

SUPREME COURT OF NOVA SCOTIA

Citation: *KMC v. R*, 2021 NSSC 375

Date: 20211005

Docket: Syd. No. 500291

Registry: Sydney

Between:

KMC

Applicant

v.

Her Majesty the Queen

Publication Ban: S. 486.4; 486.5; 539.1; 278.9

Second Stage - Production

LIBRARY HEADING

Judge: The Honourable Justice Patrick J. Murray

Heard: October 4, 2021 in Sydney, Nova Scotia

Oral Decision: October 5, 2021

Subject: Criminal Law, Application by accused for production of Record-s. 278.3 and s.278.7 of Criminal Code.

Facts: [1] The Applicant argued that a diary of the Complainant related to the time period of the relationship, and the potential for this information to be useful in making full answer and defence was significant. The Applicant pointed to several of the factors in s. 278.5(2)(a) to (h), referring specifically to (a) full answer and defence, (b) the probative value of the record, (c) the nature and extent of the reasonable expectation of privacy of the record, (h) the effect of the determination on the integrity of the trial process.

[2] Counsel for the Complainant argued the nature of the charge was significant to this production application. The prosecution of these offences can be challenging for all participants. While the right to make full answer and defence is a prominent consideration, so is the Complainant's expectation of privacy.

Issue:

[3] Should the Application be granted?

Result:

Court was satisfied that the journal/diary met the definition of "record", in s. 278.1. Court weighed all factors and concluded that a portion of the record not previously disclosed should be produced to the Accused.

[4]

[5] This is a decision on production, and not a ruling with respect to admissibility.

[6]

Caselaw:

[7] *R v. Mills*, [1999] 3 S.C.R. 668, and *R v. MacNeil*, 2009 S.C.C. 3; and *R v. Batte*, [2000] O.J. No. 2184, (Ont. C.A.).

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Counsel: Marc Njoh for the Crown
Darlene MacRury for the Applicant, KMC
Damian Penny for the Complainant

Section 486.4 - Order restricting publication — sexual offences

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or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

(i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 210, 211, 212, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 346 or 347,

(ii) an offence under section 144 (rape), 145 (attempt to commit rape), 149 (indecent assault on female), 156 (indecent assault on male) or 245 (common assault) or subsection 246(1) (assault with intent) of the Criminal Code, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 4, 1983, or

(iii) an offence under subsection 146(1) (sexual intercourse with a female under 14) or (2) (sexual intercourse with a female between 14 and 16) or section 151 (seduction of a female between 16 and 18), 153 (sexual intercourse with step-daughter), 155 (buggery or bestiality), 157 (gross indecency), 166 (parent or guardian procuring defilement) or 167 (householder permitting defilement) of the Criminal Code, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 1, 1988; or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in any of subparagraphs (a)(i) to (iii).

Mandatory order on application

(2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall

(a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the complainant of the right to make an application for the order; and

(b) on application made by the complainant, the prosecutor or any such witness, make the order.

Child pornography

(3) In proceedings in respect of an offence under section 163.1, a judge or justice shall make an order directing that any information that could identify a witness who is under the age of eighteen years, or any person who is the subject of a representation, written material or a recording that constitutes child pornography within the meaning of that section, shall not be published in any document or broadcast or transmitted in any way.

Limitation

(4) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice when it is not the purpose of the disclosure to make the information known in the community.

Section 486.5 - Order restricting publication — victims and witnesses

486.5 (1) Unless an order is made under section 486.4, on application of the prosecutor in respect of a victim or a witness, or on application of a victim or a witness, a judge or justice may make an order directing that any information that could identify the victim or witness shall not be published in any document or broadcast or transmitted in any way if the judge or justice is of the opinion that the order is in the interest of the proper administration of justice.

Justice system participants

(2) On application of the prosecutor in respect of a justice system participant who is involved in proceedings in respect of an offence referred to in subsection (2.1), or on application of such a justice system participant, a judge or justice may make an order directing that any information that could identify the justice system participant shall not

be published in any document or broadcast or transmitted in any way if the judge or justice is of the opinion that the order is in the interest of the proper administration of justice

Section 539.1 - Order restricting publication of evidence taken at preliminary inquiry

539 (1) Prior to the commencement of the taking of evidence at a preliminary inquiry, the justice holding the inquiry

(a) may, if application therefor is made by the prosecutor, and

(b) shall, if application therefor is made by any of the accused,

make an order directing that the evidence taken at the inquiry shall not be published in any document or broadcast or transmitted in any way before such time as, in respect of each of the accused,

(c) he or she is discharged, or

(d) if he or she is ordered to stand trial, the trial is ended.

Section 278.9 Publication prohibited

278.9 (1) No person shall publish in any document, or broadcast or transmit in any way, any of the following:

(a) the contents of an application made under section 278.3;

(b) any evidence taken, information given or submissions made at a hearing under subsection 278.4(1) or 278.6(2); or

(c) the determination of the judge pursuant to subsection 278.5(1) or 278.7(1) and the reasons provided pursuant to section 278.8, unless the judge, after taking into account the interests of justice and the right to privacy of the person to whom the record relates, orders that the determination may be published.

By the Court: (2nd stage)

Introduction

[8] This is my decision on the second stage of the Application of KMC, pursuant to s. 278.3. I earlier decided that the Court would review the record and determine, pursuant to s. 278.7, whether the record, or any part of it, should be produced to the Applicant.

[9] I confirm that Crown counsel provided the record to me which consists of the Complainant's personal journal/diary. In her statement to the police, the Complainant indicated she kept this journal and made entries in it during the "whole time" of her relationship with KMC.

[10] The considerations for me under stage 2 are essentially those under stage 1, in so far as the test of "likely relevant to the issue at trial" and "necessary in the interests of justice". I have considered the criteria in s. 278.7(2) in relation to production of the record, or part thereof, which requires me to consider the salutary and deleterious effects of the determination on the Accused's right to make full answer and defence and in the right of privacy, personal security and equality of the Complainant, and any other person to whom the record relates. In doing so, I must take into account the list of factors specified in s. 278.5(2)(a) to (h).

[11] In my earlier decision on stage 1, I referred to a letter provided to the Court by the Crown dated April 8, 2021 indicating as follows:

The Crown met with [...] in the presence of a victim services worker and reviewed the journal. Photocopies of the relevant portions are..., a total of five (5) pages were made during this meeting and have been disclosed to the defence counsel on April 8, 2021 to complete the request for disclosure of this document.

[12] In its brief, the Defence submits that the allegations against KMC are based largely upon the entries contained in the diary/journal. Further, KMC submits that access to the Complainant's diary entries are needed to properly make full answer and defence. In addition, the Defence submits there is a reasonable possibility that additional details exist that were not disclosed.

Position of the Defence

[13] The Applicant, KMC, admits the diary only relates to the period of the relationship, and therefore, the potential that this information will be useful in making full answer and defence is significant.

[14] The Defence points to several of the factors in s. 278.5(2)(a) to (h), referring specifically to (a) full answer and defence, (b) the probative value of the record, (c) the nature and extent of

the reasonable expectation of privacy of the record, (h) the effect of the determination on the integrity of the trial process.

[15] In addition, in terms of probative value, the mindset of [...] is very important, says the Applicant, in making full answer and defence. It is very important, he submits, to have for review, the total journal, recording daily by [...]. There are different perspectives, something the Court or Crown may think irrelevant may trigger an important piece of information for him.

[16] Certain disclosure has already been made argues the Applicant. This attenuates to some extent the expectation of privacy, which is not elevated in terms of the production KMC should receive. The Defence relied upon the seminal cases of *R v. Mills*, [1999] 3 S.C.R. 668, and *R v. MacNeil*, 2009 S.C.C. 3.

[17] This record goes to the heart of the charges and therefore, the integrity of the trial process will be impacted without the production sought.

Position of the Complainant, [...]

[18] Counsel for the Complainant, [...], submits, the nature of the charge is significant to this production application. The prosecution of such offences can be challenging for all participants. While the right to make full answer and defence is a prominent consideration, so is the Complainant's expectation of privacy.

[19] This record presents the Complainant's inner most private thoughts, recorded for her own personal reasons. The eight factors set out in s. 278.5(3) exist to allow the Court to weight and consider the salutary and deleterious effects on the determination of these central factors. It is not only the Complainant's right to privacy, but also the "personal security and equality of the Complainant or witness".

[20] The Defence is correct to point out that full answer and defence is listed but there are other factors, such as: (f) society's interest in reporting sexual offences, (d) whether production is based on a discriminatory belief in areas, and (g) society's interest in encouraging the obtaining of treatment by complainants of sexual offences.

[21] In addition, while there has been some disclosure already made, there is a large difference between the Complainant informing those assisting her compared to the disclosure of her more private thoughts to the Accused.

[22] These factors support the Complainant's position that it is not in the interests of justice to have any further disclosure to the Accused. It is hard to imagine, says Complainant's counsel, any other writing being more private than a diary.

[23] The Complainant therefore submits, apart from the five pages released in Exhibit 1, the remaining materials should not be produced.

Position of the Crown

[24] Mr. Njoh provided clarification as to the extent of the disclosure already made to others which, he says, was limited. The Crown essentially reviewed those portions of the Complainant's journal with [...] that were mentioned in her statement, with a view to making the voluntary disclosure that exists in Exhibit 1.

[25] The Crown further indicated, its understanding that the journal was not recorded daily, and included notations both prior to and after the direction of the relationship. The scope goes beyond the relationship, says the Crown, and there is a higher privacy interest in such information.

[26] In addition, the Crown submits, simply because the journal may describe the relationship does not mean the Defendant is automatically entitled to production.

[27] The Crown has referred to the case of *R v. Batte*, [2000] O.J. No. 2184, (Ont. C.A.), that something more than the relationship itself that has value should be shown and it has not. Otherwise, the Complainant has disclosed what she and the Crown believes is relevant, and already in the possession of the Defence. It is up to the Defence, the Crown submits, to point to specific information as to how the production sought affects credibility or that there is a reasonable possibility that the diary contains details that will otherwise be discoverable to the Defence.

Production of “record” – Criminal Code

[28] I am satisfied that the journal/diary meets the definition of “record”, in s. 278.1 of the *Criminal Code*. Turning to the factors contained in s. 278.5(2) (a) to (h).

(a) The Accused's Right to Make Full Answer and Defence

[29] While there is no ranking of the factors in this section, this factor is of critical importance together with the right to privacy and personal security. It appears that during the interview with police (on June 10, 2020), the Complainant read specific portions directly from her journal in answer to police questions. Following the interview KMC was charged with the six offences contained in an information sworn June 17, 2020. These same charges are contained in the indictment dated September 14, 2020.

[30] The Defence has emphasized this factor, referring to the indictment, for example, the extended time frame in Count 2, and that there has been no disclosure of the date in Count 3.

(b) Probative Value

[31] I have weighed and considered this factor and have found there are parts of the record that are likely relevant to the charges and the issues at trial. Overall, beyond what was voluntarily disclosed, I have found the amount of additional information with probative value to be minimal.

(c) The Nature and Extent of the Reasonable Expectation of Privacy

[32] It is also significant that the Crown and the Complainant have recognized that certain entries (5 pages), are relevant and should be disclosed. In this case, privacy concerns remain a consideration given the highly personal nature of a diary. I have closely scrutinized the record to ensure that only relevant information is made available.

[33] Mr. Penny, counsel for the Complainant, has referred to this and several other factors (ie, (f) and (g) below) that underscore the importance of these new provisions under the current regime in relation to sexual offences.

(d) Discriminatory Belief or Bias

[34] I do not find that production of the record is based on a discriminatory belief or bias. This, of course, is subject to the Court being cognizant that past myths and stereotypical reasoning has no place in relation to these type of offences under the current law.

(e) Potential Prejudice to the Personal Dignity and Right to Privacy of any Person to whom the Record Relates

[35] I have already addressed this to some extent. There is little question that a personal diary is private in nature.

(f) Society's Interest in Reporting of Sexual Offences

[36] The Court has been careful to ensure any prejudice is minimized to both the Complainant and the Accused. The *Criminal Code* refers to any person to whom the record relates in applying these provisions.

[37] This factor has informed the Court's scrutiny of the record and has been taken into account by it attempting to achieve a balance between this and other factors, such as the Accused's right to make full answer and defence.

[38] Mr. Penny, for the Complainant, has referred to this particular factor as one worthy of consideration by the Court. The Court agrees that in these circumstances the potential impact of this factor is high. As the Court noted, there is the ability to place conditions on any production as outlined in s. 278.7(3)(a to f).

(g) Society's Interest in Encouraging Treatment.

[39] The considerations here are similar to those in (f) above and have been highlighted by the Complainant. A proper exercise of discretion by the Court ensures that treatment will be encouraged for complainants of sexual offences. I have attempted to employ that here.

(h) The Integrity of the Trial Process

[40] In this decision, the Court has had high regard for all participants in the trial process to ensure the Accused has the benefit of evidence that is likely relevant to the charges against him including material issues at trial, such as reliability and credibility, which are central to the Crown's case and to KMC's defence to these charges.

[41] To her credit, the Complainant has recognized herself that there are some entries which should be disclosed as being relevant and necessary in the interest of justice. My decision reflects the Courts ability to enhance the truth seeking function.

Decision

[42] The context of this decision is that unlike counsel, the Court has had the benefit of viewing the record itself. The Court exercised the option to it pursuant to section 278.6(2) to hold a hearing, in camera, so as to receive submissions before making my determination.

[43] Weighing all of these factors, I have concluded that a portion of the record not previously disclosed should be produced to the Accused. This essentially amounts to one (1) entry for the date of October 14, 2019. The information was referred to by the Complainant in her statement, but not included in the five (5) pages disclosed by consent.

[44] In addition, there are two (2) entries where several lines are missing either at the beginning or the end of a page. These are with respect to the entries of November 9, 2019 and February 7, 2020. They are more for proper context than substantive.

[45] With regard to the May 13, 2019 page already disclosed, I have decided to "finish" the sentence at the bottom which goes onto the next page as well as an additional line which essentially completes that paragraph, for context.

[46] Overall, what has been ordered produced is minimal and is the result of my effort to ensure a fair trial process for the Defendant while respecting the privacy rights of both him and the Complainant.

[47] With respect to conditions, I would propose the following to Counsel, and would appreciate their guidance. Please note, this is a decision on production, and not a ruling with respect to admissibility.

[48] Pursuant to s. 278.7(3)(a), the Court hereby imposes the following conditions on the production to protect the interest of justice and the privacy, personal security and equality interests of the Complainant and any other person to whom the person relates:

- b) that a copy of the record, rather than the original, be produced;
- c) that the accused and counsel for the accused not disclose the contents of the record to any other person, except with the approval of the court;
- e) that no copies of the record be made or that restrictions be imposed on the number of copies of the record that may be made; (subject to paragraph 42 below) and;

f) that information regarding any person named in the record, such as their address, telephone number and place of employment, be served from the record.

[49] Copies have been provided to Counsel by email. One copy to be given to each Counsel for their viewing and one to be given to the Complainant and the Accused. No further viewing will be permitted by anyone unless approved by the Court. When not in use the copies shall be kept in an envelope marked "sealed by the direction of the Court", and not to be disclosed to any other person. I do not find it necessary to have to have the record reviewed at offices of the Courthouse.

Murray, J.