CR 02677

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

JOBIE SANERTANUT

Application for disclosure of records in custody of Department of Social Services

---

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE J.Z. VERTES

Heard at Yellowknife, N.W.T.
on January 27, 1995

Judgment filed: February 3, 1995

Counsel for the Accused: **V. Foldats**

Counsel for the Crown: **L. Rose**

Counsel for the Complainant: **R. C. Rehn**

Counsel for the Department of Social Services: **J. Mercredi**

CR 02677

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

JOBIE SANERTANUT

REASONS FOR JUDGMENT

1 This is an application on behalf of the accused for an order directing pretrial disclosure of certain records in the custody of the Department of Social Services relating to the complainant in this case.

2 The accused is charged with sexual assault on B.A. allegedly occurring between November, 1993, and March, 1994, in Rankin Inlet. The complainant is 16 years old. She has been a ward of the Department of Social Services since early childhood. She has been in and out of numerous foster homes, group homes, and counselling centres. It is undisputed that she suffers from serious mental and physical handicaps. The Department has a thick stack of documents in its control detailing most of the complainant's life history.

3 The Crown alleges a series of assaults, consisting of forcible intercourse, while the complainant was a foster child in the home of the accused's parents. The preliminary hearing into this charge was held in August, 1994, and the trial is scheduled to start on February 13, 1995, in Rankin Inlet.

4 This application was brought by notice of motion filed on January 12, 1995. I commend all counsel on the procedures employed in this matter. The notice of motion was served on the custodian of the records, being the Department headquarters, as well as on the Crown and the complainant. Independent counsel was appointed to represent the interests of the complainant. Counsel for the Department and the complainant then worked together to prepare an inventory of the documents in question. The preparation of such a summary has been recommended by numerous authorities when the issues of disclosure and privilege arise in the criminal context: see, for example, R. v Barbosa (1994), 92 CCC (3d) 131 (Ont. Gen. Div.), at pages 136 - 137. Finally, the documents were made readily available to me should I decide to inspect them in private.

5 The application was heard in Yellowknife by me as a "pretrial" judge. It is of course preferable that the judge who hears the trial be the one to make evidentiary rulings. The trial judge is in the best position to assess the relevance of any potential evidence. But, having regard to the vast distances travelled on court circuit, and the necessity to make these types of decisions well ahead of time so that counsel may fully prepare their case before the court

travels to the place of trial, it is unrealistic to say that only the trial judge should make these rulings. Any ruling made by a pretrial judge however is not absolute and is subject to variation by the trial judge in the context of how the case unfolds at trial. As noted in R. v O'Connor (No. 1) (1994), 89 CCC (3d) 109 (B.C.C.A.), at page 132:

> Such rulings are not immutable, and no preliminary ruling on the issue of relevance, made in the context of a contested disclosure hearing, can bind the trial judge who is ultimately called upon to make a discrete ruling on that issue during the trial. That being so, there is no impediment, jurisdictional or otherwise, to a judge other than the trial judge making pretrial disclosure orders when the necessity arises.

6 This application is made on the basis that disclosure is necessary to enable the accused to make full answer and defence. His counsel submits that the Department's records are relevant to the following issues:

(a) the complainant's competence to testify;

(b) a history of false allegations and recantations by the complainant;

(c) a history of prior abuse which may lead the complainant to misperceive the perpetrator of current abuse; and,

(d) corroboration of an alibi.

7 I will deal with each of these issues, and whether they are capable of being issues, later in these reasons. At first I wish to discuss in general the question of disclosure for these types of records.

8 The records in question cover a wide variety of subjects. The inventory provided to me divides the documents into categories: school and education records; departmental progress reports; medical records and psychological assessments; departmental financial records related to care for the complainant; legal documents; care supervision admission reports; child welfare protection reports; and, general correspondence. These documents, in some instances, date back to the year of the complainant's birth. Generally speaking these documents can be regarded as therapeutic records (those that relate to medical and psychiatric assessments and treatment), child history records (placement and education), and bureaucratic records (financial and administrative). The target of this application are those records which I label as therapeutic and historic.

9 In R. v Osolin (1993), 86 CCC (3d) 481 (S.C.C.), the judges of the Supreme Court of Canada were in agreement that medical and psychiatric records are not automatically admissible because of the important societal interest in maintaining patients' expectations of privacy and confidentiality in such records. In G.M.M. v S.M.M., [1992] N.W.T.R. 249, I concluded that the records of a children's aid society respecting suspected child abuse are privileged and should only be disclosed when such records are relevant and necessary for the correct disposal

of the litigation. Therefore, I have no difficulty in concluding that the records of the Department, whether of a therapeutic or historic nature, are subject to an expectation of confidentiality. This is so even in the absence of legislation imposing confidentiality for such records (although, as noted in R. v S.R.J. (1985), 19 C.C.C. (3d) 115 (Ont. C.A.), provincial or territorial legislation prohibiting disclosure cannot affect the admissibility of evidence in criminal matters).

10 In criminal cases the aim on these types of disclosure applications is to strike a balance between the privacy interests of the complainant and the accused's right to make full answer and defence. This was explained by Then J. in R. v Coon (1991), 74 C.C.C. (3d) 146 (Ont. Gen. Div.), where he set out two important propositions (at page 152):

> First, in ordering production a balance must be struck between the right of the accused to full answer and defence and the right of the complainant (the disclosure of whose records are at issue) to privacy and confidentiality. …Secondly, the right of the accused to full answer and defence will prevail if a sufficient foundation is laid to enable the judge to determine that disclosure is necessary in the interest of justice.

11 In examining these propositions one may easily conclude that the balancing act is an exercise of competing interests: the right to a fair trial v the right to privacy. I prefer to think of these as complementary interests in the pursuit of the primary objective of our trial system,

that being the ascertainment of the truth. The test that serves as the fulcrum for this balancing act is that of "relevance".

12 The procedure for deciding whether disclosure should be ordered has become well known in this jurisdiction. It is the same as that described in in R. v O'Connor (No. 2) (1994), 90 C.C.C. (3d) 257 (B.C.C.A.). There is a burden on the person seeking disclosure to show that the information in the records is "likely to be relevant" to an issue in the case or to the competence of the witness to testify. If this burden is met then the documents are reviewed in private by the court to determine which of them are material to the defence. Any documents that are material are then disclosed to the parties subject to such conditions as the court deems fit.

13 When I use the term "relevant" I do not mean that the document, even though relevant to an issue, is admissible or even helpful to the defence. I mean simply that the information is useful in analyzing an issue or, to put it another way, it is logically probative of the matter in issue. As stated by Hill J. in the Barbosa case (at page 140), the notion of relevance "is not strictly limited to that information which would be strictly admissible in a criminal proceeding. Frequently, information which is apparently, or as a general-rule, inadmissible, may either assist the defence with pre-trial inquiries in terms of locating witnesses or preparing witnesses or may become admissible depending upon the advancement of a particular defence or

defences." I would only add that information may also be relevant to disprove a defence theory and thereby aid in the proof of guilt.

14 As a general proposition, Canadian jurisprudence does not permit the exploration of the psychiatric or medical history of a complainant simply on the basis of some hope on the part of the defence that such information may be relevant or useful to impugn the complainant's testimony. And the mere fact that a complainant, or any witness, has a psychiatric history is not of itself relevant. In O'Connor (No. 2), the British Columbia Court of Appeal also itemized those arguments that do not support disclosure of such records (at pages 265-267):

> The submission that medical records should be produced because they may be relevant to the credibility of a complainant is patently inadequate to justify their production, in the absence of evidence indicating that there is likely to be something in those records relevant to the credibility of the complainant with respect to a particular issue in the case. Invoking credibility "at large" is not sufficient to justify such an interference with the privacy interests of a complainant.
>
> Similarly, a simple submission that the documents should be produced because they may relate to "recent complaint" is an inadequate foundation for an order of disclosure. The absence of a recent complaint does not assist in determining whether there has been an assault…
>
> Further, production of medical records is not to be compelled simply because the defence hopes that they might disclose a prior inconsistent statement of a complainant. Without more, such a submission amounts to no more than a request to go fishing in these very private documents in the hope that something useful

> might be discovered, but without any basis being posited for believing that such evidence might be found…
>
> Nor, in our view, is it sufficient simply to say that because a witness received counselling or psychiatric assistance as a consequence of an alleged sexual assault that the records, must, therefore, be relevant. Although documents relating to the therapeutic treatment of a complainant as a result of an alleged sexual assault may, in some cases, be relevant to an issue in dispute, the onus is on the person applying for the production of such records to show that those documents are likely to be relevant. If the submission amounts to no more than a bare statement that the documents might impact on credibility or corroboration, or might reveal a prior inconsistent statement, then that onus will not have been met.
>
> Further, we would reject any suggestion that psychiatric and counselling records are relevant on the supposition that the very fact that witnesses obtained therapy, whether related to an allegation of sexual assault or otherwise, justifies the conclusion that their evidence may be unreliable.

15 In the previously noted Osolin case, L'Heureux-Dubé J. discussed at length the narrow circumstances in which disclosure of therapeutic records is justified. Her judgment was a dissenting one but, for various reasons, the majority did not address this specific point. In my opinion she set out the applicable standard at page 504:

> I would conclude, then, that the compulsion to disclose such records may only occur where there is serious reason to believe that, absent such disclosure, a miscarriage of justice is likely. Given the premium placed on the confidentiality of medical records in our society, and the high degree of prejudice to the witness caused by delving into psychiatric records, in my view, such records should only be disclosed when there is cogent evidence to suggest that: the competence of the witness to testify

> is in serious doubt or the witness's testimony with respect to the particular issue to be decided is unreliable because of the witness's medical condition, and furthermore, that without such disclosure, there would be serious prejudice to the accused's right to make full answer and defence. Mere suggestion, speculation or possibility raised on the part of the defence, as is the case here, that such records may be relevant cannot be sufficient.

16 While L'Heureux-Dubé J. did not enumerate the factors relevant in the balancing of the fair trial right and the privacy right, other cases, most notably the Coon and Barbosa cases already noted, have identified several of the recurring considerations: (1) the nature and seriousness of the offence; (2) the importance of the witness to establishing the guilt of the accused; (3) a reasonably close temporal connection between the records and the date of the offence; (4) evidence providing an articulable cause for ordering disclosure; (5) whether the evidence is reasonably necessary to prevent a miscarriage of justice; (6) whether the information is otherwise available; (7) the avoidance of any prejudice occasioned by the disclosure of information; (8) the prohibition against biased beliefs and stereotypes; and, (9) the preservation of legitimate expectations of confidentiality.

17 Recognizing therefore that there must be an evidential base to this application, I will now discuss those issues that the defence says are raised in this case so as to warrant disclosure.

1. The complainant's competence to testify:

18 Defence counsel submits that there is evidence so as to question the complainant's competence to testify.

19 The accused's mother, who was from June of 1993 to March of 1994 the complainant's foster mother, has deposed in an affidavit that, based on her observations, the complainant is "mentally slow", she has problems with memory, she is often confused in her perception of other people's actions, and she displayed inappropriate sexual behaviour. A review of the preliminary hearing transcript reveals that, under questioning, the complainant said, at one point, that she did not know why she was in court. She also said that she likes to tell "stories" and "fool" her friends sometimes and that she gets "confused" sometimes. She, however, also said that she knows it is wrong to tell a lie and, of course, her evidence was sufficient so as to warrant the accused's committal for trial.

20 On the issue of competence, I start from the basic principle that the court will hear the testimony of any person with relevant information if the person is duly called at the trial. The Canada Evidence Act, in section 16, sets out the standard applicable to children under 14 years of age and to adults whose competence is challenged. The judge must decide if the person understands the nature of an oath or a solemn affirmation and, even if the person does not, whether the person is at least "able to communicate the evidence".

21 The ability to communicate the evidence, in the context of the adversarial trial process, encompasses three mental capacities: the ability to perceive, to remember, and to communicate, that is to say, to relate what one has perceived and remembered. This was explained by McLachlin J. in R. v Marquard (1994), 85 C.C.C. (3d) 193 (S.C.C.), at page 219:

> Testimonial competence comprehends: (1) the capacity to observe (including interpretation); (2) the capacity to recollect, and (3) the capacity to communicate: *McCormick on Evidence*, 4th ed. (1992), vol. 1, pp. 242-8; *Wigmore on Evidence* (Chadbourn rev. 1979), vol. 2, pp. 636-8. The judge must satisfy himself or herself that the witness possesses these capacities. Is the witness capable of observing what was happening? Can he or she communicate what he or she remembers? The goal is not to ensure that the evidence is credible, but only to assure that it meets the minimum threshold of being receivable. The inquiry is into *capacity* to perceive, recollect and communicate, not whether the witness *actually* perceived, recollects and can communicate about the events in question. Generally speaking, the bast gauge of capacity is the witness's performance at the time of trial. The procedure at common law has generally been to allow a witness who demonstrates capacity to testify at trial to testify. Defects in ability to perceive or recollect the particular events at issue are left to be explored in the course of giving the evidence, notably by cross-examination.

22 The capacity to perceive necessarily includes the ability to distinguish fact from fantasy: R. v Caron (1994), 19 O.R. (3d) 323 (C.A.).

23 The capacity of a person over 14 years of age to testify is presumed. If, however, the person's capacity is challenged then the person may be cross-examined and witnesses called to prove any circumstances which might show incompetence. But, in the absence of proof, the witness is *prima facie* competent: R. v Hawke (1975), 22 C.C.C. (2d) 19 (Ont. C.A.).

24 The issue of competence was also addressed by L'Heureux-Dubé J. in the Osolin case (at page 494):

> The basic rule as to challenges to the competency of witnesses is as follows. All witnesses, with the exception of children under a specified age, are presumed competent to testify unless and until found otherwise due to some condition which renders it unsafe for the trier of fact to rely on the testimony. A finding that the witness suffers from a particular mental or psychiatric condition does not necessarily or in itself disqualify a witness; in order to disqualify a witness, the witness's particular condition must be such as to substantially negative the trustworthiness of the evidence on the specific subject.

25 In this case defence counsel submits that the issue of the complainant's competence takes on added significance because, as Crown counsel acknowledged, she will be the sole witness for the prosecution at trial. The reliability of her evidence, even if she is judged competent to testify, is still something that should be investigated. And, considering what is already known about the complainant's condition, it is argued that any records relative to that condition are relevant as to the trustworthiness of her evidence as to the specific accusations against this accused.

26 In my opinion the defence has established that this type of information is likely to be relevant. It may be relevant not just on the issue of competence but on the issue of the complainant's credibility as to these specific accusations. That is not to say that her psychiatric

or medical condition is sufficient to attack the complainant's credibility "at large". Any attack must show a nexus as between the condition and her credibility specifically in relation to this charge. As noted by the Nova Scotia Court of Appeal in R. v Nickerson (1993), 81 C.C.C. (3d) 398 (at page 405):

> A psychiatric condition of a witness, just as any other medical condition, is admissible to show that the witness suffers from such disease or abnormality as might affect the reliability of his or her evidence. To deny such an attack upon the capacity of the witness could lead to an injustice. Clearly, it would be unthinkable that medical evidence to show that a witness's eyesight or hearing was too impaired to enable such witness to see or hear that about which testimony was or was to (be) given should be refused. So too a disorder of the mind which makes a witness's testimony unreliable is a fair subject for exploration.

27 As I said above, there should be a nexus between the complainant's condition and her evidence relating to the specific assault in this case. For that reason, I do not think it is necessary to disclose the entire record for her life. Young people go through significant developmental changes from year to year, at least well into their teens, so I am satisfied that any disclosure should be limited to a narrow time frame surrounding the dates alleged in the indictment.

2. A history of false allegations and recantations:

28 The evidence in support of this issue comes from the affidavit of Darrell Blais, a solicitor, who is expected to act as trial counsel for the accused. Mr. Blais deposes that in 1994 he acted for one William Pissuk in the defence of a charge of sexual assault on the same complainant. Mr. Blais states: "That in the Pissuk case, the complainant's allegations changed over the course of time from sexual intercourse to only digital penetration and finally at the preliminary inquiry (held on August 10, 1994) the complainant admitted that nothing had happened to her, resulting in Mr. Pissuk's discharge at the preliminary inquiry." I was told that there was no investigation made by the Crown as to the reasons for the recantation.

29 It is important here to distinguish between the request for disclosure on the basis of this evidence and the question of whether this evidence is admissible at trial either at the initiative of the defence or by cross-examination of the complainant. In both situations, however, the concern is still relevance.

30 Generally speaking, the mere fact that another charge was dismissed is insufficient to lay a foundation of relevance. There are numerous reasons why a charge is dismissed. Similarly there may be numerous reasons why a witness recants. The only basis on which this evidence could be relevant is if it can be proven that a complainant recants her earlier accusations or that they are demonstrably false: R. v Riley (1993), 11 O.R. (3d) 151 (C.A.).

31 While it is not in my mandate to determine admissibility issues for the trial, it seems to me that the defence may have a good argument that the evidence of the recantation is admissible and the complainant can be cross-examined on it. That is an issue for the trial judge to decide. I simply note the obiter comments of Fish J.A. in R. v Gervais (1990), 58 C.C.C. (3d) 141 (Que. C.A.), at page 154, where he said that there may be circumstances in which cross-examination on previous accusations may be relevant and essential to the defence: "…for example, a false allegation of sexual assault previously made by the complainant would surely be relevant in relation to a similar though later complaint."

32 I make these comments only because there apparently is, in this case, evidence of the complainant's recantation on the record of the Pissuk proceedings. But there is nothing before me that suggests that the complainant has a propensity to make false accusations of sexual assault. She recanted her accusations with respect to Pissuk specifically. She did not recant her accusations against the accused. There is also nothing to suggest a connection between her accusations against Pissuk and those against the accused. So, while this evidence may be admissible at trial, it does not justify blanket disclosure.

33 What the defence is really asking for is the right to conduct an examination of these records to see if there is evidence of other false accusations or anything that suggests a propensity to fabricate. It sounds like a "fishing" expedition to me and without more does not justify disclosure: R. v Schelling (N.W.T.S.C. No. 02680; October 4, 1994).

34 Furthermore, the request for disclosure, depending as it does on the recantation in the Pissuk case specifically, could import biased notions that women who have made an earlier false accusation are more likely to fabricate. This is the type of stereotypical thinking that the Supreme Court of Canada cautioned against in R. v Seaboyer (1991), 66 C.C.C. (3d) 321. And, as noted in O'Connor (No. 2), similar policy considerations to those discussed in Seaboyer are raised on applications for disclosure of a complainant's therapeutic records. Any evidence disclosed by these requests could only be used as a general attack on the complaint's character and, absent specific circumstances, such is not relevant.

35 The question of fabrication may dove-tail with the issue of competence. But, with respect to the request for disclosure based on the prior recantation, I have concluded that the evidence on that issue is already in the possession of the defence and, since it is available independently of this application, I decline to order disclosure on this specific point.

3. A history of abuse causing the complainant to misperceive the true perpetrator:

36 This issue is unsupported by any evidence other than the general knowledge of the accused's mother that the complainant was a childhood victim of abuse. There is no evidence to suggest that there is any basis for a theory of "transference". This too is a "fishing" expedition and therefore cannot justify a disclosure order.

37 I recognize, however, that this issue may dove-tail as well with the competence issue. But I decline to order disclosure simply on this basis. To base a disclosure application on some theory of "transference" by the complainant, I would expect some evidence showing that there is an air of reality to the theory being applicable to the specific complainant (and not complainants generally).

4. Corroboration of an alibi:

38 If there is reason to think that disclosure would facilitate proof of an alibi, I think the interests of justice would mandate disclosure. In this case this is no longer an issue.

39 Defence counsel informed me at the hearing of this application that the defence evidence is anticipated to be that for part of the time when the complainant says she was assaulted she may have been residing in a group home in another community. Crown counsel, commendably in my view, immediately undertook to conduct further inquiries to ascertain where the complainant was residing on the relevant dates. It seems to me that there can be no confidentiality to such basic information and I have confidence that the Crown will be able to obtain the necessary information and communicate that to the defence.

Conclusion:

40 After hearing from all counsel, I undertook a cursory examination of the documents in question. I say "cursory" only because I was greatly assisted by the inventory of documents

prepared by counsel. I have attached, as Appendix "A", a list of those documents which I order disclosed. Counsel for the Department is hereby directed to forward copies of those documents to all other counsel forthwith. There is some urgency since the trial date is fast approaching.

41 These documents relate to the issue of the complainant's competence to testify. They are limited temporally with reference to the offence dates. Most of them are assessment and observation reports which do not contain detailed therapy notations.

42 These documents are not to be released by defence counsel to anyone not connected with the preparation and presentation of the defence case. In addition, as a further condition of this disclosure, I direct that no use may be made of these documents in any proceeding not directly related to these specific proceedings against this accused.

John Z. Vertes
J.S.C.

Dated this 3rd day
of February, 1995

Counsel for the Accused: V. Foldats

Counsel for the Crown: L. Rose

Counsel for the Complainant: R. C. Rehn

Counsel for the Department
of Social Services: J. Mercredi

R. v SANERTANUT

APPENDIX "A"

Documents to be disclosed:

1. From the "School Records" file:

   (a) "Individual Education Program" dated September 26, 1994;

   (b) All reports from September, 1993, to June, 1994.

2. From the "Progress Reports" file:

   (a) All "Child Progress Reports" from September, 1993, to December, 1994;

3. From the "Intake Reports" file:

   (a) Intake Reports of January 7, 1994, and March 27, 1994.

4. From the "General Correspondence" file:

   (a) Workers' case notes from August, 1993, to present.

CR 02677

IN THE SUPREME COURT OF THE
NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

JOBIE SANERTANUT

REASONS FOR JUDGMENT OF THE
HONOURABLE MR. JUSTICE J.Z. VERTES