SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Martin, 2010 NSSC 199

Date: 20100520
Docket: CRH No. 316875
Registry: Halifax

Between:

John Edward Martin

Applicant

v.

Her Majesty the Queen

Respondent

Judge: The Honourable Chief Justice Joseph P. Kennedy

Heard: April 27, 2010, in Halifax, Nova Scotia

Counsel: Donald C. Murray, Q.C. for the applicant, Mr. Martin
Perry F. Borden for the Crown
Brian Newton, Q.C. for the complainant

By the Court:

[1] This is an application brought by the defendant, John Edward Martin, seeking the production of third party records to the Court and subsequent disclosure of these records pursuant to s. 278 of the *Criminal Code* - commonly referred to as an *O'Connor* application.

[2] Mr. Martin is charged with sexual assault contrary to s. 271(1)(a) of the *Criminal Code*.

[3] He is seeking disclosure of psychiatric, therapeutic and counselling documentation and information pertaining to the complainant.

[4] The third party record holders are Dr. Katherine Black, Elaine Boyd-Wilcox (Psychologist), and Mary Ann Smith (Counsellor).

[5] This interest arises out of testimony given by the complainant at the preliminary hearing (pp. 126 to 236 of the transcript).

[6] At the preliminary hearing, the record holders are identified by the complainant as having participated in discussions with her about the events on August 3rd, 2007, the date she says the sexual assault took place.

[7] Further, she acknowledged that she had "dreams" about the accused some of which included events that did not happen and others that related to the incident upon which the charge is based. She said that some of her counselling has been related to the sorting out of the real and the imaginary.

[8] Significantly, the complainant lodged this criminal allegation after consultation with one of the counsellors.

[9] Finally, the complainant testified that she suffers from depression and has been diagnosed with "borderline personality disorder" before, during and after the date in question.

[10] As a result, the applicant wants to get access to these third party records and argues that they are disclosable.

The Process

[11] Firstly, as to what constitutes "record". The *Criminal Code* identified a third party record in s. 278.1:

> For the purposes of sections 278.2 to 278.9, "record" means any form of record that contains personal information for which there is a reasonable expectation of privacy and includes, without limiting the generality of the foregoing, medical, psychiatric, therapeutic, counselling, education, employment, child welfare, adoption and social services records, personal journals and diaries, and records containing personal information the production or disclosure of which is protected by any other Act of Parliament or a provincial legislature, but does not include records made by persons responsible for the investigation or prosecution of the offence.

[12] The materials sought come within this wide definition. The charge herein, sexual assault - s. 271(1)(a), is one which permits the possibility of production pursuant to s. 278.1 of the *Criminal Code*.

[13] The requirements of s. 278.3(3) and (5) have been met by the applicant.

[14] The Crown and the complainant and the named record holders have been served seven days prior to the hearing and responded appropriately.

[15] At this hearing stage, the test is "likely relevance".

[16] Section 278.5 of the *Criminal Code* reads:

278.5 (1) The judge may order the person who has possession or control of the record to produce the record or part of the record to the court for review by the judge if, after the hearing referred to in subsection 278.4(1), the judge is satisfied that

(a) the application was made in accordance with subsections 278.3(2) to (6);

(b) the accused has established that the record is likely relevant to an issue at trial or to the competence of a witness to testify; and

(c) the production of the record is necessary in the interests of justice.

(2) In determining whether to order the production of the record or part of the record for review pursuant to subsection (1), the judge shall consider the salutary and deleterious effects of the determination on the accused's right to make a full answer and defence and on the right to privacy and equality of the complainant or witness, as the case may be, and any other person to whom the record relates. In particular, the judge shall take the following factors into account:

(a) the extent to which the record is necessary for the accused to make a full answer and defence;

(b) the probative value of the record;

(c) the nature and extent of the reasonable expectation of privacy with respect to the record;

(d) whether production of the record is based on a discriminatory belief or bias;

(e) the potential prejudice to the personal dignity and right to privacy of any person to whom the record relates;

(f) society’s interest in encouraging the reporting of sexual offences;

(g) society's interest in encouraging the obtaining of treatment by complainants of sexual offences; and

(h) the effect of the determination on the integrity of the trial process.

[17] I have considered all of these factors in this process.

[18] The applicant has pointed out that he is not interested in any disclosure of sexual activity on the part of the complainant.

[19] In *R. v. Mills,* 1999 CarswellAlta 1055 (S.C.C.), Justice McLachlin (as she then was) at para. 124 states that "likely relevance" means that there is "a reasonable possibility that the information is logically probative to an issue at trial or the competence of a witness to testify".

[20] If so, the trial judge should order production of the records to consider at the second stage hearing.

[21] A "reasonable possibility" that the information is logically probative to an issue at trial has been accepted now to mean that there is some case specific information which makes the identified information have some potential significance to the specific trial. General assumptions and suppositions are insufficient and, typically, are characterized as fishing expeditions. As Justice Doherty put it in *R. v. Batte*, 2000 CarswellOnt 2113 (Ont. C.A.), at paras. 72-75, it should be shown that the record may contain information admissible in its own right as evidence going to the question of

the accused committing the acts alleged against him, or be information which has some impeachment value, and which information is not already available to the Defence in some other form.

Decision

[22] Section 278.3(4) of the *Criminal Code* provides a list of assertions which, on their own, will not be sufficient to establish "likely relevance".

[23] I am further mindful of s. 278.5(2) of the *Criminal Code* and its directive to balance the competing interests - the accused's right to full answer and defence, and the right of privacy of the complainant which is so manifestly at risk.

[24] The applicant herein has satisfied the onus of showing that there is a "reasonable possibility" that there is information contained in the material sought that is "logically probative" to issues at trial and to the competency of the complainant to testify. It is "likely relevant".

[25] Central to this determination, of course, is the testimony of the complainant at the preliminary hearing.

[26] When one considers this testimony, it becomes clear that in the interests of justice this Court should review the materials in question particularly to the extent that the information speaks to:

1. the symptomatology and management of the complaint's borderline personality disorder contemporaneous with the event in issue;

2. the appreciation by the complainant as to her actual participation and willingness to participate in sexual events involving John Martin; and,

3. the historical accuracy of the complainant's account of her encounter with John Martin on the date of the alleged offence.

[27] I intend to do so.

[28] I do not expect to hear counsel at the "second stage" level. I will give an oral decision after my review.

Joseph P. Kennedy
Chief Justice