SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. C.B.M.*, 2023 NSSC 88

Date: 20230307
Docket: CRH 514682
Registry: Halifax

Between:

His Majesty the King

v.

C.B.M.

SECTION 276 (STAGE 2) / SECTION 278 APPLICATIONS DECISION

PUBLICATION BAN: s. 486.4, s. 486.5, and s. 539(1) of the *Criminal Code*

Judge:	The Honourable Justice Jamie Campbell
Heard:	February 17, 2023, in Halifax, Nova Scotia
Decision Delivered:	March 7, 2023
Counsel:	Eric Taylor, for the Crown Jonathan Hughes, for the Defence Scott Brownell, for the Complainant

By the Court:

[1] C.B.M. has been charged with three sexual offences involving the same complainant, his stepdaughter. They are sexual exploitation, sexual assault and sexual interference. The allegations date to the time between December 2016 and December 2018, or between about 4 and 6 years ago. The complainant was a young person at the time that the offences were alleged to have been committed.

[2] C.B.M. has filed a notice of application under Section 278.93 to lead evidence with respect to two incidents in which the complainant has been the victim in matters before the court alleging sexual offences. The Crown agreed that the evidence was capable of being admissible under Subsection 276(2) and that the other requirements as set out in Subsection 278(4) were met. The complainant was given notice of the second stage hearing and was represented by counsel, Scott Brownell. An *in camera* hearing was held.

The Evidence

[3] C.B.M. says that in 2009 the complainant came forward and disclosed that a man had touched her buttocks and requested oral sex. She was about 9 years old at that time. C.B.M. says that he drove the complainant to meet with a Social Worker from Child Protection Services in Sackville. He later drove her to the police station in Burnside where she spoke with a Social Worker and a police officer to give her statement in that case. C.B.M. said that he drove the complainant to most of the meetings that she had with the police or the Crown Attorney.

[4] C.B.M. noted that the case went on for about 6 years and finally concluded at the Court of Appeal in 2015. During that time Child Protection Workers from the Department of Community Services would meet with the complainant at least once per year. As with the meetings with the Crown and the police, C.B.M. says that he did not sit in on those meetings.

[5] In 2016 the complainant provided a statement to the police in which she alleged that her then boyfriend had sexually assaulted her. C.B.M. says that as with the other matter he drove her to most of the meetings with the police and prosecutors.

[6] C.B.M. says that at the preliminary inquiry in this matter, the complainant testified that the first instance of inappropriate contact between her and C.B.M.

started in 2006 when her sister was born. That was three years before the offence involving the other man occurred.

Probative Value

[7] C.B.M. says that the allegations are a recent fabrication. He says that the number of times that the complainant met with police, prosecutors, and social worker without him being present, when those meetings occurred and that they were about a similar subject matter are relevant to the issue of the complainant's credibility. It is the similarity of the subject matter that raises an issue.

[8] Neither the Crown nor the complainant object to C.B.M.'s lawyer asking the complainant about why she did not disclose the allegations about him when she was speaking to the police before making any allegations about him. Because the question would have no sexual component Section 276 would not be engaged. Section 276 is only triggered when C.B.M. raises the sexual nature of the offences regarding which the complainant was interviewed. Mr. Hughes, on behalf of C.B.M. argues that the sexual nature of those complaints is relevant and probative because the complainant would be more likely to have raised the complainants against C.B.M. in the context of making a complaint about a similar subject matter against someone else. He does not want to ask questions about the details of those complaints but argues that the sexual nature of them is relevant.

[9] The Crown has agreed that it would be preferable if the questioning did not raise the issue of the sexual nature of the other allegations so that this process would not be engaged. But the Crown acknowledges that the evidence could have probative value that is not substantially outweighed by the prejudice of its admission. Counsel for the complainant does not agree and says that the weight that can be given to the evidence about nondisclosure is so little that it is substantially outweighed by concerns for the dignity and privacy of the complainant.

[10] It is significant in this case that the use to which the information is sought to be put is not to address the general credibility of the complainant. Credibility is an issue in almost any trial of this nature. The accused must identify specific facts or issues that require reference to sexual activity evidence to be understood. The instances here are sought be admitted to raise the question of why the complainant did not mention to social workers, police and prosecutors that her stepfather had been sexually assaulting or exploiting her at the same time that the disclosures were being made about others.

[11] The evidence is not sought to be used for either of the twin myths purposes. It is not being suggested that the complainant was more likely to have consented, because consent is not an issue. Nor is it being used to suggest that the complainant is less worthy of belief because of the "sexual nature of the activity". It is strictly to deal with the issue of recent fabrication.

[12] On the issue of probative value of the evidence and the potential prejudice from the admission of that evidence there is an important distinction to be made. It is well known that complainants in sexual assault matters come to a point at which they can make a disclosure at different times. Not everyone feels that they can disclose a sexual assault immediately. There are many reasons for that. A person may feel that a disclosure may place other relationships at risk. A disclosure about a family member may be harder to make than a disclosure about a stranger. A disclosure about a parent would be likely to have significant consequences within a family making it particularly difficult for a young person to make that disclosure.

[13] But this use of the evidence about other disclosures is not for the purpose of suggesting the inference that because the disclosure happened some years after the offences were alleged to have been committed that they are not reliable or are less reliable. The inference that the Defendant seeks to have made is that because the complainant made disclosures about two other matters, which were also sexual in nature, but did not disclosure these allegations, these allegations should be less worthy of belief.

[14] As the Supreme Court of Canada noted in *R. v. D.D.*, 2000 SCC 43, there is no inviolable rule on how people who are the victims of trauma like sexual assault will behave. Reasons for delay are many and those may include embarrassment, fear, guilt or lack of understanding or knowledge. In assessing the credibility of a complainant, "the timing of the complaint is one circumstance to consider in the factual mosaic of a particular case", para. 65. A delay in disclosure "standing alone" will never give rise to an adverse inference against the complainant's credibility.

[15] In this case the defence wants to put forward that evidence not just of a delay but of what could be described as opportunities to disclose. It is not that the complainant did not actively come forward but that she did not make the disclosure when other complaints were being made that also had a sexual component.

Probative Value Against Prejudice

[16] The admission of this evidence would not make the timing of disclosure a determinative issue. It simply allows for the consideration of whether the complainant had an opportunity to make a disclosure and did not do so.

[17] The test to be applied has four parts. The first is whether the evidence is being adduced to support the impermissible inference that the complainant is more likely to have consented or is less worthy of belief. It is not put forward for that purpose.

[18] The second is whether it is relevant to an issue at trial. It is. It is relevant to the issues of credibility and recent fabrication.

[19] The third is whether it is with respect to specific incidents. It is.

[20] Finally, the question is whether the evidence has "significant" probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice. Significant probative value can be distinguished from insignificant probative value. The probative value of the evidence must be such that it helps to establish something that important to the trial. That is weighed against the danger of prejudice to the administration of justice. The evidence would not be admitted if that significant probative value is "substantially outweighed" by the danger of prejudice. It is not enough that the probative value evidence sought to be admitted is simply outweighed by the danger of prejudice. It must be substantially outweighed.

[21] Here, the danger to the administration of justice does not substantially outweigh the significant probative value of the evidence.

[22] It is important to the right of C.B.M. to make full answer and defence. Evidence about the timing of disclosure is not inadmissible. What matters is how a judge uses that in the fact-finding process. Standing alone it does not give rise to a negative inference as to the credibility of the complainant, but it does form part of the "factual mosaic" of the case. It may, at trial, be found to be significant or it may be found to be not significant at all.

[23] Society has an interest in encouraging victims to come forward. Any time evidence of prior sexual incidents is admitted it may have the effect of discouraging some victims from coming forward. But in this case, the evidence is

not at all about the details of incidents but about their general nature and the reporting of them.

[24] It does not in any way contribute to the inclusion of discriminatory beliefs of biases in the fact-finding process.

[25] The prejudice to the complainant's person dignity and privacy is less than it might be because questioning will be limited to the nature of the reporting and will not involve the details of the events that gave rise to the earlier complaints.

[26] The application is granted.

Campbell, J.