YOUTH JUSTICE COURT OF NOVA SCOTIA

Citation: *R v W.S.*, 2019 NSPC 54

Date: 20191023
Docket: 8313449-60
Registry: Kentville

Between:

R.

v.

W.S.

DECISION ON APPLICATION FOR DISCLOSURE

Restriction on Publication: Pursuant to subsection 486.4(1) *Criminal Code*
directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way

Restriction on publication: Pursuant to subsection 110(1) of the *Youth Criminal Justice Act*, no person shall publish the name of a young person, or any other information related to a young person, if it would identify the young person as having been dealt with under this Act.

Identifying Information has been removed from this version of the judgment to comply with the court order

Judge: The Honourable Judge Ronda van der Hoek

Heard: October 21, 2019, in Kentville, Nova Scotia

Decision October 23, 2019

Charge: s. 271x 3; 151 x 3; 152 x 3; 153(b) x 3; *Criminal Code*

Counsel: Robert Morrison, for the Crown
Zebedee Brown, for W.S.

By the Court:

Introduction:

[1] This is the decision in the disclosure application brought by the young person, W.S., who faces allegations of sexual assault alleged to have occurred on three separate occasions. The foundation for the charges is entirely contained in a 40-minute video-recorded statement of the complainant taken by police in the presence of Trina Warren, a social worker employed by the Department of Community Services (DCS).

[2] A DCS report provided to the defence says the complainant's initial disclosure was made to an employee of the ISAY[1] program. That report complains of significantly more allegations than the number settled upon by the complainant in the video-recorded statement to police.

Issues:

[3] Can the court direct the Crown to write to a therapeutic services provider seeking records that substantiate an assertion of prior inconsistent statement?

[4] Likewise, when a Crown request to the RCMP to seek DCS records is met with silence from the RCMP, can the court direct the Crown to make direct contact with the DCS?

Decision:

[5] I conclude in the circumstances of this case that it is necessary to answer yes to both questions recognizing that matters proceeding in the Youth Justice Court must proceed expeditiously, and third party record applications, while necessary, are aided in that regard by Crown efforts to expedite disclosure requests in this post-*Jordan* era.

[1]Initiative for Sexually Aggressive Youth

The Items:

[6] The items sought are helpfully listed in the Crown's brief filed on October 15, 2019. They are as follows:

Item 1: "Report of Trina Warren"

[7] Ms. Warren's comments following the interview with the complainant were provided to and recorded by Officer R. Bushey who wrote as follows in his General Report dated 2018-11-19, "Spoke with Trina Warren who stated that a joint interview was conducted between her and Constable Herbert. Trina stated that she would have her report done shortly but believed that interview to be Unsubstantiated."

[8] Defence seeks Ms. Warren's impressions of the complainant's statement to police, demonstrating at Tab B of his materials that the videotaped statement was recorded with a primary view of the interviewers and not the complainant. Instead, the complainant's face is contained in a very small window in the upper right corner rendering it very difficult for counsel to see and assess.

[9] Also included in this item is any information Trina Warren received from the ISAY program. A worker in this program is the apparent source of the report that led to the investigation. Ms. Warren's subsequent report to the RCMP requests a joint interview with the complainant and attaches a *Report of Suspected Child Abuse to Police* form which contains the following description of abuse "[*][2] disclosed to mental health that he had been raped repeatedly by [*], W.S., between ages 7 to 12 about **20 to 50 times**." [emphasis added]

[10] The allegation before the court relates to three incidents and the videotaped interview of the complainant confirmed that number.

Item 2: "Original report from Mental Health reporting this allegation to the Department of Community Services".

Item 3: "Any other departmental records with respect to the information provided by Mental Health".

[2] Name and relationship of alleged victim redacted.

Item 4: "Records from ISAY of what the complainant said".

Position of the Parties:

[11] Addressing each item in turn, the Crown says with respect to item 1, defence counsel was aware by letter dated September 19, 2019 that the Crown would inquire of the RCMP to determine if such a report exists. To the date of this application, the Crown has not received a response from the RCMP, noting if a report from Ms. Warren does in fact exist the Crown will disclose it.

[12] While the defence accepts that the Crown has contacted the RCMP, it says efforts to date are simply not enough. He reminds the court that this is a *Youth Criminal Justice Act* matter, set for trial in approximately one month, and involving very serious charges.

[13] With respect to items 2 and 3, the Crown says a defence request for those materials was only provided in the context of this disclosure application. The relevancy of the items has been reviewed, the RCMP have been contacted and asked to obtain them from the Department of Community Services. Once the materials are received, they will be disclosed to defence counsel. As a result, the Crown argues there is no need for issuance of a court order to obtain these items.

[14] The defence counsel's arguments with respect to items 2 and 3 mirror his argument with respect to item 1, and in particular, such items are obviously relevant to the defence case and the Crown should have undertaken to obtain and disclose them much more expeditiously in light of the timelines involved in this matter. Efforts to date have been unsuccessful and an order should issue.

[15] Item 4, the ISAY records stand somewhat apart from the other three items requested by the defence counsel. The Crown argues that they are not within its possession or control and the Crown is therefore not able to disclose them. Advanced in support of its position, the Supreme Court of Canada decision in *R. v. Gubbins*, 2018 SCC 44 at paragraph 33:

> Based on the previous discussion of disclosure regimes, to determine which regime is applicable, one should consider: (1) is the information that is sought in the possession or control of the prosecuting crown? and (2) is the nature of the information sought such that the police or another Crown entity in possession or control of the information ought to have supplied it to the prosecuting crown? This will be the case if the information can be qualified as being part of the fruits of the investigation or obviously relevant. An affirmative answer to either of these

> questions will call for the application of the first party disclosure regime. Otherwise, the third-party disclosure regime applies. For the reasons that follow, the maintenance records are subject to third party disclosure.

[16] Based on this two-step test, the Crown argues the information sought is not in its possession or control but was generated in the context of the complainant's mental health treatment provided under the auspices of the IWK hospital that administers the ISAY program. The records are health records generated and retained by them for therapeutic purposes.

[17] He says the IWK is not part of the Crown, it is an independent health authority authorized by statute to provide health care to children throughout the province. The Crown does not dispute a connection between the program and the justice system, however, argues that such a connection does not render this material available to the Crown.

[18] Second, the Crown argues that the nature of the information contained in the ISAY records, being therapeutic, renders it the kind of information that neither the police nor the Crown ought to have been expected to receive from the program in the context of the prosecution.

[19] The Crown says the records sought are subject to the third-party records regime set out in the *Criminal Code*. This, he argues, governs the approach defence counsel should take to obtain such material. The Crown notes, even if it had possession of these records it would be unable to provide them to the defence counsel without such an application.

[20] The defence says the two-step test set out by the Crown in *Gubbins* is not the correct process to follow on this application. He argues approaching the matter as a two-step test in the manner described by the Crown ignores the real issue. This is third party disclosure, but the Crown has an obligation to bridge the gap in accordance with *R. v. McNeil,* 2009 SCC 3, at para. 47.

[21] In addition, the Supreme Court of Canada in *Gubbins*, reiterates the existing duty to inquire. At paragraph 21:

> In *McNeil*, this court clarified that "the Crown cannot explain a failure to disclose relevant material on the basis that the investigating police force failed to disclose it to the Crown": para. 24. The Crown has a duty to make reasonable inquiries when put on notice of material in the hands of police or other Crown entities that

> is potentially relevant; *McNeil* at para. 49. As well, the police have a corresponding duty to disclose "all material pertaining to its investigation of the accused": *McNeil* at paras. 14, 22-23. As well, the police may be required to hand over information beyond the fruits of the investigation where such information is "obviously relevant to the accused case": *McNeil* at para. 59.

[22] In arguing that the complainant's report to the ISAY employee should be sought by the Crown, defence explains the service operates in partnership with the Department of Justice making it appropriate for the Crown to make such an inquiry. The defence also notes he does not likely need a full report of the complainant's therapeutic records, adding it may be enough for him to simply receive minimal information related to the ISAY report of "20 to 50 times", the context in which this information was provided, and the detail regarding the words spoken, all in aid of allowing him to assess the credibility of the complainant at trial.

[23] The defence counsel does not dispute that a third-party records application is likely necessary in the circumstances, however, argues it is incumbent on the Crown to obtain the materials he seeks in aid of speeding the process of a defence application for same. The defence also points out, that should the Crown obtain such materials expeditiously there would be a two-fold benefit as it would also be in a position to assess these materials, determine their value, and perhaps make decisions with respect to whether this matter should proceed to trial. That, says the defence counsel, should be a paramount consideration of Crown counsel in dealing with a matter such as this where there is a substantiated assertion of a prior inconsistent statement.

[24] In support of his position, the defence says the decision of the Supreme Court of Canada in *R. v. McNeil*, has provided direction. He does not dispute that the records are in the possession of third party, and *McNeil* at paragraph 13 agrees:

> The notion that all state authorities constitute a single indivisible Crown entity for the purposes of disclosure finds no support in law and, moreover, is unworkable in practice. Accordingly, Crown entities other than the prosecuting crown are third parties under the *O'Connor* production regime. As I will explain, however, this does not relieve the prosecuting crown from its obligation to make reasonable inquiries of other Crown entities and other third parties, in appropriate cases, with respect to records and information in their possession that may be relevant to the case being prosecuted. The Crown and the defence in a criminal proceeding are

> not adverse in interest for the purpose of discovering relevant information that may be of benefit to an accused. [Emphasis added]

[25] The defence counsel argues that this is an appropriate case where the Crown should make such inquiries. And, it should be ordered to do so with respect to all the items sought including item 4, and the request should be made directly to the Department of Community Services or the entity holding the records. He argues that while the police can support the Crown's request, *McNeil* suggests that it is up to the Crown to follow through and make a request in circumstances such as this where the police have not been communicative with the Crown.

[26] The Crown takes the position that the records in issue fall under section 278.1 of the *Criminal Code* - therapeutic records. He says the Crown never seeks counselling or therapeutic records and maintains the position that the defence counsel must make a third-party record application. He compares the situation to the sexual assault nurse program where medical records are generated as part of an investigation and are therefore disclosable, which I note is not the case here. I do not accept the comparison.

[27] The Crown also posits, if it was ordered to produce, how would it go about doing so. With respect, the defence is not asking for production, rather it is asking the Crown to make efforts to obtain, I recognize that there is a distinction between these words. The Crown agrees that there is concern about what information may be contained in the records but says that even he cannot get around the law to get access to confidential medical information, adding that the court cannot create a venue for achieving same by means of such an application.

[28] In any event the Crown says the ISAY program is not what the defence says it is. He says the youth can be directed by the justice system to attend there however material generated in that program is not free for the asking. Once again, only a third-party records application can make them accessible.

[29] The Crown concedes that he understands why the defence counsel wants these materials and acknowledges that they may well be relevant to his approach as well as the Crown's approach to the upcoming trial. However, the Crown argues the defence must take the proper steps.

[30] In *R. v. Quesnelle*, 2014 SCC 46, at paragraph 18 the court sets out the *McNeil* duties and the *Mills* notice obligations.

> The Crown's *McNeil* duty to make reasonable inquiries and the corresponding police duty to supply relevant information and evidence to the Crown applies notwithstanding the *Mills* regime. The *Mills* regime governs the disclosure of "records" in sexual offence trials, but does not displace the Crown's duty to make reasonable inquiries and obtain potentially relevant material (or the police duty to pass on material to the Crown) under *McNeil*. As an officer of the court and Minister of Justice, the crown is duty bound to seek justice, not convictions, and to avoid wrongful convictions, in the prosecutions of all the offences, including sexual offences. The *Mills* regime simply replaces the obligation to *produce* relevant records directly with an obligation to give notice of their existence: *Criminal Code*, s. 278.2 (3). [emphasis in original]

[31] The defence also asks the court to consider the recent reiteration of the Crown's duty to inquire as set out in *Gubbins*, *supra*, that re-establishes the likely relevance to the case considerations. In *R. v. Clarke*, 2013 NSSC 386, at paragraph 19, Justice Hood said:

> The Crown does not have to take general inquiries of other government departments and police forces, but does not simply receive information without having any obligation to do more. The Crown is a minister of justice, owing loyalty to the overall administration of justice. **If the crown has notice of relevant information, it must make inquiries and, where reasonably possible, obtain the information.** It is not necessary to do so if the notice is unfounded. In order to make a full assessment of the Crown's case, as well as to fulfil its role as an officer of the court, the inquiry must be made. [Emphasis added]

[32] In *R. v. Melvin*, 2009 NSSC 249, Justice Coady directed the public prosecution service "write to Deputy Chief McNeil requesting any records from Cst. A's file that relate to his credibility and that could possibly impact on the accused ability to make full answer and defence". He also directed "the Public Prosecution Service to review that file to determine what should be released to the accused applying conventional *Stinchcombe* principles". I am asked to make a similar direction to the Crown.

[33] Mr. Brown asks the court to give life to the *McNeil* decision in considering his application. He aptly points out that "information is oxygen and the court has an obligation to keep it flowing". Mr. Brown reiterates that this is not a fishing expedition, he simply needs to know if the information provided by the complainant to the ISAY program constitutes a prior inconsistent statement.

[34] Mr. Brown points out that the timeline in this matter is very important. He says his client was arrested in January; he made his first appearance in March at

which time he was not provided disclosure; he appeared before the court once again in April, once again without disclosure; in May defence scheduled an application for disclosure and the Crown provided the complainant's statement and the application was withdrawn; and the defence raised concerns in August, September and October regarding the insufficiency of disclosure. He says the defence has been exhausting every possible avenue to move this matter along.

Conclusion:

[35] After carefully considering all the arguments in favour for and against granting the defence request, I find I must conclude that an order is necessary in the circumstances of this case and is applicable to all the items requested that are likely relevant to W.S.'s right to make full answer and defence.

[36] I appreciate the Crown has reached out to the police for three items, however urgent and immediate follow up is necessary to ensure this Youth Justice Court matter proceeds expeditiously for both W.S. and the complainant.

[37] I recognize that a third-party records application is inevitable in the circumstances of the ISAY material given its nature as therapeutic records, however that characterization cannot carry the day. The Supreme Court of Canada was clear in *McNeil* and *Gubbins*, the Crown must make enquiries. I will add, meaningful enquiries including diligent follow up.

[38] The court is operating under the regime established by the Supreme Court of Canada in *R. v. Jordan,* 2016 SCC 27, requiring all justice system participants to work diligently to avoid delay and move matters along through the system expeditiously. The public has an interest is seeing justice done and in the case of youth matters such an interest is somewhat elevated given the fact young people experience time differently than adults and matters should be resolved when consequences still matter. This case has been before the Court since January 2019 and seems destined to continue for quite some time.

[39] Both the Crown and the defence have taken appropriate steps, I simply find that the necessary outcome has not been achieved and more is required. As a result, I am granting the defence application and ordering the following:

1. I direct that the Public Prosecution Service write to the Department of Community Services and the ISAY program requesting any records relating to [*]'s disclosure of sexual abuse involving W.S..

2. I direct that the Public Prosecution Service review the materials received from the Department of Community Services and the ISAY program to determine what should be released to the defendant applying the conventional *Stinchcombe* principles.

[40] I am not at all concerned that the Crown will not undertake the appropriate steps to alert Mr. Brown to the need to make a third-party records application once it has reviewed the necessary material.

Judgement accordingly.

Judge Ronda van der Hoek