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R. v. Arenburg

Between
Her Majesty the Queen, and
Jeffrey Robert Arenburg

[1997] O.J. No. 2386

Ontario Court of Justice (General Division)
Ottawa, Ontario
Chadwick J.

June 6, 1997.
(13 pp.)

Criminal law — Evidence and witnesses — Scientific and medical evidence — Videotapes — Release to the media, when appropriate.

Application for release of clinical videotape evidence. The accused was charged with first degree murder. As a result of the high profile of the deceased who was a former hockey player and a sportscaster with a local television station, the trial attracted a great deal of media coverage. There was also extensive daily media coverage of the trial as it related to the mental health of the accused. The issue at trial was whether the accused was criminally responsible for the death of the deceased due to mental illness. A psychiatric assessment of the accused, part of which consisted of a videotaped interview conducted by the medical director at the hospital where the accused was remanded, revealed that the accused suffered from delusions. He was diagnosed as a paranoid schizophrenic. The jury found the accused was suffering from a mental disorder at the time he shot the deceased and thus, was not criminally responsible for the murder. Subsequently, the media requested the release of the videotape of the director's interview with the accused. The director, in conjunction with the accused's counsel, opposed the release of the clinical videotape interview on the ground that its release would have a harmful effect on the accused. Counsel for the media indicated that the clinical video interview sought was to be used to do a follow-up story related to mental illness.

HELD: Application allowed. The public had a right to know and understand how the disease suffered by the accused affected him and why the jury found him not criminally responsible. Any confidentiality which may have existed between the accused and the medical director was obviously

waived once the tape was admitted into evidence. Since the videotape was central to the evidence of the director, a copy of the tape should be released to the media.

Statutes, Regulations and Rules Cited:

Criminal Code, ss. 16, 235(1), 672.58. Mental Health Act, R.S.O. 1990, chap. M.7, s. 35.

Counsel:

Andrejs Berzins, Q.C. and Don Macdougall, for the Crown.
Robert A. Lewis, cor the accused.
A.L.W. Boland, for CJOH.
J. David Power, for CBC.

RELEASE OF AN EXHIBIT

¶ 1 **CHADWICK J.**:— The accused was charged with first degree murder of Brian Smith on August 1, 1995 contrary to s. 235(1) of the Criminal Code of Canada.

¶ 2 The matter came on for trial on Monday, February 10, 1997 at which time a jury found the accused unfit to stand trial because of mental illness which resulted in his inability to instruct counsel.

¶ 3 The accused was remanded to the Royal Ottawa Hospital in Ottawa for treatment pursuant to s. 672.58 of the Criminal Code of Canada.

¶ 4 The accused returned to court on April 28, 1997 and a new jury was selected to determine both the fitness of the accused and the substantive charge.

¶ 5 The jury found that the accused was fit to stand trial and the proceedings began.

¶ 6 Counsel on behalf of the accused made a number of admissions including that the accused had shot Brian Smith. The issue to be determined by the jury was whether the accused was criminally responsible due to mental illness as defined by s. 16 of the Criminal Code.

¶ 7 The accused turned himself into the police the day after the shooting. Police videotaped their interview with the accused. When this videotape was introduced by the Crown, it was apparent that the accused was delusional and was suffering from auditory hallucinations.

¶ 8 Dr. Bradford, who is the director of the Forensic Service Unit at the Royal Ottawa Hospital in Ottawa, was consulted to carry out an early psychiatric evaluation of the accused.

¶ 9 The accused was remanded to determine whether he was fit to stand trial and also whether he was criminally responsible at the time of the shooting. For that purpose he was confined at the Royal Ottawa Hospital under the care of Dr. Bradford.

¶ 10 Part of Dr. Bradford's assessment, was a videotaped interview with the accused. This interview also showed that the accused was suffering from delusions. A comment by Dr. Bradford in his report of September 27, 1995 dealing with the mental status examination on admission summarized the condition of the accused. Dr. Bradford made the following comment:

> There was some evidence of formal thought disorder and it was difficult to follow his explanations on occasions. His affect was flattened. His mood was angry and frustrated. He was not suicidal. He had extensive though disorder, specifically thought broadcast which had been present for a number of years. He also presented with profound persecutory delusions and hallucinations. These had been present continuously for some time. Thought broadcasting related to his thoughts being exposed by the "air waves", thoughts of others influenced in the same way and generally the consequences were negative for himself and had a persecutory content to them. These delusional beliefs were held with total conviction to the point that he fet it was necessary to act on them in order to protect himself and indeed he had acted on them in the past. He also presented with thought echo in addition to auditory hallucinations. He was fully orientated. There was no clinical evidence of any organic brain syndrome. His insight and judgement were extremely poor.

¶ 11 During the trial, the media requested a copy of the videotape interview with the accused and the Ottawa Police. There was no objection by either the Crown or counsel for the accused and the media were allowed to make a copy of the videotape.

¶ 12 CBC television and CJOH television both incorporated portions of the police interview in their newscast when reporting on the Arenburg trial.

¶ 13 Brian Smith was a former hockey player and a sportscaster with CJOH television. He was a well known person in the Ottawa area and therefore the Arenburg trial attracted a great deal of media attention.

¶ 14 The jury found the accused was suffering from a mental disorder at the time of the shooting, and therefore was not criminally responsible for the death of Brian Smith.

¶ 15 After the jury verdict, the Crown made an application for a disposition hearing pursuant to s. 672.45 (C.C.C.). However, for reasons delivered at that time, I refused to make a disposition order and remanded Mr. Arenburg to the Royal Ottawa Hospital to await the decision of the review board.

¶ 16 After all of these matters had been completed, CJOH and CBC television requested the release

of the videotape of Dr. Bradford's interview with the accused.

¶ 17 Counsel appeared on behalf of both CBC and CJOH and made submissions relating to the release of the tape.

¶ 18 Mr. Lewis, counsel for Mr. Arenburg, objected to its release on the basis the tape would be highly prejudicial to Dr. Bradford's continued treatment of Mr. Arenburg at the Royal Ottawa Hospital. He also pointed out that the tape was the property of Dr. Bradford who sought its return.

¶ 19 I allowed Mr. Lewis to obtain correspondence from Dr. Bradford as to his position with reference to the release of the tape. Dr. Bradford by way of a letter dated May 2, 1997 made the following comment:

> With reference to our telephone conversation earlier today and with reference to my seeing Mr. Arenburg today, I have to tell you that in my opinion any release of the clinical videotape interview between himself and myself will have a harmful affect on Mr. Arenburg.
> Mr. Arenburg, who is presently engaged in treatment, today has gone back on to his long-acting medications, and feels very threatened by what would be a clinical interview between himself and myself and I strongly support him in this regard. My understanding is that under the Mental Health Act of Ontario this constitutes part of his clinical record and it should not be released if it is harmful to him and in my opinion, it is.

¶ 20 Section 35 of the Mental Health Act R.S.O. 1990 chap. M.7 defines clinical records and in my view the clinical videotape would fall within the definition of a clinical record. The section goes on to provide protection for clinical records and describes when clinical records can be released and under what terms and conditions. It provides that the court conduct a hearing to determine whether release of the clinical record is likely to result in harm to the treatment or recovery of the patient. It also provides that the clinical record be returned to the officer in charge at the end of the trial if it was admitted into evidence.

¶ 21 Balanced against the potential harm to the accused or his treatment is the public's right to know. Counsel for the media referred me to a number of decisions where the courts have released copies of exhibits to the media under certain conditions.

¶ 22 The distinction in this case is that the videotape in question is a clinical interview between a psychiatrist appointed by the court and the accused person. Although the psychiatrist is not treating the accused, he is making an assessment. At the trial, Dr. Bradford introduced the video to show the jury the condition of Mr. Arenburg relating to his hallucinations and delusions.

¶ 23 In Vickery v. Nova Scotia Supreme Court (Prothonotary) [1991] 1 S.C.R. 671 (S.C.C.) the court

considered the media's right to access audio and videotapes which were admitted in evidence in a criminal trial which resulted in the conviction of the accused. On appeal to the Nova Scotia Court of Appeal, they determined that the evidence was inadmissible and acquitted the accused. The issue was whether the public should be entitled access to these tapes. The court had to consider the right of the accused to privacy balanced with the fact that the tapes were made an exhibit at the trial and the trial was open to the public. The trial judge granted the application and allowed a member of the public to obtain the tapes. This decision was reversed on appeal. The Supreme Court of Canada on appeal from the Nova Scotia Court of Appeal dismissed the appeal.

¶ 24 Stevenson J.A. on behalf of the court listed the factors which should be considered by a hearing judge in determining whether the public or press should have access to exhibits. The factors as set out at p.681 are as follows:

1) The nature of exhibits as part of the court "record".
2) The right of the court to inquire into the use to be made of access, and to regulate it.
3) The fact that the exhibits were produced at trial and open to public scrutiny and discussion so that the open justice requirement had been met.
4) That those subjected to judicial proceedings must undergo public scrutiny of what is said at trial or on appeal and contemporaneous discussion is protected, but different considerations may govern when the process is at an end and the discussion removed from the hearing context.

¶ 25 Because the Arenburg trial had been completed, I asked counsel how the clinical video interview was to be used. I was informed that the media wanted to do a follow-up story related to mental illness. I was satisfied with this response to my inquiry and believed that media could make copies of the videotapes without causing any damage to the exhibit.

¶ 26 It is to be noted the clinical videotape is the property of Dr. Bradford and he has requested the return of the tape.

¶ 27 One of the distinctions that can be made in Vickery v. Nova Scotia Supreme Court is that the accused Nugent was an innocent person who had been convicted of a serious crime on the basis of self-incriminating evidence obtained in violation of his Charter Rights. In that case the court concluded that Nugent's privacy interest outweighed the appellant's interest in viewing and disseminating the exhibits.

¶ 28 In the case at bar the accused Arenburg has been found not criminally responsible as a result of mental illness. His mental illness was the main issue during the trial and was not opposed by the Crown.

¶ 29 In Vickery v. Nova Scotia Supreme Court the court made reference to their previous decision in Nova Scotia (Attorney General) v. MacIntyre (1982), 132 D.L.R. (3d) 385 at p. 405. Dickson J. gave the majority judgment of the court and stated at p. 403:

> In my view, curtailment of public accessibility can only be justified where there is present the need to protect social values of superordinate importance. One of these is the protection of the innocent.

¶ 30 And at p. 405:

> Undoubtedly every Court has a supervisory and protecting power over its own records. Access can be denied when the ends to justice would be subverted by disclosure or the judicial documents might be used for an improper purpose. The presumption, however, is in favour of public access and the burden of contrary proof lies upon the person who would deny the exercise of the right.

¶ 31 The balance in this case is between the public's right to know and the treatment of Arenburg.

¶ 32 There was extensive daily media coverage of the trial as it related to the mental health. After the trial there were articles, editorials and letters to the editor all focusing on the issue of mental illness and in particular on the lack of medical treatment for Arenburg prior to the shooting.

¶ 33 The videotapes show how rational Arenburg appears at times and then how delusional he is at other times. He has been diagnosed as paranoid schizophrenia.

¶ 34 The public have a right to know and understand how this disease affected Arenburg and why the jury found him not criminally responsible for the death of Brian Smith.

¶ 35 Although this clinical videotape is the property of Dr. Bradford, it was made with the consent of counsel for Mr. Arenburg. Portions of the tape were played for the benefit of the jury and it was filed as an exhibit at the trial. Any confidentiality which may have existed between Arenburg and Dr. Bradford was obviously waived once the tape was admitted into evidence. Dr. Bradford still maintains a propriety interest in the videotape and the original will be returned to him in due course. This does not prevent counsel or any other interested party from making copies of the exhibit.

¶ 36 Notwithstanding Dr. Bradford's view, I am satisfied that in this case where this videotape was central to the evidence of Dr. Bradford that a copy of the tape should be released to the media.

¶ 37 Order accordingly.

CHADWICK J.

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