

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *R. v. Fox*,
2017 BCSC 854

Date: 20170424
Docket: 27178
Registry: Vancouver

Regina

v.

Patrick Henry Fox

Restriction on Publication: An automatic publication ban under s. 648(1) of the *Criminal Code* restricts the publication, broadcasting or transmission in any way of any portion of the trial at which the jury is not present. This publication ban applies until the jury has retired to consider its verdict.

Corrected Judgment: The front page of the judgment was corrected as well as the text of the judgment at paragraphs 1, 4, 7, 8, 9, 10 and 11 on June 23, 2017

Before: The Honourable Madam Justice H. Holmes

Oral Reasons re Crown Application for counsel to be appointed under s. 486.3(2) to cross-examine the complainant

Counsel for the Crown: M. Myhre

Appearing on his own behalf: P. Fox

Place and Date of Trial/Hearing: Vancouver, B.C.
April 24, 2017

Place and Date of Judgment: Vancouver, B.C.
April 24, 2017

[1] **THE COURT:** The Crown applies for an order under s. 486.3(2) of the *Criminal Code* that Mr. Fox not personally cross-examine the complainant, Desiree Capuano, and that counsel be appointed to conduct the cross-examination on his behalf.

[2] Mr. Fox is charged with two offences, including criminal harassment under s. 264 of the *Criminal Code*. As a result of that charge, the order sought must be granted, "unless the judge is of the opinion that the proper administration of justice requires the accused to personally conduct the cross-examination" (s. 485.3(2)).

[3] The Crown does not suggest that anything about Mr. Fox's past or anticipated behaviour in court requires the order. The Crown describes Mr. Fox as having been organized, intelligent, and polite throughout the proceedings relating to these charges.

[4] Nor does the Crown tender evidence concerning any particular vulnerability of Ms. Capuano.

[5] The Crown relies instead on the presumptive availability of the order, and on what the Crown says is Parliament's clear intention to encourage and facilitate the participation in the criminal justice system of victims of alleged harassment. As to the latter basis, I agree with Mr. Myhre that such an intent is made plain in s. 486.3(2) itself, as well as in the preamble to Bill C-2, 1st Sess., 38th Parl., 2005 (assented to 20 July 2005), S.C. 2005, c. 32, which introduced, among many other amendments, those that made the order presumptively available in respect of charges under s. 264.

[6] Mr. Fox opposes on two grounds.

[7] He submits first that Parliament's intention through s. 486.3(2) was to protect vulnerable witnesses, and not to facilitate an abuse of the criminal justice system such as, he submits, Ms. Capuano is perpetrating through her allegations in support of the charges. He submits that such an abuse is apparent in excerpts from a video-recording of an interview Ms. Capuano gave to the police, in which she is laughing

and making jokes, and not, it would appear, expressing the fear for her safety that the offence of criminal harassment requires. Mr. Fox submits that Ms. Capuano is not the type of vulnerable witness s. 486.3 contemplates.

[8] As I explained during Mr. Fox's submission on this point, when I declined to permit him to tender evidence of the police interview, Ms. Capuano's state of mind in relation to Mr. Fox's alleged conduct is a matter for determination by the trier of fact, here a jury. It would not be appropriate for me to pre-empt the jury's role by acceding to Mr. Fox's submission on this point in this application.

[9] Second, Mr. Fox expresses concern that any counsel appointed to cross-examine on his behalf would not act in his best interests. Based on Mr. Fox's previous experience, as he describes it, with different counsel in this case -- and it was either two or three different counsel -- Mr. Fox says he has no confidence that counsel would act in accordance with his interests. Rather, he fears that counsel would act for an improper motive, contrary to his interests, because of the media attention this case has had, and because there has been public criticism of the authorities for not acting either sooner or more effectively in response to Ms. Capuano's allegations.

[10] Mr. Fox is concerned in particular about a potential *Browne v. Dunn* problem he believes he could face if he testifies in the trial. He posits that he may testify about information he will not have previously disclosed to counsel appointed to cross-examine Ms. Capuano, and which Ms. Capuano will not have had an opportunity to address in her evidence. Mr. Fox explains that he would not willingly disclose that information to appointed counsel, prior to himself testifying in the trial, because he fears that appointed counsel would pass on the information to Crown counsel for improper reasons, contrary to Mr. Fox's best interests.

[11] The concerns Mr. Fox says he holds do not support a conclusion that the proper administration of justice requires that he himself conduct the cross-examination of Ms. Capuano.

[12] Even though apparently sincere, the concerns are based only on speculation or a faulty understanding of the criminal justice process. The concerns assume very serious misconduct on the part of appointed counsel, far more serious even than the misconduct Mr. Fox describes having experienced in dealings to date with his own counsel. It would be a serious breach of counsel's ethical duty to disclose the type of confidential communication to which Mr. Fox refers when describing the potential *Browne v. Dunn* problem.

[13] Our system of criminal justice relies heavily on lawyers complying with their ethical obligations. There is no reason to believe that a lawyer appointed to cross-examine on Mr. Fox's behalf would not do so.

[14] The order is granted.

[15] As I understand, Mr. Myhre, you now take certain steps, and then the Legal Services Society will be in touch with Mr. Fox -- is that what happens next?

[16] MR. MYHRE: Yes, exactly.

"H. Holmes J."