

CANADA / JUDGMENT

R. v. Hawco

2024 BCSC 122

COURT

Supreme Court of British Columbia

DECIDED

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2024 BCSC 122 R. v. Hawco

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Hawco,

2024 BCSC 122

Date: 20240110

Docket: 95767-2

Registry: Kelowna

Rex

v.

Joshua Wayne Hawco

Restriction on Publication: Pursuant to 486.4(1) C.C.C.

Before: The Honourable Mr. Justice G.P. Weatherill

Oral Reasons for Judgment

re application for disclosure

Counsel for the Crown:

J. Hatherly

Counsel for the Accused:

S.J. Tessmer

Place and Date of Trial/Hearing:

Kelowna, B.C.

December 1 and 14, 2023

Place and Date of Judgment:

Kelowna, B.C.

January 10, 2024

[1] THE COURT: These are my reasons for judgment from the hearing on December 1 and 14, 2023.

Introduction

- [2] This is a post-conviction application by Mr. Hawco for Crown production.
- [3] On November 5, 2022, a jury convicted Mr. Hawco of one count of sexually assaulting K.T., contrary to s. 271 of the Criminal Code, R.S.C. 1985, c-46. He has not yet been sentenced.
- [4] Mr. Hawco has retained new counsel, Mr. Tessmer, who is considering making a mistrial application on the basis, inter alia, that the Crown made incomplete disclosure to Mr. Hawco's previous counsel of K.T.'s video-recorded statement taken by Constable Ruitenbeck of the Kelowna RCMP on December 25, 2020, the day following the alleged sexual assault ("Statement"). The transcript of the Statement is 85 pages in length and approximately five pages of it were redacted by the Crown prior to it being provided to Mr. Hawco's prior counsel as part of the Crown disclosure ("Redacted Portions"). Neither the original nor edited copy of the video recording of the statement ("DVD") was ever provided to Mr. Hawco's counsel.
- [5] In advance of a possible mistrial application, Mr. Hawco now applies for an order for disclosure of a complete, unedited copy of both the Statement and the DVD.

Crown disclosure of the statement

- [6] Prior to disclosing the Statement to defence, the Crown vetted it for relevancy. The Crown considered the Redacted Portions to contain irrelevant information related to:
- 1) events involving K.T. in another province some years prior to the alleged assault; and
 - 2) medicine she had been prescribed at the time of the alleged assault.
- [7] Mr. Hawco's previous counsel made no demand for either the Redacted Portions or the DVD, apparently believing, based on his previous experience as a lawyer in the Yukon Territory, that the Crown will only redact personal information unrelated to the facts of the case. He was content to proceed to trial without the Redacted Portions or the DVD.

- [8] The Crown says the Redacted Portions are irrelevant, unrelated to the alleged offence, and contain private and personal information that would be considered a "record" within the meaning of s. 278.1 of the Criminal Code. The Crown asserts that Constable Ruitenbeck obtained the information in the Redacted Portions through mistake and/or ignorance of the law and should never have obtained it from K.T.

Position of the parties

- [9] In support of his demand for production of the Redacted Portions, Mr. Tessmer points to the definition of "record" in s. 278.1 of the Criminal Code that states:

278.1 For the purposes of sections 278.2 to 278.92, record means any form of record that contains personal information for which there is a reasonable expectation of privacy and includes medical, psychiatric, therapeutic, counselling, education, employment, child welfare, adoption and social services records, personal journals and diaries, and records containing personal information the production or disclosure of which is protected by any other Act of Parliament or a provincial legislature, but does not include records made by persons responsible for the investigation or prosecution of the offence.

- [10] He argues that because the Statement and DVD were obtained by Constable Ruitenbeck during the investigation into the alleged offence, neither are "records" and the Crown was obliged to produce the complete unredacted versions of them. Mr. Tessmer says the law requires that:
- a) all statements obtained by persons who have provided relevant information to the authorities are to be produced to the defence, *R. v. Dixon*, [1998] 1 S.C.R. 244 at paragraph 21, 1998 CanLII 805, citing *R. v. Stinchcombe*, [1991] 3 S.C.R. 326 at 345, 1991 CanLII 45;
 - b) the Crown's duty to disclose continues even after a conviction, that is *Dixon*; *R. v. Taillefer*, *R. v. Duguay*, 2003 SCC 70 [Taillefer];
 - c) the obligation on Crown to disclose material gives rise to a corresponding constitutional right of the accused to the disclosure of all relevant or potentially relevant material. This is one of the components of an accused's right to make full answer and defence, a principle of fundamental justice embraced by s. 7 of the Charter of Rights and Freedoms. A breach of that obligation is a breach of the accused's constitutional rights; and
 - d) even if the information in the statement may only be of "some use", it is relevant and should be disclosed: *Stinchcombe* at page 345. This means that if the redacted information could have reasonably been used by Mr. Hawco, either in meeting the case for the Crown, advancing a defence, or otherwise deciding how to conduct his defence such as, for example, deciding whether to call evidence, it must be disclosed: *Taillefer* at paragraph 59.

- [11] The Crown maintains that the Redacted Portions relate to K.T.'s privacy interests and are irrelevant and unrelated to the offence. The Crown points out that Parliament has created provisions to protect the complainant's privacy rights in sexual assault cases: *R. v. Mills*, [1999] 3 S.C.R. 688 and 1999 CanLII 637. These provisions are set out in ss. 278.1 to 278.92 of the Criminal Code and limit access to and the use of certain "records" wherein the complainant may have a "reasonable expectation of privacy".
- [12] It is clear that under the *Mills* regime, if a document is found to be a "record" within the meaning of s. 278.1, then the accused must follow steps set out in the subsections to obtain access to it. However, if a relevant document is not a "record" within the definition of 278.1, it must be disclosed by the Crown to the accused in accordance with his right to make full answer and defence.
- [13] Without disclosing any details, the Crown asserts that the Redacted Portions fall into two categories already mentioned:
- a) information pertaining to two unrelated and private events that took place in another province several years prior to K.T. giving a statement; and
 - b) information pertaining to K.T.'s medical prescriptions.
- [14] The Crown opposes the defendant's application on the basis that the Redacted Portions are irrelevant. Further, it argues that the Redacted Portions contain information that would have been considered a "record" as defined in s. 278.1 of the Criminal Code. The Crown says that K.T. was not in an informed position to waive her rights, because she provided this information without knowing that it was unnecessary to the investigation. Thus, she would not have relinquished her privacy rights regarding this information.
- [15] With respect to waiver, the Supreme Court of Canada's comments in *Mills* at paragraph 114 are noteworthy:
- . . . Where the complainant or witness, with knowledge that the legislation protects her privacy interest in the records, indicates by words or conduct that she is relinquishing her privacy right, waiver may be found. Turning records over to the police or Crown, with knowledge of the law's protections and the consequences of waiving these protections, will constitute an express waiver pursuant to s. 278.2(2).
- [16] The Crown says that no such waiver was obtained by Constable Ruitenbeck prior to obtaining the Redacted Portions. K.T. was not advised of the protections afforded under the *Mills* regime, and no explicit waiver was obtained from her, informed or otherwise, presumably, the Crown says, because Constable Ruitenbeck was not alive to the issue.
- [17] The Crown contends that just because Constable Ruitenbeck obtained the Redacted Portions from K.T., it does not make them disclosable, especially given that they contain private information provided in the absence of an informed waiver.

Analysis

- [18] Simply put, the Crown has a general legal duty to disclose all relevant information in its possession to the defence: *Stinchcombe* at paragraph 19. This is subject to the Crown's reviewable discretion not to provide information that is "clearly irrelevant": *Stinchcombe* at paragraph 20.
- [19] Much of the Crown's argument was focused on K.T.'s privacy interests and that the Redacted Portions would qualify as a "record" within the meaning of s. 278.1. However, the definition of "record" in that section specifically excludes "records made by persons responsible for the investigation or prosecution of the offence." Accordingly, the complete and unredacted Statement and DVD must be disclosed, subject to the issue of relevancy. This is because records created in the investigation of an offence are presumptively relevant to an issue at trial, and it is in the interests of justice that they be disclosed to the defence. In my view, there is no need to consider the issues raised in subsections 278.1 to 278.92 because the statements obtained by investigating officers are not "records" as defined by s. 278.1 and should always be produced, again subject to relevancy.
- [20] The Crown has the onus of satisfying the court that the Redacted Portions are irrelevant and there is no reasonable possibility that withholding the information would have impaired Mr. Hawco's right to make a full answer.
- [21] If the Crown is unable to meet that burden, production should be ordered. The relevancy issue requires a balancing exercise: *R. v. Quesnelle*, 2014 SCC 46 at paragraph 56.

Decision

- [22] The overarching rule under the *Stinchcombe* regime is that the Crown must disclose everything relevant or potentially relevant to the defence. Crown has a limited discretion to redact information that is either irrelevant or privileged. If irrelevant, the Crown has the authority to withhold the information. It is a relatively high threshold.
- [23] Crown's discretion is not unfettered and is reviewable by the court.
- [24] The Statement and DVD were obtained by Constable Ruitenbeck while investigating the alleged offence and both are *prima facie* producible under the Crown's obligation to disclose, subject to relevancy. This means that the defence application must be allowed, unless Crown satisfies the Court that it was entitled to excise the Redacted Portions because they were irrelevant and of no use to the defence.
- [25] Crown's decision to excise the Redacted Portion is reviewable by the court. This review is to be guided by the general principle that information should not be withheld if there is a reasonable possibility that it would impair the right of the accused to make full answer and defence.

- [26] Mr. Hawco can (and always could) challenge Crown's decision to excise the Redacted Portions, provided that there is some basis for suggesting that they were wrongfully withheld. He now does so, arguing that previous sexual assaults may have possibly coloured her evidence, and that drugs prescribed to K.T. may have affected her ability to recall relevant events, and therefore the reliability of her evidence. It is unfortunate this challenge was not made prior to trial.
- [27] As the Crown's discretion to redact the statement is reviewable, I have concluded and, in my view, fairness demands that the complete unredacted Statement and corresponding portions of the DVD be produced for my review.
- [28] Mr. Hawco's application is adjourned pending my review of the Redacted Portions and the corresponding portions of the DVD. Following that review, I will decide if Crown's discretion was properly exercised.
- [29] Those are my reasons.

"G.P. Weatherill J."

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