IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR

Citation: *R. v. Hoyles*, 2018 NLCA 46
Date: July 24, 2018
Docket Number: 201701H0020

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BETWEEN:

PETER JACOB ENOIL HOYLES — APPELLANT

AND:

HER MAJESTY THE QUEEN — RESPONDENT

Coram: Barry, Hoegg and O'Brien JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador, General Division 201204G0228
(2016 NLTD(G) 170 and 2017 NLTD(G) 61)

Appeal Heard: June 4, 2018
Judgment Rendered: July 24, 2018

Reasons for Judgment by: Hoegg J.A.
Concurred in by: Barry and O'Brien JJ.A.

Counsel for the Appellant: Jonathan Regan
Counsel for the Respondent: Arnold Hussey Q.C.

Hoegg J.A.:

INTRODUCTION

[1] Peter Jacob Enoil Hoyles was convicted of uttering threats and two sexual assaults on October 21, 2016. He was subsequently sentenced to three and one-half years imprisonment. Mr. Hoyles had been previously convicted and sentenced (in 2014) for the same offences, but those convictions were overturned due to legal error, and a new trial was ordered (*R. v. Hoyles*, 2015 NLCA 26, 121 W.C.B. (2d) 431). This appeal involves the convictions and sentence imposed following his new trial in 2016.

[2] The basis of Mr. Hoyles' convictions appeal is two-fold. First, he says that the Trial Judge erred by granting the Crown's applications for a support person to be present with the complainant S.F. when she testified and for her to testify outside the courtroom by closed circuit television. Mr. Hoyles argues that the Judge did not apply the correct test in deciding to grant the applications and also that he did not have a sufficient evidentiary basis on which to do so. Second, Mr. Hoyles argues that the Judge's reasons for conviction failed to address the evidence of a witness which Mr. Hoyles maintains impugned Ms. F.'s credibility. He argues that the witness's evidence goes to the heart of Ms. F.'s credibility and is therefore reason to allow his appeal.

[3] Mr. Hoyles' sentence appeal concerns the three-year sentence he received following the first (2014) trial. He argues that the three and one-half year sentence imposed after the second trial ought to be reduced to a three-year sentence so that he will not be seen to be penalized for having taken a successful appeal.

ANALYSIS

Did the Judge err in granting the section 486.1 and 486.2 orders?

[4] Mr. Hoyles' first ground of appeal engages sections 486.1 and 486.2 of the *Criminal Code*.

[5] Section 486.1(2) provides for witnesses to have a support person close by when they testify:

> In any proceedings against an accused, the judge or justice may, on application of the prosecutor in respect of a witness, or on application of a witness, order that a support person of the witness' choice be permitted to be present and to be close to the witness while the witness testifies if the judge or justice is of the opinion that the order would facilitate the giving of a full and candid account by the witness of the acts complained of or would otherwise be in the interest of the proper administration of justice.

Section 486.1(3) sets out the factors for consideration in making such an order:

> In determining whether to make an order under subsection (2), the judge or justice shall consider
>
> (a) the age of the witness;
>
> (b) the witness' mental or physical disabilities, if any;
>
> (c) the nature of the offence;
>
> (d) the nature of any relationship between the witness and the accused;
>
> (e) whether the witness needs the order for their security or to protect them from intimidation or retaliation;
>
> (f) society's interest in encouraging the reporting of offences and the participation of victims and witnesses in the criminal justice process; and
>
> (g) any other factor that the judge or justice considers relevant.

[6] Section 486.2(2) provides for witnesses to testify outside of the courtroom:

> [I]n any proceedings against an accused, the judge or justice may, on application of the prosecutor in respect of a witness, or on application of a witness, order that the witness testify outside the court room or behind a screen or other device that would allow the witness not to see the accused if the judge or justice is of the opinion that the order would facilitate the giving of a full and candid account by the witness of the acts complained of or would otherwise be in the interest of the proper administration of justice.

Section 486.2(3) sets out the factors for consideration in making a section 486.2(2) order:

> In determining whether to make an order under subsection (2), the judge or justice shall consider
>
> (a) the age of the witness;
>
> (b) the witness' mental or physical disabilities, if any;
>
> (c) the nature of the offence;
>
> (d) the nature of any relationship between the witness and the accused;
>
> (e) whether the witness needs the order for their security or to protect them from intimidation or retaliation;
>
> (f) whether the order is needed to protect the identity of a peace officer who has acted, is acting or will be acting in an undercover capacity, or of a person who has acted, is acting or will be acting covertly under the direction of a peace officer;
>
> (f.1) whether the order is needed to protect the witness's identity if they have had, have or will have responsibilities relating to national security or intelligence;
>
> (g) society's interest in encouraging the reporting of offences and the participation of victims and witnesses in the criminal justice process; and
>
> (h) any other factor that the judge or justice considers relevant.

[7] In support of its applications for a support person and for Ms. F. to testify outside the courtroom, the Crown filed an affidavit of a Victim Services worker. At the hearing, Mr. Hoyles argued that some content in the worker's affidavit was inadmissible and ought to have been struck by the Judge, and that the remaining evidence was an insufficient basis on which to grant the orders requested.

[8] The Judge did not strike any parts of the worker's affidavit. In deciding the Crown's applications, he observed that granting the requested orders is an exercise of discretion, and he referenced the applicable legislation and factors for consideration as well as a case from the British Columbia Supreme Court submitted by counsel for Mr. Hoyles. The Judge granted the requested orders, saying:

> … I am satisfied to grant an order to allow the complainant to testify in these proceedings, outside the courtroom through the use of closed circuit TV, and I'm also

> satisfied to grant an order that a support person be present. And what - - what I've looked at in particular, with respect of the factors are, the age of the witness, I note that she is over 19 years of age now, but the evidence that she would likely give relates to an alleged offence which occurred when she was just over 14 years of age. I've looked at the nature of the offence, which is referenced in paragraph (c), and the offence that is referenced in the charges is a serious one, and it's one which obviously relates to the complainant. And I've also looked at paragraph (g), which is society's interests [in] encouraging the [reporting] of offences, and the participation of victims and witnesses in the criminal justice process. And really, the later factor flows from *The Victim's Bill of Rights,* because section 14 and 15 of the *Bill of Rights* resulted in the amendments to section 486.1 and 486.2 that are the new wording of the *Criminal Code.* …

[9] On appeal, Mr. Hoyles argues that the Judge failed to apply the correct test in granting the orders. He also submits that the affidavit of the Victim Services worker contained inadmissible hearsay and opinion evidence which ought to have been struck by the Judge. To support his argument in this regard, Mr. Hoyles relies on *R. v. Adeagbo*, 2017 NLTD(G) 156.

[10] In *Adeagbo*, the trial judge distinguished between sections 486.1(1) and 486.2(1), and sections 486.1(2) and section 486.2(2) of the *Code.* Sections 486.1(1) and 486.2(1) require orders for a support person and testimony outside the courtroom to be made upon request when the witness is under the age of 18, whereas sections 486.1(2) and 486.2(2) provide that a judge can exercise his or her discretion to make such orders when the witness is over 18. He concluded that section 486.1(2) and 486.2 (2), being discretionary rather than mandatory, require evidence which establishes, on the balance of probabilities, that the orders sought would facilitate the giving of a full and candid account by the witness of the facts complained of or would otherwise be in the interest of the proper administration of justice.

[11] I would first observe that evidence is not always required to support an application under sections 486.1(2) or 486.2(2). For instance, the nature of the offence, a factor for consideration in both sections, is a matter of record. Other factors, like the age of the witness, whether the witness has mental or physical disabilities, the nature of the relationship between the witness and accused, may also be matters of record or patently obvious from observation. While a judge's exercise of discretion must be properly exercised, and must have some proper basis, it can be properly exercised on the basis of the record before him or her and submissions made, as Goodridge C.J.N.F. stated at paragraph 42 of *R. v. Merdsoy* (1994), 121 Nfld. & P.E.I.R. 181, 91 C.C.C. (3d) 517 (Nfld. C.A.):

> The exercise of discretion is generally not attended by extended arguments or evidence. An application is made and the reasons for it are expressed; it may be opposed and the reasons for opposition are expressed. Knowledge of things arising out of the trial process which must be obvious to the trial judge may be presumed.

This is not to say that formal evidence is never necessary, or that it is not a good idea. Rather, it is to say that trial judges make proper discretionary rulings day in and day out in the absence of formal evidence. In this case, the record disclosed the history of the case, the age of the complainant, and the nature of the offences, all criteria for consideration. As well, both Crown and Defence Counsel made submissions with respect to the information available.

[12] The Victim Services worker's affidavit states her opinion that the orders sought by the Crown would facilitate Ms. F. giving full and candid testimony in relation to her complaint. Mr. Hoyles maintains that the worker was not qualified as an expert, and, therefore, her opinion ought not to have been considered by the Court. He also argues that the worker's evidence that Ms. F. told the worker she vomited after testifying at the preliminary inquiry and that she was nervous was hearsay because the worker did not personally observe the vomiting and was repeating what Ms. F. said to her.

[13] It is not always necessary for opinion evidence to come from a witness whom the court has qualified as an expert. In *R. v. Graat,* [1982] 2 S.C.R. 819, 144 D.L.R. (3d) 267 the Supreme Court of Canada addressed non-expert witnesses being able to express admissible opinions in certain situations. At page 835 of *Graat*, Dickson J. (as he then was) identified several situations in which it would be appropriate for a court to receive such evidence, of which two are relevant to the worker's opinion in this case: "the bodily plight or condition of a person, including death and illness" and "the emotional state of a person—*e.g.* whether distressed, angry, aggressive, affectionate or depressed."

[14] In this case, the worker had known Ms. F. for several years by the time she swore her affidavit, having been the support person for Ms. F. during the preliminary inquiry and the first trial. At the first trial, the orders requested were mandatory given Ms. F.'s age. At the second trial, Ms. F. was 18 years old. While not qualified as an expert, the worker spoke from a position of knowledge of the circumstances and observation of the complainant in relation to the subject matter of the applications. Accordingly, the worker did not have to be formally qualified as an expert in order to express her opinion respecting Ms. F.'s condition or emotional state.

[15] Strictly speaking, some of the worker's statements in the affidavit are hearsay, because they are expressed as information received by the worker from Ms. F. and not personally observed. While the worker's affidavit could have been more carefully worded, her evidence was informed by her observations and experience working directly with Ms. F. over a period of years respecting the very matters before the court. On a principled application of the hearsay rule, reliability concerns about the worker's statement were next to nil. Moreover, defence counsel did not seek to cross-examine the worker so as to test her opinions respecting Ms. F., and in any event, the Judge did not express reliance on the worker's evidence in his reasons for granting the orders requested. I also note that Mr. Hoyles did not allege that the fairness of his trial was comprised by Ms. F. giving her evidence outside of the courtroom and/or the presence of the Victim Services worker.

[16] In the result, there was a sufficient basis before the Judge to enable him to grant the orders requested. He identified Ms. F.'s age, the nature of the offences, and society's interest in encouraging the reporting of offences and the participation of victims and witnesses in the criminal justice system as reasons why he exercised his discretion to grant the orders. He did not err in doing so.

Did the Judge err in failing to address the evidence of Kyle Hiscock?

[17] Kyle Hiscock was a friend of the complainant who testified at trial. He gave evidence that, one day during the summer of 2011, he and the complainant were walking along a street in their community when Mr. Hoyles drove by in his burgundy truck and stopped. Mr. Hiscock said that Ms. F. went up to the truck and had a short conversation with Mr. Hoyles. He said that he could not hear their conversation, but that there was nothing about the incident that was out of the ordinary. Mr. Hiscock was unable to say precisely when during the summer the incident occurred. However, he did say that it occurred before he learned that Mr. Hoyles had been charged with sexually assaulting Ms. F.

[18] When Ms. F. was cross-examined, she testified that she and her brother had been in Mr. Hoyles' truck once before, and that there may have been other times but she did not remember them. She was asked if "there were any other times that he stopped on the side of the road and you spoke to him when he was in his truck" and she answered "not that I remember." She was then asked if any such incident occurred after the two sexual assaults had taken place, and she answered "no." Ms. F. testified before Mr. Hiscock.

[19] Mr. Hoyles maintains that Mr. Hiscock's evidence shows that Ms. F. and Mr. Hoyles were friendly after the assaults took place which undermines Ms. F.'s evidence that she had been sexually assaulted. Mr. Hoyles also argues that even if the incident occurred before the assaults took place, Mr. Hiscock's evidence undermines Ms. F.'s credibility because it contradicts her testimony that she knew Mr. Hoyles only as a friend of her father whom she might have occasionally encountered in the community. Because credibility was a live issue at trial, Mr. Hoyles asserts that the Judge's failure to address Mr. Hiscock's evidence in his reasons for conviction should cause this Court to vacate Mr. Hoyles' convictions.

[20] Mr. Hoyles' first argument is premised on the truck conversation occurring after the assaults happened. To reiterate, Mr. Hiscock's evidence was that the truck conversation happened sometime during the summer of 2011. The assaults occurred between August 24 and September 6, 2011. Ms. F. specifically denied speaking with Mr. Hoyles after the assaults, and the evidence is that Ms. F. and her family moved away from that community shortly afterwards. Mr. Hoyles did not testify or call evidence, and there was no other evidence touching on the issue. Accordingly, the evidence did not establish that the truck conversation incident occurred after the assaults took place. Mr. Hoyles' argument rests on speculation and cannot be sustained.

[21] Mr. Hoyles' second argument, that Mr. Hiscock's evidence affected Ms. F.'s general credibility, is also speculative. Ms. F. testified that she knew Mr. Hoyles as a fishing friend of her father, as a man living in the community, and that she had met him at a birthday party. She testified that she may not recall every occasion when she encountered Mr. Hoyles in her young life. To say that her testimony was inconsistent with that of Mr. Hiscock because she did not identify the truck conversation as an occasion of meeting Mr. Hoyles is reading much more into her evidence than what she said. This is especially so given that she was not advised of Mr. Hiscock's anticipated evidence, and therefore did not have an opportunity to have her memory specifically refreshed with respect to the incident—which occurred some five years before—so as to be able to address it specifically. Mr. Hoyles' argument raises a fairness issue akin to the fairness issue addressed by the rule in *Browne v. Dunn* (1893), 6 R. 67 (H.L), which defence counsel appropriately brought to this Court's attention during the hearing. In any event, whether Ms. F. spoke with Mr. Hoyles by his truck at the side of the street prior to the assaults was not material to her evidence respecting the assaults. Even if it could be said that Ms. F.'s and Mr. Hiscock's evidence are contradictory, which a fair reading of the evidence does not show, such a

contradiction would be of negligible, if any, consequence to the Judge's assessment of Ms. F.'s credibility. A trial judge's assessment of a witness' credibility is based on the evidence as a whole, and a discrepancy of the immaterial sort alleged here generally will not overcome a witness's evidence that is otherwise reliable and credible. In his reasons for conviction, the Judge acknowledged minor inconsistencies in Ms. F.'s evidence, but concluded that the minor inconsistencies did not affect the core of her "credible and reliable" evidence respecting the charges against Mr. Hoyles (paragraphs 83–89).

[22] Mr. Hoyles also argues that the Judge's failure to address Mr. Hoyles' argument about the alleged inconsistency in his reasons was an error. The Judge did reference Mr. Hiscock's evidence and argument when setting out the positions of the parties in his decision. However, he did not expressly reject it or explain why he rejected it.

[23] The Judge did not have to do so. The law is clear that a trial judge does not have to expressly deal with "every consideration leading to a finding of credibility, or to the conclusion of guilt or innocence" or "reconcile every frailty in the evidence," as the Supreme Court of Canada ruled in *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3, at paras. 55–57. This is especially true when an argument, like that of Mr. Hoyles in this case, relates only peripherally, if at all, to the assessment of a witness's general credibility. The Judge's reasons for finding Ms. F.'s evidence "credible and reliable" established a basis for convicting Mr. Hoyles that is intelligible and well supported.

[24] In summary, Mr. Hoyles' arguments respecting Mr. Hiscock's evidence and the Judge's treatment of it have no merit.

Did the Judge err in imposing a sentence longer than was imposed at the first trial?

[25] Mr. Hoyles submits that the Judge erred in imposing a sentence that is longer than the sentence that was imposed on him at his first trial. His position rests on the proposition that a successful appellant should not be penalized for a successful appeal by receiving a longer sentence at a subsequent trial than was imposed at his or her previous trial. Mr. Hoyles relies on the New Brunswick Court of Appeal decision in *R. v. Doiron*, 2007 NBCA 41, 315 N.B.R. (2d) 205, leave to appeal to SCC refused, [2007] 3 S.C.R. viii (note) to support his position.

[26] In *Doiron*, the accused had been convicted of obstructing justice by bribing a witness not to testify at a trial involving accused persons associated

with organized crime and a fire which caused millions of dollars in property damage and risked the lives and livelihoods of many people. Mr. Doiron had been convicted by a jury and sentenced to three years at an earlier trial. On retrial, he was again convicted and sentenced to four and one-half years. He appealed his sentence.

[27] The appellate court dismissed Mr. Doiron's appeal. In doing so, it referenced two decisions of the Quebec Court of Appeal (*R. c. Valère*, [1996] J.Q. No. 1365, 31 W.C.B. (2d) 510 and *R. c. Daoulov*, [2002] J.Q. No. 1203, J.E. 2002-1077) which the New Brunswick appellate court stated stand for the proposition that "the imposition of a more severe sentence at a second trial can only be justified on the basis of new evidence of aggravating facts, or on a finding that the first sentence was clearly unreasonable" (paragraph 152). Without specifically adopting the Quebec decisions, the New Brunswick appellate court ruled that the sentence imposed on Mr. Doiron at his first trial was "clearly unreasonable" in the circumstances of the case, and upheld the sentence imposed on the second trial which was one and one-half years longer than the first sentence imposed.

[28] I begin by saying that a sentence imposed at an earlier trial is a relevant consideration in imposing sentence on the same charge at a subsequent trial. While relevant, a previously imposed sentence cannot determine a subsequent sentence.

[29] The Supreme Court of Canada has made it abundantly clear that sentencing judges who have seen the witnesses, heard the evidence, and considered the submissions of counsel, which submissions generally include the *current* circumstances of the offender being sentenced, are in the best position to craft an appropriate sentence for that offender. This principle is well-established in the jurisprudence, having been recently stated in *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089 per Wagner J. (as he then was) at paragraph 11:

> This Court has on many occasions noted the importance of giving wide latitude to sentencing judges. Since they have, *inter alia*, the advantage of having heard and seen the witnesses, sentencing judges are in the best position to determine, having regard to the circumstances, a just and appropriate sentence that is consistent with the objectives and principles set out in the *Criminal Code* in this regard. …

In this respect, *Lacasse* follows the Supreme Court's earlier sentencing jurisprudence. In particular, I reference Iacobucci J.'s words at paragraph 46 of *R. v. Shropshire*, [1995] 4 S.C.R. 227, 129 D.L.R. (4th) 657:

> … The formulation of a sentencing order is a profoundly subjective process; the trial judge has the advantage of having seen and heard all of the witnesses…

and Lamer C.J.C.'s words at paragraph 91 of *R. v. M.C.A.*, [1996] 1 S.C.R. 500, 30 W.C.B. (2d) 177:

> [W]here the sentencing judge has had the benefit of presiding over the trial of the offender, he or she will have had the comparative advantage of having seen and heard the witnesses to the crime. But in the absence of a full trial, where the offender has pleaded guilty to an offence and the sentencing judge has only enjoyed the benefit of oral and written sentencing submissions … the argument in favour of deference remains compelling. A sentencing judge still enjoys a position of advantage over an appellate judge in being able to directly assess the sentencing submissions of both the Crown and the offender. … The discretion of a sentencing judge should thus not be interfered with lightly.

[30] The Supreme Court's direction respecting the unique position of a first instance judge in sentencing an offender has been expressed in the context of appellate review. However, the same reasoning applies to the presenting argument—it is the judge who presides over the final trial, or the sentencing if there is a guilty plea, who is uniquely and best positioned to impose a sentence on the offender in the case before him or her. A sentencing judge cannot base his or her sentencing decision on evidence, circumstances, and submissions that were not before him or her. Nor can a sentencing judge impose a sentence based on another judge's perception of evidence and arguments that other judge considered.

[31] Evidence is always different from one trial to the next for any number of reasons. Evidence unfolds in different ways at different times and in different places. Witnesses may forget evidence which may have been adduced at a previous trial, or remember more at a subsequent trial. Evidence which was excluded at an earlier trial may be admitted at a subsequent trial, and evidence which was admitted at an earlier trial may be excluded at a subsequent trial. Moreover, evidence can be regarded differently by different judges. The notion that a subsequent sentencing judge must impose the sentence a prior sentencing judge imposed unless "new evidence of aggravating facts" is raised or "the first sentence was clearly unreasonable" is a marked departure from authoritative sentencing jurisprudence (*Lcasse, M.C.A.,* and *Shropshire*).

[32] In addition to the above point, accepting Mr. Hoyles' argument would require a sentencing judge to engage in either an evaluation of the previous sentence to determine its reasonableness and/or a comparison of the evidence at

the first trial with that of the second so as to determine if there is new evidence of aggravating facts in order to impose a different sentence from that the offender received at the earlier trial. Such requirements would complicate the sentencing process in an unnecessary and unseemly manner.

[33] The point is that the judge who sees and hears the witnesses and otherwise receives evidence in a particular trial, and who hears and considers current sentencing submissions, is in the best position, having regard to all of the circumstances, to impose a just and appropriate sentence respecting the particular offence and offender before him or her. A current sentencing judge is not a place holder for a previous sentencing judge.

[34] The fitness of the three and one-half year sentence imposed by the Judge was not challenged by Mr. Hoyles. Given that he was convicted of two separate, serious sexual assaults of a 14-year-old girl, as well as threatening her and her family if she disclosed the assaults, his sentence of three and one half years, while at the low end of the range, was not unfit.

[35] In the result, the Judge did not err in sentencing Mr. Hoyles.

[36] I would dismiss Mr. Hoyles' appeal.

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L. R. Hoegg J.A.

I concur**:** _____

L. D. Barry J.A.

I concur**:** _____

F. P. O'Brien J.A.