

SUPREME COURT OF NOVA SCOTIA

Citation: *R. R. v. R*, 2020 NSSC 408

Date: 20201130

Docket: Syd. No. 494235

Registry: Sydney

Between:

R. R.

Applicant

v.

Her Majesty the Queen

Publication Ban: S. 486.4; 486.5; 539.1; 278.9

Second Stage - Production

Judge: The Honourable Justice Patrick J. Murray

Heard: November 9, 2020, in Sydney, Nova Scotia

Oral and Written Decision: November 30, 2020

Counsel: *Rochelle Palmer for the Crown*
Christa Thompson for the Applicant, Mr. R.
Sean MacDonald for the Complainant

Section 486.4 - Order restricting publication — sexual offences

486.4 (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

(i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 210, 211, 212, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 346 or 347,

(ii) an offence under section 144 (rape), 145 (attempt to commit rape), 149 (indecent assault on female), 156 (indecent assault on male) or 245 (common assault) or subsection 246(1) (assault with intent) of the Criminal Code, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 4, 1983, or

(iii) an offence under subsection 146(1) (sexual intercourse with a female under 14) or (2) (sexual intercourse with a female between 14 and 16) or section 151 (seduction of a female between 16 and 18), 153 (sexual intercourse with step-daughter), 155 (buggery or bestiality), 157 (gross indecency), 166 (parent or guardian procuring defilement) or 167 (householder permitting defilement) of the Criminal Code, chapter C-34 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) to (iii).

Mandatory order on application

(2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall

(a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the complainant of the right to make an application for the order; and

(b) on application made by the complainant, the prosecutor or any such witness, make the order.

Child pornography

(3) In proceedings in respect of an offence under section 163.1, a judge or justice shall make an order directing that any information that could identify a witness who is under the age of eighteen years, or any person who is the subject of a representation, written material or a recording that constitutes child pornography within the meaning of that section, shall not be published in any document or broadcast or transmitted in any way.

Limitation

(4) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice when it is not the purpose of the disclosure to make the information known in the community.

Section 486.5 - Order restricting publication — victims and witnesses

486.5 (1) Unless an order is made under section 486.4, on application of the prosecutor in respect of a victim or a witness, or on application of a victim or a witness, a judge or justice may make an order directing that any information that could identify the victim or witness shall not be published in any document or broadcast or transmitted in any way if the judge or justice is of the opinion that the order is in the interest of the proper administration of justice.

Justice system participants

(2) On application of the prosecutor in respect of a justice system participant who is involved in proceedings in respect of an offence referred to in subsection (2.1), or on application of such a justice system participant, a judge or justice may make an order directing that any information that could identify the justice system participant shall not

be published in any document or broadcast or transmitted in any way if the judge or justice is of the opinion that the order is in the interest of the proper administration of justice

Section 539.1 - Order restricting publication of evidence taken at preliminary inquiry

539 (1) Prior to the commencement of the taking of evidence at a preliminary inquiry, the justice holding the inquiry

(a) may, if application therefor is made by the prosecutor, and

(b) shall, if application therefor is made by any of the accused,

make an order directing that the evidence taken at the inquiry shall not be published in any document or broadcast or transmitted in any way before such time as, in respect of each of the accused,

(c) he or she is discharged, or

(d) if he or she is ordered to stand trial, the trial is ended.

Section 278.9 Publication prohibited

278.9 (1) No person shall publish in any document, or broadcast or transmit in any way, any of the following:

(a) the contents of an application made under section 278.3;

(b) any evidence taken, information given or submissions made at a hearing under subsection 278.4(1) or 278.6(2); or

(c) the determination of the judge pursuant to subsection 278.5(1) or 278.7(1) and the reasons provided pursuant to section 278.8, unless the judge, after taking into account the interests of justice and the right to privacy of the person to whom the record relates, orders that the determination may be published.

By the Court: (2nd stage)

Introduction

[1] This is my decision on the second stage of the Application of Mr. R. pursuant to s. 278.3. I earlier decided that the court would review the record and determine, pursuant to s. 278.7, whether the record or any part of it should be produced to the Applicant.

[2] I confirm that the Complainant's counsel provided the record to me which consists of the original diary, a small plaid covered booklet and a second updated version, with some edits. Having reviewed these, I can state that while it was re-written, the second booklet it is essentially a duplication of the first but not all, about half or less than half of the pages in the original. There are some but not many edits in the document itself.

[3] The considerations for me under stage 2 are essentially those under stage 1, in so far as the test of "likely relevance to the issue at trial and necessary in the interests of justice". I have considered the criteria in s. 278.7(2) in relation to production of the record or part thereof which requires me to consider the salutary and deleterious effects of the determination on the Accused's right to make full answer and defence and in the right of privacy, personal security and equality of the Complainant, and any other person to whom the record relates. In doing so I must take into account the list of factors specified in s. 278.5(2)(a) to (h).

[4] The Court has heard evidence that the record was prepared in anticipation of Court. Turning to the factors contained in s. 278.5(2) (a) to (h)

(a) The Accused's Right to make full Answer and Defence

[5] While there is no ranking of the factors in this section, this is of critical importance together with the right to privacy and personal security. The document having been prepared in anticipation of Court suggests a high degree of relevance but this does not mean that is so, as it is subject to the Court's review.

[6] The Complainant's counsel has suggested the vast majority is irrelevant. The Complainant herself has acknowledged that the record refers to the allegations, which I can confirm. I have closely scrutinized the record to ensure relevant information is made available.

(b) Probative Value

[7] I have weighed and considered this factor and have found there are some parts of the record that are likely relevant to the charges and the issues at trial. Overall, I have found the amount of information with probative value to be minimal.

The Nature and Extent of the Reasonable Expectation of Privacy

[8] When one considers the purpose for which the record was made, this reduces the privacy interest to some degree. However, privacy concerns remain a consideration given the highly personal nature of a diary.

(c) Discriminatory belief or bias

[9] I do not find that production of the record is based on a discriminatory belief or bias. On the contrary the Court has been careful to ensure any prejudice is minimized to both the Complainant and the Accused. The *Criminal Code* refers to any person to whom the record relates in applying these provisions. This also relates to clause (e) *potential prejudice to personal dignity and right to privacy*.

(f) Society's Interest in Reporting of Sexual Offences

[10] This factor has informed the Court's scrutiny of the record and has been taken into account by it attempting to achieve a balance between this and other factors, such as the Accused's right to make full answer and defence.

(g) Society's interest in encouraging treatment.

[11] A proper exercise of discretion by the Court ensures that treatment will be encouraged for complainants of sexual offences. I have attempted to employ that here.

(h) The Integrity of the Trial Process

[12] In this decision, the Court has had high regard for all participants in the trial process to ensure the Accused has the benefit of evidence that is likely relevant to the charges against him including material issues at trial.

Decision

[13] Weighing all of these factors, I have concluded that approximately 6 pages (or entries) in total should be produced from the original diary, and 1 entry from updated portion.

[14] Overall what has been produced is the result of my effort to ensure a fair trial process for the Defendant while respecting the privacy rights of both him and the Complainant.

[15] With respect to conditions, I would propose the following to Counsel, and would appreciate their guidance.

Murray, J.