

SUPREME COURT OF NOVA SCOTIA

Citation: *R. v. D. (W.C.)*, 2020 NSSC 392

Date: 20201218

Docket: CR Ant No. 496032

Registry: Antigonish

Between:

Her Majesty the Queen

v.

W.C.D.

DECISION - VOIR DIRE 1 - IN CAMERA

Section 278.3 Criminal Code Application, Stage Two

Publication Ban: *Criminal Code* ss. 486.4 & 486.5 – any information that will identify the Complainant, victim or witness shall not be published in any document or broadcast or transmitted in any way. No end date for the ban stipulated in these sections.

Judge: The Honourable Justice James L. Chipman

Heard: December 18, 2020, in Antigonish, Nova Scotia

Written Decision: December 18, 2020

(Counsel Only)

Redacted Decision: February 4, 2021

Counsel: Jonathan C. Gavel, Crown Counsel
Stanley W. MacDonald, Q.C., Defence Counsel
Carbo Kwan, Complainant Counsel
Kelly E. McMillan, Counsel for [redacted] Sexual Assault
Services Association

**Counsel Not
Appearing:** Lesley M.W. Sawers, Counsel for Nova Scotia Health Authority
Sheldon A. Choo, Counsel for Minister of Community Services
Ashley McClelland, Counsel for [redacted] Alberta Health
Services
Leisa T. MacIntosh, Counsel for Complainant/Plaintiff

By the Court (orally):

OVERVIEW

[1] The Applicant, WCD (the “Applicant”), is charged with attempted rape and indecent assault of [redacted] (the “Complainant”) pursuant to (now repealed) *Criminal Code* ss. 145 and 159, respectively. It is alleged that the offences occurred between January 1, 1975 and January 1, 1980 in [redacted], Nova Scotia. A five day jury trial is scheduled to commence February 1, 2021.

[2] On December 4, 2020 upon reading the written submissions and hearing oral argument, I granted the Stage One application and ordered that the following records be produced for my review on or before December 11, 2020:

1. The manuscript identified as “[redacted]”, in the possession of the Public Prosecution Service of Nova Scotia;
2. Records in the possession of the Minister of Community Services pertaining to [redacted] for the period from January 1, 1975 to January 31, 1980, inclusive;
3. Counselling records pertaining to [redacted] in the possession or control of the [redacted] for the period from January 1, 1989 to December 31, 1991, inclusive;
4. Counselling records pertaining to [redacted] in the possession or control of the [redacted].;
5. Counselling records pertaining to [redacted] in the possession or control of the [redacted] Hospital;

On December 10, 2020 I released my Stage One written reasons.

BACKGROUND

[3] The Applicant made his application in accordance with s. 278.3 of the *Criminal Code* for disclosure of various files and the Complainant’s manuscript of a book she authored. In my Stage One decision, I determined that the Applicant met

the Stage One test and ordered that the files be produced for my review. Today the parties, Complainant and [redacted] counsel argued Stage Two.

[4] No *viva voce* evidence was called in relation to Stage One or Stage Two. In my Stage One decision, I recounted the facts (derived from Applicant's counsel's affidavit and the Complainant's Statement of Claim) as follows:

...

8. During the preliminary inquiry, the Complainant stated that she told her social worker, [redacted], that Mr. D. was sexually abusing her.
9. The Complainant alleges that she told [redacted] exactly what was happening in the home. She testified that she told [redacted] during a meeting in his office on [redacted] in [redacted].
10. The Complainant testified that she told [redacted] about all of the alleged sexual acts that form the current charges against Mr. D.. She also testified that [redacted] was taking notes on a note pad while she spoke.
11. The Complainant testified that she obtained the Department of Community Services records through a FOIPOP application she filed approximately ten years ago.
12. The Complainant testified that her counsel at MacGillivray Law currently possesses a copy of the Department of Community Services records.
13. The Complainant testified that the Department of Community Services records do not contain reference to any sexual abuse perpetrated on the Complainant by Mr. D..
14. The Complainant also testified that she could not remember if Mr. D's name or initials appeared in the Department of Community Services Records.

...

16. The Complainant wrote a book or manuscript, titled "[redacted]", approximately 13 years ago. The book/manuscript references Mr. D. by the initials W.C.
17. The Complainant testified that she turned over a copy of the book/manuscript to the Crown because she referenced it in her statement to police.
18. The Complainant testified that the book/manuscript contains some level of detail pertaining to the Complainant allegedly being sexually abused by Mr. D.. The Complainant also testified that she may publish the book/manuscript in the future.

...

20. The Complainant attended counselling sessions in the late 1980's after the death of her daughter. The Complainant testified that her family doctor, [redacted], referred her to a psychologist employed with [redacted] to continue her counselling.
21. The Complainant testified that she mentioned Mr. D's name during counselling sessions at [redacted].
22. The Complainant testified that she signed a release for her [redacted] counselling records for MacGillivray Law.
...
24. The Complainant testified that she took counselling through both the [redacted] and [redacted] Hospital in [redacted], Nova Scotia, beginning approximately ten years ago.
25. The Complainant signed separate releases for both her [redacted] and [redacted] Hospital Records. Those records are currently held by counsel for the Complainant At MacGillivray Law.
26. The Complainant testified that she described what allegedly occurred between herself and Mr. D. to counsellors at both organizations. She testified that she assumes both sets of records will include reference to Mr. D..
...
29. During her interview with Cst. Ramaglia of the [redacted] RCMP on July 6, 2018, the Complainant alleged that Mr. D. forced her to have intercourse with him approximately ten times.
30. During the preliminary inquiry, the Complainant denied ever having been penetrated by Mr. D., saying instead that Mr. D. would rub his penis on the outside of her vagina or try to penetrate her. She estimated that this behaviour happened approximately three times.
...
11. The Plaintiff states that beginning in approximately 1976 and continuing until approximately 1979, she was exposed to sexual molestation by her foster brother, W.D. Jr. The abusive sexual acts included, but were not limited to: fondling, including touching her genitals and breasts under her clothing; attempted vaginal intercourse; ejaculation on her body; and anal intercourse. These assaults and rapes occurred on approximately fifty to sixty occasions and continued until she left the foster home at age 18.
14. In or around 1977, following an incident where the Plaintiff ran away from the foster home, she explained to her long-term social worker [redacted] that she was running away from the home due to the sexual and emotional abuse that was being inflicted upon her. She made a full and detailed disclosure to [redacted] of the sexual abuse that she had been enduring in

the foster home, including the names of the people in the foster home who were inflicting the abuse.

[5] Following the Stage One hearing and my decision, I reviewed the notes received in compliance with my Order. I then provided the parties with a general inventory of the notes. In advance of today's hearing, I received correspondence from Applicant's counsel seeking full disclosure of the impugned files. From the parties providing the documents, none took a position with respect to disclosure to the Applicant other than the [redacted] Sexual Assault Services Association. The Sexual Assault Services Association argued that the Applicant should not be provided with their materials and alternatively, suggested redactions in the event of disclosure. The Crown and Complainant's counsel argued that the Applicant should not be provided with any documents, other than relevant portions of the material specifically identifying the allegations against the accused.

LAW

[6] The *Criminal Code* sets out a comprehensive process for an accused who wishes to obtain records held by third parties that relate to a complainant in a criminal prosecution.

[7] Section 278.3 involves a two-stage process. As was noted by Scaravelli, J. in *R. v. R.E.W.*, 2009 NSSC 286:

[3] An application of this nature involves a two-stage process. The trial judge hearing the application may order that the records be produced to the Court if the accused has established that they are likely relevant and that production is necessary in the interest of justice pursuant to Section 278.5(1) of the Code.

[4] In making this determination the Court must consider the salutary and deleterious effects of determination of the accused's right to make full answer and defence, and on the right to privacy and equality of the complainant to whom the record relates as set out in Section 278.5(2).

[5] In particular, the Judge is required to take into account the extent to which the record is necessary for the accused to make a full answer and defence; the probative value of the record; the nature and extent of the reasonable expectation of privacy with respect to the record; whether production of the record is based on a discriminatory belief or bias; the potential prejudice to the personal dignity and right to privacy of any person to whom the record relates; society's interest in encouraging the reporting of sexual offences; society's interest in encouraging the obtaining of treatment by complainants of sexual offences; and the effect of the determination on the integrity of the trial process.

[8] Recently Justice Scaravelli had to consider a Stage One application in *R. v. Chisholm*, 2020 NSSC 364. The case has remarkable similarities to the case at bar as it dealt with historical sexual assault and the request for the complainant's book/manuscript. As with this case, the complainant in *Chisholm* agreed to the production of the book/manuscript for Court inspection. At para. 4, Justice Scaravelli described the rationale for the request, which applies here:

[4] The Applicant says this material is likely relevant to an issue at trial as it relates to the subject matter of this proceeding and the allegation against the Applicant. More specifically, he says the material is likely relevant to the credibility and reliability of the complainant's evidence about the alleged offence, and that they are necessary to the Applicant's right to make full answer and defence.

[9] Justice Scaravelli ultimately determined that the book relating to the subject matter of the charges should be produced but not the other sought after records, noting at para. 38:

[38] As a result, the Application for Third Party Records relating to Community Services child protection records and therapy and counselling records is dismissed. Based on the consent of the complainant, the portions of her book/manuscript relating to the subject matter of the charges shall be produced for inspection by the Court.

STAGE TWO

[10] For the reasons outlined in my Stage One decision, I ordered all (with the exception of the MacGillivray Law materials) of the sought after records be produced for Court inspection. I have since carefully reviewed the material in the absence of the parties, in order to determine if the records (or any part of them) should be produced to the accused (s. 278.6(1)). Following my review of the material, I must only order production to the Applicant if I am satisfied the record is "likely relevant" to an issue and its production is "necessary in the interests of justice". In this event, I may order the record, or part of the record be produced to the Applicant, subject to any conditions imposed (s. 278.7(1)).

[11] According to s. 278.7(2), in determining whether to order production to the accused, I must again consider the "salutary and deleterious effects" of the determination on: (1) the right of the accused to make "full answer and defence"; and (2) the "right to privacy, personal security and equality" of the Complainant,

witness or other person to whom the record relates. I must also consider the eight statutory factors in s. 278.5(2):

- (a) the extent to which the record is necessary for the accused to make a full answer and defence;
- (b) the probative value of the record;
- (c) the nature and extent of the reasonable expectation of privacy with respect to the record;
- (d) whether production of the record is based on a discriminatory belief or bias;
- (e) the potential prejudice to the personal dignity and right to privacy of any person to whom the record relates;
- (f) society's interest in encouraging the reporting of sexual offences;
- (g) society's interest in encouraging the obtaining of treatment by complainants of sexual offences; and
- (h) the effect of the determination on the integrity of the trial process.

[12] Having reviewed the Department of Community Services (“DCS”) and [redacted] files, I have decided that they are not relevant or probative of the allegations in issue. Indeed, the file contents do not supply any detail such as names or dates. Furthermore, there is nothing within the documents that might be construed to identify the accused or anyone else referable to alleged sexual assault. In the result, I do not believe they are necessary for the accused to make full answer and defence. In short, they offer very little probative value and the deleterious effect of disclosing the files far outweighs production. In this regard, I am mindful of the factors found in s. 278.5(2) (listed above).

[13] Applicant's counsel argued that the DCS file should be produced because of the evidence from the Complainant that she reported sexual assaults to a DCS social worker, [redacted], and that she observed [redacted] taking notes at the time she told him of the abuse she says was perpetrated by the Applicant. The Crown and Complainant oppose production of the DCS file on this, or any other basis.

[14] In his argument Mr. MacDonald focussed on the credibility of the Complainant, citing *R. v. S.L.*, 2020 ONSC 497 in support of his position that the DCS file should be produced. In *R. v. S.L.* Justice Gordon recounted the background at paras. 4, 5 and 6:

- 4 In the course of these proceedings, the applicant brought an application for disclosure of records pertaining to the complainant and held by the local Children's

Aid Society (the "CAS"). On September 12, 2018, the Crown, the applicant, the complainant and the CAS consented to an order by which the complainant's CAS records would be vetted by the CAS and disclosed to the Crown, the defence and counsel for the complainant. The records were subsequently disclosed in accordance with that order.

5 At the preliminary hearing, the complainant provided a detailed account of a discussion with a CAS worker in which she disclosed specific allegations against the applicant. She testified that the CAS worker would make regular visits to the foster home and would speak privately with her and inquire about how things were going. She testified that she was truthful and honest with the CAS worker.

6 The complainant's brother was in foster care at the same home. He also testified at the preliminary hearing and confirmed the regular attendance of the CAS worker and recalled that complaints made to her were recorded by the worker in a book.

[15] Accordingly, Justice Gordon had evidence of both the complainant and her brother regarding regular attendance of the CAS worker and the fact that she recorded notes in a book. Further scrutiny of the case illustrates that the book comprised over 2000, pages, as noted at para. 7:

7 The CAS records pertaining to the complainant encompass 2,136 pages and apparently include many minute details of the complainant's time in this foster home. The sole reference in the notes to any complaint concerning the applicant is a caseworker note dated September 29, 1995:

"Vanessa supposedly told [vetted name] she was uncomfortable with Sam babysitting. [Vetted name] told Rollande -- Rollande talked to Karen -- Sam never touches kids -- never bathes them, etc. Vanessa said she never said this to her mother -- Karen decided Sam not to babysit to protect him."

[16] Accordingly, I believe *S.L.* is readily distinguishable from what we have here; i.e., an approximate 50-page DCS file largely consisting of forms and letters. Indeed, the running notes only take up 10 pages and are not detailed. Further, the author, [redacted] is no longer living and cannot be questioned on his practice for taking notes back in the late 1970's and into 1980. In any case, the notes are certainly nothing like what Justice Gordon characterized as having "minute details".

[17] Having regard to the s. 278.5(2) factors and caselaw, I do not believe the interests of justice would be served are such that any portion of the generic DCS file ought to be disclosed.

[18] Correspondence received from counsel from [redacted] Health Services confirms they do not possess any records responsive to the Stage One Order. In his

submissions today, Mr. MacDonald asked if the Court might consider broadening the Stage One Order to request counselling records pertaining to the Complainant so as to go before or after the dates specified in the Stage One Order. In this regard, he re-visited the affidavit evidence and the Complainant's Preliminary Inquiry evidence at pp. 136 and 152.

[19] Having reviewed these passages, my Stage One Decision and notes, I am not persuaded that the Stage One Order should be amended. In my view the original Order is responsive to the evidence; accordingly, I will not re-open this aspect of the matter.

[20] This leaves the "[redacted]" manuscript and counselling records pertaining to the Complainant in the possession or control of [redacted] Hospital for consideration. With respect to the former, upon receipt of the manuscript Inventory, Mr. MacDonald wrote the Court on December 9, 2020, stating:

In my view, the references to the complainant's "foster brother" should be disclosed. Also, if there are any references to others who were in the household between 1975 and 1980, including any others against whom the complainant makes allegations of sexual abuse, those passages may also be relevant ...

[21] Having regard to the *Criminal Code* provisions, guiding cases and evidence on this application, I accept the first part of Mr. MacDonald's submission but not the latter. That is to say, I am of the view that the manuscript passages referable to the Complainant's "foster brother" (i.e., the accused) are probative and required for the Applicant to make full answer and Defence. As for the more general request, I am mindful of s. 278.3(4)(g) which reads:

(4) Any one or more of the following assertions by the accused are not sufficient on their own to establish that the record is likely relevant to an issue at trial or to the competence of a witness to testify:

...

(g) that the record may reveal allegations of sexual abuse of the complainant by a person other than the accused;

[22] There is nothing in Allan MacDonald's affidavit that provides support for the production of the manuscript referable to "any others against whom the complainant makes allegations of sexual abuse". In the result, I am ordering production to the Applicant of excerpts from "[redacted]" at p. 8 and p. 23 (referenced in the Inventory) as well as a final excerpt at p. 50. I would add that scrutiny of the excerpts

I am ordering produced from pp. 8 and 23 reveal references to the “foster father”; however, on balance I have determined that these references should not be redacted as they are required to provide context and meaning to the produced passages.

[23] With respect to the [redacted] Hospital records, I am ordering production of the only document – a June 10, 2012 progress note (p. 29) authored by a social worker – that refers to the allegations in issue.

[24] The above-referenced excerpts from the manuscript and [redacted] Hospital file are relevant and must be produced as they are necessary for the Applicant to make full answer and defence.

[25] In keeping with s. 278.7(3), copies of this material (rather than the originals) shall be produced to the Applicant, Crown and Complainant. As well, counsel for [redacted] Hospital shall be provided with a copy of their Court ordered production. The Applicant and his counsel shall not disclose the contents of the Court ordered passages to any other person, except with Court approval. Further, unless the Court approves, no copies of the produced pages shall be made.

[26] On balance, I conclude that the effect on the accused's right to make full answer and defence, and the potential probative value of the records, weigh strongly in favour of disclosure of the aforementioned passages. I have edited the manuscript pages and the [redacted] Hospital page and they shall be disclosed in an edited form and with conditions as outlined above.

Chipman, J.