SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. A. (B.J.)*, 2024 NSSC 200

Date: 20240321
Docket: CR No. 510773
Registry: Halifax

Between:

B.J.A.

Applicant

v.

His Majesty the King

Respondent

Restriction on Publication of any information that could identify the victim or witnesses: Sections 486.4 486.5 *Criminal Code*

D E C I S I O N

Section 278 *CC* Application – Stage 2

Judge:	The Honourable Justice James L. Chipman
Heard:	March 21, 2024, in Halifax, Nova Scotia
Written Decision:	March 21, 2024
Counsel:	Christa Thompson, for the Applicant Nicholas Comeau, for the Respondent Carbo Kwan, for the Complainant

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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or

(ii) any offence under this Act, as it read from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day; or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).

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a judge or justice may make an order directing that any information that could identify the victim or witness shall not be published in any document or broadcast or transmitted in any way if the judge or justice is of the opinion that the order is in the interest of the proper administration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.

By the Court (orally):

INTRODUCTION

[1] The accused plead not guilty to the two-count indictment which reads:

> 1. that he, between the 1st day of February, 2010 and the 31st day of March, 2010 at or near Halifax, in the Province of Nova Scotia, did unlawfully commit a sexual assault on C.R., contrary to Section 271 of the Criminal Code.
>
> 2. AND FURTHER that he at the same time and place aforesaid, did unlawfully commit a sexual assault on C.R., contrary to Section 271 of the Criminal Code.

[2] During the pre-trial conferences counsel advised the Court that an application pursuant to s. 278 of the *Criminal Code*, R.S.C., 1985, c. C-46 was not required. The trial got underway on January 2, 2024 and during cross-examination of the Complainant it became apparent that a s. 278 application would indeed be necessary.

[3] The stage one hearing went ahead on March 1, 2024. I provided my oral decision on that date with a written release on March 8th. At para. 26 I concluded:

> [26] In the result, I have determined that the applicant has met the likely relevant threshold in respect of the NSHA and Homewood records. It is in the interests of justice for the Court to receive and review the requested documents. On the other hand, I have decided that the opposite is the situation regarding Avalon. The applicant has not met the likely relevant threshold and it is not in the interests of justice to compel Avalon's records for review.

[4] I subsequently received and reviewed the NSHA and Homewood records and on March 11th provided an Inventory as follows:

> The Nova Scotia Health Authority materials comprise 48 pages. They span the time period from February 13, 2018 (referral) to June 4, 2018 (discharge). They pertain to the complainant's sessions at the mental health day treatment program beginning on April 4, 2018 and ending on June 4, 2018. The file contains nothing with respect to the allegations contained in the two-count indictment.
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> The Homewood Health Centre Inc. materials comprise 48 pages. They span the time period from August 5, 2021 (initial request) to February 16, 2024 (file closed). They pertain to the complainant's sessions with Wellness Together Canada beginning on August 13, 2021 and ending on January 1, 2024. The file contains entries on August 5, 2021, August 11, 2021, September 5, 2021, February 1, 2022,

August 13, 2023 and January 1, 2024 referencing the allegations contained in the two-count indictment.

[5] In advance of today's stage two hearing the Court received and reviewed these materials:

- Crown's cover letter, brief and *R. v. Porter*, 2023 ABKB 197;
- Applicant's brief; and
- Complainant's brief.

Guiding Law

[6] In addition to the above referenced decision of Justice Devlin, the Court has reviewed the cases referenced in the stage one hearing, namely:

1. *R. v. J.J.*, 2022 SCC 28, 471 DLR (4th) 321
2. *R. v. Mills*, [1999] 3 S.C.R. 668
3. *R. v. O'Connor* (1995), 103 C.C.C. (3d) 1 (S.C.C.)
4. *R. v. M.C.*, 2023 ONCA 611
5. *R. v. Batte* (2000), 145 C.C.C. (3d) 449
6. *R. v. N.K.*, 2021 NSSC 334
7. *R. v. D.(W.C.)*, 2020 NSSC 391
8. *R. v. Bonvie*, 2020 NSSC 342
9. *R. v. E.W.*, 2020 NSSC 191
10. *R. v. E.W.*, 2020 NSSC 19
11. *R. v. G. (R.R.D.)*, 2013 NSSC 371
12. *R. v. Martin*, 2010 NSSC 199

13. *R. v. Fones*, [2009] MBQB 65

14. *R. v. Googoo*, 2022 NSPC 28

15. *R. v. A.B.*, 2022 NSPC 19

[7] In *R. v. M.C.*, Justice Paciocco provides a helpful roadmap for s. 278.3 applications at paras. 21 – 23:

> 21 For reasons that will become apparent, it is helpful to review the structure of a s. 278.3 application. Section 278.3 applications are conducted in two stages. During stage 1 an applicant must establish: (1) that their application conforms to s. 278.3(2)-(6); (2) that the record is "likely relevant"; and (3) that its production is "necessary in the interests of justice": s. 278.5. Precondition (3) requires the trial judge to inquire, as best as can be done in the absence of having seen the record, into the "extent to which the record is necessary for the accused to make full answer and defence" (s. 278.5(2)(a)), and "the probative value of the record" (278.5(2)(b)). The trial judge is also required to consider any opposing interests that may justify non-disclosure, such as privacy and equality interests and the preservation of the integrity of the trial process: *R. v. Mills*, [1999] 3 S.C.R. 668 at paras. 139-141. If the applicant does not meet these three requirements, the application fails. If the applicant meets these requirements, the trial judge must order the production of the record for review "in the absence of the parties" to determine whether the record should be produced to the applicant: s. 278.6(1).
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> 22 Stage 2, which is only undertaken if the applicant meets their stage 1 burden, involves the review of the records by the trial judge to determine whether to produce records to the applicant: *Mills*, para. 14. Section 278.7(1) sets out the pre-requisites to production of the records to an applicant. One of those pre-requisites, again, is "likely relevance". Since the judge will have reviewed the documents before making this second "likely relevance" determination, they will know the actual contents of the records. Therefore the "likely relevance" inquiry no longer focuses on what the documents are likely to contain (as it will at stage 1) but focuses instead on whether the known contents could relate to "likely" issues.
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> 23 Before ordering production to the applicant, the application judge must also be satisfied that production is "necessary in the interests of justice". Once again, this inquiry is undertaken by applying the same considerations described above in para. 21 of these reasons, although at this juncture the determination of whether production is "necessary in the interests of justice" will be made with the benefit of having seen what the records actually contain: *Mills*, para. 54.

POSITIONS OF THE PARTIES

Applicant

[8] Given the Inventory, Mr. A acknowledges that the NSHA's records would have minimal probative value. As for Homewood's records, he states:

> Conversely, the Court's inventory, related Homewood Health Centre Inc., confirms that the records relate directly to the allegations faced by Mr. A. We know from Stage 1 that C.R. initially sought this recourse to assist her in differentiating between her dreams and actual memories. Following the Court's inventory, we also know that the file contains entries on August 5, 2023, August 11, 2023, September 5, 2021, February 1, 2022, August 13, 2023, and January 1, 2024, referencing the allegations against Mr. A.
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> Mr. A argues that the probative value of the records, as they relate to his right to make full answer and defence, is high given that the Crown's case will rise or fall on the credibility and reliability of C.R.'s evidence. In balancing the factors listed in section 278.5(2)(a) – (h), Mr. A respectfully submits that if the Court opts not to order production at Stage 2, the deleterious effects on his ability to make full answer and defence would outweigh the salutary effects of C.R.'s right to privacy, personal security, and equality.

[9] The Crown fashions the following position in their brief:

Crown

> Respectfully, in light of the Applicant's successful Stage I – 278.3 Application, this Court must again apply the same statutory scheme from Stage I. In this regard, when reviewing the actual content of the records to decide whether to produce all or part of the record(s) to the Accused / Applicant, this Honourable Court must apply the factors that are set out in section 278.5(2)(a) to (h).

[10] The Complainant argues as follows:

Complainant

> The Complainant is only conceding relevance and to allow production to Mr. A if the entries in any or all of the six noted dates make a reference or suggestion relating to the memory of the complainant. If the entries merely discuss the allegations in details similar to the complainant's testimony, they would not offer any additional value to Mr. A – it would be a prior consistent statement.

ANALYSIS AND DISPOSITION

[11] As pointed out by the Ontario Court of Appeal in *R. v. M.C.* (para. 22) at stage two "since the judge will have reviewed the documents before making this second 'likely relevance' determination, they will know the actual contents of the records." Obviously, I have read the entire NSHA and Homewood files and the Inventory confirms that in the Homewood file there are six entries referencing the allegations contained in the two-count Indictment.

[12] In analyzing this Application, I have bourne in mind the precise content of these entries and the relevant *Criminal Code* provisions, especially ss. 278.5(1) and (2) and 278.7(1) and (2) which read:

> **Judge may order production of record for review**
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> 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);
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> (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, personal security and equality of the complainant or witness, as the case may be, and of 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.

Judge may order production of record to accused

278.7 (1) Where the judge is satisfied that the record or part of the record is likely relevant to an issue at trial or to the competence of a witness to testify and its production is necessary in the interests of justice, the judge may order that the record or part of the record that is likely relevant be produced to the accused, subject to any conditions that may be imposed pursuant to subsection (3).

(2) In determining whether to order the production of the record or part of the record to the accused, 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, personal security and equality of the complainant or witness, as the case may be, and of any other person to whom the record relates and, in particular, shall take the factors specified in paragraphs 278.5(2)(a) to (h) into account.

[13] I have also kept in mind the guiding cases earlier referenced in this decision.

[14] On balance I am not satisfied that the impugned records are likely relevant to an issue at trial or to the competence of a witness to testify. In my view it would not be necessary in the interests of justice to order any part of the NSHA or Homewood records to be produced to the Applicant.

[15] Having carefully scrutinized the Homewood file I can say that not one of the identified entries on the six noted dates refers to details referrable to the allegations. Further, there is nothing with respect to the Complainant's memory. In the result, I have determined that the Complainant's privacy and personal security interests far out-weigh the accused's interests on this Application. Indeed, having reviewed the files I am of the emphatic view that the accused's right to make full answer and defence would not be enhanced with the production of these records. Accordingly, the Application is dismissed.

Chipman, J.