IN THE SUPREME COURT OF NOVA SCOTIA
Citation: R v. R.E.W., 2009 NSSC 286

Date: 20090922
Docket: CrAT. No. 263601
Registry: Antigonish

Between:

Her Majesty the Queen

v.

R. E. W.

D E C I S I O N

Editorial Notice

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

Judge: The Honourable Justice N.M. Scaravelli.

Heard: in Antigonish, September 22, 2009

Oral Decision: September 22, 2009

Counsel: Catherine Gillis, counsel for the Crown
Coline Morrow, counsel for the defence
Lorne MacDowell, Q.C., counsel for the

agency Department of Community Services
Carol Gillies, Q.C., counsel for agency for St. Martha's Hospital
Brian Newton, Q.C., counsel for J. W.

NOTICE OF BAN ON PUBLICATION

A ban on publication of the contents of this file has been placed subject to the following conditions:

486(3) Subject to subsection (4), the presiding Judge or Justice may make an order directing that the identify of a complainant or a witness and any information that could disclose the identity of the complainant or witness shall not be published in any document or broadcast in any way when an accused is charged with

(a) any of the following offences:

(i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 170, 171, 172, 173, 210, 211, 212, 213, 271, 271, 273, 346, or 347,

(ii) an offence under section 144, 145, 149, 156, 245, 246 of the **Criminal Code**, chapter C-24 of the Revised Statutes of Canada, 1970, as it read immediately before January 4, 1983, or

(iii) an offence under section 146, 151, 153, 155, 157, 166 or 167 of the **Criminal Code**, chapter C-24 of the Revised Statutes of Canada, 1970, as it read immediately before January 1, 1988, or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in any of subparagraphs (a)(i), (ii) and (iii).

This ban is in effect until further Order of the Court.

REPORTING OF THIS PROCEEDING IN ANY MANNER THAT WOULD IDENTIFY THE NAME OF ANY INDIVIDUAL WHOSE NAME IS COVERED BY THE BAN IS STRICTLY PROHIBITED WITHOUT LEAVE OF THE COURT. THE INTENT OF THE PROCEEDING IS TO PROTECT THE WELFARE OF ANY CHILDREN OR VICTIMS REFERRED TO IN THE PROCEEDING AND/OR AVOID PREJUDICE TO ANY PERSONS FACING CRIMINAL CHARGES.

DECISION: (Orally)

[1] This is an application under Section 278 of the **Criminal Code** for disclosure of third party records. The applicant in this proceeding is charged with incest with his daughter contrary to Section 155 of the **Criminal Code** which is alleged to have occurred between December 2nd, 1998 and August of 1999.

[2] The applicant, Mr. W., asserts that the records being requested are relevant to an issue at trial, specifically, credibility of the complainant.

[3] An application of this nature involves a two-stage process. The trial judge hearing the application may order that the records be produced to the Court if the accused has established that they are likely relevant and that production is necessary in the interest of justice pursuant to Section 278.5(1) of the **Code**.

[4] In making this determination the Court must consider the

salutary and deleterious effects of determination of the accused's right to make full answer and defence, and on the right to privacy and equality of the complainant to whom the record relates as set out in Section 278.5(2).

[5] In particular, the Judge is required to take into account the extent to which the record is necessary for the accused to make a full answer and defence; the probative value of the record; the nature and extent of the reasonable expectation of privacy with respect to the record; whether production of the record is based on a discriminatory belief or bias; the potential prejudice to the personal dignity and right to privacy of any person to whom the record relates; society's interest in encouraging the reporting of sexual offences; society's interest in encouraging the obtaining of treatment by complainants of sexual offences; and the effect of the determination on the integrity of the trial process.

[5] If the trial judge determines that the records should be

disclosed to the Court, the judge shall then review them to determine whether or not all or parts should be disclosed to the accused. The decision to disclose is to take into account the same factors which guided the decision to produce the records to the Court as set out in Section 278.7(2).

[6] I note that Section 278.3(4)(a)(b)(c) and (k) all appear directed at prohibiting production solely on the basis that the witness received counselling or therapy some time after the offence. The remaining subsections, that is, (d)(e) (f) and (g), these provisions are guided by the words “may disclose”, “may relate”, or “may reveal”. These words suggest, to me, that an order for production to the Court may be made if the accused is able to demonstrate more than a possibility or a prospect of relevance. It’s only the mere assertion that the records “may” contain useful information which is condemned as being inadequate. In other words, invalid assumptions are insufficient.

[7] What’s required, it appears, is a reasonable evidentiary

basis to legitimize the request. In a case such as this, evidence or information that the record does or is likely to contain information which relates to the credibility of the complainant may be sufficient to warrant production of the records to the Court.

[8] I refer to the decision of Ewaschuk, J. in ***R v. Boudreau*** [1998] O.J. No. 3526, paragraph 6, he states:

> It is my view that s. 278(4) merely requires that the applicant provide the Court hearing the application with some evidence or credible information beyond the applicant's mere assertion that the record is likely relevant. In other words, the applicant must be able to point to some evidentiary or informational foundation showing that the record is likely to be relevant to an issue at trial or to the competence of a witness to testify. Parliament has deemed that the applicant's mere assertion that the record is likely relevant to be an impermissible and unlawful attempt to indulge in a fishing expedition.... Conjectural or speculative possibility that the records may be relevant is insufficient to override the complainant's privacy interest in the record. Fishing in private records without judicial license is lawfully prohibited.

[9] I also refer to the ***Mills*** decision (1999) 39 C.C.C. (3d) 321, referred to by counsel earlier where the Court indicated that the accused must be able to point to case specific evidence or information to show that the record is likely relevant to the issue at trial. Where it's a mere

assertion, the applicant would not succeed.

[10] **Mills** *(supra)* states at paragraph 132:

> If the judge concludes that it is necessary to examine the documents at issue in order to determine whether they should be produced to enable the Court to make full answer and defence then production to the Judge is "necessary in the interest of justice".... If a record is established to be "likely relevant" and, after considering the various factors the judge is left uncertain about whether its production is necessary to make full answer and defence, then the judge should rule in favour of inspecting the document.

[12] The application as presented sought disclosure of records from the Department of Community Services, records in possession and control of the Public Prosecution Service, and records in possession and control of St. Martha's Regional Hospital.

[13] The Court was advised on today's date that the Public Prosecution Service records being sought were disclosed to defence counsel leaving the issues of the records in possession of the Department of Community Services and in possession of St. Martha's Regional Hospital to be determined by the Court.

[13] With respect to the Department of Community Services, the grounds set out in the application in support of its position is essentially that the charge before the Court was initiated by a report that the complainant made to the Department of Community Services which was followed by an RCMP investigation. This ground has not been challenged. The ground states that information is that these "foregoing records" including complainant's report will have impeachment value given the complainant gave inconsistent statements to a social worker.

[14] There's attached to the application and affidavit of defence counsel which does attach a report from a social worker dated September 1999. The social worker was employed by St. Martha's Hospital at the time and contains information where the complainant denies, essentially, any sexual contact with the accused, that is, the applicant in the matter before me.

[15] As a result, I find there is likely material difference between this statement to the social worker and the statement or report made to

the Department of Community Services that initiated the investigation and ultimately resulted in the charge being laid. That is, a basis exists to show possible inconsistencies, and therefore, the information is likely relevant to the issue of credibility. However, I find there is no foundation or basis for the request of records beyond the initial report by the complainant to the Department of Community Services that led to the charges being laid. Indeed, the grounds refer to, as I've indicated, the foregoing records. Foregoing being the initial report by the complainant which is referred to in the grounds.

[16] The application is for records extending from 1998 to 2004. There's no foundation or basis before me to establish any close connection between the creation of the records involving the initial report by the complainant that would extend through to 2004. Anything beyond this, obviously, in my view, is a fishing expedition.

[17] So that as part of the stage one process the order would go forward for the Department of Community Services to produce records

to the Court for the time frame surrounding the initial report by the complainant regarding the matter before the Court that deal with comments or reports relating to the sexual relationship between R. W. and J. W. or the lack thereof.

[18] In terms of the St. Martha's Hospital records, again, the request is from 1998 to 2004. As indicated, there is a September 2009 report from the social worker employed by St. Martha's Hospital that obviously shows, in my view, inconsistencies with respect to the matter before the Court and what was stated in the report to the social worker. It is evident from pre-trial conferences that the Crown's position is that the child born to the complainant was fathered by the accused. This child was born in October 1999.

[19] I find on similar grounds that there is a basis that exists to show that there's possible inconsistencies between the report to the social worker and disclosure to hospital and mental health personnel during the period of pregnancy, at the time of discharge from hospital.

Again, I find there is no close connection between this period, the period the statement was made to the social worker that would extend to 2004.

[20] So, the order would go forward to produce to the Court records relating to the care and treatment of the complainant during the pre-natal period as it relates to statements by the complainant about conception of the child and/or sexual relationship with the accused, R. E. W., to date of discharge from the hospital.

J.