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CR 02671

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

Respondent

- and -

DANIEL ALBERT HUDKINS

Applicant

Application for disclosure of third party therapeutic records. Dismissed.

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

Heard at Yellowknife, Northwest Territories
on August 22, 1995

Reasons filed: August 23, 1995

Counsel for the Crown: Les Rose

Counsel for the Accused: Scott Duke

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REASONS FOR JUDGMENT

1 The accused stands charged with the commission of a series of sexual assaults between 1981 and 1987. These assaults were allegedly committed against the same person, the complainant L.C.H., who was between 7 and 14 years of age at the time. The trial into these charges is scheduled to start before a judge and jury on circuit in Hay River in a few days.

2 The accused brings this application seeking disclosure of records in the possession of a psychologist, Dr. Roxanne Valade, who was consulted by L.C.H. from February, 1993, until June, 1994. The grounds for this application are set forth in the notice of motion as follows:

> (1) During the course of the preliminary inquiry in respect of the charges against the Applicant, L.C.H. stated on cross-examination that she discussed the alleged offences with a psychologist named "Roxanne" in Yellowknife, in the Northwest Territories, sometime between February 1993 and June 1994;
>
> (2) Counsel for the Applicant has retained the services of Dr. J. Don Read, a psychologist, in anticipation of calling evidence on a defence of "false memory syndrome". In order to determine whether such a defence is available to the Applicant, Dr. Read requires further materials provided by L.C.H.'s psychologist which have not yet been made available through disclosure; and

(3) Counsel for the Applicant believes that such materials and records are necessary in order that the Applicant may make full answer and defence to the charges against him.

3 These records have never been in the possession of the Crown so it is not a question of the adequacy of Crown disclosure. These records are in the possession of a third party, a "non-party" to these criminal proceedings, so the guiding principles, as accepted by this court in numerous cases, are those set out in R. v. O'Connor (No. 2) (1994), 90 C.C.C. (3d) 257 (B.C.C.A.).

4 Defence counsel served both the complainant and Dr. Valade with notice of this application. Neither of them appeared in person or by counsel. Crown and defence counsel, however, acknowledge that given the essentially therapeutic nature of the relationship between the complainant and Dr. Valade, I can assume that there is a strong interest on the part of L.C.H. in protecting her privacy by preventing disclosure of these records. I can assume as well that Dr. Valade has a professional interest, specifically in the interest of her former patient, in maintaining the confidentiality of these records. I have previously discussed recognition of a privilege attaching to these types of records: R. v. Sanertanut, [1995] N.W.T.R. 36.

5 The threshold test that must be met on this application is to show that the records are "likely to be relevant" to an issue in the case. And, as I said before in the Sanertanut case, I do not mean that the records are either admissible or helpful to the defence. I use the term "relevant" simply in the sense that it may be helpful to prove a fact in issue, either directly as evidence or indirectly in pointing the way to other evidence.

6 The evidence in this case is that the complainant did not disclose these alleged assaults to anyone for several years. She testified at the preliminary hearing that the first person she told was her boyfriend. That was in 1991. She then told her sister in 1992. After that she made a disclosure to her parents in late 1992. Her first disclosure to the police was made in February of 1993. It was around the same time that she started seeing Dr. Valade. She acknowledged that she was seeing Dr. Valade about the alleged assaults. She also spoke about this to some friends.

Jurisdiction:

7 Prior to hearing argument on the application, I raised with both counsel the question of my jurisdiction to compel a third party, one who is not before the court, to produce documents. The parties to this litigation are, after all, only the Crown and the accused. This is a point that has not been frequently addressed in these disclosure applications. In O'Connor, the court set out guidelines suggesting that the person who is the subject of the records and the record-keeper be given standing to argue any claims of privilege or privacy. But that is an indulgence by the court. They are not given status by operation of the Criminal Code.

8 This point was recently raised by McDonald J. of the Court of Queen's Bench of Alberta in R. v. Fournier (August 9, 1995; No. 9403-2050C6). In that case the defence sought disclosure of records from three government agencies (not the police or the

Crown). The agencies opposed disclosure on the basis of confidentiality of their records.

In concluding that the court had no jurisdiction to order disclosure, McDonald J. said:

> I approach this question as a matter of principle. I do not see how considerations of ensuring the accused a fair trial can be invoked by the defence in regard to records or written or oral statements which are not in the control or possession of the Crown and are not accessible by the Crown. These three governmental bodies have made it clear that unless compelled to do so by an order of the court they will not produce the records. They will not do so at the request of the defence, or of the Crown. For the moment ignoring the fact that they are governmental bodies, if they were ordinary citizens (or private psychiatrists or psychologists) I do not know of any jurisdiction which this court has, to order them to produce the records as part of the disclosure process, or to order the complainants to authorize their production. I am unaware of any right, whether of the defence or of the prosecution, to obtain an order for discovery of documents in the possession or control of a person who is not a party, or of written or oral statements made to such a person. In civil litigation the right to discovery of documents developed in the Court of Chancery, as did written interrogatories, and those rights, added to by Rules of Court as to oral examinations for discovery, apply only to parties to the litigation (and, in the case of corporate litigants, their officers and employees). There is no general right to discovery of non-parties. Any such right must be given by statute or the rules; an example is Alberta Rule 266, which permits examination of a person for the purpose of using his or her evidence on a motion. In the law of criminal procedure, no such developments are known to our system.
>
> If the court does have the jurisdiction to make an order for disclosure of the sort made in O'Connor, and if a body in possession of the records refused to produce the records or the witness refused to authorize their production, it would be unfair to the Crown to treat the dilemma as one which justifies any remedy impairing the right of the Crown to proceed to trial.

9 In many ways the concerns of McDonald J. were also addressed by the Ontario Court of Appeal in L.L.A. v. A.B. (1995), 37 C.R. (4th) 170. That case dealt with the standing of a complainant and two women's counselling centres to appeal an order requiring disclosure of counselling records in a criminal case. The court held that they had no standing to do so. That court as well expressed reservations about the admixture of civil procedure and criminal procedure. Both the O'Connor and L.L.A. cases are currently pending before the Supreme Court of Canada so these jurisdictional issues may yet be resolved.

Counsel for the accused argued that jurisdiction was provided in sections 48 and 49 of the *Mental Health Act*, R.S.N.W.T. 1988, c. M-10. These records are "health records" under the Act and s.49 sets out a procedure to compel production of such records. The procedure is similar to the O'Connor guidelines and indeed several noteworthy cases, primarily from Ontario, have recommended proceeding under such legislation: R. v. Rankin, [1995] O.J. No. 1381 (C.A.); R. v. Coon (1991), 74 C.C.C. (3d) 146 (Ont. Gen. Div.).

11 In my opinion, and with great deference to the opinions of McDonald J., I believe there is some benefit in adapting civil rules of procedure to certain aspects of criminal procedure. Production of documents by a third party is a good example. The procedure outlined in O'Connor gives both notice and an opportunity to be heard to the complainant and the record-keeper. Concerns about privacy and privilege can be addressed in a convenient and expeditious manner before trial. I certainly have no jurisdictional concerns should all of the interested parties appear and take advantage of the opportunity to be heard. An adverse ruling on the disclosure application can be a ground of appeal by the accused in the event of a conviction (and presumably, if disclosure is ordered, by the Crown in the event of an acquittal on the ground that the evidence disclosed was overtly prejudicial or non-probative).

12 The difficulty arises when, as here, the complainant and the record-keeper choose not to appear. Their views are unknown. Relevant considerations may go unvoiced and unconsidered. And if the court does issue an order what is the result if the record-keeper does not comply? The record-keeper could be held in contempt but, as McDonald J. asks,

is that contempt to be visited upon the Crown so as to stay a prosecution? Is the accused's right to a fair trial to be compromised by the contempt of a third party? These are questions best left to be answered in a case that directly raises them for consideration.

13 Having regard to the decision I have reached in this case, I do not think it necessary or advisable to comment further. Therefore, assuming, without deciding, that I do have jurisdiction, I will go on to consider the substance of this application.

Disclosure:

14 The accused has retained the services of Dr. J. D. Read, a professor of psychology, to provide expert assistance to the defence. Specifically he has been asked to investigate the possibility of raising the defence of "false memory syndrome", that is to say, that the allegations now made by the complainant are not true recollections but illusions arising from subconscious suggestions or influences by others.

15 Dr. Read, who has a most impressive curriculum vitae, swore an affidavit in which he states:

> **5. THAT after a preliminary inquiry held in Hay River on August 3, 1994, the Applicant was committed to stand trial on both charges before a Supreme Court Judge and Jury, which trial is scheduled to commence at Hay River, in the Northwest Territories, on August 28, 1994. During the course of the preliminary inquiry held in relation to these charges the complainant L.C.H. admitted on cross-examination that she spoke to a psychologist in Yellowknife named "Roxanne" about the allegations involving the Applicant, and that she first saw this psychologist about the same time she originally spoke to the R.C.M.P. about the allegations.**
>
> **6. THAT I have reviewed the witness statements given to the R.C.M.P. by the complainant L.C.H., those of her siblings J.H. and L.H., as well as the transcript from the preliminary inquiry referred to in Paragraph 5 herein.**

> **7. THAT at the present time, and based upon the present statements by L.C.H. and her siblings, I am of the opinion that the qualities of her recollections of acts involving the Applicant and herself are consistent with the possibility of illusory memories arising from confusion with other similar events attested to by her siblings, from motivational sources, and from reconstructive memory processes engaged in by L.C.H. either on her own or with the guidance and support of others.**
>
> **8. THAT in order to provide a complete analysis and opinion which I believe would more accurately characterize the statements in regard to memory reliability, I believe the notes recorded by the complainant's psychologist in Yellowknife would be useful, including more detailed information as to exactly what Ms. H. remembered and when she did so, as well as that psychologist's curriculum vitae.**

16 Defence counsel submitted that, because the charges are dated, the complainant's memory, her ability to recall and the accuracy of her recollections, are important avenues of exploration. The defence is a denial that these incidents occurred at all. So, according to defence counsel, if the defence cannot explore these issues then the case will be reduced to a mere credibility contest.

17 Crown counsel argued that there is no foundation in the evidence to support the issue of "false memory syndrome". He submitted that when defence counsel said that the defence needs to "explore" this issue, what they really want to do is go on a "fishing expedition".

18 It has become somewhat common-place for courts to receive expert evidence regarding the behavioural indicia of sexual abuse. Expert evidence on human conduct and the psychological factors which may lead to certain behaviour have been consistently accepted so long as it does not cross the line into oath-helping: R. v. B.(G.), [1990] 2 S.C.R. 30; R. v. Marquard, [1993] 4 S.C.R. 223. Expert evidence on the memory recovery process in young victims has also been regarded as admissible and probative:

R. v. Norman (1993), 26 C.R. (4th) 256 (Ont. C.A.); R. v. Russell (1995), 95 C.C.C. (3d) 190 (Ont. C.A.). I note, however, the warnings raised about this type of evidence, and the assumptions made about its purported scientific base, in recent cases such as R. v. Olscamp (1994), 35 C.R. (4th) 37 (Ont. Gen. Div.). I am told that in this case the Crown intends to call its own expert to give evidence as to the sequelae of sexual abuse.

19 The request for disclosure, however, cannot be premised on the fact that evidence as to "false memory syndrome" is admissible. There must be a foundation in the evidence to suggest that there may be something likely relevant in these records.

20 In my review of the complainant's evidence from the preliminary hearing, I found nothing to suggest that these allegations arose only after therapeutic intervention. At no time did the complainant say that she could not recall these assaults and then, as a result of some outside influence, she recollected them. There is no suggestion that the memory of these alleged assaults was repressed. On the contrary, the evidence clearly shows that the complainant always recalled the alleged assaults; she merely did not want to tell anyone for many years. Here is an extract from the complainant's cross-examination regarding her initial disclosure to her boyfriend:

Q Why did you decide after eight years to tell your boyfriend?

A Because I was having nightmares every night about it. He knew something was wrong and--

Q Did he tell you he thought something was wrong?

A Yes. I figured that if anybody, he could help me.

Q Why did you keep it quiet for as many years as you did?

A I didn't think that-- I didn't think I could tell my parents.

Q Did you realise that what had happened was wrong?

A Not when I was younger but when I told Victor I knew.

Q Well, you must have known before you told Victor that it was wrong?

A Yes.

Q When did you first start to realise that what had happened, or what you thought had happened, was wrong?

A Probably when I was twelve.

Q So fairly shortly after the instances happened?

A Uh-huh.

Q Now, did you realise that what was happening was wrong only after the instances stopped?

A Yes.

Q So you were already-- had moved from Hay River to Fort Smith?

A Yeah.

Q Do you remember what year you moved to Fort Smith?

A Eighty-nine, I think.

Q So for two or three years, even though you realised that what had happened was wrong, you didn't tell anybody. Is that right?

A Right.

21 After the initial disclosure to her boyfriend, and before she started seeing a therapist, she told her sister and her parents about these alleged assaults. She may have also told some friends. All of these people could have influenced the complainant (if such influence occurred) but they are all compellable to testify if served with a subpoena. It seems to me that if there is an issue about illusory memories the best source of analysis is in the initial disclosures and how they match up to what she says at trial. The therapist's records are irrelevant on this point. Furthermore, the complainant started seeing the therapist at the same time as she gave her initial statement to the police. I fail to see how the therapist could have influenced her yet. What she initially told the police

has been recorded and disclosed and available to test her evidence. And, in any event, that came after almost 1½ years when she made the initial disclosure.

22 I fail to see any foundation for disclosure of these records on the basis of "false memory syndrome". If the complainant has said different things at different times, then that evidence is already available to the defence without these records. In my opinion the critical evidence, if any, is to be found in the initial disclosures before the complainant even started seeing her psychologist.

23 All this is not to say that Dr. Read has no relevant evidence to give. I simply think that there has been no basis established for over-riding the complainant's privacy interests in these records on some speculation concerning a possible syndrome defence. There may be all sorts of material already available to Dr. Read from which he can form his opinions.

24 I conclude that the defence has failed to meet the threshold test noted previously.

Disposition:

25 The application is dismissed. I do this, of course, in my role as a pre-trial judge. Counsel recognize that things may arise during the trial that may warrant a different conclusion by the trial judge. For that reason, this decision does not preclude the defence, if it wishes, from issuing a subpoena *duces tecum* to Dr. Valade requiring her to attend at the trial with her records. In that case, if this issue must be revisited during the course of the trial, the records will be readily available.

The order banning publication of the evidence and submissions on this application will continue until the conclusion of the accused's trial.

J. Z. Vertes
J.S.C.

Dated at Yellowknife, Northwest Territories
this 23rd day of August, 1995

Counsel for the Crown: Les Rose

Counsel for the Accused: Scott Duke

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