

Case Name:

R. v. Lachowski

Between

**Her Majesty the Queen, and
Robert Lachowski**

[2018] O.J. No. 5988

2018 ONCJ 796

Toronto Court File No.: 17-1826

Ontario Court of Justice

P.F. Band J.

November 14, 2018.

(67 paras.)

Counsel:

Mr. J. Stanton, counsel for the Crown.

Mr. S. Goldstein, counsel for the accused.

WARNING

The court hearing this matter directs that the following notice be attached to the file:

A non-publication and non-broadcast order in this proceeding has been issued under subsection 486.4(1) of the *Criminal Code of Canada*. This subsection and subsection 486.6 of the Criminal Code, which is concerned with the consequence of failure to comply with an order made under subsection 486.4(1), read as follows:

486.4 (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way;

486.6 (1) Every person who fails to comply with an order made under subsection 486.4(1), (2) or (3) or 486.5(1) or (2) is guilty of an offence punishable on summary conviction.

**Reasons for Ordering Cessation of
Cross-Examination pursuant to ss.
537(1.1) & 540(9)**

P.F. BAND J.:--

ORDER PREVIOUSLY MADE

1 Mr. Lachowski is charged that he sexually assaulted and criminally harassed S.S. in 2017.

2 During the course of this preliminary inquiry, I ordered the immediate cessation of the s. 540(9) cross-examination of the complainant, S.S., an adult woman who suffers from an obvious and pronounced intellectual disability as well as health and mobility problems. These are my reasons for doing so.

BACKGROUND

3 S.S. gave two videotaped statements to police during the summer of 2017 alleging that Mr. Lachowski had come to her apartment a number of times and engaged in non-consensual sexual activity with her (including sexual intercourse). Prior to the preliminary inquiry, the Crown filed materials seeking permission to tender S.S.'s statements pursuant to s. 540(7) of the *Criminal Code*. The Crown also registered its opposition in anticipation of any potential s. 540(9) application that might have been brought by the defence.

4 The defence filed no responding material or applications prior to the preliminary inquiry. However, by the beginning of the preliminary inquiry, the parties had reached a number of agreements. The defence conceded the Crown's s. 540(7) application (as well as applications allowing S.S. to give her testimony in the company of a support person and from another room using CCTV). The Crown agreed to make S.S. available for cross-examination, thereby changing its stance concerning s. 540(9). In the result, applications under ss. 486, 540(7) and 540(9) were granted on consent.

5 On September 11, S.S. attended court pursuant to *subpoena* and testified in-chief for

approximately 40 minutes. Then, defence counsel began his cross-examination. Early on, S.S. answered a short series of questions about the sexual allegations. Later, after 30-45 minutes of questioning, S.S. was asked why she let Mr. Lachowski into her apartment if she did not want to see him. At that point, she had an emotional breakdown and was given a break in the hopes that she would collect herself.

6 It is important to note here that nothing about the questions asked or the manner in which defence counsel was behaving could remotely be seen as abusive.

7 The Crown spoke with S.S., who told her that she did not want to continue to testify. As a result, the Crown indicated her intention to "reignite" her s. 540(7) application, to "reinvoke" her opposition to the s. 540(9) procedure and to apply for an order for the cessation of S.S.'s cross-examination. (The Crown later indicated her intention to rely on s. 537(1.1) as well). The Crown also undertook to call evidence of S.S.'s adult protection service worker, Ms. M.D., in support of her application. (In these reasons, I will refer to Ms. M.D. as S.S.'s "worker" for the sake of simplicity.)

8 The defence initially argued that S.S. was refusing to testify and that my *only* recourse as a preliminary inquiry judge whose powers are statutorily defined was to resort to s. 545.

9 Later that morning, I suggested that S.S. be returned to the CCTV room so that I could make inquiries of her in the hopes of finding a way to accommodate her. It was at that time that the Crown informed me that she had allowed S.S. to go home without seeking the Court's permission. I requested that efforts be made to have S.S. return in the afternoon so that I could speak with her. For reasons that will be explained below, that did not happen and she was not brought back to court until September 14. We spent the rest of the day hearing the investigating officer's evidence and a small portion of the testimony of S.S.'s worker.

10 Ultimately, the parties made their submissions on September 24. The Crown relied on her previously filed materials, which included a collection of Canadian cases interpreting ss. 540(7) and 540(9). She argued that it would be inappropriate, in the language of the *Criminal Code*, to continue to compel S.S. to testify due to her disability and present circumstances.

11 While defence counsel maintained that the only recourse lay in s. 545, the majority of his alternative submissions focused on the right to cross-examine at the preliminary inquiry, its relationship to the constitutional right to make full answer and defence and concerns about *trial* fairness. These submissions were not informed by a series of recent cases about the sections at issue, the nature of the right to cross-examine at a preliminary inquiry and that procedure's status as a discovery mechanism. In reply, the Crown sought to file further written submissions providing additional cases on those points.¹ Defence counsel objected to these on the basis that they somehow violated the rule against case-splitting. I received them as they were nothing more than excerpts of governing or otherwise patently relevant authorities, including from the Supreme Court of Canada. I gave defence counsel time to respond, which he did in writing on October 2.

12 This situation calls for an analysis of the interplay between ss. 537(1.1), 540(7), 540(9) and 545. Based on the submissions of the parties, the issues are the following:

- (1) Is s. 545 "mandatory" or otherwise the only section to which a preliminary inquiry judge can have recourse in this situation?
- (2) Can a preliminary inquiry judge revisit an order granting permission to cross-examine a witness made pursuant s. 540(9)?
- (3) What role, if any, does s. 537(1.1) play in this situation?
- (4) Does the cessation of the cross-examination engender trial unfairness?

FACTS

S.S. generally

13 S.S. is a woman in her mid- to late 60s. She lives alone in supportive housing and has few friends, if any. She suffered a brain injury when she was struck by a car as she was riding a bicycle as a child. This has resulted in an obvious intellectual disability. She does not know how to read. She can count but cannot do multiplication or subtraction. She cannot remember how old she is. She does not know if she is old or young but thinks she is young. I had the opportunity to observe her in her videotaped statements and during her time in the CCTV room. Her answers are simple and concrete. There is what she likes and what she does not like. I was the "nice judge." The Crown was "nice." She liked the Crown. A former male friend of hers was "more nicer" than the accused. The accused was once nice but now he is not nice. Defence counsel was "too much."

14 She tends to mouth what others are saying in an apparent attempt to better understand them. She does not appear to understand complex questions or abstract concepts; for example, she did not understand the question whether she "sometimes thinks things happened when they didn't." She is evidently suggestible and answers questions even if at times it appears that she did not understand them.

15 Importantly -- and all agree -- S.S. is incapable of relating to the concept of time. She does not know if she has known Mr. Lachowski "for a long time" or "for a short time." She gave her videotaped statements in May and July. In both, she alleged that the sexual assaults had occurred the previous week. In cross-examination, she agreed that she was talking about one and the same incident. When first asked if she went to school she said no; she later said that she went to school when she was young but does not go to school "now."

16 S.S.'s worker has been working with her through a supportive service agency since December 2016 and sees her at least once a week. Usually more than that. They speak on the telephone at least once a day. In the lead up to, and during, the preliminary inquiry, S.S. required much more intensive support.

17 There were times when the worker's evidence sprawled into impermissible opinion evidence, such as the nature and degree of S.S.'s disability and how one should question her in court to ensure her understanding. At other times, it was based on hearsay. I have not placed any weight on those portions of her evidence. However, her testimony greatly assisted me to appreciate S.S.'s limitations from a functional perspective as well as to understand the risks that the preliminary inquiry presented to her safety and security based on her past and present actions. It was based on her frequent, prolonged and direct experience with S.S.

18 S.S. depends on her worker regarding finances. While she can manage to use an ATM sometimes, and is able to hand money to a cashier, she must trust that the transactions are correct. She will often call her worker to ask if it is OK to buy a small item like a can of pop.

19 The worker described S.S.'s ability to understand as akin to that of a child of four or five years. (That description accords with my observations.) She does not understand complex or abstract questions. She is able to respond to short, simple questions but, even then, her comprehension must sometimes be confirmed. She requires help to remember doctor's appointments and to understand the doctor's recommendations. She is given colouring books when she is anxious.

20 S.S. is able to navigate her way around a one kilometer radius of her apartment. Beyond that, she is apt to get lost.

21 S.S. has run away from her apartment in the past. On one occasion, she was found in a park where she had spent the night. She had not brought her walker and was not wearing a coat or shoes. She did not know how to get home.

22 The worker further explained S.S.'s difficulty with time. She is unable to relate times to events. Her money comes in on Mondays and Thursdays, yet she regularly calls her worker to ask when her money will be available. She confuses the past with the present. An event might have occurred a week ago or a year ago. If asked whether something happened 15 minutes ago, an hour ago or this morning, S.S. might not understand.

23 Physically, S.S. has had hip replacement surgery and has depended on a walker since the winter of 2016. Her knees are always swollen. She struggles to maintain her balance and falls often. When anxious or frightened, she shuffles and bounces up and down. This causes her to become more unstable. She has a history of pulling hair out of her scalp when anxious.

S.S. and the Preliminary Inquiry

24 After being served with a *subpoena*, S.S. became worried. She was afraid of going to court. She thought she would go to jail for talking. S.S. met with the Crown to prepare for the preliminary inquiry on the Monday before the preliminary inquiry. From the Friday before, S.S. was upset and crying.

25 On September 11, after S.S.'s breakdown, the worker explained that S.S. did not have to return to court the next day and arranged to have her taken home in a taxi. She remained at court and did not see or speak with S.S. for the rest of the day.

26 The next day, the worker wanted to check in with S.S. to see how she was doing. She was unable to find her. It seemed that S.S. was out for longer than any of her normal outings. The worker then discovered two voice messages that S.S. had left her overnight. In the first one, at approximately midnight, S.S. asked "what happened?" and whether she was "in trouble." She also said she was waiting for Wheeltrans to take her to court. The second message came in at approximately 7:00 a.m. S.S. asked if the worker was coming to meet her to go to court.

27 Clearly, S.S. was disoriented. The worker was worried that she might have fallen and hurt herself. She arranged to have someone enter S.S.'s apartment. She was not there. The worker found her at a day program. S.S. said she was not feeling well and had not eaten. The worker told her that she had to go back to court on September 14 (Friday). S.S. got upset. She put her hands up in the air and said "I won't go back... this is too much."

28 The worker was worried about S.S. and decided that she should see her counsellor. The two went together on September 13 (Thursday). It seemed to the worker that S.S. had not slept. She was very tired and her balance was off.

29 In the worker's presence, S.S. told the counsellor that there were too many questions for her in court and that she was going to tell the judge "I don't like this ... I will shoot myself if they don't stop." The counsellor told the worker that she had made a risk assessment and would talk to her later.

30 The worker was concerned about S.S. and did not want her to be alone. She had made suicide threats in the past.

31 She told S.S. that on Friday, only the judge would be asking her questions. S.S. said that if the judge asked her questions, she would run away.

32 The worker was able to cajole S.S. to come to court on September 14. S.S. continued to threaten to commit suicide.

33 In my view, S.S. is an extraordinarily vulnerable witness. Her intellectual development is akin to a small child's. She has run away in the past and exposed herself to the elements and other dangers. She has a history of suicide threats. In the context of the obvious stresses associated with

this preliminary inquiry, she has threatened to run away or to kill herself. In all the circumstances, her presentation called for great caution.

Issue 1: Is s. 545 "mandatory" or otherwise the only section to which a preliminary inquiry judge can have recourse in this situation?

34 Section 545(1) reads:

Where a person, being present at a preliminary inquiry and being required by the justice to give evidence,

(a) refuses to be sworn,

(b) having been sworn, refuses to answer the questions that are put to him,

...

without offering a reasonable excuse for his failure or refusal, the justice may adjourn the inquiry and may, by warrant in Form 20, commit the person to prison for a period not exceeding eight clear days or for the period during which the inquiry is adjourned, whichever is the lesser period.

35 Assuming that S.S. was "refusing" to testify, I am of the opinion that s. 545, like many of the powers given to preliminary inquiry judges, is discretionary. I reach this conclusion for two principal reasons. First, on its own terms it is permissive. Second, as the parties agree, it is a coercive, offence-creating power akin to contempt of court. It would be most surprising if such a power were not accompanied by discretion. It is not mandatory. Nor is it the only section to which I may have recourse, given my interpretation of s. 540(9) (below).

36 Defence counsel pointed to the Ontario Court of Appeal's decision in *Re. Abko Medical Laboratories Ltd. and The Queen*, [1977] 35 C.C.C. (2d) 65 (C.A.) ("*Abko*") as authority for the proposition that, once a witness refuses to answer a question and can provide no reasonable excuse, the section requires the judge to send the witness to jail. I disagree. True, the Court wrote that because there was a reasonable excuse, the judge "was not *obligated* to send the witness to jail" (at p. 75, my emphasis.) However, at p. 74, the Court wrote that where a witness refuses to answer a proper question, the judge should order the witness to answer it. "It is then in the discretion of the Provincial Judge to take such action as he may see fit depending upon the answer given or the position taken by the witness."

37 I am further buoyed by the Supreme Court of Canada's recent decision in *R. v. Normore*, [2018] S.C.J. No. 42, declaring a similar issue as one properly left to the discretion of the trial judge in an attempted murder trial.

38 Even if I am in error as a matter of interpretation, I simply do not find that S.S. was knowingly and intentionally refusing to testify in such a way as to justify resorting to a criminal power akin to contempt. She is someone who suffers from significant deficits and is child-like in her presentation and apparent intellectual ability. To be clear, I did not see her behaviour as mawkish or capricious.

39 Finally, as I have come to the conclusion that the continued cross-examination of S.S. is *inappropriate* (s. 537(1.1)) and/or that she is no longer an *appropriate* witness to be cross-examined (s. 540(9)), it would appear that her "refusal" to testify could amount to a reasonable excuse.

Issue 2: Can a preliminary inquiry judge revisit an order granting permission to cross-examine a witness made pursuant s. 540(9)?

40 Defence counsel argues that once a cross-examination has been permitted pursuant to s. 540(9), that section cannot "be used in the middle of the [preliminary inquiry] to end it." The section reads as follows:

The justice shall, on application of a party, require any person whom the justice considers appropriate to appear for examination or cross-examination with respect to information intended to be tendered as evidence under subsection (7).

41 In *R. v. Hynes*, [2001] S.C.J. No. 80 at para. 30, the Supreme Court of Canada summarized the roles of the preliminary inquiry. It has one statutory function: to determine whether there is sufficient evidence to warrant committing an accused to stand trial. Yet, the procedure has assumed an "ancillary role" as a discovery mechanism.

42 Over time, Part XVIII of the *Criminal Code* has been amended by providing "shortcuts" for the presentation of evidence in order to streamline the preliminary inquiry and to protect vulnerable witnesses. The jurisprudence has adapted to those amendments. In *R. v. Bjelland*, [2009] S.C.J. No. 38 at paras. 32-36, the Supreme Court of Canada held that there is no constitutional right to a preliminary inquiry. The Court also clearly stated that the statutory right to cross-examine a witness at a preliminary inquiry is not a component of the constitutional right to make full answer and defence. In fact, provided that disclosure is otherwise complete, the total inability to cross-examine a witness at a preliminary inquiry does not violate an accused's *Charter* rights. The Court even went so far as to say that when the accused has been provided with witness statements, the discovery purpose of the preliminary inquiry "has been met."

43 In *R. v. S.J.L.*, [2009] S.C.J. No. 14 at paras. 22-23, the Supreme Court of Canada characterized the discovery aspects of the preliminary inquiry (described in *Skogman v. The Queen*, [1984] 2 S.C.R. 93 at p. 105) as *incidental benefits*. In the age of full disclosure, the Court held that

the "preliminary inquiry as a discovery mechanism has lost much of its relevance"

44 In my view, the case of *R. v. E.B.*, [2002] 162 C.C.C. (3d) 451 at paras. 41-44 (Ont. C.A.) on which defence counsel relies, has been overruled to the extent that it characterizes the right to cross-examine at the preliminary inquiry as "an integral part of an accused's constitutional right to make full answer and defence."

45 Section 540(9) must be considered in this general context. It has been discussed more specifically in a number of cases, including *R. v. Francis*, [2005] O.J. No. 2864 (S.C.), *R. v. P.M.*, 2007 QCCA 414, *R. v. Rao*, 2012 BCCA 275, and *R. v. Ali*, [2015] O.J. No. 4201 (C.J.).

46 From those decisions, the following principles emerge:

- A party has a right to make a request under subsection 540(9) and a preliminary justice must not overlook it.
- However, the subsection does not grant the right to that party to cross-examine. It is permissive. It can be used to satisfy the traditional screening and discovery functions of the preliminary inquiry and, in appropriate cases, to allow the justice to understand the circumstances of the information.
- When considering whether it would be appropriate to require a witness to attend for cross-examination, the justice has broad discretion. The question is not whether the witness's evidence is relevant, in the classic sense. Rather, it is whether to do so would be *appropriate, judicious* or *opportune*.
- Of those, two are well understood to lawyers and judges. Opportune, however, is less so. *Webster's* defines it as "suitable or convenient for a particular occurrence" and "occurring at an appropriate time."
- Unlike at trial, a meaningful opportunity to cross-examine has less importance at the preliminary inquiry because the accused is not in jeopardy and the evidence is not being admitted for consideration by the trier of fact.
- The regime set up in ss. 540(7) and (9) gives the preliminary justice broad

discretion.

47 Many of the cases that the Crown relied on in her written materials from other jurisdictions, including *Re. Criminal Code of Canada*, ss. 540(7) and 540(9), [2017] N.J. No. 365 at para. 50 (N.L.P.C.), define the "appropriate" scope of a s. 540(9) cross-examination at the preliminary inquiry very narrowly. Essentially, that which is not necessary to assist the preliminary inquiry judge in determining whether committal should be ordered is collateral. In his written submissions, defence counsel agrees that "pure discovery questions" are beyond the scope of the subsection.

48 In my experience, as a matter of culture or convention, Ontario courts and Crown counsel have shown more tolerance for discovery-type questions. However, in light of the amendments to the *Criminal Code*, recent Supreme Court of Canada jurisprudence concerning the discovery role of the preliminary inquiry and the ever-present concerns about delays in the post-*Jordan* era, there is merit to the approaches exemplified by the courts of other provinces.

49 In any event, having regard to the permissive and highly discretionary nature of s. 540(9), viewed in the context of the jurisprudence, it is axiomatic that a preliminary inquiry judge maintains the ability to find that a witness who was once "appropriate" no longer is. The right to cross-examine a witness at a preliminary inquiry (or trial) is not unlimited or otherwise a *carte blanche*. The preliminary inquiry judge must ensure that vulnerable witnesses are protected throughout.

50 I find that S.S. is no longer an "appropriate" witness to be cross-examined at the preliminary inquiry. Owing to her particular vulnerability and the heightened reasons to be concerned for her safety and security, she is not a suitable witness at this time. I would also add that I had no confidence that she would be a suitable witness within a reasonable time such that it would have been appropriate to hold the matter in abeyance.

51 Defence counsel's argument that S.S. can be cajoled into attending court misses the point. That a witness can be made to attend court using various means of persuasion does not address whether it is appropriate to do so.

52 While this is a sufficient reason to order the cessation of the cross-examination, I will nonetheless discuss the two remaining issues.

Issue 3: What role, if any, does s. 537(1.1) play in this situation?

53 The section reads as follows:

A justice acting under this Part shall order the immediate cessation of any part of an examination or cross-examination of a witness that is, in the opinion of the justice, abusive, too repetitive or otherwise inappropriate.

54 The parties provided me with little assistance as to how to interpret this section. On its own terms, the section is plainly discretionary. In his written submissions, defence counsel argued that the term "appropriate" in s. 540(9) should refer not to the witness but to the questions the cross-examiner seeks to ask. That proposition is difficult to endorse given the explicit language tying the concept of appropriateness in s. 540(9) to "any person." It has more obvious traction in relation to s. 537(1.1).

55 Defence counsel quite rightly shared with the Court the areas in which he intended to cross-examine if given the ability to do so. They were:

- the existence of alibi,
- the reasonability of fear regarding the criminal harassment charge,
- the existence of third-party records, and
- whether [S.S.] will adopt statements attributed to her by other witnesses.

56 I agree with him that these are specific and discrete subjects. However, with the possible exception of the second area (which I discuss below), they are nonetheless "pure" discovery-type questions insofar as they could have no impact on my decision as to committal.² This may be reason enough to find that they are "inappropriate" in the context of the proposed s. 540(9) cross-examination.

57 In any event, even if the concept of appropriateness relates to the questions, this case demonstrates that the analysis cannot (always) be undertaken without regard to the *person* being *questioned*. I am also of the view that ss. 537(1.1), 540(7) and 540(9) are not only discretionary but interrelated. A finding that a witness is no longer appropriate for cross-examination can inform the analysis of whether the continued cross-examination of that person is appropriate.

58 For the reasons discussed above, even though the proposed questions are benign, I find that they are not appropriate in all the circumstances.

Issue 4: Does the cessation of cross-examination engender trial unfairness?

59 Given that there is no constitutional right to a preliminary inquiry and that the statutory right to cross-examine at a preliminary inquiry is not a component of the constitutional right to make full answer and defence, it is difficult to see how the cessation of a cross-examination -- even of a central witness -- could lead to *trial* unfairness when the Crown's disclosure obligations have been fulfilled and the proposed cross-examination can have no real impact on committal.

60 While I acknowledge that the result in this case is not perfect, it is not unfair. The defence has received disclosure of S.S.'s statements -- including some she made to others during the preliminary inquiry. The videotaped statements were sufficient to lead defence counsel to concede committal on the most serious allegations. Also, there has been substantial cross-examination.

61 I turn now to an assessment of the areas that defence counsel will be unable to pursue in cross-examination at this stage.

Alibi

62 Given S.S.'s inability to relate to time -- best exemplified by her own answer (in cross-examination) that the instances of sexual assault that she said took place a week prior to each of her videotaped statements were one and the same -- it is most unlikely that further cross-examination could provide further assistance in framing an alibi defence. What is more, that is something that could be investigated by police outside of court should the defence choose to disclose details to the Crown.

Reasonability of fear

63 While the reasonableness of the complainant's fear is an element of the offence of criminal harassment, it must be remembered that it is to be assessed objectively. Further questioning on that issue will be of limited use, if any, to the trier of fact.

Existence of third-party records

64 While this area is technically "pure" discovery, I acknowledge that the defence is normally entitled to attempt to build a foundation at the preliminary inquiry for a potential *Charter* application at trial. In this case, that has been accomplished to a significant degree. It was learned that S.S. has been receiving support from a particular community service agency for up to seven years and that the organization keeps written records relating to her. Her worker's identity is known. Her worker disclosed the counsellor's first and last names during the hearing and said that she could also provide her address.

Whether S.S. will adopt statements made to others

65 Whether a witness adopts statements allegedly made to others may be relevant to credibility; it can also be a collateral issue. Either way, it is far removed from the core function of the preliminary inquiry and can be safely left for trial.

The spectre of s. 715(1)

66 Finally, defence counsel argued that there is unfairness in the fact that the Crown might apply to tender the transcript of S.S.'s aborted preliminary inquiry testimony at trial pursuant to s. 715(1). It must be recalled that that an application under that section is discretionary and that it will be

dismissed where "the accused did not have full opportunity to cross-examine the witness." Also, in response to a question of mine, defence counsel conceded that resort to this procedure might be affected by the Supreme Court of Canada's decision in *R. v. Bradshaw*, [2017] S.C.J. No. 35. Finally, whether the Crown will seek to avail itself of that procedure at trial is entirely speculative at this stage.

67 The cessation of the cross-examination of S.S. at this preliminary inquiry does not cause unfairness.

P.F. BAND J.

1 See the document entitled "Crown Application for an Order of Committal."

2 It bears mentioning that committal on the sexual assault count has been conceded.

---- End of Request ----

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