IN THE SUPREME COURT OF BERMUDA
Criminal Jurisdiction
2018: No. 9

THE QUEEN

v.

W.F.S.

Dates of Application:	26th & 29th November 2018
Date of Ruling	3rd December 2018
Counsel for the Prosecution:	Ms. Maria Sofianos
Counsel for the Accused:	Ms. Elizabeth Christopher

Section 542A of the Criminal Code Act 1907 – Measures to Protect the Complainant – Complainant testifying outside of court room – Use of a Screen – Evidential basis upon which a section 542A Order can be made

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RULING
on an Application under Section 542A of the Criminal Code

BAN ON PUBLICATION: Pursuant to section 542A(3) of the Criminal Code, the identity of a witness, or any information that could disclose the identity of the Complainant or any other witness, shall not be published in a written publication available to the public, or be broadcast.

Ruling of Acting Puisne Judge Juan P. Wolffe

1. The Accused faces trial for the following offences: one (1) count of Attempted Unlawful Carnal Knowledge of a Girl under the Age of 14 (contrary to section 180(2) of the Criminal Code); one (1) count of Unlawful Carnal Knowledge of a Girl under the Age of

14 (contrary to section 180(1) of the Criminal Code); and, two (2) counts of Sexual Exploitation of a Young Person by a Person in a position of Trust (contrary to section 182B(1)(a) of the Criminal Code). All of these offences were alleged to have occurred in or around September 2016 and June 2017 when the child was eleven (11) years old. The child is now thirteen (13) years old.

2. The trial of this matter was due to commence on the 26th November 2018, but due to the unavailability of Ms. Elizabeth Christopher (the attorney for the Accused) who was involved in an ongoing unrelated Supreme Court matter the trial did not proceed as scheduled. For this reason this trial was adjourned to a later date. However, Ms. Maria Sofianos (Prosecution Counsel) and Ms. Christopher made certain pre-trial submissions in respect of several issues and this Ruling is in respect of one of them (the others were resolved by virtue of the trial being adjourned).

3. As stated earlier, this case involves allegations whereby the alleged victim was 11 years old at the time of the alleged offences and is now 13 years old. In anticipation of the child giving *viva voce* testimony at trial the Prosecution made an application under section 542A of the Criminal Code ("Section 542A") for (i) the child to give her evidence outside of the Courtroom in a neutral place and via video link, or alternatively (ii) behind a screen erected in the Courtroom. Through Ms. Christopher, the Accused resists the Prosecution's application essentially on the basis that the Prosecution has not surpassed the evidential threshold for section 542A to be invoked.

4. Section 542A, *inter alia*, provides that:

> ***"542A (1) Where before a special court or at a preliminary inquiry or a trial an accused is charged with a sexual offence and the complainant is at the time of the proceedings under the age of sixteen years, the chairman or the magistrate or the judge, as the case may be, may order that the complainant shall testify outside the court room or behind a screen or other device that would prevent the complainant from seeing the accused, if the chairman or magistrate or judge is of opinion that such an arrangement is necessary for a full and candid account of the acts complained of to be obtained from the complainant.***

> ***(2) A complainant shall not testify outside the court room pursuant to subsection (1) unless—***
>
> ***(a) arrangements are made for the accused and the special court or, as the case may be, the magistrate or the judge and jury to watch the giving of the complainant's testimony by means of television or otherwise; and***
>
> ***(b) the accused is permitted to communicate with his counsel while watching the giving of the testimony."***

5. The enactment of section 542A could be seen as a step on the evolutionary path of the Courts recognizing the vulnerabilities of child victims when giving evidence in adult centered Courts but at the same time balancing the constitutional rights of the accused to have a fair trial. Having said this, our section 542A does not go near as far as recent legislative reform in Canada through its enactment of section 486.2(1) of their Criminal Code ("Section 486.2(1)") in or around January 2006 (and its amendment in 2015), or as in the United Kingdom through its enactment of "Special Measures" under their Youth Justice & Criminal Evidence Act 1999 ("YJCEA"). Further, while the jurisprudence in Canada and the United Kingdom is replete with authorities resolving the constitutionality of section 486.2(1) and the Special Measures provisions of the YJCEA (they have been deemed to be constitutional in those jurisdictions), Bermuda authorities are scant in respect of whether our section 542A (i) breaches the accused's constitutional right to have a fair trial, (ii) by what means section 542A can be applied, and (iii) the nature and extent of the evidential basis upon which a section 542A Order can be made.

6. The crux of Ms. Christopher's opposition to section 542A being applied in this case was not so much on its constitutionality (if it was then her presented authority of ***R v. Levogiannis [1993] CanLII 47 (SCC)*** should resolve this for her), but primarily on whether the Prosecution, at this juncture, has adduced sufficient evidence upon which the Court could be satisfied on a balance of probabilities that a section 542A Order should be made (of course, even if a section 542A Order is made the Accused can still take issue with the arrangements which may be put into place for the child to give evidence by

video link). In determining what indeed the Prosecution must evidentially show before the Court accedes to a section 542A application it is helpful to turn to the historical development of the Canadian legislation and case law, particularly prior to the enactment of their section 486.2(1) in 2006.

7. The legislative predecessor to section 486.2(1) was section 486(2.1) which bore some resemblance to our section 542A. The amendment of section 486(2.1) to section 486.2(1) was essentially the changing of the word *"may"* to *"shall"*. Although the change was basically just one word it represented a tectonic shift as to the test and evidential burden to be met by the Prosecution when making an application for a child witness to give their oral evidence by way of a video link or by way of a screen being put into place (the principles to be applied by the Court have not considerably been altered though). Consequently, Canadian jurisprudence in respect of exclusion provisions is split into pre and post 2006 case law. The following paragraphs will highlight that we (in Bermuda) should be determining our section 542A against the back drop of the old Canadian section 486(2.1) and of the Canadian case law which flowed from their section 486(2.1).

8. Then section 486(2.1) of the Canadian legislation, as read with 486(1), stipulated that:

> ***"486 (1)*** ***Any proceedings against an accused shall be held in open court, but the presiding judge or justice may [my underline], on application of the prosecutor or a witness or on his or her own motion, order the exclusion of all or any members of the public from the court room for all or part of the proceedings, or order that the witness testify behind a screen or other device that would allow the witness not to be seen by members of the public, if the judge or justice is of the opinion that such an order is in the interest of public morals, the maintenance of order or the proper administration of justice or is necessary to prevent injury to international relations or national defence or national security.***
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> ***(2.1) An application referred to in subsection (1) or (2) may be made, during the proceedings, to the presiding judge or justice or, before the proceedings begin, to the judge or justice who will preside at the proceedings or, if that judge or justice has not been determined, to any judge or justice having jurisdiction in the judicial district where the proceedings will take place."***

9. Whereas, the new section 486.2(1) of the Canadian legislation now provides that:

> ***"(1) Despite section 650, in any proceedings against an accused, the judge or justice shall [my underline], on application of the prosecutor, of a witness who is under the age of eighteen years or of a witness who is able to communicate evidence but may have difficulty doing so by reason of a mental or physical disability, 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, unless the judge or justice is of the opinion that the order would interfere with the proper administration of justice."***

10. Distinguishing the old section 486(2.1) from the new section 486.2(1), R.D. Gordon, R.S.J in ***R.v. W.V. 2016 ONSC 874 (CanLII)*** stated:

> "***There are several significant differences between the predecessor section and the current provision, including the following:***
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> ***1) The predecessor section did not specifically anticipate an application by the prosecutor or witness and simply gave the court discretion to make the order. The current section requires an application for relief. It is for the applicant to decide what relief is requested.***
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> ***2) The predecessor section required a finding that the granting of relief was necessary to obtain a full and candid account of the acts complained of and therefore required an evidentiary basis for such a finding. The current section does away with that inquiry and requires no evidentiary basis for the application other than the age of the witness and the availability of the relief requested. That the requested relief is necessary is presumed.***
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> ***3) Under the predecessor section, even if there was finding that relief was necessary to obtain a full and candid account of the acts complained of, the court retained discretion to deny the use of a testimonial accommodation. The current provision is mandatory unless to grant the relief would interfere with the proper administration of justice."***

11. Similarly, Justice S.R. Shamai, in ***R v. Nathan Turnbull & George Kruzik 2017 ONCJ 309*** said:

> ***"Previously, the legislation permitted the order in similar terms if it was NECESSARY to obtain a full and candid account by the witness. Now, the section permits the order to be made 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. The additional ground contemplated by the phrase "otherwise be in the interest of the proper administration of justice" is new to the Section as of July 2015.***
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> ***The test rests on a different determination, that of the facilitation of a full and candid account, rather than its necessity to a full and candid account."***

12. Simonsen J. in ***R v. G.A.P. 2007 MBQB 127 (CanLII)*** succinctly set out the effect of section 486.2(1) when he observed that:

> ***"Section 486.2(1) is relatively new, having come into force on January 2, 2006. It replaced a section which was permissive, not mandatory, and allowed for the use of a testimonial aid so that the witness would not see the accused, if it was necessary in order to get a full and candid account of the acts complained of. In order to make this determination, the witness would often have to testify on the application. This placed an additional burden and stress on child witnesses. Parliament enacted the new section to facilitate and improve the participation of child witnesses. Under the new section, there is a presumption that an order will be made. There is no longer the requirement that the court make a finding that use of a screen or video is necessary to get a full account. As such, the Crown need not tender evidence in order to be presumptively entitled to use one of the testimonial aids described. However, the presumptive rule is subject to the court being satisfied that the use of a testimonial aid will not interfere with the proper administration of justice."***

13. Citing the above words of Simonsen J. in **R v. G.A.P**., Martin J. in the later case of ***R v. C.T.L 2009 MBQB 266*** gave the following commentary on section 486.2(1):

> "***Thus, it is without question that if an application is made, and the witness will be under 18 years of age at the time of testimony, then the trial judge is required to grant the application unless he or she is of the opinion that to do so would interfere with the proper administration of justice, and provided section 486.2(7) is complied with if the witness will testify outside the courtroom".***

14. To further highlight the point (if indeed further elucidation is needed), K. Caldwell J. in ***R v. S.(C.) et al. 2009 ONCJ 617 (CanLII)*** noted that:

> ***"Secondly, the old section was clearly discretionary and placed an onus on the Crown to establish that the order was necessary for a full and candid account. In practical terms, the order was usually sought in circumstances involving young complainants who were allegedly sufficiently fearful of the accused that they would be unable to give a full account if they were looking at the accused in court. The new section clearly is intended to limit the discretion not to make the order. The insertion of the word "shall" makes it clear that there is a presumption in favour of making the order. It is only if the judge is of the opinion that the order "would interfere with the proper administration of justice" that the judge should decline from making the order. Under the new section, it falls to the defence to satisfy the judge that the presumption has been rebutted by demonstrating that the order would interfere with the proper administration of justice."***

15. Likewise, the Canadian Authorities of ***R v. J.Z.S 2008 BCCA 401 (CanLII)*** and ***R v. T.M.Q 2013 MBQB 289*** venture further and provide that under section 486.2(1) it is no longer necessary to even have a pre-testimonial inquiry into the need for a testimonial aid, and, that the onus is no longer on the Prosecution to demonstrate a need for the invocation of the exclusion provision ***(R v. T.(S.B.) 2009 BCSC 71 (CanLII))***. The subject of debate in the Canadian Courts now, of course, is whether by virtue of section 486.2(1) the persuasive or even the evidential burden has shifted to accused (while interesting, such debate will not be the subject of this Ruling).

16. In their submissions the Prosecution handed me an extract of section 486.2(1) and I assume they did so to persuade me that it will assist me in my determination of our section 542A. However, our section 542A is much more akin to the old Canadian section 486(2.1) and not the new section 486.2(1), specifically in respect of its "permissive" and not "mandatory" construction as stated in ***R v. G.A.P***. In other words, Bermuda has not as yet taken the legislative step, nor have the Courts been inclined, to remove the permissive import of section 542A, nor dilute the evidential basis upon which a section 542A Order can be made. Accordingly, the principles and procedures set out in the pre section 486.2(1) (i.e. pre 2006) case law should be applied when considering our section 542A.

17. In this regard, the case of ***R v. M.(P) 1990 CanLII 6643 (ON CA)*** gives helpful guidance as to how to deal with section 486(2.1) applications, and ergo section 542A applications. As stated in ***R v. Dale Robert Buckingham 2009 CanLII 31184 (ON SC)***), *"The Ontario Court of Appeal in* ***R v. M.(P)*** *made it clear that there must be an evidential basis upon which the judge can form the opinion that the order is necessary to obtain a full and candid account of the facts complained of"*. Morden A.C.J. in ***R v. M.(P)*** noted that:

> ***"...substantial latitude should be accorded to the trial judge in deciding whether or not to form the requisite opinion. He or she is the one who has had the advantage of hearing the evidence and seeing the witnesses give it. His or her decision on this particular issue is not, in my view, strictly speaking, one of discretion, but, rather, one of judgment. The trial judge is not, however, empowered to form the requisite opinion unless there is an evidential base relating to the standard of necessity referred to in the subsection which is capable of supporting the opinion."***

18. I therefore find that in the case at bar, and by extension in Bermuda, there must be an evidential basis upon which the Courts can make an order under section 542A that the child may give her oral testimony via video link or from behind a screen.

19. In reaching this conclusion that there has to be an evidential basis I am in no way suggesting that the Prosecution is obligated to adduce expert evidence, nor are they required to prove that the child will undergo extreme stress if required to give evidence at trial. Wright J. in ***R. v. R.B. 2004 ONCJ 369 (CanLII)*** (which references earlier cases cited in this Ruling) makes it clear that:

> ***"An evidentiary basis is required to support an order under s. 486 (2.1). Evidence on the issue does not have to take any particular form. Unless directed by s. 486 (2.11) the complainant need not testify. The Crown is not obligated to adduce expert evidence***
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> ***R. v. M.(P.) (1990), 1 O.R. (3d) (Ont. C.A.), R. v. Levogiannis (1993), 85 C.C.C. 93d) 327 (S.C.C.)***
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> ***The evidence need not be a "litany containing the words of the statute" [R. v. M.(P.) supra] nor is the Crown required to demonstrate that "exceptional and inordinate stress can be caused to the child***

> ***complainant." [Levogiannis at p. 340] The Crown does not have to adduce evidence that the complainant has expressed a specific fear of seeing the accused. [R. v. O.L.D., [2002] O.J. No. 3546 (Ont. C.J.), affirmed (January 7, 2003), Campbell J. (Ont. S.C.J.), at para 16. The trial judge has "substantial latitude" in deciding whether the use of the screen should be permitted under s. 486(2.1) [R. v. Levogiannis at p. 11]***
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> ***"…the capabilities and demeanour of the child, the nature of the allegations and the circumstances of the case" [Levogiannis at p. 340] may be considered by the trial judge when assessing an application under s. 486 (2.1)".***

20. Further, as to the vehicle by which the Court should acquire that evidential basis upon which the Court can make a determination as to whether the child can give a full and accurate account of what occurred I conclude that the most appropriate way would be by the hearing oral evidence at a *voir dire*. That is, not simply (i) on the oral or written submissions of Prosecution Counsel, nor (ii) on documents presented from various persons (such as letter, reports, affidavits, etc). Support for my conclusion comes from a slew of Canadian authorities none more persuasive than ***R v. B.C.H. 1990 58 C.C.C. (3d)*** in which Twaddle J.A., when deciding on an application under section 486(2.1), stated:

> ***"The statutory requirement is that, before permitting the witness to testify outside the court-room, the judge must be of the opinion that the exclusion of the witness is necessary in order to obtain a full and candid account of her allegations. He is entitled to hold a voir dire to ascertain the facts on which his opinion will be formed, but I do not think the Crown is entitled to ask witnesses, at least those not qualified as experts, to express their opinions on the issue."***

Conclusion

21. In the case at bar, the Prosecution seeks to persuade the Court that a section 542A Order should be made. In support of their application the Prosecution, in oral submissions, referred to (i) An application for a Protective Intervention Order dated 23rd February 2018 made against the Accused prohibiting him from associating with the child; (ii) a police statement of a Sherri Vanderpool dated 8th November 2018 essentially saying that the child is shy and soft spoken; (iii) a letter from a Anthony Peets, a school counselor of

the child's school, dated 13th November 2018 stating that the child is soft spoken; and a letter from a Cindy Corday of the Bermuda Centre for Creative Learning dated 22nd November 2018 saying that the child is "naturally shy". No oral testimony was offered or heard from any of the individuals and the Prosecution solely relied on their oral and written submissions in respect of their section 542A application.

22. For the reasons stated above, i.e. (i) that there must be an evidential basis upon which the Court can make a determination as to whether the child is able to give a full and candid account of what happened, and, (ii) that such evidence should be obtained by way of a *voir dire*, I am not satisfied that the Prosecution has as yet crossed the evidential threshold for me to make a section 542A Order. Had I heard oral testimony from Ms. Vanderpool, Mr. Peets, or Ms. Corday, and having accepted their oral evidence as being credible and reliable, it may be that I may have decided on a balance of probabilities that a section 542A Order should be made. However, in the absence of such oral evidence I am compelled to dismiss the Prosecution's application at this time.

23. Having said this, and Ms. Christopher alluded to such possibility in her submissions, if the Prosecution wish to revisit their section 542A application, and if they are prepared to proceed on such by way of oral testimony being heard at a *voir dire*, then they may do so. I would suggest that they do so well in advance of the trial date when it is fixed.

24. I have made no decision as to whether the proposed locale and arrangements of the video link was appropriate. Such determination would be made if the Prosecution revisits their section 542A application at a later date, but it would behoove the Prosecution to set about making the appropriate arrangements if in the event the Court makes a section 542A order.

Dated the 3rd day of December, 2018

The Hon. Acting Justice Juan P. Wolffe