

CANADA / JUDGMENT

R. v. 32992

2023 BCSC 2593

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Supreme Court of British Columbia

DECIDED

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2023 BCSC 2593 R. v. 32992

IN THE SUPREME COURT OF BRITISH COLUMBIA

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Before: The Honourable Mr Justice Crerar

Oral reasons for Judgment

Voir dire: production of police interview documents

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Place and Dates of Trial:

Vancouver

June 5-6, 2023

Place and Date of Judgment:

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I. Introduction

- [1] In this sexual assault prosecution, the accused is an assistant professor at a British Columbia university, and the complainant is a former PhD student in a different faculty at that university. They began dating in May 2016. They were soon living together. The relationship ended in December 2017.[1]
- [2] The complainant alleges that between September 1, 2016 and November 30, 2017, the accused sexually assaulted her around 21 times.
- [3] The final incident, as alleged, represents a more conventional sexual assault: the Crown alleges that on November 30, 2017, the accused returned home, pushed the complainant against the countertop, removed her clothing, and forced penile-vaginal intercourse upon her.
- [4] The earlier sexual assaults as alleged are more unusual: some 20 occasions of penile-vaginal penetration while the complainant was sleeping. On some occasions she woke up, to discover him mid-act; on other occasions, she only learned of the assault afterwards. She explains that she came to learn that such sexual contact was non-consensual and criminal.
- [5] The accused reported the sexual assaults to the police almost four years after the end of their relationship: in late October 2021. This led to a police statement and interview at the local RCMP detachment on October 30, 2021.
- [6] Those were not the complainant's first reports of the sexual assault, however. The complainant had earlier spoken with a sexual assault support centre ("SASC"). Those SASC consultations generated nine sets of records from June 2019 to November 2021. These include three sets of records just before and just after the police interview: October 26, October 28, and November 12, 2021.
- [7] The accused applies under s. 278.3 of the Criminal Code, RSC 1985, c. C-46 for production of the documents relied upon and referred to by the complainant in her police interview.
- [8] It is important to emphasise that the accused is only seeking production of documents relied upon by the complainant in the police interview, and not the full contents of any SASC records in the possession of the complainant, or in the filing cabinets of SASC itself. The documents sought are presently in the possession of the police.

- [9] A video of the police interview shows the complainant referring to and relying on two stapled bundles of documents. She relied extensively on these documents: the video shows her looking at the documents roughly 75 times during the 1 hour 48 minute interview. At times she reads verbatim from the documents.
- [10] At the outset of the interview, the complainant explains that she brought the documents to make sure that she had the dates and events in the right order. She said that she "tried to refresh my memory as an exercise." The officer told her that she "absolutely" could refer to the notes. He specifically told her that she would need to give him a copy of the notes after the interview. In the video, the complainant appears to nod in acknowledgement. To be fair, it is not entirely clear that she was nodding in response to the officer's words. Nor did the officer discuss potential privacy concerns or explain that the records may have to be produced to the accused.
- [11] Although the stapled bundles are visible in the video, the contents of those pages are not. That said, at least until the final day of this hearing, the Crown agreed that those documents came from three specific sources: a collection of emails; notes generated by the complainant about their relationship; and several pages of SASC records.
- [12] The first two categories of documents have already been produced by the Crown to the accused.
- [13] The Crown originally opposed production of the relationship notes, necessitating a parallel defence application for their production, to be heard this week. At the start of the hearing, however, the Crown conceded that the relationship notes referred to in the police interview ought to be disclosed, and provided those notes overnight to the defence.
- [14] In preparing the notes for production, the Crown now believes that it is possible that the remaining unproduced pages from the police interview may not in fact be SASC documents. Perhaps they are SASC documents; perhaps they are additional relationship notes; perhaps they represent an earlier version of the relationship notes.
- [15] The final possibility arises due to the complication that the complainant left one of the stapled bundles (it would appear to be the collection of emails) with the police at the end of the interview. But she did not provide the full bundle of documents to the police at that time: the video shows that she took the larger stapled collection--which was overwhelmingly the focus of her checks during the interview--with her. She provided more documents to the police about a month later: around November 26th, in response to the officer's twice-repeated brief and clear email requests to specifically provide "all the documents" that she referred to during the police statement interview, in order "to ensure complete transparency in our package to Crown Counsel."
- [16] These reasons will proceed on the basis that the unproduced police interview documents may be SASC documents, such that the full force of the submissions of the complainant and SASC may be considered.

[17] In any case, this small subset of the documents relied upon by the complainant in the police interview, and provided by the complainant to the police, remain undisclosed by the Crown, citing s. 278.2 of the Criminal Code.

[18] The trial of this matter will start on October 23, 2023, before a jury.

II. Law

[19] In *R. v. RMR*, 2018 BCSC 1889, MacNaughton J helpfully summarises the procedure and principles of the s. 278.3-9 inquiry:

The Applicable Code Sections

[5] In cases involving sexual offences, applications for records containing personal information in which the complainant retains a reasonable expectation of privacy are governed by ss. 278.1-278.91 of the Code, which establish a two-stage in camera process.

[6] The first stage of the process involves consideration of whether the records should be produced to the trial judge. If the records are produced to the trial judge, the second stage involves consideration of whether the records should be produced to the accused and, if so, on what terms if any.

[7] This process, upheld as constitutional in *R. v. Mills*, [1999] 3 S.C.R. 668, reflects Parliament's intention to accommodate and reconcile an accused's right to make full answer and defence to a criminal charge with the privacy and equality rights of complainants in sexual assault cases: see also *R. v. Quesnelle*, 2014 SCC 46 at para. 14.

[8] Ultimately, both stages of the application process and the analysis seek to balance the conflicting Charter rights of the accused and the complainant. In *Mills*, the majority summarized the balancing as follows:

[94] [T]he scope of the right to make full answer and defence must be determined in light of privacy and equality rights of complainants and witnesses. It is clear that the right to full answer and defence is not engaged where the accused seeks information that will only serve to distort the truth-seeking purpose of a trial, and in such a situation, privacy and equality rights are paramount. On the other hand, where the information contained in a record directly bears on the right to make full answer and defence, privacy rights must yield to the need to avoid convicting the innocent. Most cases, however, will not be so clear, and in assessing applications for production, courts must determine the weight to be granted to the interests protected by privacy and full answer and defence in the particular circumstances of each case. Full answer and defence will be more centrally implicated where the information contained in a record is part of the case to meet or where its potential probative value is high. A complainant's privacy interest is very high where the confidential information contained in a record concerns the complainant's personal identity or where the confidentiality of the record is vital to protect a therapeutic relationship.

The First Stage of the Disclosure Process under s. 278.5(1)

- [9] At the first stage, which the Supreme Court of Canada described as preliminary and investigatory in *Mills* at para. 123, in accordance with s. 278.5(1), the accused must establish that:
- (a) the application was made in accordance with the procedural requirements under s. 278.3(2)-(6);
 - (b) the records sought are likely relevant to an issue at trial or to the competence of a witness to testify; and
 - (c) production of the records is necessary in the interests of justice.
- [10] The standard of "likely relevance" was explained as a "reasonable possibility that the information is logically probative to an issue at trial": *Mills* at para. 124, citing *R. v. O'Connor*, [1995] 4 S.C.R. 411 at para. 22.
- [11] To establish likely relevance, the accused is not entitled to rely only on the bare assertions set out in s. 278.3(4).
- [12] In order to set up an evidentiary foundation, which rises above a bare assertion of one of the insufficient grounds enumerated in s. 278.3(4), the accused should be able to point to something specific in the diary that is probative to a specific issue at trial. This can be established through Crown disclosure, cross-examination of Crown witnesses at a preliminary inquiry, defence witnesses, expert evidence, and the nature of the record.
- [13] The burden set by s. 278.3(4) is not overly onerous. At the same time, the "likely relevant" standard should not be diluted so that the requirement is meaningless.
- [14] The determination of likely relevance is for me, as the trial judge, to decide. As the majority in *Mills* explained, at para. 120, this provision requires:
- [120] only that the accused be able to point to case specific evidence or information to show that the record in issue is likely relevant to an issue at trial or the competence of a witness to testify. Conversely, where an accused does provide evidence or information to support an assertion listed in s. 278.3(4), this does not mean that likely relevance is made out. Section 278.3(4) does not supplant the ultimate discretion of the trial judge. Where any one of the listed assertions is made and supported by the required evidentiary and informational foundation, the trial judge is the ultimate arbiter in deciding whether the likely relevance threshold set out in ss. 278.5 and 278.7 is met.
- [15] If likely relevance is established, the trial judge must then consider whether production of the records to the court is necessary in the interests of justice. In particular, the court must consider the "salutary and deleterious effects" of production on the accused's right to make full answer and defence, and on the complainant's right to privacy and equality. In balancing these rights, the court must consider the following factors set out in s. 278.5(2):

- (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.

[16] As explained in *Mills* at paras. 134 and 137, s. 278.5(2) does not require the court to engage in an in-depth analysis of each of these factors or to reach a conclusion with respect to them, but to take them into account. Where there is a danger that the accused's right to make full answer and defence will be violated, the court is to err on the side of ordering the documents produced for review by the trial judge.

The Second Stage of the Disclosure Process under s. 278.6(1)

- [17] If a determination is made that the records should be produced to the trial judge, then at the second stage, the trial judge must review the records in the absence of the parties in order to determine if they should be produced to the accused and on what terms, if any. The trial judge may hold a hearing in camera if doing so will assist in making this determination.
- [18] With the assistance of having the records and knowing their contents, the trial judge is again to consider the salutary and deleterious effects on the accused's right to make full answer and defence, and on the complainant's right to privacy and equality, taking into account the same s. 278.5(2) factors listed above.
- [19] Pursuant to s. 278.7, the trial judge may order production if satisfied that the records are likely relevant to an issue at trial and that production is necessary in the interests of justice. The trial judge is not required to rule conclusively on each of the s. 278.5(2) factors, or to balance the competing rights; again, the trial judge is only to take the factors into account when determining whether production to the accused is necessary in the interest of justice: *Mills* at para. 141. If production is ordered, the trial judge may impose conditions under s. 278.7(3).

[emphasis added]

[20] At the first stage, the subject of this hearing, any doubt should be resolved in favour of the accused. As stated in *R. v. Mills* (1999), 139 CCC (3d) 321 at para. 132:

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. As L'Heureux-Dube J. stated in *O'Connor*, supra at para. 152, "In borderline cases, the judge should err on the side of production to the court". The interests of Justice require nothing less.

[emphasis added]

III. Discussion and decision

1. Introduction

[21] The Crown, joined by counsel for the complainant and SASC, argues that the accused's application is based on pure speculation that the remaining police interview documents are "likely relevant to an issue at trial or to the competence of a witness to testify," or that their production is necessary in the interests of justice.

[22] SASC argues forcefully that the remaining pages, if they are SASC documents, are unlikely to be relevant. At the same time, production would significantly intrude on privacy: production of sexual assault support centre records, either to the court or the accused will greatly undermine society's interests in encouraging complainants to report sexual offences (s. 278.5(2)(f)) and obtain treatment ((g)).

[23] The complainant argues that the Court should not place much weight on the fact that the complainant voluntarily provided the documents to the police. The complainant comes from a country much of which is plagued by a corrupt and authoritarian police force: despite her intelligence and education, she comes from a culture where if a police officer asks for papers, the natural and prudent response is to provide them without question.

[24] For the reasons that follow, the accused has satisfied the first stage of the process, such that the Court should review these pages.

2. Step one: relevance

[25] For the first stage one inquiry, the documents are "likely relevant to an issue at trial or to the competence of a witness to testify", in several ways.

[26] The complainant herself selected specific documents to take to the police detachment to assist her, in a significant way, in making her complaint. The documents sought do not represent her entire file of documents about the sexual assault, or her relationship with the accused. There exist other records that she opted not to bring: a diary or journal of sorts, on which she based her interview relationship notes, as well as other SASC records, as well as documents relating to communications with the human rights advisor from the university equity and inclusion office which SASC suggested she visit; there are likely other emails,

texts, and other communications with and about the accused, that she opted not to bring to the interview. Even with due sensitivity to each of the natural trauma and confusion that could accompany a sexual assault, as alleged, and her cultural background, and the fact that English is her second language, the complainant is a sophisticated and well-educated person whose advanced studies, and manner in the video, show that she is used to communicating information in a focused and organised manner, based on selected information, using prepared and organised notes. In this, the complainant herself affirmatively identifies these documents as both relevant and necessary to her allegations of sexual assault: an exercise analogous to that this Court must undertake.

[27] The accused argues that the unproduced records provided by the complainant to the police will illuminate the facts and dates surrounding the alleged sexual assaults, in the same manner provided by the notes and emails already produced. At least one fact and date referred to in the interview cannot be cross-referenced to the documents already produced. Even if the unproduced documents cover the same information as those documents already produced, confirmation or discrepancies in those dates and events between the documents, or between the complainant's statements to the police and SASC will likely be relevant, either to solidify or undermine the complainant's version of events. This is particularly germane given the allegations of sexual assault while she was sleeping, and the passage of time between the events and the reports to SASC and later, to the police.

[28] These unusual aspects indicate that issues of credibility and reliability will play an even more important role than they already do in sexual assault trials. The complainant herself emphasises the relevance of these issues, in specific reference to the police interview documents:

And then things started to make no sense to me. Like, the things that will be, like, true at the beginning started to be very, like, make no sense, so I started diary because I was feeling like a lot of these was patterns and it was kept on happening. So I started writing everything right away because also I didn't believe that - Well, maybe he's saying truth, maybe I'm not telling the truth. Maybe I'm twisting reality, maybe I'm not listening well. Maybe I'm losing my mind. So I started writing out everything right away when it will happen (lines 426-32)

[29] To be fair to the complainant, at this point of the police interview, she is describing what could be described as attempts by the accused to gaslight or play mind games with the complainant, and undermine her own sense of reality. Even if that were the case, however, the quotation establishes that she herself began to question the reliability of her memory and perception of reality. She has specifically raised issues about potentially compromised perception and recall of sexual assaults, most of which allegedly occurred while she was sleeping. The issues of credibility and reliability will be of even greater relevance than they are in a typical he said-she said sexual assault trial.

- [30] Other statements by the complainant in the police interview also indicate that the complainant will likely at trial refer to the fact that she took thorough semi-contemporaneous notes, in an attempt to bolster the reliability of her memory, and thus her trial testimony. During her police interview, the complainant said:
- a) in November 2017 [I was] reading my diary back and forth and I was, like, seeing patterns in what was happening (lines 518 - 19);
 - b) [the accused] told me that [my son] was a monster and he was a bully that was literally terrorizing his [own] children. And he used this term. I wrote it down and I am completely sure because I wrote it down that he used this term I knew what [the accused] said, because I went down and I wrote it [in] this time I was keeping such detailed record[s] that I knew the things that were the truth and the things that were not the truth (lines 529 - 540).
 - c) I know [the accused] didn't tell me anything [about buying tickets to Germany], because I was writing everything in my diary (line 573);
 - d) [after the accused said "you like it rough"] I didn't say anything. I didn't say anything throughout the whole thing. I did write it down though (lines 1063 - 1068).

[emphasis added]

- [31] It is unclear from the police interview video or transcript whether the complainant in October 2021 possessed a present recall of certain facts, or was partially or completely reliant on the documents to convey that information. If she is partly or wholly reliant on the documents, the accused should not be limited to those documents in the second-hand processed form as provided in the transcript and video of the police interview. He should be entitled to see the base documents themselves, as best evidence. Further, the accused should be able to assess whether those base documents contradict either what the complainant said to the police, or alternative versions of the alleged facts in 2016 and 2017, as may emerge at trial.
- [32] There is thus an additional dimension of relevance to these passages from the police interview. The complainant is describing why she began writing notes, some of which notes she is referring to and relying on in the police interview itself, along with the documents that are the subject matter of this very application. The Court agrees with the submission of the accused that the unproduced police interview documents are "inextricably interwoven" with the other documents selected by the complainant to use in her police interview, which documents the Crown has already conceded must be produced in the ordinary course.
- [33] Finally, the accused also points to the timing of the later SASC meetings and records proximate to the complainant's report to and interview with the police, and theorises that SASC may have influenced the complainant's decision to go to the police, and the contents of what she told the police.

- [34] In response to the accused's arguments of relevance, SASC argues that it is unlikely that the records will reveal information about the alleged sexual assault, or the complainant's decision to file a police report, or what to say to the police. SASC sets out, in an affidavit from the SASC assistant manager, standard SASC policies and procedures for discussing matters with clients: "SASC's role is to provide education, support and empowerment, rather than advice or counselling." SASC's "service does not involve telling the client what to say when reporting sexual violence or provide any advice on which avenue they should pursue for reporting. SASC does not provide counselling services or legal advice." The affidavit attaches the bare-bones SASC intake form. Although that form contains an entry for "[w]hat brings you in today?", SASC emphasises that it tells its case workers that this section is to only contain "brief notes on major topic areas or themes discussed." The section is often left blank by the caseworker.
- [35] SASC does acknowledge, however, that a caseworker may generate notes in addition to the intake form. Further, without intending to impugn SASC caseworkers, those caseworkers are for the most part student volunteers, and there is no guarantee that the caseworkers in question in the complainant's multiple visits to SASC, strictly complied with SASC policy. The SASC "Support and Services Quick Sheet" indicated that SASC provides "[i]nformation" "on "processes they may go through", and an option of "reporting" "to police directly". In her police interview, the complainant states that a SASC caseworker suggested that she write the accused an email, copied to mutual acquaintances, in an effort to stop further communications from him; a SASC caseworker also suggested that she contact a human rights advisor. It is not inconceivable that a well-meaning caseworker could also provide some advice with respect to reporting the sexual assault to the police.
- [36] In this, SASC's submissions are something of a two-edged sword. If indeed the documents referred to in the police interview were SASC documents, it is unlikely that the complainant would bring them to the RCMP detachment, and refer to them in the interview, and give them to the police, unless they were relevant and important to the allegations of sexual assault. And if the documents are indeed as bare-bones as the SASC submission would seek to persuade, then the corresponding intrusion on privacy, would be more notional than real, not revealing anything other than what has already been produced, or is uncontroversial: name, date of alleged incidents, and the like.
3. Step two: necessity
- [37] I turn to the second step balancing exercise: whether production of the records to the court is necessary in the interests of justice. The court will weigh the "salutary and deleterious effects" of production on the accused's right to make full answer and defence, and on the complainant's right to privacy and equality. I will do so in reference to the factors enumerated in s. 278.5(2), starting with those factors weighing against inspection and production.
- a) Factors weighing against inspection and production

- [38] With respect to (c), and (e) through (g), the complainant has a reasonable expectation of privacy in a SASC record, with a potential prejudice to that privacy and dignity, as with any document generated in the course of treatment (in the broadest sense) after an alleged sexual assault. Their production could deter sexual offence reporting and treatment.
- [39] With respect to (d), aspersions about the truth of the complainant's allegations, based on their content or her delay in recounting them could, without more, reflect a discriminatory belief or bias. The entire presently known factual matrix, as set out above, however, provides a sufficient evidentiary foundation raising the relevance above mere speculation or discriminatory beliefs.
- b) Factors weighing towards inspection and production
- [40] All of these concerns weighing against production are attenuated by the fact, again, that the complainant herself selected these documents, referred extensively to these documents in the interview, and voluntarily provided these documents to the police. Again, the accused is not seeking all therapeutic records, or even the personal diary of the complainant: only the documents on which present criminal prosecution against him is significantly founded. A review or production order with respect to the SASC records referred to in the police interview will not lead to a slippery slope of widespread production of counselling or therapeutic records: it will be a rare situation where a complainant specifically selects counselling records, and specifically relies upon those counselling records in a police interview, and provides those counselling records to the police.
- [41] With respect to (a) and (b), for the reasons enumerated above, the records are particularly necessary for the accused to make a full answer and defence, and it is likely of probative value, not only with respect to the critical issues of reliability and credibility, but also with respect to the facts underlying the allegations of sexual assault. Given this relevance, the complainant's privacy rights must yield to the rights of the accused to make full answer and defence, on the side of inspection and production, as per Mills at paras 94 and 132.
- [42] With respect to (h), the production of these few pages will better ensure the integrity of the trial process. At the trial, the jury will likely watch the police interview video, and observe the complainant's reliance on the documents. The complainant will likely be cross-examined about her police interview, in specific reference to that reliance. An anomalous gap in production could leave the jury wondering about the missing documents, and perhaps inadvertently and ironically undermine the credibility of the complainant. Further credibility issues and trial disruption could arise if the direct or cross-examination of the complainant or of the officer leads to a mention of the unproduced documents or their contents, thus potentially leading to a mid-trial application.

IV. Conclusion

[43] The accused has satisfied stage one of the s. 278(3) inquiry. The Court will proceed to review the documents and rule on whether they should be disclosed to the accused, under the second stage.

"Crerar J"

[1] On June 1, 2024, a jury found the accused guilty of the charges. These reasons have been edited to anonymise the complainant and accused. Many of the allegations set out in these reasons were neither adduced nor proven at trial.

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