35/08; [2008] VSC 303

SUPREME COURT OF VICTORIA

DPP v FINN (Ruling No 1)

Harper J

21 July 2008 — (2008) 186 A Crim R 235

PROCEDURE – APPLICATION TO GIVE EVIDENCE VIA VIDEO LINK – MATTERS TO CONSIDER WHEN SUCH AN APPLICATION IS MADE – WITNESS FEARFUL OF EFFECT OF HER EVIDENCE ON THE FUTURE OF THE ACCUSED PERSON – WITNESS PETRIFIED IF REQUIRED TO COME INTO COURT – WHETHER WITNESS MIGHT BE PHYSICALLY OR MENTALLY INCAPABLE OF GIVING EVIDENCE IN COURT – APPLICATION REFUSED: *EVIDENCE ACT* 1958, S42E.

1. Where an application is made to a court under s42E of the *Evidence Act* 1958 for a witness to give evidence by audiovisual or audio link, there are a number of interests which have to be weighed when deciding to invoke s42E or not. These include the interests of the accused on the one hand and on the other, the public interest in the ability of witnesses to give evidence in significant criminal trials without thereby occasioning danger to themselves or to other members of the community. The accused does not have a fundamental right to confront in court those who testify against him or her.
***R v Cox and others* [2005] VSC 364; 165 A Crim R 326; and**
***R v Goldman* [2004] VSC 165; 148 A Crim R 40, distinguished.**

2. Where a witness was not said to be physically in danger merely by her presence in court but was fearful of the effect of her evidence on the future of the accused and would be petrified if required to come into court, it was not established by the Crown on the balance of probabilities that the witness by being required to be actually present in the courtroom would be physically and mentally unable to give evidence in the trial. Accordingly, the application for the witness to give evidence via video link was refused.

HARPER J:
1. This is an application by the Crown pursuant to s42E of the *Evidence Act* 1958. That section is headed "Appearance etc by audiovisual link or audio link".

2. It is, as Mr Dickinson for the accused pointed out in his submissions on the application, a merely permissive provision. The section permits evidence to be taken by audiovisual link or audio link, but is not intended specifically to protect witnesses who would otherwise be reluctant to give evidence in open court in the presence of an accused person.

3. The section has been the subject of applications made in a number of recent cases. One of those not cited to me this morning but which is nevertheless (it seems to me) of direct relevance is that of *R v Cox, Sadler, Ferguson & Ferguson*[1] an unreported decision of Kaye J of 14 September 2005.

4. In that case his Honour had to deal with a number of individual applications by the Crown to have Crown witnesses give their evidence by remote facility. His Honour allowed one of the applications but disallowed the other two.

5. In the case in which the application was allowed, there was a danger that the witness might be assassinated while travelling to or from the court. In those circumstances, his Honour was of the view that the safety of the witness warranted an order being made pursuant to s42E. His Honour took into account the fact that not only might the witness's life be in peril were the witness brought to court, but persons within the vicinity of the courtroom might also be in danger.

6. In the case of the other witnesses, questions of their personal safety in coming to court and giving evidence were not as great. Accordingly, his Honour disallowed those applications.

7. A similar application under s42E of the *Evidence Act* was granted by Redlich J in *R v Goldman*.[2] In that case, the judge held[3] that the witness, who was then in a secret location, would be exposed to the risk of harm by attending court to give evidence.

8. This present case can be distinguished from *Cox* and *Goldman*. In this case, there is no suggestion that the witness would be physically in danger merely by her presence in the court, or in the journey to or from the court. In other words, there is nothing to suggest that she would be in any greater danger if required to give evidence in court than if permitted to give her evidence via a video link.

9. During the course of giving his reasons for making the findings which he did, Kaye J referred to a number of recent cases, including the *R v Kim*;[4] *R v Weiss*;[5] *R v Goldman*; and *R v Strawhorn*.[6]

10. His Honour summarised[7] the principles which, as he understood those cases, were to be elucidated from them. He there said:

> 1. The question for the court is whether it is in the interests of justice that an order be made under s42E.
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> 2. In considering that question, the right of the accused to a fair trial is paramount.
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> 3. It does not follow that, because the accused may sustain some forensic disadvantage by reason of an order under s42E, such an order should not be made. As Brooking J observed in a different context in *Jarvie v Magistrates' Court of Victoria* [1995] 1 VR 84 at 90 a "... fair trial does not mean a perfect trial, free from possible detriment or disadvantage of any kind or degree to the accused".
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> 4. The right of an accused to confront, in person, those who testify against him or her is a fundamental right in our criminal justice system.
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> 5. However, as Redlich J observed in *Goldman*[8] that right, while fundamental, is not an absolute right at common law. Section 42E is a further qualification of that right in appropriate circumstances.
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> 6. The question whether it is in the interests of justice to make an order under s42E must be determined by balancing, on the one hand, the interests of the accused, and, on the other hand, the public interest in the ability of witnesses to give evidence in significant criminal trials without thereby occasioning danger to themselves or to other members of the community.
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> 7. Nonetheless a court should not make an order under s42E where to do so would unduly prejudice the right of an accused person to a fair trial. For, as I have observed, that right must be paramount.

11. As Brooking J pointed out in *Jarvie*, a fair trial is not necessarily a perfect trial. For one thing, there are at least two parties to any criminal trial, and being fair to one may involve an adjustment to the rights of the other. Being fair to the prosecution may necessitate the giving of prosecution evidence by video link. If that is necessary to do justice to the Crown, then an order under s42E would follow, unless of course the result would be an injustice to the accused. And, as the cases show, the fact that a prosecution witness gives evidence by video link does not automatically and inevitably produce injustice to the accused. It is in my respectful opinion for this reason wrong to describe as "fundamental" the right of an accused to "confront" in court those who testify against him or her. It is in truth no more than an interest, albeit a powerful one, that is to be weighed against other interests when deciding whether or not s42E should be invoked.

12. In the particular circumstances of this application there is not, as I perceive it, any question of the evidence to be given (as the Crown anticipates) by the witness in question being such as to occasion additional danger to her or danger to other members of the community were she to give evidence in court rather than by remote facility.

13. The fear – which I accept the witness holds – is of the effect of her evidence on the future of the accused person. It may lead to his conviction. He may blame her for it; and he may seek revenge. But that fear will remain whether her evidence is given in this court or by remote facility. She will not, on the evidence before me, be subjected to additional danger by reason of her presence in court.

14. On the other hand, she has given evidence that, were she to be required to come into court, she would be petrified. I accept that she would at least be frightened. She would not, however, be the first – and nor will she be the last – witness to be concerned to the point of being frightened about giving evidence in court.

15. That, I think, reduces the issue before me to the one succinctly put by Ms Forrester for the Crown to the effect that if called as a witness in court the witness might be physically or mentally incapable of giving truthful evidence. If that were the case, the submission continues, then the Crown would be significantly disadvantaged.

16. I accept, of course, that the Crown would be significantly disadvantaged were Ms Driscoll unable to give evidence according to the statements which she has made to the police. She is the only witness to the events upon which the charges faced by the accused are based. I of course say nothing about the truthfulness or otherwise of those statements.

17. Although she has never herself suffered physical injury at the hands of the accused, I accept that the witness is afraid of him. I must therefore consider, in the circumstances presently before me, whether that fear is such as to materially interfere with her ability to give evidence were she called to be physically present in the witness box in this Court. That is a proposition the proof of which must lie with the Crown. I could not accede to the present application unless I were satisfied, certainly on the balance of probabilities, that by the requirement of her actual presence in this courtroom, the witness would be physically and mentally unable to give evidence in this trial.

18. The onus being on the prosecution to establish this state of affairs, it has not in my opinion been discharged. Although, as I say, I accept that the witness is in fear of her position should she give evidence in this Court, objectively that fear should not be diminished by her giving evidence from a remote location. In the circumstances of this case, it is the evidence she gives, not whether she gives it in court, which may expose her to danger.

19. For that reason it seems to me that the application ought not be granted; but in saying that, I reiterate what I said this morning. It is of fundamental importance that no witness be intimidated from telling the truth. Giving evidence in a court is necessarily, for some witnesses, a traumatic experience. Any attempt to prey upon the vulnerabilities of any witness by attempting to cast additional fear in the mind of that witness and thus to divert the witness from telling the truth would be a fundamental breach of the obligation not to interfere with the course of justice. It would at the same time be an extremely serious contempt of court.

20. Accordingly, if I am of the opinion that the accused or any other person directly or indirectly is seeking to influence the evidence to be given by any witness, I will take such steps as then seem appropriate to me to ensure that the behaviour ceases and that, where appropriate, it is punished.

21. That means that any attempt directly or indirectly to influence this particular witness will result in those consequences. I trust that all those in court, particularly the accused, understand the implications of what I have just said.

22. I should add that in coming to the conclusion to which I have come, I have taken into account the provisions of s42V of the *Evidence Act*.

23. The witness in question will, as I apprehend it, be a principal – if not the principal – witness for the Crown in this proceeding. Her absence from the witness box is likely to create some questions in the mind of the jury. Whether that was the actuality or not, I would be bound pursuant to s42V to give a direction or a warning to the jury not to draw any inference adverse to the accused person or to give any evidence given by the particular witness any greater or lesser weight because of the appearance of that witness by audiovisual link.

24. That warning in the circumstances of this case would, it seems to me, simply magnify in the jury's mind the difference between the position of this witness as a witness giving evidence from a remote facility and other witnesses who will be present in court. The grave danger would be

that the jury would speculate, even given that warning, in ways which would be unfairly adverse to the accused were this witness, given her particular significance in the trial, to give her evidence externally. That therefore is an additional reason why in my opinion the application should fail.

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[1] [2005] VSC 364; 165 A Crim R 326.
[2] [2004] VSC 165; 148 A Crim R 40.
[3] at [32].
[4] [1998] VSC 215; (1998) 104 A Crim R 233.
[5] [2002] VSC 15.
[6] [2004] VSC 415.
[7] at [7].
[8] at [23-25].

APPEARANCES: For the Crown: Ms A Forrester, counsel. Angela Cannon, Solicitor for Public Prosecutions. For the accused Finn: Mr J Dickinson, counsel. Slades & Parsons, solicitors.
