the information known in the community.

[10] Section 442, which was re-enacted as section 486, was a measure enacted by Parliament to remedy the underreporting of sexual assault: *Criminal Code*, RSC 1985, c C-46. Fear of treatment by police or prosecutors, fear of trial procedures, and fear of publicity or embarrassment are all reasons sexual assault victims do not report. Section 442 was designed to ensure a victim who fears publicity is assured, when deciding whether to report the crime or not, that the judge must prohibit upon request the publication of the complainant's identity or any information that could disclose it: ***Canadian Newspapers Co v Canada (AG)***, [1988] 2 SCR 122, para 18 [***Canadian Newspapers***].

[11] In ***R v Bayley***, 2018 BCPC 16 [***Bayley***], the accused was a massage therapist registered with the College of Massage Therapists [the "College"] facing allegations of sexually assaulting a 14-year-old girl. Upon the accused being acquitted, the College applied to the British Columbia

Provincial Court for an order allowing it to access trial transcripts to contribute to its investigation. The College was granted access to trial transcripts that were redacted as the identity of the Complainant was not material to their investigation.

Application of the Law to the Facts

[12] In ***Bayley***, the purpose of the application was to aid the College in their investigation against the accused, and therefore the identity of the complainant was not material. Accordingly, the British Columbia Provincial Court ordered the redaction of the trial transcripts. However, in this case, the Applicant is asking for the release of an unredacted transcript to allow the identification of the Complainant to support his complaint to the CBSA. The express purpose of the application is to allow the identification of the Complainant, distinguishing it from ***Bayley***.

[13] This Court must be vigilant in protecting the identity of sexual assault complainants. As noted in ***Canadian Newspapers***, a mandatory publication ban assures sexual assault victims that their privacy will be protected. Exceptions to this protection should not be granted without considering the potential harm to the specific complainant which the publication ban protects, as well as broader social policy implications. In this case, the Complainant is entitled to the protection of her identity as outlined in section 486. Allowing the release of unredacted trial transcripts undermines protections that Parliament intended for sexual assault complainants. In cases where an exception is allowed, the use of the information must be managed in order to ensure protection of sexual assault complainants. The Applicant here can say nothing of how the CBSA may behave in publicizing the complainant's identity.

[14] The Applicant is able to file his complaint with the CBSA without the unredacted trial transcript. He can provide any information about the communications between himself and the Complainant before she came to Canada, as well as the fact of acquittal on the charge. He can advise there is a transcript, but that there is currently a publication ban that restricts the identification of the complainant.

[15] Any investigation would be conducted by the CBSA. I am not persuaded that the unredacted trial transcript should be released to the Applicant, even on some type of undertaking that he would only use it to give to the CBSA. The Court does not know whether the CBSA needs the transcript for their investigation, and has no information from the CBSA regarding the manner in which they may use or publicize the complainant's identity. If the CBSA, as the investigatory authority, deems the transcript to be essential to the administration of justice, it should be involved in any application affecting the publication ban, outlining why the transcript is material and relevant, and what protections it would take in relation to publicizing the complainant's identity.

Conclusion

[16] This Application, which was made without the participation of the CBSA, is denied.

[17] This Application may be brought again if the CBSA requires the transcript and is able to inform the Court of the need for the transcript, provide assurances in terms of its use, outline the safeguards in place, and advise whether publication of the complainant's identity is anticipated.

Heard on the 26th day of August, 2020.
Dated at the City of Calgary, Alberta this 15th day of September, 2020.

R.E. Nation
J.C.Q.B.A.

Appearances:

C. Wilson
for the Applicant

G. Argento
for the Crown