C.A.C. No. 132360

NOVA SCOTIA COURT OF APPEAL
Cite as: R. v. R.J.B., 1997 NSCA 43

Hallett, Freeman and Pugsley, JJ.A.

BETWEEN:

R. J. B.	)	W. Brian Smith
	)	for the Appellant
Appellant	)	
	)	
- and -	)	
	)	Stephanie Cleary
	)	for the Respondent
HER MAJESTY THE QUEEN	)	
	)	
Respondent	)	Appeal Heard:
	)	January 31, 1997
	)	
	)	Judgment Delivered:
	)	February 18, 1997
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	)	

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

THE COURT: Appeal dismissed per reasons for judgment of Hallett, J.A.; Freeman and Pugsley, JJ.A. concurring.

HALLETT, J.A.:

The appellant, R. J. B., was convicted of committing sexual assault on the complainant between May 1, 1986 and April 30, 1989, contrary to s. 246.1 of the **Criminal Code of Canada**, R.S.C. 1985, c. C-46 after a trial by Justice Nunn of the Supreme Court sitting without a jury. The appellant was sentenced to a period of twelve months incarceration, after being given credit for time served pending appeal of an earlier conviction for the same offence which was overturned by this Court.

Overview

The complainant, who was between the ages of eleven and thirteen during the times covered by the charge, was a close friend of G.H., who was the daughter of the appellant's common law wife. She testified that she visited the appellant's home regularly and that he often provided her and other girls with cigarettes and alcohol and that they participated in wrestling or games involving horseplay at which times the appellant often touched her breasts and sometimes pulled her blouse over her head. The complainant provided details of two more serious incidents, one of forceful sexual intercourse and another a year or so later, when the appellant, while naked, pinned her down on the bed and attempted to place his penis in her mouth. The latter activity ceased when someone came to the door of the house. The complainant testified that although she told her boyfriend and G.H. about these assaults, she did not report them to any adult until she told her mother a few years later when she was sixteen, shortly after which the police became involved and the charge was laid. Some time after giving a statement to the police, the complainant commenced therapy with a psychiatrist.

The appellant testified and denied ever having any sexual contact with the complainant.

Prior to the trial, the appellant, through his counsel, made an application

to Justice Nunn, to have the medical records of the complainant produced for inspection in accordance with the procedure recommended by the Supreme Court of Canada in **R. v. O'Connor** (1995), 103 C.C.C. (3d) 1. The basis of the application, as contained in the affidavit of the appellant was his belief "that the complainant suffers from possible delusions or other mental difficulties that may affect her ability to give honest and true testimony pertaining to this case which would only be found by examining the medical records of the complainant." Attached to his affidavit were excerpts from the transcript of the complainant's testimony from the first trial. Other affidavits were filed in support of the application. Counsel who then represented the appellant, submitted to the trial judge that the evidence tended to prove that the complainant had "problems with her memory" which, he submitted, were obvious because of the alleged inconsistencies in her evidence at the first trial.

In his ruling on the production motion, Justice Nunn referred to passages in the decision of Lamer , C.J. (for the majority on this point) in **O'Connor** where the two stage procedure is discussed, and properly noted that the first stage requires that the applicant must satisfy the trial judge that the information in the hands of the third parties is likely to be relevant.

Lamer C.J. in **O'Connor** described the likely relevancy burden as one that could be satisfied by oral submissions of counsel as an accused is in a very poor position to call evidence as he has never had access to the medical records (paragraph 19).

On the other hand, Lamer C.J. stated that in order to initiate the production procedure the accused ought to file a formal written application supported by an affidavit setting out the specific grounds for production although

such a formal application would not be necessary in all situations (paragraph 20).

Lamer C.J. went on to state that the presiding judge must be satisfied on such applications that "there is a reasonable possibility that the information is logically probative to an issue at trial or the competency of a witness to testify" and then stated:

> "....When we speak of relevance to 'an issue at trial', we are referring not only to evidence that may be probative to the material issues in the case (i.e., the unfolding of events) but also to evidence relating to the credibility of witnesses and to the reliability of other evidence in the case: see **R. v. R.(L.)** (1995), 100 C.C.C. (3d) 329 at p. 339, 127 D.L.R. (4th) 170 at p. 180, 39 C.R. (4th) 390 (Ont. C.A.)."

Justice Nunn, after making reference to the judgment in **O'Connor**, that the burden on an accused should be a light one for the reason that he has not seen the medical records and after making reference to the decision of Justice Saunders in **R. v. Ross**, dated April 13th, unreported, stated that the test Saunders J. applied was "certainly not" the test set forth in **O'Connor**. Justice Nunn then made a brief reference to the test at the first stage of an O'Connor application as being that of likely relevancy of the sought after third party medical records. Justice Nunn then quoted from paragraph 24 of Lamer C.J.'s judgment in **O'Connor** where the Chief Justice stated:

> "A relevance threshold, at this stage, is simply a requirement to prevent the defence from engaging in 'speculative, fanciful, disruptive, unmeritorious, obstructive and time-consuming' requests for production...."

Justice Nunn reviewed each of the examples given in **O'Connor** in which the medical records of a complainant in a sexual assault case might be relevant.

He concluded that the appellant had not satisfied the "likely relevancy" burden upon him by merely pointing to some inconsistencies in her evidence at the first trial. Justice Nunn concluded that the application was in many respects "a fishing expedition to see if there happens to be anything that might be helpful." He dismissed the application.

The trial took place about one month later. After hearing the evidence at trial and submissions of counsel Justice Nunn rendered his decision. He carefully considered the evidence and properly instructed himself on the burden of proof on the Crown. He concluded that he was satisfied beyond a reasonable doubt that the appellant had sexually assaulted the complainant.

Issues on Appeal

The appellant raised two issues on the appeal from conviction; one minor and one major. I will first deal with the minor issue. The appellant asserts that the trial judge erred at trial in excluding the evidence of Ms. D. on the basis that it violated the collateral evidence rule.

In support of the O'Connor application, the appellant had filed an affidavit of M. D., a friend of the complainant. In that affidavit Ms. D. stated that the complainant had told her in the school year 1992/93 that the "rape" had happened in the appellant's van but some months later told her the rape took place in the appellant's residence. Ms. D. and the complainant were the same age and had known each other since they were in Grade 7. Both were in their early 20's at the time of the second trial.

At trial, after completion of the evidence of the first defence witness, counsel for the defence advised the trial judge that he wished to call evidence of

statements that were "made by the complainant about other women". Counsel asserted that the evidence did not relate to a collateral issue but went to the veracity of the complainant as the complainant had made statements that the appellant had raped two other women.

We know from the affidavit evidence tendered on the O'Connor application that the complainant is said to have stated that the appellant raped a Ms. C. and G.H.

During the course of argument at this point in the trial, Crown counsel advised the trial judge that at the first trial the complainant was examined with respect to such statements. She testified that in making those statements she was merely repeating what she had been told by G.H. and L.H.; the stepdaughters of the appellant.

Crown counsel objected to Ms. C. testifying that the complainant's statement that she, Ms. C., had been raped by the appellant was an outrageous lie.

The trial judge ruled that the whole matter was a collateral issue. Defence counsel then called Ms. C., G.H. and Ms. W. as witnesses but they were not examined with respect to the statements made by the complainant about the appellant raping of G.H. and Ms. C..

The ruling that this evidence related to a collateral issue has not been challenged on appeal.

At trial, defence counsel then indicated that his next witness would be Ms. D. Crown counsel objected to Ms. D. being called to testify that the complainant had told Ms. D. that the alleged rape had taken place in a van and not in the house as the complainant had testified at the first trial. The Crown's objection was on the ground that as the complainant had not been cross-examined by

defence counsel on this matter, the defence should not be allowed to call Ms. D. to testify to this effect. There was a lengthy discussion between both counsel and the Court respecting the rule in **Browne v. Dunn** (1893), 6 R. 67 (H.L.) and **R. v. MacDonald** (1989), 48 C.C.C. (3d) 230. Crown counsel asserted that the defence was attempting to ambush the complainant. The discussions concluded with the trial judge stating at 3:30 p.m. that he was going to give defence counsel the rest of the day to prepare himself on the case law and then "decide what he's going to do first thing in the morning". Court then adjourned for the day.

The next morning defence counsel called the appellant who denied that the sexual assaults took place. Defence counsel did not call Ms. D. as a defence witness.

It is clear from the record that the trial judge did not exclude Ms. D.'s evidence; the defence simply decided not to call her. This is evident from the transcript which shows that following the re-examination of the appellant by defence counsel, the trial judge asked defence counsel if he was calling Ms. D. Defence counsel said that he was not.

Counsel for the appellant on the appeal argues that the confusion generated by the discussions about the law respecting the evidence proposed to be elicited from Ms. D., and the suggestions by the trial judge at one stage of the discussion that it might be inappropriate to call Ms. D. unfairly influenced defence counsel from calling Ms. D. The appellant's counsel asserts that, although the decision not to call her was made by the appellant's defence counsel, the evidence was essential to the determination of the matter before the Court. He argues that the evidence might reasonably have altered the ultimate decision of the Court and that the mistaken decision of defence counsel was not the fault of the accused. He

asserts that the trial judge should have intervened to ensure compliance with the obligation of the Crown to place all relevant and material evidence before the Court to ensure the appellant had a fair trial. He asserts that the trial judge's failure to do this was an error in law.

Justice Nunn would have known what Ms. D. would testify to as the essence of her testimony was in her affidavit which had been filed a month previously in support of the O'Connor application for the production of the medical records of the complainant.

During the discussion at trial respecting Crown counsel's objection to the defence calling Ms. D., the trial judge agreed with a suggestion made by Crown counsel that a possible solution to the objection he raised would be to allow Ms. D. to testify and then the Crown could recall the complainant to be questioned on issues arising from the anticipated evidence of Ms. D. This discussion took place just before the adjournment for the day to enable defence counsel to consider his position. This procedure was expressly approved by this Court in **R. v. MacDonald** (supra).

Counsel for the respondent on this appeal argues that defence counsel at trial made a tactical decision not to call Ms. D and that there was no requirement for the trial judge to second guess defence counsel's decision. I agree. The trial judge did not err. He did not have an obligation to intervene and require that Ms. D. be called as a witness for the defence. There are any number of reasons why defence counsel may not have put her on the stand including an indication by defence counsel to the trial judge that if Ms. D. were put on the stand it might confirm that a sexual assault had taken place. I would dismiss this ground of appeal; the trial judge did not exclude Ms. D.'s evidence; defence counsel decided

not to call her.

Counsel for the appellant really rested the appeal on the trial judge's failure to admit the medical records of the complainant and, in particular, his failure to have concluded at the first stage of the O'Connor application that the medical records were likely to be relevant.

On the motion, the trial judge had before him, the affidavit of the appellant to which was attached excerpts from the cross-examination of the complainant at the first trial. He also had the affidavit of Ms. W. who had attended school with the complainant. Ms. W.'s affidavit states that the complainant had told her that the appellant had raped two other women, his stepdaughter G.H. and Ms. C.. Ms. C.'s affidavit was before Justice Nunn. In her affidavit, she swore that she was not raped by the appellant, that she is close to both the appellant and his common law wife, Ms. H., and that the allegation by the complainant against the appellant is an "outrageous lie". The affidavit of G.H., the stepdaughter of the appellant, states that she was never raped by the appellant. The learned trial judge also had before him the affidavit of Ms. D. to which I have previously referred.

I have reviewed these affidavits, as well as the excerpts from the cross-examination of the complainant by defence counsel at the first trial. I have reviewed the transcript of the O'Connor application as well as Justice Nunn's decision on the motion. I have also considered the written and oral submissions of counsel for the appellant and the respondent.

The essence of the submissions that were made by defence counsel to the trial judge was premised on these facts: (i) there were inconsistencies between the evidence of the complainant at the first trial and that of the complainant at the preliminary inquiry prior to the first trial; (ii) that the complainant had admitted under

cross-examination at the first trial that she had difficulty remembering details; (iii) the complainant stated to Ms. W. that the appellant had raped G.H. and Ms. C. which both persons deny; (iv) the complainant had first told Ms. D. that the appellant had raped her in his van but subsequently told her it was in his house; (v) that in the fall of 1992 the complainant became a patient of a psychiatrist and was receiving counselling thereafter; and (vi) that she stopped seeing the first psychiatrist because she did not want the defence getting into her medical file and that she felt more comfortable with a female doctor. The complainant had testified to this at the first trial. Yet having left the first psychiatrist, she then consulted another male psychiatrist.

The defence submitted that under these circumstances it was likely that the medical records would show that the appellant was correct in the assertion in his affidavit that he <u>believed</u> that the complainant suffered from possible delusions or other mental difficulties that may have affected her ability to give honest and true testimony pertaining to the case and this could only be found by examining the medical records of the complainant.

Defence counsel submitted to Justice Nunn that the burden on the applicant on the first stage of the O'Connor application had been met and that Justice Nunn ought to look at the medical records.

Counsel for the appellant on the appeal asserts that the trial judge erred in finding that the medical records would not likely be relevant to an issue at trial.

Justice Nunn's decision clearly shows that he understood that the first stage of the O'Connor application imposed only a light burden on the applicant to show why the medical records sought from a third party are "likely to be relevant". Having referred to Lamer C.J.'s decision in **O'Connor**, Justice Nunn would have

been well aware that relevancy in this context means that there is a reasonable possibility that the information sought would be logically probative to an issue at trial including the credibility of the complainant.

In his decision, Justice Nunn made specific reference to paragraphs 22, 23 and 24 of Lamer C.J.'s judgment in **O'Connor** and then stated:

> "Now I don't dispute that, because to put a burden that the accused must prove what the records contain would be an impossible burden because he hasn't seen them and he doesn't know what they contain. However, he does have to establish some likely relevance, and that has to be established by evidence.
>
> The only reference in the affidavit to establish that likely relevance is a belief of the accused that the complainant suffers from possible delusions or other mental difficulties that may affect her ability to give evidence, and this is because, after referring to a number of the other paragraphs in the affidavit, that there are inconsistencies in her evidence, and there are certainly indications that some things are remembered and some things are not. But the accused's belief is not a significant factor. There has to be something more than that."

Following this statement, Justice Nunn then made the reference to the pre O'Connor decision of Justice Saunders in **R. v. Ross**, as I have previously noted. Justice Nunn then focused on and adopted the O'Connor threshold test of likely relevancy.

Justice Nunn reviewed the examples given by Lamer C.J. commencing at paragraph 29 of **O'Connor** respecting ways in which information in the hands of third parties might be relevant in sexual assault cases. Justice Nunn then applied these examples to the facts he was dealing with on the application before him. He concluded, based on the material before him, that the medical records would not

likely be relevant to the unfolding of events underlying the criminal complaint. Nor would the records likely reveal that the use of therapy influenced the complainant's memory of the alleged events. Nor would the medical records contain information that would bear on the complainant's credibility. He found on the evidence that there was no memory therapy involved in her consultation with the psychiatrist and counsellors. In reaching this conclusion he apparently relied on the excerpts from the cross-examination of the complainant at the first trial that in discussions with psychiatrists and counsellors they only talked about the things she did remember and she was not getting help for a memory problem. With respect to evidence bearing on the complainant's credibility, Justice Nunn stated:

> "If there was any area that the accused would be hanging its hat on would be in this area because it raised the problem of credibility and inconsistencies in her testimony. But I don't think that, and I'm certainly not satisfied that the accused has met the likely relevant burden that's on him merely because there's some inconsistencies in her testimony that the medical reports are something that would bear on that.
>
> I think there has to be some nexus between problems of credibility and the medical therapy which would cause one to say, well, there is some likely relevance here."
>
> . . .
>
> A factor which has to be considered in this case is the age of the complainant at the time these events occurred and the time of the trial. These events are alleged to have occurred a number of years before while the person -- the earlier offences at the time the person was quite a young child, 11, 12 years old, and that's a factor that one considers in determining or in assessing any vagueness in recollections or indeed in determining credibility. But I don't think that that warrants opening the door to the medical records."

Justice Nunn concluded that there was no reasonable likelihood that there was anything in the material sought by the defence that would "meet that first test of O'Connor". He concluded:

> "I think that the application is in many respects speculative and that it is really a fishing expedition to see if there happens to be anything that's in there that would be helpful, and I don't think that that's what the O'Connor test permits."

It is of paramount significance that the sexual assault complaint against the appellant was filed with the police before the complainant ever saw a professional whose records of consultation with the complainant were sought by the appellant. This was not a case of the memory of a complainant to a sexual assault having been recovered, created or suggested by a psychiatrist or a psychologist. As found by Justice Nunn, there is no temporal connection or nexus between the counselling by the psychiatrist and counsellors and the laying of the complaint as it had been made to the police prior to the complainant consulting medical professionals.

The extracts of transcript of the cross-examination of the complainant at the first trial show that she was extensively questioned as to her memory capacity. The excerpts from the evidence, as put before Justice Nunn, do not disclose any inconsistencies or deficiencies other than a failure to remember small details of the incidents and details as to the order in which things happened.

The discrepancies between evidence at the first trial and the preliminary inquiry prior to that trial were consistent with a person's inability to remember details of an event that happened years before.

The affidavits of Ms. C., Ms. W. and G.H. go to the complainant's credibility in a general sense but do not, in the absence of any credible evidence,

suggest that she suffers from delusions or has memory deficiencies of the sort that would indicate the sexual assault did not happen. The affidavits were not, in the opinion of Justice Nunn, sufficient to satisfy him that the application for the production of her medical records ought to have been granted.

Disposition

Justice Nunn did not err in law in dismissing the application. He obviously considered the appropriate test as developed in **O'Connor** and applied it to the facts before him.

As a general rule, at trial, questions of relevancy of evidence are for a trial judge. The cardinal principle of the law of evidence is that any matter that has any tenancy as a matter of logic and human experience to prove a matter in issue is admissible in evidence, at trial, subject to the overriding judicial discretion to exclude such a matter for practical and/or policy reasons that have been established by the case law (**R. v. Corbett**, [1988] 1 S.C.R. 670 at p. 715). Along with the constitutional right to make full answer and defence this principle is manifest in what the Supreme Court of Canada did in **O'Connor** when it imposed the very low threshold test of "likely relevancy" to an issue at trial of the information sought. While this is a low test it is a higher threshold of relevancy than applies with respect to matters of disclosure by the Crown of information in the possession of the Crown or the police; that test requires the Crown to disclose any information that may be useful to the defence. So the test on an O'Connor application requires the applicant satisfy the presiding judge that the information sought is more than possibly useful.

The words used by Lamer C.J. to describe the burden on an O'Connor application of satisfying the judge that the records sought are "likely to be relevant" were apparently intended to be synonymous with his statement that the trial judge

must be satisfied that there is a "reasonable possibility" that the information sought is logically probative to an issue at trial. A "possibility" qualified by the word "reasonable" as it relates to the information sought from a complainant's medical records denotes a requirement that the information has a greater likelihood of relevancy than if the Court had only imposed a "possibility" threshold for relevancy.

In **R. v. Carosella** (1997), S.C.J. No. 12, file no. 24974, 1997 February 6th, both the majority and minority opinions of the Supreme Court of Canada confirmed the **O'Connor** procedure for the production of third party records. In that case the majority of five held that the trial judge was entitled to arrive at the conclusion that the third party notes in question were likely to be relevant to issues at trial whereas the minority of four came to an opposite conclusion. The judgment in **R. v. Carosella** is of no particular relevance to the issues before us, especially since, in that case, the counsellor's notes were made before the complaint to the police. The judgment, however, confirms the **O'Connor** procedure and points out how there can be legitimately different points of view with respect to the relevancy of medical records to an issue at trial.

The test the applicant must meet on an **O'Connor** application is to satisfy the presiding judge that there is more than a possibility that the information sought would be probative to an issue at trial; he must satisfy the judge that it is likely to be relevant.

The essential issue before Justice Nunn was whether the medical records were likely to be relevant to the issue of the complainant's credibility. The conclusion by Justice Nunn that the records would not likely be relevant to the issues at trial including the credibility of the complainant was reached only after he had considered the **O'Connor** test, the submissions of counsel and the evidence

before him. Justice Nunn did not err in law in refusing to grant the motion for production of the complainant's medical records.

I would only add that defence counsel on the motion for production of the medical records could have issued a *subpoena duces tecum* directed to the psychiatrist to attend before Justice Nunn on the date set for the hearing of the O'Connor application and to bring the complainant's medical records with him. Had that been done defence counsel could have called the psychiatrist and, subject to the Court's ruling, asked the psychiatrist if the complainant suffered from delusions or memory deficiencies that would be relevant to her credibility respecting the allegations she made against the appellant. If the presiding judge had any concerns arising from the affidavit material filed by the applicant or by reasons of the submissions made by his counsel, he could have and would likely have permitted such questioning.

A subpoena should, as a general rule, be issued to the custodian of the medical records so that on the application the records will be in Court should the trial judge decide he ought to look at them. A medical doctor should not be routinely subpoenaed unless there is a need to ask him the type of question that might have been asked in this case.

This type of approach would seem to me to be a sensible practice which would impose the least intrusion on a complainant's constitutional right to privacy with respect to medical records. Depending on the answers to the relevant questions, the presiding judge would be in a strong position to make an accurate assessment whether the application for the production of the medical records met the light burden imposed at the first stage of an O'Connor application. In this case, defence counsel at trial did not issue such a subpoena.

It was also open to defence counsel to make another O'Connor application at trial if the evidence at trial warranted the same. Alternatively, defence counsel could have caused a *subpoena duces tecum* to be issued to the psychiatrist to attend at the trial. Defence counsel could then, subject to the rulings by the trial judge, ask questions relevant to the complainant's mental state if the evidence at trial made that a relevant issue.

Accordingly, the appellant was not prevented from making full answer and defence by the ruling of Justice Nunn to dismiss the application at first stage of the O'Connor application.

This appeal was brought on the basis of an error in law by Justice Nunn. It was not made on the basis that the guilty verdict was unsupported by the evidence nor on the basis that there has been a miscarriage of justice due to flagrant incompetence of defence counsel. There is nothing in the record that would have justified an appeal on these grounds. I would dismiss the appeal.

Hallett, J.A.

Concurred in:

Freeman, J.A.

Pugsley, J.A.

C.A.C No. 132360

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

R. J. B.

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT BY:

HALLETT, J.A.