

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** *R v Burns*, 2014 NSSC 436

**Date:** 2014-12-11

**Docket:** CRH No. 414664

**Registry:** Halifax

**Between:**

Her Majesty the Queen

v.

Timothy Burns

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- Judge:** The Honourable Justice Peter P. Rosinski
- Heard:** August 6, November 25 and 26, 2014, in Halifax, Nova Scotia
- Written Decision:** December 11, 2014
- Subject:** Exclusion of evidence (or stay of proceedings) sought pursuant to ss. 7, 11(d) and 24(1) Charter of Rights, and pursuant to the probative value/prejudicial effect common-law test.
- Summary:** Mr. Burns is alleged to have sexually assaulted KJA in the early morning hours of June 16, 2011. Around noon on June 16, 2011, KJA sent text messages from her phone to Mr. Burns, who responded from his phone. KJA presented at the QEII hospital around midnight June 17 – 18, 2011 and evidence was gathered by SANE (Sexual Assault Nurse Examiner) staff. Cst. Parasram, as the initial investigating officer attended to seize that evidence. Coincidentally, KJA

was still present and he spoke to her for approximately one hour. She told him that Mr. Burns had sent her text messages apologizing, and suggesting they part ways. He did not seize her phone, or view and record any text messages thereon at that time. On June 21, 2014, Halifax Police Major Crime Unit member Det. Constable Lisa MacDonald was assigned as the formal investigator regarding the offence. She met with KJA on June 23, 2011. By that time KJA had noticed that her text messages to Mr. Burns were no longer visible on her phone. She believed they were deleted by the automatic deletion feature in her phone. In an effort to preserve the text messages from Mr. Burns to her, she began to manually delete incoming and outgoing text messages. She turned her phone over to the police on June 28, 2011. Forensic analysis thereof September 30, 2011 only revealed screenshots of Mr. Burns messages to KJA sent June 16, 2011. Mr. Burns had deleted all text messages between the two on June 16, 2011. The text messages from KJA to Mr. Burns were therefore unavailable for trial. Defence made a number of motions for a stay of proceedings, or exclusion of the text messages from Mr. Burns as evidence at trial based on:

- (1) The alleged deliberate deletion of her own text messages to Mr. Burns, by KJA – “conduct intended to defeat the course of justice” –s. 7 Charter of Rights [destroyed evidence]
- (2) Unacceptable negligence on the part of Cst. Parasram in not preserving the text messages on KJA’s phone, when he could have done so on June 17 – 18, 2011- s. 7 Charter of Rights [lost evidence]
- (3) Breach of the right to fair trial, because the jury would not have the benefit of the texts from KJA to Mr. Burns, making the evidence of texts from Mr. Burns incapable of meaning – s 11(d) Charter of Rights and *R. v. Harrer* [1995] 3 SCR 562; and using a probative value versus prejudice analysis.

**Issues:**

- (1) Did KJA deliberately delete her text messages to Mr. Burns? And if so, does that constitute a breach of s. 7 of the

Charter of Rights, and what remedy should result?

(2) Was Cst. Parasram subject to a duty to seize and/or view and record the text messages on June 17 – 18, 2011, and if so was he unacceptably negligent in not doing so, causing a breach of s. 7 of the Charter of Rights? If so, what remedy should result?

(3) Are the circumstances such that Mr. Burns' right to a fair trial as envisaged under s. 11(d) would be violated if the text messages from Mr. Burns to KJA on KJA's phone were admitted as evidence at his trial? If so what remedy should result? Should the text messages be excluded after a probative value/prejudicial effect common law test assessment?

**Result:**

(1) KJA did not deliberately delete her text messages to Mr. Burns;

(2) Cst. Parasram did not have a duty to seize and/or view and record the text messages on KJA's phone; even if he had such a general duty, his actions and inactions were not negligence, and much less so, unacceptable negligence;

(3) A distinction must be drawn between the constitutional imperative that accuseds have a right to a fair trial pursuant to s 11(d), which is intended to concern itself with the manner in which a trial must be conducted if it is to be fair, and the exercise of discretion vis-à-vis a specific piece of evidence and assessing whether the probative value thereof exceeds its prejudicial effect on the fair trial rights of an accused. In the former case the onus is on the accused. In the latter case the onus is on the crown, if at trial it seeks to introduce the evidence, as it does in this case. In this case, the proper inquiry is not whether the trial would be unfair under s. 11(d) Charter, rather it is under the prejudice versus probative value analysis. The defence argument that the prejudice of only having one half of the "conversation" overbears the probative value of Mr. Burns text messages to KJA, was rejected. At trial the crown would present not only the text messages from

Mr. Burns to KJA, but also KJA who could from recollection be asked in direct, and cross-examination, what was the content of her text messages. Additionally, Mr. Burns' two police statements will be admitted as part of the crown case. They contain his recollection as to what was the content of KJA's text messages to him.

The text messages sought to be introduced by the crown at trial are admissible, subject to any unexpected change of circumstances at the trial, upon which occurrence, the court may revisit its findings and decision. Depending on the evidence put before the jury, the court may have to give an instruction to the jury about the danger associated with incomplete statements, which may not amount to an "admission" of guilt by Mr. Burns.

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